

**Stephen Levinson** considers changes to whistleblowing, early conciliation, fees for bringing claims, and transfers of undertakings

# Employment update



The most abused word in the lexicon of government-speak is 'reform'. It appears to be an article of faith that every legal change made by every administration deserves this description. The implication is that everything done is an improvement when experience teaches us this is often not so, as we will see below.

The law on whistleblowing is to change on 25 June courtesy of the Enterprise and Regulatory Reform Act 2013. One of the most remarkable decisions is to remove the requirement that a protected disclosure should be made in good faith. According to current case law a claimant may not have had a predominant ulterior motive for making the disclosure. Now after 25 June a malicious, spiteful or nearly blackmailing disclosure will not disallow the claim, however wicked the motivation, but merely affect the amount of compensation awarded. The only limitation will be that it remains the case that a disclosure amounting to a criminal offence will not qualify for protection. The maximum discount is to be 25 per cent. It seems highly likely that this will allow a number of claims, that previously would have been rejected, to proceed and provide compensation to claimants whose objectives are decidedly unappealing. When making a disclosure to an employer the fact that

it is made for personal gain will not count against the claimant. There is of course a point of view that malpractice by employers always deserves exposure, irrespective of motive and there are some instances where that argument may be powerfully deployed. The law could have been changed to provide for a more nuanced approach by judges who could have determined the appropriate balance using discretion or the law could have allowed them greater ability to reduce the award, but no such flexibility is to be possible.

For many judges and employers their aversion to some factual situations will be visceral. It is probable that many more employers will allege that their reason for dismissals or other acts imposing a detriment was the conduct of the worker making the disclosure. That a decision to dismiss can be based on the unacceptable manner of disclosure is already recognised (see *Martin v Devonshires Solicitors* [2010] UKEAT 0086\_10\_0812) and causation is likely to become a much more important issue in hearings. It would not be at all surprising if many judges were tempted to find as a fact this was the case because of their own dislike of the manner in which the complaint was made.

The second principal change to this area of the law is that an additional burden is

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to be imposed on claimants, which is that they are to be required to have a reasonable belief that the disclosure they make is in the public interest. The removal of the requirement of good faith seems to have been a last minute sop for the imposition of this new test. It was introduced at a very late stage in the parliamentary process. The intention of government was to remove the ability of employees to rely on breaches of their own contracts to found whistleblowing claims as permitted by the decision of the Employment Appeal Tribunal (EAT) in *Parkins v Sodexho* [2002] IRLR 109. It is thought by government that it will be rarely the case that the breach of an individual's own contract would amount to a matter of public interest. Quite why this

issue was not addressed more directly is unclear.

Three issues will arise as a result of this change. First there is no definition of the public interest. There will have to be a number of cases decided before it is clear whether the public interest required by the new law is wider than the list of wrongdoing in section 43B Employment Rights Act 1996 and imports an additional element of providing an advantage to the public or a sufficient section of the public. As a matter of straightforward statutory interpretation the good faith test is an addition to that list. How will be formulated is in the hands of the judiciary.

Secondly, the public interest requirement will have to be taken together with the reasonableness requirement, which under current case law is a mixed subjective and objective test. The accepted principles at present are that the belief has to exist at the time of the disclosure and can be entirely wrong yet be reasonable. The extent to which the worker has to have applied his or her mind to the public interest will have to be resolved, as it must be possible that a disclosure will be made in circumstances when the interests of the public never entered the mind of the claimant.

Finally, the belief that the disclosure is in the public interest is not expressed as having to be the principal or sole reason for the disclosure so there will also be a range of cases determining the extent of this requirement.

The fact that the cap on compensation for unfair dismissal is to be considerably reduced for a number of claimants is thought by some to be an encouragement to bring these claims. Whether or not that is true the combination of these two changes is likely to add considerably to the uncertainty of the law and add to the difficulty of advising. That may be good for lawyers but that is not exactly what the government is likely to have had in mind when it introduced these 'reforms'.

### Deserving of support

Fees to bring claims in tribunals will be introduced from 29 July. An ordinary unfair dismissal claim will require a setting down fee of £250 and to proceed to a hearing a further £950. Less than a year after that from April 2014 all tribunal claims will be required to be submitted to ACAS who will enquire of the parties whether they want to agree to an early attempt to settle the claim by conciliation. While the imposition of fees is hugely divisive (with many employers

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welcoming them as a discouragement to vexatious claims and others predicting that it will change the nature of employment litigation forever and is a clear indication that the Ministry of Justice (want to do away with employment tribunals) the effort to try to settle cases attracts general consent that the attempt is worthy and deserves support. Consider however the effect of the two processes when they are both active. Ask how many employers are likely to refuse to agree to enter into a conciliation process before the employee proved the seriousness of their intent by paying the fee. The risk is of one 'reform' working against the intent of the other because as soon as one party refuses to conciliate ACAS issues its certificate and the case moves on.

### Burden to business

In 2006 government carried out a consultation exercise and concluded that the then current rules to determine what constituted a transfer of an undertaking were so complex and uncertain that they invented the concept of a service provision change to try to simplify the issue. This dealt with most 'contracting out' situations. Very many employers and trade unions welcomed the certainty this brought. In fact some industries had unofficially adopted this approach, whatever the legal opinions they received. The present government has a fixed view that any rule that adds to the requirement of a directive is a burden on

business or is, to use their populist jargon, 'gold plating'. Evidence for this is to be seen in the Transposition Guidance issued to all government departments in April, emphasising the minimalist approach that should be taken to all directives such as never implementing until the last possible minute, never adding to any of the requirements of the directive and whenever possible copying out the language of the directive. As an application of this policy the Business Department have suggested that the service provision changes may be removed and the law revert to the pre-2006 position.

To be fair this is only a proposal, but the reason it is put forward seems to be based in part on the simplistic application of the idea that any addition to the requirements of a directive is bound to be a burden and its removal a reform. The reasons for decision to introduce the service provision change made in 2006 illustrates why the application of any blanket assumption is misguided. Many consider that the consequences of this change would be a great deal more uncertainty, a lot less employment protection and yet more work for lawyers.

### Marketing speak

The changes to whistleblowing were brought about by a combination of a desire to remove what many thought of as an anomaly and parliamentary horse-trading. The manner in which the *Parkins v Sodexho* issue is to be resolved seems to have been unnecessarily convoluted and gave lobbyists room to manoeuvre to remove the good faith test.

The possible conflict between charging fees and early conciliation are an example of how joined-up thinking is a rare commodity and the potential removal of the service provision change an example of rhetoric-driven policy making. The lack of understanding of how these laws will operate is also in part attributable to the refusal of those who run the civil service to allow sufficient expertise to be built up in departments and to allow those departments to retain that knowledge.

The manner in which we make new law is badly flawed and the appellation 'reform' is often no more than marketing-speak.



Stephen Levinson is a partner at RadcliffesleBrasseur ([www.rlb-law.com](http://www.rlb-law.com))