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Playing it safe

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New employment proposals are a step in the right direction but they don't go far enough, suggests Ronnie Fox

In May 2010, the coalition government committed itself to reviewing and attempting to simplify employment laws. One of its key aims was to boost economic recovery by encouraging businesses to recruit staff. In particular, the review highlighted employers' concerns about their ability to have conversations with employees about sensitive work issues, without fear of ending up in the employment tribunal. Currently without prejudice privilege will only protect conversations which are part of a bona fide attempt to settle an existing dispute; this can be a potential problem if an employer seeks a frank and open discussion before a dispute has arisen. Do Vince Cable's recent proposals go far enough to address this concern?

One of the most controversial proposals initially put forward was the compensated no-fault dismissal dubbed by unions as 'hire and fire at will'. It would have allowed micro-businesses, defined as those with fewer than ten employees, to dismiss an employee lawfully without identifying any cause or justification in return for a compensatory sum. It comes as no surprise that this proposal has now been shelved. It was unpopular with trade unions, it threatened to create a broader rift within the coalition and, according to government reports, little support was forthcoming from the businesses that it was intended to benefit. In other words, it was politically nuclear.

Instead, the proposals announced on 14 September 2012 focus on the use of settlement agreements and protected conversations as a means for resolving potentially litigious matters outside the tribunal process. Disappointingly, this offers employers little which will be new. The term 'settlement agreement is simply an alternative phrase for the compromise agreements which are already widely used. Protected conversations offer employers only slightly more comfort that the content of a settlement discussion will not be disclosable in tribunal proceedings than familiar off-the-record and without prejudice discussions.

Significantly, under the current proposals the "protected conversations" concept will apply only to ordinary unfair dismissal claims. It will not apply in relation to claims involving unlawful discrimination or whistleblowing, where the potential compensation that can be awarded by an employment tribunal is uncapped. We already see allegations of unlawful discrimination and whistleblowing being put forward in an effort to circumvent the cap of £72,300 on the compensatory award which employment tribunals can currently order following unfair dismissal. There is likely to be a substantial increase in the number of such allegations. There is no suggestion that the government will seek to cap awards for successful discrimination or whistleblowing claims (and any attempt would probably run into difficulties under EU law).

The government consultation paper dated September 2012 and entitled Ending the Employment Relationship acknowledges that a host of procedural questions will also need to be considered if protected conversations are to be effective. There will need to be some form of process to help the parties identify and agree whether a conversation is protected or not. For example, would an employee need to be given advance warning of a protected conversation and be given the opportunity to be accompanied by a trade union representative, colleague or official? How would the conversation be recorded? Should the parties agree the record of the conversation? Until ACAS publishes its new statutory code of practice on settlement agreements it is difficult to second guess how the proposal

will work. If an employer handles the settlement discussion in the wrong way, this could amount to a breach of trust and confidence allowing the employee to claim constructive dismissal. Clearly, the new rules could have the unintended consequence of creating a new area of contention, which will require lawyers to advise both parties.

Furthermore, under the current drafting on protected conversations in the Enterprise and Regulatory Reform Bill which is presently going through Parliament, a tribunal would have discretion to take account of anything said or done which is in its opinion “improper” or “connected with improper behaviour”, neither of which expressions is defined; and be able to take account of any determinations made in any other proceedings between the employee and employer in which a settlement offer or discussion was considered relevant. This clearly dilutes the stated aim of the rule, which is to give employers the freedom and confidence to have settlement discussions with employees.

Another proposal put forward by the government is to reduce the current compensation cap of £72,300 for unfair dismissal claims to a cap which is the lower of either 12 months’ salary; or a figure ranging between one and three times the annual median earnings (currently £25,882).The combination of a reduced compensation cap and the proposed introduction of a fee (up to £1,200) for lodging a claim in the tribunal is likely to reduce the number of tribunal claims – a key government objective – by weeding out weak and vexatious claims limited to unfair dismissal. However, the true extent and impact of this proposal will only become evident once the new cap is revealed.

It is clear that the government is trying to strike a balance between simplifying the process and reducing the cost of dismissing employees; and minimising the risk of a row within the coalition and an emotional backlash from trade unionsMany employers will think that these proposals point in the right direction, but that they just do not go far enough. It is clear that the government is trying to strike a balance between simplifying the process and reducing the cost of dismissing employees; and minimising the risk of a row within the coalition and an emotional backlash from trade unions

These reforms are unlikely to come into force before spring of next year. In the mean time, there will be a large number of responses to the consultations. It will be interesting to see how the government will strike the balance between the conflicting demands of unions and employers.

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