

Employment Bill The Dispute Resolution provisions of the Employment Bill.

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The Employment Bill

The provisions of the Bill relating to dispute resolution, which partly arise from the Michael Gibbons' independent review of workplace dispute resolution, include:

- the repeal of the statutory dispute resolution procedures and
- a package of new measures to encourage early, informal resolution and changes to the employment tribunal system.

The Bill also makes provision for:

- strengthening of the enforcement framework for the national minimum wage, including a penalty that can be levied against all non compliant businesses,
- strengthening the employment agency standards enforcement regime by making offences under the Employment Agencies Act each way offences and
- amending trade union law to allow trade unions to deny membership to people who have belonged to a particular political party

Key dates

First reading: 6 December 2007

Second reading: 7 January 2008

Royal Assent: summer 2008

To take effect: April 2009

Introduction

The Employment Bill foreshadows potentially fundamental changes for dispute resolution in the field of employment law. These changes will, if fully implemented, have far reaching implications for employees, employers and the practice of employment law. These reforms follow the Employment Law Simplification Review (ELSR) which was launched in 2007 by the Department for Business, Enterprise and Regulatory Reform (BERR). The Department's stated objective is an effective and proportionate regulatory framework where

- complying with the law is straightforward for businesses,
- individuals get the rights to which they are entitled

and there is an effective, clear and speedy enforcement and penalties regime.

The Bill also introduces other measures (see box) but this article will focus on the new approach to dispute resolution and the implications that may arise.

Background – the Gibbons Review

In March 2007, BERR published Michael Gibbons' independent Review of Employment Dispute Resolution in Great Britain, and an associated government

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Employment Bill consultation paper, Resolving Disputes in the Workplace. The Review had been set up to look at the options for simplifying and improving all aspects of employment dispute resolution, to make the system work better for employers and employees and to consider the scope for new initiatives to help resolve disputes at an earlier stage.

The Review considered, among other things, the Employment Act 2002 (Dispute Resolution) Regulations 2004. These were intended to reduce employment litigation and introduced a strict three part process that had to be followed by employers and employees. Gibbons concluded this approach was overly complex and unworkable, that it carried a high administrative burden for employers and that it had unintended consequences which outweighed the benefits. He recommended that the Regulations be axed.

Gibbons on early dispute resolution – mediation and similar techniques.

An obvious starting point, for Gibbons, was that the sooner a dispute is settled the better it will normally be for all concerned e.g. in terms of disruption to businesses and lives, time and associated costs. The problem with the existing system, he found, is that it encourages the parties to concentrate on what is in effect a rigid process, rather than seeking an early acceptable outcome.

So what is the solution? Gibbons suggested, as others have before, that mediation and other alternative dispute resolution techniques are effective means of achieving early resolution. He highlighted the flexibility of these techniques, noting that they can give rise to outcomes not available in the tribunal system, such as a positive job reference, an apology and changes in behaviour. Further, he buttressed this by pointing out that experiences with mediating employment disputes in countries such as New Zealand and the United States are largely positive, as is the emphasis on alternative dispute resolution in our civil courts.

As for the scope for using such techniques, Gibbons found that about 75 per cent of claims made to an employment tribunal are resolved before reaching a hearing and a significant proportion of cases that do reach a tribunal hearing really could be resolved beforehand between the parties.

Gibbons also reviewed the contribution made by ACAS' conciliation service. He found that the service appeared to be effective and well regarded but noted that there were in fact significant constraints and limitations on ACAS' ability to act effectively, with the result that ACAS missed opportunities to reach settlements at both the early and late stages of disputes.

The reforms will be introduced both by the Bill and by non legislative measures.

As mentioned above, the consultation paper Resolving Disputes in the Workplace was published at the same time as the Gibbons Review. It may seem surprising that although the Bill is now proceeding through parliament BERR have yet to publish

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Employment Bill a response to the consultation. The explanation is that the Government appear to broadly accept the thrust of the Gibbons Report and seeks to implement it partly via the Bill, which focuses on the policy changes that require by primary legislation, and also by a package of non-legislative measures.

By way of example, take the recommendation that there should be an incentive for employers and employees to take steps to resolve their disputes themselves. Clause 3 of the Bill deals with this, giving tribunals the discretion to adjust awards upwards or downwards by a maximum of 25 per cent. The discretion to adjust an award in this way arises where a tribunal finds that the parties have unreasonably failed to comply with ACAS's statutory code on discipline and grievance – which is yet to be published. ACAS say a concise code is to be drafted, that it will be principles based and supported by non-statutory guidance.

What else does the package of non-legislative measures contain? A major clue appeared on 6 February, when BERR announced new ACAS funding of £37 million, over three years, to prevent work place disputes unnecessarily going to employment tribunals. ACAS will receive extra funding to boost its helpline and advice services and to offer help at any stage of a dispute with a view to ensuring that it is never too late to choose an informal resolution. ACAS said that it would conduct pilot programmes over the next year to conciliate disputes which look set to become a claim to the tribunals with the aim of making this service available in 2009.

Interestingly, neither BERR nor ACAS, when commenting on the funding package, made any specific reference to Gibbons' recommendations for the greater use of in-house mediation and early neutral evaluation or of mediation forming part of a free early dispute resolution service. It is not clear whether BERR and ACAS accept the Gibbons recommendations in these respects or whether they will pursue a different path.

Implications for employees, employers, their lawyers/representatives and HR professionals.

Culture change, change management and training are three phrases that immediately come to mind if Gibbons is to be implemented in full. All concerned in this field will need to keep a careful eye on these developments given that legislative change is underway, the nature of the changes is potentially fundamental and a lot of the important detail is not yet available.

Whether an employer or employee, or a representative of one of these categories, these reforms will, if implemented in full, require the capability to operate in a different environment. The skill-set required of an adviser dealing with in-house mediation, early neutral evaluation and similar techniques is different to that of the successful adversarial tribunal advocate. Knowledge of employment law and procedure will remain important, not least to secure or avoid a 25% adjustment to

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Employment Bill the award. Negotiation and mediation skills, however, will also be key, as will the ability to advise a party before and during a conciliation or mediation. Managers, union representatives and HR professionals will need to review training needs and consider whether a new skills focus is required – or at least tell those likely to be receiving and paying compensation that inability to respond quickly to the reforms may have financial consequences.

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