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"Flexible, effective, fair: promoting economic growth through a strong and efficient labour market"

Response from the Employment Lawyers Association

19 October 2011

ELA Response:

"Flexible, effective, fair: promoting economic growth through a strong and efficient labour market"

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Applicants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or policy aims of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative & Policy committee of ELA under the chairmanship of Bronwyn McKenna of UNISON to consider and comment on the discussion document **"Flexible, effective, fair: promoting economic growth through a strong and efficient labour market"**. A full list of the members of the sub-committee is annexed to the report.

ELA's Response

Change should be based on evidence

The Employment Lawyers' Association welcomes changes which clarify employment law. As an Association, we make no comment on the policy behind any such changes: our members represent employees and employers and may have different views on that policy.

However, our experience and that of our clients is that frequent changes of themselves to employment law are likely to introduce uncertainty and complexity which have a negative impact on both employers and employees. We advocate that the effect of any change should outweigh that impact. As a general proposition, there should therefore be a clear and evidence-based rationale for change.

We are concerned about the failure to refer to evidence in a number of the proposals put forward in BIS' paper.

This is regrettable. If employers and employees are to have confidence that changes to employment law will achieve the Government's objectives – and are therefore worth bearing the negative impact of change itself – BIS should seek to garner support for those changes by publishing the evidence which has led to them.

This is particularly important in the sensitive field of employment law because one person's simplification may to another be understood as the removal of a valuable protection for employee or employer. This reinforces the need to make change by reference to evidence wherever possible.

Furthermore, where changes are far reaching, Government needs to consult stakeholders as widely as possible; to take into account the input from that consultation and to allow as much time as practicable for employers and employees to prepare for any changes. ELA would cite the Dispute Resolution Regulations, introduced and repealed, by the previous administration, as a classic example of a reform that caused more problems for employers and employees than it solved, despite the benign policy intentions that lay behind it.

Time restraints do not allow ELA to provide a detailed response to the wide-ranging issues referred to in BIS' paper or under the RTC employment focus, though our initial observations are set out below.

ELA looks forward to early involvement in any further more detailed consultations Government may announce. We wait for a formal response to the Resolving Workplace Disputes (RWD) consultation and will be in a better position to provide detailed feedback in relation to the further issues raised by Government when our RWD consultation response has been addressed.

Question 1

How can we create the space for employers and their staff to manage their relationship effectively?

ELA believes that, as a general rule, employer/employee relationships are enhanced, if the parties are given more space to sort out their differences and to find workable solutions. Of course a sensible balance has to be found between having adequate employment protection rights for employees and over-regulation for employers. But keeping things simple is one of the key planks to providing such space.

At present our employment legislation gives the appearance of "policy legislation by elastoplast". In other words, an unacceptable aspect of employment policy is remedied by a quick fix piece of legislation, rather than taking a macro perspective. Some of our employment law is either too detailed or too complicated. To use the words of Sir John Donaldson in the Court of Appeal in the 1980s in the context of complex maternity leave legislation: "*the parties need to know what is on-side and what is off-side".* This is further complicated by the issuance of guidance by Government or its agencies which is intended to be helpful to the parties, but which sometimes over complicates matters or (in some cases) appears not to reflect the primary legislation accurately.
A second requisite for providing the space to improve the employer/employee relationship is that the current framework may encourage the parties to head to the Employment Tribunal too quickly. ELA considers that serious thought should be given to extending the time limits for bringing employment tribunal claims (to, say, 6 months). ELA members' views on mediation were set out in considerable detail in our response to RWD. We think that the current proposal for 1 month ACAS conciliation period, ought, once implemented, to be kept under review. In the meantime, we are in favour of encouraging the use of mediation within the workplace or the framework of litigation. There are however some key questions which would require to be addressed, particularly if there is any suggestion that mediation is to be compulsory.

1. Who would provide the mediation? This is important not least because of the very large number of claims which could potentially be mediated, and the even larger number of workplace disputes that may lead to claims if not resolved. Any move to make workplace mediation a requirement would raise similar issues to the now repealed statutory grievance procedures, and any extension of facilities for third party mediation would have significant cost implications that would need to be addressed.

2. What would be the sanctions for failure to attend the mediation, respectively by the employee and employer (each raises rather different considerations)? In particular if failure by the employee barred the claim how would that square with article 6 rights? And what sanctions would there be for the parties that simply attended but refused to engage?

3. If the consequence of a pre-action stage is to push back the earliest date for presenting claims, how will this relate to time limits? Will there be a separate time limit for the initial reference to mediation, and who will deal with admissibility of late applications?

Question 2

What more can Government do to reduce the fear factor in employing staff, particularly the first member of staff that a business takes on?

At the outset we should say that ELA has no stated view as to whether a "fear factor" actually exists (or if it does, the extent to which that is so), and there may be, for example, an issue as to whether repeated assertions by Government that this is the case, is affecting views on the ground. However, in as much as there is a "fear factor" for employers, we believe a contributory factor may be the frequency of legislative change, with the provision of insufficient time to implement such changes. The "fear factor" Government seeks to reduce is, in our experience, fed by frequent legislative change and the provision of insufficient time in which to implement such changes. Government should therefore ensure that changes are worth making and that sufficient transition periods are built into the implementation of any legislative provisions to allow employers time to effect changes and employees time to adjust to them.

It is our members' experience that employers' confidence in employing staff is informed and improved by the provision of clear guidance where this is done. Any code or guidance produced for employers should include worked examples to make clear how their contents can practically be implemented. We recommend consultation with stakeholders on guidance as well as the underlying legislation. At its worst, poorly developed guidance can add to rather than remove confusion.

Government should seek to avoid making guidance so brief as to mislead employers nor so great that it cannot easily be digested by small and medium-sized businesses. Government should seek feedback from stakeholders as to how useful guidance is and be receptive to altering guidance to make it of more practical use where alterations are called for by employers or employees' organisations.

Question 3

What rights should be included in the set of fundamental protections?

ELA does not express views on the desirability or otherwise of particular substantive rights. Many of the issues raised by this question are therefore beyond ELA's remit. In any event, in the time available, it would not have proved possible to canvass ELA's members' views on this wide ranging question.

Question 4

Where do the processes required by the rules hinder the outcome that they are seeking to achieve?

ELA comprises lawyers and not economists so we have no professional expertise in assessing what is an efficient labour market and also suspect it may mean different things to different constituent parts of the working population. We do believe however that well drafted and designed

legislation will avoid complexity and cost and that unnecessary requirements to produce reports and paperwork are likely to lead to inefficiency. In the time available therefore we have identified some specific areas of employment law and regulation which we believe are in need of review in order to achieve greater efficiency. In addition we observe that it cannot be in the best interests of the economy to have so many different government departments having responsibilities that impinge on the regulation of employment with manifestly different agendas.

Question 5

What criteria should determine which rights are directly enforced by Government and which by the individual?

The fact that there are a number of bodies each independently enforcing aspects of employment law has been identified as a problem area for some time. Indeed this was an area of focus for the last (Labour) Administration and led to the establishment of the Vulnerable Worker Enforcement Forum in June 2007. Following its conclusions, the new Pay and Workrights Helpline was set up 2 years ago (September 2009) as a single point of entry into the system. In this respect given the number of enforcement agencies (HM Revenue & Customs, DEFRA, the Health & Safety Executive, the Employment Agency Standards Inspectorate and the Gangmasters Licensing Authority) we can see some advantage in consolidating these bodies into a single fair employment agency as the CAB and others have proposed.

The issue is arguably increasing in importance given the anticipated response to the Resolving Workplace Dispute Consultation, and the fact that many of the proposals currently being considered (and in certain cases already announced) may serve to exclude some least well paid members of society, from enforcing those employment rights to which they may be entitled. For example, the Government has recently said that they will be introducing a system of charging fees for claimants who wish to invoke the jurisdiction of the Employment Tribunal. Those with modest incomes and few financial resources may, as a result, be prevented from being able to enforce their rights.

As to criteria for determining which rights should be directly enforceable by Government, we believe these should include those rights, the breach of which may constitute criminal or quasi criminal activity. Breach of these laws may be said to be an act of exploitation on the part of the employer, rather than a more “straightforward” breach of contract or more “ordinary” breach of employment legislation or obligation. This is doubtless why we have enforcement systems for the national minimum wage, the agricultural minimum wage, the 48-hour average working week requirement, employment agency standards and gangmaster licensing.

It seems to us that the public has an interest in ensuring these criminal or quasi criminal activities are adequately policed and enforced. Of course it could also be argued, that the public has an interest in *all* employment rights being enforced. Drawing the line is not easy. Arguably the Government has itself blurred the distinction given its proposals for Employment Tribunals to impose financial penalties on employers who have been found to have breached individuals’ rights. These prospective financial penalties are not to be paid to the individuals whose rights have been transgressed, but to the Exchequer. That would indicate the Government recognises there is a public interest in enforcing such rights and arguably in those circumstances, given that public interest, it should be the responsibility of publicly funded enforcement bodies to ensure compliance.

Working Party members

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