

Unfair dismissal qualifying periods

'Resolving Workplace Disputes: Final Impact Assessment', published by the government last November, indicates that were a challenge to the extension of the qualifying period for protection for unfair dismissal to be based on indirect sex discrimination, as was done in *R v Secretary of State for Employment ex p Seymour-Smith*, it would be unsuccessful. Suzanne McKie and Alice Carse report

Trend towards equality

The statistical data in the final impact assessment reveals that in the 1990s the number of women with a length of service in the range of 0 to 11 months was two percentage points higher than men. However, in 'recent years', a length of time that is undefined in the report, this gap is not apparent.

The proportion of women with length of service from 12 to 23 months is, according to the assessment, approximately one percentage point higher than men in recent years, which is said to be a reduction since the 1990s. The assessment goes on to state: 'Consequently the gap in the proportion of males and females in the two years and over group has closed to below two percentage points in the past five years' and that 'the general trend is towards equality'.

It should be noted that currently almost 80 per cent of part-time employees are female but male part-time employees are statistically more likely to have a short length of service: twice as many men employed part-time have a length of service of under one year compared to those working full time. The assessment states that part-time women with length of service of less than one year are four percentage points higher than full-time women and some five points above full-time men.

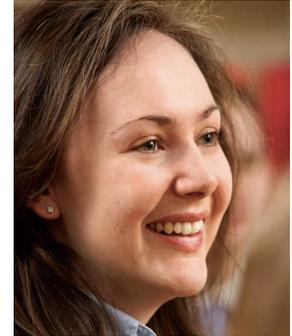
Greater job security

These figures indicate that since the 1990s women have gained better job security. This is to be welcomed and is no doubt in part due to statutory protection in relation to sex, pregnancy and maternity discrimination, the right to request flexible working and improved statutory provision for maternity leave. However, extending the qualifying period for unfair dismissal to two years may well still place women at a disadvantage to men in terms of job security today.

Analysis

Following *Seymour-Smith*, the first stage in considering whether increasing the qualifying period to two years is *prima facie* discriminatory is to consider the statistical proportion of women who are able to satisfy the criterion. Given that one percentage point fewer employed women can satisfy the two-year qualification criterion compared to men, then it can be said to be *prima facie* discriminatory.

It could be argued, however, that given this is a small disparity, the analysis should instead focus on the number of men and



McKie and Carse: 'A challenge is more likely to succeed if it is based upon protected characteristics other than gender'

women able to satisfy the two-year qualifying

period over time. On this point, the government's data is said to indicate a general trend towards equality. There is, therefore, a possibility that any challenge to the two-year qualifying period on the basis of indirect sex discrimination will fail. A factor to consider here must be the government's continuing duty to monitor the impact of a two-year qualifying period for the right not to be unfairly dismissed. The fact that there is a continuing duty is also likely to assist in persuading any court that the reason for the two-year qualification is a proportionate means of achieving the legitimate aim.

The assessment states that increasing the qualifying period to two years will realise an annual saving of £15.8 to £20.1 million to businesses in the UK. On the basis of the arguments set out, it is likely that the government's justification argument would include some of the following factors: encouraging recruitment; reducing the marginal cost of hiring an employee; and placing employees and employers on a level playing field. While a court can assess any arguments on proportionality, *Seymour-Smith* demonstrates that the government has a wide margin of discretion in such matters.

It should also be noted that the assessment considers the impact upon other groups. Employees who are young, non-white or disabled have a proportionately shorter length of service than those who are older, white or do not have a disability. If an indirect discrimination challenge is mounted, it is more likely to succeed if it is based upon protected characteristics other than gender.

Suzanne McKie and Alice Carse, Devereux Chambers

Search tags for elaweb.org.uk: unfair dismissal; sex discrimination; maternity rights

Case referred to:

R v Secretary of State for Employment ex p Seymour-Smith [1999] 2 AC 554; [1999] IRLR 554