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GENERAL COMMITTEES

Public Bill Committee

ENTERPRISE AND REGULATORY REFORM BILL

Ninth Sitting

Tuesday 3 July 2012

(Afternoon)

CONTENTS

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Saturday 7 July 2012

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: † Hugh Bayley, Mr Graham Brady, Martin Caton, Mr Charles Walker

† Anderson, Mr David *(Blaydon)* (Lab)
† Bingham, Andrew *(High Peak)* (Con)
† Bridgen, Andrew *(North West Leicestershire)* (Con)
† Burt, Lorely *(Solihull)* (LD)
† Carmichael, Neil *(Stroud)* (Con)
† Cryer, John *(Leyton and Wanstead)* (Lab)
† Danczuk, Simon *(Rochdale)* (Lab)
† Davies, Geraint *(Swansea West)* (Lab/Co-op)
† Evans, Graham *(Weaver Vale)* (Con)
† Johnson, Joseph *(Orpington)* (Con)
† Lamb, Norman *(Parliamentary Under-Secretary of State for Business, Innovation and Skills)*
† Morris, Anne Marie *(Newton Abbot)* (Con)
† Mowat, David *(Warrington South)* (Con)
† Murray, Ian *(Edinburgh South)* (Lab)
† O'Donnell, Fiona *(East Lothian)* (Lab)
† Ollerenshaw, Eric *(Lancaster and Fleetwood)* (Con)
† Onwurah, Chi *(Newcastle upon Tyne Central)* (Lab)
† Prisk, Mr Mark *(Minister of State, Department for Business, Innovation and Skills)*
† Ruane, Chris *(Vale of Clwyd)* (Lab)
† Simpson, David *(Upper Bann)* (DUP)
† Smith, Julian *(Skipton and Ripon)* (Con)
† Wright, Mr Iain *(Hartlepool)* (Lab)
† Wright, Jeremy *(Lord Commissioner of Her Majesty's Treasury)*

James Rhys, Steven Mark, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 3 July 2012

(Afternoon)

[Hugh Bayley *in the Chair*]

Enterprise and Regulatory Reform Bill

4 pm

The Chair: Before we resume the debate on amendment 19, I would like to draw the Committee's attention to a revision in the Chair's selection of amendments for this afternoon's sitting. The group of amendments to clause 17 led by Government amendment 2 will now comprise of Government amendment 2, Government new clause 2—as was on the selection list this morning—plus amendments (a) and (b) tabled to new clause 2. This is for the convenience of both sides of the Committee, but I make it clear that it will otherwise remain the practice of the Chairs not to select starred amendments. A revised selection list is available.

We will pick up where the Committee left off this morning. I invite Fiona O'Donnell to continue.

Clause 13

Power of employment tribunal to impose financial penalty on employers etc

Amendment moved (this day): 19, in clause 13, page 11, line 13, at end insert—

'(11) All monies in respect of financial penalties collected under this section shall be hypothecated directly to ACAS.'.—*(Fiona O'Donnell.)*

Fiona O'Donnell (East Lothian) (Lab): It is delightful to have you back in the Chair, Mr Bayley. I am sure you will be impressed by the progress we made this morning. I assure you that you can expect more of the same this afternoon and evening.

To recap briefly, I was speaking in support of my amendment. I was asking for the funds, which the clause proposes should go to the Treasury, to go to ACAS, where they would be better used as it is one of the main delivery agents. I am aware that the Government have been reviewing—as they do for all public bodies—the delivery of services from ACAS, and its performance and value for money. We would all agree, however, that while there will always be room for change and improvement, it is a key agent in supporting businesses and ensuring that they have access to information on a wide range of issues. As I said, it provides advice to employers and employees on just short of 100 areas. I therefore urge hon. Members on both sides of the Committee to support the amendment.

The Parliamentary Under-Secretary of State for Business, Innovation and Skills (Norman Lamb): As has already been said, it is a pleasure to have you back in the Chair, Mr Bayley. I hope you enjoy this afternoon.

I thank the hon. Member for East Lothian for her amendment. I entirely share her comments about the role and work of ACAS. It is an important organisation, and the Government strongly support it. I recognise that the motivation behind her amendment is to address, at least in part, the concerns that she and others have about the adequacy of ACAS funding, particularly in light of the additional burden that the introduction of early conciliation will place on it. We recognise absolutely those concerns. Indeed, on Second Reading, my right hon. Friend, the Secretary of State said that to deliver its new obligations

"it will be important to ensure that ACAS is properly resourced".—[*Official Report*, 11 June 2012; Vol. 546, c. 85.]

My officials are working already with ACAS colleagues to develop the details of the new process. Only then will we be able to understand what additional resources, if any, are required. We will, however, ensure that they are properly resourced to undertake their functions, including the new early conciliation role.

Once it is clear what is needed, it will be important for ACAS to be certain that that is what it will receive, and that that is what the current grant in aid mechanism provides. We cannot expect ACAS to function with some element of its annual funding dependent on what are, ultimately, discretionary decisions by a tribunal, even where that may amount to very little in the course of a year. Not only would such uncertainty be unhelpful in taking operational decisions but, if an element of ACAS's funding could derive from a matter in which it has been involved, it could undermine its impartial reputation and have a negative effect on its ability successfully to deliver early conciliation. I am confident that ACAS officers always act with the utmost integrity. However, such a measure may introduce a perverse incentive, meaning that, if there is no early settlement, ACAS could receive a payment further down the track as a result of a tribunal decision to order a penalty against an employer where there are aggravating features.

The existing mechanism for funding ACAS is the right one. We will ensure that it has the necessary resources to undertake all its functions, not just early conciliation. I hope that the hon. Lady will ask leave to withdraw amendment 19.

Fiona O'Donnell: I take some comfort from what the Minister said. I am glad that it is on the record that the resources that ACAS needs to meet the new requirements under the Bill will be made available to it.

Norman Lamb: It was on record before.

Fiona O'Donnell: Not, I hope, at the expense of other services that it provides.

I get the feeling of creeping paranoia from the Government Benches about everyone—lawyers and ACAS—seeing in the Bill an opportunity to make money for themselves and pervert the course of justice in respect of employment law. However, given the Minister's assurances, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Question proposed, That the clause stand part of the Bill.

Ian Murray (Edinburgh South) (Lab): Good afternoon, Mr Bayley. I echo my two colleagues in saying that it is great to see you back in the Chair for another fun-packed afternoon. I apologise to the Committee because I left the Minister's "How to maximise compensation at an employment tribunal" book in my office, so we shall be lost this afternoon without reference to that dusty tome of knowledge. *[Interruption]* If a Committee member runs to Waterstones, we might be able to get a brand new copy. *[Interruption]* Perhaps not.

We are trotting through the clauses with great speed, now. Talking of speed, my hon. Friend the Member for Hartlepool, the former Minister, is now the fastest Labour Member of Parliament on the Formula 1 challenge today. If we can keep up to that speed on the clauses, I am sure that we will be out of here—*[Interruption.]* Perhaps before recess, but certainly before the bells strike 12 this evening.

The Opposition proposed amendments to ensure that the employee awards were protected in the penalty system. My hon. Friend the Member for East Lothian sensibly promoted the idea that any fines be paid and ploughed back into the system to ensure that ACAS had adequate resources to carry out its tasks as proposed in the Bill. I am assured by the Minister, who has, to be fair, consistently said throughout the process that he would ensure that ACAS had the resources, even in the short term, to take forward the tasks. We support that.

The Minister will not be surprised to hear, for the 15th time, that the Opposition support in principle the financial penalties in respect of aggravating circumstances. Stating that such aggravating behaviour will not be tolerated in the system and that the penalties for doing so could be harsh is the right message to send to employers. However, there is an inherent contradiction in the Government's aims. On one hand, they are saying that the perception of and fear about the employment tribunal system is hampering business and its ability to take on employees, and that the solution is to dilute the rights of millions of workers and introduce a host of employment law changes. That is a missed opportunity fundamentally to reform the system from a strong evidence base, not based on anecdote and ideology. On the other hand, the Government are saying that the financial penalties give business the message that, if they are found guilty of unfairly dismissing an employee, they will be hit with a fine of up to £5,000 on top of the compensatory award that they will rightly have to pay to that employee. There is, therefore, a contradiction in the messages that are being sent to the employment sector.

Andrew Bridgen (North West Leicestershire) (Con): Given his remarks, would the shadow Minister support a balancing measure so that an employee who made a claim with little merit and aggravating factors could perhaps also be fined? Is he suggesting that?

Ian Murray: I am certainly not suggesting that. We have discussed vexatious claims in some detail during previous sittings of the Committee, and as the Minister has said, it would be dangerous for a lawyer or trade union to take a case to an employment tribunal if they felt that it was vexatious. Indeed, they knock out lots of claims where they feel that there is not a strong enough case. I am slightly disappointed that employment tribunal judges do little with the strike-out claims that they already have, and they could perhaps use them more. They are looking for natural justice on these issues, and I am sure the hon. Gentleman will agree that the message and rhetoric about the proposals that the Government are sending out is slightly confused.

This is a reasonable measure, but it would be up to judges to decide whether circumstances were aggravated. The fact that cost orders are not used as much as they could be may mean that these provisions will not be used at all. An employment tribunal is not a culture in which fines or penalties are distributed, and I fear that employment tribunal judges—one or two of them have hinted at this—may shy away from administering such penalty judgments because they feel that is not what the employment tribunal system was designed for. The judges would be the arbiters of what is seen as "aggravated", and it is disappointing that the Bill does not spell out what those features would be. I appreciate, however, that during the passage of the Bill, the Department will return with guidance to determine those aggravated features.

The explanatory notes mention

"where the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team, or where the employer had repeatedly breached the employment right concerned. The employment tribunal may be less likely to find that the employer's behaviour in breaching the law had aggravating features where an employer has been in operation for only a short period of time, is a micro-business, has only a limited human resources function, or the breach was a genuine mistake."

That means that the legislation will allow some leeway to smaller employers and micro-businesses where an aggravated breach may have been avoided had it been a larger business or had the capacity to deal with it, and that is the right approach to take.

I will return to a phrase that has been mentioned quite a lot in our debates, and the issue of satellite litigation around the penalties. I appreciate that there is the Employment Appeal Tribunal process for repealing any of these systems on a point of law, but this measure will put more uncertainty into a system that the Government already claim—in their own words—is uncertain and disproportionately hits small and medium-sized enterprises that may have to pay a fine. If a £5,000 fine is levied, a multinational company is likely to pay it within 21 days and have it reduced by 50%, whereas an SME may find it difficult to do that. I hope that the guidance will give judges the flexibility to take certain circumstances into account.

One wonders, however, whether the clause was inserted into the Bill as a mechanism for the Treasury to raise funds and much-needed cash for the Ministry of Justice. That returns to the point that I have made consistently over the past few sittings about the insertion of Ministry of Justice fees into the system, and evidence seems to suggest that this is a money-making exercise for the Treasury. The clause has not been consulted on, and it flies in the face of changes to employee rights and the Government's rhetoric about making things easier for businesses by taking perception and fears out of the system. It also seems to go against attempts to ensure that when someone is found guilty of an aggravated offence, energy is poured into ensuring that compensatory awards are given as directly and quickly as possible to the claimant.

[Ian Murray]

The 50% discount if payment is made within 21 days is what I call the parking ticket scenario; the Minister said that it was not the intention to give it that kind of tag. However, it suggests that the Treasury is looking to raise money off the back of the clause and indeed to ensure that it is paid as quickly as possible.

4.15 pm

We can envisage a scenario in which an employer made sure they paid the fine, to get the discount and effectively to get Government Departments off their back, while the poor claimant who had won their case and been granted compensation, particularly in an aggravated case, was left high and dry without the penalty. So, while the Treasury goes whistling all the way to its Consolidated Fund with whatever moneys come in through the fine, the claimant has to go through this process of appeal, trying to enforce their rights to the compensation that has been levied.

The Minister will say that this measure is designed to ensure maximum compliance with employment law, particularly in the most serious cases; I am sure that most of us in the room would agree with that. However, the vast majority of any tribunal award is in lost earnings and/or lost pension. If we take the scenario that the compensating award is for an exact loss of either earnings or pension, if compensation is awarded it is automatically 50% of that compensation value. Linking a penalty not to blameworthy conduct but the loss caused is ridiculous as a deterrent in these circumstances, because it is essentially being said that the individual circumstances of that claimant determine the level of award. There are some scenarios that I could point to that highlight that problem.

Let us assume that the claimant could not get a job for a year and was awarded £30,000 of lost salary. The respondent would be ordered to pay a maximum of £5,000, which would be reduced to £2,500 if paid promptly. So the determining factor in that scenario is the length of unemployment. But in other scenarios, assuming that the claimant in the first scenario got an equally well-paid job the following day, their loss of earnings would be zero. As such, the employment tribunal could fix the penalty at £5,000 if it wished, but the determining factor would be the tribunal's assessment of the employer's bad behaviour and not the compensatory payment.

These kinds of scenario can go on and on, but just let me give another scenario. Imagine four other health and safety representatives were all in the same boat as a claimant, and all five brought together a claim at an employment tribunal and they were heard together. Proposed new subsection 12A(5) prevents a separate penalty from being imposed for each, so human nature is such that each claimant would divide the penalty by five and see that as a value placed on their ordeal by the law and by natural justice. The employer could do the same and see it as "five for the price of one", because he would only be paying a penalty for the particular aggravated case against one employee and not the aggregate of all five. So there is a real problem in terms of how this is worked out and relating it directly to the compensation awards that are actually paid.

When we are looking at the scenarios I have just given, we must consider the extent to which the penalty would improve the future conduct of the respondent. There is no doubt that having a fine of £5,000 and going through the employment tribunal process, and the fine being aggravated, is a way of improving future conduct, so that has to be a measurable outcome of the clause. The extent to which it would have any impact on employer behaviour more generally—I know that many commentators have said there should perhaps be a "three strikes" type policy, in terms of these aggravated features. While that would be very difficult to administer, particularly with regard to the different sizes of businesses, it is something the Minister could consider, as well as the extent to which the penalty actually helps anyone other than the Treasury in filling its coffers. That is one of the assessments that could be made.

My hon. Friend the Member for East Lothian laid out quite a compelling case by saying that if the penalties were ploughed back into the system they would be seen as something worth while, rather than just going into the Treasury for the Chancellor to use as he so wishes.

There is also a question about how much it would cost to collect these penalties and what would happen in the event that an employer who can afford to pay the penalty defaults on paying it. There is also the issue of whether or not, if the case was hypothecated to a body such as ACAS, that would perhaps encourage people who were reluctant to pay the penalty to do so.

Fiona O'Donnell: My hon. Friend will no doubt have heard the Minister voice concerns about a potential conflict of interest. Does my hon. Friend agree that the Government lack imagination? If landfill tax can be ploughed back into measures that are beneficial to the environment, why do the Government not use the funds raised from penalties in a way that is beneficial to the source from whence they came?

Ian Murray: I am grateful for that intervention. My hon. Friend is right to point out that, over the past few hours, the Government have talked about the vested interests of lawyers, ACAS, employment tribunals and the trade unions, but the only body with a vested interest in the clause is the Government, because the money will go straight into the Treasury's coffers. The Minister has to realise that we are not talking about vested interests; we are genuinely trying to improve the Bill's provisions and I am disappointed that our amendments have not been accepted.

We shall not vote against the clause, because the financial penalties, if operated properly, will be a deterrent for employers who have consistently behaved in an aggravated manner in relation to unfair dismissal claims, and will provide much-needed resources. I hope that the resources will be ploughed back into ACAS—although that will not happen as a direct result of our amendments, because they have been rejected—and that the provision has not been put together hastily as a cash grab for the Treasury. We have given the Minister food for thought for when he returns to the issue on Report.

Norman Lamb: I will begin by addressing the hon. Gentleman's point about our discussion this morning, which relates to the suggestion made by my hon. Friend

the Member for North West Leicestershire that there could be a link between the discount on early payment of a penalty and early payment of the compensation. That is an attractive proposition and we will give it the full consideration it deserves.

The hon. Member for Edinburgh South asked why the measure is linked to the level of the compensatory award. The idea is to make sure that it is proportionate and that there is a simple formula that everyone understands, so that we can reduce any risk of complexity as much as possible. I also want to make it clear that the ordering of a penalty is seen as the exception, not the rule.

Julian Smith (Skipton and Ripon) (Con): It is important that the Committee recognises the evidence that we were given by representatives from the employers groups, who all, to a man and woman, said that they were against this part of the Bill. I am concerned about very small companies in particular. We as a Government have also said that we would have a moratorium on any new burden of regulation on our micro-businesses, so I would be keen for that to be recognised on Report and for us to make things easier for our smallest companies. At this most difficult time, we seem to be risking adding an additional burden on them.

Norman Lamb: I am grateful to my hon. Friend for that intervention. I will try to reassure him on how we envisage the measure working. I think that he will see that it is intended to be the exception, not the rule, and that its design fully recognises the position of small businesses, particularly those without an HR function. I will deal with that during the course of my comments.

The hon. Member for Edinburgh South raised the concern that the measure was a cash grab, but I assure him that that is not its purpose. We see it as the exception, not the rule, so we do not envisage it raising much money. Its purpose is to act as a deterrent and to generate good behaviour in employers. He asked whether there is an inconsistency in our approach. It seems to me that our approach is absolutely consistent. We seek to get the right balance in all our measures, including steps already taken, such as the extension of the qualifying period for unfair dismissal. We are seeking the right balance between protection of employees and employers' concerns. Probably everyone in this room shares the view that we should discourage employers from acting through malice, to use one of the words from the explanatory notes that the hon. Gentleman used. That is what we are trying to address.

Not surprisingly, the proposal is supported by those who represent the interests of employees, although they would like us to go further and make the penalty payable to the claimant or ACAS. Those representing business have, as my hon. Friend the Member for Skipton and Ripon rightly pointed out, expressed concerns about the potential impact on business of the introduction of the measure.

As I have said, the purpose of the clause is to give tribunals the power to impose a financial penalty on an employer where they consider that the breach of the individual's rights had one or more aggravating features. It does not apply to normal unfair dismissal cases. That is an important point. It is our intention to encourage all employers to have regard to their obligations to behave responsibly to employees. We do not, as has been suggested, consider the clause as a revenue-generating measure.

Andrew Bridgen: Will my hon. Friend indicate how often he thinks the penalty might be imposed? Does he envisage that it will be 20% of awards, 10% or 1%? Also, does he agree that in the case of genuine rogue employers with a bad employment history compared to their number of employees, how often awards have been made at industrial tribunals should perhaps be taken into account when considering whether a penalty is payable?

Norman Lamb: My hon. Friend makes a good point, and I agree. It is a matter of judicial discretion. I do not expect the power to be used frequently. I will not place a percentage on it, because it is a matter for judicial discretion, but as I explain to him what factors we envisage will be taken into account, he may well find some reassurance.

The process is not automatic; it is discretionary. We listened carefully to the views of respondents to the "Resolving workplace disputes" consultation and to their concerns that an automatic penalty would unfairly penalise employers for inadvertent errors. That is not what this is about. As a consequence, we revised our proposal. Now, it will bite only where the tribunal considers there are aggravating features to the breach. We do not intend to prescribe what constitutes an aggravating feature; we are clear that the tribunal will be able to recognise them from the evidence before it.

However, we have set out examples in the explanatory notes, and I will deal with some of them. Where the breach resulted from a genuine error, or where the respondent is a small business without HR capability or a relatively new entity, I think that the tribunal would be unlikely to conclude that the penalty was appropriate. However, for the minority of employers who act without any regard for the law despite knowing what is required of them—companies, perhaps, with an HR function—a penalty is justified. It cannot be right that a rogue employer—I use that term advisedly to describe the sorts of circumstance that we are talking about—should be able to act with impunity when its competitors operate within the law. That is hardly fair competition.

Because the imposition of a penalty is a matter for the tribunal, we cannot know how often it will be used. I doubt that it will be used often enough to generate any significant amount of revenue. That is not our objective in introducing the provision.

4.30 pm

Julian Smith: Could the Minister clarify his earlier comments about the appeal process for employers? I am concerned that we are talking about new legislation—new regulation on the tribunals. What happens if an employer feels that they have been aggrieved by this proposal? There does not seem to be anything in the Bill. Is there any way in which we can clarify that, certainly on Report?

Norman Lamb: I can absolutely confirm that there will be an appeal against an imposition of a penalty, on the same basis as for other decisions of the tribunal. That basis is on a point of law. It is an appeal to the

[Norman Lamb]

Employment Appeal Tribunal, so it will apply in the same way as for any other decision of the employment tribunal.

There have been calls to make the penalty payable to the individual, but I would strongly resist that. The measure is intended to benefit all employees by encouraging employers to behave better. That is addressed only at those employers that fall below the standards that any decent person would expect. The measure is not intended to benefit individual claimants directly. The only effect of such a step would be to incentivise employees to bring speculative claims—the very opposite of the steps that we are taking to deal with concerns about weak claims. The employee gains nothing from a decision that an employer has behaved particularly badly in an individual case. They get the compensation for the loss that they have suffered, as I have explained.

I do not accept the arguments that I have heard that the introduction of financial penalties will lead more businesses to settle claims even where they have a strong case. I repeat: the tribunal will impose a penalty only where the evidence indicates that there has been an aggravating feature.

Andrew Bridgen: Could my hon. Friend clarify to the Committee that it will be possible for the employer to appeal the penalty while not appealing the tribunal decision relative to the employee?

Norman Lamb: Yes, it will be, because that will be a decision in itself of the tribunal, so that decision can be appealed to the Employment Appeal Tribunal.

Just as a tribunal will recognise an aggravating feature, so, too, will an employer. If they have behaved reasonably, they have nothing to fear and should not respond to any attempts by claimants to use this measure as leverage to settle an unfounded claim or to increase the amount of any potential settlement. If they have not behaved reasonably, they should indeed consider settling the claim, rather than defending the case. That is better for them, for the claimant and for the taxpayer. I am confident that this is the right approach. It is part of a balanced package of measures that we are introducing to reform the dispute resolution landscape. I commend the clause to the Committee.

Question put and agreed to.

Clause 13 accordingly ordered to stand part of the Bill.

Schedule 3 agreed to.

Clause 14

Disclosures not protected unless believed to be made in the public interest

Ian Murray: I beg to move amendment 69, in clause 14, page 11, line 20, at end add—

'(2) In section 43B of the Employment Rights Act 1996 (disclosures qualifying for protection), in subsection (1)(b), after "any legal obligation to which that person is subject,", insert "other than a private contractual obligation which is owed solely to that worker.".'.

The Chair: With this it will be convenient to discuss clause stand part. We will therefore not have a separate stand part debate on this clause.

Ian Murray: This may be only a three-line clause in an otherwise large Bill, but it is critical that we consider it in detail. The Opposition again—I think we are up to 16 instances now, if anyone is keeping count—support the spirit of what the clause tries to achieve, but feel that its wording could give rise to unintended consequences, which I will come on to. If the clause is merely there to resolve the anomaly created by the decisions in Parkins *v.* Sodexho and other related cases, the legislation should specifically mandate that issue.

The Public Interest Disclosure Act 1998 provides protection to both employees and workers. An employee's dismissal will be automatically unfair if it is because they have made a protected disclosure. Workers have the right not to be subjected to a detriment as a result of making such a disclosure.

Employees or workers bringing a whistleblowing claim would not be required to have a minimum period of service with the employer—the two-year qualification period would not kick in. This is a day one right. I think that we will go on to talk about the ability of whistleblowing to be used for reasons other than those intended in the original legislation. Importantly, as we discussed this morning, there is no limit on the compensation that can be awarded to an employee as part of a whistleblowing claim. So, we have a situation where case law has produced an anomaly in the spirit of the law and we have a day one right, as with discrimination, to uncapped compensation awards.

Those aspects are particularly relevant in seeking to understand the increase in these types of claims over recent years. It is important to preserve the whistleblowing aspect, but the reality is that high-salaried individuals have sought to use the day one uncapped compensatory protection to bring claims to satisfy the level of compensation that they wish to see redressed, rather than genuine unfair dismissal claims under whistleblowing legislation. Undoubtedly, a City banker earning £2 million per year is unlikely to take a normal unfair dismissal case, as it would be capped at the current award level of £72,300. Therefore, whistleblowing actions are considered to enable access to the uncapped element of compensation. We know that that is a fact. I apologise to the Minister, but we have spoken to many top City lawyers who deal in this field, and they have told us that they spend lots of time on that practice. *[Interruption.]* We can see that they are not affecting us in any way whatsoever. Given the fees they get for the whistleblowing uncapped compensatory awards, I am surprised that the Minister has not decided to return to his former profession. *[Interruption.]* A Member, from a sedentary position, said, "It won't be long." That was a dreadful thing to say. None the less, it is almost true.

It is important to state at this point that when the legislation was introduced it had cross-party support, but it is surely against the spirit of the legislation's intention that a number of conditions need to be satisfied for an individual to pursue any possible end claim, and this is where the complication arises. First, the employee must make a qualified disclosure, and under section 43B of the Employment Rights Act 1996, which is referred to in clause 14, there must be a disclosure of

information, the subject matter of which must show that one of the six types of malpractice has taken place. Those six types include: a criminal offence, which seems a fairly straightforward thing to prove; a miscarriage of justice, which again, could be clearly proven in any court of law; a danger to the health and safety of any individual, which is exceptionally important in areas such as the construction industry, where health and safety is paramount; damage to the environment, which could be determined as fairly straightforward; and a breach of any legal obligation, which is the item that has caused serious concern—it is where the problem that the clause tries to remedy arose. The worker must, of course, have a reasonable belief that one of those malpractices has occurred or is likely to occur, even if, importantly, the belief turns out to be wrong.

Secondly, the disclosure must be a protected one. It is encouraged that the disclosure is made to the employer in good faith. In March 2002, the Department issued its annual "Employment Law Review", which is always an interesting read in terms of the evidence base for the changes. It said:

"It has come to light through case law that employees are able to blow the whistle about breaches to their own personal work contract, which is not what the legislation (Public Interest Disclosure Act (PIDA)) was designed for."

That brings us to the case of Parkins *v.* Sodexho, which highlighted the problems with this breach of legal obligation, and is what the clause is trying to remedy. This very controversial case from 2002 established that there is no specific requirement for the disclosure to be made in the interests of the public, even though the title of the Public Interest Disclosure Act 1998 contains the words "public interest." It was held that a breach of an employee's contract of employment was a protected disclosure in that it complied with the malpractice of a breach of any legal obligation. There were a number of cases subsequent to that, which confirmed the Employment Appeal Tribunal's position. I will not go through them all, but they run up to 2007 and beyond.

The famous Parkins case had a huge effect on employers and employees. It now allowed employees to make protected disclosures where there were breaches of their employment contracts. This includes both express and implied terms of contract; for example, the implied duty of mutual trust and confidence between an employer and an employee. The Parkins case had significant and widespread implications for the PIDA regulations and what they were intended to do.

Employers are of the opinion that this case has allowed employees who think they are about to be dismissed to allege breaches of their own employment contract. If they are dismissed at a later date, they can rely on those breaches as protected disclosures. That will provide them with protection under PIDA, and if they are successful in their claim, there will be no limit on the amount of compensation they can receive, unlike an unfair dismissal claim where there is a statutory maximum that the Secretary of State can now alter upwards or downwards. Of course, there is no minimum period of service required.

It can be argued that the intention of PIDA was to allow protected disclosures to be made where there was a public element and not a disclosure relating to a single employee and a single employment contract. The principle that a complaint of a breach of contract could qualify as a protected disclosure was established through case law and not the legislation itself. I appreciate that the Bill is trying to remedy that problem.

The Government can amend the definition of the malpractice of a breach of "any legal obligation" to exclude breaches of employment contracts, and that is what our amendment specifically seeks to address. Further, the Government can reinforce that the intention of PIDA was to protect employees who made protected disclosures in the interests of the public and not complaints concerning a single employee about an employment contract. The Government need to specify the intention of the legislation, and perhaps be more precise, in the wording of clause 14, on when the legislation is applicable.

This is the crux of the issue. There is a significant danger in introducing a public interest test to whistleblowing claims. The important thing to remember is that any amendment to the legislation must be designed to deal with the Parkins issue and individual contract disputes. The amendment deals with the removal of the loophole by inserting that the PIDA legislation cannot be used for a private contractual issue, rather than a very subjective public interest test. The definition is so subjective that the implication will be that case law will again determine what is in the public interest and may mean that we are back in a Parkins *v.* Sodexho situation to determine that. The other aspects of PIDA are very clear-cut in terms of potential wrongdoing and criminality; this particular aspect is not.

The Bill is right to consider this issue, but the wording of the clause goes too far. The Government need to look at this very carefully and come back on Report with a solution to the problem, rather than a potential complication and an inadvertent weakening of the legislation.

There is also the issue of a failure to consult. The Minister is about to pass an amendment to important legislation without proper consultation. The unions, especially

the Union of Construction, Allied Trades and Technicians, have grave concerns about the operation of the whistleblowing public interest test and are very concerned that they have not been consulted. We heard from Public Concern at Work during the Committee's evidence sessions. Businesses also need to be consulted on how this will work in practice, or, again, the only winner will be the legal profession. We must make sure that we do not end up in a situation whereby case law is determining a Parkins II, in terms of the wording before us.

The clause must also not be a barrier to honest whistleblowers who can assist employers. Sarah Veale from the TUC, in her evidence in Committee a couple of weeks ago, was absolutely correct to say:

"I would have thought that most employers…would rather have an ill-founded whistleblowing, which could be dealt with and the issue addressed."—[*Official Report, Enterprise and Regulatory Reform Public Bill Committee,* 19 June 2012; c. 37, Q83.]

The alternative is a badly worded clause that may result in unintended consequences.

4.45 pm

I have some final comments that I hope the Minister will take into account in his response and on Report. Will whistleblowing be an aggravated unfair dismissal

and be subject to the provisions of clause 13? Will the Minister ensure that whistleblowing claims are kept off the employment tribunal register, to deal with the issue of blacklisting, in particular in the construction sector? That is a key concern of the Union of Construction, Allied Trades and Technicians, which deals with the construction industry. Will the Minister monitor the new provision closely, so that its operation is dictated not by case law but by what it is intended to achieve? We all agree with what the Minister is trying to achieve.

Fiona O'Donnell: Will my hon. Friend refer the Minister to a report that the Scottish Affairs Committee is undertaking on blacklisting, in particular in the construction sector, which is very much a live issue in my constituency?

Ian Murray: I am delighted that the Scottish Affairs Committee is doing some great work on blacklisting in that instance. It is a real issue in the construction sector, in particular in the current economic downturn. As I said this morning, many people in construction are happy merely to be in employment, which has given rise to a whole host of problems, including a significant increase in bogus self-employment, blacklisting and matters to do with whistleblowing and health and safety. That is why it is very important that the wording

"is made in the public interest and"

does not give rise to additional, unintended consequences and to satellite litigation that dictates how the policy is supposed to work. Unless we can get strong assurances from the Minister, we will be voting against the clause after the stand part debate.

Norman Lamb: I am grateful to the hon. Member for Edinburgh South for his amendment.

The amendment would, in addition to the inclusion of the public interest test that we propose, disallow Public Interest Disclosure Act claims based on breaches of an individual's employment contract. In a sense, the amendment seeks to add an additional hurdle for claimants to clear on top of what the Government intend.

Setting out the issue that the Government seek to address might be helpful. The original aim of the public interest disclosure legislation was to provide protection to individuals who made a disclosure in the public interest—otherwise known as blowing the whistle. The clause seeks to make that public interest clear, and the hint is in the title of the original legislation, which was designed to deal with public interest disclosure—that is what we are talking about.

As long as disclosure is made in good faith and in a specified way, the law protects a whistleblower from unfair dismissal, from being victimised by the employer or from otherwise suffering a detriment. The intention that any disclosure should be in the public interest was apparent on Second Reading as well as from the heading of the legislation. The Bill's sponsor, Lord Borrie, said in the House of Lords that

"the tribunal must be satisfied that that disclosure was reasonable, having regard, among other things, to the seriousness of the threat to the public interest".

That is how that was defined by the Bill's sponsor, who also said:

"As I hope I have made clear, this measure will encourage people to recognise and identify with the wider public interest and not just their own private position."—[*Official Report, House of Lords,* 11 May 1998; Vol. 589, c. 891.]

Under that legislation, if it is found that the public interest disclosure rules have been breached and that someone was dismissed for that reason, compensation is unlimited. That is a day one right, so it is right that that is limited to the small number of cases that the legislation was originally designed to address.

Julian Smith: Does the Minister agree that there is quite a number of hidden cases that are difficult for his Department to assess because, once claims are brought, big employers often settle them very early? Multinationals and larger companies have had to spend a lot of money to sort out such claims, but it is difficult to assess those numbers.

Norman Lamb: I am sure that that is right. The number of cases that go to a tribunal is always, in a way, the tip of the iceberg; there will be lots more cases than that. If a claimant who has had six months of employment and cannot therefore pursue an unfair dismissal claim in the ordinary way, turns to a lawyer or another adviser, they may explore whether there is a way of defining the case as a public interest one, particularly if, as a result of that case, reference can be made to some breach of or complaint about the employment contract. That case has allowed a potential massive expansion in the number of cases in which the individual concerned has not worked for the qualifying period of employment.

Ian Murray: I have the figures for the number of claims that have been brought under the legislation: in 1999-2000, there were only 35 cases, but that has risen to well over 1,000 completed cases last year, many of which were settled early. Will the Minister tell us whether that is because the legal fraternity are bringing cases as whistleblowing claims to get round the capped nature of unfair dismissal, or because employers are settling early?

Norman Lamb: It is always dangerous to be definite about cause and effect, but there is clearly some reason for the explosion of cases. There is no evidence out there that I have seen that there has suddenly been a massive explosion of employers getting rid of people for whistleblowing, so one imagines that the reason may well be the implications of that case, which has opened the door to a much wider group of claimants than was intended when the legislation went through Parliament. I have quoted Lord Borrie, who made it clear when he was promoting the Bill that it was designed to deal with public interest issues. The Government seek to legislate now to bring that Act back to its original purpose.

Concerns about blacklisting were raised by the hon. Member for—

Fiona O'Donnell: East Lothian.

Norman Lamb: I apologise.

Chris Ruane (Vale of Clwyd) (Lab): West Lothian, East Lothian.

Norman Lamb: Okay. I am glad to say that the hon. Gentleman has got the arm back on his glasses; I was very concerned for his welfare last week.

The hon. Member for East Lothian raised concerns about blacklisting, which is something to be condemned. People should be treated on their merits, and not excluded from employment, but blacklisting is itself unlawful. Action can be taken in respect of anyone seeking to do it, and it is important that that legislation is enforced.

To return to my explanation of the purpose of the clause and of why the Government have designed it in such a way, the decision in the case of Parkins *v.* Sodexho Ltd has resulted in a fundamental change in how the Public Interest Disclosure Act operates and has widened its scope beyond what was originally intended. The ruling in that case stated that there is no reason to distinguish a legal obligation that arises from a contract of employment from any other form of legal obligation. The effect is that individuals make a disclosure about a breach of their employment contract, where this is a matter of purely private rather than public interest, and then claim protection, for example, for unfair dismissal.

The ruling has left the Public Interest Disclosure Act open to abuse and is creating a level of uncertainty for business. Concerns have been expressed, underpinned by anecdotal evidence, which I appreciate is a dangerous word to use in this Committee, from lawyers—that is an even more dangerous word—that it is now common practice to encourage an individual to include a Public Interest Disclosure Act claim when making a claim at an employment tribunal, regardless of there being any public interest at stake. That has a negative effect on businesses, which face spending time preparing to deal unnecessarily with claims that lack a genuine public interest element. It also has a negative effect on genuine whistleblowers, by encouraging speculative claims. Furthermore, by widening the scope of the Public Interest Disclosure Act to allow claims of a personal nature, the effectiveness and credibility of the legislation is, in my view, called into question. It is common ground between all Committee members that those issues need to be dealt with.

The clause will amend part IVA of the Employment Rights Act 1996 to close the loophole that case law has created. The clause emphasises the need for there to be an issue of public interest involved when an individual is pursuing a public interest disclosure case. The Government support protection for genuine whistleblowers. The clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest.

John Cryer (Leyton and Wanstead) (Lab): There may be a worry in this regard. We have discussed extensively the prospects of satellite litigation. Does the Minister think that there is any prospect of satellite litigation taking place? Employers might threaten to, or employ a lawyer to, take action against somebody who has brought an action that is arguably not in the public interest, but is perhaps a borderline case. In such a case, if satellite litigation took place the threat of litigation might act as a disincentive to potential whistleblowers.

Norman Lamb: I do not regard that as a risk. However one defines the category of cases that fall under the legislation, there will always be arguments in tribunal about where the boundaries lie. The clause will make it clear that, when the individual is raising their concern at work, or otherwise, under the terms of the legislation, they must reasonably believe that they are making their concern known as a matter of public interest. That is the original purpose of the Public Interest Disclosure Act, as Lord Borrie said in Parliament, and that is what was intended when the legislation passed through Parliament.

The clause will remove the opportunistic use of the legislation for private purposes. It is in the original spirit of the Public Interest Disclosure Act that those seeking its protection should reasonably believe that their raising an issue is in the public interest. Including a public interest test in the Bill deals with the Parkins *v.* Sodexho case in its entirety. Therefore there is no need to disallow claims based on an individual's contract, as suggested in the amendment. Indeed, although our aim is to prevent the opportunistic use of breaches of an individual's contract that are of a personal nature, there are also likely to be instances where a worker should be able to rely on breaches of his own contract where those engage wider public interest issues. In other words, in a worker's complaint about a breach of their contract, the breach in itself might have wider public interest implications.

The blanket restriction of claims involving breaches of an employee's contract, which the Opposition amendment would introduce, could have unintended adverse consequences for individuals who are legitimately concerned about a breach of their contract that has wider public interest implications. Such a restriction would not reflect the intention or the spirit of the legislation and would unfairly and unduly restrict the number of cases in which an individual could bring a public interest disclosure case. Public Concern at Work—and I believe this is also the spirit in which amendment 69 is intended—has suggested that the approach of disallowing contractual claims could be an alternative to introducing a public interest test. However, as well as potential unintended consequences for individuals, this approach would not in itself achieve the aim of addressing the issues raised by the Parkins *v.* Sodexho decision. For example, the issue in that case could have been reframed as a health and safety issue, with similar issues then arising in relation to disclosures of minor breaches of health and safety legislation, which are of no interest to the wider public.

5 pm

Furthermore, a worker has many more rights than those contained in his contract of employment, such as rights derived from common law and statute. To use wording related to personal work contracts would still leave much of the loophole open. An example here could be that the claim under the Public Interest Disclosure Act is based on an employer's failure to follow the statutory process for dealing with a flexible working request. This is a breach of a legal requirement—the right to request flexible working—but it is clearly an issue of purely personal interest and not what the Public Interest Disclosure Act was all about. Yet the phraseology used in the suggested amendment, if taken on its own as an alternative to what the Government are suggesting, could still allow an employee, who claims a breach of a right to request flexible working and gets sacked as a result, to bring it within the terms of the legislation, which is entirely against what was originally intended.

In addition, the Government's approach ensures that we do not create an overlap problem, for example where a breach of a term of an employment contract also involved the commission of an offence or a breach of health and safety requirements. In essence, the real issue here is the opportunistic use of part IVA for personal reasons rather than in the public interest. That is why inserting a specific public interest requirement is so important and why it is also the best way to deal with the issue. Alternative approaches were considered, but we were concerned that these would either not deal with Parkins *v.* Sodexho or would actually create more problems with the Public Interest Disclosure Act. As I have already indicated, this would also have the potential for unintended consequences of restricting claims that could properly be brought.

We announced in the autumn statement that we intended to address the Parkins *v.* Sodexho ruling and with the introduction of the Bill we have taken the opportunity to make the necessary changes to return the Public Interest Disclosure Act legislation to its original purpose. I commend the clause to the Committee.

Ian Murray: I want to make some short comments about amendment 69. I am delighted that the Minister has said there has been "opportunistic use" of whistleblowing, because in a previous debate the Minister said that it may not necessarily have been the case with lawyers taking these whistleblowing claims. So there is an admission here that the analysis of PIDA legislation has been misused and the Parkins *v.* Sodexho case has highlighted that.

Norman Lamb: I was simply saying earlier, and I will say again now, that if a lawyer can bring a potential claim, a lawyer will bring it.

Ian Murray: I think that was the point I was trying to make earlier as well. A lawyer will look at avenues down which to take claims, particularly if there is capped compensation and an ability to take something that gets past capped compensation. In conclusion, would the Minister answer the three questions I posed at the beginning? Will it be an aggravated unfair dismissal, subject to clause 13, which we have just passed? When whistleblowing claims get to an employment tribunal, will they be kept off its register to try to deal with the issue of blacklisting? Will the Minister monitor the provision closely to ensure that we do not end up with Parkins No. 2?

Norman Lamb: I apologise, Mr Bayley, but I wonder whether the hon. Gentleman could intervene on me and repeat those questions. As I understand, the first issue concerned whether whistleblowing could amount to aggravated features, but I should be grateful if he would repeat the two second points.

Ian Murray: It would be churlish of me not to. My second question concerned whether whistleblowing claims will be kept off the employment tribunal register to try and deal with the blacklisting issue, particularly if they get as far as that. The third point was about monitoring the provision closely to ensure that we do not end up in a case law situation—Parkins *v.* Sodexho No. 2.

Norman Lamb: I am grateful to the hon. Gentleman for repeating his questions. First, yes, this measure will be monitored to see how things play out as a result of the change to the legislation. Secondly, clause 13 will apply where the whistleblowing claim has aggravated features. If the tribunal is faced with a claim for unfair dismissal that relates to whistleblower legislation—in other words, a claim that the dismissal related to the whistleblowing—then, as with any other case of unfair dismissal, it will consider whether there are aggravated features beyond the ability to award what in this case could be unlimited compensation to make it appropriate for a penalty to be imposed. However, the test must be applied strictly to see whether there are aggravated features.

Third was the question of keeping whistleblowing claims off the tribunal list in order to ensure that there are no blacklisting implications—I am getting inspiration as I speak and stretching it out as much as I can. We will look at whether it is appropriate to include whistleblowing on the register. The hon. Gentleman raises an entirely legitimate concern and we will look into it.

Question put, That the amendment be made.

The Committee divided: Ayes 8, Noes 12.

Division No. 13]

AYES

Anderson, Mr David	Murray, Ian
Cryer, John	O'Donnell, Fiona
Danczuk, Simon	Ruane, Chris
Davies, Geraint	Wright, Mr Iain

NOES

Bingham, Andrew	Mowat, David
Bridgen, Andrew	Ollerenshaw, Eric
Carmichael, Neil	Prisk, Mr Mark
Johnson, Joseph	Simpson, David
Lamb, Norman	Smith, Julian
Morris, Anne Marie	Wright, Jeremy

Question accordingly negatived.

Question put forthwith (Standing Order Nos. 68 and 69), That the clause stand part of the Bill.

The Committee divided: Ayes 12, Noes 8.

Division No. 14]

AYES

Bingham, Andrew	Mowat, David
Bridgen, Andrew	Ollerenshaw, Eric
Carmichael, Neil	Prisk, Mr Mark
Johnson, Joseph	Simpson, David
Lamb, Norman	Smith, Julian
Morris, Anne Marie	Wright, Jeremy

NOES

Anderson, Mr David	Murray, Ian
Cryer, John	O'Donnell, Fiona
Danczuk, Simon	Ruane, Chris
Davies, Geraint	Wright, Mr Iain

Question accordingly agreed to.

Clause 14 ordered to stand part of the Bill.

Clauses 15 and 16 ordered to stand part of the Bill.

Clause 17

TRANSITIONAL PROVISION

Norman Lamb: I beg to move amendment 2, in clause 17, page 12, line 21, at end insert—

'(1A) Section [Confidentiality of negotiations before termination of employment] does not apply to any offer made or discussions held before the commencement of that section.'.

The Chair: With this it will be convenient to discuss the following:

Government new clause 2—*Confidentiality of negotiations before termination of employment*—

'After section 111 of the Employment Rights Act 1996 insert—

"111A Confidentiality of negotiations before termination of employment

(1) In determining any matter arising on a complaint under section 111, an employment tribunal may not take account of any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

This is subject to the following provisions of this section.

(2) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(3) In relation to anything said or done which in the tribunal's opinion was imp roper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(4) The reference in subsection (1) to a matter arising on a complaint under section 111 includes any question as to costs, except in relation to an offer made on the basis that the right to refer to it on any such question is reserved.

(5) Subsection (1) does not prevent the tribunal from taking account of a determination made in any other proceedings between the employer and the employee in which account was taken of an offer or discussions of the kind mentioned in that subsection."'.

Amendment (a) to new clause 2, in subsection (1), leave out 'the employee' and insert

', the employee or either one of the following chosen employee representatives—

(a) a trade union official;

(b) a workplace representative; or

(c) a legal representative.'.

Amendment (b) to new clause 2, at end add—

'(6) The Secretary of State shall review the operation of Clause 111A [Confidentiality of negotiations before termination of employment] after 12 months and shall confirm its continuation through an affirmative resolution of both Houses of Parliament.'.

Clause stand part.

Norman Lamb: This new clause was announced on Second Reading and will facilitate the use of settlement agreements.

Problems at work are unavoidable, and we recognise that not all employment relationships prove satisfactory. Either the worker does not live up to expectations, the employee is not happy in their job or the relationship does not quite work out between employer and employee. Sometimes it is in the best interests of both parties to be able to end the relationship with dignity by coming to an agreed separation. Opposition Members who have declared that they run businesses themselves will recognise that fact. Sometimes things just do not work out, and sometimes employees commit acts of misconduct or underperform their functions and the employer legitimately has to take action.

Chris Ruane: As the junior partner in the coalition, does the Minister think that he or his party will be facing this decision within the next 18 months? It may even be sooner.

Norman Lamb: That was a provocative intervention, to which I will not be tempted to rise.

I will continue to develop my theme. I strongly believe that settlement agreements are good for both parties. For employers, there is the security that they will not face a tribunal claim, distracting them and other workers from their business activities, often at enormous cost, both in legal fees and in distraction from the work that they should be doing in running their business. For employees, there is the certainty of a cash payment and they avoid the time and stress of a tribunal. Just imagine what it must be like for someone who believes that they have been unfairly dismissed to have to wait 24 weeks on average before their case is heard by the employment tribunal. The system has become somewhat dysfunctional. It has been heavily overused and has become, as others have said, highly legalistic. Instead of that, a settlement agreement means that the employee can leave with their head held high and possibly a reference to go with it.

We know that many larger businesses already use settlement agreements. We want to encourage greater use of them by making it easier and quicker for employers and employees to come to a satisfactory solution.

Julian Smith: I pay tribute to the Minister for his work on an important clause for those business owners who get to a point at which things are not working out and they want to allow an employee to exit while being fair to them. I am grateful that the clause will help many businesses throughout the country. I have campaigned on the issue and have written a report for the all-party group on micro-businesses, which supports this voluntary approach. It is excellent news.

5.15 pm

Norman Lamb: That is the sort of intervention that I like. I am grateful to the hon. Gentleman for his comments and for his work on the all-party group, whose report has been extremely helpful in understanding the issues and the concerns of small employers. The hon. Member for Newton Abbot has also been involved in the all-party group, and I was encouraged that its report recommended the measure's approach.

Although it is often dangerous to talk about personal experience, it can sometimes be helpful. I know, from the point of view of both the employer and the employee, that—as with relationships beyond the world of employment—if a difficult and unhappy relationship is brought to an end by way of agreement, and the employee's dignity is kept intact and their chances of securing fresh employment in a difficult labour market are helped by not being sacked and having to put that

[Norman Lamb]

on application forms, everyone can benefit. It is critical for businesses, particularly small businesses, to know that they can move on with peace of mind and that they will not face a claim in an employment tribunal. That is incredibly important. It allows them to focus on what they should be doing—running their business. The measure could be incredibly effective. It seeks to mainstream what is used by those who can afford expensive lawyers, so that it is available to those who cannot afford access to expensive legal processes.

Mr David Anderson (Blaydon) (Lab): The Minister said that a different wording would be used if someone infringed their contract. How will that wording relate to the reasons why they had to leave employment, and how would it affect them if they wanted to claim JSA?

Norman Lamb: I am not sure that I entirely understand the intervention. I genuinely want to take it seriously, but will the hon. Gentleman expand on it?

Mr Anderson: The Minister said that, if an employee left, his notice would not say that he had been sacked or dismissed, but what would it say? Has any work been done on how it could affect somebody who wanted to claim jobseeker's allowance?

Norman Lamb: If the initiative is taken by the employer, they will invite the employee to consider whether they want to accept a settlement agreement as a means of leaving. When an employer's action starts the process, there should be no implications at all for JSA. When an employee chooses to resign and takes the initiative themselves, that is different.

On seeking employment, if the employee has not been sacked for misconduct, but has accepted departure on agreed terms, that is less of a stain on their character and makes it less difficult for them to seek fresh employment. That is the point that I was trying to make. Again, I know from my own experience that that is the case. It is also often the case that employees who underperform do so for a reason, not simply because they are lazy; they may just be unhappy in their job, so bringing an unhappy relationship to an end may work in their interest as well as that of the employer.

Julian Smith: The other beauty of the proposal—its unique feature—is that it will be possible to use it before a dispute emerges. Before things go too far, it will be possible to end a relationship maturely and with fairness on both sides.

Norman Lamb: That is right. If an employer has to deal with the fallout from a dismissal, with a very unhappy ex-employee pursuing a claim at the tribunal, opposing camps are created, with the potential for a big dispute. Costs ratchet up and there is uncertainty and anxiety on both sides. This measure avoids all of that. It means that if the employer concludes that it would be better to end the relationship, it can be ended smoothly and cleanly, without the parties having to fall out in a spectacular way at enormous cost to both sides.

Simon Danczuk (Rochdale) (Lab): On a point of clarification, is the Minister saying that someone whose employment was finished in this way would, as my hon. Friend the Member for Blaydon says, be entitled to full jobseeker's allowance? There is no issue there, is there?

Norman Lamb: I have had confirmation from officials that they have had discussions specifically with the DWP. If the process was instigated by the employer—the circumstances that one would envisage in most cases, although the measure does allow the employee to propose a settlement agreement themselves—Jobcentre Plus staff should recognise that in assessing the JSA claim and the normal rules would apply. I hope that that reassures the hon. Gentleman.

However, we need to ensure that employers are not afraid of using these things for fear that the offer will come back as evidence against them in a tribunal case, thus undermining the whole process. Incidentally, we will ensure that the guidance covers this issue as well. That will be a further reassurance to individuals who are using the provision.

Ian Murray: Before the Minister moves on, will he say a few words about the stigma that may be attached to these agreements? Although the employee may leave the employment with a neutral or even a positive reference, it will be quite clear that they left their previous job under a settlement agreement. That may give rise to some stigma in terms of whether there were any "aggravated" circumstances that resulted in the employee leaving.

Norman Lamb: That stigma is an awful lot less than the stigma attached to being sacked and walking out with nothing—with no agreement. I know that, if someone can say to their friends, family and so on, "I chose to leave, on agreed terms," that is an awful lot easier for them to handle. It is seductive to think that it is great to be able to take one's claim to a tribunal, but waiting 24 weeks for a case to be heard and incurring potentially significant legal fees, often using no win, no fee lawyers, is no great experience. It is often very stressful and deeply unsatisfactory. Quite often, there is then a report in the local paper that includes accusation and counter-accusation. It is a destructive process. This provision avoids all that. For that reason, it is deeply attractive.

Anne Marie Morris (Newton Abbot) (Con): Am I right in thinking that in most cases these settlement agreements are subject to a confidentiality clause? In that case, when someone moves from job to job, the next employer does not know that there has been a settlement agreement, and there is normally an arrangement whereby an agreed reference is given. Therefore, the concern that the Opposition raise simply does not arise.

Norman Lamb: There often a confidentiality clause within a compromise agreement at present. Both parties often see that as a sensible thing to have. It protects both of them from improper behaviour by the other side following the departure. At the end of the day, this is a private matter. The contract of employment is a private matter between employer and employee, and it is right that it should remain confidential to the parties

to that agreement. As my hon. Friend also says, there will often be a reference. It is an interesting point. When an employee is sacked or leaves under a settlement agreement, it may well be the case that that employee was poor at the job that they were doing and unproductive and that terminating their employment was the right decision, but that is not to say that they are a hopeless or useless individual. They may have very good character traits, which a reference can identify. A reference may well help them to get into a more appropriate job. So she makes very good points in that respect.

Our new clause will facilitate the use of settlement agreements. Under this measure, the offer of a settlement will not be admissible in an unfair dismissal tribunal case. This is a fair and balanced proposal, which supports our overall aim of helping employers and employees to resolve disputes without the need to resort to tribunal proceedings. Settlement agreements are, by definition, voluntary and consensual. It will be for employees to choose whether or not to accept the offer of settlement; they are quite at liberty to reject the offer.

Before the new clause was tabled, there was a fair amount of speculation about what it would mean for employers and employees. Now that the Committee has had the opportunity to review the new clause, I hope that some of those concerns and speculations can be laid to rest.

First, I want to give reassurance about the things that the new clause will not do. As recognised by Citizens Advice in the Committee's evidence sessions, the new clause does not give businesses a licence to discriminate and nor does it strip employees of their right to take a case of unfair dismissal. It will not protect employers who act improperly when making such an offer and it does not protect any employer whose grounds for dismissal are discriminatory. It will not prevent individuals who choose not to take the offer from bringing a claim of discrimination and it will not prevent them from bringing other evidence to support a case of unfair dismissal.

What the new clause will do is give employers confidence that their offer will not be used against them in an unfair dismissal claim. That has been raised as an issue by a number of business stakeholders, including those who gave oral evidence to the Committee in their response to the "Resolving Workplace Disputes" consultation and in their ongoing discussions with the Department on policy development.

In evidence to the Committee, legal representatives expressed concern that employers would use the new clause as a means of getting rid of staff with no advance warning of any problem, by simply dropping a letter on the desk of the employee out of the blue telling them to jump before they are pushed. That view risks underestimating the business sense and common sense of British employers. Employers will offer a settlement agreement only where there is a problem; it does not make business sense to offer a settlement without careful consideration. We expect responsible employers to be smart about who they make offers to, based on their personal knowledge of the individual, their circumstances and their performance. Realistically, employers have discussions about, and give feedback on, performance all the time.

Our new clause will not—as some fear it will—give protection to employers who put undue pressure on individuals to accept a settlement offer or to employers who repeatedly offer a settlement offer until the employee eventually cracks. We have built in the safeguard of a propriety requirement, which is akin to the existing requirements of the without prejudice regime. Improper behaviour, such as the types of behaviour I have just described, would be unlikely to meet that propriety requirement and would lead to loss of the protection that the offer could not be adduced as evidence in an employment tribunal. Employment tribunals are already very well able to identify unacceptable behaviour and we will provide guidance, through a statutory code, to help employers and employees to enter into agreements with confidence.

Julian Smith: May I urge the Minister to make that guidance as simple as possible for start-up businesses and very small businesses? I say that because, even though I know that BIS has done some really good work on its website, that website is still a bit confusing and when one looks at Fair Work Australia, for example, and the simple presentation of information about employment, I think that there is more we could do.

5.30 pm

Norman Lamb: I totally agree. We have to keep it as simple as possible so that any small business can understand how to use it. The guidance will include template letters. It is not just about the legislation; it is about providing the means for people to use the legislation to solve problems. Employers will have template letters that they can use to propose settlement, so there will be no need to go to an expensive lawyer to draft the letter. I made a good living out of that, but I want to ensure that small businesses do not have to incur that cost.

We will also provide model agreements to help reduce employer uncertainty about making an offer in the right way. There will be a letter, to start with, to put the proposal to the employee. There will also be guidance on the circumstances and how to use the letter, and a model agreement to bring it to a conclusion.

Mr Anderson: I am getting more and more confused. What is the Minister suggesting? What if the employer, genuinely and in all fairness, says to the employee, "I don't think this is working", and then uses the template letter, the guidance and the agreement, and the employee still says, "I'm sorry, I don't agree with you," and it ends up in a dispute? If it goes to a tribunal, that is in the employer's interest. They will be able to say, "I tried to deal with this through conciliation and the mechanism agreed by the House of Commons. I used all the mechanisms available. I am a good employer trying to do the right thing." Surely, by putting in a clause that says that the settlement cannot be discussed at the tribunal, the Government are making it less likely that the employer will say, "I was a fair employer."

Norman Lamb: The concern expressed by many employers is that the proposal to offer a settlement to an employee could be used by the employee as an argument for persuading the tribunal that the employer had made up their mind that the employee would go, and that the dismissal was therefore unfair. The measures are designed to protect the employer, so that they can put to the employee a proposal to end the relationship

[Norman Lamb]

by agreement. If the employee does not want to accept that, the employer will have to follow the proper processes before terminating the individual's employment.

The importance of that, and the beauty of it, is that the employee's rights are protected, but the employer has an opportunity to propose a way to end the relationship by agreement without it being held against him later. In my experience, it works. People end up reaching an agreement on reasonable terms, and the employee can walk away with their dignity intact and their position in the labour market unprejudiced. They can leave, perhaps with a reference, to seek fresh employment, and the employer will have peace of mind in being confident that they will not be pursued at a tribunal.

That psychological sense of certainty is incredibly important. I know many small employers in particular who, after terminating employment, have an awful fear that they will face an expensive claim. They may be totally reasonable people who have behaved absolutely properly, but they fear a claim. I also know many employers who choose not to take action against someone who is massively underperforming or even guilty of misconduct, because they have that awful fear of the tribunal. The measures are a way of resolving that problem.

Andrew Bridgen: The Minister has spoken about the genuine anxiety that an employee might feel when waiting 24 weeks for their hearing at the tribunal, but is not the opposite true as well? The employer would have 24 weeks of anxiety, and the mechanism could relieve that anxiety for both parties.

Norman Lamb: That is absolutely right. I made the point earlier that some lawyers assert that it is a great thing to be able to take a claim to the tribunal, but it is a miserable thing to do. I know many people who suffer enormous stress and anxiety waiting interminably for five months for their day in court, in complete uncertainty about whether they will win their case and what the consequences will be of taking the case to the tribunal. Sometimes, completely wrongly, a stigma attaches to someone who has taken a case to a tribunal. The measure avoids any risk of that. It gives certainty and reassurance to both sides in the employment relationship.

Ian Murray: The issue becomes how to determine that propriety. Surely that has to be determined as part of an argument at a tribunal. Is there potential for these settlement agreements to be used as a way for an employer to avoid a tribunal, when in fact the case would point to redress having to be determined by a judge at an employment tribunal?

Norman Lamb: I am not sure I understand the point. The purpose is to allow an employer, behaving perfectly properly, using the template letter, to put forward a proposal to the employee. If the employee chooses to accept, the matter is brought to a conclusion on agreed terms. That gives enormous reassurance to employer and employee, and avoids the miserable outcome of a long and protracted dispute, in which the employee has to go to a court of law effectively to assert their rights and to get some compensation, with complete uncertainty as to whether they will succeed. This proposal avoids all of that, which is of enormous value.

Geraint Davies: Is there not a danger that this could be part of the armoury of a bad employer for constructive dismissal? The employer could say, "If you go, I will give you this money", in the knowledge that that move will not be revealed in a tribunal where it may be a relevant factor, either in a positive way, as has been suggested or, conceivably, in a slightly threatening way.

Norman Lamb: I make the point again that the protection for the employee is the right to say no. Not only that, but before the agreement can be concluded, the employee has to have access and has to have received independent advice, just as they do at the moment with a compromise agreement. That advice can be from a lawyer, an advice centre or a trade union official. The hon. Gentleman may be aware that, under existing legislation for compromise agreements, a designated trade union official, recognised as having the training to be able to advise on such agreements, can do so. In a unionised context, the employee has the absolute protection of getting that advice from a trade union official or an outside lawyer. In a non-unionised context, the agreement only protects the employer if the employee has had that independent advice.

There is real protection for employees against oppressive employers who act with malice. This would allow genuine employers, who are trying to resolve a real problem, to reach a settlement that meets the interests of both sides. It may be attractive to think of a world where no employment disputes or problems occur, and where every employee performs to the optimum, but we all know that is not the case. Employers have to deal with problems. I genuinely think that it is usually in the interests of the employee to leave on agreed terms, rather than be sacked, in the traditional sense of the word, with all of the hurdles they would then have to clear to get anything from a tribunal. The measure, therefore, has enormous merit.

The guidance we offer will be designed for SMEs and micros, which I hope will reassure the Law Society and others that we are addressing pitfalls for the unwary, as the Law Society suggested. It has also been suggested that disaffected employees might use the measure to bombard their employers with requests for settlement. As I have indicated, both the employer and employee can put forward a proposal for a settlement, and there is no reason to think that there would be any bombardment of employers by employees after a settlement. In dispute situations, employees can already make requests for a settlement. An employee can go to their employer to say, "I am prepared to leave, but I will only leave if you pay me a sum of compensation." Sometimes that is an appropriate thing to put forward, and that discussion can take place. Nothing in the legislation will encourage an increase in that.

Julian Smith: On that point, will there be a set number of times that an employer can offer this deal in any given year, or will it be as many times as they want?

Norman Lamb: If an employer were to behave in an oppressive way and repeatedly put pressure on an employee to settle, they would not, under the language that we

have used in the clause, retain the protection of the clause. This is about sensible and reasonable behaviour. Employers should be able to understand that, and guidance will be there to help them understand that. There is no reason to believe that there will be any suggestion of a bombardment from employees. In dispute situations, employees can already make requests for settlement. We have seen no evidence that that is a problem, and I see no reason why it should be different with this measure in force.

I also want to reassure the Chartered Institute of Personnel and Development, ACAS and others, which gave evidence to the Committee, that this measure will not allow employers to abdicate their management responsibilities. I am strong on the fact that the most important message to employers of all sizes is to recruit well, invest in staff and treat them properly to get the very best out of them. That is the way to get good productivity. The decent employers, of whom there are many in the country, know that that is how to get the most out of their employees. We also know, though, that sometimes things go wrong, and employers need to act.

Mr Anderson: The Minister just said that there was no difference between what happens now and what will happen after this Bill is passed. Surely, though, there will be a difference. At the moment, a compromise agreement—I have been involved in compromise agreements before—is confidential only if people agree to it being confidential. What is being proposed now is that it will be confidential as a matter of law. This House will be enforcing that confidentiality on some agreements.

Norman Lamb: The hon. Gentleman might be confusing two different things. The compromise agreement now can include a confidentiality clause, which requires both parties to maintain confidentiality, and I made that clear in my response to my hon. Friend the Member for Newton Abbot. In the future, they will be settlement agreements. As before, they will still be able to have that confidentiality clause contained within them, so no change there at all. This clause gives confidence to both parties because any discussion or proposal can be initiated by either the employer or the employee without it being used in evidence against them later on in a tribunal. It is incredibly important to encourage the parties to reach an agreement rather than to have a fight over it. As I have said, that is in the interests of both parties.

Andrew Bridgen: Given what my hon. Friend has just said, will there be a template for the optional confidentiality clause within the letter that will be available to employers? If not, may I suggest that there should be?

Norman Lamb: There will be. Again, it will be part of the consultation. As I have discussed with various trade unionists, there is a role for trade unions in negotiating settlements. They do it now, as hon. Members have said, with compromise agreements, and they can do it in the future, and that is perfectly reasonable. Of course they can then end up signing the compromise agreement, or settlement agreement, to give it force.

Geraint Davies: I still do not quite understand this. If an offer is made by either side, that transaction is part of the relationship that will ultimately be assessed in the tribunal, if the matter goes to tribunal. It is a relevant transaction. In the case where there is malicious intent—hopefully there will not be many of those—or some attempt to go for constructive dismissal or there is an inappropriate offer or threat from the employee to the employer, such as, "If you don't give me this, I will do that," then that exchange is surely relevant for a tribunal. The idea of us legally saying that it is not possible to consider that is bizarre.

5.45 pm

Norman Lamb: I can assure the hon. Gentleman that the clause provides for the circumstance when that sort of behaviour occurs and the employer says, "Here's the letter, now if you don't accept it you can…off", if the hon. Gentleman understands my attempt to avoid using unparliamentary language. They would not then have the protection of it being excluded from reference in the tribunal. An employee who had suffered oppressive behaviour from the employer in the discussion could refer to that because they would not have the protection of the clause. The clause absolutely addresses the concern that the hon. Gentleman raises there.

Ian Murray: Could the Minister give some indication of how the clause sits with the Department's consultation on protected conversations?

Norman Lamb: The hon. Gentleman rightly says that the Department, long before I turned up, did a consultation which included the issue of whether anyone would welcome the idea of a protected conversation. The idea is that there could be discussions between parties in an employment context and that those discussions, which might propose a termination of employment, could not be used if it was within what was defined as a protected conversation. The feedback was that there were a lot of concerns. The hon. Gentleman has talked a lot about satellite litigation and creating laws that generate work for lawyers, and there is a real risk that that would have done that. In my view, talking to small employers about the idea of protected conversation would be beyond what most people busily trying to run their own business would understand.

There are all sorts of exceptions. If you say something that is discriminatory, that would not be protected and rightly so. We do not want to give carte blanche to employers to discriminate. Indeed, it would not be lawful under European law. We concluded that a protected conversation itself was perhaps an unattractive outcome, but something worth consulting on. I sat round a table with a group of employment lawyers who all said that it would generate an enormous amount of litigation and, given the concerns that have been expressed in respect of other clauses, that is not something that we would want to do.

While the Bill will give employers and employees an opportunity to consider an alternative to a formal management process when an employee chooses not to accept an offer of settlement, the employer will still need to undertake proper performance management and fair process before dismissing an employee fairly. I would also like to reassure Members that there will be no change to the current requirement for an individual to seek legal advice on the implications of signing the agreement before it becomes legally binding.

[Norman Lamb]

We will consult in the summer on the principles of guidance to be included in the statutory code underpinning the fair and effective use of settlement agreements. This will include the draft letters and model templates for employers and employees to use to make the process as easy and simple as possible to understand and to follow. Like the guidance, they will be produced with the needs of SMEs and micros without extensive or any legal or HR departments on hand in mind. While we need to agree the timetable for developing the statutory code and other guidance, we are clear that it needs to be ready in good time for employers and employees to familiarise themselves with these measures.

In conclusion, we believe that the amendment on confidentiality of negotiations before termination of employment will facilitate and promote the use of settlement agreements as an effective and consensual way to resolve workplace problems without resorting to a tribunal. I am conscious that Opposition Members have tabled amendments to new clause 2. I will respond to the amendments after hon. Members have had the opportunity to speak to them.

The Chair: Just to make it absolutely clear to the Committee, as the Minister has done, we have changed the amendment group. The debate will now ensue on Government amendment 2, new clause 2, plus the two Opposition amendments and clause 17 stand part.

Ian Murray: Thank you, Mr Bayley, for being flexible about the clause. There was an error somewhere along the line in the administration of the clauses. I am grateful that we have been able to group the amendments and clauses.

I am also grateful to the Minister for taking time to explain settlement agreements. There has been a great deal of confusion out there, and I am not sure that Opposition Members are any clearer about where we are. He is right to highlight again the day-to-day relationship between the employee and employer. Good employers have that relationship, and the small business owners on both sides of the Committee know that that it is key and that a business cannot operate without its being strong and healthy.

All decent business owners would say that their first call is looking after their employees. There is nothing more heartbreaking than having to get rid of an employee or being unable to pay them what they are due. In the economic circumstances of the past few years, many business owners have had to deal with those situations. That highlights that the circumstances we have been discussing on all the clauses, and on the employment part in particular, are extreme and at the margins of what most small businesses do in this country. We must bear that in mind.

There are already ways to get rid of employees, as my hon. Friend the Member for East Lothian mentioned. Performance management techniques can be used and a proper conversation can happen between employers and employees. If there is a lack of performance or an issue to be dealt with, the ACAS guidance is very good. In fact, I have used it when talking to employees.

Norman Lamb: I agree with the points the hon. Gentleman makes, but does he agree that in circumstances where the employment is not working out, it may be in the interests of the employee not to leave at the end of a process without anything beyond notice, but to leave with a settlement, an additional payment and the possibility of a reference? Does he accept that that is often in the interests of the employee?

Ian Murray: I agree with that. It is always in the interests of the employee to ensure that their re-entry into the labour market is maximised, but it is also in the interests of the employer to ensure that any relationship, whether it has broken down or not, is dealt with appropriately. A settlement agreement, a protected conversation or being called into the manager's or business owner's office for a discussion about your employment could almost instantly give rise to grievance. That might be one of the unintended consequences of the legislation. It is well meaning but, in its operation, will it be something new or simply an extension of what we have already?

The Secretary of State trailed the proposal in the newspapers before Second Reading. It was quite clear that the entire Bill, which we have already discussed at great length, was a ragbag of different proposals coming together into something that is supposed to promote economic growth. The Secretary of State required something concrete that he could take into the Chamber on Second Reading that made this something more than just a regulatory reform Bill. I fear that that is perhaps where it has come from. It has been a rushed attempt to appease the Beecroft elements of the coalition and an attempt to insert potential Beecroft-lite options into compensated fault or compensated no-fault dismissal.

I pressed the Minister on how the measure works in relationship with protected compensation. To many Opposition Members who have been involved in compromise agreements, it sounds to all intents and purposes very much like a protected compensation-type element to what would be the employment legal framework.

Norman Lamb: May I reassure the hon. Gentleman that the measure has nothing to do with the Beecroft call for evidence? That is a separate proposition put forward quite properly to get international and domestic evidence on whether there is a case for compensated no-fault dismissal. The proposal is not a rushed attempt to find an answer to Beecroft; it is based on my experience in practice and on what many people, including the all-party group, know works. It is a decent, proper way of providing an alternative option for both employers and employees. It is nothing at all to do with Beecroft.

Ian Murray: I appreciate what the Minister has just said, but it is in practice difficult to see how the measures will operate outwith the framework that is already in place. We have no complaints about renaming the settlement agreement, but it seems strange that anybody would believe that that would suddenly result in a greater use of the compromise agreements that are already in place. They are already widely used. Indeed, one of the largest public and private sector solicitors, Thompsons, dealt with nearly 6,000 alone last year, so that shows there is no problem with employers realising that they can be

used. They are aware that such agreements can be used and they can readily use them in a whole host of circumstances.

I do not know Thompsons' detailed figures, but the 5,700 agreements that were used last year would probably dwarf the number of individual claims that it has taken to an employment tribunal. It may or may not be the case, but it seems around a few thousand cases. So the change to the Bill to add the provision regarding confidentiality in negotiations before termination of employment is fraught with difficulties and perhaps a recipe for confusion and further dispute.

It is worth considering the law that governs the current compromise agreements, because that gives the background to what is currently available. Section 203 of the Employment Rights Act 1996 gives valuable protection to an employee, who is nearly always in a subordinate and powerless position compared with their employer. The section prevents an employee contracting out of their statutory rights to bring a complaint of unfair dismissal unless, in summary, there is an agreement in writing, the agreement relates to particular proceedings and the employee is given independent legal advice. That sounds very much like what the Minister has just described in terms of settlement agreements.

Norman Lamb: We fully accept that compromise agreements are used at the moment. The problem with such agreements is that almost inevitably employers who want to use them go to expensive lawyers to get guidance about how to complete a compromise agreement. The whole purpose of the proposal is to mainstream the agreement and make it available with guidance and support to employers who cannot afford expensive lawyers. That is its potential great value: to strip away the need for expensive legal advice by making it simple and giving the protection and reassurance that it cannot be used in evidence against them in the tribunal.

Ian Murray: That is all well and good, but why can that process of standard letters and standard applications not simply be put into the normal system? That guidance would be best to go forward. The initial clause really just renames compromise agreements and calls them settlement agreements. It is important to give certainty to employers. Again, we are seeing a system of tinkering around the edges. My hon. Friend the Member for Blaydon, who has been involved in a number of these, is absolutely right that they are well used and well regarded across employees' representatives and employers.

6 pm

Andrew Bridgen: Is not the risk with compromise agreements that the employer may be accused of constructive dismissal should the case move on? Settlement agreements enable the employer to initiate the settlement, rather than waiting for the employee to come forward.

Ian Murray: I accept that, but there is a danger that the opposite could also be the case, whereby the protection given to the employer through a settlement agreement is actually counter-productive. There is case law that has tried to determine what is a without prejudice conversation in a compromise agreement process, and that has worked against the employer.

Norman Lamb: I am grateful to the hon. Gentleman, who is generous in giving way.

My hon. Friend the Member for North West Leicestershire makes the absolutely correct point that this reassures employers to initiate a discussion to bring things to an agreed conclusion. Additionally, compromise agreements are used widely by large employers who have large human resources departments and access to expensive lawyers; they are not used systematically by small companies. We are particularly trying to help small and medium-sized businesses by giving them a route to resolving genuine problems in the workplace, and this measure can be transformational in achieving that.

Ian Murray: I do not disagree with what the Minister or the hon. Member for North West Leicestershire are trying to achieve, but our point is that legislation perhaps already exists to do exactly that, so the Government could just alter that legislation. I appreciate what has been said about not being able to disclose at employment tribunal, but there is a grey area on what information may be disclosed at an employment tribunal.

Andrew Bridgen: Will the hon. Gentleman give way?

Ian Murray: Let me unpack my point, which may answer some of the interventions.

In BNP Paribas *v.* Mezzotero, which is one of the famous sex discrimination cases, in response to a grievance raised by the claimant on the way she had been treated on her return from maternity leave, the employer made a without prejudice offer of a termination payment. There was a dispute about whether what was said at the meeting at which the termination payment was offered was covered by the without prejudice privilege, and the Employment Appeal Tribunal determined that the without prejudice privilege did not apply because at the time the offer was made there was no extant dispute between the parties on termination.

That seems very much like what we have been talking about on settlement agreements. A pre-grievance predetermination issue was being addressed, and the Employment Appeal Tribunal upheld that there was no extant dispute between the parties and therefore what was said could be used as part of the determination. The judge said,

"it is very much in the public interest that allegations of unlawful discrimination in the workplace are heard and properly determined by the Employment Tribunal to whom complaint is made…cases involving allegations of sex and race discrimination are peculiarly fact-sensitive and can only properly be determined after full consideration of all the facts".

"All the facts" includes discussions on any settlement agreement. The judge went on to say that

"the logical result"

of allowing the without prejudice rule to operate in such cases would be that

"an employer in dispute with a black employee could say during discussions aimed at settlement in a meeting expressed to be being held without prejudice, 'we do not want you here because you are black' and could then seek to argue that the discussions should be excluded from consideration by a Tribunal hearing a complaint of race discrimination."

[Ian Murray]

So what can and cannot be disclosed can have consequences. There is a potential for—I use the term again—satellite litigation, which the Minister clearly said was a concern when considering whether protected conversations could fall into this measure. The terminology used in that case is unambiguous impropriety, and the only way to determine whether disclosing that is proper or improper in settling the case is through an employment tribunal hearing. It is hard to see how the Government can legislate to overturn that ruling without giving the green light to employers to treat employees badly and discriminate against them.

The Minister's example seems to be aimed at people who are not performing well, which is the right place to focus the proposals. The Government appear to be obsessed with its being difficult to dismiss people because of capability, and we have discussed various processes for doing that. To dismiss someone fairly, all an employer needs to do is show that they have pointed out failings, and have given a reasonable opportunity and time frame for employees to improve. It is not lengthy, because employers will have policies to ensure that the proper process is followed. In such a context, there will be many instances in which an employer will say to an employee, "I would like to chat about terminating your employment." As soon as a conversation is initiated in that way, it would seem to me that the vast majority of employees would pick up the phone to ACAS or an employment lawyer.

Julian Smith: The hon. Gentleman is going round the houses, because the proposals are a great move. They will mean that all the tiny employers in my constituency know that if there is a problem with their employees, they can send them a letter and give them a choice. That will give those employers confidence to take on more people in future. The hon. Gentleman's speech can go on for ever, but it will not take away from the fact that the change is a good move for jobs and growth.

Ian Murray: The hon. Gentleman has said that the proposals are good for jobs. This is the first clause that we have reached about employment, and he persists in saying that the approach has been consistent. I have lost count, but it may be 16 or 17 times now that the Opposition have agreed with much of what is in the Bill. We have merely tried to ensure that the provisions work properly and have proposed amendments to that effect.

Norman Lamb: I want to reassure the hon. Gentleman, because he spoke of a possible situation in which somebody suffered from race discrimination as part of the discussion. Proposed new section 111A(3) of the Employment Rights Act 1996 makes it clear that the employer is not protected. There is no carte blanche at all for that sort of improper conduct. The proposals enable decent employers who have a genuine problem to resolve it; they are not a licence to discriminate against employees.

Ian Murray: Subsection (3) is clear that discrimination is not included and that could then be taken forward to an employment tribunal, particularly if the employee decided that there would not be a settlement as the exit was voluntary. I fully understand that point. I am trying, however, to highlight the issue of whether a settlement agreement's intent had a discriminatory element, and therefore whether that should be admissible in terms of why the settlement agreement occurred in the first place.

I am not sure there is much disagreement between me and the Minister on that point, which is why we have produced amendment (a) to Government new clause 2. That would insert in the Bill that either the employee or one of the chosen employee representatives that the employee wishes to use to sign off the agreement is given the proper advice, whether that is by a trade union official, a workplace representative or a legal representative. Although we have been keen to draw some legal representation out of the process throughout all the clauses, the proper advice must be given to an employee about whether what is happening is in their best interests, and is not a cover-up for something that may be more appropriately dealt with through employment tribunal law. ACAS early conciliation would be the next new stage to that particular process.

Will the Minister confirm that ACAS will produce guidance on what is improper, which is one of the words that is used? The proposed protection is limited. It does not apply to claims for automatic unfair dismissal, such as whistleblowing or a dismissal connected with the transfer of an undertaking, such as TUPE. More importantly, it does not apply to discrimination, as the Minister has explained. If an employer decides to chat with an employee and suggests that the employee leaves because their performance is not as expected, the employee may not be able to rely on that conversation in an unfair dismissal claim, but can accuse the employer of discrimination on the grounds of sex, age, race and some other protected characteristics. What prevents that from happening in any case? If an employee chooses voluntarily not to settle, they could easily say, "This is not happening because of my performance; it is about sexual discrimination."

Andrew Bridgen: Surely the hon. Gentleman accepts that an employee can make such an allegation if they experience such treatment at any time, regardless of whether a settlement agreement is being offered.

Ian Murray: That may well be the case, but as soon as an employer says, "Can we have a chat about coming to an agreement to relieve you of your duties in return for some kind of compensation?" someone might wonder whether that is about performance or other aggravated factors. That is the danger that employers may fall into with this legislation.

Andrew Bridgen: Is the hon. Gentleman suggesting that third parties should be present when the settlement is offered?

Ian Murray: I am not sure that that would be advisable in view of what is trying to be achieved in a settlement agreement. We suggest that it should be possible for a settlement agreement to be signed off by someone other than just an employee, and that proper legal representation—particularly for low-paid and migrant workers—should be put in place so that proper advice can be provided on the content of settlement agreements. I do not see why that is a difficulty.

Julian Smith: My hon. Friend the Minister has already said that there will be legal representation or union representation at the point of the compromise agreements. All we are saying is that the employer can write a letter making an offer of compensation. Surely there does not need to be representation for that.

Ian Murray: Our amendment suggests that instead of stopping at the word "employee", new clause 2 should specify that settlement agreements can be signed off by "the employee or either one of the following employee representatives". I do not believe that that differs particularly from what the Minister has said, or indeed from what the hon. Gentleman has just proposed. We are not proposing that legal representation be given at any part of the discussion, as the hon. Member for North West Leicestershire perhaps suggested, but merely that the employer or the employee be able to get the document signed off by a legal representative. That is important, particularly for low-paid workers.

Let us consider a scenario in which an employer reaches a decision about a settlement that they will offer. If the employee claimed unfair dismissal, the employer could quite easily say that the offer of the settlement agreement would remain on the table at, say, £10,000, but that they would reduce it by £1,000 for every day that the employee did not decide to settle the claim. Such a course of action would remove the voluntary element of the agreement, and the employee would essentially be coerced into accepting. That employee would have to be able to decide whether they wanted to add another step into the process by taking the matter to ACAS or taking it further if they wanted to.

Norman Lamb: Obviously, this is a matter for judicial discretion, but I suggest that if a case did not end in settlement but went to an employment tribunal, the tribunal would regard an offer that went down by £1,000 a day as improper. I can reassure the hon. Gentleman that such a course of action will not be encouraged, and that it will not provide any protection for an employer.

Ian Murray: The Minister has just argued my point for me. An employee might end up being coerced into taking a settlement that may or may not be appropriate. They might think, "I will take the £10,000 settlement because I do not want to go through the process of conciliation, I do not want to have to pay a fee to get to the employment tribunal and I do not want to have to wait 24 weeks." Surely, that is some kind of compensated no-fault dismissal. I can see the hon. Member for Skipton and Ripon shaking his head to indicate that it is, which is exactly my point.

Julian Smith: All these proposals are attempts to slow down the process to make the balance between the employee and the employer more equal. Under the previous Government, it was not equal.

Ian Murray: I did not expect anything else from that intervention, but for the record, when I suggested that the scenario I outlined could be construed as compensated no-fault dismissal, the hon. Member for Skipton and Ripon was shaking his head in full agreement. I am delighted that we agree that this is a Beecroft-lite proposal.

Norman Lamb: I ask the hon. Gentleman to remember that—as with compromise agreements, which the previous Labour Government endorsed—there is the protection that the employee needs to get independent advice before signing up to the agreement. That is an incredibly important reassurance that oppressive behaviour by the employer will not succeed.

6.15 pm

Ian Murray: The oppressive behaviour by an employer may not succeed, but this legislation takes away the ability for an employee to go to an employment tribunal because they have been wronged and win their case. This is yet another hurdle to that redress. In this situation, a settlement agreement may be offered under that coerced example that I gave earlier, the employee may decide that, as a moral duty, he will take that further and end up at ACAS. We have not determined whether or not the ability of ACAS to come to an early conciliation agreement will be affected by the fact that the employee may or may not be able to pay a fee, which may be inserted after ACAS, or somewhere else in the system. They would then have to pay that fee and go through the employment tribunal system. We have to be careful that we are not just generating another selection of hurdles for the employee or, indeed, the employer to get over in order to get to a stage where appropriate redress is given for an unfair dismissal in these circumstances.

Our first amendment is very simple and asks that the legislation be changed to allow it to be signed off by a representative of an employee if they so wish. It gives the ability for all the issues to be properly explained and addressed with a sign-off for the purposes of clarity. It leaves open the ability for the employee to sign the agreement off themselves if they so wish and the guidance should also include a requirement for a mutual reference, at the very least—that should be part of the process of the negotiation.

As already mentioned, the Secretary of State has said that a higher employment tribunal fee may be levied where an employee has refused a settlement agreement. I talked about the hurdles that have been put in place, but if an employee says, "No, I do not want to accept that settlement agreement; I feel that I am being forced out of the door, unfairly dismissed, so I would like to seek other advice on this," is the Secretary of State really saying that a higher employment tribunal fee may be levied because the employee has refused a settlement agreement? I hope the Minister will clarify the position, as it cannot be called a without prejudice, compromise or settlement agreement if this is the case, because there is an additional coercion on top of the example I gave earlier.

Norman Lamb: I am not sure what statement by the Secretary of State the hon. Gentleman is referring to, but I can reassure him that there is no intention to charge a higher fee for a tribunal application where an agreement had been rejected by the employee. I keep trying to make it clear that the employee has the right to

[Norman Lamb]

say no and to pursue a claim if they are dismissed subsequently. They may not be dismissed. This is just an opportunity for the two parties to reach agreement.

Ian Murray: I am glad that the Minister has clarified the Secretary of State's position on a higher employment tribunal fee: it gives me some comfort that this additional hurdle of fees will not be inserted if a settlement agreement is refused in that process.

Employers will have to be well educated on these issues and given support and encouragement to make sure that they are used correctly. The last thing we would want would be to put this mechanism in place and for employees then to fall foul of not filling in the form correctly, not dealing with the circumstances in hand correctly and ending up inadvertently in an employment tribunal or pre-conciliation situation unnecessarily. So support must be given, and that goes back to the funding of ACAS and some of the issues we discussed what seems like 20 years ago.

We are clear that if these are to work properly, employers have to be given support. Indeed, employees need that support as well. That is why we have tabled amendment (b), which asks the Secretary of State to look at this in 12 months, just to make sure that these are working properly and are continued through an affirmative resolution of both Houses. You could say that amendment (b) is a sunset clause, which I know the Minister is incredibly fond of. We shall come on to talk about it at some point towards the end of our deliberations on the Bill. That is all our amendment is asking for.

I shall conclude where I started. This clause could have some significant unintended consequences. The law as it currently stands is there to make sure that you can have without prejudice conversations, compromise agreements that are readily used in a number of cases—I have highlighted one large legal firm that uses 5,000 or 6,000 of these agreements every year. I am concerned that the protected conversations element is part of the process. I am delighted that the hon. Member for Skipton and Ripon has agreed that this is compensated no-fault dismissal by the back door, and Beecroft-lite. It would be sensible of Government Members to recognise that that is what the proposals achieve, and to join us in voting them out of the Bill.

The Chair: Can I make sure that we put it on the record that the hon. Gentleman intends to move amendments (a) and (b) to Government new clause 2?

Ian Murray: I do intend to move them.

The Chair: We now come to a debate. Do any other Members wish to speak? As there are no other contributions, I call the Minister.

Norman Lamb: I thank the hon. Gentleman for his amendments. I understand what they seek to achieve. He made a bit of a glass-half-empty speech, though, in that he found all the possible pitfalls—

Mr Anderson: On that point—

Norman Lamb: In a moment. But the hon. Member for Edinburgh South did not in any sense acknowledge something that he conceded following my intervention: it is sometimes a good thing to reach an agreement and avoid the need for an employee to wait a stressful five months for a claim to be heard in a tribunal, the outcome of which is uncertain and has the potential adverse consequences of bad publicity and so on. Facilitating that would reassure employers, small ones in particular, that they could make such a proposition without its being used in evidence against them, but without there being protection for people making discriminatory comments—the Government have no intention of sanctioning that sort of behaviour by employers. This is a mechanism whereby decent small and medium-sized employers—indeed any employers—can make a proposition, which might well be in the interests of the employee.

Ian Murray: I am delighted that the Minister has allowed me to clarify the situation so early in his reply. He conflates the two parts of my argument. I was saying that there could be coercion to take a settlement because an employee sees many hurdles being put in place as a result of the legislation, including fees, which are not in the Bill but are in the Ministry of Justice consultation. Such coercion might involve an employer—a rogue one, I agree—saying to an employee, "Here is a settlement for you to go," and the employee might think, "Okay, I might just take that, because the Government have put in place so many hurdles to my getting access to justice."

Norman Lamb: Of course, what often happens at the moment in such circumstances as the hon. Gentleman describes, is that the employee is just sacked, without any recompense or agreed termination payment, and without a reference. Sometimes the Opposition seem to prefer such a confrontational position to a situation in which the parties can be encouraged—

Andrew Bridgen: Does my hon. Friend the Minister agree that the level of extreme coercion that the shadow Minister believes could happen would probably be a trigger for a penalty, should a case come to a tribunal?

Norman Lamb: My hon. Friend is absolutely right. If there was the extreme coercion that the hon. Gentleman referred to, the employer would not be protected by the clause. The employee could make reference to such coercion and pressure, and that would be relevant to a determination as to whether there had been an unfair dismissal and, as my hon. Friend rightly says, it would also be relevant to consideration as to whether there should be a penalty. The measure is designed to allow decent employers, who are trying to run their businesses, to settle genuine problems, and that is why it is so attractive.

John Cryer: As usual, the Minister is being very generous in giving way. He said that under the circumstances described, the employee is, at the moment, just sacked. In many circumstances the employee is, of course, not sacked, because that would be tantamount to unfair dismissal. If under those circumstances people feel as though they are pressured into accepting an offer because

of all the hurdles, and feel as though they are being pushed in a certain direction by an employer who is less than sympathetic, there is a danger that we are moving towards a position of legalising no-fault dismissal—I think that is the fear.

Norman Lamb: I understand the hon. Gentleman's point. The point that I am making is that at the moment unfair dismissals do occur. People are dismissed with no recompense, no compensation, no reference—nothing. Their dignity is destroyed and all they are left with is the possibility of being able to bring an uncertain claim to an employment tribunal, with all of the stress and anxiety that a five-month wait engenders. The provision encourages parties to think differently, to be more consensual and consider whether it is possible to reach an agreement that, as I say, might be in the interests of both employer and employee. For that reason, I think that is immensely attractive.

I understand the concerns at the heart of amendment (a). Safeguards are needed to ensure that individuals receive sufficient advice on the implications of signing a settlement agreement before they accept an offer. It is, of course, a major decision for any individual to make. As I have said, the proposed new clause does not change the requirement for an individual seeking legal advice on the implications of signing the settlement agreement before it becomes legally binding. The legal advice can be provided by any suitably qualified individual, including appropriately qualified trade union officials. We will ensure that the guidance on settlement agreements makes that point very clear.

The hon. Member for Edinburgh South made the point that employers need training, guidance and support. There will be absolute, clear guidance through the statutory code. Having spoken to the FSB, the British Chambers of Commerce, the Institute of Directors and so on, I envisage such organisations will provide guidance, support and training to their members to help them use the right that the clause provides. I absolutely agree with the hon. Gentleman that up-skilling would be entirely sensible.

Fiona O'Donnell: I do not believe for one minute that the Minister is a bad man, and I know that he is keen to make decisions and make good laws based on evidence. However, will he not concede that in the current economic climate, when so many people feel that the glass is half empty, it would at least be wise for the Government to revisit this and consider its impact?

Norman Lamb: I absolutely agree that we must monitor this measure. The very last thing that I want to do is pass a provision into legislation and then forget about it. I want to monitor it very closely. I want to hear from employer organisations, and from trade unions, to see how it is working. There will be a thorough review in 2016 of all the employment measures that the Government are pursuing. It makes sense to wait for a period of time before analysing their impact. To do so too quickly, when a measure is bedding in, does not make sense, because both sides, employers and employees, need to understand fully how the measures will work. However, after a good period of time, there absolutely should be a formal review, which, as we have indicated, will happen.

During that period of time, I want to be assessing, on a continuing basis, how this works. I therefore accept entirely the hon. Lady's proposition. I just think that to bed in, as amendments often do in Committee, a formal review at the point of a year, as well as the fact that another vote in Parliament would be required for it to continue, goes too far. We want to allow this system to develop, for people to understand how it can be used and, in a way, to change the culture away from conflict towards a much more consensual way of dealing with problems.

Julian Smith: Employers' organisations often do not reach or represent the smallest companies in our country, so I urge the Minister to work with his Department, and to work on his civil servants, to find mechanisms to reach out to those tiny companies, such as Piccalilly in Settle or the hundreds of companies I meet in my constituency. Such companies will need educating on the proposals.

6.30 pm

Norman Lamb: I am glad that my hon. Friend has got Piccalilly on the record. No doubt he will send the extract to the said company, to show his concern for its welfare. Yes, absolutely, and beyond what ACAS could do through the statutory code, the Department is working on how we can offer guidance online in simple and easily accessible terms to employers of any size, whether they employ one person or 5,000. We want the guidance to be clear and accessible.

The principles underpinning a proper way to offer settlement will be covered in the supporting statutory code, which will be subject to consultation and parliamentary scrutiny. I understand that the driver behind amendment (b) is that the provision, as with all legislative measures, should be reviewed to assess its effectiveness. As I have said, I agree wholeheartedly with that sentiment, which is why the impact of the employment changes to be introduced in the Bill, including this measure, will be reviewed in 2016. That formal review will look at the impact on employment tribunal claims of the reforms, as well as looking to understand the broader use of settlement agreements. Given our commitment to review the effectiveness of this part of the Bill, I consider the amendment unnecessary.

Fiona O'Donnell: May I check—I apologise if this is in the detail of the Bill and I have missed it—whether there is a cooling-off period after the point at which the employee signs the agreement? Admittedly, an employee would have had all that advice, but we know that people often regret once they have signed on the dotted line. Has the Minister considered that?

Norman Lamb: As now, under legislation we inherited from the previous Labour Government—*[Interruption.]* I was not expecting such a groan. I am only saying that under the legislation on compromise agreements inherited from the previous Labour Government—a statement of fact—once the employee signs, having had independent advice, that is a binding agreement. Most people understand that once someone has entered an agreement, that should be the end of the matter, to provide reassurance that it

[Norman Lamb]

cannot be reopened by either employer or employee—that is an important principle. It will work in exactly the same way as the existing compromise agreements do.

Andrew Bridgen: On a point of clarification, which might give some comfort to Opposition Members, will the Minister confirm that where a settlement agreement is offered via an employer and refused by the employee, the employee's rights and protections are in no way diminished or eroded by that refusal? The only difference is that now, perhaps, the employees will know that their employment is potentially at risk. That was always the case, but previously employees were ignorant of that.

Norman Lamb: My hon. Friend is absolutely right, and he puts it clearly and well. That is exactly the position: the rights of the employee are not prejudiced or compromised in any way. The attraction, also, to the employers is that it puts them on notice, which does not happen at the moment. Employers all too often—frequently through a misunderstanding of the law—act, but then it is too late and they are confronted by a potentially expensive claim. Under the new legislation, if the offer is rejected, the employers are put on notice that they have to be careful in what they do. It might well be sensible for them to seek advice at that point, but at least it is not too late to avoid a problem occurring. That is another reason why this is attractive.

Before I shut up, let me make one other point about amendment (a) and its reference to the "trade union official", the "workplace representative" and the "legal representative". The agreement of course must be between the employee and the employer—they are the parties to the contract—but nothing we are seeking to do excludes support representatives within the workplace from helping to secure that agreement. It would be wrong, however, as the amendment implies, for there to be the possibility of an agreement between an employer and a trade union official which does not involve the employee. The agreement must directly involve the employee, perhaps with support in negotiating it from their trade union official. The risk is that the amendment would exclude the employee from the agreement that has been reached. I am sure that that is not the intention of the hon. Member for Edinburgh South, but that would be the effect of the amendment.

Question put, That the amendment be made.

The Committee divided: Ayes 12, Noes 8.

Division No. 15]

AYES

Bingham, Andrew	Morris, Anne Marie
Bridgen, Andrew	Mowat, David
Carmichael, Neil	Ollerenshaw, Eric
Evans, Graham	Prisk, Mr Mark
Johnson, Joseph	Smith, Julian
Lamb, Norman	Wright, Jeremy

NOES

Anderson, Mr David	Murray, Ian
Cryer, John	O'Donnell, Fiona
Danczuk, Simon	Ruane, Chris
Davies, Geraint	Wright, Mr Iain

Question accordingly agreed to.

Amendment 2 agreed to.

The Chair: The questions relating to new clause 2 and amendments (a) and (b) will be dealt with much later in proceedings.

Question put, That the clause, as amended, stand part of the Bill.

The Committee divided: Ayes 12, Noes 8.

Division No. 16]

AYES

Bingham, Andrew	Morris, Anne Marie
Bridgen, Andrew	Mowat, David
Carmichael, Neil	Ollerenshaw, Eric
Evans, Graham	Prisk, Mr Mark
Johnson, Joseph	Smith, Julian
Lamb, Norman	Wright, Jeremy

NOES

Anderson, Mr David	Murray, Ian
Cryer, John	O'Donnell, Fiona
Danczuk, Simon	Ruane, Chris
Davies, Geraint	Wright, Mr Iain

Question accordingly agreed to.

Clause 17, as amended, ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned.—*(Jeremy Wright.)*

6.39 pm

Adjourned till Thursday 5 July at Nine o'clock.