

You wait for a bus and three come along at the same time: proposed employment law reforms announced today

Changes in employment law used to be a bit like waiting for a bus. You would spend most of the year with the same regulations and then a couple of times a year a few changes would come along all at once (April and October). While we presume the timing for introducing new legislation won't change, the employment law arena is starting to feel rather more like being on a roller coaster.

Over the past few months, we have had announcements and leaks about changes to the length of service requirement for unfair dismissal, Adrian Beecroft's compensated no fault dismissals, the Independent Assessment Service for long term ill health and 'protected conversations' courtesy of Nick Clegg. Today, Vince Cable, on behalf of the Government, announced his 'radical' employment law reforms, collecting together in one place these various leaks and announcements. According to Mr Cable, the purpose of these reforms is to knock down the barrier to business growth making it easier to take on staff. The reforms are a wish list of consultation, calls for evidence and definite plans. The following is a short summary of the main proposals affecting individual rights and our initial thoughts.

Compensated no fault dismissals

The Government will call for evidence on introducing compensated no fault dismissals for micro businesses employing 1 to 9 employees. We commented on the idea of no fault dismissals in our blog: <http://www.employease.co.uk/blog/?p=196>

We still have a problem with the idea that an employer can dispose of a problem without having to manage it. We also have a concern about limiting this to micro businesses. BIS publishes statistics about the number of SME's in the UK. According to their own figures printed in October of this year, SME's form 99.9 percent of all enterprises, with an estimated 4.5 million of them. Of those SME's, almost one million were micro businesses. Approximately 15% of the total workforce can be found in these micro businesses. Do we really want to create a society where 15% of us can be sacked at will whilst the remaining 85% enjoy the protection?

Even if the answer to this question is yes, if the intention is to encourage growth, does this threshold make sense? We are concerned that this threshold may have the effect of encouraging employers to remain a micro business rather than growing beyond the micro level. It may also encourage the creation of more sophisticated corporate structures where the workforce is split into several micro businesses. This is what used to happen in France in order to avoid onerous collective rights until the case law put a stop to it.

Simplifying the dismissal process

The Government will call for evidence to examine ways to slim down and simplify dismissal processes, preferably working with ACAS. While this makes some sense the most important and difficult job will be to preserve the rules of natural justice that apply to dismissals while achieving some simplification.

This is not an easy task. The last time a government made significant changes in this area it resulted in the statutory dismissal and grievance procedures that led to more litigation and the legislation's subsequent repeal. With the increase in the length of service requirement for unfair dismissal cases from one year to two, our concern is that employers will treat dismissals in a much more relaxed fashion exposing them to potential claims that do not have the length of service requirement, such as discrimination claims. If the dismissal process itself is slimmed down, these cases may well result in much more exposure for the employer since the burden of proof in discrimination cases is unlikely to change.

Protected conversations

There will be consultation on protected conversations, which will allow employers to discuss issues like retirement or poor performance in an open manner. We fail to see how this will work. What will an employer be able to say in the course of these protected conversations? Will they be able to make discriminatory statements? Clearly the scope of what can be said during a protected conversations needs to be limited. However any limitation inevitably leads to case law to test those limits.

Performance procedures are geared towards improving performance not necessarily the employee's dismissal. How can an employee who has been told that he should resign if he does not want to face a performance dismissal be expected to play ball when the employer launches the formal unprotected performance procedure?

Currently, it is already possible to have without prejudice discussions with employees where there is a dispute. Is the main difference between without prejudice conversations and protected conversations that protected conversations will be able to take place before a dispute arises? It is also somewhat naïve to think one needs to legislate on this. Many things are already said behind closed doors that don't surface in cross examination.

We fail to see the purpose of this provision. Employers already have these conversations on a regular basis even if they are quietly forgotten about when challenged in the tribunal. Do we really need legislation to allow employers to have discussions about failures in performance when there is already a way of dealing with that performance problem without having to have a get out of jail card?

Simplifying compromise agreements

A call for evidence on simplification of compromise agreements. We like the idea of this. Compromise agreements are unnecessarily lengthy and technical. Case law has allowed compromise agreements to be challenged on technicalities which had very little to do with a sense of fairness for either party. For example a rush drafting of the Equality Act 2010 means that there is uncertainty as to whether a compromise agreement can be signed by the solicitor who advised the employee in order to reach the compromise.

COT 3 agreements arranged with the assistance of ACAS tend to be more simple and it's a form of agreement that the government could consider when looking at the simplification of compromise agreements. However, the essence of a compromise agreement which is for the employee to receive advice on the claim they are waiving should be maintained.

We would also welcome the extension of the right to sign compromise agreements to authorised claim handlers with professional indemnity insurance. We are regulated by the Ministry of justice for claims handling in employment law matters. This allows us to represent individuals in the employment tribunals but we can't settle the case by signing a compromise agreement. It doesn't make sense.

I could go on with the list, but I suspect we would be testing the patience of our readers. Over the next few weeks we will cherry pick a few other items from the wish list and comment in more depth. We will also write about the Independent Assessment Service, which, despite the tone of our recent blogs, we think is fundamentally not a bad idea. In the meantime, please send us your comments on the proposals!

On a very different subject, for the past few months we have been involved with Impact 21 in Fife to provide free advice to businesses in Fife on HR and employment law issues. Impact 21 is an enterprise organisation encouraging entrepreneurial activity and business in Fife and delivers Business Gateway in Fife. EmployEase is working with Michelle Austin of MAP Ltd and Caroline Rochford both of whom are HR specialists. Further details can be found on our blog on our website: <http://www.employease.co.uk/blog/?p=199>

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0845 123 3741, or email us at info@employease.co.uk.

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