EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

Red tape challenge – Focus on Employment Law

Note on some employment regulations where ELA considers they could be reformed, simplified or merged

19 October 2011

Red tape challenge – Focus on Employment Law

Note on some employment regulations where ELA considers they could be reformed, simplified or merged

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Applicants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or policy aims of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative & Policy committee of ELA under the chairmanship of Bronwyn McKenna of UNISON to consider and comment on the consultation document **"Red Tape Challenge focus on Employment Law"**. The response draws heavily on the work of ELA's Employment Law Oversight working party which is chaired by Stephen Levinson of RadcliffesLeBrasseur. A full list of those who have contributed to this response appears at the end.

We considered that it would be more meaningful to let you have a narrative response addressing the broader issues rather than confining ourselves to the questions on the Red Tape Challenge website. ELA is very keen to engage with Government on the general question of employment law and to take part in the review of employment law both within and outside the Red Tape Challenge exercise.

General Remarks

This exercise is tightly limited in time. Whilst we are pleased to contribute this does not allow for the detailed analysis that the Employment Lawyers Association prefers to devote to consultation exercises and it is much regretted that more notice was not given particularly as the review of employment law is to subsist for the whole Parliament. This is an extremely serious issue given the fundamental nature of some of the rights under consideration. Accordingly whilst we have done what we could in the time available to set out a number of areas which we consider require review we call for adequate time for a thorough and careful examination when any substantive changes are made and a full consultation that does not coincide with holiday periods and complies with the Cabinet Office code.

Many existing complexities have been caused by the piecemeal way legislation has been produced in the past and the manner in which rules have been accumulated without proper attention being paid to their overall design. Frequently there has been a process of accretion coupled with failure to take stock and consolidate. We have confined ourselves in this exercise to a relatively high level review and we stress that it is not comprehensive, that has not been possible in the time available. We will continue to review employment law and feed in proposals during the remainder of this Parliament. In the consideration of process we have included unnecessary complexity because we believe that complexity adds to the time and cost of the process.

Given the problems under investigation ELA also suggests Government should address the important issue of what it is about the law making process that has frequently produced a poor product. ELA neither supports nor disputes any of the assumptions on which the Red Tape Challenge is based. We are however concerned about the quality of legislation. We believe that there should be a quite separate review of the law making process.

In the last two decades, our Association has often criticised the quality of legal drafting and the difficulties this has created. None of this is said from a party political perspective. We make expressly clear that we do not make any of our recommendations on political policy grounds. We are practitioners who have to advise both employees and employers on the operation of the law and are in the front line bearing much of the criticism of its complexities from both sides. Our concern is that the law should be easier to understand and to apply. Such a review should include consideration of the following:

- the rapid turnover of civil servants, which denudes their departments of valuable experience, and leads to a generalist approach where in-depth knowledge and experience is needed;
- the time spent on reviewing regulations and statutes by Parliament is often inadequate as, apparently, are the briefings given to Ministers;
- the disjointed responsibilities between the different Government departments with responsibility for employment law. This puts responsibility for Equalities in the Home Office, the management of Tribunals within the Ministry of Justice and the rule making for Employment Tribunals within BIS with a further division between BIS and DWP to deal with such matters as absence, maternity pay and maternity rebates. No one could describe this as a recipe for 'joined up' government;
- the circulation of new policy proposals at too early a stage particularly before Government has published its response to previous related consultation exercises e.g. we do not yet have an official response to the consultations on Resolving Workplace Disputes and Modern Workplaces;
- the failure to refer to evidence in formulating policy proposals; and
- guidance which is either so brief as to mislead or so great as to hinder its being understood by small and medium sized employers and on which there has been inadequate engagement with stakeholders.

Family Rights

We consider that there is a need for a streamlining exercise with a view to developing a single "Family Rights" Act along the lines of the Equality Act. This should include all rules relating to maternity, paternity and flexible working. We note that the government plans to reform family rights in the medium term and do not comment on the policy detail but suggest that the Equality Act provides a good model of the structure that could be adopted. We believe there is room for harmonisation of these regulations simply at the level of improving consistency and reducing duplication. The amount of paperwork required is enormous and the provisions have become increasingly complicated over time. For example is it really necessary to distinguish between the two types of maternity leave when the only difference is the return to work terms and qualification for pension entitlement? If the proposals in the August consultation, for everything beyond 18 weeks to become parental leave shared by the mother and father are implemented, then the distinction will disappear. In this regard, we note that the Government has not yet responded to this consultation. We understand that from press reports there is yet a further separate review commissioned by Number 10 and led by Adrian Beecroft into flexible working and parental leave.

We would suggest that if this area is due for reconstruction then it should be done on the one occasion and not in successive regulations which would be likely to lead to problems outlined above. Another possibility may be to remove from the ERA the health and safety issues relating to maternity in Part VII and move them to a Family Rights Act.

Employment Rights Act 1996

We suggest that there ought to be a re-consolidation of the whole of the Employment Rights Act 1996 (ERA) and the Employment Tribunals Act 1996 (ETA).

Here are some examples of specific ERA provisions that would benefit from this process.

- Sections 1-4 (Particulars of employment) - These provisions are too convoluted - the requirements could be set out in a straightforward list.

- Section 105 (Automatic unfair selection for redundancy) - This has 22 subsections which cross-refer to other sections of the ERA, making it difficult to read. It is a good example of how the ERA would benefit from simplification and codification.

- Section 108 (Unfair Dismissal qualifying period) - Again, this section also has lots of subsections, which cross-refer, to other sections of the Act It is all- unnecessarily complex.

- Sections 143 & 144 (Strike during employer's notice) - s.144 could be consolidated into s.143 and simplified. Section 144(3) is also an example of where definitions appear in the middle of sections and could be codified so they all appear together in a more logical place.

- Sections 145, 146, 153, 154 & 181 - All examples of sections which include definitions/supplementary provisions that are not found in the most logical place within the Act/Part/Chapter. These could be codified into a definitions section and/or moved alongside the appropriate section.

- Sections 174-176 (Death of employer & employee) - These sections are long-winded and require lots of cross-referencing to other sections, making them laborious to read.

- Sections 210-219 (Continuity of employment) - The rules are unnecessarily complex & need to be clearer and more comprehensible.

Other aspects of these Acts requiring reform and/or review include:

Section 43B(b) Qualifying Disclosures:

The law relating to whistle blowing is replete with technical detail. It may be sensible to consider simplifying this area of law. Some of our members believe that the time may have come to consider whether it remains appropriate to continue to permit a breach of an individual's own contract to be a contractual breach that may be relied upon to launch a whistle blowing claim.

The rule that notice pay is not available where contractual notice exceeds statutory notice by a week or more - s87(4) ERA

Our general view was that this is anachronistic. In practice when notice is paid most employees are paid for their notice period regardless of the length of their contractual notice period. The failure to pay notice pay at all is an enforcement issue. It really only has application where Statutory Sick Pay has expired and notice is given. It could be interpreted as not entitling some employees on maternity leave who are made redundant to notice pay; albeit that this does not happen in practice.

Lay off and short-time working – ss 147-154 ERA

Our reasons for suggesting a review in the interest of simplification here are:

- The scheme is arcane and complex, dating back to the Redundancy Payments Act 1965, a time when collective agreements commonly contained lay-off provisions.
- Statutory redundancy pay was a far more valuable right in those days. It's much less likely nowadays that employees would want to claim an SRP if laid off or put on short time.
- The scheme has limited application (e.g. it only applies where the contract allows for lay off/short-time working without pay).
- There are alternative means of redress (e.g. constructive dismissal; unlawful deduction from wages).

The provisions seem to be relied upon very little in practice (although it is recognised that a counter-argument might be that they are potentially more relevant/necessary in the current economic climate)

Guarantee payments – ss 28-35 ERA

Similarly, these provisions require review. We believe they are rarely used. And the limits are exceptionally low at £22.20 a day (subject to a maximum of 5 days or £111 in any three months).

Trial Periods for Redundancy s138 ERA

The point of a trial period was intended to be to allow an employee to make his mind up about any new offer and we consider this is sensible in principle. However it is our experience that trial periods are not as prevalent in practice now as they used to be. We suggest that the rules be reviewed to improve the usefulness of trial periods in practice. The period provided of four weeks may be extended for training and this often leads to the creation of artificial training schemes as a means of extending the trial. Also the limit of four weeks is currently very strictly applied with the EAT ruling that the limit still applied even if two of the weeks were over Christmas.

Moving away from the ERA:

sS38 Employment Act 2002

Section 38 of the Employment Act 2002 imposes a duty on employment tribunals to make an award where the claimant wins a claim under one or more of the jurisdictions listed in Sch 5 to the Act and there has been a failure by the employer to comply with the requirements of ss 1-4 Employment Rights Act to provide written particulars of employment. Unlike the position under other provisions giving tribunals power to impose financial penalties for non-compliance with legal obligations, the tribunal only has the choice under s 38 of awarding either 2 weeks' pay or 4 weeks' pay - there is no further discretion as to the amount. We make no comment on the policy of imposing a financial sanction on employers who do not discharge their legal obligations to employees, but the sanction is unusually inflexible as a response to the wide range of circumstances in which employers may be in breach of the statute, and our experience is that the provision is rather inflexible in practice. We suggest that the question of giving a more general discretion as to penalty, within a prescribed range, merits investigation.

Collective Redundancy Consultation ss 188-198 Trade Union and Labour Relations (Consolidation) Act 1992

Some simplification may be considered desirable as the scope of the obligations in the current legislation is unclear and in practice this makes it difficult for employers to get it right and for employees and their representatives to understand their rights. It is appreciated that government has indicated these rules are under review and ELA would be happy to participate in this review.

A common complaint of employers was that having carried out the consultation in such a way as to cover TUPE, they nevertheless had claims for failure to consult because they had not referred to it as such. Simplification might include clarifying whether or not employers who had consulted under collective redundancy provisions should also be subject to the obligation to consult again under TUPE where there is an overlap between the two legal regimes.

Employment Agencies: Regulation 10, Conduct of Employment Agencies and Employment Business regulations 2003

This legislation is designed to prevent employment agencies from charging an exorbitant fee on workers transferring to end users but it is not working. The rules are excessively complex for lawyers and lay people alike. The legislation does not protect hirers properly and its inadequacy may be a hindrance to workforce growth. We believe these rules require a full review

Cap on Contract Claims in Employment Tribunals: s 3(2) ETA and The Employment Tribunal's Extension of Jurisdiction (England & Wales) Order 1994 SI 1994/1623

The effect of these provisions is that employment tribunals only have a very narrowly defined jurisdiction to hear employment contract claims. The maximum amount for such a claim is £25,000, a figure fixed many years ago which has not been uprated for inflation. The provisions are long overdue for a review. They encourage (indeed require) duplication of process involving parallel proceedings. They can create difficult and confusing traps for the unwary and there is little logic for the rules. There is a difficult technical requirement that such a claim must arise or be outstanding on the termination of employment so a claim may not be brought during employment.

Working Time Regulations

We suggest that the rules regarding annual leave are candidates for simplification. The volume of case law generated supports this. The time for review would be after the Supreme Court has decided *Williams* and the Court of Justice has decided *Schult: W*e are aware of the fact that it has been announced that certain changes are to be made to these rules under the Modern Workplaces consultation.

Working Party Members
Bronwyn McKenna – UNISON
Joanne Owers – Fox Williams LLP
Ellen Temperton – Lewis Silkin LLP
Peter Wallington QC – 11 Kings Bench Walk
Peter Frost – Herbert Smith LLP
Fraser Younson – Berwin Leighton Paisner LLP
Jonathan Chamberlain – Wragge & Co LLP
Jemma O'Reilly – Wragge & Co LLP
Michael Elks – RadcliffesLeBrasseur
Stephen Levinson – RadcliffesLeBrasseur
Richard Fox – Kingsley Napley LLP
Paul Daniels – Russell Jones & Walker
Anna Henderson - Herbert Smith LLP
C J Kingsley
Richard Lister - Lewis Silkin LLP
Sean McHugh
Chris Wellham - Hogan Lovells International LLP
Robert Davies – Dundas & Wilson LLP
Anthony Korn - No. 5 Chambers