CAMPAIGN FOR

TRADE UNION FREEDOM

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.

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.

Key milestones in the employment rights review have been:

- reform of the Employment Tribunal system contained within the Government's flagship consultation paper *Resolving Workplace Disputes* 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

- the leaking into the public domain in May 2012 of the so-called Beecroft Report; an advisor to PM David Cameron, Adrian Beecroft, the private equity capitalist behind payday loan company wonga.com, scripted a report on de-regulating employment rights, made infamous by his promotion of "compensated no fault dismissal"

- the passage of Enterprise & Regulatory Reform Act in April 2013, which legislates 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; also the passage into law of the Growth & Infrastructure Act at the same time that opens the way for the introduction of a new type of worker, the "employee owner".

Other than the three key milestones, the Government has 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.

- abolished the Agricultural Wages Board and graduated agricultural minimum wage, the 15 Agricultural Wages Committees, and the 16 Agricultural Dwelling House Advisory Committees; this came in effect with the passage of the Enterprise & Regulatory Reform Act in April 2013, the current Wages Order will remain in place until 1 October 2013

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

RESOLVING WORKPLACE DISPUTES

Vince Cable's big launch was in November 2011 when in a speech responding to the public consultation on Resolving Workplace Disputes he announced a 15 point plan:

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

iv. a call for evidence on reducing the statutory period for collective redundancy consultations from 90 days to 30 days

v. a call for evidence for proposals to simplify TUPE - Transfer of Undertakings (Protection of Employment) Regulations

vi. a call for evidence on “compensated no fault dismissal” for firms with less than ten employees; this call for evidence also included review of ACAS Code of Practice No 1 “Disciplinary and Grievance Procedures” the Government now says that it is not proceeding with “compensated no fault dismissal”; it will revise the ACAS Code, eg, to allow small businesses to move directly to final warning

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

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 on streamlining 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.

The headline changes to the law arising from the Resolving Workplace Disputes and associated consultations are:

- 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; cases are grouped as level 1 (eg - non-payment of wages) where there will be an issue fee of £160 and a hearing fee of £230; and, level 2 (eg - unfair dismissal) where there will be a £250 issue fee and a £950 hearing fee *[operational from Summer 2013]*

- allowing employment judges to sit alone on unfair dismissal cases *[operational from 6 April 2012]*

- the minimum consultation period when proposing 100 or more redundancies has been reduced from 90 to 45 days *[operational from April 2013]*

THE BEECROFT REPORT

Adrian Beecroft is a private equity capitalist (behind payday loan company wonga.com) who was commissioned by the Prime Minister to write a report on the future direction of employment law in Britain.

When one of Vince Cable's team called Beecroft's proposals "bonkers" that should have been the end of his report but many of Beecroft's ideas have found their way into the Enterprise & Regulatory Reform Act.

Some of the key points of the Beecroft Report are set out here:

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.

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.

Remarkably, when questioned by a committee of MPs about his Report, Beecroft said his method was "based on conversations, not a statistically valid sample of people." He went on to say that he didn't have time to conduct detailed research as he had only two months to complete the study for Downing Street's Policy Unite.

The Report that made over 20 recommendations to change the law, Beecroft says that he's glad that the Government is acting on at least 17 of them.

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

Freedom Association
http://www.tfa.net

ENTERPRISE & REGULATORY REFORM ACT, 2013

Only a small part of this Act deals with employee rights and industrial relations. The key sections cover:

Dispute Resolution – the Bill introduces mandatory conciliation by ACAS before a claim can proceed to the Employment Tribunal.

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.

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. *[Operational from April 2014]*

The Act also allows for the introduction of "Legal Officers" who may hear, if the parties agree, many money based (underpayment of National Minimum Wage, unlawful deductions of wages) ET claims as a form of "rapid resolution". *[Operational from 25 June 2013]*

Unfair Dismissal awards - Even before the Coalition's changes the average award at Tribunal for unfair dismissal was a little under £5,000 even though the maximum basic award was set at £13,500 and theoretical maximum compensatory was £74,200.

Under the Act, the Secretary of State may introduce Regulations that would set a cap on the compensatory award. The Government has announced that the compensatory award will amount to no more than 52 weeks' salary subject to the cap of £74,200. So, for low paid workers, say an adult on NMW currently just under £13,000, you could not get more than £13,000. *[Operational from Summer 2013]*

Financial penalties – the Tribunal is to be given to power to levy a "fine" against employers that seriously breach workers' rights (an aggravated breach), such a penalty would be subject to a minimum of £100 and a maximum of £5,000

If the employer pays the penalty within 3 weeks there's a 50% discount available but there is no enforcement mechanism to make employers served with a penalty notice to actually pay.

But perhaps most importantly, there is no method introduced to oblige the employer to pay the worker any compensation awarded by the Tribunal. 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. *[Operational from Spring 2014]*

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, in which 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. *[Operational from 25 June 2013]*

Settlement Agreements – compromise agreements are to be renamed "settlement agreements" – this could be "compensated no fault dismissal" by the back door.

Until this "reform" a compromise agreement could only be signed there was an existing dispute which the compromise agreement brought to an end; the negotiations in connection with a compromise agreement could be confidential and cannot be used in proceedings at an ET (known as without prejudice). *[Operational from October 2013 or April 2014]*

Protected conversations – the without prejudice principle has also been extended to discussions that an employer may have with an employee prior to dismissal where there may have been no dispute between the worker and employer. In other words an employer may raise an issue with an employee in the most "frank" terms but because the conversation would be declared "protected" the employee could not use the conversation as evidence in any subsequent ET hearing unless the worker could show some sort of discrimination. Effectively, this opens the door to arbitrary dismissal.

The without prejudice principle will be a one way street, employees with not be able to cite the conversation at the Tribunal but employers would be allowed to cite any offer made during a "protected conversation" in any costs award. Unlike "settlement agreements" there is no provision for legal advice with a "protected conversation" nor is it clear if a union representative may be involved*. [Operational from October 2013 or April 2014]*

Equalities – the Government has repealed the third party harassment procedures which made an employer liable where an employee was harassed by a third party and it has also repealed the statutory discrimination questionnaire procedure whereby a worker could obtain information about discrimination in a workplace and use this as evidence at the Tribunal.

The first repeal does away with making an employer liable for the repeated harassment of employees by third parties like customers, clients or service users. The second has been used by the victims of discrimination since the first Sex Discrimination and Race Relations Acts and is vital to gaining an understanding about how others have been treated in similar circumstances. *[Operational from October 2013 or April 2014]*

Health and Safety (strict liability) – for 100 years workers could bring a civil claim for personal injury due to the employer's negligence and/or breach of statutory duty. A breach of statutory duty would occur, for instance, if an employer failed to comply with regulations made under the Health and Safety at Work Act.

Under the terms of the new Act employers will no longer be liable in the civil courts for the criminal offence of a breach of the HASAWA regulations unless Regulations are passed to allow it. In every case, rather than be able to rely on the breach of the regulations, the worker will have to prove the employer was negligent. *[Operational from Autumn 2013 or Spring 2014]*

Whistleblowing – the Bill restricts the definition of "qualifying disclosure" in whistleblowing legislation to "in the public interest". *[Operational from 25 June 2013]*

GROWTH & INFRASTRUCTURE ACT, 2013

At their 2012 party conference in Birmingham, the Conservatives outlined their plans to not just further erode employment rights but to change the status of "employee" to some other sort of worker who would have a stake in the equity of the enterprise. This is now part of the Growth & Infrastructure Act, 2013.

From this year employers will be able to make new job offers conditional on – and offer existing staff – this new arrangement.

Employees will be given at least £2,000 in shares in the business, exempt from capital gains tax when they sell.

In return, the employees will give up their rights on:

- unfair dismissal
- statutory redundancy
- the right to request flexible working and time off for training

and will be required to provide 16 weeks' notice of a firm date of return from maternity leave, instead of the current 8.

ESSENTIAL READING

Renton D & Macey A (2013) *Justice Deferred: a critical guide to the Coalition's employment tribunal reforms* IER (ISBN 978-1-906703-17-2)

MORE ON THE WAY

In the Queen's Speech that marked the State Opening of Parliament on 9 May 2013 the Coalition Government promised another De-regulation Bill; the Government will:

- further weaken health and safety law by exempting some self-employed workers from health and safety legislation so long as they do not "pose a risk to others" formally exempting 800,000 people from health and safety regulation;

- removing Employment Tribunal judges' power to issue wide recommendations to businesses brought before them in discrimination cases.

The De-regulation Bill is being debated by Parliament in the Spring of 2014.

In response to the expose of corrupt practices in Parliament (cash for questions) in early June 2013 the Government has legislated further on trade unions in the Transparency of Lobbying, Non-Party Campaigning & Trade Union Administration Bill:

- to limit third party election funding (mainly union support for Labour)

- to oblige unions to conduct an annual audit of membership and ensure its accuracy, giving the State powers to access information about union members' private relations with his/her union.

The Labour Party has given a commitment to repeal this law should it win the next General Election.

On the eve of Conservative Party Conference (27 September 2013), Grant Shapps, the Party Chairman, announced new measures that the Party would take should in win the 2015 General Election. These measures, which would impact greatest on public sector unions, include:

- ending the right to paid time off for union duties, including full time convenors

- banning "check off" of union subscriptions from members' salaries

- increasing the threshold before a union can apply for statutory recognition from 10% of the workforce to 30%

- insisting that strike ballots do not count unless at least 40% of members vote for it

- axing the Union Learning Fund

- requiring unions to be charged a full commercial rent for using public buildings and facilities.

In the aftermath of Unite's dispute with Ineos at Grangemouth the Government announced it was setting up an inquiry in the conduct of industrial disputes led by Graham Carr QC (who has acted for British Airways against Unite).

The Carr Inquiry has no support from the unions and only patchy support from the employers, mainly those organisations listed on page 6 of this paper.

The terms of reference of the Carr Inquiry are:

> The terms of reference of the review will be to provide an assessment of the:
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> - alleged use of extreme tactics in industrial disputes, including so-called 'leverage' tactics; and the
>
> - effectiveness of the existing legal framework to prevent inappropriate or intimidatory actions in trade disputes.
>
> The Review will make proposals and recommendations for change.
>
> The Review will be led by an independent senior lawyer from outside Government. The senior lawyer will be supported by a Secretariat drawn from officials from BIS and Cabinet Office and across Government.
>
> The senior lawyer will report jointly to the Secretary of State for Business, Investment and Skills and the Minister for the Cabinet Office. The Government will consider the proposals and recommendations and its response and position will be agreed collectively in the normal way.

In advance of Carr reporting, the Prime Minster announced on 9 May 2014 that new restrictions will be introduced on strikes in `essential' services if the Conservatives were to win next year's general election. Cameron said he intends to introduce a minimum threshold on the number of employees who must take part in a ballot on industrial action before it can trigger a strike.