

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

Government response

SEPTEMBER 2012

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## Chapter 1 - Introduction

- 1.1 The Government has been driving forward the Coalition commitment to review employment law for “employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive” since coming into office in May 2010. The review recognises that the UK has a flexible labour market that compares favourably with international counterparts.
- 1.2 But the Government believes that the existing framework of laws could be improved. For example, there are perverse incentives to take disputes to a tribunal when it may well be beneficial for all parties to resolve the issue before it reaches that point. We are therefore seeking to reform the legislative regime to remove unnecessary burdens, without compromising fairness. This is important for the UK’s economic performance.
- 1.3 The overall vision of the review is to ensure that the UK labour market is efficient, flexible and effective. More specifically, the Government aims to:
  - make it as easy as possible for employers to take on their first member of staff;
  - encourage employers and employees to have constructive conversations about workplace issues, without prescriptive rules from Government; and
  - recognise that when it is necessary to end the employment relationship this should be possible in a manner that is both fair and flexible.
- 1.4 As part of its review, the Government has already launched a new, online tool (‘Taking on a New Employee’<sup>1</sup>) to help employers understand the steps they need to follow when taking on their first member of staff. We have made changes to improve the operation of employment tribunals and continue to implement reforms of the system. And we have taken steps to improve employers’ confidence to recruit staff, such as extending the qualifying period for unfair dismissal from one to two years.
- 1.5 Following discussions with stakeholders during the review and Red Tape Challenge<sup>2</sup>, BIS has been examining employers’ concerns about difficulties that they encounter in dismissing under-performing staff. In response to this, the Government has brought forward a provision to encourage and facilitate the use of settlement agreements by ensuring that the offer of a

<sup>1</sup> <http://www.improve.businesslink.gov.uk/employ>

<sup>2</sup> <http://www.redtapechallenge.cabinetoffice.gov.uk/>

settlement cannot be used as evidence in any future tribunal claim for unfair dismissal. This is included in the Enterprise and Regulatory Reform Bill<sup>3</sup> that is currently before Parliament, along with other measures to encourage early resolution of workplace disputes.

- 1.6 The Government has separately also sought views from stakeholders on the potential for reforming the steps that employers need to take when dismissing staff. This includes examining the concept of 'compensated no fault dismissal' (NFD) for micro-businesses, and seeking comments on whether changes should be made to the Acas Code of Practice on Discipline and Grievance.
- 1.7 This paper sets out the Government analysis of the responses to the Call for Evidence.<sup>4</sup> The first section will examine evidence received on NFD, along with the international and academic evidence. The second will discuss responses on the Acas Code.

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<sup>3</sup> <http://discuss.bis.gov.uk/enterprise-bill/>

<sup>4</sup> BIS Call for Evidence Dealing with Dismissal and Compensated No Fault Dismissal for Micro Businesses, March 2012: *available at* <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-626-dismissal-for-micro-businesses-call.pdf>

## Chapter 2 - Analysis of Responses on NFD to the Call for Evidence

### *Introduction*

- 2.1 *In relation to NFD, we called for evidence on the following topics: whether NFD would reduce burdens on micro businesses and create a demand for new employees; the impact on additional tribunal claims; the impact on the behaviour of employers and employees; the impact on consumer confidence and credit provision; other potential consequences; and international dismissal systems.*<sup>5</sup>
- 2.2 *Over 250 submissions were received in response to the Call for Evidence.*<sup>6</sup> *Of these, 141 were from businesses, 18 from employer representatives, 14 from employee representatives, and 86 from others. However, not all respondents answered every question, including those on NFD. The majority of all respondents opposed introducing NFD for micro businesses. The responses from business were mixed, with a wide range of views expressed. Detailed analysis of the key stakeholders' responses was needed, however, to get an accurate picture of how the different sides of the business community viewed this proposal. It was also essential to investigate international frameworks, and the effect that similar proposals have had on the respective labour markets.*
- 2.3 *Of the respondents who provided a response to the initial question on NFD, the breakdown is as follows:*

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<sup>5</sup> For consistency, the same reference letters are used as in the Call for Evidence document.

<sup>6</sup> For a list of published responses, see Annex A.

*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. Taking these constraints into account, do you believe that introducing compensated no fault dismissal would be beneficial for micro businesses?*

|                                  | Yes | No | Unsure |
|----------------------------------|-----|----|--------|
| Micro Business (9 staff)         | 17  | 12 | 12     |
| Small Business (10-49 staff)     | 4   | 6  | 4      |
| Medium Business (50-250 staff)   | 6   | 5  | 3      |
| Large Businesses (250 +)         | 3   | 2  | 2      |
|                                  | 30  | 25 | 21     |
| Business Representative          | 10  | 7  | 1      |
| Central Government               | 0   | 1  | 0      |
| Charity or Social Enterprise     | 2   | 9  | 1      |
| Individual                       | 7   | 16 | 3      |
| Legal Representative             | 3   | 3  | 0      |
| Local Government                 | 0   | 1  | 0      |
| Trade Union or Staff Association | 0   | 14 | 0      |
| Other                            | 1   | 7  | 1      |
| Total                            | 53  | 83 | 27     |

**2.4** *The majority of respondents who answered the question did not agree that NFD would benefit micro businesses. Looking at employer responses in isolation, it is clear that even amongst the business community only a minority expressed support for the measure. The wider implications and potential consequences of NFD for micro businesses are manifold and complex. Bearing that in mind, it is not enough to simply collect numbers. Summary analysis of the responses to each of the six topics is presented below.*

**2.5** *On balance, the view was not in favour of implementing NFD for micro businesses. Many stakeholders expressed concerns about the impact on employers, employees, and the UK economy as a whole.*

**2.6** *Few responses included evidence, and the most common form of evidence given was member surveys. Such surveys are an important contribution as they add to the depth of understanding of member views and build a better picture of perception. However, these surveys are not representative of the broader population, as they inevitably suffer from bias. In non-representative surveys non-response bias is likely as motivated parties will be more likely to be respond. They may also be subject to response bias if questions are not framed in a clear and neutral way which would influence*



*the quality and accuracy of the answers. Therefore caution has to be used in drawing wider conclusions from the results. Chapter 3 summarises a broader look at the academic literature relevant to this area, which many respondents also referred to.*

- 2.7 *Many respondents felt there was no evidence to suggest NFD would increase demand for new employees, and it was also suggested that micro businesses may be less inclined to grow above the threshold as this would disqualify them from access to NFD as a dismissal mechanism. Some referenced Government and other surveys to suggest that the UK already has a relatively flexible system.*
- 2.8 *Furthermore, respondents questioned whether NFD would in reality reduce business burdens. There was a widespread view amongst respondents that there was a high risk of additional claims for discrimination or automatically unfair dismissal being filed with employment tribunals as a result of NFD. Some raised concerns about the mechanism being misused by unscrupulous employers and as a result, allowing poor management practices to go unchecked. The phrase ‘two-tiered market’ was frequently used, which many respondents argued would hurt the reputation of micro businesses and make it harder for them to attract quality applicants or retain good employees. Respondents also suggested that increased job insecurity would have a negative impact on employees, including in relation to consumer confidence.*

**Evidence Topic 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**

- 2.9 Though there was little evidence provided on this topic, many felt that NFD would not increase the demand for new employees and that reduction in the burden on micro businesses would not materialise. Many respondents believed there was no clear evidence that introducing NFD would create greater demand for new employees.<sup>7</sup> Based on six years of research, the Institute for Research into Organisations, Work, and Employment (iROWE) concluded that it would not benefit employers or employees. Rather, it may create further complexity by adding more uncertainty to existing regulations.<sup>8</sup> Other respondents based their conclusions on surveys they had put to their own members. The British Chamber of Commerce (BCC) reported, “The views we received from our membership on the specific proposal under consultation were mixed, with many saying that it would be of only minimal benefit to most firms.”<sup>9</sup> The Confederation of British Industry

<sup>7</sup> E.g., Chartered Institute of Personnel and Development (CIPD), GMB, NASUWT, Age UK, Mind.

<sup>8</sup> iROWE response, p. 9.

<sup>9</sup> BCC response, p. 7.

(CBI) noted that increased hiring was by no means guaranteed as a result of NFD: while in their view NFD has the potential to be beneficial, firms it will apply to must "feel that it will have a net positive effect on hiring. Substantial research on this area is required."<sup>10</sup>

- 2.10 The evidence that was presented in favour of a reduced burden or increased growth was based chiefly on member surveys. The majority of these surveys were not limited to micro businesses. The Institute of Directors (IoD) survey received a 76% rate of agreement from members that it would reduce burdens. According to the Building and Engineering Services Association (B&ES), 96% of surveyed members said they would use NFD, while 82% said they would hire more employees as a result.<sup>11</sup> The Forum of Private Businesses (FPB) concluded, based partly on the rising numbers of complaints related to recruitment, discipline and removal of staff, "[i]t is therefore logical to suggest that making the removal process less onerous for our members will reduce the burden they face. At the very least it will decrease the fear of being taken to tribunal."<sup>12</sup> However, the FPB nonetheless concluded NFD would not have a "particularly positive impact on employment growth"<sup>13</sup>. Although some respondents and their members were of the view that NFD would reduce burdens and boost hiring, the majority of the evidence submitted did not support either conclusion.
- 2.11 Some responses suggested that employers, including micro businesses, do not necessarily feel burdened by the current system. The ACCA UK SME Forum (ACCA) pointed to a 2011 BDRG survey in which 1.4% of SMEs with employees cited employment regulations as the main obstacle to running their business.<sup>14</sup> BIS surveyed employers in 2011 to learn about business perceptions of business and employment law. Multiple respondents<sup>15</sup> referenced this survey, highlighting that of the 40% of survey respondents who agreed that employment regulation put them off hiring new employees, 1% identified dismissal/disciplinary action regulation as the primary reason, which translates to 0.4% of respondents overall.<sup>16</sup> Thompsons Solicitors additionally referred to a BIS research paper, which concluded that most UK jobs, and the highest levels of churn, are created by small businesses. The proportion of total employment occupied by smaller firms has been growing—tripling from 1998 to 2010.<sup>17</sup> This growth tends to suggest that

<sup>10</sup> CBI response, p. 6.

<sup>11</sup> B&ES response, p. 1.

<sup>12</sup> FPB response p. 7.

<sup>13</sup> FPB response, p. 2.

<sup>14</sup> ACCA response, p. 3.

<sup>15</sup> E.g., Citizens Advice Scotland (CAS), Mind, NASUWT, Trade Unions Congress (TUC), The Union of Construction, Allied Trades and Technicians (UCATT), Working Families.

<sup>16</sup> BIS Call for Evidence Dealing with Dismissal and Compensated No Fault Dismissal for Micro Businesses, p. 29.

<sup>17</sup> Thompsons response, pp. 5-6.

micro businesses have not been impeded from hiring, given that that sector has a relatively high growth rate.

- 2.12 The Business Retail Consortium (BRC) member feedback reflects overall satisfaction with the current dismissal process.<sup>18</sup> Other member surveys, however, were less favourable. The 2011 BCC workforce survey, for example, rated dismissal regulations at extremely burdensome for 21% of micro businesses and 30% of small businesses. Eleven percent of sole traders rated dismissal regulations as a total barrier to hiring an employee.<sup>19</sup> Nevertheless, the BCC concluded that compensated no fault dismissal would only be an attractive option for small firms in limited circumstances<sup>20</sup> and, on balance, measures to encourage settlement agreements were preferred.<sup>21</sup> The Employment Lawyers Association (ELA) noted that the number of unfair dismissal claims has decreased in recent years, a trend they expect to continue given the recent extension of the qualifying period from one to two years and the introduction of fees for employment tribunal claimants.<sup>22</sup>
- 2.13 A number of respondents believed that the regulations do not have a disparate impact on small businesses. The BIS SME Business Barometer 2012<sup>23</sup> showed that 4% of businesses seek advice relating to employment law or redundancies, which could mean few small businesses are concerned with employment regulations.<sup>24</sup> Other respondents suggested smaller firms are more sensitive to disciplinary issues, given that a single employee not fitting has a more significant impact than he or she might in a larger organisation.<sup>25</sup>
- 2.14 Evidence was presented that the UK already has a flexible market.<sup>26</sup> The OECD Indicators of Employment Protection 2008 reported that the United Kingdom is one of the most lightly regulated developed countries. Given this

<sup>18</sup> BRC response, p. 1, where difficulties were expressed, they were “not because of the legal framework but due to individual line managers not following internal policies and processes.”

<sup>19</sup> BCC response, p. 2.

<sup>20</sup> BCC response, p. 5: “The limited circumstances in which compensated no-fault dismissal, at a premium cost, would become an attractive option is where a small firm without internal HR expertise either cannot afford for the boss’s attention to be distracted away from the firm’s core activity for several months or where the employer suspects that the employee is likely to cause delays to the dismissal process or become sick due to the stress of an investigation.”

<sup>21</sup> BCC response, p. 4: “The BCC supports the re-branding of compromise agreements as ‘settlement’ agreements and would support further measures to make offering such agreements more attractive and *without prejudice* to a future tribunal.”

<sup>22</sup> ELA response, pp. 5-6.

<sup>23</sup> Available at <http://www.bis.gov.uk/assets/biscore/enterprise/docs/s/12-p75b-sme-business-barometer-february-2012.pdf>.

<sup>24</sup> Age UK response, p. 3.

<sup>25</sup> FPB response, p. 8.

<sup>26</sup> E.g., CAS, Mind, NASUWT.

finding, some respondents reasoned that NFD would not lead to economic growth.

- 2.15 Some respondents argued that NFD may not encourage hiring—instead, it could be a disincentive for micro businesses to grow and thus disqualify themselves from NFD.<sup>27</sup> UNISON referred to the occurrence in social care of companies intentionally dividing large chains of care homes into individual care companies for tax purposes and so each care home company can independently employ staff.<sup>28</sup> This union reasoned that, should NFD for micro businesses be implemented, larger businesses could be incentivised to engage in similar practices.
- 2.16 A small minority of respondents advocated NFD for all businesses, regardless of size.<sup>29</sup> The Electrical Contractors' Association (ECA) remarked that false self-employment was an issue within the industry. Limiting NFD to micro businesses could exacerbate this problem.<sup>30</sup> While there were arguments suggesting NFD would reduce burdens in terms of dismissal procedure, and therefore increase hiring, there is little empirical evidence to support that conclusion. Moreover, some respondents felt that the additional issues caused by NFD would outweigh any reduced burden.<sup>31</sup>

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

- 2.17 A number of stakeholders, including those in favour of NFD, agreed that additional claims being filed was a likely result.<sup>32</sup> Even though the majority of IoD members were supportive of NFD, many believed that it would nevertheless lead to an increase in discrimination and other claims. The ECA, for example, remarked that micro businesses may get “a false sense of security when dismissing an employee’ because discrimination claims can still be filed, which “in general, tend to be more complex and difficult to defend than ordinary dismissal claims.”<sup>33</sup>
- 2.18 It is already the case that additional claims are filed when unfair dismissal claims are made. The Chartered Institute of Personnel and Development

<sup>27</sup> E.g., Association of Teachers and Lecturers (ATL), Discrimination Law Association (DLA), ECA, Mind, NASUWT, National Union of Teachers (NUT), Public and Commercial Services Union (PCS), Prospect, Thompsons, TUC, UNISON, UNITE, Working Families.

<sup>28</sup> UNISON response, p. 11.

<sup>29</sup> E.g., Association of Convenience Stores (ACS), B&ES, ECA, IoD, Lewis Silkin.

<sup>30</sup> ECA response.

<sup>31</sup> E.g., ARC, BCC.

<sup>32</sup> E.g., Age UK, ATL, BCC, CIPD, ELA, FPB, FSB, GMB, NUT, PCS, Prospect, Thompsons, TUC, UCATT, UNITE, Working Families.

<sup>33</sup> ECA response, p. 5.

(CIPD) 2011 Conflict Management survey indicated that “61% of the 206 employers surveyed had experienced employees claiming unfair dismissal and “tagging on” a discrimination claim in the hope of getting more compensation.”<sup>34</sup> The most commonly mentioned types of additional claims were discrimination and automatically unfair dismissal claims. Several reasons for this increase were offered. These types of claims would be the only legal avenues for redress still available to employees dismissed by NFD.

- 2.19 These claims would not necessarily be vexatious, however. The fact that no reason is provided would by its nature give rise to questions about whether the dismissal was for discriminatory or automatically unfair reasons. Several respondents expressed concerns that certain demographic groups, such as the elderly or those with mental health issues, could be easily dismissed using NFD.<sup>35</sup> Working Families reported an increase in the number of cases of women being discriminated against during pregnancy or when on maternity leave since the recession began. In 2011, 8% of their callers raised issues of maternity discrimination. An employer may not be aware that certain dismissals are discriminatory or automatically unfair, even in the case of NFD.
- 2.20 There were a few suggestions, however, that increased claims would not be an issue. One respondent, the solicitors Lewis Silkin, felt that NFD would not create these claims because other countries had not experienced this phenomenon. The majority of surveyed B&ES members felt that there would not be such an effect. Another suggested that the recent introduction of Employment Tribunal claims may serve as a check to any additional claims. The FPB reasoned that any vexatious claims would be thrown out by the Tribunal in any event. The majority of responses, however, reflected the view that NFD would likely result in more employment tribunal claims being filed.

***Evidence Topic 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***

<sup>34</sup> CIPD response, p. 8.

<sup>35</sup> E.g., Age UK, Mind response, p. 3: "Through calls to our information and advice services we regularly hear of cases where, due to stigma and a general lack of understanding about mental health problems, people's mental health problems become blurred and conflated with questions of underperformance."

2.21 Many respondents felt that NFD had a potentially detrimental impact on the behaviour of employers. The terms ‘hire and fire’ or ‘fire at will’ culture were frequently used.<sup>36</sup> Some respondents were of the view that unscrupulous employers could take advantage of NFD to engage in unfair practices. A commonly discussed misuse was the use of NFD as a cheaper method of dismissing redundant employees. This was based on the assumption that an employer could remove redundant employees using NFD without consultation and avoid making contractual redundancy payments, if the tariff for NFD was based on statutory redundancy pay.<sup>37</sup> This practice would be particularly attractive in the case of long-serving staff, who would be entitled to larger payments.<sup>38</sup> Others felt that employers and managers would be more likely to bully workers if NFD were a tool available to them.<sup>39</sup> This was a particular worry for employees who are likely to be subject to discrimination.<sup>40</sup>

### a) Levels of Recruitment

2.22 Levels of recruitment have been discussed in part F. An additional point raised was that NFD could make hiring more challenging for micro businesses, which already struggle with recruitment compared to their larger competitors.<sup>41</sup> According to the BCC 2011 Workforce Survey of Micro Businesses, one in two micro businesses struggle to recruit the right skill profiles.<sup>42</sup> The FSB characterised the problem in the following way: “It is likely that with lower protection, there is a risk workers will not be attracted to work in small companies. This would make it harder for these firms to recruit, skewing the market.”<sup>43</sup> The skew comes from the fact that higher calibre workers would be particularly difficult to recruit. The CIPD noted that micro businesses “already tend to have some difficulty with recruiting good calibre staff through a perception that they offer inferior training, salary, career, benefits and job security.”

2.23 NFD could make them still more so, because “of the lesser level of employment protection rights and the perception of worse employment practices.”<sup>44</sup> Job seekers would arguably prefer larger businesses, given the perceived and actual instability of ‘micro jobs’. As a result, micro businesses would be at a disadvantage compared to their larger competitors. This difficulty would translate both to attracting staff from other

<sup>36</sup> E.g., ARC, ATL, FSB, Mind, PCS, TUC, UNITE.

<sup>37</sup> E.g., ARC, CAS, CIPD, GMB, PCS, TUC, Working Families.

<sup>38</sup> See UCATT response.

<sup>39</sup> See UNITE response.

<sup>40</sup> See, *for example*, Age UK, Mind, NASUWT.

<sup>41</sup> E.g., ACCA, Age UK, CAS, CIPD, DLA, ECA, EEF, FSB, GMB, Mind, NUT, NASUWT, Prospect, Thompsons, UCATT.

<sup>42</sup> Also cited in ACCA response, p. 4.

<sup>43</sup> FSB response, p. 2.

<sup>44</sup> Prospect.

businesses who are not actively seeking employment, and to retaining employees who could get work in a larger organisation. Though some respondents believed that NFD could be designed to avoid this consequence,<sup>45</sup> and while 82% of surveyed B&ES members did not believe NFD would make them less appealing employers,<sup>46</sup> much of this issue depends on perception.

## b) Job-matching

2.24 There was little commentary on the potential impact of NFD on job matching. The TUC mentioned that potential employees will tend to be more willing to change jobs and acquire new skills if there is some level of job security in the new position. It noted in particular the case of high skilled workers who may be more reluctant to take jobs in small, innovative businesses if these become associated with lower job security. In support of its arguments, it points out that certain countries with high levels of employment protection, such as Sweden, Germany and Finland, outperform countries with lower levels of protection, such as the UK or US, on some measures of labour market movement and churn.<sup>47</sup>

## c) Employee Motivation, Commitment and Engagement

2.25 A majority of stakeholders highlighted the potentially detrimental impacts on employees, though empirical evidence was limited. The decreased job security NFD would engender could hurt morale, job satisfaction, productivity, loyalty, and the employer/employee relationship.<sup>48</sup> For example, it was suggested that employees would feel less loyalty to a business if they are less invested in its long term success since they could be dismissed at any time without warning.<sup>49</sup> Several respondents referred to the MacLeod review,<sup>50</sup> which suggested that employee engagement (that is, “when the business values the employee and when the employee values the business”<sup>51</sup>) boosts business performance. iROWE concurred that if employees think they are being treated unfairly, engagement is undermined, which could lead to more conflict and less productivity. According to the BCC, “large number of our members also expressed

<sup>45</sup> Road Haulage Association (RHA).

<sup>46</sup> B&ES response, p. 1.

<sup>47</sup> TUC response, p. 34, with reference to BIS data from the Call for Evidence.

<sup>48</sup> E.g., Age UK, CIPD, FPB, Mind, NASUWT, Working Families.

<sup>49</sup> NASUWT response, p. 20.

<sup>50</sup> E.g., CIPD, Mind, Working Families.

<sup>51</sup> MacLeod, David and Nita Clarke (2009), *Engaging for Success: enhancing performance through employee engagement*. A Report to Government, Department for Business, Innovation and Skills, p. 7, available at <http://www.bis.gov.uk/files/file52215.pdf>.

concern about the potential damage that the introduction of no-fault dismissal would have on their relationship with their employees.”<sup>52</sup>

- 2.26 A commonly discussed problem was the effect on morale. Numerous responses referred to ‘a climate of fear’ amongst employees being created by the “perpetual fear of being dismissed through no fault of their own.”<sup>53</sup> This climate of fear in turn could prevent employees from reporting health and safety concerns.<sup>54</sup> UCATT was particularly concerned about NFD leading to “a significant increase in breaches of health and safety and ultimately a rise in workplace accidents.”<sup>55</sup> Their response cited studies which have found that micro businesses in the construction industry, which comprise 90% of the sector, have a higher death rate. Thirty four percent of construction workers were employed by businesses with fewer than 50 employees in 2007/08, while 51% of deaths occurred within these same businesses.<sup>56</sup> In an industry where small businesses are already ‘less safe’ than others, incentives to let health and safety matters go unreported were viewed as particularly alarming. There was little empirical evidence provided either for or against this argument, but those arguing against it suggested that if NFD were carefully crafted, such problems would not be an issue.
- 2.27 Some submissions suggested that the increased job insecurity caused by NFD would have a greater impact on more ‘vulnerable’ workers, including low-paid workers, part-time workers, flexible time workers, and as a result, women and the elderly.<sup>57</sup> The TUC conducted a survey to determine the demographics of micro business employees, which found “those groups who are already facing high levels of unemployment are likely to face increased job insecurity should the government proceed with its proposals for no fault dismissals.”<sup>58</sup> It was suggested that micro businesses would be less likely to hire part-time or flexible time workers because one full-time worker could do the same amount of work as multiple part-time workers, but would count less towards the threshold. Women and the elderly are more likely to be affected because they are more likely to work under flexible or part-time arrangements. This argument is premised, however, on the assumption that every worker would be given equal weight towards the total count. In Germany, for example, the count of employees is based on 10 full time employees. Overall, there was a belief that NFD would have a negative impact on employees. Those in favour of NFD were mainly of the view that the benefits outweighed this consequence.

<sup>52</sup> BCC response, p. 6.

<sup>53</sup> NASUWT response, p. 18. See also Age UK, ATL, GMB, PCS, TUC, UCATT, Working Families.

<sup>54</sup> E.g., ATL, PCS, TUC, UCATT.

<sup>55</sup> UCATT response, p. 6.

<sup>56</sup> UCATT response, p. 6.

<sup>57</sup> E.g., DLA, ECA, PCS, TUC, UNITE.

<sup>58</sup> TUC response, p. 21.



## d) Investment in Skills and Training

2.28 Some respondents did not believe employers would continue to invest the same effort in skills and training for employees, given that the employees were less likely to still work for them in the future.<sup>59</sup> One respondent was of the opinion that NFD would give employers an incentive to train in order to avoid the termination payment.<sup>60</sup> There was no data provided to support either conclusion.

## e) Management, including Effective Performance Management

2.29 Several arguments were put forward as to why NFD would foster poor management. Managers may lack incentive to engage in good practices if they can 'fire at will'.<sup>61</sup> It was argued that NFD would enable managers to blame employees for his or her errors, or use NFD as a threat. It could encourage "punitive approaches to discipline and reduce incentives to encourage the early resolution of disputes," with employers choosing the option of NFD rather than dealing with employee issues.<sup>62</sup>

2.30 Even in the case of employers acting in good faith, respondents identified a possibility of bad practices going uncorrected. An employer could simply dismiss employees when the reason may be more to do with poor management.<sup>63</sup> As a consequence, "such management issues would never be resolved yet could lead to a situation where staff are being continuously moved on whilst the actual cause of the problem stays with the organisation. This would have an obvious negative impact on the organisation's long-term future effectiveness and profitability."<sup>64</sup> Systemic problems might not only go unnoticed, but could be exacerbated.

### ***Evidence Topic I: The impact on consumer confidence and credit provision:***

2.31 Though lacking empirical evidence either way, some stakeholders posited that consumer confidence would be an issue along with credit provision.<sup>65</sup> Employees working for micro businesses could be viewed as less stable, and therefore deemed higher risk by creditors. In terms of consumer confidence, the point was made that these employees might be less likely to spend, for fear that they would need a cushion should they be dismissed

<sup>59</sup> E.g., ATL, NASUWT, PCS.

<sup>60</sup> Lewis Silkin response, p. 1.

<sup>61</sup> E.g., NASUWT, PCS, TUC.

<sup>62</sup> iROWE response, p. 9.

<sup>63</sup> Mind.

<sup>64</sup> NASUWT response, p. 21.

<sup>65</sup> E.g., EEF, FSB, GMB, UCATT, UNISON.

unexpectedly.<sup>66</sup> Suggestions were made to mitigate both issues. The CBI argued that if the level of compensation is comparable to tribunal awards, “employees would be no less financially secure following the introduction of no fault dismissal than they are now. In this situation there is no reason why consumer confidence should be hit unless scaremongering persists in an effort to convince consumers that they should be worried.”<sup>67</sup> Consumer confidence and credit provision, however, are influenced largely by perception. Even if NFD were designed very carefully, if affected workers are perceived by themselves and others as being less stable, they could still have less access to credit and be inclined to spend less.

***Evidence Topic J: Any other potential consequences of introducing no fault dismissal for micro businesses***

- 2.32 A number of other potential consequences were raised. Employees who were dismissed via NFD, despite no ostensible fault given, could be stigmatised because future potential employers would think that there had been some sort of reason.<sup>68</sup> Respondents also noted that NFD will have a disparate impact across sectors, given that the proportions of micro businesses in each vary.<sup>69</sup> The construction, voluntary, and agricultural sectors were among those with higher percentages of micro businesses. Workers in these sectors will be more likely subject to NFD.<sup>70</sup>
- 2.33 A commonly identified consequence was the potential creation of a two-tiered labour market, to the detriment of employees working for small firm employees and employers.<sup>71</sup> This development could have several consequences. First, adding additional complexity to the system. Given that employees change companies throughout their careers, repeatedly changing systems could create confusion over their rights.<sup>72</sup> Second, a two-tiered market might mean that micro business employees are treated poorly, as a kind of ‘second class citizen.’<sup>73</sup> Finally, micro businesses would become less appealing as employers and as a result be unable to recruit or retain the same calibre of worker, as discussed in section H(a).
- 2.34 Another issue raised was ambiguity around the definition of a micro business. Employee numbers fluctuate and some respondents questioned whether continually switching between two systems would be confusing,

<sup>66</sup> NASUWT response, p. 3, Thompsons response, p. 5.

<sup>67</sup> CBI response, p. 6.

<sup>68</sup> E.g., ARC, ATL, NASUWT, Thompsons.

<sup>69</sup> E.g., ATL, GMB, PCS.

<sup>70</sup> TUC response, p. 22.

<sup>71</sup> E.g., Age UK, BRC, EEF, FSB, Prospect, UCATT, UNISON (no specific mention of a two-tiered market, but says that NFD could “tarnish small business as not being high quality employers.”), Working Families.

<sup>72</sup> UCATT response.

<sup>73</sup> E.g., PCS, TUC, UNITE.

and when each of the systems would come into effect, if the numbers did change.<sup>74</sup> According to UCATT, “this is especially true in the construction industry where work is cyclical and fluctuates seasonally.”<sup>75</sup> There are also questions on which workers, e.g., independent contractors, part-time workers, would count towards this total employee number.<sup>76</sup> If NFD was taken forward, there would need to be very clear guidelines on which employers can use it, and when.

- 2.35 A few submissions questioned whether the introduction of NFD might be in violation of other laws. For example, Article 4 of the ILO Convention 158 on the Termination of Employment states, “The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.” Similarly, Article 30 of the Charter of Fundamental Rights of the EU states: “Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.”<sup>77</sup> There is at least a possibility NFD could be challenged under these provisions.

### ***Evidence Topic K: International dismissal systems, their costs and benefits, and any lessons that can be learned by the UK***

- 2.36 There was little comment on international dismissal systems, which will be explored in detail in the next section. The FSB remarked that there was no international evidence that NFD would be a benefit. Age UK referred to international evidence that macroeconomic performance not related to level of employment regulation, citing a study from the US Office of Economic Policy,<sup>78</sup> and a study evaluating Spanish reforms that reduced firing costs, noting that there was no labour market benefit to older workers.<sup>79</sup> The ACCA UK SME Forum (ACCA) remarked that “There is substantial evidence against the perception of over-regulation discouraging job-creation in the UK”<sup>80</sup> citing World Bank, BDRC, and BIS data.

- 2.37 Germany in particular, was a country of interest. BIS undertook further investigation of the German system, which ultimately suggested there was no discernable impact from the exemption from elements of unfair dismissal

<sup>74</sup> E.g., ARC, DLA, FRU, JIB, UCATT, Thompsons.

<sup>75</sup> UCATT response, p. 3.

<sup>76</sup> E.g., DLA, FRU.

<sup>77</sup> NASUWT response, p. 17.

<sup>78</sup> Office of Economic Policy (2011), *Is regulatory uncertainty a major impediment to job growth?*, available at <http://www.treasury.gov/connect/blog/Pages/Is-Regulatory-Uncertainty-a-Major-Impediment-to-Job-Growth.aspx>

<sup>79</sup> Kugler, Jimeno, Hernanz (2002), *Employment consequences of restrictive permanent contracts: evidence from Spanish labour market reforms*. available at <http://www.recercat.net/bitstream/handle/2072/796/651.pdf?sequence=1>

<sup>80</sup> ACCA response, p. 3.

rules for micro businesses in Germany. This topic, along with other international evidence, will be developed in Chapter 3.

### ***A Note on Compromise Agreements***

- 2.38 NFD may be unnecessary since compromise agreements are an already existing method and preferred by many respondents. Respondents were almost universally favourable to compromise agreements. Many expressed the opinion that compromise agreements were a better option since an employee agrees to it, rather than being subjected to it.<sup>81</sup> In addition, “employees would also be guaranteed access to independent legal advice or advice from their trade union representative and therefore any agreement to sign a compromise agreement will be based on informed consent.”<sup>82</sup> Finally, according to the FSB, employers would benefit in that compromise agreements “address the underlying issue of small businesses’ fears about the risk of going to tribunal that can affect their employment decisions.”<sup>83</sup> NUT reported that 80% of surveyed companies used compromise agreements, and 52% said they reduced the number of tribunal claims made against them.
- 2.39 Concerns, however, were raised in other submissions: employees could be pressured to sign them,<sup>84</sup> and employees may attempt to “seek disproportionate payouts in the knowledge of the costs to an employer in taking a matter to tribunal.”<sup>85</sup> The positive response to compromise agreements, however, coupled with an overall preference for them over NFD, suggests that this tool may be the better one to develop.

### ***Conclusion***

- 2.40 Though responses were split in terms of whether or not NFD would benefit micro businesses, a large number of risks and issues were raised, including by business respondents. There was little empirical evidence submitted, although many respondents referenced published reports and articles and some had carried out member surveys. Overall, the material presented by stakeholders reflects more potential detriments and risks than benefits from the implementation of NFD. Furthermore, the operation of two parallel dismissal processes may serve to complicate, rather than simplify the

<sup>81</sup> E.g., BCC, CAS, CIPD, EEF, FSB, GMB, NASUWT, NUT, TUC, UNISON, Welsh Government.

<sup>82</sup> TUC response, p. 26.

<sup>83</sup> FSB response, p. 1.

<sup>84</sup> UCATT survey response, p. 6.

<sup>85</sup> FPB response, p. 7.

regulations, especially if there were increases in other types of tribunal claims.

2.41 Responses to the Call for Evidence expressed a wide range of views and presented only limited empirical evidence. It is therefore important to fully consider the available international and academic evidence. The next chapter sets out the Government's analysis of this evidence.

## Chapter 3 - Summary of Academic and International Evidence Related to No Fault Dismissal

### *Introduction*

- 3.1 *This chapter sets out a summary of the academic and international evidence on the impacts of employment protection legislation and relevant to no fault dismissal.*
- 3.2 *In looking at the case for an additional regulation to introduce compensated no fault dismissal it has been important to consider the academic evidence on how such a change might impact productivity, economic growth and employment.*
- 3.3 *There is extensive empirical literature on the effects of employment protection legislation which finds evidence to suggest EPL can lead to increased investment in skills and increased incremental innovation (positive for productivity and economic growth). However, literature also finds that EPL can discourage hiring and firing (preventing quick adjustment to shocks) and can reduce radical innovation (thereby impacting negatively on productivity and growth).*
- 3.4 *Reducing employment protection legislation can have the effect of increasing hiring when economic activity improves, but also increasing firing in downturns. The overall effect can be ambiguous as to whether stricter or lighter regulation is best for employment. There are clearly different routes to a successful labour market that vary according to a country's legal and cultural traditions.*
- 3.5 *The UK has the third lightest employment protection legislation in the OECD according to the OECD's Employment Protection Index. Given this position, it is unlikely that the UK would make significant gains in economic growth as a result of introducing "compensated no fault dismissal". That said, more perceptions based measures, such as the World Bank's "Doing Business Report", suggest a slightly less positive performance. Nevertheless, compensated no fault dismissal would involve the introduction of a new regulation, which risks increasing the overall regulatory burden (as well as other potential costs and risks outlined in Chapter 2).*
- 3.6 *During the Call for Evidence period we have looked to international case studies to learn lessons for our own system. There seems to be no discernable effect from international examples where a system like compensated no fault dismissal is in operation. Furthermore, there are*

*fundamental differences between employment law systems in these countries and in the UK, so it would be highly uncertain whether compensated no fault dismissal would fit the UK system.*

## **What Effects does Employment Protection Legislation Have?**

- 3.7 In theory employment protection legislation (EPL) could have a number of effects on employment, productivity and economic growth. The mechanisms and evidence behind them are summarised below and their overall impact is often ambiguous. This leads to a lack of clarity over the potential impact of changes to regulation on labour market performance.

### **a) Overall Labour Market Performance**

- 3.8 The OECD's 2006 Reassessment of the Jobs study<sup>86</sup> concluded "there is **no single golden road to better labour market performance**. There is more than one model of success to hand from which to take inspiration to fit specific national circumstances and history. However, this does not imply that anything goes. The successful performers share some common features, not least an emphasis on macroeconomic stability, adequate incentives for all labour market participants and strong product market competition."

### **b) Employment**

- 3.9 By raising the costs of firing workers, EPL on regular working can have the effect of discouraging hiring and firing. Literature in this area suggests an ambiguous effect on average employment over the business cycle as discussed in Bertola<sup>87</sup> (1990) and Marinescu (2003) and Griffith et al (2007)<sup>88</sup>. Greater EPL does mean that employment will *fluctuate* less over the economic cycle due to employment being held constant for longer during the downturn and companies refraining from hiring some workers during the upturn, as noted by Addison (2001).<sup>89</sup>

<sup>86</sup> OECD (2006), *Boosting Jobs and Incomes: Policy Lessons from Reassessing the OECD Jobs Strategy*, available at <http://www.oecd.org/els/employmentpoliciesanddata/36889821.pdf>.

<sup>87</sup> Bertola, G. (1990), *Job Security, Employment and Wages*. European Economic Review No.34. pp. 851-886.

<sup>88</sup> Griffith R., Harrison, R., and G. Macartney (2007), *Product Market Reforms, Labour Market Institutions and Unemployment*, available at <http://eprints.ucl.ac.uk/2689/1/2689.pdf>.

<sup>89</sup> Addison (2001), *The Economics of Employment Protection*. IZA Discussion Paper No. 381, p. 4.

- 3.10 OECD (2009)<sup>90</sup> analysis also looks at the impact on hiring and firing and concludes: "Even in a recession there is considerable **hiring**." "Stricter employment protection for regular and temporary workers tends to reduce workers flows in and out of unemployment. For permanent workers, the negative impact of employment protection on unemployment outflows (i.e. hires) dominates the negative impact on inflows (i.e. separations), resulting in an increase in the level of structural unemployment [that is likely to result from the recession]."
- 3.11 OECD (2009)<sup>91</sup> work on employment regulation concluded that "overly strict regulations can reduce job flows, have a negative impact on employment of some groups of workers (notably youth), encourage labour market duality and hinder productivity and economic growth." Indeed stricter EPL can increase long-term unemployment for certain segments of the labour market (by making it harder for certain groups to re-enter the labour market, such as women and older workers returning to workplace, or anyone who appears a riskier proposition).

### c) Productivity

- 3.12 There are a number of mechanisms by which EPL could affect the productivity of workers. In a more flexible labour market, it is easier to allocate labour to the most productive activities. Labour can be moved from declining to emerging activities with little cost, raising overall productivity.
- 3.13 Bassanini and Venn (2007)<sup>92</sup> in work for the OECD find empirical support for this link. By looking at the impact of EPL on productivity they find that too strict statutory protection for regular contracts "appears to dampen **productivity growth**, most likely by restricting the movement of labour into emerging high-productivity activities, firms or industries."
- 3.14 Where *stringent* policy, e.g. on dismissals, leads to an increase in temporary workers (and this can happen where regulation on permanent workers is too strict), this could discourage investment in training and therefore impact on productivity. Thus in the absence of appropriate legislation, younger employees (who account for a large share of temporary workers) are more likely to suffer involuntary separations. Bassanini and

<sup>90</sup> Venn, D. (2009), *Legislation, Collective Bargaining and enforcement: Updating the OECD employment protection indicators*. OECD Social, Employment and Migration Working Paper No. 89:2009, available at [www.oecd.org/els/workingpapers](http://www.oecd.org/els/workingpapers).

<sup>91</sup> OECD Employment Outlook 2009, available at <http://www.oecd.org/els/socialpoliciesanddata/43728718.pdf>.

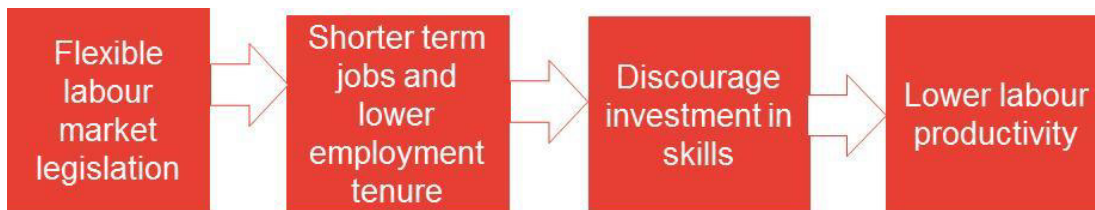
<sup>92</sup> Bassanini, A., and D. Venn (2007), *Assessing the Impact of Labour Market Policies on Productivity: a Difference-in-Differences Approach*, OECD Social, Economic and Migration Working Papers 54, OECD Employment Outlook 2007, available at <http://www.oecd.org/social/socialpoliciesanddata/38797288.pdf>.



Venn (2007) also find that it is not clear whether partial reforms to EPL, perhaps where rules on temporary contracts are relaxed without changing those on regular contracts, would have any impact on productivity.

- 3.15 On the other hand, as found by Damiani and Pompei (2010) and as illustrated in Figure 3.1 below, greater flexibility can lead to less investment in skills by employers. If the employment relationship is not working for some reason, in a more lightly regulated framework, that relationship may be more likely to end rather than investing time and training in improving it.

**Figure 3.1: Theoretical mechanisms by which EPL can impact productivity**



Source: *Frontier Economics*, taken from work by Damiani and Pompei (2010)<sup>93</sup>

- 3.16 Belot et al (2007)<sup>94</sup> find that the relationship between **EP and productivity is non-linear** (similar results were also found by Scarpetta and Tressel (2004)). At very low levels of EPL, there is a reduced incentive to acquire job specific skills (and therefore productivity is adversely affected). Equally, at very high levels of EPL, wages increase and so profitability, investment and in turn productivity and economic growth are adversely affected.

#### d) Economic Growth

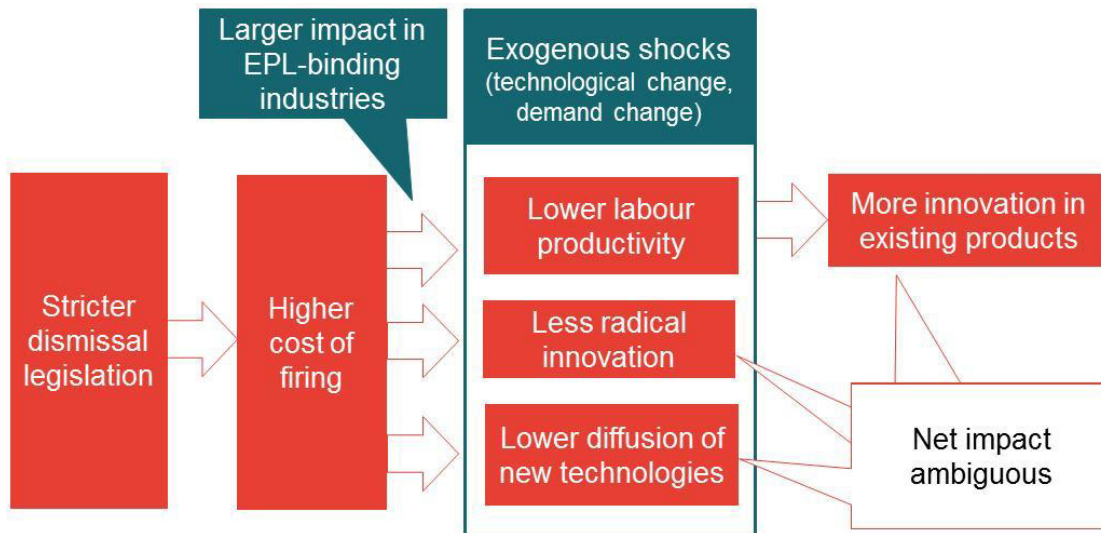
- 3.17 Figure 3.2 below works through mechanisms by which employment protection legislation could lead to changes in economic growth. By raising the costs of firing, EPL can make it harder for firms to adopt new technologies, or respond to changes in demand where adjustments to the labour force are needed. EPL has been found to increase incremental innovation, but decrease radical innovation,<sup>95</sup> therefore the overall effect is ambiguous. Greater innovation is an important driver of economic growth.

<sup>93</sup> Damiani, M., Pompei, F. (2010), *Labour protection and productivity in EU economies: 1995-2005*. European Journal of Comparative Economics, Vol. 7, n. 2, pp. 373-411, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1327040](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327040).

<sup>94</sup> Belot, M., Boone, J. and van Ours, J. (2007), *Welfare-Improving Employment Protection*. *Economica*, Vol 74 No 295, pp 381-396 as cited in Howard Reed (2010) *Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance* A Report for the TUC.

<sup>95</sup> Frontier Economics (2012), *The Impact of Regulation on Growth: A Report Prepared for the Department of Business, Innovation and Skills*, available at <http://www.bis.gov.uk/assets/biscore/economics-and-statistics/docs/i/12-821-impact-of-regulation-on-growth>.

Figure 3.2: Effects of EPL on Economic Growth



Source: Frontier Economics<sup>96</sup>, based on Bassanini et al (2009) and Griffith and Macartney (2010)<sup>97</sup>

## How does the UK Perform?

### a) Employment Protection Legislation in the UK, and International Comparisons

3.18 In general over the past 25 years the UK has been judged by the OECD as a major reformer across the whole range of labour market policies and particularly employment regulation and welfare to work policies.

3.19 These reforms have tended to be based around ‘What Works’ and appear to have been successful. The Jobs Study Reassessment<sup>98</sup> judged the UK to be one of the ‘successful’ employment performers and that “[w]hile it had its critics, the record shows that those countries [which include the UK]

<sup>96</sup> Frontier Economics (2012), *The Impact of Regulation on Growth: A Report Prepared for the Department of Business, Innovation and Skills*, available at <http://www.bis.gov.uk/assets/biscore/economics-and-statistics/docs/12-821-impact-of-regulation-on-growth>.

<sup>97</sup> Bassanini (2009) and Griffith and Macartney (2010).

<sup>98</sup> OECD (2006), *Boosting Jobs and Incomes: Policy Lessons from Reassessing the OECD Jobs Strategy*, available at <http://www.oecd.org/els/employmentpoliciesanddata/36889821.pdf>.

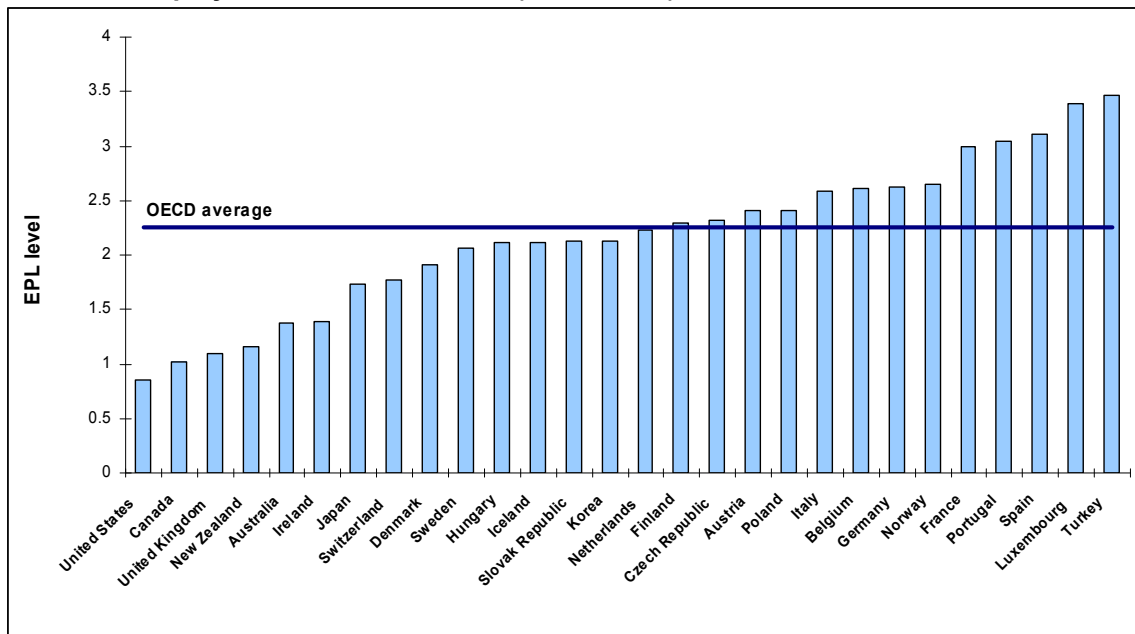
*which implemented its [the original OECD Jobs Study] recommendations outperformed those who did not.”*

## b) Strictness of Employment Protection

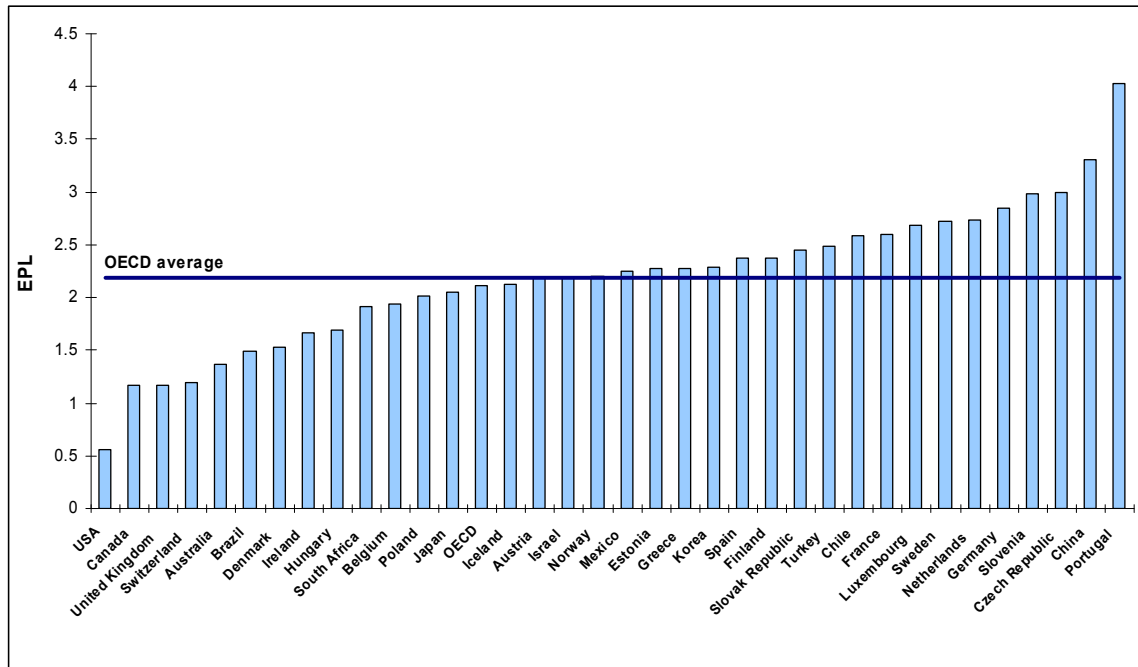
3.20 The OECD Employment Protection index combines information on the specific statutory provisions in three areas; regulation on temporary forms of employment; specific requirements for collective redundancies and protection of regular workers against individual dismissal.

3.21 The result of the UK’s ‘light and even’ approach to employment regulation is that, within the OECD, only the US and Canada have less strict employment protection regulations. The EPL level from the OECD’s 2008 study is shown in Chart 3.1 below across all employment protection legislation, with Chart 3.2 showing that for individual dismissals. The UK’s regulatory system is also much less onerous than in Brazil, Russia, India, China and South Africa (the BRICS countries) and the other developing countries that has been measured by the OECD. There has been some increase in the strictness of employment regulations since the early 1990s but it has been relatively small and it has led to the UK swapping places with Canada. Since this was last carried out, the UK has increased its qualifying period for unfair dismissal from one to two years.

**Chart 3.1: Employment Protection Index (OECD 2008)**



**Chart 3.2: Employment protection legislation for individual dismissals (OECD, 2008)**



3.22 The latest World Bank Report on Doing Business – which is based on perceptions - confirms that UK businesses tend to regard employment regulation as fairly unrestrictive. In 2009 (Doing Business 2010) the overall index number for the UK was 10 in an index that covered 0-100. However, both the index and the country ranking did not provide as positive a picture as the OECD index that is based on the reality of the legislation.

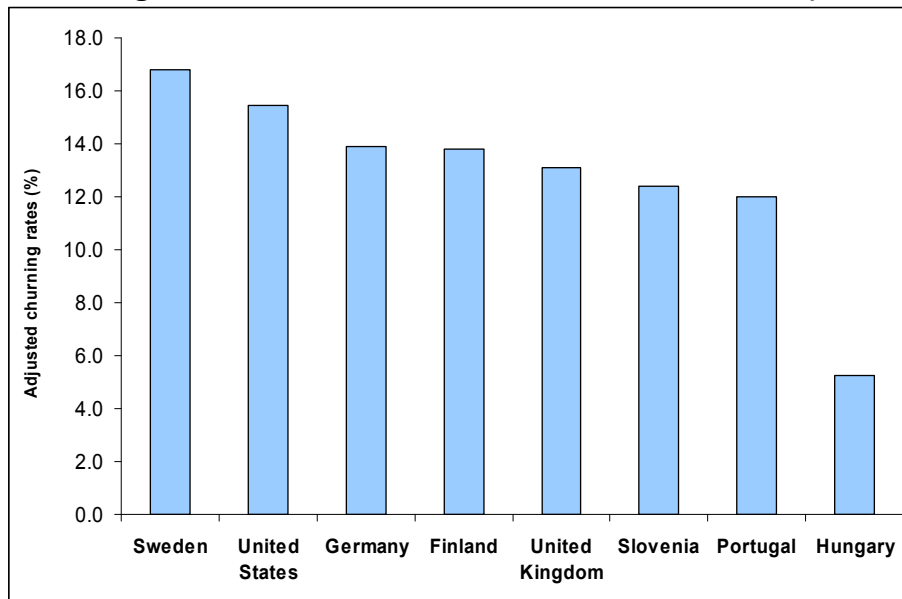
**Table 3.1 World Bank Doing Business 2010 Employment Index**

| WORLD BANK: DOING BUSINESS - measuring business regulations |    |    |             |        |         |       |
|---|----|----|-------------|--------|---------|-------|
| Components of employment index                              | UK | US | Netherlands | France | Germany | Italy |
| Difficulty of hiring index (0-100)                          | 11 | 0  | 17          | 67     | 33      | 33    |
| Rigidity of hours index (0-100)                             | 20 | 0  | 40          | 60     | 53      | 40    |
| Difficulty of redundancy index (0-100)                      | 0  | 0  | 70          | 30     | 40      | 40    |
| Rigidity of employment index (0-100)                        | 10 | 0  | 42          | 52     | 42      | 38    |

The UK’s performance in the OECD’s employment protection index is compatible with the high level of turnover that characterises the UK labour market – around 1

in 5 of the workplace move into a job each year and a similar proportion leave a job. Churn rates in the UK are compared to other OECD countries in Chart 3.3 below.

**Chart 3.3: Average churn rates for selected OECD countries (1997-2004)**



Source: OECD (2009).

3.23 In addition, just as there are incentives to avoid or evade high taxes so there are incentives to avoid overly strict regulation. There is relatively little sign of this in the UK. The proportion of temporary work – which tends to be less attractive to workers - is low and largely voluntary and there is little sign of use of this form of work as a way of avoiding the regulations on permanent work.

3.24 As well as having a very dynamic labour market compared to other countries the UK also has one of the most diverse. The lack of regulation on work patterns provides greater opportunity for businesses and workers to decide on types and patterns of work that suit them.

3.25 There is evidence that the UK has the widest range of types and patterns of work<sup>99</sup> – whether it is where they work or when they work in the day, the week or the year. In the UK, employment rates for every main age and sex category are higher than the OECD average. The greater choice of work

<sup>99</sup> See, for example, Table 20 Page 78: Implementing the OECD Jobs Strategy: Member Countries' Experience, OECD 1997.

patterns in the UK and the ease of getting a job increase the possibility that jobs are available to a wider range of people with a wider range of characteristics and responsibilities.

## **International Comparisons**

- 3.26 We have looked at the systems in a number of other countries which may be relevant to 'Compensated No Fault Dismissal'. The countries covered below are Germany, Spain, the US, Canada and Australia. There is further detail on Germany, Spain and Australia in the case studies published alongside the Call for Evidence:  
<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-771-dismissal-for-micro-businesses-case-studies.pdf>
- 3.27 Following the publication of these case studies, a delegation of BIS officials visited the German Labour Ministry to explore further the evidence surrounding the German case study.
- 3.28 Given that the employment regulation system is so dependent on the culture and tradition of each country it is not possible to import wholesale policies from another country. They will need to be adapted.
- 3.29 Therefore, although this consideration of international best practice can identify broad directions of travel, delivering an efficient and effective system requires much more in depth consideration. It is for this reason that not only were the usual consultations undertaken but also a range of other information was gathered including formal and informal consultations.

### **a) Germany**

- 3.30 The German labour market performed well in the recession, experiencing relatively little employment loss. Employment only fell by about 0.5% in 2008 before continuing its upward trend. Unemployment actually declined in Germany throughout the recession period (2007 to 2009), although it rose briefly from 7.4% to 7.9% in late 2008/early 2009.<sup>100</sup> Throughout the Call for Evidence Germany has been cited as an example and responses from the Call for Evidence suggest that there is some feeling that the German 'micro

<sup>100</sup> Burda M.C. & Hunt J. (Spring 2011) *What explains the German Labor Market Miracle in the Great Recession? Brookings Papers on Economic Activity*, available at <http://edoc.hu-berlin.de/series/sfb-649-papers/2011-31/PDF/31.pdf>.

exemption' from unfair dismissal is the most relevant to 'compensated no fault dismissal'.

### **Statutory Protection against Dismissal in Germany**

- 3.31 Statutory protection against dismissal in Germany is established by both the *German Civil Code* and the *Protection against Dismissal Act (PADA)*.<sup>101</sup> The latter can be compared to the UK's *Employment Rights Act* enacted in 1996. *PADA* stipulates that an employer may dismiss an employee if the reason is *socially justified* and the proper procedure is followed. Socially justified reasons include:
- a) Conduct: any breach of duty arising from the employment relationship where the employee is at fault.
  - b) Urgent business requirements / operational reasons: where the role itself is abolished for reasons pertaining to the business, i.e., redundancy. A termination in this circumstance is only permissible where the employee cannot be employed elsewhere in the company.
  - c) Other personal circumstances: reasons related to the employee's circumstances, such as frequent absence due to illness.
- 3.32 In German employment law there is an exemption for micro businesses under *PADA*. This exemption is not a complete exemption from dismissal protection but an exemption from having to provide a statement of reasons for dismissing an employee. In practice this means that individuals can still challenge their dismissal; however the burden falls on them to produce evidence that it was unfair. For larger businesses the burden of proof lies with the employer to prove that the stated reasons were genuine and fair.
- 3.33 In the UK the burden of proof falls on both the claimant and the respondent. First the claimant must show that they were dismissed (this can be expressly or constructively). The respondent then has to prove the reason for the dismissal and that the reason is for one of the five potentially fair reasons for dismissal (these include the category of "some other substantial reason," which is likely to catch potentially fair reasons that would not fall into any of the other categories). After these steps the burden of proof is neutral and does not rest on the claimant or the respondent.
- 3.34 The exemption was first introduced in 1969, when the threshold for the exemption was businesses with up to (and including) five full-time employees. This threshold has been changed a number of times since then. It was changed to 10 in 1996, moved back to five in 1999, and most recently back to 10 in 2004, where it currently stands.

<sup>101</sup> *PADA* is called *Kündigungsschutzgesetz* in German, enacted 1969, last amended March 2008.

- 3.35 In 2004, the German government amended its small establishment exemption from unfair dismissal regulations to include any establishment with fewer than 10 employees. This change was made as part of a set of reforms called AGENDA 2010, aimed at tackling the structural causes of unemployment<sup>102</sup> in Germany.
- 3.36 The change in the threshold of the micro business exemption to businesses with 10 employees was one change in a raft of employment measures introduced in 2004. Germany's current labour market position has come in the wake of multiple reforms and other economic factors. While it is difficult to isolate the effect of any one change, the overall perception in Germany is that this particular reform has had no discernible effect. Far more important were measures to more actively encourage employees into work and reforms related to benefits and social security.

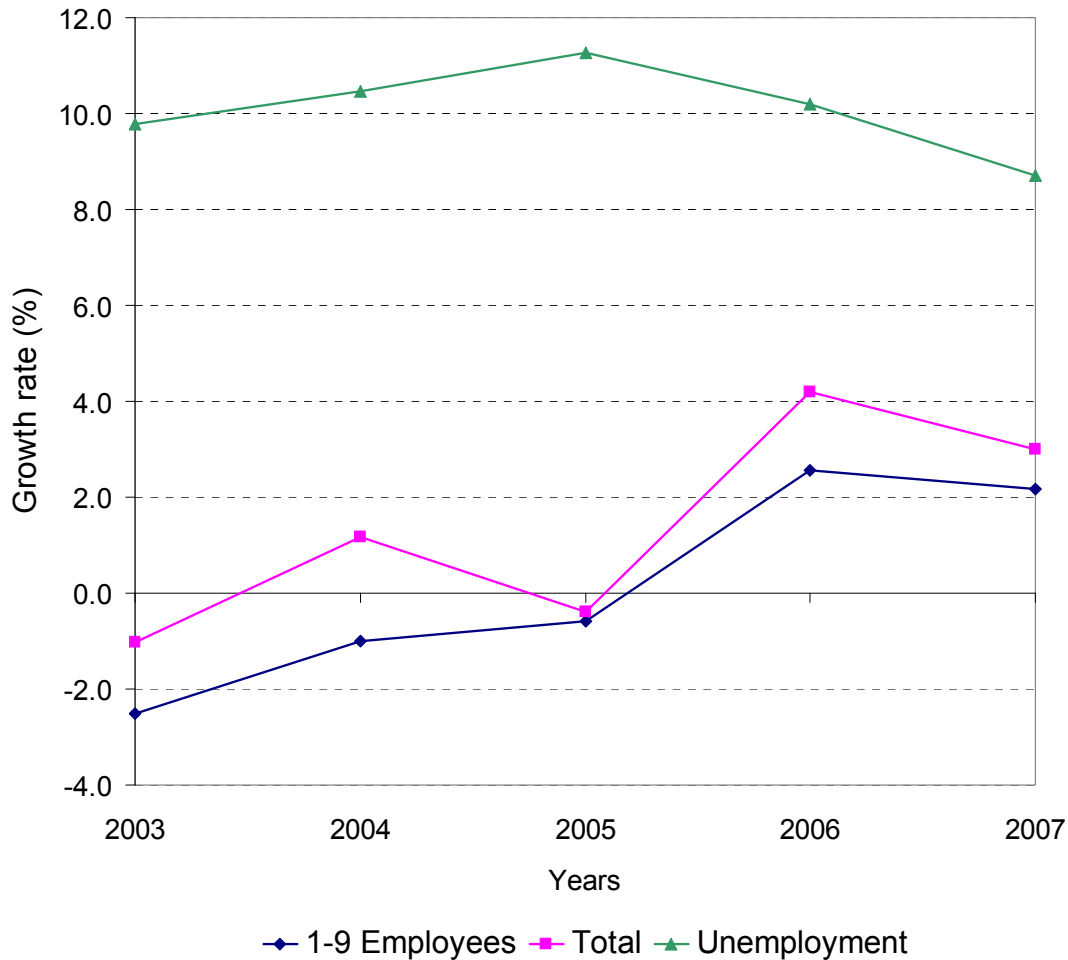
### **Impact of the exemption**

- 3.37 The effects of the micro exemption on employment, growth in the numbers of micro businesses and tribunals are discussed below. Although these are gross figures if the micro business exemption is important it would be likely to show up in these numbers.
- 3.38 There is no statistical evidence to suggest employment has grown as a result of the exemption. While employment has grown in recent years in Germany (See Chart 3.4, below), the growth rate for employment in micro businesses was consistently below Germany's average employment<sup>103</sup> growth rate.

<sup>102</sup> Causes of unemployment which do not rely on economic conjecture.

<sup>103</sup> The following is the Eurostat definition of employed persons: Persons aged 15 year and over (16 and over in ES, UK and SE (1995-2001); 15-74 years in DK, EE, HU, LV, FI and SE (from 2001 onwards); 16-74 in IS and NO), who during the reference week performed work, even for just one hour a week, for pay, profit or family gain, or who were not at work but had a job or business from which they were temporarily absent because of, e.g., illness, holidays, industrial dispute or education and training. Therefore this would include people in temporary employment or on fixed term contracts as long as they met the other criteria.

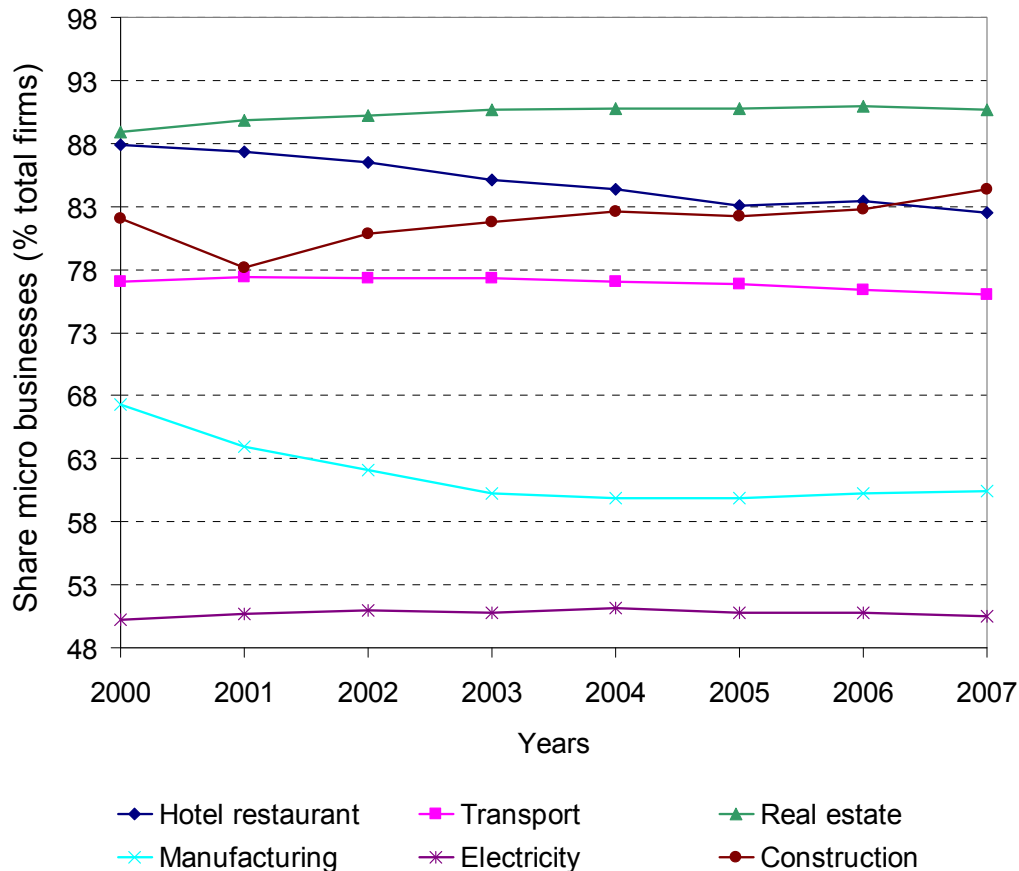


**Chart 3.4: Growth rate of employment and level of unemployment (2003-07)**

Source: Eurostat.

3.39 In addition there has not been a clear increase in the number of micro businesses since the extension of the exemption, except in the real estate sector. These factors together show no discernible effect of the micro business exemption. Although it is not possible to rule out some positive effect on growth/employment it is likely to be at most small or very small and it may have had no effect at all.

**Chart 3.5: Number of micro businesses (1-9 employees), by industry (2000-07)**



Source: Eurostat.

3.40 There has been a reduction in number of employment tribunal claims in Germany since 2004 when the reforms were implemented. There are many factors which could affect the number of employment tribunal applications. We believe that while the micro business exemption could have been a factor, the impact is likely to have been small and if there has been an effect would not necessarily transfer to the UK. The German regulatory system is more restrictive than the UK system so there may be less to gain from an exemption for small businesses. In addition the vast majority of employment in the UK is in medium to large enterprises with

only 12% of UK employees working in micro enterprises in 2011<sup>104</sup> and the majority of employment tribunal claims are against medium to large enterprises. We estimate around 13% of employment tribunals claims are brought against micro organisations.<sup>105</sup>

- 3.41 A delegation of UK officials visited the German Labour Ministry to ascertain their views and evidence about the micro business exemption and the success of the German Labour Market. The view of the German Labour Ministry is that the exemption is only one small measure amongst a raft of measures that were introduced as part of AGENDA 2010. They believe that the impact of the exemption is difficult to measure, but likely to be very small. They do not believe that it has had an impact on growth or on employment. In the literature other factors such as German employers' reticence to hire prior to the recession, wage moderation and working time accounts have been cited as reasons to explain the good performance of the labour market.<sup>106</sup>

### Comparisons between Germany and the UK

- 3.42 It is important to consider the labour market systems in both countries as a whole. The UK labour market is more lightly regulated than the German labour market. The OECD employment protection index ranks the UK as having the 3<sup>rd</sup> least strict employment protection whereas Germany is ranked at 28. Therefore it is possible that the micro business exemption in Germany is required because the overall burden on businesses from employment legislation is relatively high.

### Conclusion

- 3.43 Overall Germany's labour market has performed well throughout the recession. This is likely to have been due to a number of factors, which may include the labour market reforms, but there has been no discernible effect of the micro business exemption on employment or growth in the numbers of micro businesses. Germany's employment protection regulation is much stricter than it is in the UK so the micro business exemption may be partly to overcome the restrictiveness of the employment protection overall.

## b) Spain

<sup>104</sup> BIS Business Population Estimates 2011.

<sup>105</sup> SETA 2008.

<sup>106</sup> Burda M.C. & Hunt J. (Spring 2011) *What explains the German Labor Market Miracle in the Great Recession? Brookings Papers on Economic Activity*, available at <http://edoc.hu-berlin.de/series/sfb-649-papers/2011-31/PDF/31.pdf>.

## Grounds for dismissal

- 3.44 In Spain there is a system of ‘justified’ and ‘unjustified’ dismissals. Justified dismissals in Spain are similar to redundancies and ‘fair’ dismissals in the UK. It is possible for employers in Spain to dismiss an employee using unjustified (or unfair) dismissal and give the employee severance pay. This could be considered to be a form of ‘compensated dismissal’.
- 3.45 Employment protection in Spain is much stricter than it is in the UK. The OECD ranks Spain as one of the strictest in terms of employment protection at 37<sup>th</sup> (with 1 as the lowest). Only Turkey, Luxembourg and Mexico were ranked higher in the OECD comparison of 40 countries. Therefore this form of compensated dismissal is probably designed to alleviate the impact of this on employers. In addition it has had some potentially negative consequences. It has been argued, in particular, that the reform has resulted in a *distorted* use of its intention, with unfair dismissal becoming the rule rather than the exception. The reason for this distortion is relatively straightforward: since the probability of an employer losing a case in court is very high (90%<sup>107</sup>), firms typically find it more profitable to dismiss an employee based on *disciplinary* grounds, using the *45/2002 Act*, rather than *economic* grounds. In the first instance, an employer would pay the highest amount of severance payment for unfair dismissal, while in the second, a firm is likely to face an unfair dismissal claim and procedural and court costs.
- 3.46 This problem may account for the Spanish government’s decision to introduce new reforms. The most important reform in this sense is the *35/2010 Act* enacted in September 2010 which introduced, among other things,<sup>108</sup> a new definition of dismissal for economic reasons. Employers may still dismiss an employee using a *compensated ‘unfair’ dismissal* mechanism, but only pay the severance payment due for a dismissal based on *economic reasons*, i.e., 20 wage days per seniority year.

## c) The US, Canada and Australia

- 3.47 The final case study which we published alongside the Call for Evidence was on Australia. Two other countries have also been raised in submissions to the Call for Evidence are Canada and the US. They are

<sup>107</sup> Bank of Spain (2009).

<sup>108</sup> Another change was to decrease advance notice for economic dismissals to 15 days from 30, with the additional caveat that the firm can replace even this shortened period with the corresponding wages. This reform also dealt with changing separation costs for temporary contracts, costs of dismissals, wage adjustments, working hours adjustments, financial subsidies, contracts for young people, and labour market intermediation.

the two countries which the OECD ranked to have less strict employment protection overall than the UK in the OECD 2008 rankings. For individual employment protection (for permanent workers) the UK and Canada are ranked level, and the US is ranked to have less strict individual employment protection. Australia's employment protection is ranked higher than the UK's (Australia is ranked 6<sup>th</sup> in the OECD employment protection index). All 3 systems are quite different to the UK in terms of employment protection, and the differences are much bigger than no fault dismissal. It is difficult to know how you would import the differences to the UK, and what the effects would be if that was to be carried out but it would be likely to mean significant changes to current regulations.

## Canada

3.48 The Canadian legislation on fair dismissal is summarised by the OECD (2008)<sup>109</sup> as follows:

**'Prohibited dismissals:** Dismissals are prohibited if they are based on a prohibited ground of discrimination (e.g., sex, race, disability, religion, sexual orientation), pregnancy, garnishment proceedings, or the exercise by an employee of a right under human rights or labour statutes (e.g., employment standards, occupational safety and health and labour relations legislation).

**Unjust dismissal:** Legislation in three jurisdictions contains "unjust dismissal" provisions, whereby an employee who meets specific eligibility requirements (e.g., minimum length of service) may not be dismissed unless specific conditions are met:

- Federal jurisdiction: a person employed for more than 12 months and who is not covered by a collective agreement may not be laid off, unless due to lack of work or the discontinuance of a function.
- Quebec: an employee with two years or more of uninterrupted service in the same enterprise may not be dismissed without "good and sufficient reason."
- Nova Scotia: an employee with 10 years or more of service may not be discharged or suspended without just cause, unless it is for a reason beyond the control of the employer (e.g., destruction of a plant, labour dispute, weather conditions), the employee has refused the employer's offer of reasonable other employment or the employee has reached the age of retirement. Certain occupations and industries (e.g., construction industry) are excluded from these provisions.'

## The United States

<sup>109</sup> Detailed description of employment protection in OECD and selected non-OECD countries (2008) available at <http://www.oecd.org/dataoecd/24/39/42740165.pdf>.

3.49 *The OECD*<sup>110</sup> gives a brief description of fair and unfair dismissal in the US:

**Fair:** With the exception of the public sector, it is generally fair to terminate an open-ended employment relationship without justification or explanation (“employment-at-will” principle) unless the parties have placed specific restrictions on terminations.

**Unfair:** Dismissals based on breach of Equal Employment Opportunity principles (i.e. national origin, race, sex, etc.) and dismissal of employees with physical or mental impairment if work could be performed through appropriate workplace adjustment. In addition, there are increasing numbers of cases where employees pursue wrongful termination claims by alleging that dismissal was based on a breach of an “implied contract” for continued employment.’

3.50 This summary suggests that the US has very little federal employment protection. This does not mean that all employees in the US have no employment protection. There are state laws as well as federal regulations, and a lot of employees may have employment protection through contracts or collective agreements.<sup>111</sup> As a lot of employment protection is established through contracts this influences case law (see Labour market policies for the 1990s<sup>112</sup>). That said the US is often considered to have a ‘fire-at-will’ approach which is very different to most other countries.

## Australia

3.51 Under the *Fair Work Act*, businesses with fewer than 15 employees are subject to less onerous regulations which reflect their smaller size. The predecessor to this act, the *Workplace Relations Amendment Act 2005* (*Work Choices*) exempted businesses under 100 employees entirely from regulation.

3.52 Under the *Fair Work Act*, small businesses must instead adhere to the *Small Business Fair Dismissal Code* (*The Code*). While the Code itself is only three brief paragraphs, Fair Work Australia (FWA, the body which administers the *Fair Work Act*) created a 10 question checklist as an additional aid. As this checklist has no legal status, an employer who

<sup>110</sup> Detailed description of employment protection in OECD and selected non-OECD countries (2008), available at <http://www.oecd.org/dataoecd/24/39/42740165.pdf>.

<sup>111</sup> Autor DH, Donohue JJ & Schwab SJ (2002), *The costs of wrongful discharge*. Working Paper 9425. NBER Working Paper series; Ewing BJ, North CM & Taylor BA (2005), *The employment effects of a "Good Cause" discharge standard in Montana*. *Industrial & Labor Relations Review*, Vol 59 (1), Article 2.

<sup>112</sup> OECD: *Labour Market Policies for the 1990s* (Paris 1990).

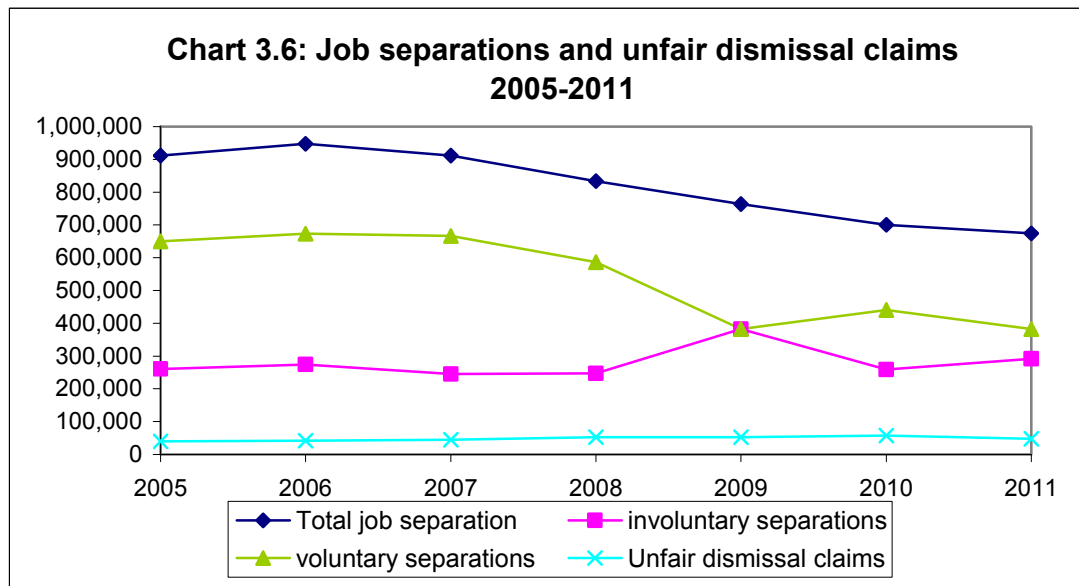
follows it may still be held liable if he or she did not respect the Code in its entirety. Small businesses (i.e., those with fewer than 15 employees) also have a longer qualifying period before their employees acquire the right to claim unfair dismissal: one year as opposed to six months for larger businesses.

## **Conclusion**

- 3.53 The international evidence suggests that if there is any impact of 'compensated no fault dismissal' it would be small or very small.
- 3.54 There is no discernible effect of the micro business exemption in Germany on employment or growth. Employment protection in Germany and Spain is much stricter than it is in the UK and there is evidence to suggest that the introduction of these regulations in Germany and Spain is partly to overcome the restrictiveness of the high levels of employment protection in these countries.
- 3.55 The US, Canada and Australia have very different systems to the UK and it is difficult to see how to adapt these to the UK system.
- 3.56 Having considered a broad range of academic and international evidence, there appears to be no evidence to suggest benefits to introducing no fault dismissal for micro businesses that would outweigh potential costs and risks.
- 3.57 Those potential costs and risks have been identified by the Call for Evidence and are summarised in Chapter 2. As discussed earlier, evidence presented by stakeholders identified several potential risks and issues with the NFD proposal. The issues were the effect on: micro business reputation and recruitment, employee morale and productivity, employer practice, discrimination and other additional tribunal claims, consumer confidence, credit provision, micro business employee stigma, the creation of a two-tiered market, and confusion around the threshold. There would also be the need for a new process set out in regulation. The benefits were that employers could efficiently and inexpensively dismiss unproductive workers, which, in a micro business particularly, have a significant impact on the business as a whole. On balance, the significant risks and issues identified outweighed the benefits.
- 3.58 Indeed it is possible that the impact on employment and economic growth could be negative, whilst there are risks that it could make the UK's employment law regime less 'even' in the sense of how it allows huge diversity across the labour market.

3.59 The Call for Evidence considers the application of compensated no fault dismissal to micro-businesses. About 12 per cent of those employed are employed in micro-businesses,<sup>113</sup> so it would cover only a small percentage of the employee population.

3.60 Chart 3.6 shows the level of separations, both voluntary and involuntary. Involuntary separations are a low proportion of employees, at less than 2 per cent of those in employment. Claims to employment tribunals for unfair dismissal amount to less than 0.2 per cent of those in employment.<sup>114</sup> The fact that applying compensated no fault dismissal to micro businesses means the number of employees affected is very low adds to the weight of evidence suggesting compensated no fault dismissal would have no discernible effect.



Source: ONS, HMCTS Annual Statistics.

<sup>113</sup> Business Population Estimates (2011).

<sup>114</sup> HM Courts and Tribunals Annual Employment Tribunal Statistics and the Labour Force Survey.



## Chapter 4 – Next Steps for No Fault Dismissal

- 4.1 The Government has carefully considered the evidence presented by stakeholders and the wider academic and international evidence. In addition to analysing the submissions received to the Call for Evidence, we have examined a wide range of relevant material from international organisations and academic sources. We have also undertaken in-depth international case studies and followed these up by visiting Germany (identified as the most relevant comparison) to understand better the reforms that have been implemented there.
- 4.2 Looking at the international evidence, it is clear that there are benefits to the UK in having a flexible, efficient and relatively lightly regulated labour market. Although, as the OECD suggests, ‘there is no single golden road to success,’ it is apparent that well-functioning labour markets are often a key component of economic efficiency and growth. The UK’s ‘light and even’ regulation, alongside welfare to work policies, help to ensure that:
- employment rates for all of the main age and sex groups are higher in the UK than the OECD average;
  - since the trough of the recession employment has grown by over 400,000;
  - the number on inactive benefits are at their lowest level for 20 years; and
  - the historic trend towards lower employment in retirement and early retirement has been reversed.
- 4.3 Nevertheless, problems remain. Unemployment amongst young people is too high. And, although the evidence is mixed, there remain perceptions amongst employers of costs and difficulties associated with dismissal. Given the impact this may have on confidence to recruit, it is imperative that we continue to work to make the labour market function even better. The Government is determined to explore all avenues that may lead to increased employment and growth, including taking steps to address these perceptions.
- 4.4 The Government is implementing a range of measures to make the resolution of workplace disputes easier, reduce unnecessary burdens, streamline employment tribunals, reduce weak claims and give business greater confidence to hire and to reach agreement about ending employment relationships where this is necessary. We:
- have extended the qualifying period for unfair dismissal, giving employers more time to get the working relationship right without fearing an unfair dismissal claim;

- are introducing early conciliation, giving employers and employees the opportunity to conciliate disputes through Acas where they can't be resolved in the workplace, before proceeding to tribunal; and
- are taking steps to facilitate the use of settlement agreements, thereby increasing business confidence to manage employment issues in the workplace.

4.5 Responses to the Call for Evidence show that there are mixed views amongst stakeholders, including businesses, business representative groups and individuals as to whether there is merit in introducing new regulation to implement the idea of NFD. While some business stakeholders strongly support NFD (most prominently the IoD, who felt that it would increase employer confidence), others are much more cautious or ambivalent (including CBI and FPB) and several are opposed (including BCC, FSB and EEF). In many instances, even those who on balance support NFD remain cautious about the risks that may arise. Key concerns for businesses included:

- that NFD would not give employers peace of mind because of the risk of discrimination claims; and
- that it could lead to difficulty in recruitment and retention for micro businesses.

Some of the main concerns raised on behalf of employees were:

- that NFD would encourage poor management practice, by promoting a 'hire and fire' culture;
- that it would create uncertainty and fear for employees, potentially reducing employee engagement and consumer confidence.

4.6 Given these risks, the Government believes that there are better ways to improve employer confidence. Our measures on settlement agreements, in particular, will give businesses greater confidence to agree negotiated and consensual separations with employees, without the risk that offers of settlement will be used against them in an unfair dismissal claim. Furthermore, where settlement is agreed, the employer is able to agree a waiver of all potential claims (including discrimination claims) with an employee and thereby ensure that they will not face an employment tribunal. This offers more certainty to employers than the proposal for NFD and also has the advantage that it does not require the creation of a new, parallel, dismissal process.

4.7 Overall, **the Government concludes that there is insufficient support for or evidence that NFD would have a positive impact on the UK**

**labour market.** Furthermore, we are pursuing a wide range of measures to help employers deal more easily with employment disputes and have confidence when taking on new staff. It is not clear that the introduction of NFD regulation for micro businesses would readily provide benefits that would outweigh the risks identified. The Government has therefore decided that it will not take forward proposals for NFD.

## Chapter 5: Analysis of Responses on the Acas Code on Discipline and Grievance to the Call for Evidence

### *Introduction*

- 5.1 *Responses to the Call for Evidence indicate that most respondents think that the principles of the Acas Code and the language used to articulate these principles are fit for purpose. A number of respondents, however, seemed unaware of the accompanying guidance to the Code: Discipline and Grievances at Work: the Acas Guide (“the Guidance”). A number of the issues that were raised by respondents as needing further clarification are addressed in the Guidance, yet most made no reference to this tool.*
- 5.2 *There was a divided view as to whether there should be a separate Code for small businesses. However, there was a clear call for greater clarity about the requirements on small business and more help in using the Code. For example, a number of respondents felt that small businesses would benefit from a checklist tool which would take them through disciplinary and grievance processes step by step. **BIS will therefore work with Acas to develop an interactive tool for small business.***
- 5.3 *Respondents also advocated drawing a clearer distinction between processes for handling underperformance and misconduct. When the Acas disciplinary and grievance procedures were revised in 2009, the Code was deliberately kept short, with a single process for dealing with conduct and performance issues. **We agree with the principle that the Code should be as concise as possible, but have asked Acas to consider how performance and disciplinary procedures could be better distinguished and clarified.***
- 5.4 *The other suggested substantive changes are for the most part already addressed by the Guidance. However, there were a few further areas identified as being unclear or ambiguous. We have shared these comments for Acas to consider alongside the planned work to improve the accessibility of the Code for small business and clarify the handling of performance issues.*

### **General Attitudes towards the Code**

- 5.5 Respondents indicated, for the most part, approval of the Code. The overall response to the Code was positive, with only a few representative

stakeholders expressing dissatisfaction.<sup>115</sup> Respondents were also satisfied with the principles in the Code. A number of stakeholders opposed making any changes.<sup>116</sup> Most respondents felt the language of the Code was easy to understand: only a handful viewed it as 'very difficult' (see Chart 1).

**Chart 1**

| Do you find the language of the Code easy to understand? |    |
|--|----|
| 1 - very easy  | 24 |
| 2 - easy   | 57 |
| 3 - neither easy nor difficult                           | 43 |
| 4 - difficult  | 15 |
| 5 - very difficult                                       | 3  |

5.6 A decision to amend the Code would have to be weighed against the cost of making changes. The 2009 Code was the result of significant reworking. Frequent changes may create confusion for both employees and employers and require time and resources. If changes are made, employers would need to review their procedures afresh. This process could disrupt the workplace<sup>117</sup> and the requirement for additional training could be costly. In addition, awareness of these changes would need to be promoted. Introducing a new raft of changes might also compound the awareness issues which already exist. Any changes to the content of the Acas Code therefore need to be considered carefully and alternatives, such as improved guidance, fully explored.

### ***Awareness of the Acas Guidance***

5.7 Analysis of the responses found issues with awareness. Stakeholders reported that most of their constituents were aware of the Code's existence, but smaller businesses were less likely to be aware of it and may benefit from targeted communications. There was even less awareness of the accompanying Guidance.

5.8 The vast majority of respondents who were not aware of the Acas Code are micro businesses. Chart 2 presents the distribution of responses to the Call for Evidence question asking about awareness. Though the sample size is small, micro businesses are by far the least aware of the Code. Acas's own research reflects this trend: only 41% of micro businesses polled were aware of the Code, compared to 50% overall.<sup>118</sup> Another study

<sup>115</sup> E.g., ACS, IoD, NHF, Unite.

<sup>116</sup> E.g., ATL, ECA, GMB, Law Society, Mind, NAHT, NASUWT, PCS, Prospect, Thompsons, TUC, UCATT, UNISON, USDAW, Welsh Government, Working Families.

<sup>117</sup> E.g., FRU, PCS, TUC, UNISON, Working Families.

<sup>118</sup> Williams, M., and Acas Research and Evaluation Section (2011), *Workplace conflict*

commissioned by Acas reported that HR staff and employer representatives were more likely to be aware of the Code than line managers.<sup>119</sup> The awareness of this study, however, are likely to overestimate awareness as participants were selected based on those who had purchased the Code or Guidance, or participated in Acas training courses.<sup>120</sup> Small businesses are less likely to have in-house HR. The IoD conducted a survey which found that 68% of micro business respondents had no internal or external HR support, compared to the 39% overall rate. The fact that small businesses are less likely to have HR means they are also less likely to be aware of the Code.

**Chart 2: Awareness of Acas Code amongst business respondents**

| Before this call for evidence were you aware of the Acas Code? |     |    |
|--|-----|----|
|  | Yes | No |
| Micro Business (9 staff)                                       | 30  | 13 |
| Small Business (10-49 staff)                                   | 14  | 0  |
| Medium Business (50-250 staff)                                 | 11  | 2  |
| Large Business (250 +)   | 11  | 0  |
|  | 66  | 15 |
| Other  | 124 | 3  |
| Total  | 190 | 18 |

5.9 The need to raise awareness of the Guidance was both explicit and implicit in responses. Acas created the Guidance in 2009 when the Code was revamped as a simpler, principles based model rather than the previous prescriptive three step process. The Guidance was intended to supplement the Code by providing advice on good practice. Employment tribunals are not required to take the Guidance into account, however, when considering cases.

5.10 Some stakeholders explicitly identified awareness of the Guidance as an issue, particularly for small businesses.<sup>121</sup> Subjects in the Rahim study reported it was more difficult to find the Guidance online.<sup>122</sup> Unfamiliarity with the Guidance is more prevalent amongst smaller businesses. The same Acas poll found a greater disparity in awareness of the Guidance:

*management: awareness and use of the Acas Code of Practice and workplace mediation—A poll of business.* Ref 8/11, available at

[http://www.acas.org.uk/media/pdf/8/s/0811\\_Workplace\\_conflict\\_management-business\\_poll.pdf](http://www.acas.org.uk/media/pdf/8/s/0811_Workplace_conflict_management-business_poll.pdf)

<sup>119</sup> Rahim, N., Brown, A. and Graham, J. (2011) *Evaluation of the ACAS code of practice on disciplinary and grievance procedures*. London: ACAS, available at

<http://www.acas.org.uk/media/pdf/4/r/Evaluation-of-the-Acas-Code-of-Practice-on-Disciplinary-and-Grievance-procedures-accessible-version-.pdf>

<sup>120</sup> Rahim et al., p. 8.

<sup>121</sup> E.g., ACCA, ATL, ECA, Nationwide, TUC, UNITE.

<sup>122</sup> Rahim et. al, p. 23.

only 28% of micro businesses knew of its existence, compared to 43% of other businesses.<sup>123</sup> The Guidance is a relatively new document, and small businesses, with fewer resources and less connection to employer representatives, seem at a disadvantage in terms of awareness.

- 5.11 This lack of awareness was also reflected in the number of responses which raised issues that are addressed in the Guidance. For example, some said it was unclear whether it was mandatory for employees and their representatives to be involved in developing rules and procedures, even though the Guidance states it is good practice.<sup>124</sup> A small number remarked that there is no guidance for what to do when employees refuse to attend or go off sick to avoid meetings. In addition to an appendix dealing with absence, the Guidance stipulates that an employer considers all the facts when reasonably deciding how to proceed, taking five considerations into account, and make a decision if the problem persists.<sup>125</sup>
- 5.12 A few respondents said it was not made clear enough that the same person could carry out different stages of the disciplinary process. Though the Code qualifies this procedural element with “where practicable” and the word “should”, small businesses may find such terminology too ambiguous. According to the Guidance: “In small organisations, even if there is no more senior manager available, another manager should, if possible, hear the appeal. If this is not possible consider whether the owner or...board of trustees should hear the appeal.”<sup>126</sup> The Guidance also proposes using an external consultant to carry out the investigation.<sup>127</sup>
- 5.13 Some respondents felt there was not enough information on how to handle requests for anonymity from those giving evidence. The Guidance addresses this issue and references the principles of a case for further guidance.<sup>128</sup> Another issue which was raised, and is addressed in the Guidance, is how to handle a grievance raised after disciplinary proceedings have already been initiated. These examples imply a lack of awareness about the Guidance. It is also possible that respondents have not read it fully, or do not view the current level of detail as sufficient.
- 5.14 There are several possibilities which might address this issue. If businesses are put off by its length, shortening the Guidance would still not be advisable. The Guidance is much longer than the Code because it is intended to address a range of issues and circumstances and provide the underpinning clarity that cannot be achieved through the Code alone. Trying to address all these issues in the Code risks making the document too long,

<sup>123</sup> Williams et al., p. 11.

<sup>124</sup> Acas Guidance, p. 12.

<sup>125</sup> Acas Guidance, p. 20.

<sup>126</sup> Acas Guidance, p. 34.

<sup>127</sup> Acas Guidance, p. 37.

<sup>128</sup> Acas Guidance, Note 2, p. 82.

complicated, and inaccessible. Targeted guidance for small businesses is another alternative which could also help raise awareness. Possibilities for this option are discussed further in the next section.

### ***Improved Accessibility for Small Businesses***

- 5.15 Responses were mixed on whether there should be a separate code for small businesses. A number of respondents argued against it,<sup>129</sup> while those in favour felt that the Code is not accessible to small businesses. Small businesses seemed unaware that they may often issue only one warning. Some respondents felt that the checklist tool which accompanies the Australian Small Business Code was a useful model. Therefore, while the analysis suggests the benefits of introducing separate requirements for small businesses are outweighed by the potential detriments, a simplified small business checklist, which signposts where small businesses have flexibility, may be useful. As noted above, we will work with Acas to develop an interactive tool for small business.
- 5.16 Many of the concerns raised about a separate small business code echoed those mentioned in conjunction with implementing no-fault dismissal for micro businesses. Respondents feared a separate code would create a two-tiered market in which small businesses become disreputable and unable to recruit high quality applicants. There may also be confusion over what constitutes a micro business and having to learn two sets of rules which would have to change as a business grows or shrinks. Both of these issues could serve as a disincentive to growth.
- 5.17 Respondents also pointed out that the Code and Guidance make allowances for the unique situation of small businesses. The Code reiterates the statutory requirement that if an employer shows the reason was fair, the tribunal will factor in an employer's size and resources<sup>130</sup> into its assessment, and because of these factors "it may sometimes not be practicable for all employers to take all of the steps set out in the Code."<sup>131</sup> The Acas Guidance discusses small businesses in greater detail. One of the appendices outlines disciplinary rules for small businesses, and another includes sample procedures for small business. A few small business respondents remarked that the Code did not accommodate the informal approaches which smaller organisations prefer. The Code however, is intended to come into play after informal methods have failed. The first part

<sup>129</sup> E.g., ACS, ATL, B&ES, BRC, BVCA, CIPD, DLA, ELA, FRU, GMB, Law Society, Mind, NASUWT, NUT, PCS, Prospect, Thompsons Solicitors, TUC, UCATT, UNISON, UNITE, USDAW, Working Families.

<sup>130</sup> Employment Rights Act 1996 c. 18 Part X §98 (4).

<sup>131</sup> Acas Code, para. 3.



of the Guidance stresses that informal techniques are the first approach which should be used to address disciplinary issues with employees.

- 5.18 These allowances, however, may not be explicit enough. Those in favour of separate requirements felt the Acas Code is not accessible to small businesses, which are often without HR support.<sup>132</sup> They viewed the procedure as being too complicated and lengthy for the limited resources of a micro business. Aside from lacking an in-house HR department, micro businesses, with fewer than 10 employees, may have only a single owner/manager. For this individual, already acting in several roles, the cost of learning and implementing Acas procedures may be disproportionately high.
- 5.19 The current Code may not make it clear enough that small businesses can deviate from the standard procedure. Only one place in the Code references the size and resources of a business matter. In other places, the use of terms like ‘if possible’ or ‘where practicable’ merely give implicit permission to a small business to deviate from the standard. As previously mentioned, respondents did not feel confident using one manager throughout the process even though the Code permits it.
- 5.20 The Code also gives small businesses latitude to use a single warning in many cases. The text states that if the employee behaviour is: “sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee’s actions have had, or are liable to have, a serious or harmful impact on the organisation”<sup>133</sup> In Acas’s response to this Call for Evidence, Acas explains that this clause was introduced: “in recognition of the fact that a disciplinary problem that in a large business would be relatively minor could in, a small firm, have serious consequences, and therefore needed to be handled in a speedy fashion.”<sup>134</sup> The phrasing in the Code itself, however, does not directly make the link between level of impact and size of business. In fact, some respondents seemed unaware of this option. It may be helpful to make it clear that the size and resources of a business factors in to degree of harm.
- 5.21 Along with this clarification, a checklist tool for small businesses may address the other ambiguities. Though it would not alter the requirements of the Code, this guide would be aimed specifically at small business. It would signpost the relevant areas where small businesses may deviate from good practice, if needed. There is a similar tool used in conjunction with the Australian *Small Business Fair Dismissal Code* (“Small Business Code”) which might serve as a model.

<sup>132</sup> E.g., CBI, CIPD, FPB, NHF, RHA.

<sup>133</sup> Acas Code, para 19.

<sup>134</sup> Acas response, p. 3.

- 5.22 Though there was not overwhelming support for modelling small business requirements after the Small Business Code, these objections mostly were aimed at the contents of the Code rather than the checklist. Others felt that the Small Business Code was not effective, citing statistics from Fair Work Australia.<sup>135</sup> A recently published review of the Australian Small Business Code, however, has not identified any areas in the Small Business Code which need to be changed.<sup>136</sup> It is difficult to judge, then, how effective the Small Business Code has in fact been.
- 5.23 Regardless, there was support from respondents to the Call for Evidence for additional guidance for small businesses. Businesses without HR capability feel pressured to consult an outside source, which can create additional anxiety and cost. While acknowledging the “fear factor” for small businesses, the CIPD did not feel the current code is too burdensome.<sup>137</sup> A checklist was suggested because “the advantage for small employers, compared with the existing checklist in the Acas guide, is the question-and-answer format, intended to reduce the need for employers to use judgement in applying the advice it contains.”<sup>138</sup>
- 5.24 Nationwide Building Society, which opposed separate requirements for small businesses, felt that “...for smaller businesses with no previous experience or context, the Acas Code may assume a level of knowledge that they might not have. Therefore we would suggest that a separate guide for small businesses (referred to in the Acas Code) might be better.”<sup>139</sup> The fact that smaller businesses are less likely to have an HR team means that acquiring this knowledge is more difficult than for larger businesses. A step by step guide would walk these less knowledgeable businesses through the process of dealing with discipline and grievance issues.
- 5.25 Looking at all the evidence together, there a need to develop user-friendly guidance targeted at small business. It would be a simple, step-by-step guide to the relevant processes and provides easy access to common questions. BIS will work with Acas to develop such interactive guidance and ensure it meets the needs of users. A simple, one page guide could direct small businesses precisely where to look and the ways in which they may differ from the standard procedures outlined in the Code. This tool could be used by larger business, but it would highlight the existing allowances made for small businesses.

<sup>135</sup> In 2010-11, eight claims were dismissed because the employer was deemed to have complied with the *Small Business Code*. So far in 2011-12, three claims have been dismissed.

<sup>136</sup> *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (2012), available at [http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Documents/Towards\\_more\\_productive\\_and\\_equitable\\_workplaces.pdf](http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Documents/Towards_more_productive_and_equitable_workplaces.pdf)

<sup>137</sup> CIPD response, p. 4.

<sup>138</sup> CIPD response, p. 5.

<sup>139</sup> Nationwide response, p. 6.

5.26 A few respondents were concerned that the checklist model would create issues. It could encourage a ‘tick box’ approach and might cause confusion as it does not carry the same authority that the Code does. The small business situation is a special case which, along with other special cases, would be better addressed outside of the Code itself. On balance, the possibility of confusion is outweighed by the benefits to small businesses and the disadvantages of alternative solutions, such as lengthening the Code itself. BIS will work to ensure that this small business guidance minimises the identified risks. Any checklist created would need to emphasise that it is a tool rather than a document with legal status. The Code and BIS’s online guidance could reference the small business checklist tool to raise awareness.

### ***Substantive Changes: Distinguishing performance issues***

5.27 The most significant issue raised in terms of the content was whether performance should be treated separately from conduct. Though in all cases only a minority of respondents supported any substantive changes, this issue was the most frequently mentioned. Whether this should be addressed by changing the Code or Guidance depends on the relative costs and benefits. BIS has presented this issue to Acas, who have agreed to investigate it further. The other substantive changes suggested were either not considered worth changing or, as has already been discussed, are addressed in the Guidance.

#### **a) Performance Issues**

5.28 Respondents asked that performance issues be distinguished from conduct issues more clearly. The current language refers more to conduct issues and to some respondents, is therefore less suited to dealing with underperformance. The Code used to address performance issues separately from conduct, but in 2009, this element was removed as part of efforts to shorten and simplify Code.

5.29 Though the Code and Guidance do discuss performance issues somewhat, some respondents felt these two circumstances may be too distinct to be treated quite so interchangeably. A number of respondents highlighted that fact that performance issues differ significantly from conduct issues.<sup>140</sup> For example, investigations differ when performance rather than conduct is at issue. Where an employee is deemed to be underperforming, the situation

<sup>140</sup> E.g., ARC, ATL, BVCA, EEF, FRU, GMB, IoD, JIB, NUT, Prospect, RHA, TUC, UCEA, USDAW.

is often handled on a longer term timescale. Underperformance is often not considered deliberate<sup>141</sup> and may result from a health or personal issue. Initially, it is typically dealt with on an informal basis. BIS has discussed this issue with Acas in detail and have asked Acas to consider how performance and disciplinary procedures could be better distinguished and clarified.

## b) Grievances

- 5.30 A few respondents proposed a few changes to the Grievances section of the Code; however, these changes would be best addressed through the Guidance. One suggested possibility was to require employees initiating a grievance procedure to provide evidence for the employer to prepare a defence. At present, only an employer initiating a disciplinary procedure must provide sufficient evidence so the employee can prepare a defence. This rule is one-sided because an employer usually has far more resources to prepare a defence than an employee. In the case of a small business, however, the same imbalance of resources does not exist between employer and employee.
- 5.31 Other concerns related to ‘trouble shooting’ particular problems within grievance proceedings. For example, how to treat repeat grievances which the employer feels have already been addressed, or grievances brought by former employees. There is also no template letter in the Guidance for grievances. A few employers felt that the definition of a ‘grievance’ was unclear, with the result that an employee could raise one unintentionally. The definition of grievance is intentionally open, however, to accommodate the many different kinds of grievances that might be raised. As previously mentioned, there was an issue with grievances raised while a disciplinary action is in progress. Though the Code and Guidance propose putting the latter proceeding on hold, an employee could theoretically use a grievance to delay a disciplinary action. Only a handful of responses discussed any one of these points. An employer can choose, though, to continue proceedings simultaneously, even if the two are not related.<sup>142</sup> Overall, these are detailed issues that would be best addressed through guidance.

## c) Timescales

- 5.32 A small number of respondents felt the timescales were too vague. They were designed to be flexible, however, as the Code encompasses so many different situations and circumstances it would be impossible to prescribe a single timeframe. Specifying strict timescales is likely to increase procedural

<sup>141</sup> UCEA response, p. 36.

<sup>142</sup> Acas Code, para. 44, “the disciplinary process *may* be temporarily suspended in order to deal with the grievance.” (emphasis added)

risks for employers as well as employees. Acas could consider giving examples of how timescales might run in the Guidance.

### **Clarifications**

- 5.33 Respondents identified a few areas of ambiguous wording in the Code. There are inconsistencies in terminology and in relation to other resources. If the Code is to be amended, it makes sense to redraft a few ambiguous clauses simultaneously. In places, inconsistent, yet similar, terms are used.
- 5.34 Some terms seem interchangeable, but the fact that they differ leaves room for interpretation. The terms “where practical,” “wherever possible,” and “wherever reasonably practicable” all seem the same. The introduction to the Code states that issues should be dealt with “promptly,” yet in the main body of the Code, they are to be dealt with “without reasonable delay.” The Code uses word “persistently”, while the Guidance uses term “repeatedly.” Adopting the same term, or clarifying how they differ, would alleviate confusion.
- 5.35 It is also unclear, even in the Guidance, how often “persistently” or “repeatedly” is. Though there are too many factors involved to be prescriptive, the Code could give a few examples illustrating what that might mean. In one area, it may be simpler for employers to replace language from the Code with language from the Guidance. The Code states that employers and representatives “should” be involved in developing rules and procedures. To change the phrasing to that of the Guidance, i.e., “it is best practice” to involve both, would make the issue clearer while not adding any real length to the Code.
- 5.36 Though a grievance in parallel with disciplinary proceedings is addressed by the Code and Guidance, there is a question of whether it applies to redundancy proceedings. The Code does not apply to redundancy dismissals, but does to a grievance raised by an individual employee during such a proceeding. It may be worth making this distinction explicitly, though the Guidance may be a more appropriate place for it.
- 5.37 There was confusion about how a companion may contribute to proceedings. Workers have a statutory right to be accompanied by a companion in some instances. The Code states that a companion may respond on behalf of the worker to views expressed, but cannot have the right to answer questions on the worker’s behalf. Some respondents did not understand the distinction between the two. The Guidance does little to clear up the ambiguity: it says the companion ‘should be allowed’ to respond on behalf of the worker, but an employer ‘is not legally required’ to let a companion answer questions on behalf of the worker. The Code or the

Guidance should make it clear that responding to questions is one of the responses on behalf of a worker which a companion *may* do, but an employer has the right to insist that the employee answer. These issues represent minor clarifications to the Code for Acas to consider.

- 5.38 Separate to the Acas Code, an additional guidance document that could be made more accessible to businesses is the Government's Business Link guidance. This online tool has a few sections which discuss the dismissals process. Though the Business Link guidance is intended to mirror the Acas Code, there are places where this guide is misleading. Some of the wording is confusing and could be interpreted inconsistently with the Code. The Government has reviewed the guidance on Business Link which corresponds to the Acas Code. Amendments to reduce 'gold plating' and more clearly reflect the contents of the Code and Guidance will be published by mid September.

## **Conclusion**

- 5.39 The challenge for the Acas Code has always been how to create disciplinary and grievance procedures which are simple yet flexible. A balance must be struck between accessibility for any size business and the detail to adequately address the many different potential situations businesses of any size may face. According to respondents to the Call for Evidence, the current Code strikes this balance fairly well. The overall positive reception, the fact that many of the issues raised by respondents are addressed in the Guidance, and the downsides of frequent changes to the Code, mean no amendment should be made to the Code without carefully weighing the costs and benefits.
- 5.40 There are three particular areas, however, which would benefit from action. Raising awareness is needed, particularly among small businesses. There is a small business need for more accessible guidance which takes into account their size and resources. It should be clear that if an incident has or may seriously harm or impact the business an employer can move straight to final warnings. Targeted guidance could clear up confusion. Such a tool could link to the Guidance and Code, and possibly address awareness issues too. A further significant issue for Acas to consider is the need to more clearly distinguish the handling of performance and conduct issues and the means of doing so. Alongside this, we have identified some smaller clarifications for Acas's consideration.

## ANNEX A: List of Published Responses

| Organisation  | Acronym |
|---|---------|
| Acas  |         |
| ACCA UK SME Forum   | ACCA    |
| Age UK  |         |
| Association of Convenience Stores                               | ACS     |
| Association of Teachers and Lecturers                           | ATL     |
| British Chambers of Commerce                                    | BCC     |
| British Retail Consortium                                       | BRC     |
| Building & Engineering Services Association                     | B&ES    |
| Chartered Institute of Payroll Professionals                    | CIPP    |
| Chartered Institute of Personnel and Development                | CIPD    |
| Chartered Management Institute                                  | CMI     |
| Citizens Advice Scotland  | CAS     |
| Confederation of British Industries                             | CBI     |
| Discrimination Law Association                                  | DLA     |
| Electrical Contractors Association                              | ECA     |
| Employment Lawyers Association                                  | ELA     |
| Engineering Employers Federation                                | EEF     |
| Federation of Small Businesses                                  | FSB     |
| Forum of Private Businesses                                     | FPB     |
| Free Representation Unit  | FRU     |
| GMB   |         |
| Institute for Research into Organisations, Work, and Employment | iROWE   |
| Institute of Directors  | IoD     |
| Joint Industry Board  | JIB     |
| Lewis Silkin LLP  |         |
| Local Government Association                                    | LGA     |
| Mind  |         |
| NASUWT- The Teachers Union                                      | NASUWT  |
| National Association of Head Teachers                           | NAHT    |
| National Hairdressers Federation                                | NHF     |
| National Union of Teachers                                      | NUT     |
| Prospect  |         |
| Public and Commercial Services Union                            | PCS     |
| Road Haulage Association  | RHA     |
| Society of Local Council Clerks                                 | SLCC    |
| The Association of Recruitment Consultancies                    | ARC     |
| The British Private Equity and Venture Capital Association      | BVCA    |
| The Law Society   |         |

|  |       |
|--|-------|
| Thompsons Solicitors                                 |       |
| Trade Unions Congress                                | TUC   |
| Union of Construction, Allied Trades and Technicians | UCATT |
| Union of Shop, Distributive and Allied Workers       | USDAW |
| Unison   |       |
| UNITE  |       |
| Universities and Colleges Employers Association      | UCEA  |
| Welsh Government                                     |       |
| Working Families                                     |       |



## **ANNEX B: List of Resources**

The following sources of information were drawn upon in reviewing the evidence:

Acas (2009), Acas Code of Practice on Discipline and Grievance

Acas (2009), *Discipline and Grievances at Work: the Acas Guide*

Addison (2001), *The Economics of Employment Protection*, IZA Discussion Paper No. 381

Autor, Donohue, and Schwab (2002), *The costs of wrongful discharge*, Working Paper 9425. NBER Working Paper series

Bassanini and Venn (2007), *Assessing the Impact of Labour Market Policies on Productivity: a Difference-in-Differences Approach*, OECD Social, Economic and Migration Working Papers 54, OECD Employment Outlook 2007

Bassanini, Nunziata, and Venn (2009), *Job Protection Legislation and Productivity Growth in OECD Countries*, Economic Policy Vol 24, pp 349-402

Belot, Boone, and van Ours (2007), *Welfare-Improving Employment Protection*, *Economica*, Vol 74 No 295, pp 381-396

Bertola (1990), *Job Security, Employment and Wages*, European Economic Review No.34, pp. 851-886

Burda and Hunt (2011), *What Explains the German Labor Market Miracle in the Great Recession?*, Brookings papers on Economic Activity, Spring 2011

BIS (2012) *Dealing with Dismissal and Compensated No Fault Dismissal for Micro Businesses: Call for Evidence*

BIS (2012), *Dealing with Dismissal and Compensated No Fault Dismissal for Micro Businesses: International Case Studies*

BIS (2012) *SME Business Barometer*

BIS (2008), *Survey of Employment Tribunal Applicants*

Damiani and Pompei (2010), *Labour protection and productivity in EU economies: 1995-2005*, European Journal of Comparative Economics, Vol. 7, n. 2, pp. 373-411

Eberly (2011), *Is regulatory uncertainty a major impediment to job growth?*  
Treasury Note, US Department of the Treasury.

Ewing, North, and Taylor (2005), *The employment effects of a "Good Cause" discharge standard in Montana*, Industrial & Labor Relations Review, Vol 59 (1), Article 2

Frontier Economics (2012), *The Impact of Regulation on Growth: A Report*  
Prepared for the Department of Business, Innovation and Skills.

Griffith, Harrison, and Macartney (2007), *Product Market Reforms, Labour Market Institutions and Unemployment*, Economic Journal, Royal Economic Society, vol. 117(519), pp. C142-C166

Griffith and Macartney (2010), *Employment Protection Legislation, Multinational Firms and Innovation*, CEPR Discussion Paper No 7628

HM Courts and Tribunals Service: Annual employment tribunal statistics

Kugler, Jimeno, and Hernanz. (2002), *Employment consequences of restrictive permanent contracts: evidence from Spanish labour market reforms*.

MacLeod and Clarke (2009), *Engaging for Success: enhancing performance through employee engagement*. A Report to Government, Department for Business, Innovation and Skills

OECD (1997), *Implementing the OECD Jobs Strategy: Member Countries' Experience*

OECD (1990), *Labour Market Policies for the 1990s*

OECD (2006), *Boosting Jobs and Incomes: Policy Lessons from Reassessing the OECD Jobs Strategy*

OECD (2008), *Detailed description of employment protection in OECD and selected non-OECD countries*

OECD (2009), *Employment Outlook 2009*

Office for National Statistics – Labour Force Survey

Rahim, Brown, and Graham (2011), *Evaluation of the ACAS code of practice on disciplinary and grievance procedures*, Acas Research Paper, Ref: 06/11

Reed (2010), *Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance - A Report for the TUC*

'Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation,' Fair Work Act Review 2012

Venn (2009), *Legislation, Collective Bargaining and enforcement: Updating the OECD employment protection indicators*, OECD Social, Employment and Migration Working Paper No. 89:2009

Wells, B (2012), *Employment regulation, employment and growth: consideration of international evidence*, found at:  
<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/e/12-1147-employment-regulation-and-growth-international-evidence>

Williams, M., and Acas Research and Evaluation Section (2011), *Workplace conflict management: awareness and use of the Acas Code of Practice and workplace mediation—A poll of business*, Acas Research Paper, Ref 08/11

## ANNEX C: Table of Responses to Questions on NFD

*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. Taking these constraints into account, do you believe that introducing compensated no fault dismissal would be beneficial for micro businesses?*

|                                  | Yes       | No        | Unsure    |
|----------------------------------|-----------|-----------|-----------|
| Micro Business (9 staff)         | 17        | 12        | 12        |
| Small Business (10-49 staff)     | 4         | 6         | 4         |
| Medium Business (50-250 staff)   | 6         | 5         | 3         |
| Large Businesses (250 +)         | 3         | 2         | 2         |
|                                  | <b>30</b> | <b>25</b> | <b>21</b> |
| Business Representative          | 10        | 7         | 1         |
| Central Government               | 0         | 1         | 0         |
| Charity or Social Enterprise     | 2         | 9         | 1         |
| Individual                       | 7         | 16        | 3         |
| Legal Representative             | 3         | 3         | 0         |
| Local Government                 | 0         | 1         | 0         |
| Trade Union or Staff Association | 0         | 14        | 0         |
| Other                            | 1         | 7         | 1         |
|                                  | 53        | 83        | 27        |

Of the respondents who provided a response to the follow up questions on NFD, the responses are as follows:

*Would it be necessary to set out a process for no fault dismissal in:*

|             |    |
|-------------|----|
| Legislation | 43 |
| Acas Code   | 33 |
| Both        | 92 |
| Neither     | 25 |

*What type of compensation would be appropriate for a no fault dismissal?*

|   |    |
|---|----|
| A flat rate                               | 25 |
| A multiple of a week's or a month's wages | 86 |
| Other                                     | 22 |
| I don't agree with no fault dismissal     | 71 |

## ANNEX D: Table of Responses to Questions on Acas Code of Practice on Discipline and Grievance

Before this call for evidence were you aware of the Acas Code?

|     |     |
|-----|-----|
| Yes | 129 |
| No  | 17  |

Before this call for evidence were you aware that the statutory ('three step') dismissal procedures were abolished in April 2009?

|          |     |
|----------|-----|
| Yes      | 105 |
| No       | 32  |
| Not sure | 4   |

Are you aware that the current version of the Code, reflecting this legal change, also came into effect in April 2009?

|          |     |
|----------|-----|
| Yes      | 103 |
| No       | 31  |
| Not sure | 2   |

Has the new Code prompted you to review your organisational discipline and grievance policies and procedures?

|          |    |
|----------|----|
| Yes      | 57 |
| No       | 60 |
| Not sure | 16 |

Do you find the language of the Code easy to understand?

|                                |    |
|--------------------------------|----|
| 1 - very easy                  | 24 |
| 2 - easy                       | 57 |
| 3 - neither easy nor difficult | 43 |
| 4 - difficult                  | 15 |
| 5 - very difficult             | 3  |

Do you find the language of the Code appropriate for dealing with performance issues?

|          |    |
|----------|----|
| Yes      | 61 |
| No       | 45 |
| Not sure | 27 |

Have you used the Code when carrying out a disciplinary procedure?

|     |    |
|-----|----|
| Yes | 81 |
| No  | 46 |

If answer to question 12 is 'yes', did you find that the Code helped you to deal with the disciplinary issue?

|                         |    |
|-------------------------|----|
| 1 - helped a lot        | 28 |
| 2 - helped a little     | 27 |
| 3 - neutral             | 20 |
| 4 - was unhelpful       | 7  |
| 5 - very very unhelpful | 3  |

Do you consider the disciplinary steps set out in the Code to be burdensome?

|                |    |
|----------------|----|
| Yes - very     | 24 |
| Yes - a little | 31 |
| No             | 61 |
| Not sure       | 13 |

Do you consider that the Code provides sufficient flexibility in dealing with discipline and grievance issues?

|          |    |
|----------|----|
| Yes      | 62 |
| No       | 45 |
| Not sure | 26 |

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