Employment*Brief*

July 2015

# The Queen's Speech 2015 – Implications for employment law

The Queen's Speech took place on 27 May 2015. Aside from the EU Referendum Bill and the proposed replacement of the Human Rights Act with a British Bill of Rights, employment related measures include:

### Trade Unions Bill

With the aim to protect public services from disruption and reform trade unions by:

- Setting a minimum threshold of a 50% turnout on union ballots with a simple majority in favour together with time limits on mandates following a ballot for action.
- In the health, education, fire and transport services, in addition to the 50% turnout requirement, 40% of those entitled to vote need to vote in favour of striking.
- Preventing intimidation of non-strikers.
- Introducing a transparent opt-in process for the political fund element on trade union subscriptions.

### Immigration Bill

With the aim of reducing demand for skilled migrant workers and cracking down on the exploitation of low-skilled workers by:

- Making illegal working a criminal offence, which will allow wages to be seized as crime proceeds.
- Setting up a new enforcement agency to take action against employers who exploit migrant labour.
- Making it illegal for agencies to only recruit from abroad without advertising in Britain.

### Enterprise Bill

Introducing measures to reduce regulation on small businesses to create more jobs and capping exit payments to public sector workers.

### Full Employment and Welfare Benefits Bill

The Government intends to create 3 million new apprenticeships over the next Parliament. Ministers will be under a statutory duty to report annually on their progress towards achieving full employment and meeting the new apprentices target.

### National Insurance Contributions Bill

Future increases to the personal income tax allowance will be linked to changes to the National Minimum Wage ensuring that those working 30 hours a week on the National Minimum Wage will not pay income tax. There will be no rises in income tax, VAT or National Insurance contributions for the next five years for individuals and employers.

### Childcare Bill

To increase the provision of free childcare for eligible working parents of three and four year olds to 30 hours a week for 38 weeks of the year.

### Extremism Bill

As part of a package of measures to defeat extremism, employers will be able to check whether an individual is an extremist and bar them from working with children.

## NEWS IN BRIEF

### Hold fire on calculating holiday pay

Recent commentary following a much publicised case on the issue of holiday pay concluded that holiday pay had to include commission payments and compulsory overtime. But before you address this, be aware that all cases pending on this topic are still being stayed as a result of a potential appeal by the employer in the case to take the matter further. The Employment Appeal Tribunal is not expected to hear the case until the end of this year. Employers are still left not really knowing what to do and their advisers not really being able to help until this thread of litigation has been resolved.

### Impact of Employment Tribunal fees

The introduction of Employment Tribunal fees on starting cases has, as predicted, led to a huge reduction in the number of claims being made. The total number of claims at the Employment Tribunals fell by almost 70% in the first quarter compared to previous years. In the run up to the election various parties said they might look at this with a view to reducing or doing away with the fees altogether. Post election the Government "is currently considering the options for a review of Employment Tribunal fees" but has given no time scale on this. UNISON's appeal against the High Court's dismissal of its judicial review challenge to the introduction of fees in the Employment Tribunals will be heard mid-June.

### Updated facts and figures card

Our updated Employment facts and figures cards have gone to print and are now available. We will be sending out copies to our regular clients. If you would like extra copies of it please let us know at the contact details at the end of the newsletter. Online copies will be available on our website for those that prefer.

# Shared parental leave and pay

Most employers although aware of shared parental leave and statutory shared parental pay have yet to get to grips with the detail. Many consider that they won't have to do so until they are notified about a pregnancy, but many have overlooked the fact that they now have maternity and paternity processes in their handbooks which are out of date and misleading.

Employees can start shared parental leave if they are eligible and they or their partner end their maternity or adoption leave or pay early. The remaining leave will be available as shared parental leave, whereas the remaining pay becomes shared parental pay.

Employees can take shared parental leave in up to three separate blocks. They can also share this leave with their partner if they are both eligible. Each parent can choose how much of the shared parental leave each of them will take. Both the leave and the pay must be taken between the baby's birth and first birthday (or within one year of adoption). To qualify for shared parental leave your employee must share responsibility for the child with either:

- Their husband, wife, civil partner or joint adopter.
- The child's other parent.
- Their partner (if they live with them).

Your employee or their partner must be eligible for maternity pay or leave, adoption pay or leave or maternity allowance. They must also:

- Have worked for you continuously for at least 26 weeks by the end of the 15th week before the due date (or the date they are matched with their adopted child).
- Still be employed by you whilst they take shared parental leave.
- Give you the correct notice including a declaration that their partner meets the employment and income requirements which allow your employee to get shared parental leave.

You should remember that a mother must take a minimum of 2 weeks maternity leave following the birth (4 if she works in a factory).

For shared parental leave to start the mother or adopter must do one of the following:

- End their maternity or adoption leave by returning to work.
- Give you "binding notice" (a decision that cannot normally be changed) of the date when they will end their maternity or adoption leave.
- End maternity pay or maternity allowance.

The mother must give you notice (at least 8 weeks) to end her maternity pay. The employee must give you written notice of their entitlement to shared parental leave including:

- Their partner's name.
- Maternity leave start and end dates.
- The total amount of shared parental leave and shared parental pay available and how much they and their partner intend to take.
- That they are sharing childcare responsibilities with their partner.

# Facial disfigurement
## - guidance launched for employers

Changing Faces, a national charity, has released guidance to assist employers in dealing with employees both current and prospective who suffer with the issue of facial disfigurement. The charity supports individuals who are living with scars, marks or conditions, which affect their appearance. Research published by them revealed that 43% of the individuals surveyed did not apply for a job because they believed their face would not fit. The full guidance is available on the website www.changingfaces.org.uk, but some of the key issues covered are as follows:

Employers could assist people who are scared to make the application because of scars or marks, by making it clear in their equality statement that they go above and beyond the protected characteristics specified in the discrimination legislation to ensure fair treatment of all candidates. Avoiding phrases such as "must be well presented" will also assist. Use of photo shop perfect images in promotional literature or on websites can dissuade prospective employees.

Although not illegal per se to ask for a photograph with a CV or application, employers should consider whether it is essential for selection purposes. Failing to recruit or shortlist someone who has supplied a photograph which shows any form of protected characteristic, could be legally an issue.

As an employer you should think about whether any disfigurement will directly impact on a candidate's ability to do the job in question.

As with disabilities, do not make assumptions about a candidate based on their appearance but look beyond that to their experience and character.

Changing Faces provides expert training to employers to ensure that their workplaces are fair and inclusive and to allow employers to become more aware of how their unconscious attitudes about appearance may affect their policies and practice.

# Fit for Work service

The Fit for Work service (FFW) will be introduced on a phased basis and was due to be completed by May 2015.

The FFW provides:

- Free health and work advice through its website and telephone advice line to help with absence prevention.
- Free referral for an occupational health assessment for employees who have reached, or whose GP expects them to reach, four weeks of sickness absence.

## Online and telephone advice

FFW can be contacted online through its website, or by telephone, as many times as required. It can give employers advice about work-related health matters (when an employee's health condition is affecting them at work) or when an employee is off sick from work. The advice can help identify adjustments that could help an employee remain in, or return to, work.

## Referral for an occupational health assessment

Employees will normally be referred to FFW by their GP, but employers can also make a referral. It is suggested that a referral to FFW is the "default" position. However, it is not mandatory since it is dependent both on the employee's consent and on the referring GP, or employer, considering that there is a reasonable likelihood of the employee making at least a phased return to work.

The trigger point for referral is four weeks' absence. This includes absence self-certified by the employee.

There is no limit on the number of eligible employees that can be referred to FFW by an employer, but an employee can only be referred for one assessment in any 12-month period.

## Assessment by FFW

FFW is delivered by registered occupational healthcare professionals who either:

- Have occupational health qualifications.
- Have occupational health experience.
- Are able to demonstrate experience and skills appropriate to working in an occupational health context.

They will be trained, "appropriately supervised" and under the overall direction of an accredited specialist in occupational medicine. They will also have access to professionals with appropriate competencies in musculoskeletal and mental health conditions.

## Return to work plan

The outcome of an assessment will be reflected in a Return to Work Plan that, with the employee's consent, will be provided to their GP and employer via email or, where appropriate, by post. The employee can ask for specific parts of their plan to be removed before it is shared with their GP or employer.

## Discharge from FFW

Employees will automatically be discharged from FFW:

- Two weeks after they have returned to work, including beginning a phased return.
- On the date when FFW decide that there is no further assistance they can offer the employee, which will be either when the employee has been with the service for three months, or at the point that FFW decides that the employee will be unable to return to work for three months or more.

## Tax exemption for recommended medical treatments

The Government has introduced a tax exemption of up to £500 (per tax year, per employee) on medical treatments recommended to help employees return to work. This will be applicable to treatments recommended by health professionals at FFW and health professionals within employer-arranged occupational health services. The exemption will not need to be claimed from HMRC but will be applied by the employer at the time they provide the benefit.

# Quick reference section

**Statutory minimum notice periods**
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years' service the notice period does not extend beyond 12 weeks.

**National Minimum Wage**
From October 2014

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| 16 – 17 | £3.79 |
| 18 – 20 | £5.13 |
| 21+ | £6.50 |
| Apprentices | £2.73 |

**Statutory Sick Pay**
From April 2015
£88.45 per week

**Shared Parental/Maternity/ Paternity/Adoption Pay**
Basic rate from April 2015
£139.58

**Statutory Holiday**
5.6 weeks for a full time employee.
This can include bank and public holidays.

**Redundancy Calculation**

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 weeks' pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped for dismissals after 6th April 2015 under the Statutory Scheme at £475.00.

# Time spent in union meetings can be working time under the WTR

The Employment Appeal Tribunal (EAT) has overturned a recent Employment Tribunal case that held time spent by a Health and Safety rep and a union rep attending union meetings between shifts could be working time within the meaning of the Working Time Regulations 1998. The Employer's unsuccessful argument was that the employees were not 'at the Employer's disposal' or carrying out their 'activities or duties' during the meetings. The EAT held that the Tribunal had applied too restrictive an approach to the meaning of those words and in the circumstances they could include an employee attending a union meeting at a time and place dictated by the employer. They deemed that the activities in a broad sense were at least partly for the employer's benefit.

This was the first EAT decision on whether time spent union meetings or health and safety meetings counted as working time. However the case is by no means authority that this will be the case. Commentators say that the decision related to health and safety reps and shop stewards and did not relate to individual union members or other employees attending such meetings. The meetings in question here were held at a time and place determined by the employer and therefore were directed by them. It also involved a case where an employer recognised a union. It is already well established by statute that employee reps are entitled to time off for carrying out their duties.

It is expected that unions may well renegotiate their terms and conditions with employees to widen or clarify the scope of union duties that constitute union time in a collective agreement in light of this case.

# Discrimination and the mind-set of the decision-maker

A recent Court of Appeal decision looked at discrimination when the decision-maker relied on others' information.

The case concerned the Chief Medical Officer at Canada Life, Dr Reynolds who was engaged under a consultancy agreement. The consultancy was terminated by the general manager following a presentation by two other managers highlighting issues with her performance. At the time of termination Dr Reynolds was 73 and she brought a claim for direct age discrimination.

The Employment Tribunal looked at the general manager's rationale for terminating the agreement and found that his decision was not driven by discrimination but by his genuine belief that Dr Reynold's was not up to the job. Dr Reynolds appealed to the Employment Appeal Tribunal on the basis that the Tribunal should have considered not only the general manager's motivation, but also that of the two managers who had informed his decision in the presentation. The EAT found in favour of Dr Reynolds and the employer appealed to the Court of Appeal which found in its favour.

The Court of Appeal's decision was that as the Tribunal had found that the general manager alone had made the decision to dismiss, it was only his motivation that was relevant. On the other hand, if the decision to terminate had been made jointly, the Tribunal would have had to consider the mind-sets of all of those involved, because if any of them had been driven by a discriminatory reason this would have been enough to taint the decision. However providing information or opinions to help others was a separate action to be considered in its own right.

Where an employee can show that their employer has done something which in the absence of an explanation could constitute discrimination, the claim will succeed unless the employer can provide an explanation unrelated to discrimination. However this did not mean that the employer had to show the absence of discrimination in every act that led up to the dismissal.

# Employment myths

### If an employee resigns within a certain period of receiving training, we can deduct training fees from their final salary payment

The starting point is that it is unlawful to make deductions unless authorised by statute, the employment contract or the employee has given prior written consent.

This means there must be a clause in the employment contract allowing repayment of fees in the event that the employee leaves within a certain period of the training. Such a clause will need to be carefully drafted, if it is too onerous, there is a risk that it will be deemed to be an unenforceable penalty clause. The safest option is to set out a sliding scale so that the proportion of the fees to be repaid is reduced depending on how long ago the training took place.

In the absence of an express clause, the employee will need to confirm agreement to the deduction in writing, which at that stage might be difficult to secure.

### Leavers are entitled to a reference

There is no general right to a reference, but once an employer has agreed to provide one it owes the employee a duty to take reasonable care to ensure the information is accurate, fair and true and not misleading.

The referee will also owe a duty to the new employer, who will be relying on its knowledge of the employee.

For these reasons, it is common for a reference to contain only a factual statement confirming that the individual was employed together with a disclaimer.

### An employee whose fixed term contract has come to an end cannot claim unfair dismissal

The ending of a fixed term contract will amount to a 'dismissal'. This means that if the employee has at least two years' service, she will have the right not to be unfairly dismissed and the employer will need to follow a fair procedure before the contract ends. Usually this means writing to the employee and identifying the reason that the contract is due to expire, a meeting and allowing them to appeal the decision.

Employees who have been continuously employed for four years on a series of fixed-term contracts are deemed to be permanent employees unless the continued use of a fixed-term contract can be justified.

## CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.


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