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**EMPLOYMENT RELATIONS
RESEARCH SERIES 123**

Employment Regulation

**Part A: Employer perceptions
and the impact of employment
regulation**

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Executive Summary

Background

Comparative analyses show the UK regulatory environment to be ‘light touch’, and yet many employers report that regulation is affecting their ability to recruit¹. Currently, the Employment Law Review is seeking to improve the employment regulatory environment by addressing the following three themes:

- *Taking someone on* – making it as easy as possible for businesses to recruit their first, and subsequent, members of staff;
- *Managing Staff* – getting the Government out of the relationship between employer and staff by removing inflexible processes and requirements and allowing grown-up conversations between employers and their staff; and
- *Making change easier* – allowing change to happen in a way that is flexible and economically efficient, whilst remaining fair for individuals.

Underpinning the Employment Law Review is an emphasis by the Government on a drive for flexibility and the need to empower those involved in the workplace – both employers and employees – in order to achieve decisions more quickly and efficiently. This research focuses on the regulatory framework of the labour market by exploring the strategies that employers adopt when employing, managing and letting staff go.

Research aims and design

The aims for this research project were to explore employers’ perceptions of employment regulation and the impact of employment regulation on business development. In particular, to:

- explore whether employer’s current working practices are influenced by regulation;
- examine general perceptions employers have about employment regulation to understand:
 - a) whether these perceptions reflect the real impact that regulation has on businesses (the so-called ‘perception reality gap’); and
 - b) how these perceptions arise;
- explore employer perceptions of the value of any information sources that they use.

¹ See: <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/f11-1308-flexible-effective-fair-labour-market.pdf>

The research used a qualitative interview approach with a wide spread of businesses in terms of size, industry sector and geographical location. Subsidiary outlets of larger firms were excluded from the sample as their employment practices are often dictated by head office. A total of 40 businesses took part in the research. Interviews were conducted between the 16 April and 22 August 2012. A single interview was conducted with micro and small businesses with either the owner or manager as it was likely that there was only one person who was the decision maker. For larger businesses a case study approach was adopted, interviewing an individual with a designated HR function as well as one or two line managers.

Influence of employment regulation on HR practices

Employers said that they adopted HR practices which worked best for their business and ensured employee retention. Regulation was found to influence HR practices in a variety of ways, for example employers described practices they had developed to comply with Health and Safety, the Working Time Directive and the Agency Workers Regulations, dismissal and redundancy regulation. However, this was not evident or consistent across all employers. Employers were not consciously aware of the impact of regulation on their practices. When asked about how they recruited and managed their employees, employment regulation rarely emerged as a key driver.

Consistent with wider research, employers that had developed written employment policies were more confident that they were compliant with regulation than employers who operated more informally. These employers recognised a number of other benefits of adopting formal practices including ensuring transparency and consistency when managing staff, encouraging retention and maintaining morale.

Businesses which operated informally (i.e. which had few written policies or practices they followed consistently) often lacked confidence that they were meeting all their regulatory requirements. Although these employers felt they were at risk of litigation there was little motivation to change their working practices because they believed that working informally maintained better working relationships with staff and ensured managerial autonomy.

Taking people on

When recruiting staff, employers said they were primarily concerned with finding the best candidate who had the required education, work experience and skill level. However, equality legislation, recruiting migrant workers and the Agency Workers Directive were all raised by employers as impacting recruitment practices. Larger employers were more likely to recognise the influence of legislation on their practices because they recruited more frequently and had formal recruitment policies in place.

In most cases, employers that regularly used agency workers (these tended to be large employers in sectors with fluctuating resource needs such as hospitality) had changed their practices by shortening assignment lengths to less than 12 weeks, by bringing in different workers each week and by using fixed-term contracts for longer term cover.

Managing the workforce

There were two main methods of managing the workforce, formal and informal:

1) Formal systems were utilised by medium-sized and large employers that had internal HR support as well as by small employers that employed mainly professional workers. Formal policies and practices were in place to monitor and measure performance, feeding into pay scales and disciplinary systems when appropriate.

2) Informal systems were evident amongst some small and micro employers, particularly those employing predominately unskilled or semi-skilled employees. These employers had no written performance management policies or practices and instead relied heavily on a 'family' approach to staff management.

Ending the employment relationship

All the employers in this research said they were particularly concerned about 'getting it right' when ending the employment relationship. Dealing with disputes when letting staff go was frequently considered to be complex, potentially costly and weighted in favour of the employee. Employers said they were often nervous when letting staff go; this was a key time when they would seek advice to ensure that they were following the correct procedure. Small employers tended to approach lawyers or accountants, larger businesses also had access to industry bodies or the Chartered Institute of Personnel and Development.

Small and micro businesses that managed staff informally often said they were reluctant to initiate disciplinary processes. They believed that by doing so would negatively impact on their relationships with staff. These employers tended to talk about following a '*dismissals process*' which they believed they were required to implement once they had made the decision to dismiss an employee.

Perceptions of employment regulation

Employment regulation was generally considered both necessary and fair as it ensured that employees' rights were protected and provided employers with a legal framework to refer to when managing staff. They also recognised that they rarely experienced issues relating to regulation – such as dismissal or dealing with a dispute.

However, when asked directly, employers tended to say that regulation was burdensome. Employment regulation was perceived as complex. Employers were anxious about the impact that regulation may have on their business or other businesses in the future should they face litigation for failing to meet all the legal requirements.

Employers that had adopted formal practices were less anxious about litigation, having a better understanding of their obligations and believing their practices to be compliant. However, small businesses were reluctant to adopt formal practices, for the following reasons:

- A perception that developing formal practices required expensive expertise and would damage personal relationships with employees;
- A perception that only large businesses had the necessary resources to keep policies up to date as this was time consuming and required internal expertise;
- A view that legal advice and guidance was ambiguous and tribunal outcomes could be subjective. Devoting time to learning the rules was unjustified as employers may still have to face a tribunal and could not be confident they would win;
- In small and micro firms, the norm was to operate 'like a family', which was at odds with developing formal practices.

Communicating with employers about regulation

Employers varied considerably in how they found out about employment legislation. Employers with access to professional HR services were proactive in finding out about, and updating their knowledge, of relevant legislation. Those without HR support tended to seek out information as and when problems arose.

Employers used numerous sources of information about employment law. These included: Acas, Directgov, CIPD, professional bodies and professional HR networks. Medium-sized, large employers and those operating in the professional sectors had more sophisticated information networks, including membership of CIPD and professional bodies, for example. Despite being aware of online resources including the Acas website and Directgov, employers without an HR specialist found it difficult to acquire the required information. This was partly because they did not know where to look, or they felt the sources they used were too generic and did not relate to their specific circumstances.

Web-based information was highly valued by all employers, with Directgov, Business Link and the Acas websites being highly valued for their comprehensiveness and clarity, although they were often said to lack the detail that would help them with more complex issues.

Businesses – especially those without a dedicated HR function – wanted a single portal through which they could obtain all the employment legislation information and advice they needed. This would provide both generic and more specialised information and be a repository of up to date guidelines and documents such as contract templates. These employers were not always aware of the full scope of content available via Business Link and Acas as they found the sites difficult to navigate, often because their understanding of what they needed was limited and found it difficult to search the site effectively.

Conclusions and implications

To what extent are employers' practices influenced by regulation?

The influence of regulation on HR practices was most apparent amongst employers that had formal HR policies. Wider research has shown that small employers are more likely to be involved in, and lose, employment tribunals, particularly those that did not follow formal processes when dealing with disputes (Saridakis et al. 2008). This chimes with the finding here that small and micro employers are more likely to be reactive, responding to issues relating to regulation only when they arise. The influence of regulation on day to day practices was therefore less evident for these employers.

When recruiting, employers said they were primarily concerned with finding the most suitable candidate, although having confidence that the resource need would be sustained was also key to their decision. Some small and micro employers, whose knowledge of employment regulation was limited, were concerned about being able to dismiss new members of staff who later proved unsuitable, or make redundancies should there be a fall in demand. Consequently, they used a variety of techniques which they believed would make it easier to terminate employment, including incorporating trial periods into permanent contracts and using a variety of temporary working arrangements, such as fixed-term contracts, agency workers for short periods, or using sub-contractors and freelance staff to cover peak workloads.

Dismissal practices were either shaped by legislation, or what employers believed they had to do, often following consultation with trusted others. Often employers erroneously believed that there was a statutory process for dismissal and that failure to follow this process could result in a fine.

What are employers' perceptions about employment regulation and is there a perception-reality gap?

Evidence of a perception-reality gap was most apparent amongst small and micro employers that did not have any formal HR policies in place. When describing their practices for managing staff, they indicated that the affect of regulation was limited and yet they described regulation as burdensome because they were anxious about litigation. This is very similar to the findings of Peck et al (2012). They showed that the perception of regulation being burdensome was influenced by anxiety and the belief that regulation was overly complex, rather than by the actual legal obligations that employers had to meet.

Employer views of the value of employment regulation information?

Government websites were used as a first port of call to access information about unfamiliar regulation. However, it was not always easy for employers to find the information they were looking for or else they felt that the content was insufficiently detailed to be useful. There may be a need for one-to-one support which provides employers with the opportunity to discuss their own specific

circumstances; employers that were aware of the Acas helpline indicated that this service met this need very well.

Implications

- Employers were often supportive of the need for a regulatory framework and recognised that the impact of regulation on their business was minor. This and other research (Peck et al, 2012; Kitching 2006) indicates that the general perception of regulation as burdensome may reflect an 'anti-legislation' view and be a poor indicator of the actual impact on businesses.
- Reducing the regulatory obligations for small employers may not be effective in addressing anxiety amongst these employers as often they were unaware of all the rules relating to employment. Previous research has suggested that this may also reinforce the perception that regulation changes frequently, making it difficult to keep up to date. (Peck et al, 2012).
- Employers tend to have an inflated idea of the risk of being taken to an industrial tribunal when dismissing staff. Work may be required to dispel 'high risk' myths in order to reduce the perception that all employment regulation is burdensome.
- Tribunal outcomes were perceived as unpredictable. Pre-tribunal compromise agreements can seem the safest option for employers that are anxious about having to pay a tribunal award.
- Small employers (who employed manual workers) sometimes treated disciplinary processes as a formality which they followed only when they had decided to dismiss the employee. As a result, employees may feel that they had not had sufficient opportunity to improve their performance, which may lead to disputes and litigation.
- Encouraging small and micro employers to consistently follow a formal process, particularly when dealing with poor performance, may help them to avoid disputes and feel more confident when dismissing employees. However, employers were concerned about the effort and expertise this required as well as the potentially damaging impact on the personal relationships with their employees.
- There is a clear need to provide a single information portal that guides employers to the relevant information to support employers that have no internal HR and consider regulation too complex to understand. The new single government website launched on 18th October 2012 may provide a single gateway to information. However, it is not yet clear whether the level of detail meets users' needs.

- Employment legislation communications and/or support should prioritise disciplinary and dismissal procedures. The erroneous belief that there is a statutory process to follow when dismissing employees increases anxiety and the perception that regulation is unfair to employers.

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1. Introduction

This programme of research is focused on how employers view, and respond to, the employment regulatory framework. The research is divided into two distinct parts. The first focuses on the strategies that employers adopt when working within the provisions of current labour market regulation framework, in terms of taking someone on, managing staff, and letting staff go. The findings of this part of the research are reported here. The second part of the research addresses broader theme of work-life balance and explores how employers respond to *family friendly policies*.²

1.1 Policy Background

In setting out the context for this research and the main issues, it is important to appreciate the broader policy-based relations between government and businesses. Public policy interventions for businesses are regarded as central to the macro Government objectives of improved economic output, employment and prosperity. Thus, enterprise is promoted by government through a series of interventions to strengthen the environment for businesses, covering their start-up, development and performance. These interventions span a portfolio of activities that are designed to overcome market failures, enable businesses to tackle their specific challenges and provide opportunities through stimulating their access to finance, employment capabilities, innovation, exports and growth.³ At the same time, government provides the necessary employment regulatory framework within which businesses operate. Striking a balance between the objectives of improved economic performance and the provision of an appropriate regulatory framework can prove challenging. In 2010, the Government instigated a five-year review of employment law, and employment related law is a central theme of the Government's Red Tape Challenge, which was launched in its mission to provide a more conducive regulatory environment.

It should be noted that the Beecroft Report was published shortly before fieldwork for this study commenced, with considerable media coverage. The Beecroft report was not directly referenced by the employers who took part in this research and therefore it is not clear whether this influenced their views or responses. The Report made various recommendations for reducing the burden of regulation on employers including introducing compensated no-fault dismissal, whereby an employer could pay a compensation payment in order to terminate employment.

This research focuses on the regulatory framework of the labour market. Inevitably, the policy environment for businesses is complex and dynamic, as policy makers seek to enable improved business performance, innovation and growth, on the one hand; and ensure the rights of employees on the other. The latter has received attention as government has sought to reduce the regulatory

² Reference to be added on publication

³ See for example, the Solutions for Business for the extent of the portfolio of measures to support SMEs: <http://www.bis.gov.uk/assets/biscore/enterprise/docs/s/11-776-solutions-for-business-government-funded-business-support.pdf>

burden on employers, many of whom have reported that the cumulative burden of regulation is affecting their recruitment.⁴

In reviewing the regulatory framework, government is seeking to improve the strength and efficiency of the labour market such that it is flexible, effective and fair. The current statutory employment rights for employees seek to provide protection for employees during the ‘employment life-cycle’: from their recruitment, being in post and then leaving the job. These rights derive from a range of origins and motivations and include a variety of provisions. Hence, labour market regulation and individual employment rights are often regarded as a complex array of provisions that both employers and employees, especially in SMEs (Small and Medium Enterprise)⁵, approached with some trepidation and are too often poorly informed. Government has made a number of attempts to help unpack the details of employment legislation and simplify this for those parties involved, including most recently the Employer’s Charter.⁶

Whilst comparative analyses show the UK regulatory environment to be ‘light touch’, the Employment Law Review is seeking to improve this environment. It seeks to address the following three themes:

- *Taking someone on* – making it as easy as possible for businesses to recruit their first, and subsequent, members of staff;
- *Managing Staff* – getting the Government out of the relationship between employer and staff by removing inflexible processes and requirements and allowing grown-up conversations between employers and their staff;
- *Making change easier* – allowing change to happen in a way that is flexible and economically efficient, whilst remaining fair for individuals.

Underpinning the Employment Law Review is an emphasis by the Government on a drive for flexibility and the need to empower those involved in the workplace – employers and employees - in order to achieve decisions more quickly and efficiently. Hence, this research has focused on the strategies that employers adopt when working within the current labour market framework. The three themes outlined above have formed the basis for this part of the research.

1.2 Research Aims

The overarching aims for this part of the research were to explore employers’ perceptions about employment regulation and the impact of employment regulation on business development. In particular:

- Explore the extent to which employers’ current working practices are influenced by regulation and the impact this has on business growth and/or HR capacity;

⁴ See: <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/f/11-1308-flexible-effective-fair-labour-market.pdf>

⁵ See Blackburn, Robert and Hart, Mark (2002) *Small firms' awareness and knowledge of individual employment rights*. (Technical Report) London, UK : Department of Trade and Industry. 94 p. <http://www.bis.gov.uk/files/file13207.pdf>

⁶ <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/e/employerscharter>

- Examine general perceptions about employment regulation to understand
 - a) whether these perceptions reflect the real impact that regulation has on businesses (the so-called 'perception reality gap'), and
 - b) how these perceptions arise;
- Explore employer perceptions of the value of any information sources that they use.

1.3 Structure of the Report

Following this overview of the research methodology and objectives, the findings from the research and literature review are discussed as follows:

- **Chapter 2** – is a literature review, providing context to the research findings
- **Chapter 3** – describes employers working practices and explores the drivers of these
- **Chapter 4** – explore beliefs and attitudes concerning employment regulation
- **Chapter 5** – examines the information sources employers use to learn about employment regulation and their views on these
- **Chapter 6** – draws together findings and presents a set of concluding comments

1.4 Methodology

The research adopted a wholly qualitative approach exploring the practices of private sector businesses through a series of in-depth interviews. A key element of the design was to ensure that a wide range of views were captured, both in terms of the nature of the business as well as different players and decision makers within the business.

In discussing employment practices with micro and small employers there was likely to be only one person who was the decision maker. In these instances we conducted a single interview - usually the owner or managing director. For larger companies however there was often a designated HR function that sets the employment policies, with decisions being made either at the HR level or further down the organisation at unit, or line manager level. For these employers we adopted a case study approach, interviewing a representative of the HR function to explore their policies and practices and one or more line managers and / or an HR administrator to understand how the policies are put in practice at the local level.

Most of the in-depth interviews were conducted face to face and lasted up to an hour in length. In a small number of instances interviews were carried out by telephone so as to meet the availability of the respondent.

1.5 Achieved sample

The sampling framework was designed to provide a wide spread of businesses in terms of size, industry sector and geographical location. Subsidiary outlets of larger firms were excluded from the sample as their employment practices were dictated by head office. The achieved sample is shown in the table below:

Table 1: Achieved sample

Strand A	Employer size			
Private sector	Micro 1-9	Small 10-49	Medium 50-249	Large 250+
Industry sector (5 broad categories)	Broad mix of sectors with at least 5 in each broad sector category Manufacturing & Construction – 7 Manual Services – 7 Office Based Services – 15 Retail / Hospital / Accommodation & Catering – 4 Arts / Education / Carers – 7			
Geographical location	England 27, Wales 6 and Scotland 7			
Number of cases (40)	16	9	8	7
No. of interviews	16	9	15	14

1.6 Data collection and analysis

All of the interviews were exploratory and interactive in form and were based on topic guides (Appendix A), which allowed questioning that was responsive to the issues which arose during the course of the interview.

The topic guide covered the following issues:

- A mapping exercise, exploring the processes of recruiting staff, managing staff and reducing head count;
- The methods by which employers keep up to date with employment regulation;
- How businesses managed HR/personnel issues as the business grew or become more diverse; and
- Employer's views about employment regulation and the burden it placed on them.

In order to test the research approach and materials a small pilot study of ten interviews was undertaken between the 16th and 23rd April 2012 inclusive. As a result of the findings, the discussion guide was revised and simplified in agreement with BIS. The main stage of fieldwork was conducted between 30th May and 22nd August 2012.

All the interviews were recorded and transcribed verbatim for subsequent analysis. The transcribed interviews were subject to a rigorous content analysis (Matrix Mapping), which involved systematically sifting, summarising and sorting the verbatim material according to key issues and themes within a thematic

framework. Further details of the analytical process used may be found in the Technical Appendix.

The findings have been illustrated with the use of verbatim quotations. The quotations have been edited for clarity but care has been taken not to change the respondents' meaning in any way – alterations are shown using parenthesis and ellipses. Quotations attributions will include the size of the business and the job role of the respondent.

2. Literature review

This section provides context to this report by summarising the existing research on the impact that employment regulation has on businesses in the UK.

The Government requires an evidence base for the impact and cost of employment regulation for UK businesses in order to inform future policy on regulation. Of particular interest is whether employment regulation places unnecessary constraints on employers and if so, whether this is due to specific legal obligations or a lack of understanding of the regulations by employers. A considerable body of literature already exists examining the burden of employment regulation and is summarised in this section. Within this literature there is considerable divergence between survey and qualitative data. The former aims to quantify the burden placed on employers while the latter presents a more nuanced picture of what 'burden' means to employers. This research project aims to report on employment practices from a qualitative point of view, in the light of the existing research on the impact of regulation.

Successive UK governments over the past 30 years have pursued a policy agenda of regulatory reform: regulations have been perceived principally as a cost or constraint upon doing business and, consequently, as an impediment to national economic growth (eg HM Government 2010). The current government focus on tackling the large national debt has intensified such concerns (HM Treasury/BIS 2011). International indices offer a mixed picture of UK regulatory policy. The Global Competitiveness Report 2012-13 ranks the UK 72nd of 142 countries with regard to burden of government regulation, yet recognised its flexible labour market as a particular strength: the UK ranked fifth with regards to labour market efficiency and eighth with regard to 'global competitiveness' (World Economic Forum 2012). Only 6.4 per cent of respondents surveyed for this report cited restrictive labour regulations as the most problematic factor for doing business. Other sources note the 'business friendliness' of the UK regulatory framework with the World Bank (2013) ranking the UK seventh best of 183 countries in terms of the ease of doing business.

Critics of regulation arguably ignore that 4.4 million businesses are active in the UK, a number that has continued to rise in the last decade, despite claims of the increasing burden of regulation (BIS 2011a: Table 24).

Many commentators argue that businesses – and small firms, in particular – suffer from regulatory constraints on their activities and performance (eg Chittenden et al. 2002; Crain and Crain 2010; Better Regulation Executive 2010; Forum of Private Business 2011a; Haldenby et al. 2011; Federation of Small Businesses 2012a). Since 2010, government has implemented a range of policy initiatives aimed at reducing both the stock of existing regulation and the flow of new regulation. The 'Red Tape Challenge', comprising a series of thematic reviews of different aspects of the UK regulatory framework, invites interested parties and the general public to identify regulations for removal or reform; employment law has been part of the Challenge since 2011. The 'one-in, two-out' policy for new UK regulation compels regulators, when contemplating new

legislation, to identify existing regulations imposing equivalent costs or burdens for removal (eg HM Government 2012). Policy-makers identify regulatory burdens as a particularly difficult challenge for micro and small business owners: a 3-year 'moratorium' on new domestic legislation for micro businesses, employing fewer than 10 people, commenced in April 2011 as part of the Government's Plan for Growth, which also applies to employment law.

Employment law has been identified as one of the principal 'regulatory burdens' in need of reform (Beecroft 2011; BIS 2012a). Business associations insist that the volume and complexity of employment law causes problems for many, particularly smaller, employers and that the law is now weighted too far in favour of the employee (eg British Chambers of Commerce 2010; Federation of Small Businesses 2012b) , However, the OECD (2008) report indicates that, along with Canada, the UK has the second most business-friendly framework of labour law in the developed world, second only to the US.

A number of employment regulations have been reformed since 2010 with the purpose of stimulating growth. This includes:

- the extension of the unfair dismissal qualifying period from one to two years for employees starting new employment from April 2012;
- increasing the maximum level of costs awarded to employers for vexatious employment tribunal claims;
- allowing judges to preside alone over unfair dismissal cases, unless there are good reasons for them to be heard by a full panel;
- the introduction of a National Insurance Contributions 'holiday' for new employers;
- a review of the sickness absence system;
- and government have also published an 'Employer's Charter' setting out what employers can do with regard to staff issues (BIS 2012b).

As at September 2012, current proposals for reform include further changes to employment tribunal procedural rules, measures to facilitate the use of 'settlement agreements' to end employment relationships and powers to vary the compensatory award for unfair dismissal. Government has issued and responded to a call for evidence on compensated no-fault dismissal, and the Acas Code on Discipline and Grievance, and has established the Employment Law Review Business Challenge Panel (BIS 2012a).

This research investigates employer perceptions of the impact of employment regulation on employment practices, including the recruitment, management and removal of employees. Specifically, the study explores:

- How employers' working practices are influenced by regulation and its impact on business growth;
- Employer perceptions of employment regulation and whether there is a perception/reality gap;
- Employer views of the value of employment regulation information and advice.

2.1 Existing Research on the Influence of Employment Regulation on Employment Practices

Broadly speaking, two types of research evidence on the impact of regulation on business activity and performance might be distinguished. Survey data suggests that large numbers of employers, particularly micro and small employers, employing fewer than 10 employees and 10-49 employees respectively, experience regulation as a burden, cost or constraint. In contrast, qualitative studies drawing on interview or focus group data suggest a more nuanced picture, highlighting considerable variability in employer awareness of regulation, levels of compliance and adaptation to regulation. Research has typically focused on micro and small employers; our review centres primarily on these studies.

Business and Government Survey Data

Surveys of business owners/managers routinely demonstrate regulation to be perceived as a cost to, or constraint on, business activity and performance (eg Carter et al. 2009; Forum of Private Business 2011b; Federation of Small Businesses 2012b; BIS 2012c). Regulation is argued to raise the substantive, administrative and psychological costs to businesses, and to encourage business owners to divert resources from profit-generating to 'unproductive' activities and consequently to weaken business performance (Chittenden et al. 2002). Such costs might deter start-up, investment, innovation and growth (eg van Stel et al. 2007). Commentators argue that employers might be deterred from recruiting employees in order to grow because they fear being taken subsequently to an employment tribunal to fight allegations of unfair dismissal (eg British Chambers of Commerce 2010). Surveys differ in their estimates of the proportions of employers reporting employment regulations as a burden, cost or obstacle to business success – but support the general finding that regulation can be burdensome for employers.

A CBI survey of 319, predominantly large, employers in mid-2012 reports employment regulation to be a serious constraint on UK businesses. Two-thirds of employers (67 per cent) cite employment regulation as a burden on labour market competitiveness. However, since the start of the employment law review, this survey has shown a downward trend in the proportion of employers citing employment regulation as a barrier to competitiveness. In response to the same question two years earlier, for example, 81 per cent of those surveyed cited employment regulation as a barrier. Almost half (44 per cent) reported facing an employment tribunal case in the past year, within which 34 per cent report such claims have been withdrawn by applicants and 26 per cent of employers report settling a dispute out of court to avoid disruption despite being advised they would win (CBI 2012). Such data might, of course, indicate that employees withdraw or settle cases, despite believing they would win, to avoid financial and time costs, and stress themselves. Recent studies demonstrate that employers have a very low probability of losing at employment tribunals or incurring high awards against them – only 8 per cent of unfair dismissal claims ultimately succeed at a full hearing, only 5 per cent of claims achieve an award of compensation, reinstatement or re-engagement and, in 2011/12 close to three-quarters of payouts to unfairly dismissed employees were below £10,000, the median being £4,500 (Ewing and Hendy 2012).

BIS SME Barometer surveys report 'regulation' as the main obstacle to business success by fewer than one in ten business owners, a proportion that has remained fairly constant since the onset of the recession in the wake of the global financial crisis (BIS 2012b); 'the economy' continues to be the most important obstacle reported by SME employers, with approximately a third of the sample (32 per cent) doing so – an understandable response given the economic conditions many businesses have experienced since 2008. This survey asked employers about regulation in general, rather than focussing on particular aspects of employment regulation. In a recent survey of SME employers, BIS (2012d) found that fewer respondents report regulation as an obstacle to business success in 2012 than three years previously (55 per cent, compared with 62 per cent in 2009), although a third of the sample reported that compliance had become more time-consuming in the past year. Small employers are more likely to report both that regulation is an obstacle and that time spent on compliance has increased than larger employers. Employers report that finding out which regulations apply and having to keep up to date with regulation as particularly burdensome (reported by 65 per cent of sample respondents). Surveys rarely, however, ask if regulation might benefit businesses (Kitching 2006).

Discovering, interpreting and complying with employment regulation might be particularly challenging for micro and small employers with limited HR management capacity (Better Regulation Executive 2010). Micro/small employers tend not to employ dedicated HR managers whereas large organisations often have dedicated departments to develop and administer HR policies (BIS 2012d). Only one in four SME employers employ anyone specifically to deal with regulation (BIS 2012d). There is some evidence of a size differential in reported critical perceptions of regulation as a barrier to business success/growth, although not perhaps in the expected direction. Small employers, with 10-49 staff, are often more critical of regulation than micro employers (eg Blackburn and Hart 2002; Federation of Small Businesses 2012b), perhaps reflecting lower levels of awareness of employers' legal obligations and employees' entitlements among micro firms (eg Kitching 2006): micro employers often do not know what they don't know!

Employers might seek external HR support to augment their limited internal capacity. Survey data suggests an increase in businesses reporting the use of external agents to provide information and advice on regulation (BIS 2012d), with 86 per cent of SME employers reporting their use. External sources of HR information and advice include solicitors, accountants, government department websites and trade organisations (ACCA 2011; BIS 2012d). Sources involving face-to-face interaction tend to be the most trusted (Peck et al. 2012). One estimate suggests that, in 2007, external advice-seeking on regulatory issues (not just employment regulation) cost businesses £1.4bn (Better Regulation Executive 2007). Whether employers find this financial outlay a burden or money well spent is an open question.

One contemporary employer concern surrounds the Agency Workers Regulations (AWR), which entitle agency workers to equal employment conditions with employees in client firms after 12 weeks. The use of agency workers is widespread, particularly among large employers, to meet their labour requirements. CBI (2012) report that the AWR damages employers by restricting

their labour market flexibility. The CBI survey found that almost a half of employers (46 per cent) report their businesses have been affected by AWR; large and medium-sized employers, with 50 or more workers, are more likely to have been affected. The Recruitment and Employment Confederation's impact assessment of the AWR (2012) found that the new regulation had prompted half of employers (50 per cent) to change their practices in some way: of these, 19 per cent had used temporary workers for shorter assignments, 19 per cent had sourced temporary staff directly, and 17 per cent had used fewer agency workers.

Survey data provide useful information on employer perceptions of employment regulation but, arguably, suffer from a number of shortcomings that limit our understanding of how regulation influences employer behaviour (Kitching 2006, 2007). First, survey data on employer perceptions tells us what employers think about regulation but not necessarily what they do about it. Second, surveys offer limited insight into the influences on employer perceptions and therefore are unable to explain the variation in reported perceptions, either within or across studies. Employer awareness and understanding of their legal obligations (eg Atkinson and Curtis 2004), and their attitudes to compliance, are variable – both of which mediate the influence of regulation on business activity and performance. Survey evidence has demonstrated variation in employer awareness of individual employment rights, though not at a detailed level, and linked this to differences in the age of employment laws, how well-publicised they have been, workforce characteristics and other factors (eg Blackburn and Hart 2002; Hayward et al. 2007). Distinct attitudes to compliance have been identified (eg Vickers et al. 2005), including 'vulnerable compliance' (Petts et al, 1999), where business owners are uncertain whether they are compliant or not. Third, surveys explicitly, or implicitly, treat regulation one-sidedly as a cost or constraint, neglecting the ways in which regulation can enable and motivate action that generates higher levels of business performance. Fourth, and most importantly, survey data provide little understanding of the causal processes through which employment regulation shapes small business activity and performance. Simply reporting employers' perceptions gives no indication of whether, and how, business owners adapt employment practices to regulation.

Qualitative Research on Employer Perceptions of, and Responses to, Employment Regulation

Qualitative studies, based on interview or focus group data from employers, produce a more nuanced picture of employer perceptions and practices. Qualitative studies highlight considerable variability in employer awareness of employment regulation and how they adapt to it (Edwards et al. 2003). Pre-start and start-up business owners often overstate the impact of regulation on their ventures (Allinson et al. 2005, 2006). Qualitative studies also identify benefits of regulation, where business owners are motivated and/or enabled to access new market opportunities or to implement more efficient business processes as a consequence of regulation (eg Edwards et al. 2003; Arrowsmith et al. 2003; Kitching 2007; Small Business Research Centre 2008).

Qualitative studies have also found the impact of employment regulation on small employers is more variable than one might expect from reading the survey data; specifically, the law has fewer adverse impacts. Edwards et al. (2003, 2004) suggest a number of reasons for this, particularly the informality of workplace

relations in micro and small enterprises. Small employers typically operate with fewer formal, written HR policies and procedures than large companies (Ram 1994; Forth et al. 2006) and, even where formal procedures do exist, they often exert a limited influence on day-to-day employment practices (Moore and Read 2006). Small employers perceive important benefits by being informal in their approach, such as the flexibility to treat employees on an individual basis with regard to pay, training, working time, work allocation, discipline and dismissal that facilitate rapid responses to changing circumstances (eg Ram and Edwards 2010). Employees, too, are argued to prefer informal management practices and working arrangements (Forth et al. 2006; Storey et al. 2010). Invoking formal procedures to resolve workplace issues might be perceived by employers, and employees, as introducing an unnecessary, impersonal bureaucratic element into a personal relationship which might undermine good staff relations.

There are, however, potential costs and disadvantages from operating informally. For instance, there are increased risks arising from dealing with 'personnel problems' reactively, often waiting until problems become crises and then treating employees without reference to legal requirements or formal procedures which might lead to employee perceptions of unfair treatment (eg Scott et al. 1989). Examples include dismissing employees without following procedure (where these exist), or observing the precepts of natural justice (where they do not). Such methods put small employers at risk of potentially expensive, time-consuming and stressful litigation. Employment tribunal data show that small employers are more likely to experience employee claims than large firms, and to lose tribunal cases, particularly where they do not have procedures or do not follow them (Saridakis et al. 2008).

Employment regulation might trigger increased HR formalisation among employers. As businesses grow, or become more complex, employers may find they need to adopt formal procedures because they cannot control all aspects of people management and/or to ensure the clear and consistent treatment of employees with the aim of avoiding employee litigation (Marlow 2002). A reliance on informal approaches, with their inherent individuality and flexibility, might leave employers open to accusations of discriminatory or unfair treatment, which may lead to litigation if not dealt with appropriately. But procedural formalisation carries risks too. Depersonalising relationships might reduce the satisfactions, for both employers and employees, deriving from informality with potential consequences for employee motivation, performance, attendance and retention (Marlow and Kitching, forthcoming). In growing organisations, moreover, managers and employees might attempt to resist greater formalisation in order to retain their decision-making autonomy (Marlow et al. 2010).

In summary, by treating regulation exclusively, or primarily, as a cost or a constraint on small firm activity and performance, largely because it is understood in terms of the obligations it places upon small employers, studies often ignore the enabling and motivating impacts of regulation, and the benefits that might arise. Regulation *enables* businesses to achieve their aims by making certain actions possible; it *motivates* by incentivising businesses to act in particular ways rather than others; and it *constrains* businesses by limiting their scope for action (Kitching 2006). The precise impact of particular employment regulations for businesses is contingent upon not only the scope of the regulatory obligations

and entitlements created, important though these are, but also, crucially, upon how employers adapt to them.

Regulatory burden should not be viewed simply in terms of costs (both time and monetary) to the business. Peck et al (2012) distinguish between regulatory costs and regulatory burden, the latter incorporating the anxiety resulting from poor understanding amongst employers of the law, the perception that the law is too complex and a lack of confidence that they were compliant with it.

Given the disparity between survey and qualitative data regarding the impact of employment regulations this research seeks to explore if there is a perception – reality gap and whether employers' responses about business burden arise from the real impact on their working practices, or are based on assumptions made about the burden, which arise from a lack of knowledge or misconceptions about the regulations and / or the perceived risk of being non compliant. The approach adopted by the research seeks to address this issue by not directly asking about the impact of regulation, but by initially exploring employers' working practices and then understanding how regulation has affected these.

3. Influence of Regulation on Practices

This section considers the impact of regulation on working practices when taking staff on, managing staff and letting staff go and addresses: *Objective 1: To what extent are employers' current working practices influenced by regulation and what impact does this have on business growth and / or HR capacity.*

Table 2: Key Findings Chapter 3

KEY FINDINGS:

- Employers overall indicated that employment regulation had little effect on their HR practices and that generally they did what was best for the business;
- However they did highlight specific areas of concern, these were
 - Dismissal - perceiving the regulations to be: very complex; likely to end up in litigation; costly; and likely to favour the employee;
 - Agency workers regulation – in order to avoid workers exceeding the 12 week qualification period, employers used fixed term contracts for longer term cover or brought in different workers every week.
- Informal working practices – micro businesses and small/medium businesses employing manual workers were particularly reluctant to develop formal written policies and to put these into practice. As a result they were not confident that their practices were compliant. By encouraging these employers to adopt formal practices for dealing with disciplinary action dismissal could be avoided in many cases by resolving performance issues and ensuring employees understand the issues and have time to improve (in line with the Acas code);
- Knowledge –micro and small/medium businesses often had little internal HR expertise and saw employment regulation as complex and inaccessible to people who lacked a background in law or HR;
- Operating informally, with little understanding of their regulatory obligations made some employers anxious about regulation. As a result of this *anxiety*, they described employment regulation as burdensome, although when discussing the impact on their working practices it was clear that the impact was minimal.

When describing their approach to recruiting and managing staff, employers said they adopted practices which worked best for their business and ensured retention. There was evidence that working practices were developed in response to comply with specific regulation, such as health and safety legislation, the Working Time Directive and Agency Workers Regulation. In a few instances, employers adopted particular practices in response to the threat of litigation by employees. However, other associated benefits soon emerged which became the main driver for maintaining these practices, for example:

- Developing formal performance monitoring systems gave employers the evidence they needed if they were accused of unfair dismissal but also served to address behavioural issues before disciplinary action was needed.
- Similarly, recording interview outcomes against a range of recruitment criteria demonstrated that practices were non-discriminatory but also ensured that the employers recruited the most suitable person for the role.

Employers were concerned about discrimination and unfair dismissal in particular because: a) employers believed that it was easy to at least begin the tribunal process without solid grounds for a case; and b) tribunals were expensive, both in terms of legal fees and staff time, and risked heavy fines.

When describing their day to day practices, employers rarely described employment regulation as a principle driver, indicating that they may not be consciously aware of the influence of regulation on their practices. Employers tended to say that they were primarily concerned with maintaining morale and maximising productivity, unless prompted to think about the influence regulation has had.

3.1 Influence of regulation when taking on staff

Deciding to recruit was primarily influenced by budgeting and sustainability of the resource need, ensuring that the business was compliant with employment regulation had a limited effect on recruitment practices. Due to current market instability, employers were not always confident that demand would be sustained. They also expressed some concerns about the potential cost of redundancy or the risk of litigation should they later decide to dismiss new members of staff.

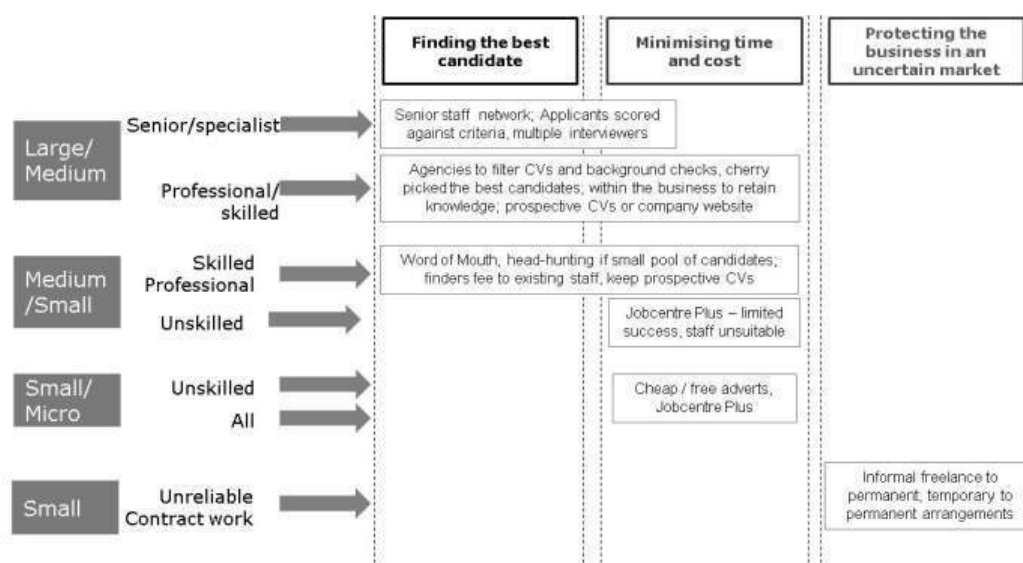
"You're scared to employ someone because they might do this or they might take you to a tribunal or might go off sick [...] you feel like they've got so many rights that it is a bit scary" (Micro, Birmingham)

However, this would not deter employers from recruiting staff if it were necessary to meet client demand and employers believed that using temporary contracts or probationary periods allowed them to terminate employment within a short period if demand decreased.

The primary drivers which influenced recruitment practices were: finding a suitable candidate, both in terms of technical job related skills and capabilities – but also in ‘fitting into’ existing workplace relationships; minimising the time and cost as recruitment was an expensive process and deciding whether to recruit and on what terms in uncertain market conditions. Figure 1 shows how practices were shaped by the three primary drivers:

- Finding the best candidate;
- Minimising time and cost; and
- Protecting the business in an uncertain market.

Figure 1: Practices when taking on staff



Legislation did influence practices to some extent, employers specifically commenting on:

- **Equality legislation**, in that employers developed practices to show that their reasons for choosing between candidates were not discriminatory;
- **Eligibility to work**: employers that recruited migrant workers, as well as those in certain sectors, particularly finance and security, were required to carry out particular background checks before taking on staff; and
- **Agency Workers Directive**: the changes to agency workers rights after 12 weeks discouraged employers from using agency workers for longer-term roles, choosing instead to use fixed-term contracts.

3.1.1 Deciding on the type of contract to use

Employers preferred to recruit permanent employees as they were thought to be more trustworthy, reliable and loyal. However, in times of economic uncertainty employers were not always in the position to offer permanent contracts. (The types of contract used and employers' reasons for using these are summarised in Table 3 below.) However, those with limited knowledge of regulation, particularly non-professional micro, small and medium businesses were concerned about their ability to dismiss staff if they proved unsuitable, or there was insufficient work to sustain them, believing that they risked litigation. Therefore they:

- included a probationary period which they believed allowed them to terminate employment at this point without being exposed to litigation on the basis of unfair dismissal; and
- operated a variety of temporary working arrangements including temporary, subcontract, freelance and agency workers.

This indicates that employers may not be aware of the qualifying period of two years' continuous employment for unfair dismissal⁷ and therefore may not appreciate the flexibility this allows. At the time that interviews were carried out, between May and August 2012, the change from one to two years would have just come into effect which may explain why awareness was low. However, amongst small employers with limited knowledge of employment regulation, there was little evidence that employers were aware that there was a qualification period or that this alleviated concerns about employing permanent staff.

The table below shows the reasons employers gave for offering different types of contracts:

⁷ The qualifying period was extended from one to two years for people recruited from 6 April 2012.

Table 3: Reasons for type of contract used

Business	Contract	Reason
Large / medium	Fixed term contract for long term absence or contract work	Agency workers were too expensive over long periods due to agency fees.
	Agency workers for short term absence, workload peaks	Staff could be sourced at short notice and unsuitable workers could be replaced overnight.
Small contract based work (ie construction, security)	Sub-contractors	Sub-contractors were used to cover peaks, less expensive than agency; managers could use their professional networks to source trusted contractors.
Small and micros – new role	Freelance or fixed term contracts with view to permanent	When creating a new role, employers were often uncertain if demand would be sustained and were anxious about making staff redundancies. Fixed term contracts allowed them to terminate employment after six months if the company's work load decreased. Employers were not responsible for national insurance contributions for employees who were self-employed. Some employees preferred the flexibility of a fixed term contract or self-employed status.
Small and micro's – existing role	Replace on basis of previous employee (permanent / full time) but with trial period.	For existing roles, employers were confident that the resource need would be sustained and therefore a permanent contract was appropriate. They believed a trial period provided the flexibility to dismiss staff who turned out to be unsuitable.

3.1.2 Choosing between candidates

Employers used a range of methods to choose between candidates which were shaped primarily by the need to find the best candidate, although employers did discuss equality legislation as an additional consideration. There was a lack of clarity, particularly amongst small and micro businesses, regarding the types of practices which would be considered discriminatory. For example employers believed that this was limited to asking questions about health, ethnicity and age or asking for this information on candidates CVs. Employers said they were not overly concerned about equality legislation because they based their choice on the suitability of the candidate and did not actively discriminate against particular groups. .

"I know there's a discrimination act for sex and colour and creed and religion and so on, seriously it doesn't bother me because I just employ the best person whose in front of me [...] I recruit from the heart as pure as my heart can be. I just look at the person, I don't really see colour." (Medium, Birmingham)

Record keeping was evident in large businesses and those with HR support, both to ensure that they chose the best candidate and to demonstrate that they had followed a fair process. Micro employers based their choices on whom they got on with the best and did not necessarily keep records of how they had chosen between candidates. Without such evidence, micro businesses recognised that they may be exposed to litigation on the grounds of discrimination, although none had experienced this.

3.1.3 Preparing for new employees to start work

In terms of preparing for an employee to start work, generally employers had experienced few problems. Small and micro businesses issued standard contracts, which they had either prepared themselves from a generic template or which they had paid a legal advisor to prepare on their behalf.

Checking **eligibility to work** for foreign nationals was described as problematic; particularly in countries where the infrastructure was poor and records were difficult to access.

There were also mandatory checks when recruiting within certain sectors. Financial services and security sectors, for example, required **sector specific checks, qualifications and registrations** to be in place before an employee started work.

These requirements had some impact on recruitment practices, although this was limited. Where these checks were more time consuming or challenging, employers tended to outsource to specialist agencies.

3.1.4 Deciding on levels of pay

The level of pay was decided at the start of the recruitment process when designing the job specifications. There was some room for negotiation, to reflect the applicant's qualifications or experience. Large businesses or businesses with

professional and high paid staff set the level of pay against sector standards and used external agencies to source data on salary levels. Employers recruiting unskilled staff at the lower end of the pay scale were aware of the minimum wage and set their level of pay against that. The minimum wage levels were proactively checked each year by employers and pay levels adjusted accordingly.

3.1.5 Recruiting temporary workers

Businesses that used agencies more regularly said that the agency 'knew their needs' and therefore provided suitable staff. By contrast, small and micro businesses only used agencies sporadically and had less of a relationship with them and their perception was that the agencies they worked with did not fully understand their staffing needs. They therefore considered agency workers offered poor value for money as in the past agency workers had been unreliable and lacked the skills required for the post.

Where demand was unpredictable, businesses sometimes had a small core team of permanent employees and used agency workers on a regular basis. For example, a construction firm had 19 core permanent staff but used around 40 agency staff as labourers and engineers all year round. As a consequence their annual cost for labour was higher than if they had hired permanent employees but they considered this to be a more cost effective solution and they avoided the potential financial liability of making redundancies should demand significantly reduce.

3.1.6 Agency Workers Regulation

Employers who used agency workers were generally aware of the agency workers regulation and there was evidence that agencies proactively informed employers about the impact that the regulation would have on them. Agencies held seminars and provided information sheets to employers explaining the key features of the legislation and in one case offered to monitor use of agency workers to ensure employers did not exceed the 12 weeks rule.

Since the agency workers regulation came into effect, with the exception of one very large professional business, all employers in this research that used agency workers on a regular basis⁸ said that they had changed their working practices to avoid using agency workers for more than 12 weeks. These employers said they now actively avoided exceeding 12 weeks because they did not want to offer agency workers paid annual leave or equal pay, which would increase the cost. As a consequence these employers:

- chose to employ on a fixed-term contract, rather than use an agency worker, for longer term posts; and
- monitored individual workers to ensure they did not exceed 12 weeks of non-continuous employment.

The CBI (2012) argued that Agency workers regulation was detrimental to employers, particularly large employers, because it restricted labour market flexibility. This research found that some employers were starting to avoid the

⁸ All were medium and large employers in sectors with fluctuating resource needs such as hospitality and manufacturing

regulation by using fixed-term contracts, despite being unable to let staff go at short notice should they no longer require the resource. In addition, it was suggested by CBI that the Agency workers regulation may also be of little benefit to workers as employers can easily avoid them qualifying; it may be detrimental to those workers whose period of work ends prematurely in order to avoid exceeding the 12 week limit.

3.2 Influence of regulation when managing staff

Regulation had very little influence on the working practices adopted when managing staff.

There were some practices which employers had adopted to ensure they were compliant with specific regulations, although these were considered straightforward and had a limited impact on day to day working. These were:

- **Health and safety** – employers monitored training to ensure staff were kept up to date and aware of health and safety requirements
- **Working Time Directive** – contracts contained a waiver, no employer said that an employee had ever refused to sign this;
- **Agency workers regulation** – none of the employers interviewed treated agency workers any differently to staff, in terms of the facilities they could access and the uniforms they wore. Therefore the new Agency Workers Regulations had little effect on employers when managing staff other than in monitoring how long an agency worker had been employed by the company. See section 3.1.7 for the impact of agency workers regulation on recruitment practices;
- **Sick leave** – the financial cost of covering long term absences could be damaging, particularly for small and micro businesses. Employers were concerned about long term sick leave as they believed that they had no certainty about how long the employee would be on leave and therefore it was difficult to plan cover. Administration of statutory pay and leave was not considered particularly burdensome because this was built into payroll software.

The extent to which employers had written policies for managing staff varied considerably according to size and sector. Having written documentation was considered best practice by HR managers. Businesses which had written documentation said this was in place primarily to ensure transparency (ie staff knew how they could expect to be treated by the company and what was expected of them) and consistency (ie all staff have the same rights and entitlements). Written policies also gave guidance to line managers should an issue arise. Ensuring that working practices met regulatory requirements was a secondary driver.

By contrast, small/micro businesses were sometimes actively opposed to formalising people management processes, believing this would have a detrimental effect on their relationships with their employees. Owner managers in micro firms indicated that their businesses operated 'like a family'. Informal arrangements, they insisted permitted them the flexibility to treat employees as individuals with specific concerns and circumstances without regard for formal procedures. For example, if staff wished to leave work early to pick up children or

visit the doctor then this could be accommodated on an ad hoc basis without reference to a formal process.

Figure 2 summarises the use of formal and informal practices for managing staff in different types of employers.

Figure 2: Formal and informal practices when managing staff

Large	All	Full range of written policies on rights and entitlements, training, health and safety, equal opportunities, performance and disciplinary. Considered best practice by HR.
Medium	Professional	Formal appraisal process feeding into training and salary review. Line manager discretion and autonomy.
Medium	Non-professional	Rights and entitlements and disciplinary outlined in contract. Annual appraisals; no record keeping; no policy
Small	Professional	Rights and entitlements and disciplinary outlined in contract. Appraisals and performance monitoring and recording; learnt from previous employer
Small	Non-professional	Preference for one-to-one feedback, day-to-day informal people management; 'having a word'; reliance on personal relationships discourages more formal approach
Micro	All	

3.3 Developing formal and informal working practices

By examining the working practices of businesses, ranging in size from micro firms with less than ten employees to very large organisations employing over 1,000 people, this research found that as businesses grew in size they adopted more formal working practices⁹. Developing formal practices happened on an ad hoc basis in small business, for example employers may develop a formal disciplinary process following a dispute with an employee over dismissal. Medium and large businesses employed HR professionals who also formalised HR processes. Previous research has shown that in larger businesses it becomes increasingly difficult for managerial staff to control all aspects of people management. Therefore, they required dedicated HR support in order to treat employees consistently and avoid litigation. (Marlow 2002).

Adopting formalised HR practices were driven by a range of factors and consequently there was considerable variation between businesses of similar sizes. These drivers are discussed below:

- **Business Sector** – In businesses where the core staff had professional qualifications, for example financial services, law and engineering, there was an expectation amongst staff that written policies would be in place outlining their rights and entitlements and enabling progression through the business. Therefore, for these businesses formalising working practices

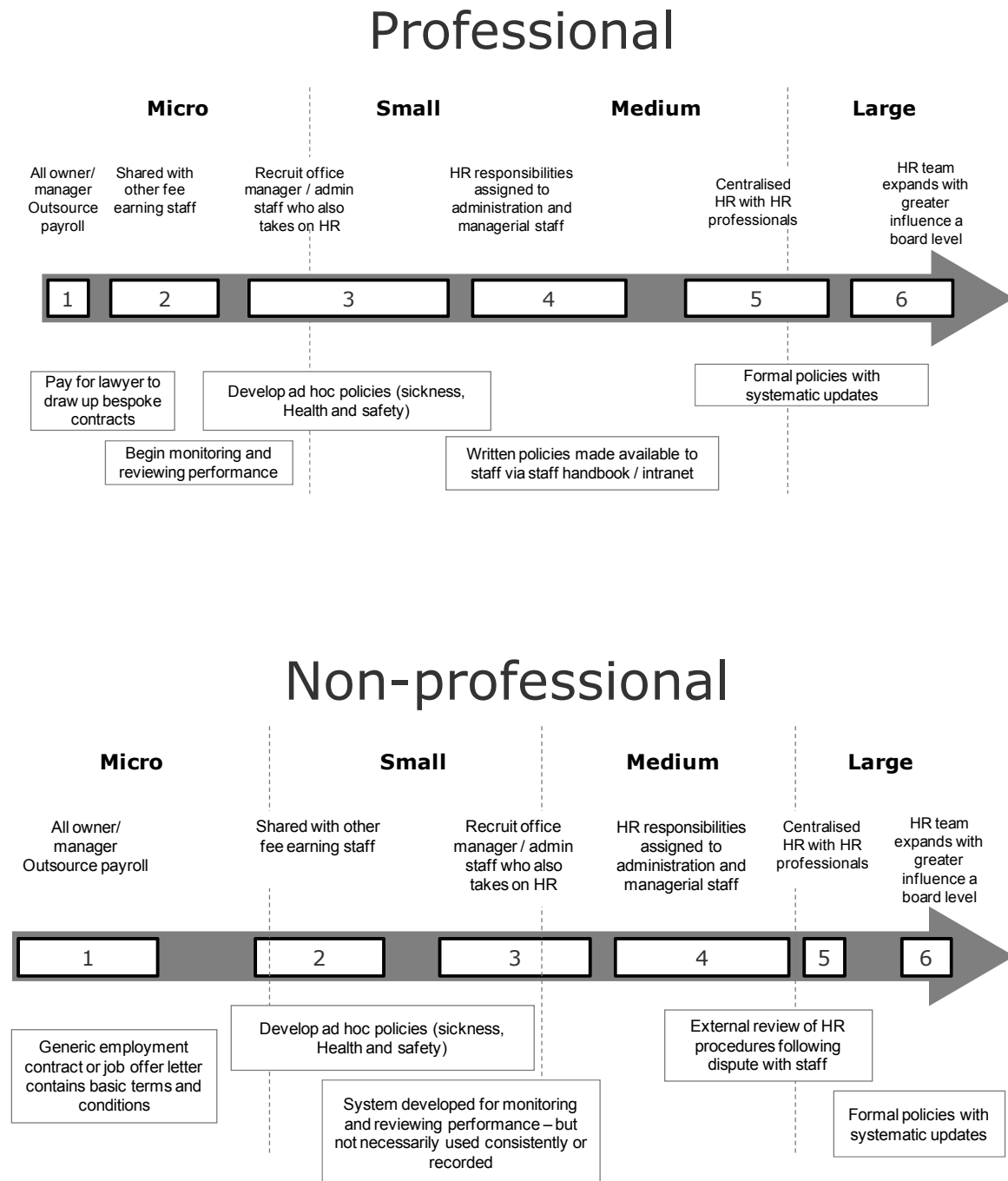
⁹ For example developing written policies, having set procedures which were implemented consistently across the business and retaining records as proof that company policies had been implemented.

was a key to attracting and retaining employees. Employers of predominately non-professional workers believed their employees preferred a more informal approach to management and suggested that employees were not always well informed about their rights and entitlements, nor were they particularly interested in finding out unless they faced dismissal.

- **Competitors** – smaller businesses wanted to emulate their competitors and therefore adopted formal processes employed in larger businesses. This was predominately in professional sectors where trust and reputation was a key selling point, particularly legal or financial services.
- **Internal experience** – Owner-managers of small professional organisations had often spent part of their career in larger organisations where they had learnt that formal approaches were best practice both in terms of retaining staff and developing the right skills within the workforce. Similarly, as businesses grew from small to medium sized, administration staff were recruited to reduce the burden on fee earning staff, bringing in knowledge of effective working practice from their previous employment.
- **Critical events** – Formal policies and practices emerged in small businesses on an ad hoc basis in response to a critical event. This might be, for example, as a consequence of an employment tribunal, a dispute, or performance management issues such as absenteeism or lateness.

However, employers did not always consider that developing formal policies and practices was worthwhile. For example, in small businesses with a predominately unskilled workforce and a particularly flat structure, performance review processes were not considered valuable as there was little scope for promotion. The diagram below outlines the key milestones in the life-cycle of businesses included taking on a first employee, outsourcing specific HR services such as writing employment contracts or payroll administration, and internal HR capacity-building (from appointing an individual with a dedicated HR management role through to building a multi-person department with a division of labour and hierarchy of positions). At each stage, businesses further formalise their HR practices (shown in the boxes beneath the arrow below). There are a number of stages, which are discussed below. The diagram shows that professional organisations move through the stages more quickly, although all large employers had a dedicated HR team and formal working practices.

Figure 3: Developing an HR capacity



Drawing up a contract

When making the decision to take on the first member of staff, researching legal obligations was considered daunting and employers delayed recruiting until they had reviewed their obligations fully. To some extent, these are transitional costs in so far as employers learn from their experience such that taking on a second employee becomes much easier.

Employers first learnt about their legal obligations through developing an employment contract as these contained an overview of an employee's basic

statutory rights as well as disciplinary and disputes policies. Micro employers operating in professional sectors paid for legal advice when recruiting their first members of staff whereas employers whose staff were predominately non-professional tended to use generic contracts they found on the internet. The primary motivation for purchasing a bespoke contract and external advice was not necessarily a concern about compliance with employment regulation. Rather, employers wanted advice on specific clauses in order to protect intellectual property or prevent employees working with clients for a defined period after leaving the company. Alternatively, contracts were downloaded online, sometimes at a small cost, or copied from a previous employer.

Delegating HR support

Many micro/small employers perceived there to be no pressing need to develop an internal capacity at the time of interview. Such an investment was considered a luxury the business could not (yet) afford. Therefore, HR and payroll tasks were handled by the owner-manager and they indicated that they would manage for as long as possible to save on costs. However, there were tipping points when the value of their time spent managing HR tasks was greater than the cost of internal or external support, which tended to occur at an earlier point in professional businesses. There were a variety of factors which influenced when this tipping point occurred. However, internal or external administrative support was usually in place once businesses had grown from micro to a small employer (ie between 10-15 employers). Factors which influenced the tipping points included:

- the value of the owner-managers time, particularly in professional sectors where their expertise was the key commodity;
- employers' prior knowledge, experience and willingness to continue to perform these functions; and
- the resources available to invest in internal or external HR capacity.

Delegating HR tasks was not necessarily as a result of an increased HR burden; rather this occurred as a natural division of labour when managerial staff delegated work to new members of staff, for example to administrative staff employed to handle a range of tasks including, but not restricted to, HR.

Micro/small employers sought HR advice and support on an ad hoc, reactive, basis from external 'experts'¹⁰, primarily from those whom they trusted and with whom they had prior connections, to deal with specific critical events such as dealing with performance and behavioural issues, employees taking long term sick leave and disputes with employees following a dismissal. Employers were very keen to avoid becoming embroiled in litigation should a disgruntled employee allege unfair dismissal. In this sense, regulation served as an important stimulus for employers to seek advice. However, this entrenched reactive approach may discourage employers from developing their internal HR capabilities or adopt a proactive approach to HR and employment regulation.

¹⁰ This group includes not only those with accredited HR or legal expertise but also those with some knowledge but lacking accreditation.

Employing a dedicated HR professional

In larger businesses, centralising the HR function became necessary due to the complexities of managing staff in larger businesses. Dedicated HR professionals were commonplace in medium sized employers, although there was evidence that professional businesses centralised their HR function at an earlier stage, ie the transition from small to medium sized businesses (between 40-60 employees). It was necessary in professional organisations to emulate larger competitors to attract quality employees and develop a broad skills profile within the business. Therefore they required HR specialists to develop personal development plans, deal with benefits and occupational schemes (maternity or pensions) and to handle more complex recruitment of highly skilled and qualified applicants.

In micro / small employers HR practices tended to be reactive because HR responsibility was shared between senior management, administration staff and occasionally an external agency that dealt with payroll tasks including statutory holiday and leave entitlements. As no individual or team had ownership of HR and employment regulation, policies and practices were not updated to reflect regulatory changes or to mitigate the risk of employment tribunals. There were several reasons why businesses were resistant to centralising their HR function. First and foremost there was the cost of a dedicated HR professional. Second, the business may have operated successfully for many years without HR professionals, and third it was not considered common practice in all sectors, particularly those employing non-professional workers.

In non-professional businesses there was a delay in employing HR professionals as employers wanted to avoid the additional costs. However, in some cases medium sized businesses had lost tribunals because their practices were not compliant. These critical events triggered a comprehensive review of working practices, which was outsourced to HR consultancies.

3.4 Influence of regulation when letting staff go

When letting staff go, legislation was a primary driver of employment practices because employers were concerned about litigation. Although written disciplinary policies were incorporated into the most basic employment contracts, employers were particularly cautious when dismissing staff and often sought advice, either from internal HR professionals, external legal professionals or HR consultants. To safe-guard against litigation, employers used temporary contracts and probationary periods, which they believed allowed them to dismiss new members of staff within a defined period (usually six months or a year) without risking litigation. These practices were discussed primarily by small and micro employers who lacked confidence in their knowledge of employment regulation. There was no evidence that these employers were aware of the increased qualifying period for unfair dismissal – after 6 April 2012 employees could not claim unfair dismissal until they had been employed for more than two years.

There was evidence that some employers did not have a clear understanding of the rules around dismissal, in particular, micro and small employers as well as

some medium-sized employers that did not have internal HR expertise. These employers erroneously believed that there was a defined statutory procedure when dismissing staff and that missing a stage in the process would result in a large tribunal award to the employee. While any award is intended to compensate the ex-employee for being unfairly dismissed (eg loss of earnings, loss of future earnings etc) employers viewed it as a fine.

The anxiety associated with letting staff go was evident across all employers, with the exception of HR professionals in large businesses, who had well defined and well used disciplinary procedures in place. HR professionals were nonetheless concerned about the legal costs and/or staff time associated with litigation despite being confident they were acting in accordance with the Acas code of practice. There were three interrelated beliefs which contributed to employer anxiety about litigation:

- **Cost** – Tribunals were considered to be expensive in terms of legal costs or staff time, although only employers with experienced HR teams or in house legal specialists were confident enough to represent themselves. The damaging effect on a company's reputation was a secondary consideration, particularly for large professional organisations such as law firms or financial services;
- **Ease of bringing claim** – As employees could begin the tribunal process at no cost to themselves, there was a perception that employers were exposed to malicious litigation or employees seeking settlement payments regardless of whether their treatment had been unfair.
- **Subjectivity** - Elements of the Acas Code of Practice were considered subjective. For example, giving *reasonable* opportunity for improved performance was considered to be a very subjective requirement, and consequently employers lacked confidence that any disciplinary action would be deemed fair in accordance with the Code of Practice.

A report by Confederation of British Industry (CBI) indicated that 44 per cent of those employers surveyed said they faced an employment tribunal in the past year (CBI 2012)¹¹, of those 34 per cent reported that claims had been withdrawn by the applicant. However, only 5 per cent of claims for unfair dismissal resulted in employers being ordered to pay an award (Ewing and Hardy 2012). This study indicated that employers believed the risk of losing to be higher than research suggests is the case. However the threat or experience of a tribunal, which the CBI data indicated was more commonplace, was also considered both stressful and expensive if legal representation or advice was sought. As such, employers perceived there to be a power imbalance in favour of the employee which made them more cautious when dismissing staff for poor performance.

¹¹ The actual figure is likely to be much lower. In 2009/10 there were 236,000 employment tribunal cases. Given that there are around 1.2 million employers in the UK, then the proportion of employers who have experienced a tribunal could be no more than 20% and this does not account for multiple claims cases where several employers make claims against a single employer.

The disciplinary procedures described by employers who had been through the process appeared to be in line with the Acas Code of Practice. Employers discussed gathering evidence, allowing employees to be accompanied at meetings, giving employees the opportunity to dispute decisions and carrying out meetings in a reasonable time. However, with the exception of HR professionals, employers were not always aware of the Code of Practice as they had sought external guidance to develop their procedures.

The process of dealing with disciplinary issues also commonly used a sequence of verbal and written warnings. Between 2004 and 2009 there was a requirement to follow a statutory three-step procedure to deal with disciplinary or grievance cases. Failure to follow the process led to an automatic finding against the employer. This was repealed in 2009 and replaced by the Acas Code a principles-based set of guidance allowing a business to adopt an approach that was fit for their organisation (size, etc). In some cases, employers were unaware this was no longer a statutory requirement, which could mean that employers were using a more onerous system than needed. However, employers with internal HR expertise had retained the sequence of warnings as this was an effective and familiar way to communicate with employees about disciplinary issues.

3.2.1 Dismissal

Whilst there is no statutory procedure for handling disciplinary issues and dismissal, instead the Acas Code provides guidance for employers and indicates that employers should make individuals aware of their concerns, expectations of performance or behaviour, and give employees the opportunity to improve. Across all the employer sizes, an informal approach was usually considered sufficient as a first response to disciplinary issues as this capitalised on, rather than jeopardised, personal relationships between employees and managerial staff. However, where performance issues persisted, or the issue in question was severe (ie theft or abusive behaviour) the usual course of action amongst large and / or professional employers was to initiate a formal disciplinary process as they recognised that a transparent process was instrumental in resolving behavioural issues and ultimately avoiding dismissal.

Small and micro businesses tended to be more reluctant to initiate formal procedures to deal with poor performance believing that these jeopardised personal relationships. As a consequence, some small employers only initiated disciplinary procedures as a formality when they had already made the decision to dismiss the employee, rather than as a genuine process in which the decision is reached after the investigation and meeting(s) have been held. There may be two potential negative outcomes associated with this behaviour: 1) that employers are unable to demonstrate that they had given sufficient opportunity for improvement as feedback was given informally, and 2) that employers do not benefit from the positive effects that structured performance management can have on employee behaviour.

3.2.2 Misconduct

Dismissal on the grounds of misconduct was considered more straightforward than performance related issues. Small and micro employers sought out legal

advice when a misconduct case arose, carried out an investigation and held a disciplinary meeting. Employees were dismissed for gross misconduct such as theft or abusive behaviour. For less serious offences, a verbal or written warning was usually issued. In small and micro firms the full disciplinary procedure was usually only implemented in the case of gross misconduct, other misconduct issues would be addressed informally by management staff.

Identifying behaviours as gross misconduct could be problematic for some businesses. For example, one medium-sized business was contractually obliged to have members of staff present in buildings they serviced 24 hours a day. Although all staff were aware of this, the business had not identified leaving a site as an act of gross misconduct. As a consequence this employer lost a tribunal case when dismissing an employee on these grounds.

3.2.3 Compromise agreements

Paying a compensation payment in return for an employee agreeing not to take a case to tribunal was considered by several employers to be the safest response to litigation, regardless of whether the employer had acted fairly. Large businesses weighed up the cost of legal advice or internal time against the settlement and chose the least expensive. However, they did recognise that there was a risk of setting a precedent with future employees. In some cases businesses that were experiencing financial difficulties at the time of the tribunal felt compelled to reach a compromise agreement as paying large legal fees or an employment tribunal award was not financially viable. These were medium sized businesses that did not have internal HR specialists and therefore required external expert support to deal with the claim. Research by CBI showed that around a quarter of employers opt for compromise agreements rather than going to a tribunal. This research indicates that Employers may be opting for compromise agreements because they lacked faith in the tribunal process and could not afford the legal costs, therefore leaving employers feeling aggrieved and disempowered.

In one case, a medium-sized employer with around 60 employees had paid a compromise agreement in the past. As a result, this employer said they were less concerned with meeting statutory requirements as they would ultimately pay off employees who made a complaint, regardless of whether they were compliant or not.

3.2.4 Redundancies

Although redundancies were costly to businesses, employers felt more confident in the redundancy process as there was a clear procedure which they were required to follow.

With the exception of very large businesses with in-house HR and legal experts, there was a tendency for businesses to outsource the redundancy procedure to solicitors or HR specialists. Outsourcing this process ensured that businesses were compliant. However, adopting best practice was considered of utmost importance when making redundancies. This was for both paternalistic reasons, as employers felt they had a duty of care to employees who were being made

redundant, and to maintain morale amongst remaining staff by reminding them that the business would act in a fair and proper way. Therefore, the additional cost of outsourcing was considered worthwhile.

4. Perceptions of employment regulation

This chapter discusses employers' attitudes to employment regulation and the influencing factors which shape these beliefs. This chapter addresses research *Objective 2: Explore employers' perceptions about regulation and whether there is a perception/reality gap.*

Table 4: Key findings chapter 4

KEY FINDINGS:

- Overall, employment regulation was seen as necessary to ensure that employees are treated fairly; regulation was seen as morally right, therefore they would do little to change their practices if there was no regulation;
- There was evidence of a perception - reality gap amongst micro, small and medium-sized employers with limited knowledge of employment regulation. Most of their anxiety was about employment tribunals rather than the impact of regulation on day to day practices. These employers believed that:
 - It was not possible for them to understand regulation as it was too complex; and
 - Regulation changed frequently, reinforcing the belief that it is not possible to maintain a good understanding of legal obligations;
- Adopting formal working practices was instrumental in addressing negative perceptions. Beliefs about adopting formal practices acted as barriers and should be addressed, these were:
 - Cost versus benefit – a perception that developing formal practices required expensive expertise and would damage personal relationships with employees;
 - Efficacy – a perception that keeping policies up to date was time consuming and that only large businesses had the necessary resources;
 - Legitimacy – a view that legal obligations were ambiguous and subjective. Devoting time to learning the rules was unjustified as employers may still have to face a tribunal and could not be confident they would win;
 - Social norms – In small and micro firms, the norm was to operate 'like a family' which was at odds with developing formal practices.

4.1 Attitudes to regulation

Before being asked about their attitudes to regulation, employers discussed their day to day working practices in depth. This allowed for a comparison between employers' attitudes and the actual impact of regulation on the business. Employers very often reported that employment regulations had not been particularly burdensome in comparison to their other responsibilities as an employer, such as meeting customer demand and managing cashflow. Legal responsibilities were considered an accepted part of running a business - and such arrangements were considered by some to be fair or necessary to protect employees.

"I find it a stress [...] but I certainly wouldn't class it as a burden. If you ask me of my top ten things [...] that are keeping me awake at night, HR isn't one of them." (Small, Wales)

'Yes. I mean, to be fair, I probably wouldn't be as damning about employment law as I know it's become trendy to be. Because I've worked abroad a bit as well, I know how complex employment laws can be in some other European countries, for example ... Of course, things could always be lighter, but let's get real – I think employment law is pretty much doing what I would expect it to do from an employee's point of view. And it isn't, for me, at least, overly onerous from an employer's point of view.' (Micro, London)

There were some small and micro employers who said that employment regulation was burdensome, despite their response to previous questions demonstrating that they had little effect on their working practices, but this response was primarily due to their anxiety about litigation than the burden placed on their business by any particular requirements.

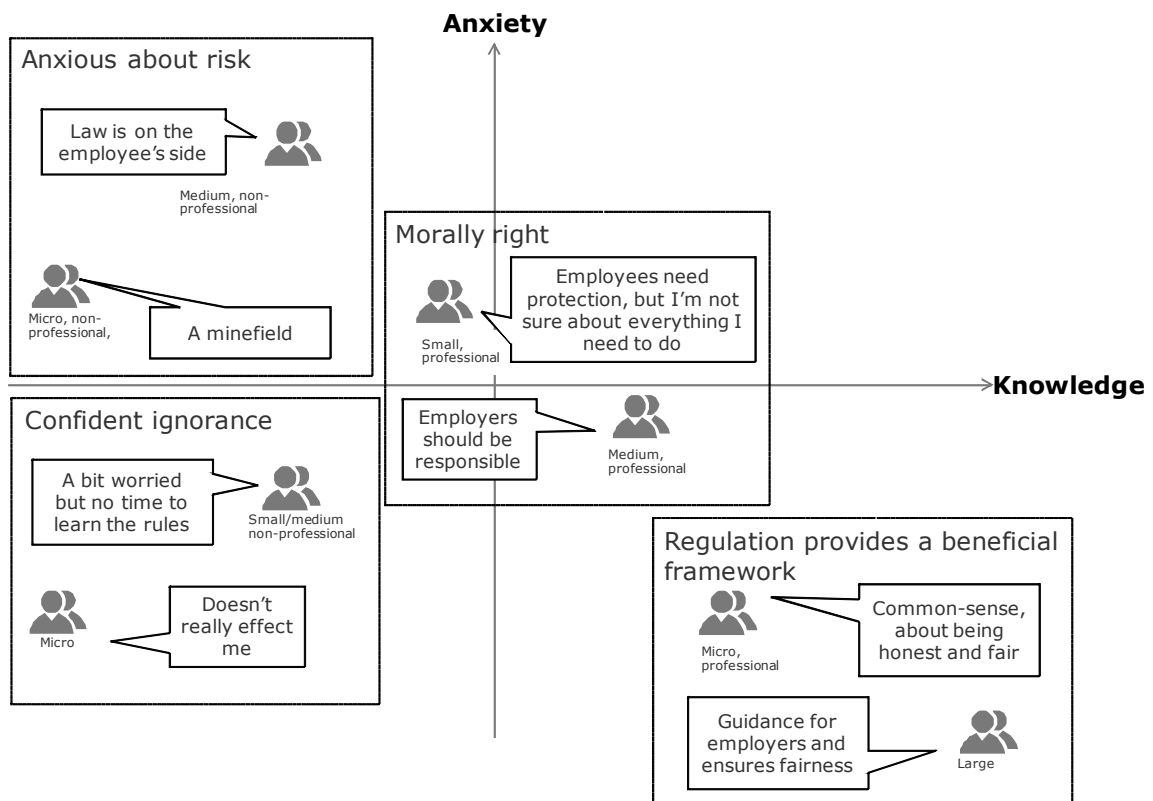
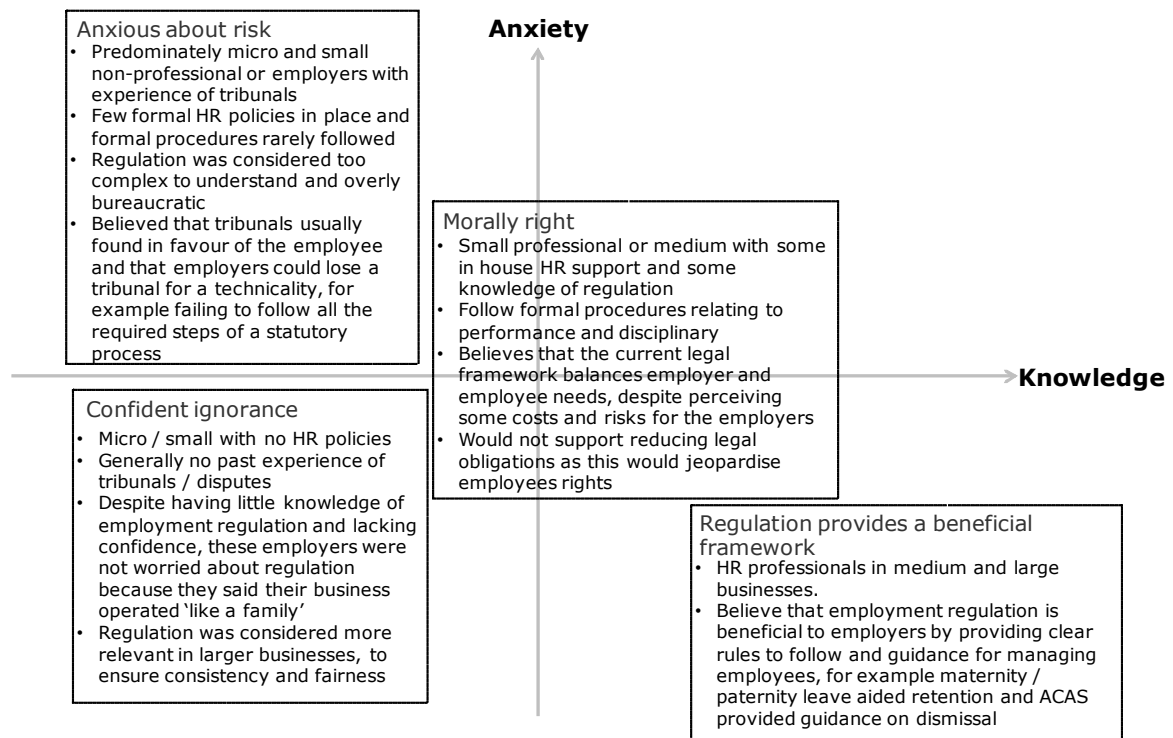
"It's a nightmare [...] the culture is where there's blame, there's a claim [...] people see it as an avenue to get extra money." (Micro, Newcastle)

Previous research has shown that employers can have different attitudes to regulation in general and in relation to their business. Edwards et al. (2003) contrast employers' general perceptions of employment regulations from the specific impact of the regulations on their particular business. They noted that employers often made distinctions between the two, usually to report that regulation had limited specific effects on them as employers while acknowledging the adverse impact employment regulation imposed on others.

The diagrams below position employers' attitudes to regulation against the level of knowledge within the business and the anxiety employers felt about litigation. Employers' responses can broadly be placed into four categories:

- Anxious about risk
- Confident ignorance
- Morally right
- Regulation provides a beneficial framework

Figure 4: Attitudes to regulation



This research indicates that attitudes to regulation may be a poor indicator of impact on day to day practices. Employers with formal working practices in place, who arguably were impacted the most by regulation, talked about the need for and benefits of the regulatory framework in the UK. Whereas those employers who operated informally and therefore whose HR practices were impacted the least by regulation were most critical. Saying that regulation was burdensome often meant employers believed regulation must be burdensome to someone else or else that it may be burdensome at some point in the future, if they were taken to a tribunal. Peck et al (2012) make a similar distinction when reporting for BIS on employers' perceptions of regulatory burden. Regulatory burden does not equate to a cost to the business, rather employers perceived regulation as burdensome due to their anxiety resulting from the threat of litigation.

The response to regulation by micro and small businesses – either confident ignorance or anxiety about risk – was particularly telling. They either felt powerless to mitigate risk or believed regulation was not relevant to them. In either case, these attitudes legitimised these employers choice to do nothing and their resistance to learn about regulation or put formal policies into practice. Small employers, with no internal HR support, said that it was not possible for them to learn about employment regulation because it was deemed too complex, required legal knowledge and changed too frequently. Therefore they were not confident they were compliant with all legal requirements. Rather, they learnt about rules reactively, when a problem arose, such as a dispute with employees. Although these employers considered this approach to be more efficient, they risked only learning that their actions were non-compliant when an employee disputes their treatment. At which point it may be too late and the employer may be required to pay compensation.

As a consequence these employers may be at greater risk of litigation. Indeed, research has shown that micro and small employers were most likely to be taken to tribunal and to lose, particularly when they failed to follow formal practices. (Saridakis et al. 2008). Government policy has been to reduce burden on small and micro employers, however, this research indicates the impact may be limited as micro employers have a poor understanding of their obligations in any case. The root cause of their difficulties concerning regulation was a lack of understanding and reluctance to deal with HR issues formally.

4.2 Beliefs about adopting formal employment practices

Developing formal employment practices and written policies had an important impact on employers' attitudes to regulation, particularly their confidence in dealing with regulation. Where formal practices were in place, confidence amongst managerial staff was high. However, previous research has shown that micro and small businesses are reluctant to developing formal HR policies because this allowed them to treat staff as individuals and be more flexible when deciding on pay, working time and dealing with disciplinary issues. (Ram 1994; Forth et al. 2006; More and Read 2006).

Marlow et al. (2010) also identified a number of barriers to formalising working practices, including reducing employee satisfaction by depersonalising relationships and undermining managers decision-making autonomy.

Consistent with these findings, this research has identified several beliefs which acted as barriers for small employers to adopt formal practices, these are discussed below:

Table 5 – Barriers to developing formal employment practices

Cost versus benefit	High time and financial costs. It was believed that developing and updating policies would be very time consuming and, without internal expertise, it would be necessary to pay for expert HR advice which was expensive.
Efficacy	Developing and updating comprehensive policies was considered too resource intensive for small businesses
Legitimacy	Regulation is ambiguous and subjective. Therefore, despite developing compliant practices, employers could not be certain that they would not have to face an employment tribunal
Social norms	Employers said they operated 'like a family' and believed that adopting more formal practices would potentially be damaging to personal relationships they had built with employees

The current recession also influenced beliefs about employment regulation. This heightened anxiety about litigation, with small and micro businesses feeling particularly exposed to possible fines. In addition, employers were more cautious about taking on permanent members of staff because they were worried about making redundancies should demand drop off. Consequently, employers may be employing on different basis, ie using fixed-term or zero hour contracts to a greater extent to protect the business from expensive redundancy costs (it should be noted that employers may not be aware that staff must be employed for two years before they are entitled to redundancy payments. Although it should be noted that employers were also reluctant to take on new staff, if they did not believe that the resource need may not be maintained, because the costs and disruption of recruitment were considered high.

5. Communicating with employers about regulation

This chapter focuses on how employers become aware of employment regulation and legislation, either new legislation, or existing legislation that they have not come across before. Preferences for how information is delivered and changes that could be made to make employment legislation more accessible are also discussed. This chapter addresses research *Objective 3: What are employers' views about the value of employment regulation information?*

Table 6 – Key findings chapter 5

<p>KEY FINDINGS:</p> <ul style="list-style-type: none">• Medium and large businesses were proactive in learning about legislation and keeping up to date with changes, whereas small and micro businesses were reactive, seeking out information around critical events and when problems arose.• Small and micro employers only learnt about changes to legislation through the media. Medium and large employers received email updates from a supplier, such as an HR consultancy, payroll bureau, or a government resource including Directgov and Acas (Advisory, Conciliation and Arbitration Service - aims to improve organisations and working life through better employment relations).• Information about employment regulation was said to be available from a diverse range of sources. Whilst this meant that employers believed that there was enough information available to them it was sometimes difficult for employers to find the information they needed, particularly small and micro businesses that only had limited experience of navigating the various information resources.• Web-based government resources were valued by employers, particularly Directgov and the web pages of Acas. Whilst these sources were considered clear and comprehensive, the information was sometimes criticised for being generic and therefore of less use in more complex situations.• Employers, especially those with no HR function, were keen for a single portal that comprised up to date employment legislation written in lay terms that provided both generic and more specialised information. Templates, such as contracts and performance monitoring proformas were also highly desired.
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5.1 How employers find out about new regulation

The process of finding out about employment legislation varied by size and type of employer. This is summarised in the table below.

Table 7 – Learning about new regulation

Type of business	Keeping up with legislation	Recruitment and managing staff	Drawing up contracts	Letting staff go	Information sources
Medium / Large / All industry sectors	Proactive. HR professionals. Legal department. Produce policy documents	Approach designed and managed in house; may use recruitment agencies to filter	HR professionals with legal oversight. Contracts tailored to job role	HR professionals. Legal advice where required	Direct.gov Acas CIPD HR networks Solicitors, if required
Small and micro / professional sectors	Proactive. Finance or Business manager / director; senior administrator. Produce policy documents	Approach designed and managed in house; may use recruitment agencies to filter	Often based on previous employment experiences; may obtain legal advice	Obtain legal advice where required	Direct.gov Acas CIPD Small Business Federation Business Acquaintances Solicitors
Small and micro / semi / unskilled sectors	Reactive – only when issue is serious. No written policy	Jobcentre Plus Recruitment agency	Download from web sites; may tailor to job role; Acas	Always obtain legal advice, but often very late in the dispute process	Friends Acquaintances Acas Direct.gov Accountants Solicitors Small Business Federation

5.2 Preferences for how employment legislation information is delivered

Employment legislation is currently delivered in a variety of different ways. Employers of all sizes that are currently linked into information sources – ranging from the Small Business Federation to UK Trade, solicitors to HR consultants – all felt that they were adequately supplied with relevant information, either by email or through newsletters or web-based updates. For the micro and very small businesses, it was difficult to sift through the information to find what was relevant – and having the time to do so. As one micro business indicated, although it was interesting to know if there was new legislation about recruiting new staff, as they had only taken on one employee in six years, the information was not particularly relevant to them.

Employers were keen to know if there is new legislation that is relevant to them. The medium and large employers considered that they had adequate mechanisms to ensure that they were on top of anything new. It was, however, the micro and smaller businesses that wanted more use of the media to inform businesses; they could then decide if the legislation was relevant to them and seek out further information. They did not want more emails; they felt they received enough electronic information already and more emails would simply be an additional burden to them, or they would never be read.

"They should advertise it more [...] to help small businesses along [...] you don't always have the time [to research yourself]." (Medium, Birmingham)

Web-based employment legislation information was highly regarded and a preferred source of information. The Directgov and Business Link websites were felt to be highly informative, although criticised for being *'fairly basic'* and generic. The Acas website was considered to be excellent for information about grievance procedures, dismissal and redundancy, albeit *'a bit wordy'*. The BIS website was least preferred of the three, having a *'poor search facility'*. Despite the value placed on these websites, most of the employers interviewed indicated that they would have the information checked out either by their legal team (for large employers) or their solicitors (for all other employers), especially if the issue they were dealing with was complex. This was primarily because of the generic information provided by these websites, or the legal disclaimers that were attached. However, employers were not always aware of the full scope of content available via Business Link and Acas as they found the sites difficult to navigate, often because their understanding of what they needed was limited and therefore it was difficult to search the site effectively.

5.3 How can employment legislation be made more accessible?

Information about employment legislation is available from a very wide range of sources. For businesses that were large enough to have dedicated HR functions, or specific individuals for whom this is their role, or part role, this was not a problem. They generally knew where to go for specific types of information and had sufficient resources to sift the relevant material.

For small and micro businesses, the plethora of information sources was an added burden when seeking out information. The fact that much of the information was generic made it difficult for these businesses to understand how to apply the information to their specific issue. What they required was a single source of information that covered all aspects of employment legislation, that provided a high quality search function, and information that was both generic and tailored. Templates that could be adapted for use would also be highly regarded.

6. Conclusions and Implications

This section brings together the findings and draws out the conclusions and implications of the research. Throughout, these are presented in response to BIS's three research questions:

- Are employer's current working practices influenced by regulation and what impact does this have on business growth and / or HR capacity?
- What are employers' perceptions about employment regulation and is there a perception / reality gap?
- What are employers' views about the value of employment regulation information?

The section closes by discussing some of the implications of the findings for government.

6.1 Conclusions

To what extent are employers' practices influenced by regulation?

The influence of regulation on working practices was most apparent amongst employers who maintained formal working practices. Employers who operated more informally (usually small and micro, non-professional businesses) tended to be more reactive to regulation, which only impacted their practices when an issue arose. However, employers who operated more informally expressed greater anxiety about non-compliance and other research has shown that they were more likely to be taken to a tribunal and lose.

When recruiting a new employee, employers said that they were primarily concerned with finding the right candidate with the necessary skills and experience, although it was also important that the resource need would be sustained. In the current economic climate, employers said that their workload was difficult to predict. Therefore, in order to justify the cost and disruption associated with recruitment, it was important that employers were confident that the resource need would be ongoing. In addition, some small and micro employers, were concerned about being able to end the employment relationship should demand drop off, particularly those who lacked confidence in their understanding of employment regulation. Consequently, they used a variety of techniques which they believed would make it easier to terminate employment including incorporating trial periods into permanent contracts and using a variety temporary working

arrangements, such as fixed-term contracts, agency workers for short periods or using sub-contractors and freelance staff to cover peak workloads.

When dismissing employees, practices were wholly shaped by legislation - or rather what employers believed they had to do to avoid paying compensation. With the exception of large employers with a dedicated HR team, employers were considerably more anxious about meeting their legal requirements in respect to dismissal. Anxiety about dismissal was particularly evident amongst those small employers that had limited knowledge of employment law. This was fuelled by the erroneous belief that there was a statutory dismissal process and that failure to follow this could result in an expensive tribunal case.

As a consequence, the fear of litigation had a more significant impact on working practices than the legal obligations employers had to meet. This resulted from:

- a belief that it was relatively easy for employees to make a tribunal claim for unfair dismissal or discrimination; and
- media coverage of large compensation payments that favoured the claimant.

What are employers' perceptions about employment regulation and is there a perception / reality gap?

Whilst employers recognised that the impact of regulation on day to day working practices was minimal, learning about regulatory requirements could be stressful and time-consuming if an issue arose, such as a dispute with an employee. Consequently, the perception that legislation was burdensome was based more on their fear of litigation than any actual experience and perpetuated by the pervasiveness of the 'anti-regulation' discourse occurring in the wider society (Kitching, 2006).

Research has shown that there is an important distinction between perceived regulatory burden and the time and financial costs of compliance (Peck et al. 2012). When employers describe their working practices in detail they acknowledge that the cost of compliance is negligible but nevertheless continue to describe regulation as burdensome. This research therefore adds further weight to the research literature which indicates that the perception of legislative burden may be more indicative of employers' anxiety than the actual impact of regulation on running a business.

Employers – particularly smaller employers – tended to describe employment regulation as burdensome. In most cases employers were referring solely to dismissal. In some cases this was because they had experienced an employee taking them to an industrial tribunal; they described the experience as burdensome, expensive and time-consuming. Others however, thought that employment legislation was burdensome purely on the basis of conjecture and media reporting, and again limited only to dismissing staff. In this respect there was a perception-reality gap of two forms. First there was tendency to view *all* employment legislation as burdensome, purely based on their experiences of dismissing staff; second, those employers that had not been through the tribunal experience still thought that *all* employment legislation was burdensome because of what they had heard about dismissal in the media.

The employers, of any size, that had been through a tribunal experience thought that the experience was unpleasant, time consuming and potentially expensive. However, the medium and large-sized firms usually had procedures in place to manage staff performance such that most cases could be dealt with through performance management processes without staff having to be dismissed and going through the tribunal process. However, micro and small employers were less likely to have such performance management processes in place which meant that an issue could escalate and very quickly end up as a tribunal case. The lack of procedures meant that they were less able to demonstrate compliance with the legislation, making it more likely that they would lose a tribunal case, thereby reinforcing the view that dismissal was a burdensome process. Further research is required to understand the extent to which SME employers are at risk of litigation as a result of operating informally. It should be noted that in one year, only 60,000 – 70,000 employers (of 1.2 million across the UK) will experience a tribunal claim, therefore it is unlikely that SMEs will be involved in tribunal in case.

Of all the employers in this research, it was the micro and small employers, particularly those employing non-professionals, and with limited HR knowledge, that were the most at risk of being unable to demonstrate their practices were compliant with employment legislation, a finding that echoes other research in the literature. They had little or no written policies or formal processes to follow and were the least confident of all the employers in the study that they were compliant with all employment regulation. However, research also showed that businesses which operated informally tended to have happier workers (Sadarikis, 2008). Therefore, these employers were generally unwilling or unable to develop formal policies which are in line with employment regulation as they wanted to retain 'family' approach to staff management. In so doing, they lost the potential benefits of formal practices – ensuring all staff were treated fairly and consistently, improving performance, giving guidance to managers and managing performance such that dismissals may not be necessary.

The Government response to evidence which indicates that regulation is burdensome has been to reduce the regulatory obligations for small employers. However, as micro and small employers are often not fully aware of relevant employment legislation and may not have the internal processes to match, a reduction in legislation is unlikely to have any impact. This may also reinforce the perception that regulation changes frequently making it difficult to keep up to date. (Peck et al, 2012). While they may no longer fall foul of regulation they did not know previously existed they remain at risk of losing tribunal cases because they do not know what they should be doing – a viscous cycle which reinforces the perception that regulation is opaque, favours the employee and there is little they can do to avoid expensive compensation payments / tribunal awards.

What are employers' views about the value of employment regulation information?

The response to communications about regulation was positive. Employers valued the information available to them through the Directgov, Business Link and Acas websites. It was usually straightforward and gave clear instructions,

although much of the information was generic and may not necessarily help employers with specific questions.

Employers preferred to access information online so that they could familiarise themselves with the general information in the first instance. However, it was said to be difficult to find the required information for a number of reasons:

- Information was available from numerous online sources which made it difficult to know which website to go to. In addition, the various websites were sometimes said to be contradictory, and employers were unclear which source they should trust. An excess of website disclaimers added to this view;
- Information was either considered to be too basic, too technical, generic, 'wordy', or lengthy;
- While employers found generic information useful they were conscious that in the event of a tribunal, the information available would not be sufficient and they would have to resort to paid professional advice.

However, there was also a need for one-to-one support which gave employers the opportunity to discuss their own specific circumstances; employers that were aware of the Acas helpline indicated that this service met this need very well.

The research indicates that whilst the information available to employers was meeting requirements in terms of giving the required information about general working practices, it was often less useful when employers had specific queries. However, the published information available was considered to be insufficient to be totally sure of an issue; as a consequence employers continued to buy legal / professional advice.

6.2 Implications

- When employers describe regulation as burdensome, this may be a poor indicator of the actual impact or cost of compliance to the businesses. However, it does highlight the level of anxiety experienced by employers dealing with unfamiliar regulation or entering into a dispute with employees.
- Employers tend to have an inflated idea of the risk of being taken to an industrial tribunal when dismissing staff. The 'high risk' myth needs to be dispelled as this would help to reduce the perception that all employment regulation is burdensome;
- Employment legislation communications and/or support should prioritise disciplinary and dismissal procedures. The erroneous belief that there is a statutory process to follow when dismissing employees increased anxiety and the perception that regulation was unfair to employers.
- Tribunal outcomes were perceived as unpredictable. Therefore, pre-tribunal compromise agreements can seem the safest option for employers that are anxious about having to pay a tribunal award.

- There is a clear need to provide a single information portal that guides employers to the relevant information to support employers who had no internal HR and considered regulation too complex to understand. The new single government website launched on 18 October 2012 may provide a gateway to this information, if the level of detail meets users' needs.
- There is a need for targeted support at the small / micro employer level which educates them about the value of having formal employee management and monitoring processes should they wish to employ such measures. Further research is required to determine the appetite for formalisation, including which practices would benefit from formalisation and which should remain informal in order to maintain a 'family' approach whilst also safe-guarding against litigation.

7. Technical Appendix

The research was qualitative in design, adopting in-depth interviews in order to examine employer's practices, and explore perceptions of employment legislation. The in-depth interviews were carried out by qualitative researchers who have extensive experience and have been trained in the techniques of non-directive interviewing. Each interview was exploratory and interactive in form so that questioning could be responsive to the experiences and circumstances of the business. Interviews were based on a topic guide, which listed the key themes and sub topics to be addressed and the specific issues for coverage within each. Although topic guides help to ensure systematic coverage of key points across interviews, they are used flexibly to allow issues of relevance for individual respondents to be covered through detailed follow-up questioning.

All members of the research team took part in a briefing to ensure the interviewing approach was consistent across the interviews. The interviews were conducted at the respondent's place of work. All interviews were digitally recorded and transcribed verbatim.

Material collected through qualitative methods is invariably rich but unstructured. The primary aim of any analytical method is to provide a means of exploring coherence and structure within a cumbersome data set whilst retaining a hold on the original accounts and observations from which it is derived. The analysis of the in-depth interviews was undertaken using a qualitative content analytic method called 'Matrix Mapping', which involves a systematic process of sifting, summarising and sorting the material according to key issues and themes. Information from each interview transcript was summarised and a map was produced which identified the range and nature of views, experiences, and issues for development and form the basis of this report.

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APPENDIX A

TOPIC GUIDES AND STIMULUS

Topic guide
BIS – Employment regulation
Mainstage V2
Part A

Job Number: 260107108

Date: May 2012



Topic guide: BIS employment regulation – Part A
Perceptions and impact of employment regulation

Aims:

- Understand how (and to what extent) employers current working practices are influenced by regulation
 - Explore the factors that affect behaviour (e.g. deciding what practices to adopt in order to be compliant or whether to comply with regulation)
- Identify tipping points where the burden of compliance (actual or perceived) affects businesses either by restricting growth or requiring additional resource or outsourcing
- Examine general perceptions about employment regulation to understand
 - a) whether these perceptions reflect the actual impact that regulation has on businesses (perceptions reality gaps)
 - b) where perceptions come from – beliefs and hearsay
- Explore employer perceptions of the value of information sources used

Appro x timing	Key Questions
5	1. Introduction
	<ul style="list-style-type: none"> • Commissioned by the Department for Business, Innovation and Skills • Purpose of the research – to understand the practices employers adopt to manage and develop their workforce • TNS-BMRB are an independent research agency working on behalf of BIS • Length of interview – 60 minutes. • Confidentiality and anonymity – audio recordings and personal details will be held securely and will not be shared with BIS or used in our report • We use verbatim quotes to illustrate our reports but these will not be attributed using personal details and neither you nor your business would be identifiable.
5 mins	2. Business context
	<ul style="list-style-type: none"> • Job title, length of time in business <ul style="list-style-type: none"> • Role; particularly in relation to recruitment, retention, letting staff go • Background to the business <ul style="list-style-type: none"> • Nature of business / sector • How the business is organised (e.g. subsidiary, part of a group, establish how the business fits within the rest of the organisation – where relevant) • How long THIS business established; how long GROUP established, if relevant • Current market conditions; how the business has fared over the past 2 years; have there been any changes to the business and reasons why <ul style="list-style-type: none"> ▪ Markets they operate in: <ul style="list-style-type: none"> • - local / UK / export • - dependence on particular customers ▪ Sources of competitive advantage – do they compete primarily on quality or price? ▪ Performance – sales & profit performance over past 2 years. • Number of employees – and changes in past two years; reasons for changes • Employee profile <ul style="list-style-type: none"> ▪ gender mix ▪ age mix

	<ul style="list-style-type: none"> ▪ Professionals, skilled workers, unskilled workers ▪ full / part-time mix ▪ use of freelance, consultant, temporary staff, agency staff <ul style="list-style-type: none"> • What does it mean to be a good employer? <ul style="list-style-type: none"> ▪ Within your business, how much of a priority is being a good employer in comparison to other duties (i.e. paying invoices, attracting clients, meeting demand) <ul style="list-style-type: none"> • Why? What gives you that impression?
20 mins	3. Policy and processes relating to recruiting staff, managing and getting rid of staff
	<p>I'd now like to move on to some questions about how you go about recruiting new staff</p> <p>Note to researcher – We are most interested in how policies and practices developed in order to understand the influence of regulation on what happens in businesses</p> <p><i>Use STIMULUS process map to guide discussion and make a note of processes</i></p> <p><u>Taking people on</u></p> <p>Giving a recent example, I'd like you to describe all the steps that you go through when taking on new staff</p> <ul style="list-style-type: none"> • Please take me through what happened and who was involved when: <ul style="list-style-type: none"> ○ Deciding to recruit ○ Recruiting ○ Choosing between applicants ○ Making an offer ○ Deciding on pay ○ Preparing for them to start • Why do you recruit in this way? • How did these processes come about? <ul style="list-style-type: none"> ○ Have you ever changed the way that you recruit, what happened to prompt this change • Where do you go for advice about how you should go about recruiting staff • What policies do you / your business have about recruiting staff <ul style="list-style-type: none"> ○ Are these written or an 'accepted' / informal policy • How did these policies come about [<ul style="list-style-type: none"> Probe on <ul style="list-style-type: none"> ▪ Follow existing processes ▪ Advice, what info sources used ○ How closely are your policies followed in practice

- How do you decide between employing someone on a **permanent basis versus temporary** or through an agency
 - What do you think about when deciding what type of contract to use
 - If not spontaneous, probe on regulation
 - What do you know about regulation relating to temporary or agency staff
 - How much do you think about employment regulation when deciding on what type of contract
 - What specific aspects of regulation do you think about
 - What do you know about the Agency Workers Regulations?
 - What rights do agency workers have on day 1 and after 12 weeks?
 - How does this relate to your business (probe in relation to processes on how you take on, manage and let people go).
 - What effect has this had on the way you use agency staff

Managing Staff

Thinking about permanent staff who work for you at the moment, I would like to talk about how you go about managing staff

- **What happens and who else is involved** when making decisions about:
 - Training and development
 - Retention / moral
 - Promotion
 - Salary / levels of pay / minimum wage
 - Dealing with staff who have families / care responsibilities
 - Dispute resolution
 - Mediation
- **Why** do you deal with your existing staff in this way?
- **How did these processes come about?**
 - Have you ever changed the way that you deal with staff, what happened to prompt this change
- Where do you go for **advice** about how you should deal with existing staff
- What **policies** do you / your business have about managing staff
 - Are these written or an 'accepted' / informal policy

How did these policies come about Probe on

 - Follow existing processes
 - Advice, what info sources used
- How closely are your policies followed in practice
- How does this differ for **agency** and **temp** workers
 - How has the **agency workers directive** affected the way you manage staff?

Letting people go

I'd now like to discuss the process you follow when someone is asked to leave the company, giving examples where possible

- **What happened** and **who else** was involved the last time the business went about:
 - Dismissing someone
 - Making someone redundant
 - Collective redundancies (i.e. 20+ people made redundant)
 - IF have experience probe:
 - How many people they made redundant
 - How long they spent in consultation
 - Costs to the business; what sort of costs
 - Did the regulations affect how they went about making redundancies; how
 - Dealing with disputes or claims of unfair dismissal
 - If have experience probe:
 - What methods do they use
 - Barriers and benefits to mediation or compromise agreement
- **Why** do you deal with letting staff go in this way?
- **How did these processes come about?**
 - Have you ever changed the way that you deal with staff, what happened to prompt this change
- Where do you go for **advice** about how you should deal with existing staff
- What **policies** do you / your business have about managing staff
 - Are these written or an 'accepted' / informal policy
- How did these policies come about
 - Probe on
 - Follow existing processes
 - Advice, what info sources used
 - How closely are your policies followed in practice
- Can you give any examples where your decision to recruit someone has been effected by potential difficulties letting people go?

Thinking about all procedures we just discussed, I'd now like to ask you how these have effected your business

- Have the procedures you follow ever effected your business' ability to make a profit
 - If so, how and why, what was it specifically which had this effect

Complying with regulation

- What do you know about what employers are legally required to do in relation to

	<ul style="list-style-type: none"> ○ hiring people, ○ managing staff and ○ letting people go ● If you had your procedures checked, how confident are you that you would be compliant with the employment regulations; reasons for this
10	4. Keeping up to date with employment regulation
	<p>I'd now like to move onto some questions about how you find out about what your legal obligations when managing staff (i.e. requirements relating to taking people on, managing people and letting them go).</p> <ul style="list-style-type: none"> ● When dealing with legal requirements you have not encountered before (for example, the first time you need to deal with maternity leave), how would you find out about what you need to do? ● Are there any sources that you use to seek out information If so what <ul style="list-style-type: none"> ○ HR department ○ Accountant ○ Employer / trade organisation ○ Government sources (business link; ACAS) ○ Business / management consultants ○ Friends/family ○ Other businesses ○ Anything else <ul style="list-style-type: none"> ▪ Which do you trust ▪ What type of information do you expect to get from different sources ▪ Do you pay to use any of these sources ● How do you receive this information <ul style="list-style-type: none"> ○ Face to face ○ Leaflets ○ Telephone ○ Social networking ○ Websites <ul style="list-style-type: none"> ▪ Channel preferences; reasons why ▪ Would they use / want to use different channels for different types of information; what for ▪ Would you expect to get different types of information from different channels; what, reasons why ● How would this differ if you wanted to find out about new/changes in legislation about employment?

	<ul style="list-style-type: none"> • Thinking about the information that's available to businesses like yours <ul style="list-style-type: none"> ○ How easy is it to understand; any difficulties; what makes it difficult ○ Do you get enough information for you to put it into practice in your business ○ What do you do if you receive conflicting information? • When the government is planning some changes to the law, at what point do you hear about it / start to look for information <ul style="list-style-type: none"> ○ During the consultation stage (i.e. when the government is collecting peoples views about the change) <ul style="list-style-type: none"> ▪ Why? What are you looking for? What do you do with the information? ▪ Have you ever contributed to a government consultation for example, the Red Tape Challenge? ▪ If yes: what did you say & why? ○ When the change has been agreed but not actually launched yet <ul style="list-style-type: none"> ▪ Why? What are you looking for? What do you do with the information? ○ When the change has taken effect <ul style="list-style-type: none"> ▪ Why? What are you looking for? What do you do with the information? • How might the government make the information available to you more helpful? <ul style="list-style-type: none"> ○ What improvements could the make in terms of content and how it is communicated?
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15 mins	5. Growing pains
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	<p>[Note to researcher – the purpose of this section is to understand when and why employers need to invest in their HR capacity. Investment could range from paying for some advice to hiring in new HR staff. It is important to get as many examples as possible and to understand the specific triggers (i.e. dealing with new / unfamiliar regulation; workforce becoming more diverse; or recruiting more staff)</p> <p>I'd would now like to move on to some questions about how the business managed HR/personnel issues as the business has grown/become more diverse.</p> <p>For micro / small businesses who have recently grown from sole trader:</p> <ul style="list-style-type: none"> ○ Tell me about the process you went through when taking on staff for the first time (probes – drivers; follow existing processes, information sources, advice, regulations/guidance)How long did you wait between needing staff and taking an employee on for the first time; reasons why ○ How did the process you went through affect your business? <ul style="list-style-type: none"> ○ Financial costs ○ Time ○ Stress ○ What did you need to do / what HR capabilities did you need to have in place in order
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to take on staff for the first time?

- Do employment regulation influence the decisions you made when taking on staff
 - Which requirements specifically

Established micro / small

- Can you describe who has been involved with decisions about HR in your company since you have been there?
 - Have you taken on additional staff to deal with HR tasks since you have been there?
 - What changed in your business which required additional HR staff
 - Have you ever bought in advice about an issue relating to HR?
 - Why? What was this about?
 - Who did you go to for advice?
 - Accountant
 - HR consultants
 - Business advisors
 - Anyone else
 - Do you outsource any HR tasks
 - Who do you outsource to?
 - Why did you outsource? What did outsourcing allow you to do that you weren't able to do before?
 - How long have you been doing this?
 - What is it about these tasks which made you decide to outsource
- FOR EACH EXAMPLE PROBE ON - What made you change at that time; was it the number of employees or something else
 - Was this change necessary in order to meet legal requirements
 - If so, what specifically
 - How much did this cost the business?
 - How much staff time was spent implementing this change?
 - What information did you use when deciding this change was necessary?
 - How useful did you find this information

Medium and Large

- Since you have been at the company, do you know whether they have had to take on new HR staff?
 - What happened in the business to make this necessary?
- Has your business ever paid for advice about HR?
 - Why; what was this advice about?
 - Who did they go to for this advice and why did they choose to go there

	<ul style="list-style-type: none"> • Do you outsource any HR tasks <ul style="list-style-type: none"> ○ Who do you outsource to? ○ Why did you outsource? What did outsourcing allow you to do that you weren't able to do before? ○ How long have you been doing this? ○ What is it about these tasks which made you decide to outsource • FOR EACH EXAMPLE PROBE ON - What made you change at that time; was it the number of employees or something else <ul style="list-style-type: none"> ○ Was this change necessary in order to meet legal requirements <ul style="list-style-type: none"> ▪ If so, what specifically ○ How much did this cost the business? ○ How much staff time was spent implementing this change? ○ What information did you use when deciding this change was necessary <ul style="list-style-type: none"> ▪ How useful did you find this information
5 mins	6. Perceptions about employment related regulation
	<p>Thinking about everything we've discussed up to this point, I'm now going to ask for your views about the effectiveness of employment law in the UK</p> <ul style="list-style-type: none"> • How would you characterise the UK employment law <ul style="list-style-type: none"> ○ Spontaneous and then probe: light – moderate – heavy touch ○ What makes you say this <ul style="list-style-type: none"> ▪ other legal obligations they have ▪ other countries • If there was no employment regulation, how would that affect the way you recruit staff; manage staff; get rid of staff • Probe for an examples where deregulation / changes to employment law has made it easier for their business to operate. <ul style="list-style-type: none"> ○ What changed specifically to have this effect ○ How this changed what they had to do ○ What do they mean by easier to operate <p>Probe on:</p> <ul style="list-style-type: none"> ▪ Understanding their obligations ▪ Less staff time ▪ Easier to make a profit ▪ Easier to hire and fire staff <p>NOTE: Only discuss if not already covered</p> <ul style="list-style-type: none"> • What aspects of employment regulation in the UK work well – in what way specifically <ul style="list-style-type: none"> ○ What are the benefits of the way that legislation works now <ul style="list-style-type: none"> ▪ Who and how you recruit

	<ul style="list-style-type: none"> ▪ Managing and retaining staff ▪ letting people go ○ Which aspect do you find most challenging <ul style="list-style-type: none"> ▪ Who and how you recruit ▪ Managing and retaining staff ▪ letting people go ▪ What makes this challenging: <ul style="list-style-type: none"> • Costs • Staff time • Understanding the rules • Stress • What employment regulation should there be; reasons why • How might other businesses differ from you in the way they deal with employment regulation <ul style="list-style-type: none"> ○ Why would they act differently • What do your staff expect from you in terms of meeting employment regulation • Are there some legal requirements related to people management that aren't relevant to your business / sector <ul style="list-style-type: none"> ○ Which requirements and why (give examples) ○ How do you treat these
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2mins	7. Close
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	<ul style="list-style-type: none"> • Do they have any other issues they would like to raise (ensure they are 'on topic'). • DESCRIBE what happens next and reassure about confidentiality <p>Thank and close</p>
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