



2013 Lord Renton Lecture

delivered by

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"Respect for law and sausages": how Parliament made Section 31 of the Growth and Infrastructure Act 2013 on the sale of employment rights

Otto von Bismarck is said to have commented, though the attribution is almost certainly false, that "to retain respect for laws and sausages, one must not watch them in the making".² As a Crossbench Peer in the House of Lords I have a front-row seat when laws are made, and the process is often very unappetising.

In this lecture, I want to describe what occurred earlier this year in the Parliamentary kitchen when we cooked one particular law, Clause 27 which became Section 31 of the Growth and Infrastructure Act 2013. That provision allows employers and employees to agree that the latter will give up their statutory employment rights, such as the right to protection against unfair dismissal and redundancy, in return for shares in an employing company worth at least £2000 at the date of issue.

I must declare an interest because, as I shall explain, I was doing all I could to prevent this

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² The poet and lawyer John Godfrey Saxe is much more likely to be the source of the aphorism. See The Yale Book of Quotations (edited by Fred R Shapiro, 2006, p.86).

particularly unappetising dish from leaving the kitchen.

In addressing this subject I pay tribute to Lord Renton, in whose honour this annual lecture was established and who played such an important role in improving the drafting of legislation. His inaugural Statute Law Society Lecture, delivered in 1995, assured his audience, "Don't worry about the Lords!". As he pointed out, the House of Lords makes a significant number of amendments to Bills each year, "many of them made to improve the drafting".³ I like to think that Lord Renton would have approved of how the House of Lords dealt with Clause 27.

The story starts in October 2011, when venture capitalist Adrian Beecroft produced a report for the Government on employment law. He suggested, without any research apparent from the published document, that "much of employment law ... deters small businesses in particular from wanting to take on more employees". One of his proposals was that small businesses should be able to opt out of some employment law obligations, such as those relating to unfair dismissal.⁴

The Secretary of State for Business, Vince Cable, was not impressed. When the Beecroft Report was leaked in May 2012, Mr Cable wrote an article in The Sun newspaper in which he referred to "ideological zealots who want to encourage British firms to fire at will". He added that it was "complete nonsense" to think that if employment rights were restricted, employers would start hiring more staff and the economy would boom.⁵

Mr Cable's Cabinet colleague, the Chancellor of the Exchequer, George Osborne, took a different view. In his speech at the Conservative Party Conference on 8 October 2012, Mr Osborne thanked Mr Beecroft and announced a new proposal: companies would be able to give employees shares in the

³ The Rt Hon Lord Renton KBE, QC "The Evaluation of Modern Statute Law and its Future" (Inaugural Statute Law Society Lecture, 1 November 1995).

⁴ Adrian Beecroft Report on Employment Law (24 October 2011), pp.4-6. Under the Beecroft proposal, the employer would have to make clear to potential employees that their jobs involved such an opt out and "nobody would be forced to join" such a company.

⁵ The Sun 21 May 2012. See also The Daily Telegraph 21 May 2012.

business, in return for which the employees would agree to give up their protection against unfair dismissal and redundancy, as well as other employment law rights, and the Government would charge no capital gains tax on the profit made by the employees on the shares. As Mr Osborne enthusiastically described the proposal: "Owners, workers and the taxman, all in it together". Well, it was a Conference speech.

Ten days after Mr Osborne's announcement, on 18 October, the Growth and Infrastructure Bill was published. It included a clause which provided for the new employee shareholder status. On the same day, the Department for Business, Innovation and Skills announced a 3 week consultation on the proposal, to end on 8 November.⁶ It is, of course, customary to consult *before* putting legislative proposals before Parliament. And three weeks is not a long time for views to be expressed on such a novel and substantial proposal. Indeed, Beecroft had not referred to, far less recommended, any such solution to the problems which he identified. As a former Conservative employment Minister, Lord Forsyth of Drumlean, suggested during the Report Stage Debate in the House of Lords, the proposal gave every appearance of "something that was thought up by someone in the bath".⁷

The responses to the consultation suggested that Mr Osborne should have pulled out the bath plug and let the idea go down the drain. As noted in the Government's written reply to the Consultation in December 2012⁸, only three of those responding to the consultation said they would take up the new status, two of them individuals and one a small business.

Nevertheless, the Government pressed on with the proposals in the House of Commons. In response to concern about pressure from employers, the Government added a clause to protect employees from unfair dismissal or other detriments if they declined to take up the new status.

That Clause 27 of the Bill - the relevant provision which became Section 31 - was going to cause

⁶ Department for Business Innovation and Skills "Consultation on Implementing Employee Owner Status" (18 October 2012).

⁷ Hansard, House of Lords, 20 March 2013, column 614.

⁸ Department for Business Innovation and Skills, "Implementing Employee Owner Status: Government Response to Consultation", December 2012, p.34.

trouble for the Government in the House of Lords became apparent at the Second Reading stage, the debate on issues of principle, on 8 January 2013. Lord Adonis, who led for the Labour Opposition, said that the shares-for-rights scheme was so ill-considered that "it makes the back of the envelope look like Magna Carta".⁹ Baroness Brinton, from the Liberal Democrat Benches¹⁰, and Baroness Wheatcroft from the Conservative Benches, also expressed their concerns.¹¹

In the period leading up to the Committee Stage, Lord Adonis addressed the weekly meeting of Crossbench Peers, as did Baroness Hanham, the Minister in charge of the Bill. It was apparent that many of us Crossbenchers were troubled by Clause 27. I discussed the issue with Lord Adonis and we agreed to table detailed amendments for debate at the Committee Stage. Baroness Brinton, from the Liberal Democrats, tabled amendments of her own.

At the Committee Stage debate in the Chamber of the House of Lords on 6 February, the widespread nature of the opposition to Clause 27 became apparent. There was agreement on all sides of the House of Lords that it was objectionable to allow employers to buy-off basic employment law rights, such as unfair dismissal and redundancy rights, by persuading employees to receive shares worth at least £2000 on the day of issue, though probably worth much less when a company was considering making employees redundant. Employment rights had been conferred, and protected, over the past 50 years by Governments, both Conservative and Labour, precisely because the inequality of bargaining power between employee and employer means that freedom of contract is insufficient to protect the employee or prospective employee. To allow these basic employment rights to become a commodity to be traded frustrates the very purpose of the entitlements as an essential protection in the employment context. Of course we can argue about what employment rights Parliament should confer, and Parliament regularly alters the detailed content. But once Parliament has decided what employment rights should be enjoyed, it is wrong in principle to allow them to be bought off, and it is especially bizarre to do so when there is no demand from

⁹ Hansard, House of Lords, 8 January 2013, column 33.

¹⁰ Columns 44-47.

¹¹ Columns 60-62.

employers for any such provision and when responsible employers are introducing genuine share-ownership schemes.¹²

At Committee Stage, the House of Lords considered a series of detailed amendments which sought to ensure further protection for employees and prospective employee. For example, that the individual must have received legal advice on the consequences of the agreement from an independent solicitor or barrister;¹³ and a guarantee that a prospective employee who did not want to take a job on Clause 27 terms would not lose his or her jobseekers' allowance.¹⁴

During the Committee Stage debates, a number of Conservative Peers expressed concern about Clause 27, most notably Lord Deben, the former John Selwyn Gummer, a past Chairman of the Conservative Party. He said that as the founder of a small business, and having worked in other small businesses, he could not "imagine any circumstances whatever in which this would be of any use to any business that I have ever come across in my entire life". He said that it was "mystifying" that the Government was pursuing this proposal.¹⁵ It was plain that there were many other Peers on the Conservative and Liberal benches who shared his views about Clause 27.

Although votes are possible at Committee Stage, it is more common to wait for Report Stage. Lord

¹² See Hansard, House of Lords, 6 February 2013, columns 265-266. I added that there is only one precedent for Clause 27. In Genesis, chapter 25, Jacob refuses to let his famished brother Esau eat some of the broth he has made "until you sell me your rights as the first-born". Esau agrees because he is famished and, he says, "what use is my birthright to me?" compared to the mess of pottage of which he has immediate need.

¹³ The absence of any such protection in Clause 27 was particularly indefensible when statutory provisions do provide that if an employee signs a compromise agreement to settle an unfair dismissal or other tribunal claim, such an agreement is valid only if the employee has received independent legal advice.

¹⁴ The absence of such protection for the job applicant meant that, in practice, clause 27 did not simply provide for an agreement to give up employment rights but imposed an obligation to do so.

¹⁵ Columns 293-294.

Adonis and I decided not to move our amendments to a vote at Committee Stage. We wanted first to see what concessions we could extract from the Government, who were by now under some pressure from their own backbenchers.

By Report Stage, a cross-party alliance was building up. I knew that many of my crossbench colleagues were troubled by Clause 27. I had meetings with Lord Adonis, leading for the Labour Opposition, whose Peers would be strongly whipped on this core Labour issue, and with Baroness Brinton, from the Liberal Democrat benches, who was hopeful that many of her colleagues would vote against the clause or at least abstain.

Lord Adonis, Baroness Brinton and I agreed that the best tactic at Report Stage was not to put down further detailed amendments and vote on them, but simply to table and vote on an amendment to leave Clause 27 out of the Bill. This was a risky tactic because if we had failed, Clause 27 would almost certainly become law with no additional protection for employees. But we took the view, based on our discussions with Peers from around the House, that we had good prospects of defeating the Government on Clause 27. If we did so, then the Government might be forced to abandon Clause 27 or, at least, it would need to accept detailed amendments as the price of restoring Clause 27.

An amendment in the House of Lords may be presented in the names of up to four Peers. Lord Adonis, Baroness Brinton and I had hoped to attract a Conservative Peer as the fourth name to emphasise the cross-party concern. Although many Conservative Peers were sympathetic, none of them was willing to add their name. So we did the next best thing. We persuaded the Bishop of Bristol to sign the amendment.

The Report Stage debate was on 20 March.¹⁶ From the Conservative Benches, Lord Forsyth of Drumlean and Lord King of Bridgwater - both of whom had served as employment Ministers - and Baroness Wheatcroft (with her extensive business experience), explained their concerns. Lord Forsyth described it as "a positively dreadful clause". He said he "could not believe the clause when I read it".¹⁷ He

¹⁶Hansard, House of Lords, 20 March 2013, columns 594-631.

¹⁷Column 613.

was "surprised that this clause has survived so long" since it was "ill thought through, confusing and muddled".¹⁸ Lord King said that he had carried out his own consultation and "I have not found anybody yet who is in favour of the proposal or who says that they think that they will use the provision".¹⁹ Baroness Wheatcroft expressed her fears that the clause "will bring out the worst in business". She said it "risks giving employee ownership a very bad name". She added that the proposal might just possibly be of value if it were to be restricted to start-up companies, or small companies, but she pointed out that the clause was general in its application.²⁰

The Minister, Viscount Younger of Leckie, with whom Peers expressed sympathy because it was not in his bath that the proposal was dreamt up, was unable to offer any compromises on unemployed people losing jobseekers' allowance for refusing to accept a job offer on Clause 27 terms, on employers having to pay for legal advice before a Clause 27 agreement is valid, or on any other point. So Lord Adonis, Baroness Brinton and I called a division on our amendment to remove Clause 27 from the Bill. We won by 232 votes to 178, a healthy majority of 54. Among the Conservative Peers voting with us were Lord Forsyth, Lord King, Baroness Wheatcroft, Lord Deben and Lord Lawson (the former Chancellor of the Exchequer).

The Bill returned to the House of Commons for further consideration on 16 April, after the Easter holiday. The Government decided to insist on Clause 27. Ministers gave way on one of the defects in the clause: they accepted that a person refusing work on Clause 27 terms should not lose Jobseekers' Allowance. The debate in the House of Commons - limited by a timetable motion to 45 minutes - barely addressed, let alone answered, the other concerns which had been expressed on all sides of the House of Lords.²¹ The Minister, Michael Fallon MP, described Clause 27 as an "imaginative proposal". The Government won the Commons vote to restore Clause 27 to the Bill by 38 votes.

¹⁸ Column 597.

¹⁹ Column 611.

²⁰ Columns 617-618.

²¹ Hansard. House of Commons, 16 April 2013, columns 174-189.

So the Bill returned to the Lords for ping-pong on 22 April, the first day back for the Lords after the Easter recess. Lord Adonis, Baroness Brinton and I had been in contact and we had circulated a letter to all those Peers for whom we could find email addresses. Parliamentary procedure is that a motion to disagree with the Commons is presented in the name of one Peer. Lord Adonis, Baroness Brinton and I agreed that the motion should be in my name since Crossbenchers would be so crucial to a successful vote.

In the debate on 22 April, a large number of speakers pointed out that Clause 27 was either wrong in principle, or damaging in practice, or unworkable, or misses its target, or unbalanced, or offers a means of avoiding tax on capital gains arising on shares with an initial value of up to £50,000 for high-paid employees who have no need for unfair dismissal and redundancy protection. I pointed out that it was regrettable that the Government had chosen not to listen to the political wisdom and business experience on its own benches in the House of Lords. I added that the Government knew that there was not just a lack of enthusiasm for this measure on its own Benches but a positive hostility to it. Lord Adonis, Baroness Brinton and I had decided that we would again put the question to a vote. Again, the House of Lords decided to exclude Clause 27 from the Bill, this time by an even larger majority of 69 votes.²² Five Conservative peers voted for the amendment (including Lord Forsyth, Lord King and Baroness Wheatcroft), and 18 Liberal Democrats (led by Baroness Brinton). Out of the 60 crossbenchers who voted, 59 supported the motion to disagree with the Commons (an exceptionally high percentage). Of course, Crossbenchers are not whipped, and a large proportion of those who vote actually listen to the debate - which is not always true of the other benches.

So the clause went back again to the House of Commons for further consideration the next day, 23 April. By now, there was some pressure because the end of the Parliamentary session was approaching and there was a risk of the Government losing the whole Bill. The Government did offer a further concession, but a weak one. Employers would be required to give the individual a written statement of the employment right which they would lose and the shareholding rights which they would obtain. Furthermore, there would be a cooling-off period of 7 days before an agreement signed by the employee would take effect. But

²²Hansard, House of Lords, 22 April 2013, columns 1247-1281.

there was still no right to legal advice paid for by the employer, and so employees might not understand the implications of what they were signing. The House of Commons approved this amended clause.²³

Back then to the House of Lords, the next day, Wednesday 24 April. By this stage, we had already asked the House of Commons to think again about Clause 27 on two occasions. A substantial number of my Crossbench colleagues take the view that because we are an unelected House, we are entitled to ask the House of Commons to reconsider an issue, but only in the most exceptional circumstances is it appropriate for us to insist on our legal powers to delay legislation. I feared that for many Crossbench Peers, and also for some of our supporters on the Government Benches, a third vote would be one too many. However, I thought we could win a third vote if the Government persisted in refusing to offer a further compromise.

Meanwhile, I knew that Lord Forsyth and Lord King, in particular, were working hard behind the scenes to persuade Ministers to offer a further concession. The most promising area for compromise concerned a requirement for the employee to receive legal advice, paid for by the employer, before a Clause 27 agreement has legal effect. I agreed with Lord Adonis and Baroness Brinton that I would again table a Motion to remove Clause 27 of the Bill. But I told them that if the Government did come forward with a sensible compromise, then I would be unlikely to push the matter to another vote. I did not think we could again win a vote in those circumstances, and if concessions were offered, it was, I thought, preferable to thank the Minister, rather than continue to fight a battle that could not be won.

But would the Government offer any further concession? On the evening of 23 April, after the debate in the House of Commons and the day before the debate in the House of Lords, the Government published a motion inviting the Lords to accept Clause 27 with a modification which would ensure that an agreement would be valid only if the employee had received legal advice paid for by the employer. The drafting was inadequate, as was explained to the Minister, Viscount Younger, at a meeting in the House of Lords at midday on Wednesday 24 April. At 1.30 pm, the Government published a revised version of the Government's motion, curing the technical defects. I confirmed to Lord Adonis and Baroness Brinton that I would not push the issue to a vote, for the reasons I have already mentioned. Lord Adonis told me that the

²³ Hansard, House of Commons, 23 April 2013, columns 767–787.

Labour Opposition would probably still call a vote on the issue of principle, though he recognised that the chances of success were poor.

The House debated Clause 27, for the final time, later that afternoon.²⁴ I explained why I thought that the concession by the Government was significant. A Clause 27 agreement to remove employment rights would be of no effect unless the employee or prospective employee has received independent advice, paid for by the employer. It is not sufficient that independent advice is available or is offered. It must be received. The advice would need to be comprehensive, covering the nature and effect of the employment rights that are lost, and in what circumstances, the content of the employment rights that are retained, such as discrimination law rights, and also the terms and effect of the shareholding aspect of the agreement: what rights will the employee be receiving in relation to the shares, both as to their retention and their possible disposal? What voting rights does the employee have, can the employer dilute the shares, what happens if the company is restructured or goes into liquidation, and many other relevant legal issues?²⁵

I doubt that there will be many employers who will be prepared to pay for legal advice on these complex issues to enable the employee to decide whether to enter into a Clause 27 agreement. A much more substantial risk, as Lord Forsyth explained, is that employers will enter into agreements with high-earning employees to use Clause 27 as a tax device to increase employees' salaries through a share scheme under which they can avoid a substantial amount of capital gains tax on any increase in the value of their shares.

²⁴Hansard, House of Lords, 24 April 2013, columns 1441-1467.

²⁵Echoing the statutory provisions which require independent advice when tribunal claims are settled, the adviser must be a qualified lawyer, a person certified by an independent trade union as competent to give advice in this context (it is highly unlikely that any independent trade union would want anything to do with this provision), an advice centre worker certified by the centre as competent to give advice in this context (it is highly unlikely that advice centres would wish to give advice on such complex issues), or a person of a description specified in an order made by the Secretary of State.

I emphasised that I had not altered my opinion about Clause 27. It is a deeply unsatisfactory provision, for all the reasons identified by Lord Adonis in particular and across the House of Lords at every stage of the Bill. But I concluded at the end of the debate that the Government were determined to enact Clause 27; it was impossible to see what further protection the Lords could add for employees; and the question was whether the Lords should continue to stand in the way of the Commons in the light of the safeguards introduced. I therefore told the House of Lords, as the proposer of the motion, that I was not going to divide the House again. The Labour Opposition did call a vote, which the Government won by a majority of 107. I could not bring myself to vote for Clause 27 and so I abstained.

The Bill returned to the House of Commons for the final time for MPs to approve the changes to Clause 27. One unfortunate consequence of the vote in the Lords was that it enabled the Minister, Michael Fallon, to say, with his tongue so far embedded in his cheek that he must have required medical assistance to remove it, that "we are now in a position where both Houses of Parliament support the clause and the principles behind it".²⁶ The House of Commons approved the clause by a majority of 61.

What lessons can we learn from the passage of Section 31 of the Growth and Infrastructure Act 2013 (as Clause 27 became)? First, that the House of Commons does a very poor job of holding the Government to account. A manifestly inadequate proposal, which had received no more than rudimentary consideration before its inclusion in the Bill, passed through the Commons with no more than basic scrutiny.

Second, the House of Lords does a much better job of identifying the defects in proposed legislation. I am not the most objective judge, but the experience of Clause 27 is just one of many examples I could give where I have seen proposed legislation come to the Lords after cursory, if any, analysis by Government and in the Commons, and where Peers identify the problems and secure improvements. Andrew Adonis concluded in his study of the House of Lords from 1884-1914 that, apart from its efforts to undermine the legislation proposed by Liberal Governments of which it disapproved, the House of Lords "was a revising chamber notable for undertaking almost no revision".²⁷ Today, the House of Lords has its

²⁶ Hansard, House of Commons, 25 April 2013, column 1030.

²⁷ Andrew Adonis Making Aristocracy Work: The Peerage and the

manifest defects. But it does scrutinise legislation comprehensively and effectively.

Third, the Government can be and is defeated in the House of Lords on the merits. The arithmetic is simple: an alliance of the Labour Opposition, the majority of Crossbenchers and some rebel Government Peers willing to vote with their conscience or their brain, or at least abstain, means that if the Government loses the argument, it will lose the division. Such Government defeats in the Lords can best be brought about by detailed discussions and planning of tactics across the House, as occurred in this case. It also requires co-ordination, and good fortune, in seeking to ensure that votes take place on days when those moving amendments can be present.

Fourth, that this power of the Lords is limited in practice, and I think rightly so in an unelected Chamber. The Lords can secure revision of Government proposals. But if the Government is determined to stand firm, then only on rare occasions would the Lords be willing to use its powers under the Parliament Acts 1911 and 1949 to delay implementation of legislation approved by the Commons. This was a classic example of an unattractive policy proposal whose defects were identified and exposed by the House of Lords, leading to the inclusion of protective measures to mitigate the damage which the clause might otherwise cause. But after a fairly long rally in the game of ping-pong, a determined Government is going to win, particularly if the proposal (as here) is being driven by the Chancellor of the Exchequer (or another senior Minister), provided the Government makes concessions, unless - unlike this case - the dispute raises an issue of fundamental principle.

I would be surprised if anyone who watched, or who now studies, what went on in the Parliamentary kitchen could find the process of producing section 31 appetizing. Still, it is now on the statutory menu, though the dish is expensive for employers who choose it and there are unlikely to be many employees who want to taste it, other than as a means of avoiding capital gains tax.

Political System in Britain 1884-1914 (1993), pp.68-69.