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1: Adrian Beecroft's report on employment law

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We will not occupy bulletin space by describing the now published Beecroft report's proposals in full. In brief, this report, partially leaked in October 2011, was published in May 2012" to dispel some of the myths that have become associated with the report". Its suggestions include: scrapping unfair dismissal laws outright; streamlining dismissal procedures; changing the burden of proof in dismissal claims; and providing for compensated no-fault dismissals. In addition, the report proposes opt-outs for employers with fewer than 10 employees from a wide range of current employment protection legislation. It proposes abolition of the third party harassment rules (under which an employer can be liable for harassment of an employee by a third party); a review of the default retirement age; and a cap on loss of earnings compensation in discrimination cases equivalent to the unfair dismissal cap. It also proposes removing the employer's responsibility for checking a worker's immigration status. And finally, it proposes reform of the TUPE Regulations by allowing harmonisation of employment terms after 1 year following the transfer and replacing the "service provision change" rules with "something different" (unspecified). The report may be found at http://www.bis.gov.uk /news/topstories/2012/May/ministerial-statement-on-beecroft-employment-law-report

Immediately the Government's response was that a number of measures were already promised/subject to consultation but there is a stated reluctance to limit discrimination compensation (for this would be contrary to EU law) and no exemption for micro-businesses has currently the unqualified support of Government.

The most controversial part of Beecroft, the proposal for compensated no-fault dismissal now seems likely not to be implemented. At the outset, business minister Vince Cable called it the "wrong approach" which would "scare the wits out of people". Outspoken Lib Dem peer Lord Oakeshott described the proposal as "harmful" and the "economics of the madhouse". Employers' organisations the CIPD and EEF are also against such a proposal, the former saying that the "proposals will not create jobs" and the latter stating the proposal is "objectionable and unnecessary". The story perhaps ends with Vince Cable's comment in Parliament on 11 June that:

"I have made it absolutely clear that I have no truck with the idea of a free-for-all hire-and-fire culture and responsible British businesses do not want to go their either".

Quite where that leaves the idea of exempting small organisations from unfair dismissal law is unclear. Part of the heat may be taken out of the argument by Vince Cable's proposal for a new kind of "settlement" agreement which can be put forward by an employer to an employee without the fear of it being raised in a future employment tribunal if the employee refuses to go along with it.

2: The Enterprise and Regulatory Reform Bill 2012

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The main vehicle for employment law reform will be the Enterprise and Regulatory Reform Bill. It was announced in the Queen's Speech on 9 May 2012 and introduced on 23 May 2012.

The Bill concerns early conciliation of employment claims; the creation of new legal officers for employment tribunal hearings; a change in the composition of Employment Appeal Tribunal panels; a limit on the compensatory award for unfair dismissal claims; financial penalties for losing respondents in employment claims; whistle blowing; the indexation of a week's pay; and the renaming of compromise agreements.

Also addressed is the scope of the Equality and Human Rights Commission's duties and powers.

We deal with these in a little more detail below

Early conciliation of employment claims

Clauses 7-9 of the bill would require employees to lodge employment claims initially with ACAS before presenting an employment tribunal application. A " 4 step procedure" is envisaged

- **Step 1** would require sending ACAS a claim in the form of prescribed information in the prescribed manner
- **Step 2** ACAS must then send a copy of the information to a conciliation officer
- **Step 3** The conciliation officer must try to promote a settlement within a prescribed period
- **Step 4** If a settlement is not reached or the prescribed period expires the conciliation officer has to issue a certificate to this effect (without which the claimant may not submit a claim).

The detail will be supplied in regulations and there will be appropriate adjustments to the limitation periods for bringing claims.

Legal officers

Clause 10 of the Bill would allow someone who is appointed as a legal officer to determine proceedings with the parties' consent.

Employment Appeal Tribunal

Judges in the Employment Appeal Tribunal will be able to hear cases sitting alone, copying the new practice in employment tribunals.

Unfair dismissal compensatory award

Clause 12 proposes a change in the cap on compensatory award for unfair dismissal (which currently stands at £72,300). The proposal for a new cap is either between 1 and 3 times median annual earnings (currently £26,200) and 52 weeks pay, or the lower of the above two amounts.

Financial penalties on employers

Clause 13 of the Bill would provide for financial penalties to be paid by a losing employer

to the Exchequer if the breach of the employment right in question has "one or more aggravating features". It is not clear from the Bill what an aggravating feature is.

The penalty would be 50% of any financial award made by an employment tribunal against the losing employer subject to a minimum of £100 and a maximum of £5,000. If the employer were to pay 50% of the penalty within 21 days the liability would be discharged.

Whistle blowing

An employee gains special protection from dismissal or detriment when making a qualifying disclosure under the Employment Rights Act 1996. "Qualifying disclosure" can include breach of any legal obligation. So this means, as currently interpreted, an employee could blow the whistle about breaches of their own employment contract. The Government thinks this is a loophole and now proposes that a qualifying disclosure must be made in the public interest as well as being in the reasonable belief that the worker making the disclose it would cut out claims base on disclosure about breach of a personal employment contract.

Indexation of awards and payments

The amount of a week's pay for employment protection purposes is currently increased in line with the RPI rate of inflation and currently rounded up in this process to the nearest £10. The Government proposes to change this by providing that the rounding up is, instead, to the nearest £1.

Compromise agreements

It is regarded that the current format of compromise agreements is unduly bureaucratic. All the Bill, as introduced, provides for however, is a renaming of compromise agreements as settlement agreements. However, subsequently, Vince Cable has announced his intention to amend the Bill to allow for a new kind of settlement agreement to be arrived at between employer and employee which would have a simplified format. Furthermore, the fact that the employer puts forward such a settlement proposal to an employee would not be admissible in future employment tribunal proceedings if the deal were not accepted. As mentioned above, it is likely that this proposal will take much of the heat out of the debate on compensated no-fault dismissals.

Equality and Human Rights Commission

The Bill amends generally the duties and powers of the EHRC in line with the Government's response to the consultation on the reform of the EHRC.

3: Dismissal by school for "some other substantial reason" was unfair, even though the employer had lost trust and confidence in the employee

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In *Governing Body of Tubbenden Primary School v Sylvester* Ms Sylvester was a deputy headmaster at Tubbenden Primary School. She was a friend with another teacher at the school, Mr Quinney. The latter was arrested and suspended for possessing indecent

images of children (not from the school). The Headteacher asked Ms Sylvester not to get in touch with Mr Quinney. She ignored this advice and continued her friendship. The local education authority considered that no action should be taken against her over that friendship.

But then there were complaints from parents. The Headteacher again spoke to Ms Sylvester. The outcome was dismissal on the basis that her continuing friendship with Mr Quinney affected the School's reputation and her actions had lead to a break down in trust and confidence between her and the Headteacher. However the dismissal, for "some other substantial reason" was unfair. There was insufficient evidence of a breakdown in trust and confidence, not least because the local authority had tacitly approved the continuation of her friendship.

4: Claimant given leave to ask High Court to consider whether the European Convention on Human Rights extends liability for public sector employees beyond the statutory unfair dismissal scheme

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In *(R) Bakhsh v Northumberland and Tyne and Wear NHS Foundation Trust* the High Court has granted permission for a claimant to apply for judicial review of the Trust's refusal to comply with an employment tribunal order requiring his re-engagement. An employment tribunal may order reinstatement or re-engagement. But if the employer refuses, the default penalty is an additional award of compensation.

However as the claimant's case was based trade union activities he argues reliance on Article 6 of the European Convention on Human Rights, requiring the Trust as a public body, to act compatibly with the ECHR, in particular Art 11 (freedom of association and assembly). The arguments at the hearing will be fascinating, and, if developed, would break new ground.

5: Can the assignment of a lease of commercial premises amount to a TUPE transfer?

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Not unless it can be shown that there was concomitantly a transfer of an economic entity retaining its identity, says the EAT in *LOM Management Ltd v Sweeney*.

A tenant ran MacConnell's Bar in Glasgow under a commercial lease from a brewery. The lease was then assigned to a new tenant. The claimant was on holiday at the time of the assignment. On her return she discovered from the new tenant that she no longer had a job at the pub. The question was whether there had been a TUPE transfer automatically transferring her employment from the outgoing tenant to the incoming tenant. An employment tribunal found there was a TUPE transfer. In its opinion "this was a classic transfer of undertakings situation". It therefore found that the claimant had been automatically unfairly dismissed by the new tenant.

The EAT reversed this decision. Whist it is trite law that TUPE can apply where there has been an assignment of a lease of commercial property (see, for example *Landsorganisationen i Danmark v Ny Molle Kro* [1989] ICR 330), it must also be shown

that there was a transfer of a business which was intrinsically liked to the property and satisfied the definition of an economic entity. In other words, it had to be shown there was an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective. In short, the assignment of a commercial lease does not of itself establish that TUPE applies.

The employment tribunal had failed to ask the relevant questions about whether there had been an economic entity retaining its identity and whether, if so, it had transferred to the new tenant, and its decision could not stand.

6: In the absence of a relevant TUPE transfer, can an individual's employment transfer from one employer to another without the employee's consent?

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No, says the EAT in *Gabriel v Peninsula Business Services*.

The Claimant was employed by Peninsula as a marketing consultant. Peninsula purchased the shares of a company later known as Taxwise Services Ltd. The Claimant was moved to Peninsula's "Taxwise Department" and on to the Taxwise payroll, but ostensibly remained employed by Peninsula.

An email was then sent, stating that the trade and assets of Peninsula's Taxwise business were to be transferred to Taxwise Services Ltd, along with the employee's employment contract. The Claimant did not receive the email and was otherwise unaware of the purported change of employer. The Claimant then brought sex and race discrimination claims against both companies. For the purposes of compliance with the now repealed statutory grievance procedure and limitation issues (the details of which need not concern us here) the identity of the true employer was important. In essence, for her claim to succeed against Peninsula, as well as Taxwise, she had to show she remained employed by Peninsula over the relevant period.

The EAT (overruling the employment tribunal) applied the House of Lords authority of *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 to the effect that, at common law, the employment of an employee cannot be transferred from one employer to another without the consent of the employee. Peninsula therefore remained her "general employer", and the claim against Peninsula could therefore proceed.

It is important to note that TUPE was not pleaded by the employer. If TUPE had applied, the statutory doctrine of automatic transfer of employment would of course have been engaged, subject only to the employee's right to object to the same under Reg 4 (7) of TUPE.

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