equality matters

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Newsletter for the Police Federation

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Welcome to the Winter 2012 edition of Equality Matters.

We take a look in this edition at recent Employment Tribunal statistics which actually show that the number of employment tribunal claims are falling not increasing.

Despite this the Government is clearly focused on reducing Employment Tribunal claims and upon cutting so called "red tape" employment law. We therefore focus this edition on summarising the Government plans for Employment Tribunal reform and how it may affect Police Federation members.

We also provide our usual round up of current Employment Tribunal cases.

This update is aimed at Equality Representatives, but please feel free to circulate to any other Federation members.

We would welcome any feedback or suggestions for subjects you would like to see covered in future editions. Please send any suggestions/ feedback to:

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Please copy any comments to the Secretary of the JCC Equality and Diversity Sub-Committee **Ian Trueman: ian.trueman@polfed.org**

Enterprise and Regulatory Reform Bill

The Enterprise and Regulatory Reform Bill contains a series of proposals that will affect tribunal cases. Those of interest to Police Federation members include:

- **Early conciliation of employment claims.** Claimants will have to provide details of their dispute to ACAS first, at which point they will be offered pre-claim conciliation for a period of one month. If the conciliation is refused by either party, or unsuccessful, the Claimant will be able to go ahead and lodge their tribunal claim. If the parties agree to the conciliation it will "stop the clock" on the limitation period for lodging the tribunal claim. A Claimant will have one month from the end of the conciliation to lodge their claim. Early conciliation usually benefits all involved, particularly in discrimination cases where parties tend to become increasingly polarised as a case progresses. It is hoped this will be a positive proposal provided the legislative framework does not become so cumbersome that it leads to uncertainty and satellite litigation. Success will also depend upon ACAS being properly resourced.
- **Legal officers to determine straightforward claims in the ET.** The current proposal is that a legal officer, with the parties consent, will decide low value claims, such as holiday pay claims, on the papers alone. The Government's intention is that it will provide quicker and more cost effective determination of small claims.
- **Financial penalties for losing respondents in employment claims.** Tribunals will have the discretion to impose a penalty on an unsuccessful employer of 50% of any financial award subject to a minimum of £100 and maximum £5000. Where there is a non financial award the tribunal will be able to give it a notional financial value. The penalty with be reduced by 50% if paid within 21 days.
- **Requiring whistleblowing disclosures to be in the public interest.** The definition of a qualifying disclosure will be restricted to disclosures "in the public interest."
- **Renaming compromise agreements 'settlement' agreements.** The Government's explanation for the change is that they believe the word "settlement agreement" is a more readily understood term and that the word "compromise" may have negative connotations which could itself be a barrier to reaching an agreement.

ET statistics

On 20 September 2012 the Ministry of Justice published its report on employment tribunals and EAT statistics for April 2011 to March 2012.

- There were 186,300 claims accepted by employment tribunals, representing a 15% decrease on the previous year and 21% lower than 2009-10
- In discrimination claims, sex discrimination had the highest number of claims, with 14,700, then disability with 7,300. Race and age claims had around 4,000 each. Religion and sexual orientation claims numbered less than 1,000 each
- The percentage of claims lodged which ultimately go on to win at hearing remained 1-3% for discrimination claims
- The median awards for discrimination claims ranged from £4,267 (religion or belief discrimination) to £13,505 (sexual orientation discrimination). In other types of discrimination the median was £5,000 (race), £6,065 (age), £6,700 (sex) and £8,900 (disability). One race discrimination claimant was awarded £4.5m
- The number of costs awards rose from 487 in 2010-11 to 612. 81% of those 612 awards were awarded to respondents.

Employment Tribunal Fees

The Government has announced that it will introduce a two-stage fee structure for employment tribunal claims from Summer 2013.

A Claimant will now be required to pay a fee at the issue of their claim (an issue fee). If the claim proceeds to a full tribunal hearing, the Claimant will be required to pay a subsequent fee (a hearing fee), provisionally around four to six weeks before the hearing date. This timing will be kept under review in light of concerns about its link with exchanging witness statements in the case. However, the intention is that once the hearing fee is paid it will be non refundable whether or not the hearing actually goes ahead.

Tribunal judges will have a power to order the unsuccessful party to reimburse the fees paid by the successful party, although this will be at the judge's discretion rather than automatic.

The level of the fee will depend on the type of claim. For a single Claimant discrimination or whistleblowing claim the issue fee will be £250 and the hearing fee £950. The fees will be different for multiple Claimants. For example, where there are between 2 and 10 Claimants the fees will be for single claims multiplied by two.

Fees will also be charged for certain applications made as the case progresses. For example, if a Respondent applies to set aside a default judgment (where they have not lodged their Response in time) they will have to pay a fee of £100. Judicial mediation will also no longer be free with a cost of £600 payable by the employer.

There will also be fees for pursuing appeals. There will be an upfront fee of £400 to issue an appeal to the Employment Appeal Tribunal and a fee of £1200 to proceed to a full hearing.

The Government's intention to protect access to justice for Claimants who cannot afford the fees is to extend the current civil court fee remission system into the Employment Tribunals and the EAT. A Claimant may be eligible for full or partial fees remission if in receipt of certain benefits or their family income is below a certain level. The Government is however also planning to overhaul the remission system in general and their proposals therefore remain uncertain.

New Employment Tribunal Procedural Rules

The Government is currently consulting about a new proposed set of Employment Tribunal rules.

The review's proposals, led by Mr Justice Underhill, aim to improve the flexibility, efficiency, proportionality, and consistency of the Employment Tribunal system. The proposed changes include the following:

- New ET1 and ET3 forms
- A new 5pm deadline for complying with Employment Tribunal orders (instead of the current midnight)
- A new initial paper sift assessment by a judge after submission of the ET1 and ET3 to consider whether any claim or response should be struck out (an affected party may, within a set time limit, ask for a hearing to discuss the proposed strike out) and to consider what proposed case management directions are required
- Case management discussions and pre-hearing reviews to become "preliminary hearings"
- The prospects for settlement / alternative dispute resolution to be discussed at preliminary hearings
- Tribunals to have the express power to set a hearing timetable to limit the giving of evidence, cross examination and submissions
- New provisions for applying for private hearings and restricted reporting orders.

The consultation closes at the end of November 2012. It is not clear when the new rules are likely to come into force but it is possible it may be the summer of 2013.

The Unfairness of Unfair Dismissal

Police Officers do not have unfair dismissal rights but unfair dismissal law is of interest to those retiring and contemplating new employment elsewhere.

We previously reported that the Government has increased the qualifying period of employment before an employee is protected from an unfair dismissal from 1 year to 2 years.
The Government has recently confirmed it is not pursuing plans to replace unfair dismissal law with a "no fault" compensated dismissal process whereby a set sum akin to a redundancy payment would be paid to those dismissed. It is however now proposing to alter the cap that is placed on the maximum amount of financial compensation that can be awarded following an unfair dismissal.

This could potentially be limited to 1 year's median pay at approximately £26,000 (as compared to the current £72,300).

The Government is also proposing a new type of employment status, of an "owner-employee" who would sign away their employment rights for some shares in the employer's business.

The Equality Act under attack?

The Government is proposing three amendments that will water down the protection given by the Equality Act 2010.

First, in August 2012 consultation closed concerning the Government's proposal to remove the third-party harassment provisions from the Equality Act. These provisions currently require an employer to take reasonable steps to protect employees from third party harassment provided the employer knew the employee had been harassed by a third party in the course of their employment on at least two previous occasions. (The third party does not need to be the same person on each occasion). The Government suggests the provisions are unnecessary regulation that was introduced without any real need and that there are other legal avenues open to Claimants. Such alternative avenues are not, however, so clear cut. The existing third party harassment provisions are intended to strike a balance so that employers are only liable for harassment from third parties (such as members of the public) which is linked to a protected characteristic where the employer could actually reasonably have done something to stop it happening.

Second, the Government is proposing to remove the right to serve a questionnaire on a Respondent to an Employment Tribunal claim. Currently a Claimant can submit a series of written questions to a Respondent either before a tribunal claim is brought or within 28 days of starting an Employment Tribunal claim. The purpose is to assist a Claimant with evaluating and presenting their claim given that often key information is held by the employer. The Respondent does not have to respond but the Tribunal can draw adverse inferences from a failure to respond or evasive or equivocal answers. The Government sees the process as being unnecessary "red tape." In some cases, however, it can be a key tool to a Claimant properly evaluating and presenting their claim in a focussed manner. The questionnaire process has been a feature of discrimination law for over 36 years.

Finally, the Government is proposing to repeal the wider power given to Tribunals when making recommendations in successful discrimination cases. It will mean a return to the old system where Tribunals could only make recommendations that would benefit the particular Claimant bringing the claim. If the Claimant has left employment then recommendations are not effective. Currently Tribunals have a discretion to make recommendations that would help the wider workforce. The extended power to make recommendations has only been in place for two years and it is questioned whether, after such a short time, it can properly be tested as to the benefits and burdens it brings.

Equality Case Watch

In our regular case watch column, we outline some cases of interest on equality issues in which we are acting for Police Federation members.

Disability Discrimination
We represent a police constable in an associative disability discrimination claim and direct sex discrimination claim. The officer is the carer of a disabled child whose request for flexible working has been rejected. The case is brought on the basis that the request would have been accepted for female child-carers or carers of non disabled children.

We are continuing to run cases challenging decisions to ill health retire disabled officers where we argue that with adjustments an appropriate role could be found.

In one case we challenged a blanket policy that every permanently disabled officer would be ill health retired. A settlement was negotiated. Tribunal decisions are due in two other cases. One is concerned with an officer whose role was centralised and due to his disability he could not travel to the new location. It is argued that alternatives were open to the Force including allowing some home working or to redeploy the officer to another role nearer to home.

The second case concerns whether the Force could reasonably refuse to consider a job swap with an able bodied officer and the reasonableness of retaining an officer in a restricted post until civilianisation.

We are also running cases challenging disciplinary action brought against officers with disabilities. In one case an officer was subjected to a lengthy gross misconduct process where the misconduct hearing dismissed the charges concluding the conduct complained about was an occupational health issue not a misconduct issue. It is argued that if this had been considered at the outset and adjustments made the officer's health would not have been injured further.

Race Discrimination
We are acting for a custody sergeant in a third party racial harassment claim, where she was subjected to repeated racial abuse in the custody unit by various detainees.

Sex Discrimination
We have seen a general increase in sexual harassment claims and have secured good settlements for officers where the harassers have been dismissed for their misconduct. We are acting for an officer seconded to the UK Border Agency in a sexual harassment claim. The case will address the issue of who is responsible for acts of alleged harassment committed by officers from different home forces seconded to the same organisation.

Transgender
We have been involved in advising transgender individuals who have faced difficulties in work related to their transition process.

Whistleblowing
We continue to run whistleblowing claims. We are currently acting for two officers who complained about the management practices of their superiors who then found themselves being transferred out of the unit.

Religion/Belief
We are advising a Muslim officer in a religion/belief claim whose request for annual leave over the Christmas Holidays was refused potentially on the basis that it is not a religious festival that he himself celebrated.

Sexual Orientation
We continue to advise and represent officers in sexual orientation claims, particularly those relating to alleged inappropriate comments and victimisation once a complaint of discrimination has been made.

If you need further assistance, in the first instance please contact your local Joint Branch Board.

W: www.rjw.co.uk/policelaw

Our offices:
Birmingham, Bristol, Cardiff, London, Manchester, Milton Keynes, Newcastle, Sheffield, Wakefield & Edinburgh - Associated office.