

Playing with perceptions

Stephen Levinson puts Vince Cable's new regime for employment tribunals under the spotlight

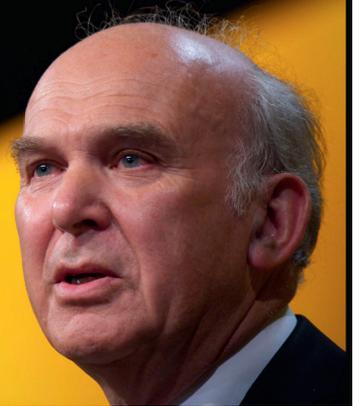


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The new regime for employment tribunals revealed by the Business Secretary is a product of a variety of motives. Politics and money were the principal drivers and their effect will be analysed in this article, which will suggest that while their overall impact is mixed some will cause long-term damage to a system that has many merits as well as recognised flaws.

Good sense

First, it has to be recognised that some very welcome changes are to be made. The proposals for encouraging early conciliation and mediation, streamlining compromise agreements and redrafting s147 Equality Act 2010 all make sense and are to be encouraged. In addition rewriting the whistle blowing laws to prevent employees bringing claims based on complaints about breaches of their own contracts is long overdue. Also on the list of sensible ideas is the fundamental review of tribunal rules to be carried out by Mr Justice Underhill; and the removal of some of the absurdities of obtaining CRB checks.

Money & politics

The business community has convinced government that employment law and tribunals are important barriers to growth. To deal with this political pressure changes are proposed which are designed principally at altering perceptions. The best example here is the increase in the qualification period for an unfair dismissal claim to two years. The government now estimates it will reduce claims by between 1,600 and 2,100. Plainly this is insignificant but it will look good to less well informed employers.

In the same category and rather more insidious in their potential impact are the nebulous proposals for protected conversations; a no-fault dismissal process

for businesses employing fewer than 10 employees and a 'radical slimming down of our existing dismissal processes'. These last two have been put forward on the basis that views are sought and will be evaluated. The idea of extending the without prejudice rules to ordinary exchanges dealing with poor performance will initially appear attractive. There are circumstances when this facility might head off litigation but it is also likely that it will require some very complicated rules to avoid the risks of bullying and satellite litigation. The other two ideas are obviously capable of making serious inroads into employee protection. The Secretary of

By far the most damaging suggestion made in the teeth of opposition from the overwhelming majority of those consulted is the decision that most unfair dismissal cases should be heard by judge alone. Truly Cable came to bury Donovan with this idea. If the primary remedy in employment tribunals is to be adjudicated upon by a lawyer alone the idea of an industrial jury has been binned. Over time lawyers sitting as judges will have less and less experience of having their views of what is fair in the workplace corrected by those with much wider experience. Expect the distinction

“ Treasury pressure is openly the reason for many of the proposals ”

State said he did not want to create a 'hire and fire' culture but both of these proposals have the potential to promote just that.

Treasury pressure is openly the reason for many other proposals. Introducing fees to bring claims; imposing financial penalties on errant employers; dispensing with lay members in the Employment Appeal Tribunal and unfair dismissal cases; reducing the length of hearings by making it the general rule that witness statements be taken as read and finally the removal of expenses for witnesses are all financially motivated. Some of these decisions are less damaging than others. Taking witness statements as read and dispensing with lay members in the EAT are probably in this category. Making tribunal judges tax collectors (for fines will go to the exchequer) is less attractive. The introduction of fees has been attacked as a barrier to justice as indeed in one sense it is designed to be, as the aim is also to reduce claims and save money that way as well. More importantly it undermines the separate nature of employment tribunals as distinct from courts.

between tribunals and courts to melt away and look for a re-emergence of all of those complaints of legalism that echo over the decades. Every single examination of the workings of tribunals over the last 20 years, and there have been many, has paid tribute to the value of the lay membership. The reason why this decision went through is not only the financial saving but because there is no vision within the Business Department of what is valuable and should be preserved in employment tribunals.

Those values have been pejoratively described as "soft benefits" by government. They are nothing of the kind in practice and the inability to recognise that fact is a serious criticism of the Business Department. They hold the brief for policy in the tribunals but this attitude questions their suitability for purpose.

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