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Will A Longer Qualifying Period Lead To Fewer Unfair Dismissals?

With the best will in the world, the relationship between employer and employee does not always work out. Even a candidate who is perfect on paper and impressive in interview can disappoint when it comes to actually performing the role. There is no substitute for 'on the job' assessment of an employee's skills, experience and 'fit'.

Until recently, only an employee with at least one year's length of service could bring an unfair dismissal claim. This effectively gave an employer a year in which to assess a new recruit's performance (often referred to as the 'statutory probationary period') and, if not up to scratch, the employer could terminate the relationship without risking an unfair dismissal claim.

An employer that dismisses a qualifying employee will be vulnerable to a claim for unfair dismissal unless the employer can show a fair reason for the dismissal and that they acted reasonably in using that reason to justify the dismissal. If an employment tribunal finds that the dismissal was indeed unfair, it can order the employer to re-engage the employee or pay compensation, which is currently capped at £72,300.

As part of the UK government's wide-ranging initiative to improve business confidence and boost economic growth in the UK, from 6 April 2012 new legislation has increased the qualifying length of service requirement for unfair dismissal claims from one to two years. The change affects new employees employed on or after 6 April 2012; employees already in post on that date will not be affected.

The government has stated that the aim of the increase is to encourage companies to recruit without fear of unfair dismissal claims if things do not work out, to reduce the marginal cost of hiring and to place employees and employers on a level playing field, by making it easier to hire and fire employees. The prediction is that the new legislation will result in around 2000 to 3000 fewer claims for unfair dismissal being brought each year, realising an annual saving of £15.8m to £20.1m to businesses in the UK and a further saving to the taxpayer (because the tribunals are not self-financing).

Generally, this change sounds attractive to employers; on the face of it companies have an extra year in which to decide whether an employee makes the grade without fear of redress. But what does the change actually mean for employers in practice?

Potential consequences of the change

The main concern of employment law practitioners is that the change will simply mean that employees who are prevented from claiming unfair dismissal will look to broader and more creative means of recompense for their dismissal.

Under the Equality Act 2010, employees are able to claim unfair dismissal regardless of length of service if they are dismissed for a discriminatory reason (i.e., age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation). In addition, an employee who is dismissed as a result of 'blowing the whistle' in accordance with the Public Interest Disclosure Act may bring a claim for unfair dismissal for which there is also no qualifying period. Discrimination and whistleblowing claims tend to be extremely time-consuming, complex and costly for employers to deal with. Compensation for successful claims brought under either of these pieces of legislation is uncapped and can be significant.

New employees will be only too aware of their reduced employment rights as a result of the change. Although it is hoped that the increase in qualifying period will lead to employees trying even harder to make the grade and to be accepted by their employers, mangers should beware of a perceived lack of job security by employees, lower morale and a tendency to move jobs.

These unintended consequences make it even more important for managers and HR professionals to manage poor performance and conduct issues from the outset. There is a risk that managers will choose to bury their heads in the sand until nearing the expiry of the two year period in the expectation that they can dismiss without consequence as opposed to managing poor performance as it arises. Regardless of length of service, the best way to avoid employment tribunal claims and increase morale and productivity within a team and the wider organisation is to manage conduct, performance and relationship issues as they arise rather than waiting until things are out of control and relationships are irreparable. Time and again we see attempts to dismiss on under-performance grounds following several appraisals at which no concerns about performance have been raised.

Practical tips for dealing with the change

Identify those employees who shall continue to be subject to the one year qualifying period and those which have a two year qualifying period. Update internal policies and procedures accordingly.

Manage performance issues as soon as they arise. It will remain essential to consider the potential dismissal of employees well in advance of the expiry of the two year period. Employers should still use contractual probationary periods much shorter than two years to monitor employees and pick up quickly on any issues of poor performance.

Expect an increase in discrimination and whistleblowing claims which can be brought without any period of continuous employment. Keep a paper trail of reasons for dismissal and ensure the proper use of disciplinary and grievance procedures to help to reduce the risk of other claims being brought.

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