TRADE UNION & EMPLOYMENT RIGHTS

THE GOVERNMENT'S EMPLOYMENT LAW REVIEW 2010/15

When elected in 2010 the Government announced a parliament long review of employment rights, initially conducted by the disgraced Thatcher era peer, Lord Young, who pronounced both on unfair dismissal and health and safety at work.

Thus far the review has mainly concentrated on (i) weakening individual workers' rights at work and (ii) de-regulating health and safety at work under the guise of the Löfstedt Report http://www.dwp.gov.uk/docs/lofstedt-report.pdf

The overarching principle behind the employment rights review is to change the law and associated procedures so that employers may move to dismissal more quickly and that there will be less or no legal redress available to the worker.

In the Mediterranean countries that have been subject to an IMF/ECB/EU "bail out", Greece, Spain and Portugal, employment law has been changed in the same way as an integral part of the imposed package of structural adjustment. The UK seems to be the only country that is making these changes voluntarily. The employment law response to the crisis across Europe can be viewed at: www.lcdtu.org/wp-content/uploads/2012/06/The-crisis-and-national-labour-law-reforms-Country-by-country13.pdf

Key milestones in this review have been:

- reform of the Employment Tribunal system contained within the Government's flagship consultation paper *Resolving Workplace Disputes* www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-511-resolving-workplace-disputes-consultation in the Spring of 2011; at the same time the Government published the *Employers' Charter* reminding employers how the law supported them in dismissal and disciplinary matters, the *Charter* was updated in March 2012 to include sickness absence and recruitment issues www.bis.gov.uk/assets/biscore/employment-matters/docs/e/employerscharter.pdf

- the leaking into the public domain in May 2012 of the so-called Beecroft Report; an advisor to PM David Cameron, Adrian Beecroft, the venture capitalist behind payday loan company Wonga, scripted a report on de-regulating employment rights, made infamous by his promotion of "compensated no fault dismissal" http://bis.gov.uk/assets/biscore/employment-matters/docs/r/12-825-report-on-employment-law-beecroft.pdf

- the publication Enterprise & Regulatory Reform Bill also in May 2012, Part 2 of which will seek to legislate on some of the issues that BIS Secretary Vince Cable has been trailing, particularly at a speech he gave at the Engineering Employers' Federation in the Autumn of 2011 www.publications.parliament.uk/pa/bills/cbill/2012-2013/0007/cbill_2012-20130007_en_1.htm

Other than these key milestones, the Government also:

- announced a moratorium on all new domestic regulation for micro businesses (employing less than ten staff) and start-ups for a period of three years that began on 1 April 2011, as part of the Government's Plan for Growth, which also applies to employment law

- repealed the planned extension of the right to request flexible working to parents of 17 year olds

- decided not to bring forward the dual discrimination provision in the Equality Act

- decided not to extend the right to request time to train to companies with fewer than 250 staff.

- announced the abolition of the Agricultural Wages Board and agricultural minimum wage, the 15 Agricultural Wages Committees, and the 16 Agricultural Dwelling House Advisory Committees

- reviewed the compliance and enforcement arrangements for those employment rights enforced by Government.

RESOLVING WORKPLACE DISPUTES

The headline points arising from the *Resolving Workplace Disputes* consultation were:

- **raising the qualifying period to 2 years for unfair dismissal** *[operational from 6 April 2012]*

- **the introduction of fees for (i) lodging a claim and (ii) proceeding to trial** *[public consultation, joint with Ministry of Justice, closed on 6 March 2012]*

- **review of ET procedural rules** *[Mr Justice Underhill is conducting the review; allowing employment judges to sit alone on unfair dismissal cases was made operational from 6 April 2012]*

In late 2011 the Government published a further consultation document *Flexible, Effective, Fair: promoting economic growth through a strong and efficient labour market*
www.bis.gov.uk/assets/biscore/employment-matters/docs/f/11-1308-flexible-effective-fair-labour-market

Vince Cable's big launch, in response to the consultation, was in November 2011 when in a speech at the Engineering Employers' Federation he announced:

i. consultation on introducing fees for anyone wishing to take a claim to an employment tribunal

ii. an increase in the qualification period for unfair dismissal from one to two years

iii. a review existing rules of procedure governing Employment Tribunals - Mr Justice Underhill to conduct
www.bis.gov.uk/assets/biscore/employment-matters/docs/f/11-1379-fundemental-review-employment-tribunal-rules-terms.pdf

iv. a call for evidence on reducing the statutory period for collective redundancy consultations from 90 days to 30 days; a formal consultation opened on 21 June
www.bis.gov.uk/Consultations/collective-redundancies-consultation-on-changes-to-the-rules?cat=open

v. a call for evidence for proposals to simplify TUPE - Transfer of Undertakings (Protection of Employment) Regulations
www.bis.gov.uk/Consultations/call-for-evidence-effectiveness-of-current-tupe-regulations?cat=closedawaitingresponse

vi. a call for evidence on "compensated no fault dismissal" for firms with less than ten employees; this call for evidence also includes review of ACAS Code of Practice No 1 "Disciplinary and Grievance Procedures"
www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-626-dismissal-for-micro-businesses-call

vii. consult on slimming down and simplifying existing dismissal processes *[see vi, above]*

viii. consult on 'protected conversations', which allows employers to discuss issues like retirement or poor performance with staff - without this being used in any subsequent Tribunal claims

ix. requiring all employment disputes to go to the Advisory, Conciliation and Arbitration Service (ACAS) to be offered pre-claim conciliation before going to a Tribunal

x. consult on simplifying compromise agreements, which will be renamed 'settlement agreements'

xi. consider how and whether to develop a 'rapid resolution' scheme which will offer a quicker and cheaper alternative to determination at an Employment Tribunal *[the Government has announced that Manchester and Cambridge are to be the pilot areas for a scheme of mediation to be offered as an alternative to ETs, however no firm date from BIS, later in 2012; also scheme to develop best practice in retail sector]*

xii. close a whistle blowing case law loophole which allows employees to blow the whistle about their own personal work contract

xiii. merge 17 National Minimum Wage regulations into one set which will simplify the current regime

xiv. consult in Spring 2012 to streamline the current regulatory regime for the recruitment sector

xv. modifying the formulae for up-rating employment tribunal awards and statutory redundancy payments to round to the nearest pound.

Points iv, v and vi above are issues which Cable announced and on which there has been a public call for evidence/consultation; these issues have not appeared in the Enterprise and Regulatory Reform Bill but are all contained in the Beecroft Report.

THE BEECROFT REPORT

When one of Vince Cable's team called Beecroft's proposal to introduce universal compensated no fault dismissal "bonkers" that may have killed of that particular proposal but many other of Beecroft's ideas are currently being worked up by Cable's team at BIS. For example, BIS has consulted on compensated no fault dismissal for the micro business sector.

Some of the key points of the Beecroft Report (in Beecroft's words) are set out below.

Unfair dismissal

- compensated no fault dismissal should be introduced; this would require changes to primary legislation

- BIS should proceed with its proposals to extend the qualifying period for unfair dismissal from one to two years.

Exemptions for Small Businesses

Small businesses (less than 10 employees) should be given the option to opt of current and potential Regulations covering:

- unfair dismissal
- pension auto-enrolment
- right to request flexible working (other than for parents and carers, which is required by European Directive)
- flexible parental leave
- licensing for employers of children
- gangmaster licensing
- equal pay audits

Businesses would be obliged to make it clear to potential employees which Regulations they had opted out of.

Discrimination law

The third party harassment provisions of the Equality Act, 2010 should be rescinded.

The Home Office has in fact started a public consultation on the Government's proposal to repeal the provisions in the Equality Act 2010 which make employers liable for harassment of their employees by third parties over whom they do not have direct control, such as customers or clients.

The Government believes that the legal provisions governing third party harassment were introduced by the previous Government without any real or perceived need. As far as we are aware, an employment tribunal has ruled on only one case involving the third party harassment provisions since they were introduced in 2008 and that, in any case, alternative legal routes exist that employees can pursue if they consider that they have been subject to repeated harassment by a third party.
www.homeoffice.gov.uk/publications/about-us/consultations/third-party-harassment/

At the same time the Home Office has initiated another public consultation on two further aspects of the Equalities Act, 2010, on:

- *Employment Tribunals' power to make wider recommendations in discrimination cases*
- *the procedure for obtaining information.*

The Home Office says: "based on concerns raised by businesses and other organisations, the view of this consultation is that the power of Employment Tribunals to make wider recommendations is unlikely to serve a practical purpose or to be an appropriate or effective legal remedy for Employment Tribunals. The obtaining information procedure was intended to increase pre-hearing settlements and reduce tribunal loads, but it has not had this effect. There is evidence to suggest that this too has created new burdens and risks for employers."
https://www.homeofficesurveys.homeoffice.gov.uk/v.asp?i=51131twcph

Employment Tribunal

The steps announced by the Government for reducing the number of cases that result in an ET should be implemented as soon as possible, with the exception of the proposals to fine employers who are found not to have followed unfair dismissal rules.

The thirty point ACAS guidelines for the unfair dismissal process should be reviewed.

Charging a fee for employees who apply for an ET should be introduced as soon as possible.

Pensions

Micro businesses with less than five employees should be excluded from the auto-enrolment scheme. This would require an amendment to the Pensions Bill, which is currently going through Parliament. Businesses with between five and ten employees should be given the right to opt out of auto-enrolment.

TUPE

UK law should be changed to incorporate the concept inherent in the EU Directive that harmonisation of the terms and conditions of transferred and original employees of the transferee company can be enforced after one year.

UK law should be changed such that a transferring employer can make redundant employees who if it transferred would immediately be made redundant for valid ETO reasons by the transferee employer.

The EU should be lobbied to change the Directive to state that TUPE does not apply to the employees of a business that is in administration.

The service provider provisions of UK law should be repealed and replaced by a better way of identifying whether or not a transfer is subject to TUPE.

Collective redundancies

The consultation period for collective redundancies should be 30 days (or five days in the case of insolvency) regardless of the number of employees to be made redundant.

Equal pay audits

Equal pay audits should not be required if an employer loses an equal pay case at an Employment Tribunal.

Gangmasters Licensing Authority

Abolishing the GLA should be seriously considered. This would require repeal of the current Gangmasters Licensing Act and accompanying Regulations.

Employment Agency Regulations and Employment Agency Standards Inspectorate

A new non-statutory Code of Practice should be introduced, and a much simplified Regulation enacted to replace the current thirty-three Regulations and six Schedules. The EASI should be closed when the non-statutory Code of Practice has been introduced.

In addition to Beecroft there is any number of right wing pressure groups and think tanks only too willing to offer policy advice to the Government on employment and trade union rights.

Tax Payers' Alliance
www.taxpayersalliance.com/unionfunding.pdf

Policy Exchange
www.policyexchange.org.uk/publications/publication.cgi?id=203

Institute of Directors
www.iod.com/mainwebsite/resources/document/policy_paper_growthplanreview2_290911.pdf

Free Enterprise Group
http://www.freeenterprise.org.uk/sites/freeenterprise.drupalgardens.com/files/Learning%20lessons%20from%20Germany.pdf

Trade Union Reform Campaign
http://turc.org.uk

ENTERPRISE & REGULATORY REFORM BILL

This Bill published on 23 May contains many of the issues trailed by Vince Cable in his EEF speech in the Autumn of 2011 and covers 7 employment rights issues:

- Dispute resolution
- Employment Appeal Tribunal
- Unfair Dismissal Compensatory Award
- Financial penalties for employers
- Whistleblowing
- Compromise Agreements
- Statutory Redundancy Pay increases/decreases

Dispute Resolution – the Bill introduces mandatory conciliation by ACAS before a claim can proceed to the Employment Tribunal, an ACAS officer will "endeavour to promote a settlement between the parties". While the case is being conciliated the time periods for lodging the claim with the Tribunal will be extended but it's not yet clear if it will be for the full amount of time that the conciliation attempt takes.

Failure to reach a settlement via conciliation will lead to an ACAS certificate being issued to this effect, Tribunal proceedings will then be able to commence.

It is anticipated that there will be some occasions when a worker can go directly to the Tribunal, for example, the Bill indicates that this will be case if there is more than one applicant on the same matter. Other such instances may be brought forward in Regulations.

Other than extending the time before resolution in a contested and irreconcilable case, there is every likelihood of subsidiary court action on procedural grounds, claiming irregularities in the conciliation process, the granting of a certificate and so on.

Employment Appeal Tribunal – the move to allow employment judges to sit alone at the ET on unfair dismissal cases has been extended to the EAT and extended to all appeals, not limited to those on unfair dismissal.

This is a further rolling back of the principle of the tribunal system, which is a strict legal interpretation of the law would be tempered by the employee and employer "wingers" who would bring practical experience of industrial relations to the court.

Unfair Dismissal - Even before the Coalition's proposed changes the average award at Tribunal for unfair dismissal was between four and five thousand pounds even though the theoretical maximum award a Tribunal can make is £72,300.

Under the Bill's proposals, depending on business type, the Secretary of State could introduce Regulations that would set a cap on the compensatory award of between one and three times median annual earnings, which the Department for Business, Innovation and Skills considers to be £26,000 – so at most £78,000. We could confidently assume that the Secretary of State would choose the lower, one year median salary as the cap. The cap would apply even if you earned more, so someone on £52,000 could receive no more than £26,000 (if that was where the cap was set) in compensation – six months' pay.

For low paid workers it's worse, if you only earn £13,000, you would not get more than £13,000.

All this ignores any pension loss.

Financial penalties – the Tribunal is to be given to power to levy a "fine" against employers that seriously breach workers' rights, such a penalty would usually be half the amount of any compensation awarded subject to a minimum of £100 and a maximum of £5,000

In case of more involving more than one applicant the employer will not have to pay the "fine" for each of the workers involved and if the employer pays within 3 weeks there's a 50% discount available for the employer.

But perhaps most importantly, there is no method introduced to oblige the employer to pay the worker any compensation awarded by the Tribunal, which is not uncommon. An employer could pay the penalty (to the Government) but still leave the worker with any compensation unpaid and having to contemplate further court action to recover the cash.

Whistleblowing – the Bill restricts the definition of "qualifying disclosure" in whistleblowing legislation to "in the public interest", which has not been defined. This removes any protection from retaliation when an employee complains that their own contact of employment has been breached by the employer.

Compromise Agreements – for an inexplicable reason compromise agreements are to be renamed “settlement agreements”.

Statutory Redundancy Pay increases/decreases – changes to the rules defining statutory limit for weekly wages used to calculate SRP; specifically limits will be rounded to the nearest £ and SRP changes will take effect on 6 April each year.

WESTMINSTER HALL DEBATE – 29 FEBRUARY 2012

TRADE UNION FUNDING – FACILITY TIME

The debate was tabled by TURC Parliamentary Council member Fiona Bruce MP. The debate mainly focused on trade union facility time in local government; some of the Tory MPs also raised questions about the Union Learning Fund. So in this they were not saying anything they'd not said before. The Tory MP for Harlow did acknowledge that the manager at his local Arriva bus garage did support facility time!

Nick Hurd, Cabinet Office Minister, replied on behalf of the Government:

- Government not proposing any change to the statutory right to paid time off
- stressed the difference between trade union duties and trade union activities
- what is reasonable (paid time off) today may not be reasonable tomorrow
- acknowledged that facility time may minimise loss of working time arising from injuries or industrial disputes
- public employers must manage facility time effectively.

The review of Civil Service facility time announced at Conservative Party Conference 2011 has as its aim “modernisation” and will look to:

- reduce overall facility time
- end 100% facility time
- end paid time off for union activities
- introduce monitoring.

Minsters with other public sector responsibilities were being encouraged to apply a similar review in their own Depts.

The contents of this document is for information guidance only and does not constitute legal advice