BIS | Department for Business Innovation & Skills

DEALING WITH DISMISSAL AND 'COMPENSATED NO FAULT DISMISSAL' FOR MICRO BUSINESSES

Call for Evidence

MARCH 2012

Contents

1. Introduction

Flexible labour markets are an essential component of a successful economy. Flexibility gives employers the confidence to recruit staff and create new jobs. A growing and prosperous private sector is an essential part of the Government's strategy for a balanced economic recovery. It enables firms to recruit the staff that they need and can create a market that works more efficiently with staff better able to move freely between employers as their circumstances change.

Britain's employment framework stands up very well to international comparison. According to the OECD, the UK has one of the most effective and lightly regulated labour markets among developed economies: it describes us as a 'successful employment performer' The relatively successful performance of the UK's labour market during the recent recession was to a significant degree a result of the flexibility that characterises the UK labour market.

But we cannot be complacent.

On of the most important steps a growing or new business ever takes is to recruit its first employee. We know that it is businesses that have yet to make this first step that are most put off by a fear of the burdens associated with employing someone, and a key driver of that fear is the perception that it can be difficult, time-consuming and expensive to end the employment relationship when things go wrong.

We therefore need to ensure that we strike the right balance between providing flexibility for the employer and ensuring protection for the employee. An important part of the Government's Coalition Programme has been to conduct a Parliament-long review of the current employment framework, and within that to look at any areas of the current laws and regulations that apply to employers that can dissuade responsible employers from hiring new staff.

The Government has already identified a package of measures to improve the way businesses hire, manage and end relationships with employees, when this proves to be necessary:

- Our plans to radically reform the employment tribunal system were set out in the Government's formal response to the Reducing Workplace Disputes consultation[1] which we conducted earlier this year, and we estimate they will deliver £40m in direct savings to employers each year;

- We will consult later in the year on introducing a system of 'protected conversations', with the aim of enabling employers to more confidently raise issues such as poor performance in an open way, free from the worry it will be used as evidence in a subsequent tribunal claim;

[1] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1365-resolving-workplace-disputes-government-response.pdf

- where relations have broken down, we want it to be as easy as possible for both parties to reach a settlement without a tribunal so we will take steps to simplify and facilitate the use of compromise arrangements, to enable the two sides more easily to reach a no-fault settlement in exchange for an agreement not to bring future claims; and

- from April, the qualifying period for the right to claim unfair dismissal will be increased to two years, to provide employers with greater confidence to recruit new employees.

As set out by Vince Cable in his speech to the Engineering Employers' Federation on 23 November 2011, we are now seeking views on two further measures, stemming from stakeholder suggestions, that dismissal procedures can be too onerous, particularly for smaller businesses.

First, we want to examine existing dismissal processes. These can be perceived to be – and often are – lengthy and unfair to both employers and employees. So we are seeking views on how these might be made simpler, quicker and clearer.

Second, we are seeking views on the concept of '*compensated no-fault dismissal'* for businesses with fewer than 10 employees. The Government would like to seek evidence on the potential impacts on employers, on employees, and on the broader economy.

Our objective is to strike a sensible balance between the need to give workers enough support and clarity about what is expected of them to perform to an acceptable standard, and employers, especially small businesses, the ability to dismiss poor performers without unnecessary bureaucracy. We therefore want to undertake a full analysis of the evidence, the views of employees and employers, and the implications for job creation and productivity. We want to hear the different views of employees, business organisations and all other interested parties.

2. Purpose of this call for evidence

This document sets out in brief the current legal framework for dismissal, summarises the existing evidence base and asks you to consider a number of questions and provide evidence in response. On some of the questions it will be relevant to provide evidence based on your experience of the current dismissal system. On other questions, we are seeking submissions of evidence backed by relevant data and analysis. Not all of the questions will be relevant to all respondents. Questions where we are seeking analytical input and data are likely to be of most relevance to business and employee representative groups and the academic community.

Through this call for evidence the Government is seeking to establish a strong evidence base to help inform our understanding of the current dismissal system, including awareness, use and understanding of the Acas Code of Practice on Discipline and Grievance. In particular, we want to understand whether the Code could be adapted to make it easier to use and more accessible to smaller businesses.

Evidence is also being sought on whether the concept of compensated no fault dismissal should be introduced for micro businesses (i.e. businesses employing fewer than 10 staff) and what the consequences could be, including the wider impact on both employer and employee confidence.

Disclosure of information you provide

Information provided in response to this call for evidence, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide, to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

3. Issues under consideration

According to the OECD, in regulatory terms the UK is joint second in the world (behind the US and alongside Canada) for ease of individual dismissal. The UK also has higher job separation rates than in many other countries, with one of the highest rates of churn in the OECD. Around 6-7 million people a year move in or out of jobs within the UK's flexible labour market.

Recent survey evidence (September and October 2011) commissioned by BIS[2] has provided information on business perceptions of employment law. The survey showed that half of businesses with fewer than 5 employees, including sole traders, agreed that employment regulation put them off employing staff, falling to 29% of businesses with 5 to 9 employees, and 11% of large businesses.

Nevertheless, there has been considerable stakeholder concern shown by business organisations (expressed through the recent Red Tape Challenge spotlight on employment related law and business organisation surveys) about the operation of dismissal laws, particularly around dismissal for underperformance. We therefore want to look closely at the current framework for dismissal and to understand better these perceived problems. In particular, we want to examine current dismissal processes (which are underpinned by the Acas's Code of Practice on Discipline and Grievance) and also explore the concept of a new form of compensated no fault dismissal for micro businesses.

Annex A sets out relevant UK and international data on dismissal regulations. However, we are interested to receive further relevant evidence from respondents on international practices. In parallel we will be investigating a number of international case studies, the findings of which we will publish during the course of this call for evidence.

The Acas Code of Practice on Discipline and Grievance

In April 2009, Acas introduced a revised Code of Practice on Discipline and Grievance. This followed the repeal of statutory discipline and grievance procedures (the background to these legislative changes is set out in more detail below) that had been introduced in 2004. The new Code was intended to be a practical guide for employers, employees and their representatives that set out the principles for handling disciplinary and grievance situations in the workplace.

[2] BIS Survey of Business Views on Employment Regulation (*BDRC International*)

In essence, the Code sets out the steps that an employer should take when undertaking disciplinary action, including dismissal, whether that is a result of disciplinary action for misconduct, or due to poor performance. A failure to follow the Code does not, in itself, make an employer liable to legal proceedings. However, employment tribunals are required to take the Code into account when considering dismissals for reasons of capability (including performance) and conduct. Tribunals can adjust any awards made in relevant cases by up to 25 per cent for *unreasonable* failure to comply with the Code.

In summary, the disciplinary steps set out in the Code are:

- **Establish the facts of the case**
  - An employer should carry out any necessary investigations without unreasonable delay.

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- **Inform the employee of the problem**
  - Notification should be in writing and have sufficient information for the employee to understand what the issue is and be able to answer the case. It should also inform the employee of their right to be accompanied at a disciplinary meeting.

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- **Hold a meeting to discuss the problem**
  - The employer should explain the problem and set out their evidence. The employee should have a full opportunity to put their case in response.

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- **Allow the employee to be accompanied**
  - Workers have a right to be accompanied to a disciplinary meeting.

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- **Decide on appropriate action**
  - Where misconduct or underperformance is confirmed it is usual to give a written warning. A further act of misconduct or failure to improve performance would usually result in a final written warning.
  - If misconduct or underperformance is serious a first and final warning may be appropriate.
  - The warning should set out the improvement needed and the consequences of a failure to improve.
  - Gross misconduct (which might include theft, fraud, physical violence, gross negligence etc) may call for dismissal without notice for a first offence. However, a fair disciplinary process should still be followed.

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- **Provide an opportunity to appeal**
  - Employees should be given the opportunity to appeal against disciplinary action. Where possible, the appeal should be heard by a manager not previously involved in the case.
  - Workers have the right to be accompanied at the appeal. They should be informed of the result of the appeal in writing.

Acas research[3] has found that the 2009 Code has generally been welcomed by employers. However, some doubts were raised about whether the language of the Code was sufficiently accessible to small businesses. Furthermore, in BIS's discussions with stakeholders, views have been expressed that the language of the Code is principally targeted at disciplinary issues related to conduct, rather than to capability/performance. In particular, some of the backwards-looking actions outlined in the Code (e.g. 'conducting investigations') are arguably less relevant to a forward-looking performance management process which is seeking to bring about an improvement in an employee's performance.

Views have also been raised that all the steps outlined may not be practicable for smaller employers. In particular, for the smallest companies it might not be reasonable to assume that a "manager not previously involved in the case" should be a requirement of an appeals process, or to expect a series of written warnings before an owner/manager can safely dismiss a worker for poor performance.

An alternative model that sets out similar principles to the Acas Code but seeks to provide greater certainty for small businesses in handling the dismissal stage of a disciplinary process is the Australian 'Small Business Fair Dismissal Code'[4] (Annex D). We are interested in views as to whether this model could be successfully applied in the UK, and if so, what changes might be necessary for the UK context.

[3] http://www.acas.org.uk/media/pdf/4/r/Evaluation-of-the-Acas-Code-of-Practice-on-Disciplinary-and-Grievance-procedures-accessible-version-.pdf (*NatCen*)
[4] http://www.fwa.gov.au/documents/dismissals/Small_Business_Fair_Dismissal_Code.pdf

Questions on the Acas Code of Practice on Discipline and Grievance:

Please respond only to those questions that are relevant to you. You do not need to respond to all questions. Please only respond to 'evidence topics' if you are able to provide evidence backed by analysis and/or data.

For the following questions we are requesting responses based on individual experiences:

Call for Evidence	Questions on the Acas Code of Practice on Discipline and Grievance
Question 1	Before this call for evidence were you aware of the Acas Code? Yes No
Question 2	Before this call for evidence were you aware that the statutory ('three step') dismissal procedures were abolished in April 2009? Yes No Not sure
Question 3	Are you aware that the current version of the Code, reflecting this legal change, also came into effect in April 2009? Yes No Not sure
Question 4	Has the new Code prompted you to review your organisational discipline and grievance policies and procedures? Yes No Not Sure
Question 5	If answer to question 4 is 'yes', please describe what changes you have made and any impact of these changes.
Question 6	Do you find the language of the Code easy to understand? Very easy Easy Neither easy nor difficult Difficult Very difficult

Call for Evidence	Questions on the Acas Code of Practice on Discipline and Grievance
Question 7	Do you find the language of the Code appropriate for dealing with performance issues? Yes No Not sure
Question 8	Have you used the Code when carrying out a disciplinary procedure? Yes No
Question 9	If answer to question 8 is 'yes', did you find that the Code helped you to deal with the disciplinary issue? Helped a lot Helped a little Neutral Was unhelpful Was very unhelpful
Question 10	Do you consider the disciplinary steps set out in the Code to be burdensome? Yes – very Yes – a little No Not sure
Question 11	If answer to question 10 is 'yes', in what way do you consider them to be burdensome?
Question 12	Do you consider that the Code provides sufficient flexibility in dealing with discipline and grievance issues? Yes No Not sure
Question 13	Do you consider that the Code provides sufficient clarity in dealing with discipline and grievance issues? Yes No Not sure
Question 14	Should the requirements of the Code be different for micro and/or

Call for Evidence	Questions on the Acas Code of Practice on Discipline and Grievance
	small businesses? Yes No Not sure
Question 15	If answer to question 14 is 'yes', please explain how you think the requirements should differ for micro and/or small businesses.
Question 16	Does the Australian Small Business Fair Dismissal Code provide a useful model for the UK? Yes No Not sure
Question 17	Please provide any further comments on the Australian Small Business Fair Dismissal Code.
Question 18	Do the requirements of your internal disciplinary processes differ from the requirements of the Code? Yes No
Question 19	If answer to question 18 is 'yes', why and in what way?
Question 20	If you have any further suggestions to improve awareness and understanding of the Code, please describe them here.
Question 21	If you have further comments on putting the Code into practice, please detail them here.
Question 22	Any other general comments on the Code.

Evidence topics for the Acas Code

In addition to responses to the specific questions above we are requesting evidence-based submissions on the topics below.

(Responses to the evidence topics should be provided in a single Word document, stating clearly which topics are being addressed, and emailed to dismissal.callforevidence@bis.gsi.gov.uk)

Please provide relevant evidence relating to:

A. Levels of awareness and understanding of unfair dismissal law and the Acas Code

B. Access to relevant advice (including HR/ legal advice) for businesses, particularly SMEs and Micros, and whether such advice is accurate and helpful

C. Specific difficulties with the current dismissal system for employers and employees. What are the impacts of these difficulties?

D. Any benefits of the current dismissal system for employers and employees.

E. Whether businesses internal processes disciplinary processes differ from those set out in the Acas Code and the reasons for this

F. Differences in practices amongst employers, particularly SMEs and Micros, and whether the impact of employment disputes is greater on smaller businesses

Compensated No Fault Dismissal

On 23 November 2011 the Government set out radical plans to reform and rebalance the employment tribunal system in its response to the *Resolving Workplace Disputes* consultation , We are now implementing a series of reforms designed to encourage the early resolution of disputes in the workplace, deliver a more efficient and streamlined Employment Tribunal system for all users, cut the number of tribunal claims, and give employers more confidence to hire new staff and support growth.

The following measures require secondary legislation and, subject to parliamentary procedure, will come into force on 6 April 2012:

- Doubling the length of the unfair dismissal qualifying period from 1 to 2 years
- Increasing the maximum limit for deposit orders and cost awards to £1,000 and £20,000 respectively
- Allowing judges to sit alone in unfair dismissal cases at employment tribunal.
- Giving judges discretion to direct the payment of witness expenses from either party
- Streamlining hearings by having witness statements taken as read

Further measures require primary legislation and will be implemented as soon as parliamentary time permits:

- **Early Conciliation** - all tribunal claims will be sent to Acas before they can be lodged with the tribunal so that the parties can be offered conciliation. This will encourage resolution of disputes outside the tribunal system, ease the burden on employers and deliver savings to the Exchequer
- **Financial Penalties** – we will introduce a discretionary power so that employment tribunal judges can levy a financial penalty on employers found to have breached employment rights. This will encourage compliance from employers, without penalising them for inadvertent errors.
- **Judges Sitting Alone in the Employment Appeal Tribunal** - to remove the requirement for Employment Appeal Tribunals to include lay members. The EAT is there to review points of law, not workplace practice, and the use of lay members is therefore not an efficient use of resource. Judges will still be able to call lay members in cases where they need them.
- **Limits** - will modify the formula for calculating increases to statutory redundancy payments and tribunal awards limits to round to the nearest pound. This will generate net savings to business £5.4 million per annum (calculated as an average over next few years, so will yield even more savings into the future). It will also benefit the Exchequer.
- **Rapid Resolution** – we will develop options for an alternative system for determining straightforward claims.
- **Compromise Agreements** - will amend the title of 'compromise' agreements to 'settlement' agreements - to encourage further uptake, as part of wider steps to simplify their use.

In addition to these measures, Lord Justice Underhill is currently undertaking a fundamental review of the employment tribunal rules of procedure. We believe that the current rules are too voluminous, elaborate and inflexible and so hinder the effective management and disposal of cases. The intention is that the review will deliver a streamlined procedural code. This will save taxpayers, and users of the system, time and money.

Finally, as part of its wider review of employment law, the Government has announced that it will consult later this year on introducing a system of "protected conversations". This will respond to concerns that many employers are reluctant to engage in conversations with their staff on issues such as poor performance, either because they believe that they are not allowed to do so or

because they are scared that they will end up in an employment tribunal. A system of protected conversations would make it clearer that either employer or employee could initiate a conversation on an issue relating to an employee's employment rights. We are currently developing the detail of a consultation, which we plan to launch later this year.

More broadly, BIS intends to take steps to simplify and facilitate the use of compromise agreements. This includes considering standard compromise agreement texts that would be available for employers to download, together with appropriate guidance for their use. The Government has also recently brought forward an amendment to respond to concerns about the effect on compromise agreements of section 147 of the Equality Act 2010.

In addition to the package of reform that is currently in train, the introduction of a system of compensated no fault dismissal was proposed during the course of the Government's Red Tape Challenge. The concept of compensated no fault dismissal is that a business would be able to dismiss an employee where no fault was identified on the part of the employee, provided that it paid a set amount of compensation to the employee. The employer would not be required to go through a formal dismissal procedure. It would remain possible for an employer to dismiss an employee without having to pay the set amount of compensation if (as is currently the case) the employer had a fair reason for dismissal and acted reasonably in carrying it out.

Employees dismissed through compensated no fault dismissal would not be able to bring an employment tribunal claim for unfair dismissal. However, individuals would still be able to bring claims where they believed discrimination on the grounds of sex, race, disability, sexual orientation, age, religion or belief had taken place or where they believed they had been dismissed for an automatically unfair reason, including 'whistleblowing' or asserting a statutory right, such as asking to be paid the National Minimum Wage. More than half of unfair dismissal claims include a claim in some other jurisdiction[5]. It would not therefore give complete peace of mind to an employer.

The Government recognises that micro businesses are likely to find it more difficult to access expert Human Resource and legal advice. The effect of this is that they are likely to feel less confident in applying detailed disciplinary procedures and have a greater fear of employment tribunal claims. We are calling for evidence on the concept of compensated no fault dismissal for micro businesses but not for all businesses across the whole economy. Similar laws exempting businesses with 10 or fewer employees from some parts of employment protection legislation exist in some EU countries such as Germany (enacted in 2004).

As set out in our response to the *Resolving Workplace Disputes* consultation, the Government is committed to taking steps to simplify and facilitate the use of compromise agreements to settle employment disputes. A key benefit of compromise agreements is that they enable employers and

[5] Analysis of Employment Tribunal Service data suggests that 56% of unfair dismissal claims have a claim in another jurisdiction attached.

employees to reach a settlement in exchange for an agreement not to bring any future claims, including those related to discrimination. We will be taking forward the measures on compromise agreements later in the year, but would welcome any comments on the relationship between compromise agreements and dismissal procedures.

Questions on Compensated No Fault Dismissal:

Please respond only to those questions that are relevant to you. You do not need to respond to all questions. Please only respond to 'evidence topics' if you are able to provide evidence backed by analysis and/or data.

For the following questions we are requesting responses based on individual views:

Call for Evidence	Questions on Compensated No Fault Dismissal
Question 23	Under a system of Compensated No Fault dismissal, individuals would retain their existing rights not to be discriminated against or to be dismissed for an automatically unfair reason[6]. Taking these constraints into account, do you believe that introducing compensated no fault dismissal would be beneficial for micro businesses? Yes No Not sure
Question 24	If answer to question 23 is 'yes', who would benefit and why?
Question 25	Would it be necessary to set out a process for no fault dismissal in a) legislation b) the Acas Code c) both d) neither?
Question 26	Any comments on process requirements. What would need to be considered when developing the process?
Question 27	What type of compensation would be appropriate for a no fault dismissal? a) a flat rate b) a multiple of a week's or a month's wages c) other d) I don't agree with no fault dismissal
Question 28	Further comments on the above, including any comments on possible impacts on redundancy and redundancy payments.

[6] Automatically unfair reasons for dismissal include dismissal for whistleblowing, asserting a statutory right, and for certain trade union activities.

Call for Evidence	Questions on Compensated No Fault Dismissal
Question 29	Any comments on the relationship between compromise agreements and the topics set out in this call for evidence.

Evidence topics for Compensated No Fault Dismissal:

In addition to responses to the specific questions above we are requesting evidence-based submissions on the topics below.

(Responses to the evidence topics should be provided in a single Word document, stating clearly which topics are being addressed, and emailed to dismissal.callforevidence@bis.gsi.gov.uk)

Please provide relevant evidence relating to:

F. Whether or not no fault dismissal would lead to a reduced burden on micro-businesses and an increase in the demand for new employees

G. Whether or not no fault dismissal would lead to an increase in other types of employment tribunal claim e.g. discrimination

H. The potential impact of no fault dismissal on the behaviour of employers and employees, and levels of productivity, including on a) levels of recruitment b) job-matching ('right person, right job') c) employee motivation, commitment and engagement d) investment in skills and training e) management, including effective performance management

I. The impact on consumer confidence and credit provision.

J. Any other potential consequences of introducing no fault dismissal for micro businesses

K. International dismissal systems, their costs and benefits, and any lessons that can be learned by the UK

4. Background - Legislative Context

The legal position on unfair dismissal

As a result of a period of intense industrial unrest during 1964-1966, concerns grew from the Government over the level of industrial action taking place. This led to the setting up of a Royal Commission on 'Trade Unions and Employers' Associations' under Lord Donavan. The Commission was established to "consider relations between managements and employees and the role of trade unions and employers' associations in promoting the interests of their members and in accelerating the social and economic advance of the nation, with particular reference to the Law affecting the activities of these bodies". The result of the Commission's recommendations was the introduction of the Industrial Relations Act in 1971 which contained the first unfair dismissal provisions. The main reason for the introduction of unfair dismissal rights was to ensure that a worker's dispute could be dealt with individually and was less likely to escalate into a full scale collective dispute or strike by the workforce on behalf of the individual as was often the case at that time.

Under the current system, employers can dismiss employees if they have a fair reason for the dismissal and act reasonably in carrying out the dismissal. The Employment Rights Act 1996 (s.98) lists the following potentially fair reasons for dismissal:

- Capability (including poor performance and ill health)
- Conduct
- Redundancy
- that continued employment would breach a statutory requirement (e.g. a driver losing his licence)

In addition, the law allows for 'some other substantial reason', where an employer has a good reason for dismissing an employee which is not one of the four above (this may include reasons such as an irretrievable breakdown in working relationships).

For a dismissal to be fair, an employer must first show that it was for one of the fair reasons. If a fair reason is shown, the tribunal will then consider whether the employer 'acted reasonably' in dismissing the employee.

Case law has developed a number of tests for what constitutes 'acting reasonably'. For example, in relation to conduct dismissals, the employer must have reasonable grounds for believing that the employee was guilty of the conduct which caused their dismissal, and must have carried out as much investigation as was reasonable in the circumstances.

Case law has also developed the band of reasonable responses test (the 'Burchell test'). Tribunals must consider whether an employer's action in dismissing an employee fell within the *range of responses* to a given situation which might have been expected of a hypothetical reasonable employer in the same circumstances. The test acknowledges that more than one response to a given set of circumstances may be reasonable. The test also underlines the principle that employment tribunals should avoid subjective decisions. They must not seek to substitute their view for that of the employer. Tribunals must also take into account the size and resources of the employer in deciding whether their actions were reasonable in the circumstances.

Alongside these legal requirements, the Acas Code of Practice on Discipline and Grievance sets out in practical terms the principles and processes for handling disciplinary and grievance situations in the workplace for employers, employees and their representatives. This includes dismissal for conduct or capability (such as poor performance) reasons. Employment Tribunals must have regard to the Code in deciding whether a dismissal was unfair and can vary the compensation awarded in a successful claim by up to 25% if either party unreasonably failed to comply with the Code.

Compensation in a successful unfair dismissal claim is composed of two main elements:

- A basic award calculated in the same way as statutory redundancy pay (based on age and length of service criteria) up to a current maximum of £12 900
- A compensatory award currently limited to £72 300.

Compensation is unlimited where discrimination is found or where the dismissal was as a result of a public interest disclosure (a 'whistleblowing claim') or for carrying out certain health and safety activities.

Recent changes to the legal framework

In October 2004, statutory discipline and grievance procedures were introduced which required employers to follow a statutory minimum procedure if they were contemplating dismissing an employee or imposing some other disciplinary penalty that was not suspension on pay or a warning. The statutory requirement was a three step process comprised of the following elements:

Step 1 – Write to the employee notifying them of the allegations against them and the basis of the allegations and invite them to a meeting to discuss the matter.

Step 2 – Hold a meeting to discuss the allegations - at which the employee has the right to be accompanied - and notify the employee of the decision.

Step 3 – If the employee wishes to appeal, hold an appeal meeting at which the employee has the right to be accompanied – and inform the employee of the final decision.

If the dismissal of an employee took place without the employer having followed the three step procedure the dismissal would be automatically unfair. In addition, employers were required to pay 10%-50% extra compensation for a failure to follow the statutory procedure. Moreover, even if the dismissal procedure was followed, but the employer had not acted reasonably in all the circumstances, the dismissal could still be found to be unfair.

The stated aims of introducing the statutory procedures were to encourage employers and employees to discuss disputes in the workplace, to promote effective alternative ways of resolving disputes without having to go to tribunal and to provide clarity about the steps to be followed in the event of pursuing a disciplinary or grievance procedure.

However, the introduction of the statutory procedures had unintended consequences. Many unfair dismissal claims were made on purely procedural grounds even where the dismissal may have been substantively fair. The statutory procedures also created significant opportunities for satellite litigation as to whether the proper process had been followed correctly at every stage. In turn, this led to workplace dispute resolution becoming more formalised and legalistic at an early stage – the opposite of what had been intended.

In 2007, a review of workplace dispute resolution was carried out by Sir Michael Gibbons. The aim of the review was to identify options for simplifying and improving all aspects of dispute resolution and to make the system work better for employers and employees while preserving existing

employee rights. The review concluded that, due to the unintended consequences described above, the statutory discipline and grievance procedures should be repealed. This recommendation was accepted and the procedures were repealed by the 2008 Employment Act, with effect from 6 April 2009.

The review also recommended that clear guidelines on grievances, discipline and dismissal in the workplace should be produced for employers and employees. In response to this recommendation, the Acas Code was revised and substantially shortened. The revised Code came into effect in April 2009, alongside the repeal of the statutory procedures. The 2009 Code is intended to be a practical guide setting out the principles for handling disciplinary and grievance situations in the workplace for employers, employers and their representatives.

The effect of these changes is that failure to adhere strictly to a procedure no longer means that a dismissal is automatically unfair. However, employment tribunals are required to take the Code into account when considering cases and have the ability to increase awards to employees by up to 25% if an employer has unreasonably failed to comply with any provision of the Code, and make a reduction in an award of up to 25% where an employee has unreasonably failed to follow the guidance set out in the code. Furthermore, employment tribunals can also make substantial reductions to awards where they believe that there has been a procedural failing on the part of the employer but where the tribunal considers that this would not have affected the decision to dismiss (so-called 'Polkey reductions'). Reductions to awards can also be made where the tribunal considers that the actions of the employee have contributed to his or her dismissal. The cumulative effect of this is that employment tribunals have had greater freedom since April 2009 to determine claims and awards on their substantive issues and merits rather than on procedural grounds.

ANNEX A – Summary of Evidence

Summary

- There is limited detailed knowledge of how employers approach dismissal and what the general consequences of this are for employers and employees. This call for evidence seeks to improve that understanding. In parallel with the call for evidence, BIS will be conducting further research to better understand dismissal regimes in other countries, and whether these hold lessons for the UK system.

- Dismissals appear to amount to about 400,000 per year (although this is uncertain) or around 1.3 per cent of those in employment, and there is a risk that when an employer dismisses someone they will face an employment tribunal claim (claims for unfair dismissal stand at around 50,000 per year on average).

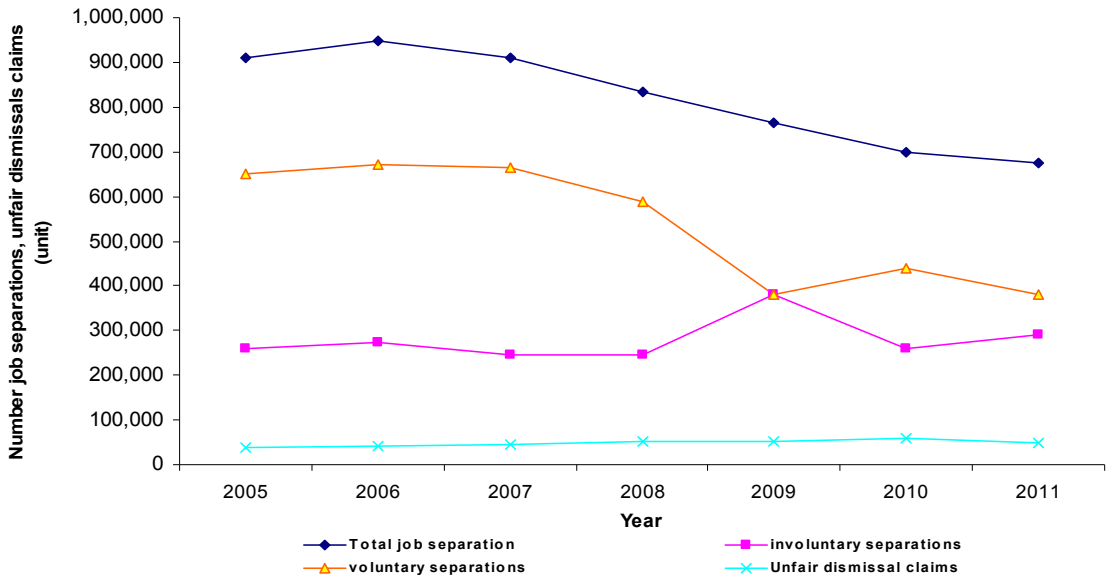
- There is considerable stakeholder concern (shown by business organisations and expressed through Red Tape Challenge, as well as business organisation surveys) about the operation of dismissal laws so there is reason to look closely at the nature of problems.

This section briefly summarises the evidence base as it is currently understood.

Number of unfair dismissal claims

The UK labour market is characterised by a high degree of churn – there is significant movement between jobs, as well as between employment and inactivity or unemployment in every year. Chart 1 shows the number of 'voluntary and involuntary separations' annually from 2005 to 2011. 'Voluntary separations' include resignations. 'Involuntary separations' include dismissals, redundancies and retirements. The chart includes the recent recession, in which involuntary separations rose and voluntary separations fell. An unfair dismissal claim will usually arise from an involuntary separation, but can also arise where an individual resigns and claims constructive dismissal.

Chart 1: Job separations and unfair dismissal claims (2005-2011)



Source: ONS, HMCTS Annual Statistics

It is uncertain exactly how many dismissals there are annually (the separations data above does not give us this level of detail). However, the 2004 Workplace Employment Relations Survey[7] (WERS) suggests there is a rate of 1.65 dismissals per 100 employees. Multiplying this up by 24.9 million employees (ONS Labour Market Statistics), gives a rough approximation of 400,000 dismissals per year. This represents just over 1 per cent of those in employment.

WERS 2004 also shows a rate of 5.71 disciplinary sanctions per 100 employees. This is useful as it provides an indicator of how many problems there are in the workplace which do not end up in dismissal. However, this can only serve as an indicator as it is a snapshot in time. The study also states that about half of the workplaces surveyed reported using at least one of the following sanctions: verbal warning, written warning, suspension without pay, deductions from pay, internal transfers and dismissals. Forty-six per cent of respondents cited poor performance as the reason for the above sanctions.

[7] http://www.wers2004.info/

2. Current patterns of unfair dismissal claims to employment tribunals

Unfair Dismissal is the jurisdiction most commonly claimed by Employment Tribunal claimants. The number of unfair dismissal claims at employment tribunals annually stands at around 50,000 (see Table 1 below), of which 52 per cent follow a dismissal and 23 per cent a redundancy (as outlined in Table 3 below).

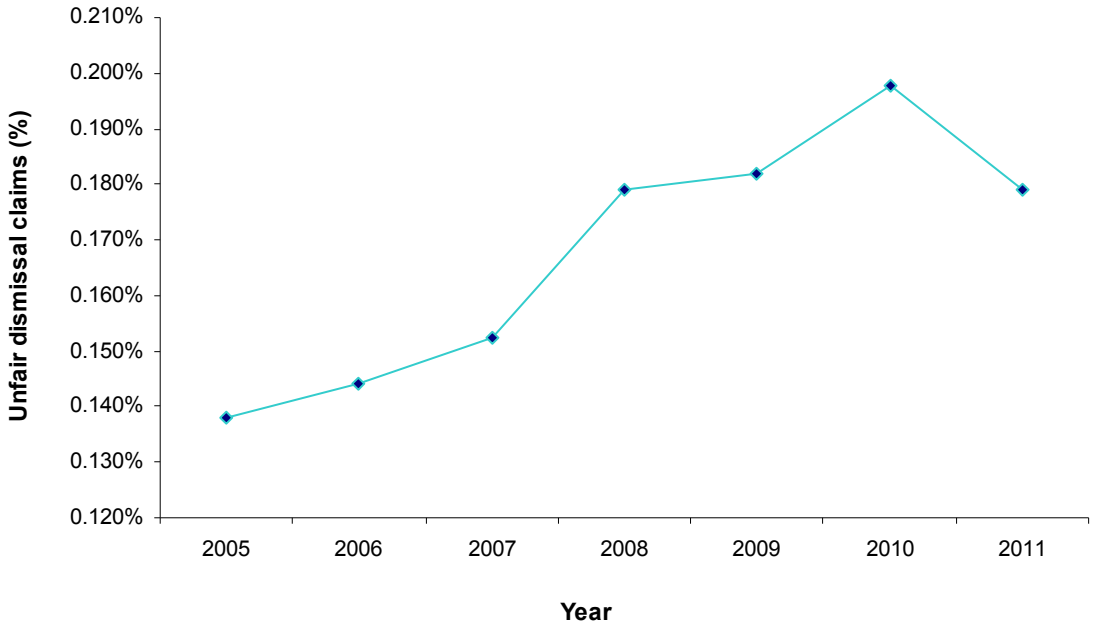
This suggests as a very rough estimate that 6.5% of dismissals resulted in an unfair dismissal claim (26,000 / 400,000). Where an unfair dismissal claim is lodged, employers face on average £3,700 worth of time and legal representation costs in responding to the tribunal claim (see the Resolving Workplace Disputes impact assessment for more information on this calculation[8]). This excludes money spent on awards (median awards are described below in Table 2).

Table 1: HMCTS data on recent total claims and unfair dismissal claims

	2008-09	2009-10	2010-11
Unfair Dismissal claims	**52,700**	**57,400**	**47,900**
Total jurisdictional claims*	**266,500**	**392,800**	**382,400**

*** Claims can be made in multiple jurisdictions (e.g. an unfair dismissal claim and a discrimination claim) and on average there are typically 1.8 jurisdictional claims per individual or multiple claim**

[8] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1381-resolving-workplace-disputes-final-impact-assessment.pdf



Source: ONS, HMCTS Annual statistics

As a percentage of all those in employment, we can see that unfair dismissals are quite small. The recent rises reflect a rise in unfair dismissal claims following the recession.

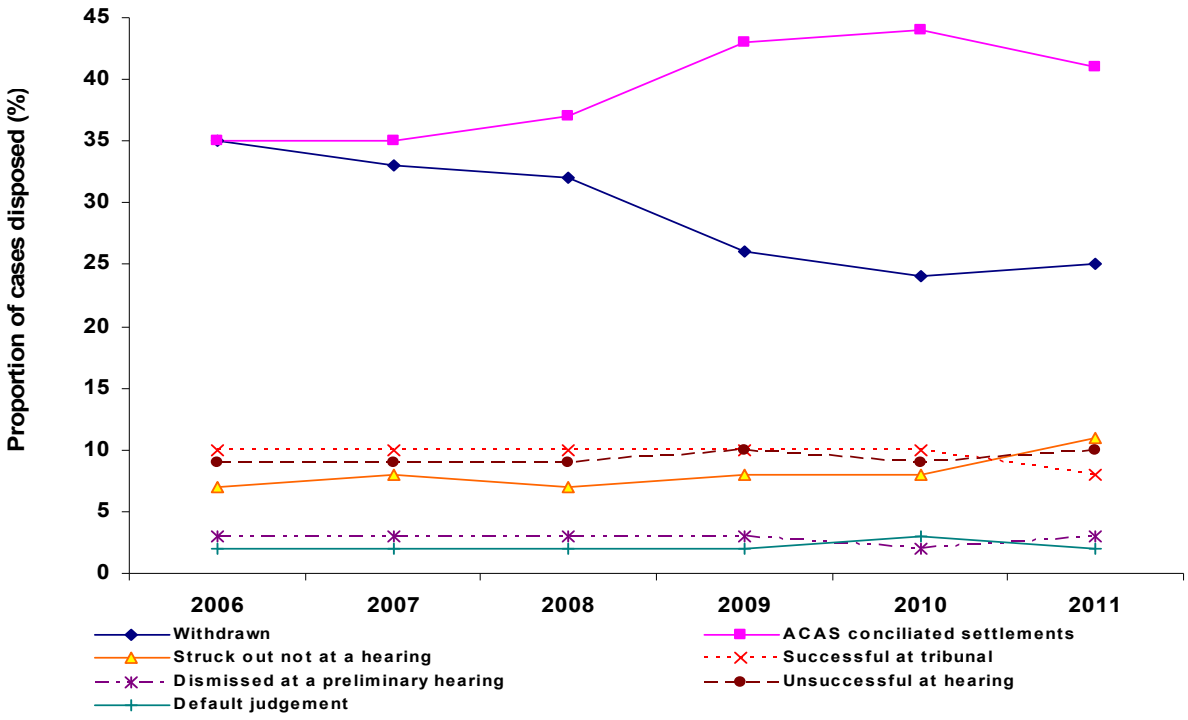
Awards made in Unfair Dismissal cases between 2010 – 2011, as reported in HMCTS annual statistics are shown in Table 2 below:

Table 2: Awards Made in Unfair Dismissal Cases in 2010-11, HMCTS Annual statistics	
Maximum Award	**£181,754**
Median Award	**£4,591**
Mean Award	**£8,924**

Table 3: Data from SETA 2008 on the proportion of unfair dismissal cases relating to different forms of job separation	
Claimant	**Percentage**
Dismissed	52
Made redundant	23
Resigned	18
Other	8

Chart 3 below indicates the outcomes of claims taken through the unfair dismissal jurisdiction since 2005. The most common outcome is that both parties engage in individual conciliation and this leads to settlement. The next most common outcome is that a case is withdrawn. This can occur for a number of reasons, including that there is private settlement between the parties.

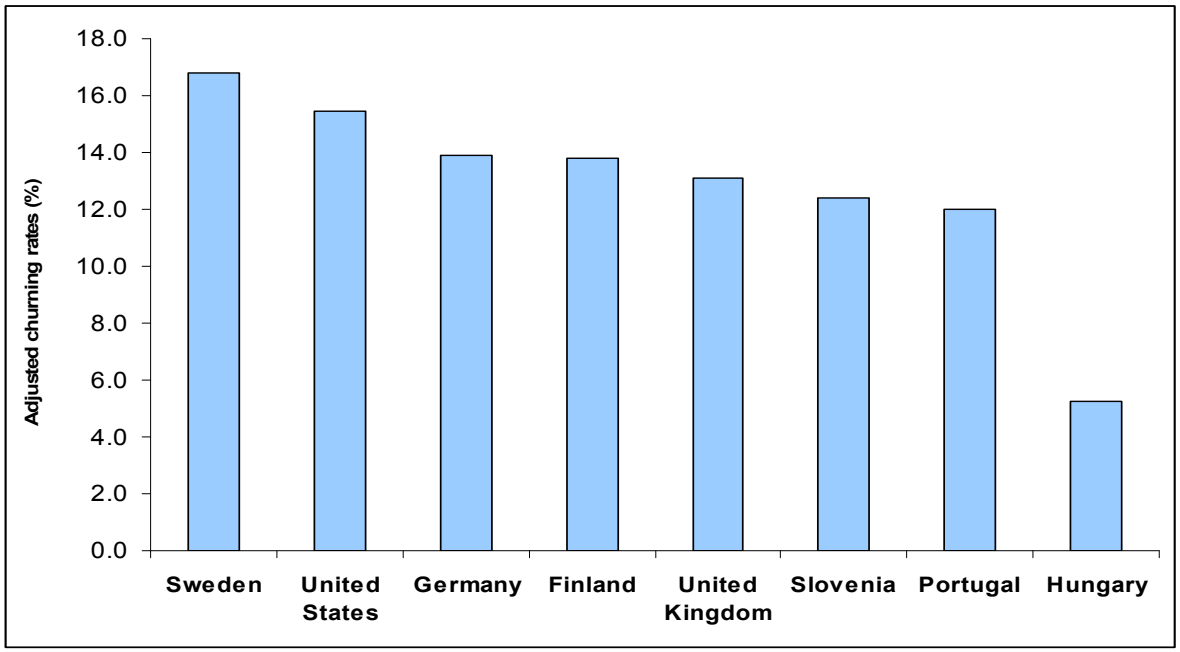
SETA 2008 also sought to understand average settlement values. For unfair dismissal this suggests a median settlement value of £2,000 and a mean value of £4,555.



3. Churn rate

The UK has higher separation rates than many other countries. Within the OECD, we have one of the highest rates of churn – with around 6-7 million people a year moving in or out of jobs. The chart below presents an estimate of churning rates as percentage of total employment adjusted by industry composition for the period 1997-2004.

Chart 4: Average churn rates for selected OECD countries (1997-2004)



Source: OECD (2009).

The rate of churn stands at 13.1% in the UK. However, it can be seen that some countries, such as Germany (13.9%), though relatively more regulated, or United States (15.4%) display a higher rate.

4. Business Perceptions

Recent survey evidence (September and October 2011) commissioned by BIS provided information on the perceptions of business about employment law:

Table 4: Do you agree that UK employment regulation is fair and proportionate?						
		Number of Employees				
	Sole trader	2-5	6-10	11-50	51-250	251+
% Agree	26	43	43	40	40	53
% Disagree	35	29	22	27	30	16
% Net agree	-9	14	21	13	10	36

The survey also suggested that 40 per cent of employers agree or strongly agree that the demands of employment regulation put them off employing staff. Of the 40 per cent who agreed that employment regulation puts them off employing staff, only 1 per cent say that dismissal/disciplinary action is the regulation that most puts them off employing staff. Their most serious concerns were:

Table 5: Top 10 regulations deterring businesses from taking on staff:			
	Regulation	% picking out as top concern	Type of firms concerned by this regulation
1	Health and Safety	13	Micros
2	Maternity / paternity leave	10	SMEs (large firms were concerned by the right to request flexible working)
3	Tax	8	Micros
4	National Minimum Wage	6	Small (not micro)
5	National insurance	6	SMEs
6	Employer's liability insurance	5	Micros
7	Working time regulations	5	SMEs

8	**Sickness absence**	**5**	**SMEs**
9	**Time off to Train**	**4**	**SMEs**
10	**Discrimination**	**3**	**All firms (top concern for firms with 251+ employees)**

Other business organisation surveys, responses to BIS consultations and responses to the Red Tape Challenge further highlight business concerns about the current situation. However, understanding the nature of these concerns in more detail is important.

5. International evidence

Part I: OECD employment restriction index

1. The primary source of information on international comparisons of employment regulation comes from the OECD *index of strictness of employment protection.* This database is updated approximately every five years. The latest update (2008) covered 35 countries within the OECD and five emerging countries (Brazil, China, India, Indonesia, and South Africa).

2. This index relies on a compilation of 21 components, divided into a weighted aggregation of three distinct criteria[9]:

- **Protection of permanent workers against individual dismissal (weight: 5/12):** Comprising three sub-categories, namely i) Severance pay and notice periods, ii) Degree of procedure the employer has to face when deciding to dismiss and iii) Difficulty of dismissal and compensation / reinstatement in case of unfair dismissal.

- **Specific requirements for collective dismissal (weight: 2/12):** additional delays or notification procedures when an employer decides to dismiss more than one employee at a time. It does not include any costs engendered by individual dismissal regulation and therefore does not reflect the overall strictness of regulation on collective dismissals.

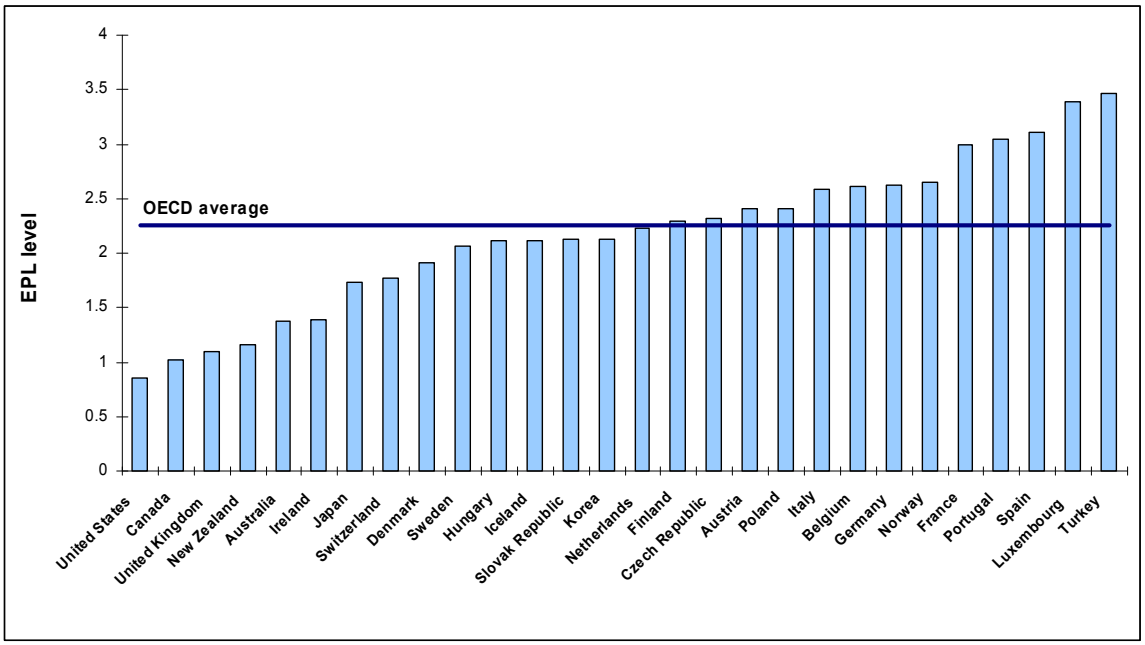
- **Regulation on temporary forms of employment (weight: 5/12):** Considers the regulation of temporary and fixed term contract (types of contract, duration etc).

3. The final derived index provides an overall 'score', on a scale of 0 to 6, with a higher number indicating a greater degree of Employment Protection Legislation (EPL)[10]. Figure 1 shows the results for 2008.

[9] For a more detailed description of these indicators, including score assigned for each category, see http://www.oecd.org/dataoecd/24/40/42740190.pdf .

[10] The weight assigned to each of the three categories remains subjective and thereby subject to caution. However, this uncertainty is dampened by the fact that OECD ranking established under equal weight displays very high level of correlation (0.97 significant at 1%) with initial weighted indicators. For more information, see http://www.oecd.org/dataoecd/36/9/43116624.pdf

Figure 1: Strictness of Employment Protection (OECD, 2008)



Source: OECD (2008)

4. Among the OECD countries, those with the highest stringency of employment protection appear to be Turkey (index of 3.46) Luxembourg (3.11) and Spain (3.11) while USA (0.85), Canada (1.02) and United Kingdom (1.09) have the lowest Countries with a legal framework based on Common-Law (i.e. a system of law derived from judges' decisions and arising from the judicial branch of the government, namely, USA, UK, Canada[11], Ireland, Australia, and New Zealand) are ranked higher than countries where the legal framework is based on Civil-Law (i.e. a system of law arising from statutes or constitutions, and deriving from the legislative branch of government, namely France, Turkey, Spain, Portugal, Italy, Netherlands, Belgium, Greece , Germany, Poland, Hungary, Switzerland, Slovakia, Japan, Austria, Korea, Finland, Norway, Denmark, Sweden).

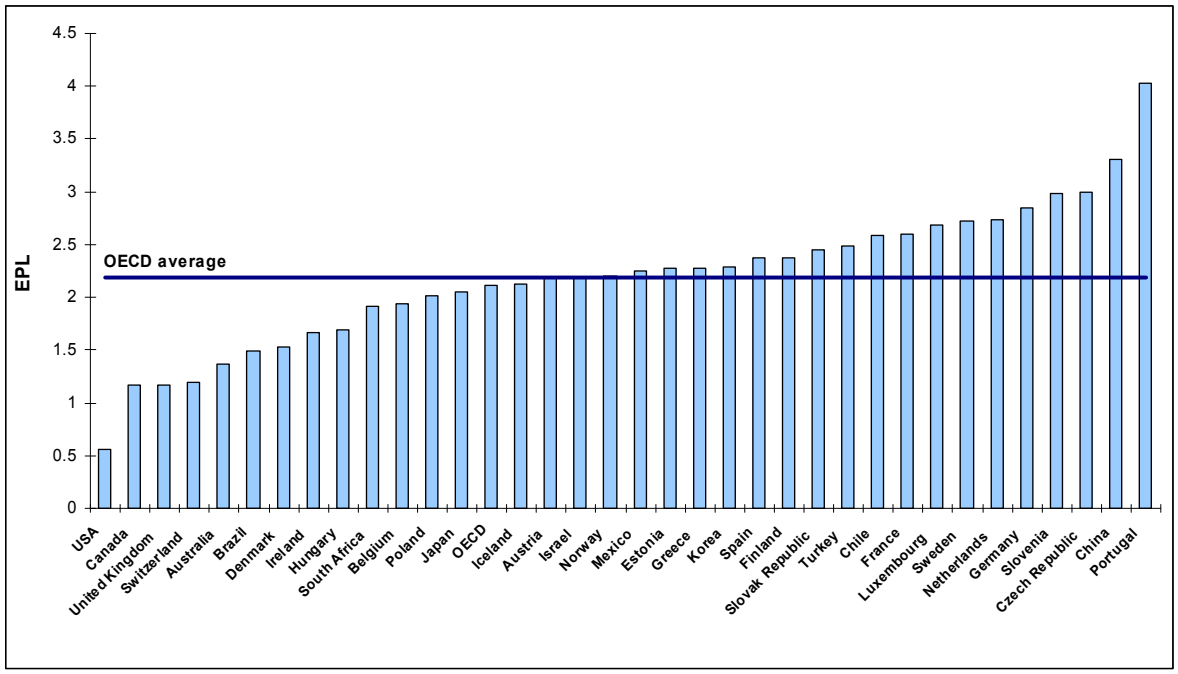
One reason proposed for the greater flexibility of common law-based systems is that these systems, relying principally on judicial precedent, are more efficient (quicker) in adapting to changes in the economic environment than civil laws based on rigid legislation. Hefeker and Neugart (2007) also explain this difference by a higher level of uncertainty concerning judge's decision/interpretation constraining the government to undertake more regular legislative reforms.

[11] Note that legislation in Quebec province differs from the rest of the country since its law is based on French civil law.

There is a positive correlation between overall levels of restriction and levels of regulation on temporary forms of employment. Countries with high level of EPL rely principally on this type of contract while countries with a flexible labour market tend to marginalise it.

5. Although interesting as a general overview of employment legislation across countries, a better understanding of the types of restrictions in each country can be gleaned from looking at the individual components of the index. The section below therefore focuses on dismissals restrictions. Figure 2 and 3 show the results of the OECD survey for individual and collective dismissals.

Figure 2: Employment protection legislation for individual dismissals



Source: OECD (2008)

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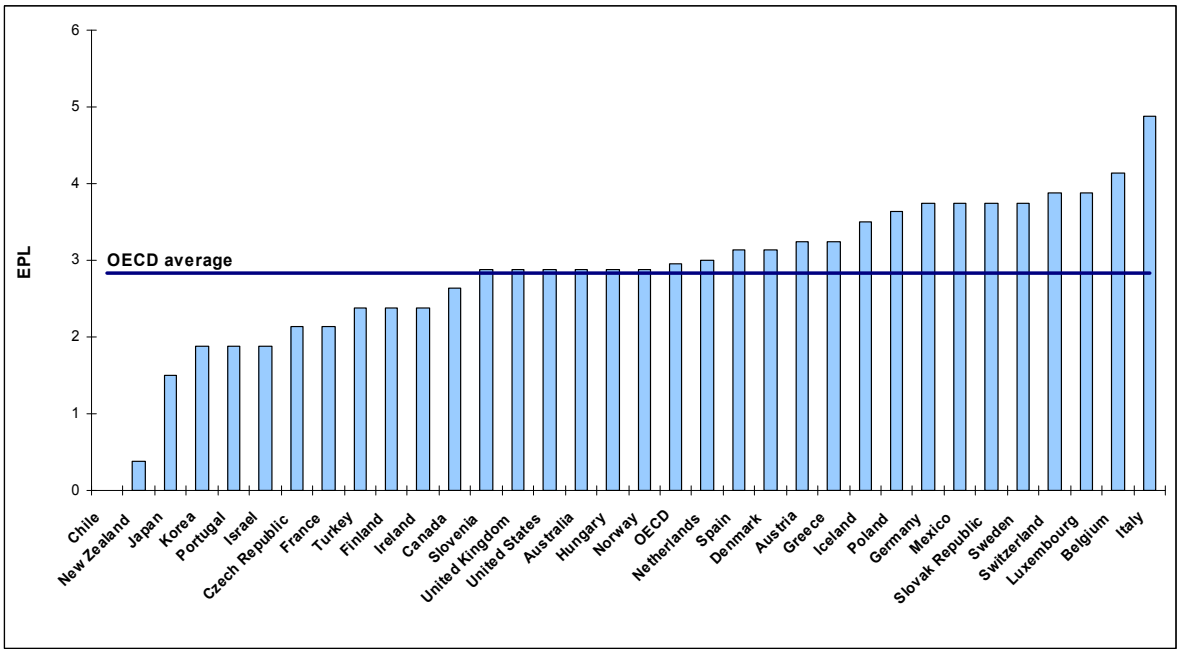
Figure 3: Employment protection legislation for collective dismissals



Source: OECD (2008)

6. Figure 2 and 3 highlight the fact that despite a low overall index of employment protection legislation (see Figure 1), the UK has levels of protection close to and even slightly above the OECD average for collective dismissals (2.88 against 2.84 for the OECD average). The UK's ranking is therefore boosted by a relatively low level of restriction on individual dismissal (1.17 compared to the OECD average of 2.19).

Part II: Exempting small firms from aspects of employment protection and its application across countries.

7. Several OECD countries exempt small firms from some aspects of dismissal regulations. EPL is often perceived as causing a greater burden for small firms than bigger firms. These costs include severance payments, management time and/or legal costs or compensation if the case is disputed. However, unlike big firms, small companies do not generally have access to a specialised human resources department to deal with these operations and are thereby more affected by these constraints.

Table 3 presents an overview of exemption measures on individual dismissals implemented in various OECD countries. The third column shows the proportion of total employees affected by these reforms[12]. Note that most of these exemptions relate to particular aspects of a state's unfair dismissal regulations rather than exemptions from unfair dismissal regulations altogether. The exceptions to this are Australia for businesses with fewer than 100 employees (although this was reversed in 2009), Austria (fewer than 5 employees) and Germany (fewer than 10 employees).

Table 3: Exemption from individual dismissals for selected OECD countries

COUNTRY	EXEMPTION	% OF TOTAL EMPLOYEES
Australia (2006-2009)	Exemption from unfair dismissal laws for firms employing 100 or less employees and from redundancy pay obligation for firms with fewer than 15 employees. (NB these exemptions have subsequently been reversed	56 (<100) 20 (<15)
Austria (2007)	No obligation to inform the "work council" of eventual dismissals or possibility for the council to contest unfair dismissals for firms with fewer than 5 employees	15
Finland	Firms with fewer than 20 employees do not have to take part in consultations with employees, reducing delays before notification of dismissal can take place.	27
Germany (2004)	Exemption from unfair dismissal legislation for firms employing 10 or fewer employees	18

[12] Figures extracted from the SDBS Structural Business Statistics (OECD). The database classifies firms according to their sizes, ranging from very small firms (1-9 employees) classified as National size Class 1 to biggest firms (200+ employees) classified as National Size Class 5.

Portugal (1990)	Possibility to request the tribunal to oppose reinstatement in unfair dismissal cases for firms with fewer than 10 employees	42
Spain (2003)	The duration of the trial period is 3 months for employees without higher education and for firms with fewer than 25 employees. This period is reduced to 2 months for firms with more than 25 employees	51

Source:OECD

8. First, it should be noted that the choice to exempt small firms from specific aspect of regulations does not depend on the initial level of EPL. Indeed, despite already very flexible employment legislation, countries such as Australia have previously implemented such rules while Luxembourg, a relatively strict country in terms of employment protection, has no exemption rules in place.

Second, a distinction should be drawn between reforms that exempt certain firms from unfair dismissal rules (i.e. Australia, Germany) and others that are focused only on specific elements (i.e., the choice or obligation of reinstatement and compensation, as in Italy and Turkey; the notification procedure, as in Austria or Finland; or the trial period duration, as in Spain).

Third, the UK has a lower than average proportion of employees working in small firms (1-9 employees) when compared to other OECD countries (21% against 33% in average for the other OECD countries)**.** However, whether the impact of an exemption from unfair dismissal rules (such as the concept of compensated no fault dismissal for micro businesses) would lead to a substantial benefit or a negative impact for the UK economy remains undetermined. Advocates for such a policy have argued that it would contribute to increased competitiveness, greater flexibility to adapt to economic circumstances and more recruitment. On the other hand, arguments have been put forward that allowing employers to freely dismiss an employee, via a single compensation payment, could lead to an increase in job instability and more employee turnover, with a negative affect on productivity[13] and consumer confidence. It could also lead to dismissed employees pursuing other claims such as discrimination or dismissal for an automatically unfair reason. Even if these claims had no substance, they would still need to be defeated.

[13] Evidence of negative correlation between employee confidence/motivation and level of productivity can be found in a large amount of literature treating this subject. See for example Hackmam and Oldham (1980).

ANNEX B – Full List of Questions and Evidence Topics

Please respond only to those questions that are relevant to you. You do not need to respond to all questions. Please only respond to 'evidence topics' if you are able to provide evidence backed by analysis and/or data.

Type of respondent

E.g. Small firm, large firm, trade union, business representative organisation etc.

I. Experience of the current system and the Acas Code

For the following questions we are requesting responses based on individual experiences:

Call for Evidence	Questions on the Acas Code of Practice on Discipline and Grievance
Question 1	Before this call for evidence were you aware of the Acas Code? Yes No Not sure
Question 2	Before this call for evidence were you aware that the statutory ('three step') dismissal procedures were abolished in April 2009? Yes No Not sure
Question 3	Are you aware that the current version of the Code, reflecting this legal change, also came into effect in April 2009? Yes No Not sure
Question 4	Has the new Code prompted you to review your organisational discipline and grievance policies and procedures? Yes

Call for Evidence	Questions on the Acas Code of Practice on Discipline and Grievance
	No Not Sure
Question 5	If answer to question 4 is 'yes', please describe what changes you have made and any impact of these changes.
Question 6	Do you find the language of the Code easy to understand? Very easy Easy Neither easy nor difficult Difficult Very difficult
Question 7	Do you find the language of the Code appropriate for dealing with performance issues? Yes No Not sure
Question 8	Have you used the Code when carrying out a disciplinary procedure? Yes No
Question 9	If answer to question 8 is 'yes', did you find that the Code helped you to deal with the disciplinary issue? Helped a lot Helped a little Neutral Was unhelpful Was very unhelpful
Question 10	Do you consider the disciplinary steps set out in the Code to be burdensome? Yes – very Yes – a little No Not sure
Question 11	If answer to question 10 is 'yes', in what way do you consider them to be burdensome?

Call for Evidence	Questions on the Acas Code of Practice on Discipline and Grievance
Question 12	Do you consider that the Code provides sufficient flexibility in dealing with discipline and grievance issues? Yes No Not sure
Question 13	Do you consider that the Code provides sufficient clarity in dealing with discipline and grievance issues? Yes No Not sure
Question 14	Should the requirements of the Code be different for micro and/or small businesses? Yes No Not sure
Question 15	If answer to question 14 is 'yes', please explain how you think the requirements should differ for micro and/or small businesses.
Question 16	Does the Australian Small Business Fair Dismissal Code provide a useful model for the UK? Yes No Not sure
Question 17	Please provide any further comments on the Australian Small Business Fair Dismissal Code.
Question 18	Do the requirements of your internal disciplinary processes differ from the requirements of the Code? Yes No
Question 19	If answer to question 18 is 'yes', why and in what way?
Question 20	If you have any further suggestions to improve awareness and understanding of the Code, please describe them here.
Question 21	If you have further comments on putting the Code into practice, please detail them here.

Call for Evidence	Questions on the Acas Code of Practice on Discipline and Grievance
Question 22	Any other general comments on the Code.

Evidence topics relating to the current system and the Acas Code

In addition to responses to the specific questions above we are requesting evidence-based submissions on the topics below.

(Responses to the evidence topics should be provided in a single Word document, stating clearly which topics are being addressed, and emailed to dismissal.callforevidence@bis.gsi.gov.uk)

Please provide relevant evidence relating to:

A. Levels of awareness and understanding of unfair dismissal law and the Acas Code

B. Access to relevant advice (including HR/ legal advice) for businesses, particularly SMEs and Micros, and whether such advice is accurate and helpful

C. Specific difficulties with the current dismissal system for employers and employees. What are the impacts of these difficulties?

D. Any benefits of the current dismissal system for employers and employees.

E. Whether businesses internal processes disciplinary processes differ from those set out in the Acas Code and the reasons for this

F. Differences in practices amongst employers, particularly SMEs and Micros, and whether the impact of employment disputes is greater on smaller businesses

II. Compensated No Fault Dismissal for Micro businesses

For the following questions we are requesting responses based on individual views:

Call for Evidence	Questions on Compensated No Fault Dismissal
Question 23	Under a system of Compensated No Fault dismissal, individuals would retain their existing rights not to be discriminated against or to be dismissed for an automatically unfair reason[14]. Taking these constraints into account, do you believe that introducing compensated no fault dismissal would be beneficial for micro businesses? Yes No Not sure
Question 24	If answer to question 23 is 'yes', who would benefit and why?
Question 25	Would it be necessary to set out a process for no fault dismissal in a) legislation b) the Acas Code c) both d) neither?
Question 26	Any comments on process requirements. What would need to be considered when developing the process?
Question 27	What type of compensation would be appropriate for a no fault dismissal? a) a flat rate b) a multiple of a week's or a month's wages c) other d) I don't agree with no fault dismissal
Question 28	Further comments on the above, including any comments on possible impacts on redundancy and redundancy payments.
Question 29	Any comments on the relationship between compromise agreements and the topics set out in this call for evidence.

[14] Automatically unfair reasons for dismissal include dismissal for whistleblowing, asserting a statutory right, and for certain trade union activities.

III. Wider impact of no fault dismissal on productivity, industrial relations and the wider economy

Evidence topics on the potential wider impacts of no fault dismissal:

In addition to responses to the specific questions above we are requesting evidence-based submissions on the topics below.

(Responses to the evidence topics should be provided in a single Word document, stating clearly which topics are being addressed, and emailed to dismissal.callforevidence@bis.gsi.gov.uk)

Please provide relevant evidence relating to:

F. Whether or not no fault dismissal would lead to a reduced burden on micro-businesses and an increase in the demand for new employees

G. Whether or not no fault dismissal would lead to an increase in other types of employment tribunal claim e.g. discrimination

H. The potential impact of no fault dismissal on the behaviour of employers and employees, and levels of productivity, including on a) levels of recruitment b) job-matching ('right person, right job') c) employee motivation, commitment and engagement d) investment in skills and training e) management, including effective performance management

I. The impact on consumer confidence and credit provision.

J. Any other potential consequences of introducing no fault dismissal for micro businesses (e.g. their ability to attract future employees)

K. International dismissal systems, their costs and benefits, and any lessons that can be learned by the UK

ANNEX C – The Acas Code of Practice on Discipline and Grievance

ANNEX D – Australian Small Business Code

How to Respond

Call for Evidence: Dealing with Dismissal and 'Compensated No Fault Dismissal' for Micro Businesses

You can complete your response from questions **1-29** online through Survey Monkey:

https://www.surveymonkey.com/s/CWH2TMR

Alternatively, you can email, post or fax this completed response form (**this link will no longer work when the consultation has closed**) to the Department for Business, Innovation and Skills (BIS).

Email: dismissal.callforevidence@bis.gsi.gov.uk

Responses to evidence topics **A-K** should be submitted in a single Word document, stating clearly which topics are being addressed, and emailed to dismissal.callforevidence@bis.gsi.gov.uk)

Postal Address:

Shelley Torey
3rd Floor Abbey2
Department for Business, Innovations and Skills
1 Victoria Street
London SW1H 0ET

Fax: 020 7215 6414

This call for evidence will close on Friday 8 June 2012.

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

This publication is also available on our website at www.bis.gov.uk

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

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