We consider what Brexit will mean for employment law, what is meant by a month in ACAS Early Conciliation and the ongoing debate regarding employment tribunal fees.

What will Brexit mean for employment law?

The Trades Union Congress has commissioned a 66 page report, prepared by Michael Ford QC, reviewing the potential impact of Brexit. The following summarises his findings:

1. The areas of pay and dismissal are excluded from the scope of EU law and will not be directly impacted by Brexit. Areas such as the National Minimum Wage/Living Wage and the laws on unfair and wrongful dismissal would remain unchanged in the event of Brexit.

2. Many employee rights at work derive from EU law and could theoretically be repealed in the event of Brexit. These include:

   (a) Anti-discrimination rights e.g. disability rights, which covers discrimination at all stages of employment, including selection;

   (b) Pregnant workers rights including rights to maternity and parental leave;

   (c) Working time rights including rights to daily rest, limits to weekly working hours, paid annual leave and measures protecting night workers;

   (d) Agency workers rights;

   (e) Rights to collective consultation e.g. in the context of collective redundancies and transfers of employees between businesses; and

   (f) Health and safety rights.

Whether the above rights would be cancelled by a future government is not however guaranteed. Indeed the UK government has often enacted legislation which gives a higher level of protection to workers than is normally required under EU law. By the same token, a government committed to deregulation in the employment sphere would be unrestrained from doing so, post-Brexit.

Although the UK has signed up to international treaties which protect some of the above rights, their protections are comparatively weak.

Other than pregnant workers’ rights, Mr. Ford believes all the above areas would be vulnerable to attack in some form or the other, be it wholesale in the case of health and safety legislation, or on a selective basis in the case of anti-discrimination legislation, where there is less political consensus, e.g. in the area of age discrimination.
3. Under EU legislation, sanctions for breach of EU law must be adequate and a genuine deterrent. A Brexit would free a government from these constraints, allowing it to introduce **caps on compensation or other measures** to limit the practical enforcement of rights.

It can be concluded from Mr. Ford’s report that while Brexit would leave a large body of employment law susceptible to repeal, whether this would happen in practice ultimately depends on the legislative agenda of the government of the day.

**ACAS Early Conciliation – the extension of one month, but what is a ‘month’?**

ACAS early conciliation introduced the concept that the limitation period is extended in order to incorporate the period of time that parties spend undertaking ACAS Early Conciliation (EC). This is the period of time between the day on which a claimant contacts ACAS (either by telephone or through the sending of a form) to the day that the Claimant receives the EC certificate.

If the original limitation was due to expire during the conciliation period, the EC process extends the expiration date to lodge a claim to one month after the Claimant receives the EC certificate.

The Employment Appeal Tribunal (EAT) has ruled in *Tanveer v East London Bus and Coach Company* that when an employment claim is extended by one month, the extension period expires on the corresponding day of the following month. One month, therefore, could mean less than 31 days! This rule is known as the ‘corresponding date rule’, which states that if, for example, the extension begins on 1st January 2016, it is deemed to end on the 1st February 2016.

In *Tanveer*:

- 20.03.16 the Claimant was dismissed
- 18.06.15 the Claimant’s solicitors contacted ACAS
- 30.06.15 the EC certificate was issued ending the EC period of time
- 31.07.15 the Claimant’s solicitors lodged the ET 1 claim to the Employment Tribunal (ET)

The ET dismissed the claim because it was out of time. Tanveer appealed to the EAT.

The EAT upheld the ET’s finding that the claim had been brought out of time, rejecting the Claimant’s appeal. The judgement stated that ‘one month’ after the expiry of the EC period (the day the Claimant receives the EC certificate) was to mean the corresponding date in the next month. The EAT regarded itself as bound by the case of *Dodds v Walker*, which set out the corresponding date rule clearly. In *Dodds*, Lord Diplock stated that "all that the calculator has to do is mark in his diary the corresponding date in the appropriate subsequent month".
MPs renew call to scrap ‘punitive’ employment tribunal fees

On 3 December 2015 the CIPD published an article on MPs calling to scrap ‘punitive’ employment tribunal fees.

MP Justin Madders said that the fees structure “acts as encouragement to those rogue employers who think that employment protection and workplace rights are an optional extra to be ignored whenever possible”. Furthermore, that it created a hire and fire ethos.

MPs asserted that the current cost of bringing a claim is “punitive and shuts thousands of workers out of accessing justice”. In particular, Ruth Cadbury, MP, warned that the tribunal fees are damaging for women because they are an “important mechanism” for securing equal pay.

Equal pay was not the only area affected, in the first year of the introduction of the fees, 2013, pregnancy related detriment or dismissal claims effectively halved falling from 1593 claims in 2012/13 to 790 the year after. Ruth Cadbury asserted that pregnancy discrimination is “rife in the workplace” and that figures suggest that 54,000 women are dismissed on the grounds of pregnancy each year. Only 1.5% of this number proceeded with a tribunal claim.

Sex discrimination claims were also reduced by 90%. Overall there has been a decrease in employment claims, with single employment tribunal claims falling by 64% which equated to a reduction of 32,671 claims. Multiple claims, brought by two or more people against the same employer, fell by 67%, a decrease of 3,527 claims.

The question is then raised of whether the tribunal fees are working as intended, to weed out those vexatious, time wasting, claims that have no real prospects of success. From the information in this article, the answer is not really. Ministry of Justice data shows that, for the four quarters preceding the introduction of the tribunal fees, the average success rate for claimants was between 9% and 10%. In theory, the success rate of claims should have dramatically increased but the data suggests that this is not the case and in fact, the success rate has been very much the same. For the four quarters following the tribunal fees, the success rates were: 9%, 9%, 5% and 13%.

We are finding that since the introduction of the fees, claims are becoming increasingly complex and involving multiple areas of law. We also find that employers believe that employment tribunals are heavily stacked in the claimant’s favour. From these figures, it could be suggested that quite the reverse is true.

If we apply the highest success rate of 13% to the single claims reduction, 32,671, we are able to estimate that out of those claims, that never made it, only 4,247 would have been, on average, successful. This means that employers did not have to deal with 28,424 claims that, on average, would not have been successful.
The Minister for Justice, Shailesh Vara said that the government was reviewing the tribunal fees regime to determine how successful it had been and stated “If, after the review has reported, the government believe that there are compelling arguments for changes to the fees structure or to the operation of the fee remissions scheme, we will, of course, bring forward proposals for consultation.”

Employment Update & Brainstorming sessions

We are conducting in-house employment update and brainstorming sessions. The session briefs you on the legislative changes which have had an impact for employers in 2015. We also consider with you what is being introduced in 2016. Our session includes a bit of brainstorming to consider the impact for the business of these changes and whether there could be any employment consequences for your business/issues that need to be addressed.

There is no charge for this session. The session will take approximately an hour and a half. We do suggest that it is useful to include your senior management team in the briefing and update session so that they are up to date with the legislative changes. It also gives them an opportunity to raise and ask any questions they may have.

If you would like to arrange for a briefing and brainstorming session, please can you email Charlotte Astridge – charlotte.astride@ts-p.co.uk.

Focus on...

George Liley – Trainee Solicitor in the Employment Team

What was your first job?

I was a paper boy in 2003. I may have been the only source of news for the village at that time.

What was your worst experience as a pupil?
Losing the 4x100m relay final on sports day in 2005. Despite being a good distance clear I was the victim of a dodgy handover and I sadly dropped the baton on the last leg in front of the whole school.

What’s your favourite film?

It’s a close call between Forrest Gump and Titanic. Both are emotional rollercoasters.

If you hadn’t decided to be a lawyer, what would you have been?

Either a journalist or a teacher.

What was the first record you ever bought?

The B*Witched, ‘C’est la Vie’ album because my nan had recommended it.

What’s your favourite children’s book?

‘Not now, Bernard.’

Who do you most admire and why?

Muhammad Ali. Not only was he a great sportsman but he showed a lot of courage and bravery in the face of adversity. As a child I often watched old videos of Muhammad Ali and I still find him just as inspiring today as I did when I was younger.

Tell us two truths and one lie

1. Despite being a terrible cook, the late great 70s pop star Alvin Stardust once gave me an award in recognition of my culinary expertise

2. I once played a frame of snooker against Jimmy White in a local charity fundraiser and lost on a re-spotted black

3. I have a cat that eats bananas and broccoli

Although this newsletter highlights some key issues relating to employment law, it should not be considered comprehensive and is not a substitute for seeking professional advice on a specific issue.
Meet the team

For more information on anything mentioned in this newsletter please contact a member of the employment team.

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