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Employment Law BULLETIN

On 23 November 2011 Dr Vince Cable, the Business Secretary gave a speech at the EEF. He said:"...today I want to set out our plans to radically reform employment relations- we want to safeguard workers' rights while deregulating to reduce the onerous and unnecessary demands on business". In the first part of this bulletin we review the Government's proposals to reform employment law. As will be seen many are controversial and there will be vigorous and heated debate.

We include our usual case law round up. And, finally, we would like to remind you about our free breakfast seminar on 7 February 2012 on the subject of "Dismissing fairly for conduct and performance".

Click here for details - we hope to see you there.

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1: The Coalition Government's employment law review

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On 23 November 2011 Dr Vince Cable gave a speech at the EEF on the topic of de- regulation of employment law.

The promised review covers the following areas:

Employment tribunal claims

- All claims will go to ACAS and pre-claim conciliation will be offered before the matter proceeds to an employment tribunal
- The unfair dismissal qualifying period will rise from 1 to 2 years from April 2012
- A consultation will be published in 2012 on "protected conversations" which would allow employers to discuss issues like retirement or poor performance in an open manner with staff without this being used against the employer in any subsequent tribunal claim
- There will be consultation on simplifying the use of compromise agreements
- The Government will explore options for a "rapid resolution" scheme, ie an alternative system of determining cases to provide quicker cheaper decisions in low value, more straightforward claims
- The employment tribunal system will be streamlined. This might involve removing witness expenses, taking witness statements as read, and requiring only one judge in unfair dismissal cases. A fundamental review of the rules of procedure governing employment tribunals will be undertaken by the retiring presiding judge of the employment appeal tribunal, Mr Justice Underhill.
- Mediation will be encouraged between parties by introducing a regional pilot scheme for SMEs

Employment law "red tape"

Dr Cable announced that more than 70 employment related regulations are to be merged, simplified or scrapped. Very probably, some of these will either be duplications or archaic but some of the more significant proposals are as follows:

- Closing a whistle-blowing case law loophole which allows employees to blow the whistle about their own personal work contract
- The merging of 17 national minimum wages regulations which will simplify the current regime, making it easier for employers to navigate the law.
- Consultation in Spring 2012 to streamline the current regulatory regime for the recruitment sector
- Create a universally portable criminal records bureau check that can be viewed by employers instantly, online, from early 2013.

Calls for evidence

- There is a call for evidence on proposals to simplify the TUPE regulations, which the Government claims businesses say are too complex and bureaucratic
- There is also a call for evidence on the Collective Redundancy consultation rules, looking at the impact of reducing the 90 day consultation period possibly to 60, 45 or even 30 days. The Government claims the current 90 day period is too restrictive for businesses
- Views are being sought on the proposal to introduce compensated no fault dismissals for micro-firms with fewer than 10 employees (in plain speaking terms, to remove employees in small businesses from unfair dismissal protection)
- Looking at ways to slim down existing dismissal procedures, how they might be simplified including working with the Advisory Conciliation and Arbitration Service (ACAS) to make changes to their code or supplementary guidance for small businesses

Some say these changes are unnecessary and there is no evidence that employment law stops employers recruiting. But whilst the Government says that it wishes to consult on certain issues before legislating, some change, it seems, is bound to occur.

2: Marital discrimination

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In Dunn v Institute of Cemetery and Crematorium Management the EAT (HHJ McMullen) decided an interesting point on marital discrimination. This was: Does an employer act unlawfully if he treats an employee less favourably, not because she is married, but because she is married to a particular man?

Mrs Dunn was employed as a technical services manager. Following a dispute over her employment terms she resigned and claimed constructive unfair dismissal. But she also claimed breach of the Sex Discrimination Act 1975, because she contended she was less favourably treated because she was married to Mr Dunn, with whom the employer was also in dispute. She was treated as an adjunct of him.

According to the EAT, reviewing the authorities, including Chief Constable of the Bedfordshire Constabulary v Graham [2002] IRLR239, section 3 of the Sex Discrimination Act 1975 (see now Equality Act 2010, s.8) could be construed as protecting the claimant by reason of her status not only of being married, but also being married to her husband. Furthermore, although the 1976 Equal Treatment Directive was not of assistance in this interpretation, the claimant's rights under ARTS 8, 12 and 14 of the ECHR were engaged and section 3 of the SDA should be construed accordingly.

3: Entitlement to annual leave

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Entitlement to annual leave can be satisfied by time off when the employee is not required to work.

In Russell and others v Transocean International Resources Limited and others the Supreme Court confirmed that onshore field breaks could constitute annual leave for the purposes of the Working Time Directive and the Working Time Regulations.

The case involved oil and gas industry workers who had a shift pattern of 2 weeks working offshore followed by 2 weeks onshore. The question was whether periods onshore had to be counted to the workers' entitlement to annual leave under regulation 13 of the WTR at the employers' request. The Supreme Court held the employer was entitled to request that annual leave be spent during the periods onshore. Such workers did not have a right to take their annual leave as time off from their offshore work. It is not necessary, said the Supreme Court, that holidays must also be taken from time that would otherwise be work. There is no qualitative requirement to test whether a given period can be counted as rest. A rest period is simply any period that is not working time. Any period when the workers were onshore would fall into that category. The employer was entitled to insist that annual leave was taken when the periods were onshore.

By analogy, a school can require a teacher to take holiday during school holidays and not term time.

4: Equal pay using incremental pay scales and the "material factor" defence.

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In Secretary of State for Justice (sued as National Offenders Management Service) v Bowling the question was whether putting a male recruit on a higher point on an incremental pay scale than a female colleague could be a genuine material factor explaining the ongoing pay differential between the two.

In this case Ms Bowling started working for the Prison Service in IT services in 2008 at spinal point 1 (the lowest point on an incremental scale) at an annual salary of £14,762. Shortly afterwards a Mr Thomas was recruited to the same role. But he was placed at point 3 of the scale, at an annual salary of £15,567. The employers' policy allowed it to appoint a new recruit at a point above point 1 where it was experiencing recruitment difficulties. The policy further provided that lower paid colleagues' pay need not be raised: "where a new entrant clearly possesses a stronger background/experience in the relevant line of work". As Mr Thomas had 10 years experience in IT support, analysis, testing and implementing change in customer service, Ms Bowling's pay was not increased on his appointment. Both colleagues then moved up the spine but the gap between them of 2 points still remained. In August 2010 Ms Bowling brought an equal pay claim. An employment tribunal considered that given
the length of time between appointment and the claim, the original reason for the differential in pay had "evaporated". The EAT reversed the employment tribunal.

The point at which employees start on incremental pay scale will, by the nature of such a scale, impact on their pay in the future. If the original pay differential had nothing to do with sex nor did the differential in subsequent years. The cause of the pay differential remained the same in 2010 as it was in 2008 and the mere passage of time did not cause the genuine material factor defence to "evaporate".

5: Discrimination claims

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The National Minimum Wage (NMW) Regulations 1999 give employees and workers the right to a specified minimum hourly rate of pay. The employer is obliged to pay NMW and there are no exclusions as such for small employers.

In Julio & Ors v Jose & Ors UKEAT/0070/11 the EAT looked at whether a live-in housekeeper was eligible for NMW or whether such an employee falls within the exemptions given in the Regulations. Employees who live in their employer's family home, are treated as a member of the family and are not charged for food or accommodation are not entitled to the NMW. For this exemption to apply, the worker must be treated as part of the family in respect of the provision of accommodation and meals and the sharing of tasks and leisure activities

The EAT decided that no one factor decided the case but that all the circumstances of the employment and the overall relationship between employer and employee should be taken into consideration. The sharing of tasks was found to relate to tasks performed by the family as a family unit, such as caring for young children, cooking and cleaning, and was a measure of the employee's integration into the family unit. What the employee was required to do under his or her contract of employment was not relevant.

Unsurprisingly the Court considered that mistreating or exploiting a live-in employee (although not the issues in this case) would not amount to treating them like a family member and therefore an employer would lose the benefit of the exemptions under the NMW regulations.

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