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Battling employment law to boost the economy

It is no secret that the current state of economic play has made for some tumultuous economic times. The Government has focused its efforts on considering ways in which it can boost business confidence and create conditions for businesses, particularly SMEs, to grow and expand. Employment regulation was high up on the hit list. January 2011 saw the Government's consultation on Resolving Workplace Disputes and things have moved on swiftly since then. The Government has committed itself to increasing the qualifying period for unfair dismissal from one year to two years from April 2012.

We have been here before. The qualifying period for unfair dismissal has changed a number of times since it was first introduced in 1971 as just six months. In 1980 this increased to one year (two years for businesses with less than twenty employees) and then to two years in 1985 irrespective of the size of the employer. In June 1999 this was reduced to one year for all employees.

Businesses have generally welcomed the change to the qualifying period. There has been a steady rise in claims filed with the Tribunal with 86,181 in 2004/05 to 236,100 in 2009/10 – a 173% increase. Interestingly, there was a slight decrease in the Tribunal's most recent statistics, but nevertheless the current system is undoubtedly creating a burden on businesses with time and money being lost in defending Tribunal claims. The CBI's response to the Government's consultation paper quotes a business which incurred a £35,000 legal bill and four months of wasted management time in defending a spurious claim that was thrown out on the first day of hearing. There is confidence that the change will buck the trend of the increasing number of claims filed against employers and that the time and money in defending claims can be invested valuably to assist businesses to maintain sustainability in difficult financial times.

However, could SMEs be facing a different problem which would wholly undermine the Government's intention? Looking beyond claims for unfair dismissal, employees obtain other rights from day one, for example, protection from discrimination. Employees may also claim unfair dismissal from day one in circumstances where the dismissal relates to certain reasons, for example where an employee is dismissed for making a whistleblowing disclosure. Such claims could cause a bigger headache for employers as they are notoriously complex and often more timely and costly to defend; damages are uncapped compared to compensation for a straightforward claim for unfair dismissal being capped at £68,400; Tribunal statistics indicate that claims for discrimination have a lower percentage rate of settlement through ACAS; and the average award for discrimination claims are generally higher. Will an aggrieved employee rely on their day one rights instead? Only time will tell, but there certainly is a risk.

The two year qualifying period intends to encourage businesses to recruit freely without fear of reprisal. The same point above applies here. Employees may rely on their day one rights so fear of reprisal would still be very much alive, if in fact it exists at all. Recruitment is usually driven by business need – when there is an increased demand for goods and services, an employer will look to increase manpower to meet market demands. There are other factors which are far more likely to inhibit business growth than the fear of an unfair dismissal claim – if banks remain unwilling to lend then recruitment may not be an option anyway.

In more practical terms, does a business really need two years to assess the suitability of an employee? If employees are monitored efficiently, the decision to retain or dismiss should be evident within the first year of employment. The change has been criticised for failing to properly balance the needs of employees with those of the employer.

The qualifying period for unfair dismissal should be considered in the context of the Government's other proposals which include measures to encourage early resolution of workplace disputes, speeding up the Tribunal process and measures to tackle spurious claims. April 2013 will allegedly see the introduction of a £250 fee for filing a claim and a further £1,000 fee upon a claim being listed for hearing. This is undoubtedly a positive step forward for SMEs although unconfirmed as yet. Other proposals include increasing powers to make awards of costs and a formalised system for making offers of settlement with penalties where offers are unreasonably declined.

The Government estimates that the change in the qualifying period together with its other proposals will see the number of unfair dismissal claims reduce by 2,000 a year and a saving of £6 million a year for British business. But could there instead be an increase in costs and claims arising from other causes of action? October 2011 saw the introduction of the Agency Worker Regulations. The Regulations create increased rights for agency workers at the expense of the hiring business which creates a barrier for business growth. At a time when the economy is at a historical low, the Government's growth strategy does not appear to be consistent and could be criticised for giving in one hand whilst taking from the other.

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