AN IER RESPONSE

The Enterprise and Regulatory Reform Bill

A Department of Business, Innovation and Skills Consultation

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THE INSTITUTE OF EMPLOYMENT RIGHTS

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The Institute of Employment Rights is an independent think tank involving academics and lawyers specialising in labour law. IER is supported by trade unions representing over six million workers.

This Submission has been approved for your consideration by leading experts within the IER network.

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Call for evidence to the Public Scrutiny Committee in respect of the Enterprise and Regulatory Reform Bill.

Response from the Institute of Employment Rights

Clauses 7-9: Conciliation

1. We support alternative dispute resolution so long as it is (a) voluntary and (b) properly funded.

2. If the pre-conciliation process is not voluntary we are concerned that this will necessarily entail delays which will be bad for employees and employers alike. This was the case with the statutory dispute resolution procedures and we are concerned that it will happen all over again with the proposed pre-conciliation measures.

3. We are concerned that the proposal would mean a greatly increased workload for ACAS but it has not yet been clarified what extra resources if any would be made available to deal with this. If ACAS is unable to cope due to insufficient resources being allocated then the delays could be intolerable.

4. We are also concerned that the rules for extending time, as currently drafted, are too complex and that this will cause problems for claimants, in particular the 40,000 or so claimants who are unrepresented. We would suggest that rather than have time limits extended by a variable number of days, time limits should simply be extended by a sufficiently generous period to allow for conciliation to take place.

Clause 10: Legal Officers

5. A new tier of legal officers would be cheaper than employment judges but may also be insufficiently knowledgeable and skilled in employment law to handle anything but the simplest of cases. Indeed what is on the face of it a simple claim for, say, unlawful deduction of wages can involve a complicated point or points of law.

6. In our view any decisions by legal officers should be capable of quick review by an employment judge followed if need be by appeal to the EAT.

Clause 12: Limit of compensatory award

7. We are very concerned at the introduction of this clause without any prior consultation in the last 18 months that the Employment Law Review has been going on, and without any statement of any underlying principle or any evidence to support a case that it is necessary to do this.

8. The proposal would allow a government with virtually no further consultation to arbitrarily reduce compensation from its present limit of £72,300 (starting in 1999 at £50,000 and uprated annually in line with inflation) to a paltry £26,000 (1 x the national median wage) or a year's pay if lower. Indeed if the median is £26,000 it would follow that in that case for half the population the limit would be lower than £26,000.

9. The effect of such a measure would be disproportionately felt by those on low incomes as the cap for them would be lower, especially as legal costs have to be funded by the claimant themselves.

10. We do not understand why compensation should be arbitrarily limited. Claimants do not on the whole receive vastly inflated awards from tribunals. They only receive any compensatory award if they can demonstrate they have suffered financial loss, caused by the unfairness of the dismissal, and which they have fully mitigated so far as possible.

11. The median unfair dismissal award in 2010-2011 was only £4,591. Only 2% of awards were for more than £50,000. However, for the small number of individuals concerned (with the present limit) there is a very great injustice when they cannot recover the full extent of their losses because of an arbitrary limit and the system is already unfair to them (particularly when they have to pay the tax on any award to the extent it exceeds £30,000).

12. Reducing the limit to £26,000 (lower in the case of low paid workers) would greatly increase the number of successful claimants who are affected by the cap. In real terms, it would almost reduce the value of the compensatory award back down to what it was in 1999 (£12,000). Indeed an alternative one year cap would potentially reduce the value for the poorer half of the workforce to below 1999 levels.

13. We also believe there would be unintended consequences. The differential treatment of unfair dismissal (compensation capped at an arbitrary level) and discrimination claims (no cap on compensation) already incentivises claimants to present their claims as discrimination claims if at all possible. So does the minimum service requirement of one year, now two years, for an unfair dismissal claim which does not apply in a discrimination claim. However if the cap is reduced even further this will add an even greater incentive to claimants to try and present their claim as discrimination if possible.

14. Once a claim becomes a discrimination claim it increases costs all round. The pleadings are much more complicated. The nature of the tribunal's task is much more complicated. There tend to be more witnesses. Discrimination claims take longer to hear. The judgments take longer to write. They are more likely to be appealed.

15. We would suggest a radical step would be to do the opposite and lift the cap on compensation for unfair dismissal altogether. This would be fairer to those who do not have a complaint of discrimination, only a complaint of unfair dismissal,

and less divisive. It would also mean that those who do not really have a complaint of discrimination would have no incentive to find one (subject of course to having sufficient qualifying service). Demands on tribunal would be reduced in consequence.

16. We do not believe median awards would increase significantly if this were done, as at present only a tiny percentage of awards are actually subject to the cap. However, the knock on benefits of a certain percentage of claimants no longer looking for a discrimination and/or whistleblowing angle to their case would be felt by both employers and the tribunal service.

Clause 13: Financial penalties on employers

17. This clause gives the tribunal a discretionary power to impose a financial penalty of between £100 and £5,000.

18. We consider these penalties are not high enough to offer any real disincentive to employers. We believe a much greater disincentive exists in the current system where claimants can be properly compensated in an appropriate case.

19. Moreover as the financial penalties will not be imposed automatically, only in certain circumstances, they introduce uncertainty into the process and make it less likely that cases will be settled.

Clause 49: Sunset clauses

20. Clause 49 of the Bill makes it possible for Government Ministers to introduce 'sunset clauses' and 'review provisions' into primary or secondary legislation. We do not agree with the use of such clauses. If employment legislation needs to be kept under review, Parliament should do that rather than delegate that power to ministers.

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