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BRIEFING PAPER

Number CBP 4526, 20 June 2018

Unfair dismissal: qualifying service rule

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Summary

Employees acquire the right not to be unfairly dismissed after two years of continuous employment with their employer. The two-year period was implemented by the *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989)*, affecting persons whose employment commenced on or after 6 April 2012.

Immediately prior to this, section 108 of the *Employment Rights Act 1996* provided for a one-year qualifying period. Since the right to claim unfair dismissal was introduced by the *Industrial Relations Act 1971*, the qualifying period has been amended several times, ranging between six months and two years.

The qualifying period applies to normal unfair dismissal claims. Besides these, legislation deems certain reasons for dismissal to be "automatically unfair". If dismissal is for one of these reasons the qualifying period will generally not apply.

1. The qualifying period

With effect from 6 April 2012 the normal qualifying period of continuous employment for unfair dismissal rights was increased to two years. Immediately prior to that it was one year.

The period of employment must be unbroken to qualify for the right. Continuity is broken by a gap in employment of a week or more, although gaps due to temporary cessation of work or illness/injury do not break continuity.[1] A transfer to a new employer will not necessarily break continuity; for example, TUPE transfers or employment by an associated employer will not break continuity.

The two-year qualifying period applies to normal unfair dismissal cases. That is to say, cases where the employee argues that the employer's decision to dismiss was outside of the range of reasonable responses open to a reasonable employer in the circumstances.

A dismissed employee who has not completed the relevant period of service might still be able to pursue a claim if the reason for dismissal is one deemed by statute to be "automatically unfair". Most, but not all, types of automatically unfair dismissal are not subject to a qualifying period. Additionally, protection against discrimination is not subject to any qualifying period.

1.1 Automatically unfair dismissal

The provisions for automatically unfair dismissal are found mainly in sections 99 – 108 of the *Employment Rights Act 1996*, although others are found elsewhere in employment legislation. The various grounds for claiming automatically unfair dismissal are summarised below.

- **Jury service** – dismissal for taking time off work for jury service
- **Leave for family reasons** – dismissal for reasons related to pregnancy, childbirth, maternity, paternity, adoption leave, antenatal leave, parental leave, shared parental leave or time off for dependents
- **Health and safety cases** – see below
- **Sunday work** – dismissal of a shop or betting worker because they refuse to work (or work additional hours) on Sunday
- **Working time regulations** – dismissal for asserting rights under the *Working Time Regulations 1998*
- **Pension fund trustees** – dismissal for performing (or proposing to perform) functions as an appointed trustee of a relevant occupational pension scheme
- **Employee representatives** – dismissal for performing or proposing to perform any functions as an employee representative or candidate for election in respect of employees' rights to be

[1] Employment Rights Act 1996, section 210(4)

consulted in the event of proposed multiple redundancies or sale/transfer of the employing business

- **Whistleblowing** – dismissal for making a protected disclosure
- **Assertion of statutory rights** – dismissal on grounds of "assertion of a statutory right". Relevant statutory rights for this purpose are defined in section 104(4) ERA
- **National Minimum Wage** – dismissal in connection with an attempt to exercise any right under the *National Minimum Wage Act* or seek enforcement of the National Minimum Wage
- **Tax credits** – dismissal if the principal reason relates to a claim for tax credits
- **Flexible working arrangements** – dismissal for making (or proposing to make) an application for flexible working arrangements
- **Pension enrolment** – dismissal in connection with pension enrolment
- **Study and training** – dismissal in relation to exercising the statutory right to make request in relation to study or training
- **Trade union blacklist** – dismissal for a reason relating to a trade union blacklist prohibited by the *Employment Relations Act 1999 (Blacklists) Regulations 2010*
- **Employee shareholder status** – dismissal for refusing to accept an offer of employee shareholder status
- **Improper selection for redundancy** – selection for redundancy for a reason that would otherwise be regarded as an automatically unfair dismissal, subject to the condition that "the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer"
- **Fixed term contracts** – dismissal for exercising or attempting to exercise rights under the *Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002,* for employees who work under fixed-term contracts
- **Part time workers** – dismissal for asserting rights under the *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000*
- **Membership or non-membership of a trade union** – dismissal of an employee, including selection for redundancy, on grounds related to union membership
- **Industrial action** – dismissal for involvement in industrial action during the 12 weeks of "protected industrial action" under section 238A of the *Trade Union and Labour Relations (Consolidation) Act 1992*
- **Information and consultation**
  - dismissal for exercising rights under the *Information and Consultation of Employees Regulations 2004*

  - dismissal in connection with information and consultation rights of occupational and personal pension scheme members - *Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006*
  - dismissal in connection with rights in respect of European Cooperative Societies - *European Cooperative Society (Involvement of Employees) Regulations 2006*
  - dismissal in connection with the rights of employees involved in cross-border mergers - *Companies (Cross-Border Mergers) Regulations 2007*
  - dismissal in connection with the rights of employees of European public limited liability companies - *European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009*

- **Recognition of trade union** – dismissal for a reason relating to obstruction or promotion of official recognition of a trade union
- **Right to be accompanied at disciplinary or grievance hearing** – dismissal for relying on the right to be accompanied by a fellow worker or trade union representative at internal disciplinary and grievance procedure hearings
- **Spent conviction** - dismissal because of a spent conviction within the meaning of the *Rehabilitation of Offenders Act 1971* unless the employee falls within a category excluded from the Act by statutory order
- **Taking part in union activities** – dismissal if the principal reason was that the employee "had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time" (*Trade Union and Labour Relations (Consolidation) Act 1992*, s152(1)(b))
- **Time off for dependents** – dismissal in connection with exercising the right to time off for dependents
- **TUPE transfer** – dismissal for a reason connected with a sale or other transfer of a business covered by the *Transfer of Undertakings (Protection of Employment) Regulations 2006*

Health and safety

The normal qualifying period is reduced to **one month** if the dismissal is due to a requirement or recommendation relating to suspension on medical grounds: see *Employment Rights Act 1996*, section 64(2).

Under section 100 of the *Employment Rights Act 1996* dismissal is automatically unfair in six specified health and safety cases,[2] as follows:

1 The employee was carrying out or proposed to carry out activities in connection with prevention of health and safety risks at work, having been designated to do so by the employer.

[2] This implemented the *EC Health and Safety Framework Directive 89/391*

2 The employee, being an appointed safety representative, performed or proposed to perform his duties as such.

3 The employee was exercising rights under the *Health and Safety (Consultation with Employees) Regulations 1996*.

4 The employee brought to the employer's attention, by reasonable means, circumstances connected with their work which he reasonably believed were harmful or potentially harmful, provided there was no safety representative or safety committee whose attention could be drawn to the matter.

5 The employee left or proposed to leave their place of work because they reasonably believed there was serious and imminent danger which they could not reasonably be expected to avert.

6 The employee took or proposed to take appropriate steps to protect themselves or others from danger which they reasonably believed to be serious and imminent, unless those steps were so negligent that dismissal would be justified.

2. History

The right to claim unfair dismissal was introduced by the *Industrial Relations Act 1971*. At that time the qualifying period was two years.[3] It has changed many times since, ranging between six months and two years.

- The *Trade Union and Labour Relations Act 1974* reduced the period to **six months**, following a (six month) transition period in which it was one year[4]
- The *Unfair Dismissal (Variation of Qualifying Period) Order 1979 (SI 1979/959)* increased it to **one year**
- The *Employment Act 1980* increased it to **two years** for employees in firms with fewer than 21 employees
- The *Unfair Dismissal (Variation of Qualifying Period) Order 1985 (SI 1985/82)* increased it to **two years** in all cases
- The *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999 (SI 1999/1436)* lowered it to **six months**
- The *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989)* increased it to **two years**

Originally, the only people able to claim unfair dismissal were those who worked 21-or-more hours a week.[5] The *Employment Protection Act 1975* reduced this to 16 hours a week and allowed part-time workers who worked between 8 and 16 hours a week to claim the right after five years' service.[6] On 3 March 1994, the House of Lords ruled that this law amounted to indirect discrimination against women as more women than men worked under 16 hours a week. It was, therefore, incompatible with EC law.[7] The Government eventually laid a Statutory Instrument which amended the *Employment Protection (Consolidation) Act 1978* to take account of this judgment.[8] It removed all references to hours worked from the Act so that all employment rights applied equally irrespective of hours are worked.

In *R v Secretary of State for Employment ex parte Seymour-Smith and Perez*, the Court of Appeal ruled that the two-year qualifying period was discriminatory in certain circumstances.[9] Ms Seymour-Smith and Ms Perez were both dismissed in May 1991 after having been employed for fifteen months by their employers. The *Unfair Dismissal (Variation of*

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3 Section 28
4 Schedule 1, para 10
5 *Industrial Relations Act 1971,* s27(1)(f)
6 Schedule 16, Part II, para 14 - brought into force on 1 February 1977 by the *Employment Protection Act 1975 (Commencement No 6) Order (1976 SI 1976/1996)*
7 *Regina v Secretary of State for Employment ex parte Equal Opportunities Commission and Another* [1994] UKHL 2
8 *The Employment Protection (Part-time Employees) Regulations 1995 (SI 1995/31)*
9 [1995] ICR 919

the Qualifying Period) Order 1985[10] had increased the qualifying period for unfair dismissal claims from one to two years' service, so both women had insufficient service to take their case to an industrial tribunal. The women applied for judicial review in the High Court, and sought orders quashing the 1985 Order and declaring it incompatible with the EC *Equal Treatment Directive*.[11] They argued that fewer women than men were able to meet the two-year qualifying rule; that there was no objective justification, unrelated to sex, for the rule; and that it therefore breached the Directive's prohibition on indirect discrimination against women in employment.

In February 2000 the House of Lords, having considered the equivocal decision of the European Court of Justice, ruled against the employees.[12] They agreed that the two-year qualification period was indirectly sex discriminatory. However, their Lordships held that, at the time of dismissal in 1991, a two-year qualification period had been objectively justified. It was justified by reference to the Government's view that, had there not been a two-year qualification period employers might have been less likely to recruit new staff. In any event, by that time the Labour Government had reduced the period from two years to one, by the *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999*.

In May 2011, under Coalition Government, the Department for Business, Innovation and Skills issued a consultation - *Resolving Workplace Disputes* - which considered various matters, including increasing the qualifying period.[13] The Government set out its rationale for increasing the qualifying period in its response to the consultation:

> While there are clearly divergent views on the merits of the proposal, we consider that business stakeholders are best placed to evaluate the likely impact on business confidence. Improving business confidence (and the economic benefits which would flow from such an improvement) is a key aim of Government policy.
>
> As well as a positive impact on business confidence, we consider that there is a potential secondary benefit for employees recruited into roles with a high training requirement (where there may be a risk of employers taking a cautious approach and dismissing employees before they qualify for the right not to be unfairly dismissed, if there is uncertainty that they will achieve the required standard).
>
> The extension of the qualifying period is also consistent with the general aim set out in the RWD consultation of reducing the number of tribunal claims. However, in light of the consultation, we have revised down our estimate of the number of claims that will be saved. This is because we are now assuming that all claims currently under multiple jurisdictions (and including an unfair dismissal claim) will proceed under the other jurisdiction(s). We had previously assumed that half of such claims would be withdrawn. This means that the measure is now expected to

10 SI 1985/782

11 76/207/EEC

12 *R v Secretary of State for Employment, Ex Parte Seymour Smith and Another* [2000] UKHL 12

13 BIS & HMCTS, *Resolving Workplace Disputes: a consultation*, January 2011

> result in a reduction in tribunal claims of between 2,100 - 3,200 claims, representing 4% - 7% of all unfair dismissal claims. When the wider impact of early conciliation is taken into account, the impact decreases further so that we can expect a reduction of around 1,600 – 2,100 claims. The detail of this change is set out in the Impact Assessment.
>
> We are unconvinced by arguments made by some respondents to the consultation that there could be widespread substitution of current unfair dismissal claims into other jurisdictions, such as discrimination. There is little evidence that, where there are grounds for a discrimination claim, individuals are currently choosing to pursue an unfair dismissal claim instead. Furthermore, other Resolving Workplace Disputes proposals aim to encourage early resolution of disputes (for example, greater use of pre-claim conciliation). This will help to avoid weak claims from being pursued in other jurisdictions.
>
> As detailed in the Equality Impact Assessment, there is a degree of disparity of impact from extending the qualifying period. However, the Government does not consider that, an extension of the unfair dismissal qualifying period would cause a *considerable* disparity of impact on any particular group. Furthermore, we believe that extending the qualifying period is a proportionate means of achieving the legitimate aim of improving business confidence to recruit and retain staff. We are committed to assessing the impact of policy changes and we will monitor the impact, including the equality impact, of this proposal as part of our overall assessment of the implementation of the Resolving Workplace Dispute proposals.
>
> As set out in the Impact Assessment, the Government has considered the alternative option of extending the qualifying period only for small businesses. However, there does not appear to be strong evidence that small businesses are disproportionately affected by unfair dismissal rules. Data from a 2008 Survey of employment tribunal claimants shows that 34% of unfair dismissal claims involve businesses with fewer than 50 employees, whereas such businesses employ 37% of the workforce. There was no pattern in responses to consultation to suggest small firms are more concerned about the qualifying period. Furthermore, extending the qualifying period only for small businesses would reduce the benefits associated with this proposal. The Government has therefore decided to go ahead with extending the qualifying period for all businesses. [14]

The qualifying period was then increased to two years, by the *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989).*

[14] BIS & HMCTS, *Resolving Workplace Disputes: Government response to the consultation*, November 2011

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