

Department for Business, Innovation and Skills

Flexible, effective, fair: promoting economic growth through a strong and efficient labour market

Response from Thompsons Solicitors

October 2011

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Introduction

We welcome the opportunity to respond to this paper. It contains a number of statements and assumptions which we are concerned are not backed by statistical evidence and are instead based on anecdote and reports by employer representative bodies.

It is important that these issues are addressed.

We note that the British Chambers of Commerce report cited in the paper as justification for the claim of a “fear factor” for employers which is preventing them from employing people. Just 2,000 small businesses responded to the BCC’s Workforce Survey 2011 and no information has been given about the methodology used for gathering the data and therefore the robustness of the statistical conclusions drawn from it.

The UK’s labour market is the least regulated in Europe. Only the US and Canada have fewer regulations. It is simply not logical to assume, as this paper does, that the heavier the regulation the higher unemployment is. The US, Canada and the UK have some of the highest unemployment rates amongst the major global economies.

The paper’s analysis of the current state of the UK labour is that we are a “successful employment performer”. It states that the private sector has created 264,000 jobs in the past year, outweighing the reduction in public sector employment. If this statistic is true, it implies that private sector employers are not being impeded in taking people on by employment regulations. Indeed, the government’s own research, published on 17th October 2011, concluded that:¹

The majority of jobs in the UK were created by small firms; Out of a total of 2.61 million jobs created on average each year between 1998 and 2010 existing small firms (i.e., less than 50 employees) contributed 34 per cent (i.e., ~870,000 jobs) while start-ups (of which nine out of 10 employ less than five people at birth) contributed a further third (33 per cent) – another 870,000 jobs.

Smaller firms have been increasing their share of total employment year on year and in 2010 their share was triple that in 1998. Single employee firms increased from three per

¹ Job Creation and destruction in the UK 1998-2010, Anyadike-Danes, Bonner & Hart, BIS October 2011

cent of the total employment in 1998 to 10 per cent in 2010, whilst at the large end the share of 250+ employee firms fell from 49 per cent to 40 per cent over the same period.

All English regions (with the exception of West Midlands) as well as the three devolved administrations, recorded a small positive net employment change on average each year between 1998 and 2010.

And then again, with UK unemployment now the highest since 1984 and rising faster than the EU average (while the heavily regulated economies and labour markets of Germany, Austria and Japan are growing strongly by comparison) our light-touch labour market regulation would appear to be of little consequence to our jobless figures.

Prior to the banking crash we had near to full employment. The government cannot seriously argue that a year's qualifying service for an employee to claim unfair dismissal had a negative impact on job creation.

Ultimately, no economy will grow when working people face uncertainty at work. Making it easier to sack people and harder for them to go to an employment tribunal to seek redress will make them feel more insecure. The knock on effect of this is less consumer spending and a lack of economic growth.

There is no evidence that the government has consulted on and carried out an impact assessment on whether these changes comply with its duty under the Equality Act 2010 to eliminate unlawful discrimination. The government has a duty to publish the results of any consultation and impact assessment.

Questions

1. How can we create space for employers and their staff to manage their relationship effectively?

We take this question to be suggesting that government somehow interferes with or intervenes in employer/employee relationships. We can only think of few ways in which this happens. If the implication is that discipline and grievance procedures prevent employers and staff "creating space" to manage their relationship effectively then we would point out that the Employment Act 2002 (Dispute Resolution) Regulations 2004, which did not work well in practice, were scrapped by the government in 2006 and replaced with a semi-voluntary code of practice.

Trade union involvement in the workplace is the most effective way for employers and staff to manage their relationship. Countries such as Germany and Austria, with their high degree of worker participation, derive huge economic and social benefit from unions representing employees at all levels.

As the government's Business Link website states "Having a single body for negotiating terms and conditions for workers is simpler than dealing with workers individually" and that by negotiating terms and conditions and consulting on workplace issues with a recognised union, employees "are likely to feel more involved in the way the business is run" and that employers can "encourage trust and commitment among the workforce".

Recent research by Cambridge University commissioned by ACAS² concludes that: "Recent studies point to the positive role played by unions in helping to resolve workplace disputes. Research by Richard Saundry and colleagues found that autonomy from management and greater dispute resolution skills and expertise allowed union representatives to play a more constructive

² *What role for trade unions in future workplace relations?* Chris F. Wright, Research Fellow, Faculty of Economics, University of Cambridge, September 2011

role than non-union representatives in disciplinary proceedings. Managers in union-recognised workplaces generally felt that union representatives helped to ensure that disciplinary hearings operated in a more procedurally fair and efficient manner than might otherwise have been the case.”

Ultimately, if pay differentials between managers and the lowest paid were addressed by firms of all sizes, the relationship between employers and their staff would benefit enormously. This is in the gift of employers. It doesn't need the government to “create space” for this to happen.

2. What more can Government do to reduce the fear factor in employing staff, particularly the first member of staff that a business takes on?

We do not accept that there is a fear factor or that there is any evidence that employers feel they have no rights against their employees and refer again to the government's data showing that 67% of all new jobs are created by small businesses.

Employers, particularly small employers without HR departments, would not fear employing staff if they had sufficient support and advice from the government and other bodies. The ACAS and Business Link websites provide valuable guidance but more support is needed.

Government cuts such as scrapping the Regional Development Agencies which provided specialist support to businesses has not helped employers.

The BCC claims that ET cases are too costly and take too much time to be heard and that it is too easy for employees to make unmeritorious claims and that employers could not balance risk without further information as to the remedy sought by the claimant.

Rather than making it more difficult for employees to pursue ET claims – by increasing unfair dismissal qualification periods and imposing unaffordable fees – BIS should make a very simple change to ETs that would undoubtedly reduce the number of claims.

In this we agree with the BCC. If limitation were increased then the pressure on employees with a grievance and who believe they may have a claim to submit an ET1 form would be significantly reduced.

Because most employees do not get immediate advice about their problem, the three month statutory time limit effectively requires the claimant or their trade union rep/lawyer to submit a claim form to avoid the case being out of time should it need to be pursued.

It is far better that employees have access to and are encouraged to take early advice about their claim and have time to think about it than be rushed into lodging an ET claim due to time limits. In our view, this would significantly reduce the number of claims.

However, government spending cuts and the drastic reduction in legal aid will significantly reduce the ability of employees who are not in trade unions to access advice.

3. What rights should be included in the set of fundamental employment protections?

International HR standards i.e. International Labour Organisation and Council of Europe standards should be included.

We would support a move to streamline employment protections – in the way that the Equality Act brings together the various equality duties into one piece of law - so that they are easier for employers to follow. However we emphasise that it will be of no help to the UK economy if employment protections are watered down or scrapped.

4. Where do the processes required by the rules hinder the outcome that they are seeking to achieve?

It is unclear as to which processes this question is referring to. There need be nothing onerous about developing and following processes that create transparency and ensure fairness.

Effective record keeping will protect the interests of all sides in the employment relationship and are developed by good employers for that reason. Employers will be more likely to face claims by disgruntled employees if records are not kept and processes not followed.

For example, if employers do not sack people who are sick, and they use rehabilitation to enable them to return to work, then they will not face discrimination and unfair dismissal claims.

We wonder if the question is hinting at plans to enable employers to drop equality monitoring. This would be a mistake that would impact on the economy and undermine the huge progress made in improving equality outcomes in the last few decades.

5. What criteria should determine which individual rights are directly enforced by Government and which by the individual?

The majority of rights are enforced individually. Statutory enforcement goes to gangmaster legislation, immigration, the minimum wage, data protection and public sector equality duties. That means health and safety and fundamental human rights. Those criteria should remain.

We are sure the government would not want there to be another tragedy such as Morecambe Bay.

There is a dangerous contradiction between the government's stated commitment to protect vulnerable workers while it is abolishing the Agricultural Wages Board which does precisely that.

And asserting that enforcement is generally better left to individuals whilst removing the unfair dismissal rights of 3,000 people annually and introducing ET fees to deter claims will impact on the most vulnerable employees, not those inclined to pursue vexatious claims.

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