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Legal opinion: Reform of unfair dismissal law and the tribunal system

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Cutting unnecessary regulation is seen by the Government as one of its core priorities. Employment lawyer Sarah Rushton looks at its review of employment law.

The Government's proposals have included increasing the qualifying period for employees to bring unfair dismissal claims from one to two years and introducing fees for lodging employment tribunal claims.

The qualifying period

The qualifying period for unfair dismissal claims has varied over the years, but has been set at the current period of one year since 1999. A number of practitioners have commented that if the aim of increasing the qualifying period is to discourage claims, in reality it is unlikely to make a significant difference. If employees are unable to bring "ordinary" unfair dismissal claims, it is argued, there will simply be an increase in those claims for which there is no qualifying period, such as discrimination or whistleblowing. As these claims tend to be more expensive to bring and to defend, due to their complex nature, the proposed change might actually increase costs for both claimants and respondents. Vexatious claimants are by definition, vexatious and are unlikely to be put off by legislative changes if they have a sense of entitlement or expectation.

The two-year qualifying period for unfair dismissal was challenged in the House of Lords in the case of R v Secretary of State for Employment Ex Parte Seymour-Smith & Perez (No.2) 2000 IRLR 263 HL. The House of Lords accepted that the two-year period was indirectly discriminatory against women, who statistically had shorter periods of service than men. With this background, it is something of an unattractive proposition to re-introduce a two-year qualifying period again. While it is fair to say that the profile of the workforce may have changed over the last 10 years or so, it might be reasonable to suppose that a two-year qualification period might have more of an impact on certain groups of employees such as the young or the disabled. If the change is implemented, it is surely going to be ripe for a legal challenge.

Fees

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An introduction of fees for employment tribunal proceedings would be a highly controversial step. The Government believes that it is necessary to discourage vexatious and frivolous claims and to shift the cost of the tribunal system from the taxpayer to the user. There has been much speculation as to the level of fees, with suggestions that it could be as much as £250 to lodge a claim and £1000 when the claim is fixed for a hearing, with claimants who win being able to claim a refund and those on low incomes being exempt from payments, or paying on a sliding scale.

Given that a high proportion of those bringing unfair dismissal claims must be on low incomes (after all, they have lost their job) and given also the proliferation of employment insurance, it is questionable just what impact the introduction of fees will have. If those on low or no income are exempt from paying fees, how will this discourage frivolous claims? Furthermore, there has been little or no mention of the cost to the tribunal system caused by those employers who insist upon defending the indefensible and run cases on the basis that they have deep pockets and the employee does not. The proposals are also troubling because the very purpose of employment tribunals is to be simpler and cheaper than ordinary civil proceedings and to provide an easier route to justice. On this basis, it is hard to see how fees that are more than those for small claims in the civil courts can be justified.

Unmeritorious claims

The reforms appear to be prompted by a perception that the tribunal system is swamped by unmeritorious claims, but the evidence for this is purely anecdotal. Most employment lawyers will accept that they have in their careers come across weak or misconceived employment tribunal claims, but to introduce changes that will potentially adversely impact upon hundreds of thousands of people seems to be taking something of a sledgehammer to crack a nut. One more obvious solution (but one which might lack the same political rhetoric) would be a greater use of the current system of costs orders and deposits.

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