



City Research Online

City, University of London Institutional Repository

Citation: Mangan, D. (2013). Employment Tribunal Reforms to Boost the Economy. *Industrial Law Journal*, 42(4), pp. 409-421. doi: 10.1093/indlaw/dwt021

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <http://openaccess.city.ac.uk/16424/>

Link to published version: <http://dx.doi.org/10.1093/indlaw/dwt021>

Copyright and reuse: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk

EMPLOYMENT TRIBUNAL REFORMS TO BOOST THE ECONOMY

1. INTRODUCTION

One of the more ignored aspects of employment law is tribunal procedure. To this neglected area the Coalition Government has brought in a host of reforms to address what is regarded as an economic imperative. This commentary considers the employment law reforms contained in the Enterprise and Regulatory Reform Act 2013, Part 2.¹ Coming at the mid-way point in the Coalition's planned reforms which are scheduled to be fully introduced as of 2015,² this legislative overhaul of employment tribunal procedure has been linked to efforts to improve the country's economy. Government reports published leading up to the passage of the legislation offer guidance to the new framework. The package contains a negative and singular view of employment litigation. The Act and Regulations may assist employers, but more remarkable is the Government's ambivalence regarding rights. These reforms put into question access to redress for potential infringements of employment rights and emphasise the use of law as a tool for economic stimulation rather than a source of rights protection.

This commentary first briefly situates the package within a continuum of procedural changes and then outlines the long-standing discussion regarding Employment Tribunal reform. The next segment delves into the reforms by considering three provisions which are: the requirement for claimants to report their claims to Acas first; fees for launching claims; and settlement offers. This discussion is interspersed with references to Government documents

¹ 2013 Chapter 24. Royal Assent 25 April 2013 [ERRA] as well as the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (in force as of July 2013 [2013 Regulations]).

² BIS, *Employment Law 2013: Progress on Reform* (March 2013) [*Progress on Reform*], 18.

anticipating the changes. Based on these foregoing sections, the final portion of this commentary investigates instructive themes emerging from the current reforms package. The Coalition's plans are of particular importance to small to medium-sized (SME) and micro businesses. The emphasis of Employment Regulation is being shifted to that of an easy-to-use format accessible to those entirely unfamiliar with these regulations. Together this package suggests fundamental change in employment law: a retrenchment of the parameters for access to redress which has the potential to limit the enforcement of recognised employment rights, especially when determined by their impact on business.

2. SITUATING THE PROCEDURAL REFORMS

A. An Issue in Perennial Development

The benchmark for Employment Tribunals has been the statement from the Donovan Royal Commission: a procedure which is 'easily accessible, informal, speedy and inexpensive'.³ The phrase has become a mantra but not dogma since informality has arguably given way to formality. As a result of fees being introduced as a precondition for claims, accessibility has now come into question. Speed within an efficiency context is the focal point. With the ERRA and the 2013 Regulations, costs have been confirmed as a paramount concern.

The costs associated with raising claims have been an underlying issue for some time. In 1994, the Green Paper *Resolving Employment Rights Disputes – Options for Reform* Cmnd. 2707/94 suggested tribunals be given the power to dismiss claims at a pre-hearing review.⁴ The proposal was not realised until the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004, SI 2004//1861. These Regulations targeted a reduction in the

³ HMSO, Report of the Royal Commission on Trade Unions and Employers' Associations (1968) Cmnd 3623, 156.

⁴ *Resolving Employment Rights Disputes—Options for Reform* Cmnd. 2707/94, at [6.21].

number of claims. Estimates for 2005-2006 were a reduction between 28,000 and 32,000 claims.⁵ Rule 3 of the 2004 Regulations provided little guidance as to when a claim may not be accepted other than mention of ‘weeding out’ those deemed ‘ultimately ... unsuccessful in any event’. These Regulations granted the power to strike out a claim at a pre-hearing review (r.18(7)(b)). Prior to 2004, the 2001 Regulations SI 2001/1171, r.7(4) only permitted a deposit order if the Tribunal thought the case was hopeless and allowed the case to be struck out if the deposit was not paid. The 2001 Regulations appeared to be similar to the 1993 Regulations (SI 1993/2687). The role of the Advisory, Conciliation and Arbitration Service (Acas) was prominent at this time as it was relied upon to realise reduction targets.⁶ In the middle of this period there was the short-lived Employment Act 2002 which also aimed at reducing the number of cases headed to Tribunal by emphasising dispute resolution; for example through setting out a formal process for dismissal (Sched.2); time for settlement of disputes (s.24); and permitting costs for expenses for preparation time (s.22). The ethos behind the 2002 Act was that ‘there would be fewer employment disputes if there were effective disciplinary and grievance procedures in the workplace’.⁷ By the time Gibbons reported, the new statute was deemed to have failed.⁸ In discussing the impact of Labour’s *Routes to Resolution: Improving Dispute Resolution in Britain* (DTI, July 2001) and its legislative manifestation, the Employment Act 2002, Davies and Freedland remark: ‘it is hard to avoid the conclusion that its proposals quite extensively crossed the line which separates measures to facilitate the settlement of disputes from measures to stifle the assertion of the rights which might give rise to disputes’.⁹ Sanders describes the Employment Act 2008 which

⁵ Employment Relations Directorate, ‘Amendment of Tribunal Regulations’ (July 2004) [2004 Regulations Explanatory Notes], [14], [35].

⁶ 2004 Regulations Explanatory Notes, [45].

⁷ A. Sanders, ‘Part One of the Employment Act 2008: “Better” Dispute Resolution?’ (2009) 38 ILJ 30, 34.

⁸ M. Gibbons, *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain* (London: DTI, 2007) [Gibbons], 5.

⁹ P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (Oxford: OUP, 2007), 65.

replaced the 2002 Act as an example of proceeding through a ‘new era in unfair dismissal law in which “economic prosperity” dominates “social justice” to a degree not seen before’.¹⁰

As changes have been made to Employment Tribunal procedures, the target of reform has become more precise: those ‘whose intent or action is to waste time and drain valuable tribunal resources’.¹¹ For many including the Government the persistence of slow economic recovery coupled with the perception of wasted expenditure for employers as a result of employment regulation has prompted the present changes.

B. The Case for Reform

The debate surrounding the qualification period for employment law protections illustrates the case for reform. In April 2012, a new qualification period of two years of consecutive employment with the same employer came into effect (Section 108, Employment Rights Act 1996, as amended by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012). Addressing the argument for extension of the qualification period, Adrian Beecroft wrote of the difficulty employers had in making such an important determination within one year of employing an individual.¹² Of note, SMEs have been found to be less likely to have unfair dismissal claims made against them.¹³ Ewing and Hendy launched a fervent critique of the extended period.¹⁴ The authors challenged the premise of the reforms pointing to the absence of support for the assertion: ‘In the light of the

¹⁰ Sanders, 31.

¹¹ Gibbons, [4.40]; though a small number was identified [4.39].

¹² A. Beecroft, *Report on Employment Law* (24 October 2011) [Beecroft], 4).

¹³ G. Saridakis, S. Sen-Gupta, P. Edwards, D.J. Storey, ‘The Impact of Enterprise Size on Employment Tribunal Incidence and Outcomes: Evidence from Britain’ (2008) 46 *British Journal of Industrial Relations* 469-499 [Saridakis *et al.*], 483.

¹⁴ K. Ewing & J. Hendy ‘Unfair Dismissal Law Changes – Unfair?’ (2012) 41 *ILJ* 115-21.

government's statistics, it is therefore hard to understand Mr Osborne's comment that introducing tribunal fees would end "the one way bet against small businesses"¹⁵.

The Coalition's plan links Employment Tribunal reforms with economic growth and in particular the growth of small to medium-sized businesses.¹⁶ To effect this development, emphasis is placed on cutting employment costs such as those related to claims brought by workers or former workers. The focus of the latest reforms is the costs associated with defending claims in the first place. For this reason, I depart somewhat from the arguments made by Ewing and Hendy. Their comments were premised on claimants' lack of success at employment tribunals: 8% of unfair dismissal claims against employers are successful; employers had a 73% chance of success at tribunal.¹⁷ For the Government this fact is irrelevant because the cost (or at least the perception) arises when a claim is launched. Cost certainty for employers is the aim: 'The risk is that the fear of being faced with tribunal claims impedes growth because businesses become too cautious to hire people or to address capability issues in the workforce'.¹⁸ The current plan takes a different approach from Gibbons who suggested early resolution of disputes (notably at an informal stage). The Government's perspective on early resolution focuses on the benefits for one side: if claims arise, they should be disposed of before employers are to expend any financial resources.

The perceived ease in launching a claim and the associated costs founds employers' concern over costs.¹⁹ This attitude can be found in other surveys of employers. For example, consider the following: 67% of employers believe employment regulation is a barrier to the UK's

¹⁵ *Ibid*, 120.

¹⁶ See for example, Beecroft, 2.

¹⁷ Ewing and Hendy, 116.

¹⁸ *Progress on Reform*, 24.

¹⁹ E. Jordan, A.P. Thomas & J.W. Kitching, R.A. Blackburn, 'Part A: Employer perceptions and the impact of employment regulation' *Employment Relations Research Series 123* (BIS, March 2013) [Jordan *et al*], 18.

market competitiveness; 34% of claims are withdrawn by applicants; employers are four times more likely to win but 26% are still settling even when told they can win.²⁰ These statistics reinforce employers' and therefore the Government's concern over wasted expenditure when it comes to employment claims.

3. THE REFORMS

The procedural reforms of the ERRA and the 2013 Regulations present subtle yet nonetheless significant change. The aim of this paper is not to provide a comprehensive listing of the reforms but to highlight three of particular note: the requirement for claimants to report their claims to Acas first; fees for launching claims; and settlement offers.

A. Mandatory Consultation with Acas

Prior to submitting their claims to the tribunal, workers ('prospective claimants') must report their claims details to Acas (s.7 of the ERRA adding s.18A to the Employment Tribunals Act 1996). During the prescribed period (which remains to be defined), a conciliation officer shall 'endeavour to promote a settlement between the persons who would be parties to the proceedings'. If settlement is not possible or the period expires, the prospective claimant must obtain a certificate confirming such. Still, Acas conciliation is not mandatory (either party can refuse).²¹ Arguably, the voluntariness of conciliation continues a lack of commitment to dispute resolution between the parties.²²

²⁰ *Facing the Future: CBI/Harvey Nash Employment Trends Survey 2012 (July 2012)*, 25-26.

²¹ BIS, *Ending the Employment Relationship: Government Response to Consultation* (January 2013) [*Ending the Employment Relationship*], [108].

²² Sanders, 32.

Mandatory consultation finds its basis in the idea of costs. Since fewer than one third of claimants sought out Acas, the Government speculates this body can reduce the number of claims which reach the tribunal by 12,000.²³ The *WERS 2011* suggests that many may continue to opt out of this process as the authors found few used dispute resolution.²⁴ Mandating Acas be involved addresses the concerns of SMEs insofar as employers have not had to put out any money at this point and the claims may potentially be averted.

Other factors may affect the success of this plan. The problem with such heavy reliance on Acas is that there is currently a funding issue for the body.²⁵ When the 2004 Regulations came into effect, the Government budgeted £850,000 for implementation costs.²⁶ There do not appear to be any such budgeted costs at present. One target for further funds would be adding to the number of caseworkers at Acas could better facilitate settling cases at an early stage.²⁷ Unfortunately, the reporting requirement may form a gateway to further issues regarding the information provided to Acas and whether information is absent or the proper materials were provided. Aside from funding, claimants' attitudes are clearly targeted by this measure. It appears that Acas' filtering role will entail putting the realities of claims success to the individuals (claims forms now have the median awards listed for this purpose).

B. Introduction of Fees for Launching Claims

²³ BIS, *Resolving Workplace Disputes: A consultation* (January 2011) [*Resolving Workplace Disputes*], 21–2.

²⁴ B. van Wanrooy, H. Bewley, A. Bryson, J. Forth, S. Freeth, L. Stokes & S. Wood, *The 2011 Workplace Employment Relations Study: First Findings* (London: BIS, 2013) [*WERS 2011*], 27.

²⁵ *Ending the Employment Relationship*, [60].

²⁶ Employment Relations Directorate, 'Amendment of Tribunal Regulations' (July 2004), [21].

²⁷ D. Renton & A. Macey, *Justice Deferred: A critical guide to the Coalition's employment tribunal reforms* (Liverpool: Institute of Employment Rights, 2013) [Renton & Macey], 25.

The ethos behind the introduction of fees for launching claims is: those who use government services should pay for them.²⁸ Fees can help to offset some of the planned 23% budget reduction over four years which began in 2011.²⁹ The Government expects to recover approximately 33% of the cost of employment tribunal proceedings through these fees.³⁰ The introduction of fees suggests a departure from Gibbons' recommendation that the system should be made cheaper.

The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) provides some idea as to the look of fees (in force 29 July 2013). There are two groupings of claims identified in the order, A and B. In Schedule 2, Table 2, Type A claims are listed. Type B claims are said to be 'All other claims' (according to the explanatory note). Schedule 2, Table 3 outlines the costs: Type A – an issuing fee of £160 and a hearing fee of £230; Type B - £250 as the issuing fee and £950 for a hearing. These are single claimant fees as there are higher rates for a group (Schedule 2, Table 4). In addition, BIS estimates employment tribunal hearings cost claimants about £1800 and employers £6200.³¹ For appeals under the new fees regime, an appellant pays £400 for a notice of appeal and £1200 for an oral hearing (ss. 13, 14 of the Order). Rule 78(1)(c) of the 2013 Regulations permits 'reimbursement' for all Tribunal fees within a costs order.

For those workers unaccustomed to such legal language, the order may prove challenging to follow. One can foresee Acas being called upon by claimants for guidance as to the procedures and fees (especially when they are being shepherded that way). Employment

²⁸ *Resolving Workplace Disputes*, 49.

²⁹ *Ibid.*, 49.

³⁰ See Employment Tribunal and Employment Appeal Tribunal Fees Stakeholder factsheet <http://www.justice.gov.uk/downloads/tribunals/employment/et-fees-factsheet.pdf> (date last accessed 22 October 2013).

³¹ *Progress on Reform*, 26.

rights are spread across a number of sources and claims today often combine different rights. In itself, the procedure for launching a claim can dissuade. Many workers have found completing the preceding version of ET1 forms for claims to be a ‘daunting experience’.³²

Upon meeting certain criteria regarding income, there is potential for remission of fees (full or partial) outlined in Schedule 3, Articles 2 and following. Some may suggest that qualifying individuals are the ones who are more likely to bring claims but abandon them. Saridakis *et al* found that pay at less than £25,000 per annum had a ‘positive effect on the probability of having an unfair dismissal case’.³³ This will be a point to monitor as the impact of the reforms unfolds.

Fees for claims must be considered alongside the costs of raising a claim and losing. The 2013 Regulations have maintained the costs regime found in the 2004 Regulations.³⁴ For example, provision for a costs order is found in r.78 and largely carries on from r.41 in the 2004 Regulations. Preparation time orders may still be made pursuant to r.79 (following on from r.42 in the 2004 Regulations). Finally, wasted costs orders have been retained in r.80 and largely draw from r.48 of the 2004 Regulations. Advice given to potential claimants must not only include the cost of filing and a hearing but also the possibility of a rather extensive range of powers to award costs against any party. Clearly this is of particular concern to a worker who likely would not be in a satisfactory position to pay, for example, £20,000 in costs pursuant to r.78(1)(a); let alone any further order which can exceed that figure pursuant to r.78(1)(b)-(e) (see r.78(3)). This means that payees will bypass the County Court stage of assessment for costs up to £20,000. To borrow a phrase from defamation law, there is clear

³² N. Busby & M. McDermont, ‘Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings’ (2012) 41 ILJ 166-83, 175.

³³ Saridakis *et al*, 483.

³⁴ Though Mr Justice Underhill identified some desire for change by the Minister: *Fundamental Review of Employment Tribunal Rules* (29 June 2012), 5.

potential for the entirety of costs considerations to create a ‘chilling effect’ dissuading those who may have claims to make. A judicial review of the fees was heard in Scotland where the Court of Session refused an interim interdict on the grounds of an undertaking by the Government that if the fees were found to be unlawful they would be refunded with interest and that the case required a full hearing. In England, the court granted a judicial review application regarding the lawfulness of the fees submitted by Unison, but refused to grant an interim injunction to stop the fees from coming into force as scheduled.³⁵

C. Settlement Offers/Pre-Termination Negotiations

Amendments to settlement offers incentivise the early resolution of disputes.³⁶ Section 14 of the ERA adds s.111A to the Employment Rights Act 1996 and hints at some of what the Government has planned. These negotiations remain inadmissible at tribunal (ss 111A(1),(2) Employment Rights Act 1996, as amended) except where there has been improper conduct (ss.111A (4),(5) as amended).

Again, much depends on the ‘critical role’³⁷ ACAS continues to play. The Government will rely on Acas to set out ‘in accompanying guidance how the appropriate use of settlement agreements sits within broader good management practices, and the type of good practice we expect businesses will normally follow’.³⁸ There will be no guideline tariff for settlement agreements because of opposition to it,³⁹ but factors include:

- Terms of contract such as remuneration, notice period, and untaken annual leave;
- Length of employment;
- Reason for offering settlement;
- Length of time it would take to follow the full process for a fair dismissal if the employee refused the offer;

³⁵ *R. (On the Application of Unison) v. Lord Chancellor*, 29 July 2013, QBD, unreported.

³⁶ See *Resolving Workplace Disputes*, 37.

³⁷ Busby & McDermont, 178.

³⁸ *Ending the Employment Relationship*, [36].

³⁹ *Ibid.*, [69].

- How difficult it would be to fill the post and the value of the individual to the organisation;
- The individual's perception of how long it would take them to find another job; and
- The perceived liability to the employer of any potential employment tribunal claim.⁴⁰

In response to consultation on settlement agreements, Acas will provide detailed assistance to parties such as guidance on 'what parties need to do to make a settlement agreement legally valid' (including a ten calendar day period during which workers must consider such an agreement) and template letters.⁴¹ Not noted in the aforementioned Acas and government documents, Busby and McDermont's research identified the need for clear parameters to Acas' role which can be readily understood by service-users. This step would seem necessary given the significant reliance on Acas for the success of these reforms.

The trigger for admissibility of settlement negotiations raises questions. Improper behaviour is the benchmark.⁴² Concerns about improper behaviour suggest that the premise is more about dispensing with claims.⁴³ The focus on boosting the economy places the emphasis with regards to settlement offers on the disposal of claims so as to protect the financial resources of employers; thereby playing into the notion of vexatious litigants who waste employers' financial resources. Recently, Acas has provided sparse commentary on what constitutes 'improper behaviour' within the context of settlement agreements.⁴⁴ It will be with interest that the Acas guidance and the implementation of settlement offers will be monitored.

Overall, instruction should be taken from the impetus for the proposed procedural reforms: concerns over vexatious litigants and frivolous claims. Aim has been taken at perceived motivations of workers for pursuing claims. For example, rules 10, 11, 12 of the 2013

⁴⁰ Ibid., [76].

⁴¹ Acas, 'Acas response to consultation on settlement agreements code' (June 2013) [Acas June 2013].

⁴² *Ending the Employment Relationship*, [37].

⁴³ See *Resolving Workplace Disputes*, 37.

⁴⁴ Acas June 2013, Draft Code of Practice, [18].

Regulations grant the Employment Tribunal the power to reject claims for failure to supply the minimum information (r.10 of the 2013 Regulations carries on from r.3 of the 2004 Regulations); the failure to pay the Tribunal fee (a new addition for 2013) (which will lead to the dismissal of a claim under r.40); and for substantive defects (respectively). The new additions speak to the essence of the changes: a generalised view that claimants have used the system in a manner which wastes employers' financial resources. It should be noted, the number of claims accepted at the Employment Tribunal has declined steadily for the last two years: a fall of 15% from the 2010-2011 year and 21% from the 2009-2010 figure.⁴⁵

4. THEMES

The unifying idea of this section is that the reforms are premised on cost certainty for employers; that is, eliminating 'vexatious' actions and streamlining the claims process so that the overall numbers are reduced thereby presenting a cost saving on employment regulation.

A. (Vexatious) Claims as a Hindrance to Economic Growth

These reforms are most significant because they retrench the practice of employment law. First, there is a subtle indictment of lawyers and rights litigation. Since financial resources are not as plentiful amongst workers, contingency fee arrangements have become more common. Despite Lord Justice Jackson's endorsement,⁴⁶ criticism persists against no-win-no-fee arrangements which (to many) take the risk off of the worker.⁴⁷ Moorhead, bringing the assertion into question, contends that 'lawyers have incentives to proceed only with cases that

⁴⁵ Ministry of Justice, *Employment Tribunals and EAT Statistics, 2011-12* (1 April 2011 to 31 March 2012) (20 September 2012).

⁴⁶ R. Jackson LJ, *Review of Civil Litigation Costs: Final Report* (London: Judiciary of England and Wales, 2010), [12.4.1].

⁴⁷ See Beecroft, 8.

are economically viable'.⁴⁸ If the aim is to curb the number of claims, then the issue includes regulation of how the law processes these claims and this necessarily involves lawyers. In effect, employment law is being retrenched. These reforms taint rights litigation in a manner so as to make launching a claim economically impracticable if not socially contrarian. Somehow those who make employment claims are automatically viewed as potential abusers of the system (vexatious litigants) and, now, these individuals are being said to threaten the country's economy. Moreover, these amendments suggest little confidence in tribunals and courts and despite low claimant success rates (if one measures Tribunal efficiency in this manner). The growing force of the adverse attitude towards employment regulation is perhaps the most dangerous challenge to access to rights redress.

Second, employment law is being reformed based on a concept of flexibility. Throughout this package of changes, flexibility has been about meeting business needs through the fluctuations of the economy so that employers may 'hire people to meet new challenges, knowing they can reduce the size of their workforce if economic circumstances require'.⁴⁹ Economic pressures do not obscure the significant challenges to access to employment law redress posed by these reforms. The effect of these amendments may not be readily noticeable for some time, but the practice of this discipline (especially on the claimant side) must confront these reforms. The shift is unmistakable: a movement away from dispute resolution to conflict management where the latter (as a result of reforms like fees) is a construct leveraged in favour of employers.

Finally, a troubling rhetoric underlies these changes. Workers are characterised with nefarious undertones; possessing a savvy understanding of employment law which (it seems)

⁴⁸ R. Moorhead, 'An American Future? Contingency Fees, Claims Explosions and Evidence from Employment Tribunals' (2010) 75 *Modern Law Review* 752-784, 762.

⁴⁹ *Progress on Reform*, 7.

evades employers' own. For example, s.65 of the ERA has repealed s.40 (2)-(4) of the Equality Act 2012 which allowed for third party liability for harassment at work. Beecroft championed the change: 'The legislation clearly creates a temptation for workers to conspire with each other or with customers to create a harassment situation which might result in substantial financial compensation from their employer'.⁵⁰ The description ascribes a high level of deviance to workers as a class and to an extent that it tests the boundaries of credibility. The concept of the vexatious litigant presumes an intricate knowledge of employment law, its procedure and any opportunistic strategies; not to mention individuals who are willing to risk sums of money on 'bets' of dubious return as noted by low success rates. The perspective advanced (overtly by Beecroft and more subtly in these reforms) remains remarkably one-sided for it presumes that no employers conduct themselves in an equally strategic manner. The premise for this singular approach originates in unrelentingly negative perceptions about the British workforce which in turn appear to be informing Government policy. If the dominant view of workers remains one of widespread lethargy, the problem moves beyond employment regulation to something more pervasive requiring attitudinal change. It remains a challenge to see how this situation could be entirely attributable to employment regulation alone.

Though some may point to previous reforms and how employment law trudged on, the consideration here is the accumulation of change: is there a point at which employment law can no longer remain a viable avenue for workplace redress?

⁵⁰ Beecroft, 6.

B. Focus on Small Business

According to 2010 statistics from BIS, small to medium-sized firms accounted for a combined 48% of private sector employment.⁵¹ Seemingly with this substantial figure in mind, the Government has shifted the emphasis of regulation towards ease of use for those who are less likely to employ legal or human resource assistance.

The case for regulation in favour of SMEs has been developing for some time. There are two guiding factors: SMEs prefer to have an informal workplace; that is, few if any formal written policies).⁵² Consequently, these undertakings expose themselves to greater potential liability at employment tribunals for the absence of formal procedures. Gibbons wrote that small businesses preferred the informal workplace because expressing ‘problems in writing can act as a trigger for greater conflict’.⁵³ Empirical evidence has been marshalled to support this focus: ‘Wider research has shown that small employers are more likely to be involved in, and lose, employment tribunals, particularly those that did not follow formal processes when dealing with disputes’.⁵⁴ The reason for loss at the Employment Tribunal is not attributable to the absence of HR support.⁵⁵ More than their mere presence, the application of procedures ‘makes the difference between winning or losing a case’.⁵⁶

Given their desire to not spend money on outside advice, SMEs are relying on the Government. This cohort seeks free, bespoke materials readily accessible at any point in

⁵¹ BIS, Business Population Estimates for the UK and Regions 2011, http://www.bis.gov.uk/assets/biscore/statistics/docs/b/business-population-estimates-2011_statistical-release.pdf (date last accessed 22 October 2013).

⁵² Employers who do not have procedures were identified as smaller sized operations in the Workplace Employment Relations Study: *WERS 2011*, 27.

⁵³ Gibbons, 2.11.

⁵⁴ Jordan *et al* i citing Saridakis *et al*.

⁵⁵ Saridakis *et al*, 492.

⁵⁶ *Ibid.*, 493.

time.⁵⁷ The scenario begs the question: if we want government to abstain from significant employment regulation, should it be relied upon to shore up gaps created by businesses? Moreover, SMEs' expectations appear to contradict the essence of the 'Big Society'.

C. SMEs' Lack of Awareness of Employment Regulation

The difficulty with the Government's benchmark of SMEs is that while much may be done to benefit them, SMEs are most likely to be unaware of this largesse. The report of Jordan *et al* identified this curiosity: 'There was no evidence that these employers were aware of the increased qualifying period for unfair dismissal'.⁵⁸ Little surprise should arise that confidence in being compliant with regulations increased with larger employers who had developed formal policies and was low amongst SMEs. It may be quizzical as to why although 'these employers felt they were at risk of litigation there was little motivation to change their working practices because they believed that working informally maintained better working relationships with staff and ensured managerial autonomy'.⁵⁹ The decision to adhere to informality for reasons of staff morale can be valid, but this does not eliminate the risk these employers run in not having procedures to apply when circumstances arise.

Given SMEs' ignorance of regulations being made for their benefit coupled with a seeming reluctance to be better informed, one must wonder at the extensive package being unveiled. SMEs' anxiety has driven these changes and yet that anxiety will remain.⁶⁰ The difficulty here lies not in regulation but in informing a reluctant group. SMEs' inflated sense of risk in the absence of accurate information (and one could add reinforcing such an attitude by legislating based on this quicksand) creates a moving target for reform efforts.

⁵⁷ Jordan *et al*, (iv).

⁵⁸ *Ibid.*, 29.

⁵⁹ Jordan *et al.*, (ii).

⁶⁰ *Ibid.*, (i).

A better foundation through which to achieve desired goals may be the promotion of accurate information for both workers and SMEs. Only now have details regarding median awards been provided on ET1 and ET3 forms.⁶¹ These figures are lower and more representative (\$4560) than the average awards (£9133) which are buoyed by a few larger sums.⁶²

Another (though perhaps more controversial) focus is to address the perception of employment advice as an unnecessary expenditure or luxury. An intriguing illustration arises from accounting. The Association of Chartered Certified Accountants notes that accountants are being asked by their clients for employment advice.⁶³ Clearly SMEs prefer a one-stop source of information. Reliance on accountants by this cohort illustrates that the work done by those in employment law is undervalued.

5. CONCLUSION

There was a time when ETs were encompassed by the acronym ADR. These reforms clearly demonstrate this to no longer be the case. The aim of these reforms has ostensibly been economic improvement and yet one cannot easily gloss over the second-class treatment of employment regulation and those working within it. There is a movement away from informality and towards greater procedural formality.⁶⁴ Gibbons called for the abolition of the 2004 Regulations which promoted formality (In relation to the Employment Act 2002, Gibbons found that ‘increased use of formal processes has been an unnecessary burden that

⁶¹ *Progress on Reform*, 25.

⁶² Ministry of Justice, ‘Employment Tribunals and EAT Statistics, 2011-12 (1 April 2011 to 31 March 2012) (20 September 2012).

⁶³ *Business Advice to SMEs: Human Resources and Employment* (2011).

⁶⁴ A movement which it has been suggested has been underway for some time: S. Corby & P.L. Latreille, ‘Employment Tribunals and the Civil Courts: Isomorphism Exemplified’ (2012) 41 ILJ 387-406, 397.

has not increased the rate of resolution'.)⁶⁵ but here there is greater codification even if it is aimed at reducing the burden on employers. Curiously contradiction seems inevitable: the reforms formalise much and yet, this is in opposition to the wishes of SMEs. The Government has skipped an important step which is clearly present in the information before them. Efforts must be made to inform claimants and SMEs about the process of employment law. Then Government must permit the different layers of dispute resolution to unfold. The current reforms package seems more suited to arrive after the first step has been embraced, employed and found wanting.

David Mangan

* Conversations with Rebecca Zahn and David Monk assisted in the preparation of this piece.

⁶⁵ Gibbons, 2.10.