SQUIRE SANDERS

RED TAPE AND EMPLOYMENT RIGHTS
A FUNDAMENTAL REBALANCE?

4 January, 2013

One of the Coalition Government's most prominent policy statements after taking power was to cut "red tape". Too much of it, they felt, was stifling growth and preventing business from flourishing.

It quickly became apparent that for the Government "red tape" often meant "basic employment rights".

According to the Government, the process to dismiss underperforming employees had become too complex. Tribunal claims were too easy to bring. The result: "coasting" employees could take advantage, while employers were reportedly fearful of the costly consequences both of dismissing them and of the recruitment of successors.

There followed a number of proposals to rebalance the system. These included:

- Extending the qualifying period to claim unfair dismissal to two years
- Introducing fees for claims in the Employment Tribunals
- Requiring pre-claim conciliation to reduce the burden of litigation
- Permitting "protected conversations" during which employers could have "frank conversations" with their employees about their possible departure without the risk of what was said being referred to during litigation
- Most controversially, "no-fault dismissals" which would allow employees to be dismissed for a pre-determined payment, with no right to claim unfair dismissal.

These proposals were based on a number of frankly rabble-rousing assumptions, backed by little or no actual evidence in the Government's consultation paper.

For example, little evidence was provided that:

- Employers found employment rights a disproportionate burden (the Government's own statistics suggest that only 6% of employers consider such regulation to be an obstacle to business success)
- Fairly dismissing employees really is problematic or is preventing employers from considering further recruitment
- The number of "coasting" and vexatious employees who take advantage of their rights outweighs the number of employers who are willing to exploit the many low paid and relatively powerless employees in this country who are dependent on them.

The effectiveness of the changes/proposals has also been brought into question. Will making it more difficult to claim unfair dismissal not merely result in employees bringing more complex (and expensive to defend) discrimination or whistleblowing claims? Won't a system of protected settlement discussions just increase litigation as the Tribunals struggle to define the limited circumstances when such protection applies? Is this not just tinkering round the edges because EU membership makes it impossible to make material alterations to many more fundamental worker rights, TUPE and discrimination in particular?

Despite these concerns, the Government has pressed ahead with its proposals.

In April last year, the qualifying period to bring a claim for unfair dismissal was increased to two years. The system of fees to be charged to bring a claim in the Tribunal has been clarified and is expected to be rolled out later this year. Pre-conciliation now looks set to come into effect in 2014. Employers also look likely in the near future to be able to make settlement offers under the guise of "protected conversations", though the draft enabling legislation is riddled with problems of definition and enforcement.

The only idea to be dropped by the Government (at least for now) was no-fault dismissals. However, in late 2012 it introduced and consulted on its latest initiative: to allow employees to give up certain rights, including the ability to claim unfair dismissal, in exchange for shares in their employer. Again, greeted with enormous scepticism by bosses and employees alike.

Of course, the changes have not all been to reduce worker rights. Over the next two years, we will also see the extension of parental rights and of the right to request flexible working. However, these increases to family friendly rights do not undermine the general trend towards making it easier to fire employees and harder for them to bring claims in the Tribunal.

2012 has seen a continuation of changes introduced in 2011. In 2013, we should be ready not only for the implementation of the current proposals, but the introduction of still more initiatives aimed at rebalancing the status quo in favour of the employer. Whether next year's proposals have any more promise than the current crop remains to be seen.

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