Employment provisions in the Small Business, Enterprise and Employment Act 2015

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Employment: What does the Small Business, Enterprise and Employment Act 2015 mean for those advising on employment tribunal cases, whistleblowing and zero hours contracts? David Bowden of David Bowden Law comments on the 2015 Act which has now received Royal Assent.

Original news

The Small Business, Enterprise and Employment Act 2015 received Royal Assent on 26 March 2015 in a final swathe of Bills that passed all their parliamentary stages before Parliament was dissolved. This note deals with the employment provisions in the Act. There are other notes on this Act, which deal in more detail with the Act's provisions on finance and the pub code adjudicator.

How does SBEEA 2015 affect the position around whistleblowing?

The Public Interest Disclosure Act 1998 sets out the initial framework with its stated purpose to protect individuals who make certain disclosures of information in the public interest. It is worth remembering that PIDA was enacted following a number of things that happened that it was thought could have been prevented if workers had been freer to raise workplace concerns, such as:

- Zeebruge ferry disaster,
- Clapham junction rail crash,
- Piper Alpha explosion,
- Financial scandals:
  - BCCI,
  - Robert Maxwell,
  - Barlow Clowes, and
  - Barings.

The BIS Guidance Notes that accompanied the Bill, said its intention was that workers who made PIDA protected disclosures have the right not to be unfairly dismissed or suffer detriment as a result. But for this protection to apply a worker must make sure the disclosure is either made internally to their employer or another responsible person or to specified external bodies. This is given effect in section 149 of SBEEA [which insert a new sections 49B into the Employment Rights Act 1996 (ERA)].

BIS also stated it wanted certain public bodies to report annually on disclosures made by workers. This is given effect in section 148 of SBEEA (which inserts a new section 43FA into the ERA. This part of SBEEA did not come into force on Royal Assent. The Coalition Government consulted in August 2014 as to which organisations should be a prescribed body. Whilst BIS issued its response paper on 12 March 2015 with the draft Prescribed Persons (Report on Disclosures of Information) Regulations 2015, these have yet to be finalised or laid before the new Parliament for approval. The response paper seems to contemplate that the reporting duty will only apply to "regulators" but it is not clear if the scope will be widened. Some regulators said they collected data on "complaints" and said it was a difficult line to draw between those and PIDA protected disclosures.

Is the NHS treated differently on whistleblowing?

The Employment Appeal Tribunal (EAT) held in *Parkins v. Sodexho* [2002] IRLR 109 that a PIDA protected disclosure covered a breach of a worker's own employment contract. That decision was reversed by the Enterprise and Regulatory Reform Act 2013 (ERRA) and is not disturbed by SBEEA.

The reversal of *Sodexho* in the 2013 Act troubled BIS as it related to the NHS where in some quarters it was official NHS policy to encourage whistle blowing. "NHS public body" is precisely defined in s149 of SBEEA with a list of 15 NHS organisations such as:

- NHS Trust or foundation trust,
- Clinical commissioning group,
- NICE or Health Research Authority, etc.

Section 18 of ERRA removed the requirement that a PIDA protected disclosure had to be made in good faith. However in relation to remedies available to an Employment Tribunal (ET) any award could be reduced by 25% if an ET found that a disclosure was not made in good faith. SBEEA goes further than this in relation to NHS employees. The new s49B of ERA gives BIS the power to make regulations prohibiting an NHS employer from discriminating against an NHS employee because (s)he has made a protected disclosure. We have yet to see these regulations and BIS will have to consult both the Welsh Assembly and Scottish Government before making these regulations.

What changes does SBEEA 2015 make to the ET system around financial penalties?
Section 15 of the Employment Tribunals Act 1996 (ETA) provides that awards made by an ET can be enforced in the same way as if were a county court judgment and section 142 of the Tribunals Courts and Enforcement Act 2007 extended this to awards made by ACAS. BIS in its Guidance Note that accompanied the Bill state that only around half of claimants receive any form of payment for their ET award prior to enforcement. Instead of seeking to improve enforcement and strengthen links between ETs and county court, the SBEEA tackles the wrong target. It confuses ET awards with a parking enforcement type scheme.

The Guidance Notes proposed that first an employer who did not pay sums awarded by an ET would receive a warning notice giving them 28 days to pay up. If they did not pay, a penalty notice would be issued with the penalty set at 50% of the sum owed – with a minimum penalty of £100 and a maximum of £5000. Penalties would be paid to BIS and into the Consolidate Fund rather that to the courts or tribunal system. If an employer pays up within 14 days of a penalty notice, then like a parking ticket, the penalty would be reduced by 50%. There is 28 days to appeal a penalty notice.

This is all given effect in section 150 of SBEEA which inserts new sections 37A to 37Q of the ETA. The scheme envisages there will be “an enforcement officer” but it is not clear who this will be.

Are these to be welcomed?
Whilst this part of SBEEA may generate work for whichever outsourced service provider is awarded the contract to operate the scheme, its focus seems to be on recovering penalties for BIS rather than ET awards for workers. If BIS is going to find funding for enforcement officers for its penalties, the question has to be asked why neither ETs nor county courts can be better resourced so that unpaid ET awards can be prioritized and enforced more effectively.

In its Guidance Notes BIS also said it wanted to deal with what it perceived to be a problem with ET cases where there were “unnecessary” or “short notice” adjournments of cases. To do this, BIS proposed a limit on the number of applications for a postponement either an employer or worker can make; and to introduce cost order penalties in ETs. These proposals are given effect in s151 of SBEEA which introduces new section 7(3ZC) and 13 to the ETA. This leaves to regulations (drafts of which have not yet been produced) to determine what is a “late postponement”. Many ETs block list cases on the basis that a proportion will settle anyway and so the effect of cases being postponed does not of itself mean tribunal or judge’s time is wasted.

What is the significance of the provisions relating to zero hour contracts?
BIS ran a consultation on zero hours contracts from December 2013 to March 2014. Unsurprisingly this attracted an overwhelming response with BIS receiving 36,000 submissions. Of all the things the coalition government could have done on zero hours contracts, in the end it focused on only one thing – that is exclusivity. In the BIS Guidance Note, it said 83% of consultees were in favour of banning exclusivity – that is a zero hours contracts that states that a zero hours worker is not able to work for any other employer. BIS’s stated intention is to allow all workers on zero hours contracts whose current employers are unable to offer them enough work to boost their income by working elsewhere. BIS felt that the existing system was lop-sided.

This is given effect in s153 of SBEEA which inserts new s27A/s27B into the ERA. Again this is an enabling provision with the detail left to secondary legislation. In its March 2015 paper (Government Response to the ‘Banning Exclusivity Clauses: Tackling Avoidance’ Consultation), BIS was concerned that employers may seek to try to avoid an exclusivity ban. This paper contains the draft Zero Hours Workers (Exclusivity Terms) Regulations 2015 which have yet to be laid before Parliament for

approval. Regulation 2 provides that any provision of a "prescribed contract" which prohibits the worker from doing work or performing services under another contract, or prohibits the worker from doing so without the employer's consent is unenforceable against the worker. The draft regulation proposes that this will only applies to workers who are paid £20per hour or less. Regulation 3 states that a worker must not be subject to "detriment" if (s)he does work for another employer. ETs are given powers to determine if there are breaches and to order compensation or make declarations accordingly.

Is there still any ambiguity around the legal status of such contracts?
The ERA contains no specific provisions about zero hours contracts. For there to be a valid employment contract there needs to be mutuality of obligation and it is not clear that this will always be the case. This is the test set out by the House of Lords in *Carmichael v. National Power PLC* **[1999] ICR 1226**. Here the House found as a matter of construction that on letters exchanged between the worker and employer that there was no obligation on the employer to provide casual work nor on the workers to undertake it, and consequently there was an absence of the irreducible minimum of mutual obligation necessary to create a contract of service.

There are conflicting decisions from the EAT on this in relation to zero hours type contracts. In *Saha v. Viewpoint Field Services Ltd* 2014 WL 1219929, Judge Shanks on 20th February 2014 considered the position of a telephone interviewed engaged by a market research organisation who had working patterns which varied from 7 to 43 hours a week. The worker had occasionally declined work. The EAT declined to interfere with the ET's decision that there was insufficient mutuality of obligation to be an employment contract which gave the worker unfair dismissal rights.

In *St Ives Plymouth Ltd v. Haggerty* 2008 WL 2148113, a 3 judge EAT presided by Elias J had to decide if there were mutual obligations subsisting between the employer and a casual worker during periods when she was not actually engaged on any particular shift. The casual worker was a bindery assistant who covered for periods of peak demand. The EAT found that it follows that a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided. The issue for the tribunal is when a practice, initially based on convenience and mutual cooperation can take on a legally binding nature.

In finding mutuality of obligation and a binding employment contract with unfair dismissal rights the EAT pointed to factors such as:

- the lengthy period of employment,
- the fact that the work was important to the employers,
- the work was regular even if the hours varied, and
- an obligation to distribute the casual work fairly.

These 2 EAT decisions which are difficult to reconcile give a free rein to ETs in deciding cases before them involving zero hours contracts. Only a decision of the Court of Appeal can put this matter beyond doubt.

Following the general election, could the provisions in SBEEA 2015 be subject to change in the near future?
Nearly 700,000 people were employed on a zero hours contract between October and December 2014, according to figures from the Office for National Statistics. The figure of 697,000 is a 0.4 per cent increase from the same period in 2013. David Cameron was forced to admit in his interview with Jeremy Paxman that he could not survive on a zero hours contract.

In the Conservative Party manifesto for the 2015 General Election, it promised to take further steps to eradicate abuses of workers, such as non-payment of the Minimum Wage, exclusivity in zero hours contracts and exploitation of migrant workers. However a far greater focus was given to preventing strikes by worker. The manifesto included these proposals:

- Strikes should only ever be the result of a clear, positive decision based on a ballot in which at least 50% of the workforce has voted,
- In health, education, fire and transport a strike proposal would require the support of at least 40 per cent of all those entitled to take part in strike ballots as well as a majority of those who actually turn out to vote,

- A repeal of restrictions banning employers from hiring agency workers to provide essential cover during strikes,
- Strikes cannot be called on the basis of ballots conducted in previous years,
- Measures in relation to intimidation of non-striking workers, and
- A transparent opt-in process for trade union subscriptions.

On 19 February 2015, in Northern Ireland the Department for Employment and Learning announced it was looking at potential measures relating to zero hours contracts. This included not just measures banning exclusivity clauses in contracts that do not guarantee any hours but also:

- a right for a worker to request a fixed working pattern if that is what they have worked over a period of time, and
- an obligation on employers to review a regular working pattern with a view to converting it to a fixed hours contract.

As to the minimum wage, the SNP has said it wants to increase this in Scotland and it may feature in the 2016 election for the Scottish Parliament. This may bounce BIS into increasing the minimum wage across the UK. Finally, it would be preferable for legislation to reconcile the conflicting EAT decisions on which zero hours contracts have mutuality of obligation and accordingly give rise to unfair dismissal type rights.

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