

## **Speech to Employment Law Bar Association**

**2<sup>nd</sup> November 2009**

Thank you for inviting me this evening. I am pleased to have this opportunity to discuss some of the employment issues and issues relating to work more generally that are most pressing at the moment and that I am sure are of interest to many of you here. As both Shadow Secretary of State for Work and Pensions and Shadow Minister for Women and Equality my interest in this area comes if you like from two different angles. What I would like to do tonight is both touch on some of the issues in my brief relating to equality that might be most of concern to you, but also set out our approach to one of the most pressing issues for government namely welfare reform and how to tackle the rising level of unemployment. .

These issues interconnect in a variety of ways coming together in the interesting question of the structure and nature of the workplace of the future. More of that later.

First to equality. This is an area that has certainly not been quiet over recent years. Since the Discrimination Law Review and the establishment of the Equality and Human Rights Commission in 2007 there has been an increasingly vocal debate about equality in the workplace and the role of employment law. This debate is to be welcomed and the Conservative Party has played its role fully. I am proud that Conservatives have been leading the debate on issues such as equal pay, flexible working and shared parental leave. The workplaces of the coming decades will not look like the ones of the past. Younger people's expectations of their

relationship with their employer have changed. The evidence is that Generation Y is more willing to mix work and home life and are less rigid in compartmentalising time in the workplace and time outside it. We are also likely to see women continuing to take more senior positions in all areas of business and public life.

Government, of whichever party, needs to take a measured approach. There is a legitimate role for the Government to encourage equality in the workplace, and to make sure that the right legislative framework is in place to achieve this. But it is also incumbent upon the Government not to burden businesses with red-tape or make the legal structure overly complex so that people – businesses and employees – are unclear on where they stand.

## Equality

This government has greatly increased employment regulation. 25 Acts of Parliament and 250 secondary laws dealing with employment have been passed. These form a major element of the £76 billion of regulatory costs which has been identified as having been imposed on business since 1998. This level of red tape has left employers, and particularly small businesses, feeling hugely frustrated.

When it comes to equality, we need to acknowledge that there are large groups of people – perhaps some of you in this room – who sigh quite heavily whenever these issues are raised. Some in the business community are extremely wary of the equality agenda and the role of government in promoting it. I understand those concerns. We need to acknowledge that, over recent years, ‘equality’ has been given a bad

name. For many people equality is seen as something that is available to others and not to them. There are people who feel that their “group” is never the one that benefits from equality legislation. Perhaps the best example of this phenomenon is the tension in the workplace when those with caring responsibilities exercise their right to request flexible working. Irritation all too often builds up among those who feel they are left to pick up the work.

But it is also true that for too many people, equality has become about bureaucracy and box-ticking, getting in the way of business efficiency particularly in our small companies. Equality should never be the enemy of common-sense. Equality should not get in the way of businesses but help them work better.

That is why, even in the middle of a serious recession, I supported the Government’s decision to bring forward an Equality Bill as an attempt to streamline and simplify equality legislation. There are many aspects of the Bill to be welcomed. For example, the merging of the existing public sector equality duties on race, gender and disability into one single equality duty will help to simplify matters. But overall the Government has spoiled the good bits with too much that is overly bureaucratic or unworkable.

There are several aspects of the Bill that are particularly pertinent to employment and recruitment. If you will allow me, I will briefly touch on some of the key issues and hopefully give you a clear insight on where the Conservative Party stands on each.

Equal pay

Firstly, equal pay. I have been campaigning on this issue for some time and there is without doubt a real issue to be addressed. The causes of the gender pay gap are complex but those causes do include outright discrimination. That is why we launched our 'Fair Play on Women's Pay' campaign in 2007 and we have been pushing the Government to do more on this. We set out a series of measured proposals including compulsory pay audits for companies found guilty of discrimination. The emphasis of equal pay policies should be on incentives to encourage pay equality rather than punitive measures. However, there will continue to be a need to protect employees from employers who fail to conform to equal pay legislation. So we believe that an adverse tribunal decision against an employer should automatically trigger a pay audit. This will also get over the problem of individuals being required to take cases against employers.

We also proposed tightening up the law in regards to the material factor defence. As you will know, the Equal Pay Act provides for a material factor defence in cases where a variation in pay is not due to gender. Tribunals are not presently required to agree that such a material factor is reasonable, only that it was the cause of the pay difference and that it was not discriminatory. We believe that the Equal Pay Act should be amended to introduce a 'reasonableness test' for the material factor defence, which would make it easier to identify cases where pay discrimination is indirect, and not just direct.

The Government seems to have gone from one extreme to the other on this. Having done little over recent years to tackle the pay gap, they are now putting forward clumsy proposals in the Equality Bill to require

every company with more than 250 employees to undergo a pay audit, regardless of whether they have been found guilty of discrimination. This will not only cost businesses financially through increased paperwork, it will damage the cause of fair pay by again associating ‘equality’ simply with increased bureaucracy. There is an important balance to be found between punishing discrimination and deterring unfair practice on the one hand, and maintaining minimal levels of regulation on the other. I think the Government is now going too far in one direction and they should adopt our measured and workable proposals instead.

On a linked point, the Government has also proposed to outlaw gagging clauses which prevent staff for discussing what they are paid. Such practices could potentially entrench unfair pay practices and we support the Government’s proposals here.

#### Positive action

The second issue to mention is positive action in recruitment. This proposal has attracted a fair deal of attention and criticism. The basic proposal, as it was originally stated, was to allow organisations to take into account the diversity of their workforce when recruiting, but only in cases where there are two candidates of equal merit. For example, a primary school that has only female teachers and has two candidates for a job of equal merit – a man and a woman – could appoint the man in order to address the imbalance of their workforce.

Put like that, I have no problem with this proposal. However, we have been clear all along that this must only be a tie-breaker in the rare situation in which there are two genuinely equally qualified candidates.

The Government has been somewhat less clear. Harriet Harman recently suggested that she wanted to use the legislation to pack the boards of nationalised banks with women. She said, ‘It is about saying, “because you are a woman I’m going to put you in this promotion”.’

That deeply patronising approach is precisely not what this proposal should be about. The Government have given the impression that this would allow widespread positive discrimination. An explanatory document produced by the Government stated that the proposal might allow a police service to give preferential selection to candidates from an ethnic minority where there are ‘a number of equally qualified candidates’. I cannot think of a situation where there would ever be ‘a number’ of genuinely equal candidates assuming that number is larger than two. However, the document went on to say that positive action in this situation would not be unlawful so long as ‘the comparative merits of other candidates were...taken into consideration’. I don’t think you have to be a lawyer to see that taking into consideration the merits of other candidates is not the same as only allowing positive action where there are actually two candidates of equal merit.

So the Government has been confused about this. Either it is a limited measure, to be used only as a tie-break in rare cases, or it will allow positive discrimination as a widespread recruitment policy. We have been pushing them on this but we will only support the former approach and not the latter.

Pre-employment questionnaires

Thirdly, there is the question of what information it is legitimate for employers to ask before the offer of a job or even the offer of an interview is made. This is an issue of concern to those with disabilities or longer-term health issues, and particularly to those who suffer from mental health conditions. The Royal College of Psychiatrists has said that people with mental health problems face serious discrimination in the employment process, particularly through the attitude of employers

I am increasingly concerned about the amount of information that employers are requiring from job applicants about their health or disability status as part of the application process. We need to make sure that there is a level playing field for those with health issues, particularly as it is people in this situation who are more likely to have been out of the workplace for some time and consequently find it harder in any case to get back into the workplace.

Clearly there are some situations in which an employer needs to know about a particular health condition – for example, when special arrangements have to be made for the interview itself, or where a condition would seriously affect a person's ability to do the job. However, generally speaking we do not believe that details of an illness or disability should be required to be revealed until after a job offer has been made. We have therefore tabled some amendments to the Equality Bill that would limit an employer's ability to produce pre-employment questionnaires which ask about an applicant's health or disability. This is particularly relevant to illnesses or disabilities that would not be visible during the interview, such as mental health conditions or HIV; the aim being to ensure that such issues are not a factor in the decision on a job offer. The purpose of this is not to trick employers but to ensure that the

job application process is fair and equitable for all. Once the offer of a job has been made, a discussion can then take place as to what reasonable adjustments the employer might be required to make under law.

The important thing is to ensure that a structure is in place that encourages employers not to make decisions based on inadequate information or fear, which are often at the root of discrimination. The important thing is to ensure that employers are given every opportunity to do the right thing. The most important development will of course be employers having a greater understanding of disability and mental health and a more open attitude to employees with such issues. Many businesses are already doing this and organisations such as the Employers' Forum for Disability do an excellent job communicating the business case for hiring a more diverse work force. But we need to be better at convincing businesses that disabled people and those with other health conditions have the potential to bring added value to their operations.

### Flexible working

A further important issue is flexibility in the workplace. This is not so much relevant to the Equality Bill but certainly feeds into the wider debate about equality in the workplace. Flexibility works both ways – we need flexibility for employees and families, so that we can get more people into work, and flexibility for employers so they are not deterred from creating the jobs necessary to move the economy forward.

Encouraging flexible working practices will be key to making the most of all the talent of our workforce. As with equal pay, the most important step will not be any one government measure but the development of a culture

within business that values flexibility and recognises the benefits of working arrangements that work for all staff. Experience so far has shown that because of caring responsibilities, women are more likely than men to seek to work flexibly. However, jobs currently available on a flexible basis tend to be more poorly paid than jobs with 'conventional' hours and working practices. This correspondence between flexible working and low pay has significantly contributed to the gender pay gap. The right approach to tackling this problem is to extend the option of flexible working as widely as possible. This would broaden the variety of jobs available on a flexible basis, including better paid jobs, and would also help reduce the stigma all too often associated with flexible working.

In the past flexible working has been seen as predominantly for women with children. This has led to some of the tensions in the workplace which I referred to earlier. If we are to widen the offer and take up of flexible working it is key that it is recognised as not just something that is offered to women with children or even to people with caring responsibilities. For some people with long term conditions such as rheumatoid arthritis flexible working may well be the difference between being able to be in a job or not.

To encourage flexible working firstly we need to work with businesses, including SMEs, to make sure that the existing regulations are as simple and easy to implement as possible. Beyond that, we need to extend the right to request flexible working to all parents of children aged 18 or younger. Following pressure from the Conservatives the Government has agreed to extend this to parents of children aged up to 16 but I still think there is scope to go further. Our aim is that in time flexible working should be available to as many as possible. Of course, many businesses

make use of flexible practices without ever thinking of it under the banner of ‘flexible working’. Working from home, job sharing or even flexibility in shift patterns are all forms of flexible working. Many businesses are embracing this, finding that it increases staff commitment, productivity and retention. Indeed the recession has led many businesses to adopt flexible working practices in order to get through recession. So for example we have seen companies putting people on short time working. It is possible that as a result we will see a greater willingness to embrace flexible working in the future.

Flexibility for parents should begin as early as possible. That’s why we have been calling for dramatic changes to the system of maternity and paternity leave. We need a system of leave that maximises choice for parents and allows them, as far as possible, to make the major decisions about how to balance their family, work and other commitments. Conservatives believe that it is for parents to choose the arrangements that suit them best. I am pleased that the Government now seem to acknowledge this and that they are supposedly taking steps to allow mothers and fathers to share maternity leave. But this does not go as far as our system of Flexible Parental Leave which we first proposed in 2007. Under our system the first 14 weeks of paid maternity leave would apply automatically to the mother, allowing her to recover from childbirth and to develop a strong bond with her child. However, it would then be for parents to decide how to use the remaining time. Many will choose for the mother to continue taking it. But for others the father can take over, or – crucially – both the mother and father could decide to take leave simultaneously.

The evidence shows that the more involved the father is in the first six months, the more likely it is that he will continue to be involved at a later stage. Equally, a high level of paternal involvement in the child's first six months has a positive impact on their cognitive and social development. But the point is for parents to have the choice.

Flexibility is also important at the other end of the age spectrum: older workers. We have said for some time that we want to move to a point where retirement is a process rather than an event and it is clear that flexible work practices could greatly help people approaching retirement to gradually reduce their working hours or to find new ways of working that allow them to continue working more comfortably up to retirement. As part of this we obviously need to review the Default Retirement Age. The recent test-case in the High Court, based on the ruling of the European Court of Justice, reaffirmed the need for the Government to justify the Default Retirement Age and I welcome the Government's decision to bring forward its review of this. The High Court case was an important development in convincing the Government to do this. More and more people will want to work beyond the default retirement age, and we should encourage and support that where it is practical to do so.

Indeed as we made clear at our recent Party conference, people will have to work longer in future anyway. Should we be elected into government next year, we will initiate a review of the timetable for raising the state pension age from 65 to 66. But no change would start to take place until 2016 for men and 2020 for women. As longevity increases we need to look at how long people are in the workplace. Bringing forward the increase in the state pension age will make it more affordable to restore

the link for state pensions with average earnings – which will benefit all pensioners.

## Welfare Reform

I said earlier that I wanted to say a little about our approach to welfare reform. While this does not strictly fit under the heading of equality issues it does fit in with our approach on flexible working particularly in relation to our proposals to ensure more people who are able to work but claiming Incapacity Benefit are able to get into the workplace.

Obviously against the background of recession it is harder to get people into work as there are fewer jobs available. But I am certain that this is not a reason to give up on welfare reform indeed the recession makes welfare reform all the more important. We must ensure that as we come out of recession and as jobs become available not only are people who are more recently unemployed equipped with the skills they need to get into jobs but also we don't see an increase in the number of people who are long term unemployed but we do start to reduce the number of people who are long term unemployed.

Our approach is to work with the private and voluntary sectors harnessing their expertise at getting people into work, and paying them by results. The Government has made some steps in this direction already but there are crucial differences between us. We will intervene earlier with young unemployed people being referred to welfare to work providers after six months – not ten or twelve as currently. We will cover more people – we will include people currently on Incapacity Benefit who are assessed as being able to work and they will be referred to specialist help straight

away. We will pay by results and a result will be a sustainable job – not just 3 or six months but a year; and we will pay more for people who are harder to help recognising that the costs for this group are higher. Welfare reform is desperately needed. We need a system that focuses on getting people into work and that’s what our proposals will deliver.

## Conclusion

These are some of the key issues that will help shape the kind of workplaces that we have for many years to come. There are real problems to be addressed – the complexities of equality regulations, the persistent gender pay gap, the difficulty that some with disabilities and mental health conditions have in getting into the workplace, and the lack of flexibility in working practices. Simply creating new regulations and piling more bureaucracy on businesses will not provide the answer. But the law does have an important role to play. Without being heavy-handed, there is clear scope for aspects of the law to be tweaked in order to provide better protection for employees who might face discrimination.

The Government needs to create the right regulatory framework for equality to flourish. That doesn’t mean assuming that all businesses are out to cheat their employees and imposing the same sanctions on every employer whether they are guilty or not. But it does mean taking a measured and reasonable approach and using the law effectively to deter unfair practices and punish discrimination where it occurs.

But the biggest change will not be any one law or piece of regulation. We need businesses to embrace this agenda, not because they have to but

because it is good for them and good for their employees. Equal pay, flexible working, fairness in recruitment – these things help our businesses flourish as much as they support employees. Equality is for all times, not just good times. The recession should not change our commitment to it, and it would be disappointing for this chance to make real progress on equality issues to pass. But it would be worse for us to allow a Bill to go through with flaws that could set the equality agenda back. So we will be working with the Government to improve the Equality Bill and, should we win the next election, we will work on this *with* businesses, not against them.

We also need to accept that the workplace of the future will be different from the past. The old rigidities will be less evident. There will be more flexibility. Employees will expect more from their employers. This will not be achieved by government edict but again can only be achieved by working with employers, highlighting good practice and encouraging innovation. It also means that government itself needs to set a good example. Only by working with employers and employees will we develop workable equality policies that genuinely advance the cause of fairness in 21<sup>st</sup> century Britain.