



## Update | Employment: controversial reform proposals

FEATURE | 28 March 2013

**Its been a controversial few months, with various employment reforms under proposal. Stephen Levinson reports**

The Enterprise and Regulatory Reform Bill has completed its progress through the Lords and been republished. On 16 April the Commons will consider the amendments made in the Lords. An attempt to remove entirely the proposed rules on protected conversations was defeated by 33 votes in February. Possibly because this all out assault was attempted no further consideration has been given to the problems the drafting of what is now clause 14 of the bill. For an assessment of these issues see the 5 March edition (Solicitors Journal, 157/9). All of these potential problems remain to be resolved in tribunal hearings over the next few years.



New provisions added since the last update include the addition of caste to the definitions of 'race' in the Equality Act and also a clause to accommodate the implications of the decision of the ECHR in *Redfean v The United Kingdom* [2012] ECHR 1878 so that there will no longer be a length of service requirement to bring an unfair dismissal claim based on dismissal for holding political opinions or affiliation.

### Acas consultation

In the meantime, Acas are consulting on the content of a new Code of Practice and Guidance on how protected conversations should be conducted and crucially on the meaning of the new concept of saying or doing anything that is improper or connected with improper behaviour. Such a transgression will permit a tribunal to lift the veil on the conversation to the extent it considers just. One of the key issues is what is to be in the code and what in the guidance. The Employment Lawyers Association has suggested that the code should be limited to explaining the concept of improper behaviour and should not extend to best practice as this may be seen by some as a requirement. For example as presently drafted the code would set a mandatory minimum period to consider an offer of seven working days and there well might be situations when both parties want to make progress more rapidly than that.

Other issues are the extent to which draft settlement agreements should be in the code or guidance and whether there should be examples of conduct that should not be regarded as improper as well as example of what is improper. The better view is that the draft agreements should be confined to the guidance but that it would be helpful to both sides if examples of what is permissible were included. Finally it is understood that government does not intend that a breach of the code by an employer would

result in uplift of compensation that may be awarded, but this is not stated in terms and perhaps should be.

## Employee shareholders

Events on 21 March provided much entertainment to lovers of parliamentary theatre. In his budget speech in the Commons the chancellor, George Osborne, said that the rules permitting employers to offer shares to employees in return for their giving up their ability to claim unfair dismissal, a redundancy payment or request flexible working would become law on 1 September 2013. Meanwhile and on the same day the House of Lords rejected clause 27 of the Growth and Infrastructure Bill, intended to introduce this law.

Whether this proposal will survive is debatable. In political terms it is close to the heart of the chancellor, though it seems the Department for Business, Innovation and Skills is lukewarm as it was a project thrust upon them. It has divided parties and faces severe criticisms from some leading lawyers. The opposition to the clause in the Lords was led by Lord Pannick QC who pointed out a particularly unpleasant feature of the proposal which affects those looking for work. An employer would be entitled to refuse a job to anyone who did not want to exchange employment rights for shares. If that happened the applicant would be refused jobseekers allowance for not accepting available employment, not an attractive proposition in the current jobs market. If this proposal does survive it is likely to do so in a considerably amended form.

## TUPE troubles ahead

The prize for the understatement of the decade may well go to the civil servant in the business department who drafted this gem in the recently launched consultation paper on transfers of undertakings, "TUPE is generally considered complex". The most widely discussed proposal is to remove the definition of service provision changes as transfers. The probability is that those proposing this policy had no dealings with employment law in the decade before the rule was introduced in 2006. The decision in *Spijkers v Gebroeders Benedik Abattoir CV* [1986] ECR 1119 introduced the era of the multi-factorial test of what was or was not a transfer and a huge range of conflicting decisions. So difficult was the issue that whole sectors of business decided to ignore legalities and treat gaining and losing contracts as TUPE transfers whatever they were advised, as it was simpler that way. The current proposal is to return us to that state of affairs. As the rules on service provision are not required by the directive they must be 'gold-plating' and therefore inevitably a burden on business. The fact that the rules were introduced in an attempt to reduce uncertainty and burdens seems to have been forgotten, although one has to admit that some recent decisions of the EAT have chipped away at any such certainty.

There are a large number of other changes proposed which have received less attention. The first is the requirement to provide employee liability information (ELI). Having stated in the consultation paper that ELI is helpful to transfers the proposal is nevertheless that all rules requiring it to be given should be scrapped and be balanced by beefing-up the requirements in regulation 13 (informing and consulting employees). A simpler approach might have been to suggest increasing the short period before the transfer (14 days) when information has to be provided. This was rejected on the ground that any specified period would be arbitrary. Would this matter if it solved the major problem that 14 days beforehand is too late?

The rule preventing changes in terms of employment made by 'reason of the transfer' currently extends to reasons 'connected with the transfer'. As these words are not in the directive they too are considered 'gold plating' and the suggestion is they be removed. It is unlikely that this will have much practical effect given the decision of the CJEU in *Martin (C-4/01)* that reasons 'connected with' the transfer are caught by the directive. Government also proposes a similar excision of the same words in the rules about dismissals connected with the transfer. Again whether this will make any practical difference in the courts is moot.

There are some proposals which will be welcomed by employers. The requirement that an ETO (economic, technical or organisational) reason should require a reduction in headcount is to be removed when there is a change in the workplace. This change is made to align these rules with the

definition of redundancy in an unfair dismissal case. Also businesses with fewer than ten employees may be able to consult employees direct. There are also suggestions that transferors may be able to dismiss on the ground of the transferee's ETO and that transferees may be allowed (but not required) to consult with employees coming across before the transfer takes place, and for that to count as effective consultation. The consultation closes on 11 April.

## New tribunal rules

The exercise to change the rules governing employment tribunal cases is moving towards completion and a revised draft is to be tabled in parliament in May but will not come into effect until the summer. The idea is to coordinate the introduction of the new rules with that of fees and also to allow the profession to familiarise themselves with the new rules before they have to use them which seems very sensible.

One result of the consultation is that the use of legal officers to deal with interlocutory matters is to be put on hold for the time being. There was obviously some disquiet at the whole concept in the responses and that is hardly surprising at this stage as no one has yet made clear what sort of legal person will be appointed to this role. Practitioners are only too aware of the importance of the quality of decision making at this stage of litigation and there was a real concern that appointing those with too little experience would result in lowering the quality of the service.

## Good faith and penalty clauses

The decision of the High Court in Fahim Imam-Sadeque v Bluebay Asset Management (Services) Limited [2012] EWHC 3511 (QB) will be required reading for some time on the issues of what constitutes a penalty clause in a compromise agreement and the extent of an employee's duty of good faith. The case has to be read with care as it appears to be one where the judge took against the claimant's evidence to a marked degree (no doubt for excellent reasons). He was described by the judge as having the "articulate fluency of a good salesman" before saying he felt unable to accept parts of his evidence. One clear message is that arguments that there is an attenuation of the negative obligations imposed by the duty of good faith during a period of garden leave will be difficult to sustain. Also in this case the compromise agreement expressly stated that the claimant was a good leaver provided he observed his warranties and that in breach he had to forfeit the benefit of options that had been treated as vested on this basis. The court held that this provision did not amount to a penalty as the benefits conferred by the agreement were conditional. The analysis of what constitutes a penalty is fairly comprehensive and may require a second look at some standard compromise agreements.

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