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The UK Employment Law Review and Changes to Unfair Dismissal

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Introduction

This short article discusses the changes being brought in by the UK government as part of its Parliament-long Employment Law Review (running 2010-2015). The context of this Review is two-fold. Firstly, these changes arise in the context of the global economic crisis of 2008 and the need to promote economic recovery and “growth”. Secondly, these changes reflect the particular political aims and aspirations of the Conservative/Liberal coalition. In this Coalition, the Conservative party is in the majority, and so arguably has the opportunity to promote its favoured political goals of economic freedom and efficiency over other considerations (rights). Certainly, the promotion of economic efficiency and freedom is evident from the first two of the stated aims of the Employment Law Review. These are: to create a flexible labour market to support the UK economy which encourages job creation, and to ensure that the labour market is “effective” which will enable “employers to manage their staff effectively”.¹ The final aim of the Review, to create a “fair” labour market, does include providing a “strong foundation of employment protections”² and suggests that some consideration is to be given to rights, although the priority given to rights in practice will be examined in this article. This article will also discuss the balance and conflicts between all three aims, and the structure of the resulting

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¹ BIS, *Employment Law Review: Annual Update 2012*, 2012, 5.

² *Ibid.*, 5.

compromise in (selected elements of) the Employment Law Review. The content of the Employment Law Review is very wide ranging, but can be broadly separated into three (overlapping) areas. The first of these areas is reform of unfair dismissal law. This includes the extension of the qualification period for unfair dismissal from 1 to 2 years (already in force), the exemption from unfair dismissal legislation for small businesses and the reform of unfair dismissal procedures. The second area of reform involves the introduction of alternative dispute resolution mechanisms to ensure that, where possible, workplace disputes are resolved without recourse to the Tribunal system. The government plans to introduce a comprehensive system of mediation for the resolution of employment disputes, as well as facilitating the use of compromise agreements. It also intends to allow “protected conversations” between employers and workers (which cannot be used in any litigation between the parties) as well as introducing Tribunal fees and streamlining the Tribunal process. The third area of reform stems from the “Red Tape Challenge” to reduce the amount of statutory legislation which creates “onerous and unnecessary demands on businesses”³. As part of this element of reform, the government plans to review the obligations under the Agency Worker Regulations 2010 and the Transfer of Undertakings (Protection of Employment) Regulations 2006, and to consider reducing statutory consultation periods for redundancy.

The very wide ranging nature of the employment reforms means that it is impossible to deal with them all in the format of a short article. I thus intend to deal only with the reforms to the system of unfair dismissal. All three elements of the reform to the unfair dismissal system will be considered, although the second and third elements are connected (the introduction of compensated no-fault dismissal and the reform of discipline and grievance procedures) and will be considered together. It is hoped that an analysis of these (actual and proposed) reforms will provide an insight into the ethos and direction of the UK government and the possible impact that this will have on employment relationships in the UK.

³ V. Cable, *Speech to the Engineering Employers Federation* 23 November 2011 <http://www.bis.gov.uk/news/speeches/vince-cable-reforming-employment-relations> (accessed 9 May 2012).

1. Extending the Qualification Period

In its Response to the Resolving Workplace Disputes consultation (the Response),⁴ the government states that the major benefit of the extension of the unfair dismissal qualification period from one to two years from April 2012 would be the increase in business confidence to “recruit and retain staff”.⁵ This corresponds with the government’s aim to create a more flexible labour market which allows the “creation of jobs by making it easy to get people into work and stay in work”.⁶ However, it is difficult to see how in practice, greater flexibility for employers to hire and fire without fear of Tribunal claims will lead to job creation and retention. Indeed, one commentator has suggested that although deregulation and less job protection “encourages increased hiring during economic recoveries, it also results in increased firing during downturns”.⁷ Therefore the overall effect of such a measure is to make “employment less stable over the economic cycle, with little significant impact one way or the other on structural rates of unemployment”.⁸ Furthermore, if such a measure simply encourages a “hire and fire culture”, that might also decrease the willingness of employers to invest in staff, and manage them “productively”. Thus, there could be a conflict between the first aim stated by the government of achieving a “flexible” labour market whilst at the same time achieving the second stated aim: an “effective” labour market which allows productive workforce planning.

It is interesting to note that in the Response the government mentions the concerns raised by the majority of consultation respondents that the increase in the qualification period for unfair dismissal would reduce employee rights and have a disparate impact on particular groups.⁹ However, in relation to the first of these concerns, the government hardly deals with the issue at all, despite a “strong foundation of employment protections” being part of one of the government’s stated aims in relation to the reform. Rather, the government focuses on the “benefit for employees recruited into roles with a high training requirement”.¹⁰ The

⁴ BIS, *Resolving Workplace Disputes: Government Response to the Consultation*, November 2011.

⁵ *Ibid.*, 34.

⁶ *Ibid.*, 34.

⁷ J. Philpott, CIPD’s Chief Economic Advisor, quoted in *Coalition Employment Law Plans*, in *Employment Law Bulletin*, 2011, n. 105, 7.

⁸ *Ibid.*, 7.

⁹ BIS, *op. cit.*, 33.

¹⁰ *Ibid.*, 33.

government contends that if these employees are falling below the required standard then firms are likely to dismiss them before their qualification for unfair dismissal to avoid the costs associated with these claims. Thus, if the qualification period were extended, then workers would have a greater opportunity to meet the required standard and would be more likely to retain their job. This is a strange comment, and in fact suggests problems with business culture rather than employment law (i.e. businesses are more prone to “hire and fire” than invest in staff). It also suggests that the problem lies more with business understanding of the effect and implications of unfair dismissal law, rather than the length of the qualification period. The current law on unfair dismissal is supposed to act to protect an employer who dismisses an employee for genuine reasons of capability and who has followed the correct procedures in this regard. If employers feel that this option is not available to them, then this implies that the unfair dismissal laws are not working effectively and need to be amended, or that “business confidence” could be furthered without changing the law, by simply making employers aware of what they are and are not entitled to do.¹¹

In relation to the disparate impact that the increase in the qualification period might have on different groups, the government does deal with this in the Response. This is perhaps a reflection of the legal challenge to the two-year qualification period which was brought against the previous Conservative government on the grounds of disparate impact (indirect discrimination), and which reached the European Court of Justice.¹² In the Response, it is stated that according to the (Equality) Impact Assessment, the extension of the unfair dismissal qualifying period would not cause *considerable* disparity of impact on any particular group (and so the measure could not be indirectly discriminatory). In any event, the government states that (even if the measure were indirectly discriminatory) increasing the qualification period for unfair dismissal could be objectively justified on the grounds that it is a proportionate means of achieving the legitimate aim of improving business confidence to recruit and retain staff.¹³ Certainly, such an aim is likely to be considered “legitimate” as a similar aim was considered legitimate by the Court in the previous *Seymour Smith* case, but the proportionality of such a

¹¹ In fact the government has already attempted this in the creation of an Employers Charter. This is available at <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/E/employerscharter.pdf> (accessed 16 May 2012).

¹² *R v Secretary of State for Employment ex p Seymour-Smith* C-167/97 [1999] ECR I-623 ECJ.

¹³ BIS, *op. cit.*, 34.

measure was not tested in that case. Furthermore, whether there is “considerable” disparity of impact would depend on the statistical evidence at the time, and the government should be mindful of the findings of its Impact Assessment which suggest that young people and ethnic minority groups will be particularly affected by these new rules. Finally, the government claims that the changes to the unfair dismissal qualification period will mean a 4-7% reduction in Tribunal claims and a considerable cost saving for employers.¹⁴ However, it has been suggested that such cost savings have been exaggerated, and that in any event, they have not been properly balanced against the clear social costs to workers losing their right to unfair dismissal. Ewing and Hendy estimate that the increase in the qualification period for unfair dismissal will remove dismissal protection for 3 million workers.¹⁵ By contrast, the cost savings will be very modest, because unfair dismissal cases have a very low success rate in Tribunal, and the level of compensation awarded is modest.¹⁶ Therefore the social costs – including the disproportionate effect of such proposals on certain groups – outweigh the modest administrative cost savings.¹⁷

2. No-fault Dismissals and Procedural Reform

As part of the government’s overall review of unfair dismissal procedures, it suggests a system of “compensated no-fault dismissal” for businesses with fewer than 10 employees. Essentially this system would allow small businesses to dismiss an employee who was not “at fault” (i.e. had not been guilty of misconduct) without going through formal disciplinary processes, as long as that employee receives a set amount of compensation. Employees dismissed in this way would not be entitled to claim unfair dismissal at Tribunal, but could still claim other employment law rights. The government hopes that this will not only increase efficiency by reducing the number of unfair dismissal claims reaching the

¹⁴ BIS, *op. cit.*, 33.

¹⁵ K. D. Ewing, and J. Hendy, *Unfair dismissal law changes – unfair?* in *Industrial Law Journal*, 2012, vol. 41 n. 1, 115.

¹⁶ The average level of compensation for unfair dismissal last year was £4591. Ministry of Justice, Employment Tribunal and EAT Statistics 2010-11, available at <http://www.justice.gov.uk/downloads/statistics/mojstats/employment-trib-stats-april-march-2010-11.pdf>, 10.

¹⁷ K. D. Ewing, and J. Hendy, *op. cit.*, 117.

courts, but will address the particular problems that small businesses have in complying with unfair dismissal procedures.¹⁸ The government contends that these proposals will benefit both employees and workers, by striking “a sensible balance between the need to give workers enough support and clarity about what is expected of them” and the need of (small) employers to dismiss workers without “unnecessary red tape and bureaucracy”.¹⁹

There are a number of elements of these proposals which are perplexing. Firstly, the notion of “no-fault” seems very odd in this context, where clearly some culpability is suggested on the part of the employee. Secondly, it is strange that the government seeks to argue that this will strike a fair balance between the needs of employers and employees. It is hard to see this as anything other than a deregulatory measure and an erosion of employees’ rights. Thirdly, the “efficiency” basis of this measure can certainly be questioned. Evidently, it is possible to argue that this measure will give greater flexibility for (small) employers, but it appears that these changes have great potential to undermine job stability and will have a negative impact on productivity (through a much reduced investment in people).²⁰ Furthermore, it could certainly reduce the attractiveness to potential employees of working for small employers, if they realise that in doing so they will be entitled to far fewer employment rights. This can only act to undermine the productivity of these small employers, and mean that they fail to attract the best (and perhaps most innovative) people.²¹

In relation to these observations, the no-fault system of compensation is of course used (effectively) in order to provide compensation for medical accidents. This system therefore provides an interesting comparison with

¹⁸ The government cites two elements of the current ACAS Code on Discipline and Grievance, which are particularly onerous for small business in this regard. The first of these is the requirement for different personnel to run different meetings in the disciplinary process, and particularly that a manager not previously involved in the case should chair any appeal. The second onerous element is the requirement for a series of warnings before dismissal. The government suggests that this represents too much of a burden on small businesses, presumably because this takes up considerable management time (and there are a restricted number of managers and often no HR to deal with these). BIS, *Dealing with Dismissal and “Compensated No-fault dismissal” for micro businesses*, 2012, 8.

¹⁹ *Ibid.*, 4.

²⁰ *Ibid.*, 36.

²¹ M. Bradshaw, “Compensated no-fault dismissal: the case for and against.” 12 April 2012, available at <http://www.personneltoday.com/articles/2012/04/12/58472/compensated-no-fault-dismissals-the-case-for-and-against.html> (accessed 16 May 2012).

the system of compensated no-fault dismissals suggested in the Response. In the context of medical accidents, it has been argued that the success of the no-fault system is based on the fact that it more effectively meets the aims of tort than negligence litigation. This is because a greater number of people receive compensation than under negligence (receiving compensation does not rely on proving fault), and also the no-fault system prevents accidents by creating a “culture where doctors and other medical professionals are not afraid to admit where they have made mistakes”.²² However, it could be argued that the no-fault system will not be as effective in the context of employment law, because the aims and operation of employment and tort law are different. Employment law, in the context of unfair dismissal with which we are concerned here, seeks to remove the arbitrariness of dismissal through the imposition (on business) of legal standards. This is not only to boost the bargaining power of the weaker party, but also to maintain employment relationships where possible, in recognition of the social and economic value of employment. Under tort law, the (on-going) relationship between the parties is not so important, and so no-fault systems can successfully be introduced which distance the “victim” and “perpetrator” and remove the stigma of fault (compensation is paid through general taxation).²³ However, in the employment law context, the no-fault system is not depersonalised, and so the stigma of fault is not removed. Furthermore, such a system is unjust because it is no longer the employer who is judged by the required (and now non legal) standards, but the employee, so the system penalises rather than aids the weaker party.

In the Response, the government also suggests that small businesses (and businesses in general) would benefit from reform of unfair dismissal procedures as a whole. It therefore asks for stakeholder opinion on the current unfair dismissal procedures under the ACAS Code of Practice for Discipline and Grievance 2009. It also introduces the model of the Australian Small Business Fair Dismissal Code (SBDC) and asks for views on whether this model could be successfully applied in the UK. The SBDC sets out the basic principles that small businesses should take into account when considering “summary” or “other” dismissal. “Summary” dismissal is permitted where the employer believes on reasonable grounds that the employee’s conduct is sufficiently serious to warrant immediate dismissal. For “other” dismissals, the employer must give the employee a

²² M. A. Jones, *Medical Negligence*, Sweet and Maxwell, 2003, 36.

²³ T. Douglas, *Medical Injury Compensation: Beyond No-fault*, in *Medical Law Review*, 2009, vol. 17, n. 1, 30, 45.

reason why he or she is at risk of being dismissed. This must be a valid reason based on capability or conduct. The employee must be warned either verbally or in writing and given the chance to respond to the warning and a chance to improve. This might include providing training or making clear the employer's expectations. The employee has the right to be accompanied in any discussions which may lead to dismissal.

The SBDC certainly represents a watering down of the ACAS Code. For instance, the ACAS Code requires that notification of disciplinary issues must be in writing, an employee must have the opportunity of a meeting to discuss the problem, and every employee must be given the right to appeal disciplinary action. It also suggests a series of warnings for lesser conduct or capability issues rather than just the one warning in the SBDC. However, the introduction of the SBDC does have great advantages over the compensated no-fault dismissal system in which employees can be dismissed for "poor" performance without any warning or any chance to improve. It therefore perhaps provides a better compromise for small businesses and their workers than the compensated no-fault dismissal system.

3. Conclusions

It appears from the above discussion that the UK government has made and intends further wide ranging changes to employment law in the name of "efficiency". However, how far these aims consider "efficiency" beyond the cost savings of deregulation must be brought into question. It must also be questioned whether the government can sensibly maintain the argument that these changes will not affect the employment protections currently enjoyed by UK workers, given that in all of the elements of unfair dismissal reform considered in this article, the employment rights of workers have been, or potentially will be, seriously curtailed.

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