IoD response to consultation on Ending the employment relationship

The IoD welcomes this opportunity to respond to the consultation document "*Ending the employment relationship*" issued by the Department for Business, Innovation & Skills.

About the IoD

The IoD was founded in 1903 and obtained a Royal Charter in 1906. It is an independent, non-party political organisation of approximately 45,000 individual members. Its aim is to serve, support, represent and set standards for directors to enable them to fulfil their leadership responsibilities in creating wealth for the benefit of business and society as a whole. The membership is drawn from right across the business spectrum. 80% of FTSE 100 companies and 60% of FTSE 350 companies have IoD members on their boards, but the majority of members, some 72%, comprise directors of small and medium-sized enterprises (SMEs), ranging from long-established businesses to start-up companies. IoD members' organisations are entrepreneurial and resolutely growth orientated. More than two-fifths export. They are at the forefront of flexible working practices and are fully committed to the skills agenda.

General comments

Policy relating to employment law is of the highest interest to the IoD and its members. Our surveys of members regularly show that excessive and burdensome employment regulations are one of their greatest concerns, and the area most in need of reform. Annual surveys of IoD members show that the regulatory burden is a top three issue for them (alongside tax and skills shortages) with employment regulation the area cited by the highest proportion of members (70%). Within that, the difficulties, risks, expense and time involved in dismissing someone for poor performance is the most problematic area of all. Our members tell us that the difficulty of dismissing someone diverts management resources away from running the business (a particular problem for small firms), wastes money which could otherwise be invested in the business, and deters them from taking on more staff.

Our comments in response to questions in the consultation document are below.

<u>Settlement agreements/protected conversations</u>

Question 1: Do you agree that these are the correct principles to underpin the use of a settlement agreement which is inadmissible in unfair dismissal cases?

In principle we support facilitating the use of settlement agreements, and the use of a statutory code as long as it is concise and straightforward. There is a risk that a statutory code will simply create more rules to be followed when dismissing someone, eg to give clear reasons for the offer, to set out clearly what the offer is and next steps if it is refused, to give a reasonable time to respond, not to exert undue pressure to accept the offer. All of these create scope for uncertainty and risk as to whether the obligation has been met. It is essential therefore the Code is kept as simple, straightforward and concise as possible, so as not to overload employers with yet more rules.

Given that an employment tribunal will have to take the code into practice when determining a case, there must be some potential sanction for not complying, but we are not clear what this would be – the consultation document only mentions the possibility of an employee resigning and claiming constructive dismissal (which is itself worrying, but in any event only covers constructive dismissal claims). It seems to us that a statutory code will create new grounds for claiming unfair dismissal – failure to follow the code – which do not exist at present. Might a tribunal also increase the amount of an award for unfair dismissal if the Code had not been followed in making a settlement offer? For those companies who have used compromise agreements in the past, they will now have to ensure they comply with the new Code of Practice. If the Code was too long or detailed and prescriptive, there is a risk that the policy could have the opposite of effect of that intended, by discouraging rather than encouraging use of settlement agreements.

There is also a risk that by only protecting against unfair dismissal claims, it will create a complicated legal situation. For example, a conversation with an older employee about their performance could be protected in the event of an unfair dismissal claim, but would not be if an age discrimination claim was added in. Similarly, a conversation or correspondence with an employee who is on long-term sick leave about dismissing them might be protected against an unfair dismissal claim, but not a disability discrimination claim. It runs the risk of creating an even more complex legal environment in which to dismiss someone. The Government should eliminate this risk and uncertainty by extending the protection to cover discussions with staff about retirement and about returning from long-term sickness absence.

We absolutely do not agree that an employee should be able to initiate the process. This will lead to spurious requests, and an expectation of a settlement offer from anyone who thinks they may be vulnerable to dismissal for poor performance or misconduct. It would not reflect current practice with the use of compromise agreements, which are proposed by employers not employees. Presumably an employer would have to follow a certain procedure in considering a request from an employee for a settlement agreement. If so, this will just add further regulation, burden and risk to the employer. This aspect of the proposal must be abandoned.

One of the proposed principles is that no undue pressure should be put on a party to accept an offer of settlement. However, the level of any financial offer could itself be considered undue pressure to accept it, as could a statement that it is a final offer which will not be repeated, or a deadline for acceptance of the offer. At the very least, it should be made clear in any Code of Practice that this would not be the case.

Question 2: Do you agree that model letters proposing settlement and a template for producing a settlement agreement should be included in a Statutory Code?

Yes we agree, for the sake of simplicity and certainty, and this is one of the most useful elements of the proposal. However, it will need to be made clear in guidance to what extent employers can depart from the model.

Question 3: If you currently use settlement or compromise agreements, what impact would these templates have on the costs to your organisation of using agreements?

Not applicable.

Question 4: Would model letters proposing settlement and a template for producing a settlement agreement be likely to change your use (increase / decrease / stay the same) – please give reasons

Not applicable.

Question 5: Do you have comments on the content of the model letters?

Guidance will need to help employers avoid discriminatory language in the description of unsatisfactory performance, conduct or attendance to avoid any suggestion of discrimination.

Guidance will need to explain that the tax free amount is subject to an upper limit, currently £30k. It must be borne in mind that many employees will have a contractual right to a notice period longer than the statutory minimum, and also that an employer may offer pay in lieu of notice.

Greater certainty is needed on some points, not just suggestions, for example, it should state a minimum period before termination, eg 2 weeks.

Question 6: Do you have comments on the content of the model settlement agreement and guidance?

We do not think it should be compulsory for an employee to obtain legal advice. If the employer does not pay for it, it will be an expense for the employee that s/he may not want to incur or be able to afford.

It is not clear to us why it is considered better to list all the potential claims being waived in the agreement itself rather than in guidance and with a blanket waiver statement in the agreement. Surely it is better to make the guidance longer by listing them, rather than the agreement itself? Moreover, the list is certain to grow over time, and it will be far easier to amend guidance than to amend the model agreement which it is said will be part of the statutory code – the code itself will have to be amended every time a new potential claim is created.

Question 7: Do you agree that the use of templates should not be compulsory?

Yes, we agree that employers should be free to use their own letters and agreements, but it is not clear how this will fit with the statutory nature of the proposed Code and the fact that it includes the templates. It adds to the overall impression that this is creating a rather complex legal environment.

Question 8: Do you think it would be helpful if the Government set a guideline tariff for settlement agreements?

No, definitely not. This should be left to individual employers to decide.

Question 9: What would you expect to be the impact of having a guideline tariff?

We fear that setting a guideline tariff will deter employers who do not wish, or cannot afford, to offer as much; that it will create uncertainty and risk if less if offered (whether it would constitute non-compliance with the Code) or indeed if more is offered (whether it would constitute undue pressure to accept the offer). We also fear that a future Government would yield to the temptation to increase the guideline tariff, in the way the maximum compensatory award in unfair dismissal cases has been raised over the years.

Question 10: If you do favour a guideline tariff for settlement agreements, do you have a view on the approach or formula that should be used?

We do not agree that a guideline tariff should be set, but we would take the opportunity to say we find some of the suggested factors on page 22 a bit unusual, eg "how difficult it would be to fill the post" (would this make the employer offer more or less?), and "the value of the employee to the organisation" (presumably low since they want to dismiss them, but again would this make the employer offer more or less?). In reality the key considerations are likely to be how much the company can afford, the likelihood of any claim being brought against the company, the perceived strength of any such claim, the likely level of any award, how much the individual was being paid, and where relevant the length of any non-compete restriction,

Question 11: Do you have a view on what level of tariff would be appropriate?

Not applicable. We do not agree that a guideline tariff should be set.

Unfair Dismissal – limits on compensatory awards

Question 13: Would the introduction of a cap of 12 months' pay lead to more realistic perceptions of tribunal awards for both employers and employees?

We support a cap of 12 months' pay for unfair dismissal claim. We believe it could help create more realistic perceptions of tribunal awards, in conjunction with other efforts to publicise the level of median awards. It would also send a strong signal that tribunal claims are not to be seen as a get rich quick scheme.

Question 14: Would the introduction of a cap of 12 months' pay encourage earlier resolution of disputes?

We believe it could do so by helping employees understand that taking disputes all the way to a tribunal decision will not bring them the levels of compensation that the current maximum might lead them to expect.

Question 15: Would the introduction of a cap of 12 months' pay provide greater certainty to employers of the costs of a dispute?

It could do so, by restricting the range of a possible award to a known amount.

Question 16: Do you support the introduction of a cap on compensation of 12 months' pay?

Yes we strongly support such a cap. However, we believe it should apply to the full award, not just to the compensatory element. By applying the cap only to the compensatory element it perpetuates the current misleading impression as to the maximum size of an award.

Question 17: Do you have any comments on the impact of this proposal on claimants?

The Impact Assessment shows that the proposal will have a very limited impact in terms of the number of claimants affected – just 6% of awards were above £30,000 in 2010/11.

Question 18: Do you have any comments about the impact of this proposal on employers?

A reduction in the maximum award could help encourage firms to employ people by reducing the fear factor if things go wrong, and make them more willing to dismiss for poor performance or misconduct. In a survey of IoD members earlier this year, they told us that a reluctance to make justified dismissals can be detrimental to other employees and protect poor performers, while the fear of a tribunal claim encourages a "pay off" culture.

Question 19: Do you have any other comments on the proposal?

No.

Question 20: Do you consider that the overall cap on compensation for unfair dismissal is currently set at an appropriate level (£72,300)?

The current level is much too high, and contributes to the fear factor in employing someone and in dismissing for poor performance or misconduct. The IoD has long been calling for a significant reduction to counter the more than fourfold increase made by the last Labour government in 1999. The excessive level of the maximum figure has only been exacerbated by the yearly above-inflation rises that have occurred, and which also need to be corrected.

Question 21: What do you consider an appropriate level for the overall cap, within the constraints of full-time annual median earnings (c£26,000) and three times full-time annual median earnings (c£78,000)?

We support a cap of one times annual median earnings. This would still be considerably more generous than if the 1999 level of £12,000 had simply been uprated each year in line with RPI (which the Impact Assessment shows has risen by 42% between 1999 and 2011). It would send a strong signal from the Government that it is pro-business, and is serious about helping employers at this critical time of faltering economic recovery.

We hope you find these comments helpful. For further details please do not hesitate to contact me.

Regards,

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