I
d it safe to come out yet?
Those of us who work in employment law have already
to take on board the following changes: as of this April
the doubling of the period during
which an employee needs to be
continuously employed in order to
bring an unfair dismissal claim;
the doubling of the amount of
costs an employment judge can
order without needing to refer the
case to the county court; and the
phasing out of lay panelists in all
cases save discrimination.

In June 2012, the Government
published its Employment and
Regulatory Reform Bill, which in
due course will mean ‘protected conversations’, under which
managers will be empowered to
force workers – ostensibly by
cost – out of their jobs, save
that employment judges will be
banned from asking what was said
by each side in the display
meetings (which will have taken
place directly between manager
and worker with no lawyer
present) by privilege rules akin to
the privilege a lawyer has with her
lay client.

From April 2013, employment
lawyers will contend with changes
to public funding, with legal help
being removed from all categories
of claim save discrimination cases.
The Government has also
announced that from next
summer, there will be for the first
time fees for issuing Tribunal
claims. The fees, at up to £1,500,
are far higher than the equivalent
fees in the county court. To crown
the injustice, the fees are to be paid
by workers only, with employers
paying nothing.

Any readers pausing at this
point to draw breath may realise
that they have only reached the
starting point of the Government’s
plans. For in the middle of
September 2012, the Government
introduced a further three
consultations, covering matters as
diverse as workers’ rights on
transfers of employment (which
the Government belatedly admits
it cannot diminish, as the source of
the law is European rather than
domestic), Tribunal procedure,
settlement and compensation.

The most significant change to
the procedural rules is a new
power that a Judge can strike out a
claim at any stage in the process.
Gone will be the old fashioned
Case Management Discussions,
slow, civilised hearings at which
the Judge grapples with what the
case is about and lists it
accordingly. In place of them,
every hearing will be what we now
call Pre-Hearing Reviews, i.e.
hearings, with or without
evidence, where the employer
jockeys, rarely with success where
the worker is represented, to have
the entire claim dismissed with no
further hearings.

This ‘reform’ is a Government
concession to the employer’s lobby,
with its bogus argument that the
majority of Tribunal claims are
vexatious. In fact 60 per cent
succeed, and only 0.5 per cent are so
unreasonable as to attract costs.
The Government proposes to
encourage settlement by
introducing a new rule that cases
may not be brought until the
worker has submitted the claim first
to the conciliation service Acas and
received back from Acas a
certificate that the claim has been
lodged with them for a period of
time without being settled. It is
envisioned that a certain amount of
information will be needed to be
given to Acas. What that
information will be, the
Government has not decided. Acas
will be able to refuse to accept some
claims. However there has been no
real thinking about what would
happen to time limits, e.g. if the
refusal had been misguided.

As an inevitable by-product, this
will mean that the limitation periods
for introducing tribunal claims
which are presently relatively simple
– three months but the time can be
extended, in certain exceptional
circumstances – will become very
complex indeed. It will be rich
pickings for respondent lawyers,
who will raise time defences in very
many cases, but of no benefit to
claimants or even to Judges who face
lengthy, complex hearings on issues
far from the real subject of the case.

Changes to the maximum
compensatory award that can be
made for unfair dismissal, will
reduce the top award from its
present £72,000 to a future
£26,000. Only a minority of
dismissal claimants are in fact
awarded more than £26,000. This
is in part because the highest value
claims with the most extraordinary
facts inevitably settle. The workers
in this category will have the same
complaints and the cases will have
the same outcome. Employers will
be desperate to keep their bad facts
away from the Tribunal. The chief
difference is that managers who
behave badly will be able to get rid
of these cases by throwing less
money at them.

Paul Heron

Workers will find it harder to win unfair dismissal claims.