IoD response to Call for Evidence on "Dealing with dismissal and 'compensated no fault dismissal' for micro businesses"

The IoD welcomes this opportunity to comment and provide evidence on the topics in the BIS Call for evidence on "Dealing with dismissal and 'compensated no fault dismissal' for micro businesses".

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

1. 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.

2. This last point – the deterrent effect on employment growth – is of particular significance at the present time. It is essential that the Government takes decisive and radical action to promote growth in the economy, and especially employment growth. This must take the form of supply-side reforms, including significantly reducing the burden of regulation, and above all employment regulation. It will not do to tinker at the edges of the law. Radical reforms are needed if employers are to gain the confidence to hire people.

3. Whilst we welcome the recent change to a two-year qualifying period for unfair dismissal claims and the other tweaks to the law around employment tribunals introduced in April this year, and we support most of the proposals to be enacted through the Enterprise and Regulatory Reform Bill now introduced in Parliament, they do not go nearly far enough, and will take far too long to come into effect. Moreover, they must be set against some major additional burdens imposed on employers by the Coalition Government in its first 18 months – abolition of the Default Retirement Age, the Agency Worker Regulations, and the extension of discrimination law through the Equality Act 2010. The Government had the opportunity to reduce the impact of the Agency Worker Regulations and the Equality Act, but did not do it. It also had the opportunity to abolish the pointless and burdensome right to request time off for training, but did not do it. On top of this, it plans to impose new complexities, burdens and costs on employers through flexible parental leave, extending the right to request flexible working to all employees, and compulsory equal pay audits. All of this makes the Prime Minister's promise to "change the culture of regulation within Whitehall" sound hollow.

4. The World Bank *Doing Business* report 2010 showed that employing workers in the UK has become harder every year since 2007. UK labour market flexibility has slipped down the international league table from 17th in 2007, to 21st in 2008, to 28th in 2009 and to 35th in 2010. The UK is now behind European countries like Switzerland, Denmark, Ireland and the Czech Republic, as well as Australia, Canada and the United States on labour market flexibility.

5. The Government recently published the Report on employment law produced for the Prime Minister by Adrian Beecroft. It contains many excellent and well thought through proposals for improving employment law so that employers will be encouraged to hire more staff. Yet elements of the Government already seem to have rejected many of them, or is pushing them into the long grass with promises to review at some point in the future. The proposal that has attracted most attention is for compensated no fault dismissal. It is one of the subjects in the current Call for evidence. And yet the Secretary of State, Vince Cable, has appeared in the media describing the proposal as "nonsense" and "bonkers". We are astonished that he seems to have already dismissed the idea in the middle of a consultation on the subject, and it calls into question the purpose and value of consulting and asking for evidence.

6. We will present evidence in this response, based on a survey of our members, that there are real and serious problems with current dismissal rules which urgently need attention. If the Government enacted "compensated no fault dismissal, over a third of our members say it would contribute to their taking on more employees. This is the sort of evidence that the Government should listen to, and act upon.

7. Companies are subject to fluctuations in demand and other factors that mean they must be able to "right size" the business quickly in order to get back to profitability without delay, and create a platform for future growth. This means they need to be able to dismiss staff quickly, especially underperforming staff, without having to go through a long drawn out process which achieves nothing and only harms the business. Having a process for making quick and straightforward dismissals is not about creating a charter for unscrupulous employers to exploit and abuse vulnerable workers, but about creating the conditions in which business can succeed.

<u>IoD survey of members on dismissal procedures and "no fault dismissal"</u>

8. IoD surveyed its members on a number of the questions in the Call for Evidence, and related points. Over 1,100 members responded to the survey, of which 5% were from organisations with no employees, 35% with 1-10 employees, 26% with 11-49 employees, and 34% with 50 or more employees. The responses, and some of the comments made, are incorporated in our responses to the questions in the Call for evidence below.

<u>Summary of key points in the IoD response to the Call for Evidence</u>

9. Many of our members report significant difficulties with present statutory dismissal procedures. Almost 60% of respondents to our survey believe it is too difficult to dismiss for poor performance or misconduct. An even higher number (70%) believe it has become <u>more</u> difficult to dismiss for poor performance or misconduct over the last 10 years. Over 40% said they had been deterred from dismissing someone in the past 3 years because of statutory dismissal procedures. Significantly for this Call for Evidence, over a third of respondents said they have been deterred from <u>recruiting</u> someone in the past 3 years because of statutory dismissal procedures.

10. The problems with the present statutory dismissal system cited by IoD members include: the time, burden and cost for the employer, the minimal disincentive for employees bringing a tribunal claim, the particular problem of discrimination laws, and the feeling that the balance of employment law has shifted too far in favour of the employee. The impact of these difficulties for IoD members are that it diverts management resources away from running the business, it discourages growth in employment, it adversely affects other employees and the business generally, it protects poor performers, it encourages use of other less protected forms of working or non-UK employment, and it encourages a "pay-off" culture which can lead to grossly unfair outcomes.

11. These problems require substantial changes to the law.

12. Employers must be assured that compliance with the Acas Code of Practice on disciplinary and grievance procedures means they cannot be found guilty of unfair dismissal on procedural grounds – this is not the case at present. The Code also needs to be shortened and simplified, to distinguish between minimum requirements and good practice, and to incorporate clear timescales.

13. We support the introduction of Compensated No Fault Dismissal for all employers, not just for micro employers. More than three-quarters of respondents to our survey considered it would reduce the burdens on their organisation (34% strongly agreeing), while just 11% disagreed. This view was felt most strongly among firms with 100-200 employees (86%) and 11-50 employees (84%), suggesting that the Government should not be considering confining the system to micro businesses. Most importantly for this Call for Evidence, more than a third (36%) of respondents said compensated no fault dismissal would contribute to their organisation employing more new employees than would otherwise be the case. Fewer respondents considered that Compensated No Fault Dismissal would contribute to their organisation dismissing someone than would otherwise be the case (26% compared to 36%) – and these dismissals would be of employees with poor performance/misconduct, who one would expect to be replaced by new hires.

14. There would be benefits in such a system not just to employers, but to other employees – both existing and potential employees, to the economy through better business efficiency and productivity, and to the taxpayer in not have to fund so many tribunal cases.

15. The international case studies published by BIS in the course of the Call for Evidence, do not seem to add a great deal to the debate in the UK partly because of the differences between the legal changes in the three countries and partly because of the different context in which those changes were made. Nevertheless, the German experience shows that an exemption from unfair dismissal laws can be accepted in a country which, according to the Secretary of State[1], has "a model of employee relations where they treat their employees as a resource, an asset".

16. Our detailed responses to the questions posed in the Call for evidence are set out below.

17. One further point, in relation to the process the Government is following. We are concerned that the Government is increasingly using a two-stage approach of issuing a "call for evidence" followed by the more customary consultation document. It means the process of reforming the law takes even longer than before. We call on the Government to fast track the process with the current Call for evidence by quickly publishing its response and holding a shorter consultation than the usual 12 weeks, leading to legislation at the earliest opportunity,

Questions on the Acas Code of Practice on Discipline and Grievance

Question 1: Before this call for evidence were you aware of the Acas Code?

The IoD survey found high awareness of the Acas Code (even among micro-employers), and high compliance with it, though less awareness of the consequences of non-compliance.

Asked whether members were aware of the Acas Code prior to participating in the survey, 82% of respondents said they were and 18% said they were not (rising to 25% of those with 0-10 employees).

79% said they had ensured their dismissal procedures comply with the Acas Code (falling to 67% of those with 0-10 employees). 12% said they had not done so (rising to 25% of those with 0-10 employees). 9% did not know.

58% of respondents were aware of the potential 25% uplift for failure on the part of the employer to comply with the Code, while 42% said they were not (rising to 47% of those with 0-10 employees).

[1] Vince Cable speech "Reforming employment relations", 23 Nov 2011

These figures suggest that there is still some work to be done in raising awareness of the Acas Code, and especially of the potential consequences for non-compliance.

Questions 2 to 15. We did not survey members on the 2009 changes to the Acas Code or the use and contents of the current Code. However, what came through loud and clear from our survey is the pressing need to simplify and shorten the process for dismissing someone. The law is too complicated and too uncertain, and is a source of great frustration for many. The Government could make a real difference here by significantly simplifying the law and improving the Acas Code so that it plays the key role in setting a minimum process.
We have the following comments in relation to the present Acas Code.

(1) One of the problems with dismissal law is that compliance with the Acas Code does not necessarily make the dismissal procedure fair. A tribunal will only "take the code into account when considering relevant cases". This is not nearly clear or certain enough. Employers should have assurance that following the Code's procedure will mean that the dismissal is fair from the point of view of procedure, as seems to be the case with the Australian Small Business Fair Dismissal Code (see below).

(2) The Code should clearly distinguish between what is essential for a legally-compliant procedure, and what is simply good practice for the sake of good employee relations or for the sake of the employee who is threatened with dismissal. As it is presently written, an employer cannot know for example whether he must involve employees/representatives in developing his own procedures, whether different people should carry out investigations, hearings, appeals, whether a written warning is needed etc.

(3) The title of the Code is not helpful. The term "disciplinary procedures" conjures up the idea of some form of sanction applied to an employee for misconduct. There are two problems with this. First, the term "disciplinary" is not suitable for issues around poor performance. Second, from the title it is not immediately obvious that it covers dismissals.

(4) The Code needs to be shortened with irrelevant elements removed. For example, the Foreword and introduction could be merged and reduced to one page stating what the Code is and why it is important. There is no need for information on its passage through Parliament, references to the 25% adjustment are repetitious, references to independent third parties are not appropriate for small employers, references to the longer Acas guidance are too wordy, most of the points in paragraph 4 are repeated in the next section, yet it is nkt a summary of the process to follow (which would be useful).

(5) It should contain clear minimum timescales eg for holding meetings, allowing improvement, issuing a final warning, so that an employer knows for certain what is acceptable.

(6) Greater clarity is needed on summary dismissal, eg when it is allowed, what process should be followed, whether a meeting needed?

(7) We do not agree that an investigation and disciplinary hearing should be carried out by different people (paragraph 6). It would mean the hearing will be based on second hand information/knowledge, and the person conducting the hearing may not be able to respond to questions/points made by the employee.

(8) Paragraph 16 (rights of companion) is too prescriptive. What's the difference between responding on behalf of the worker to any views expressed (allowed) and answering questions on the worker's behalf (not allowed)? It suggest the law in this area needs to be simplified.

We have other more detailed comments on the current text of the Code which would be keen to share as part of a review of its contents.

Question 16 Does the Australian Small Business Fair Dismissal Code provide a useful model for the UK?

Some elements of the Code could provide a useful model for improving the Acas Code of Practice (see below), in particular the fact that compliance with the Code is sufficient for a having a fair procedure, and its brevity. But we would not see it as a substitute for a more thorough-going reform of UK dismissal laws through Compensated No Fault Dismissal.

Question 17 Please provide any further comments on the Australian Small Business Fair Dismissal Code.

Although the Australian Code is very concise, an employer seeking to dismiss someone would still have to use one of the permitted reasons, with the consequent risk of legal challenge, and would still have to go through a process which involves giving a warning and an opportunity to respond and to rectify the problem, possibly providing training, allowing the employee to be accompanied during meetings, and compiling evidence in the event of a legal challenge. Such an approach in the UK would do little to mitigate the problems of the current statutory dismissal system, described elsewhere in this response. We would not see it is as a substitute for Compensated No Fault Dismissal.

The Australian Code could though serve as a model for improving the Acas Code of Practice for disciplinary and grievance procedures. For example:

- Following the Code means a dismissal will be fair. Unfortunately, this is not the case in GB under the Acas Code.

- It involves just one warning, rather than the series of meetings and warnings envisaged in the Acas Code and on the BusinessLink website

- It provides some useful guidance on summary dismissals, ie the fact that an allegation to the police is sufficient

However, in some respects the Australian Code is too short, and would not give employers enough certainty if it was used as a model for the UK. For example, how long should an employee be given to rectify the problem? What evidence is needed to back up the reason given for dismissal?

On a more general point, it is quite difficult to comment on the usefulness of the Australian Code without knowing how it differs from the procedure that must be followed by larger employers. It would also be very helpful to know how the Checklist is used when deciding the validity or merits of a legal challenge to a dismissal by a small business – are the employer's responses simply taken at face value, or can an employee challenge them, eg whether a clear warning was given, whether enough time was given to improve performance, whether performance subsequently improved?

Questions 18-19 We did not survey members on any differences between their internal procedures and the Acas Code.

Question 20 If you have any further suggestions to improve awareness and understanding of the Code, please describe them here.

Our survey of members showed relatively high awareness of the Acas Code - 82% of respondents overall, and 75% of those with 0-10 employees. However there was less awareness of the potential consequences of non-compliance - 58% were aware of the 25% uplift for failure to comply with the Code, and 53% of those with 0-10 employees. This suggests more need to be done to raise awareness, and especially of awareness of the consequences of non-compliance.

BusinessLink is an excellent source of informationon employment-related issues. It is quite easy to find the section on dismissals on the BusinessLink website, and there are references to the Acas Code within these pages, and links to it. We do not know levels of awareness of BusinessLink, or the extent to which it is used, but we suggest focusing on raising awareness of BusinessLink, rather than the Acas Code

specifically, and ensuring maximum consistency between what BusinessLink (or any successor website) says on dismissing employees and what the Acas Code says (see the next question/answer).

Question 22 Any other general comments on the Code.

There are some differences between the guidance on BusinessLink and what is in the Code. For example, BusinessLink lists factors that tribunals are likely to consider in deciding whether an employer acted reasonably in dismissing someone. Not all of these are in the Acas Code, while some points in the Acas Code (eg prompt and consistent actions) are not on BusinessLink. Under "Capability and Conduct Dismissals" BusinessLink advises three meetings before holding a "full disciplinary hearing". Apart from being excessive, it is quite different from what the Code says. We suggest reviewing the contents of the BusinessLink pages and the Acas Code together, with the aim of making the two as consistent as possible, and signposting from BusinessLink to the Code as clearly as possible.

Evidence topics for the Acas Code

A. Levels of awareness and understanding of unfair dismissal law and the Acas Code
Our survey showed high awareness and understanding of unfair dismissal law, even among micro-employers. This is true of both the grounds for dismissal and the procedure for carrying it out:

86% of respondents said they understand the grounds for dismissing someone (38% strongly agreeing), while only 6% said they did not. 78% of those with 0-10 employees said they understand.

88% of respondents said they understand the procedure that must be followed (45% strongly agreeing), while only 5% said they did not. 81% of those with 0-10 employees said they understand.

Our survey also showed high awareness of the Acas Code (even among micro-employers), and high compliance, though considerably less awareness of the implications of non-compliance:

82% of respondents were aware of the Acas Code of Practice, 18% were unaware of it (25% of those with 0-10 employees).

79% had ensured their dismissal procedure complies with the Acas Code (67% of those with 0-10 employees) , 12% had not (25% of those with 0-10 employees), 9% did not know.

58% were aware of the 25% uplift for failure to comply with the Code, 42% were not (47% of those with 0-10 employees).

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

Our survey showed that:

44% of respondents have a dedicated in-house HR/personnel team or individual, 24% with a team, 20% with an individual.

29% of respondents source HR support from an external organisation or consultancy.

39% have no dedicated internal or external HR support (68% of those with 1-10 employees).

A comment that was made by a number of respondents was in relation to HR legal advice provided through legal expenses insurance. The problem is two-fold:

(1) If the insurance is to cover the cost of legal representation at a tribunal and any award, the advice must be strictly followed. A number of IoD members have commented that the advice given is designed to minimise the possibility of any claim, and so to protect the insurer rather than the employer.

(2) In other cases, the insurer says it will only pay to settle a case, not to cover the legal expenses of defending a tribunal claim. So, it promotes a "pay off culture" – on which see comments on page [##] below.

The following are some comments from members on this point:

"I've seen some cast iron dismissal cases for undeniable gross misconduct which the personnel advice was to mitigate to a final warning."

"I can give an example of an employee who drove a company car when inebriated to the extent of being three times over the limit, crashed and wrote the car off, was prosecuted by the police and convicted, fined and banned. He was dismissed but went to the Tribunal. The insurers offered him £15k to settle, which he accepted. Quite unbelievable."

"Sometimes the insurance scheme allows the employer direct access to a qualified employment lawyer and that is usually OK. However very many use poorly trained staff who are very cautious (even when the case is good) and not commercial."

"the so called specialist personnel advice companies are only there to look after themselves and not the company they are supposed to be advising. They are quite happy to take your money and give you letters that you must send out and rules you as an employer must obey, but when it comes down to getting rid of someone for what seems to be a cast iron reason, evidence sometimes built up over a number of years, they usually find a reason not to take the final decision and terminate the employees contract of employment."

"Good advice is all that is required but sadly many fixed-fee employment law consultants are risk-averse and advise their clients not to take any action towards dismissal."

"Against my will our insurer has done this [settled rather than paying to defend the case]. In my experience it is the insurers taking short term cheap settlements that have done most to encourage the "pay off culture"."

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

A high number of respondents to the IoD survey believe it is too difficult to dismiss for poor performance or misconduct, twice as many as those that do not. And an even higher number believe it has become more difficult to dismiss for poor performance or misconduct over the last 10 years:

59% agreed it is too difficult to dismiss for poor performance or misconduct (29% strongly agreeing), while 30% disagreed. Perceptions of difficulty rise with size from 57% of those with 1-10 employees, to a peak of 75% of those with 26-49 employees, then gradually diminishes.

70% agreed it has become more difficult over the past 10 years (41% strongly agreeing), while just 12% disagreed. This holds true for all sizes of business.

Given the high proportion of respondents who said they know and understand the law on unfair dismissal, this perception of the difficulty of dismissing someone is not based on ignorance of the law.

A significant number of respondents said they had been deterred from dismissing someone in the past 3 years because of statutory dismissal procedures:

41% agreed their organisation had been deterred from dismissing someone (15% strongly agreeing), while 29% disagreed.

Significantly for this Call for Evidence, just over a third of respondents said they have been deterred from recruiting someone in the past 3 years because of statutory dismissal procedures:

34% of respondents agreed that their organisation had been deterred from recruiting because of statutory dismissal procedures (15% strongly agreeing), while 41% disagreed.

We set out below the main difficulties with the current dismissal system cited by IoD members in our survey, together with selected individual comments from members.

(1) It is very time-consuming and onerous for the employer.

It involves a long, bureaucratic, stressful process of up to a year, collating evidence, issuing warnings, holding meetings, giving time to rectify the situation, making sure all procedures are complied with; and then an even longer process if a tribunal claim is made.

"A long process of verbal and written warnings all carefully documented en route to a tribunal which sympathises with the employee and forgets any rights and wrongs in giving the employee compensation whether or not it is deserved."

"At least 6 months to dismiss for poor performance by the time all procedures followed and chance given to improve. Meanwhile employee is demotivated. Also proving poor performance is far too onerous on employer even when facts are clear."

"As a small business it is too draining to try to dismiss based on poor performance."

"Common sense has gone out the window, it is all about ticking boxes to be seen to do the correct thing rather than being able to work through an issue and getting a result."

"Excessively prescriptive guidance has greatly increased the potential for 'technical error' in process."

“have to be very careful, when you know the decision is right (for both parties), so waste peoples time in managing a long process with an inevitable outcome.”

“I feel very strongly about this issue. It is far too hard to dismiss an employee. No good businessman would dismiss a good employee. It restricts quality business best practice as the law stands”

“I have skill base in being very pedantic so can follow proof for poor performance procedure; shortest time 11 weeks most take a year to prove in following procedures. Most in my company will not do this labour intensive procedure as it is complex, tiresome and hard to manage.”

“In a small company - say up to 50 employees, it is not only the sheer hassle involved but the stress & strain of knowing that the implied threat of unfair/constructive dismissal is likely to result from any/all intentions to discipline leading to procedures to dismiss.”

“I understand there is a system and procedure to follow but equally know it is so complex that I could easily trip up and fall foul at one of many hurdles”

“In my experience there is a fear of dismissal arising due to failure to follow process to the letter: a tendency to presume that a claim will automatically arise”

“In previous roles, I have successfully dismissed personnel for poor performance – it was the time that it took that was crippling.”

“It has always been difficult - the verbal/written warning process alongside weekly objectives agreed with the individual is time consuming and can impact the morale of others”

“It has become a lengthy and expensive procedure getting rid of disruptive or non performing staff”

“It is a mine field one wrong step on the part of the employer and the law falls onto the employees side and leaves the employer with either a bad employee or a bad dose of penalties. It is ridiculous...there should be no law against hiring and firing staff it is ludicrous that we as employers do not have the right to hire who are right for our company.”

“It is almost impossible for a SME to dismiss an employee without making them redundant. It is even almost impossible for an employer to dismiss a thief”

“It is often difficult to deal with the overhead of the process that has to be followed, it is stressful for both manager and the employee and it would be better if a "no fault" process could be established that was fair and would expedite the process.”

“It is significantly harder for SMEs to know how to dismiss correctly unless they use an HR provider. Solicitors are far too cautious and more expensive”

“It is way too difficult and indeed costly to dismiss people which is detrimental to the employer, employee and their colleagues and to business in general”

“It seems almost impossible to dismiss a long term employee despite having systems in place.”

“It's not "difficult" but I would argue for a less bureaucratic process. Many small businesses worry that if they get any small part of the process wrong then they are wide open to "unfair dismissal" litigation. It's this aspect that provokes many to claim "it's too difficult".”

“It's often easier to make a position redundant. The formal process takes a very long time and can create schism in the workplace”

“Often the need to follow a very rigid and defined policy in order to make sure all the boxes are ticked from an ET viewpoint, make the process less flexible and employee/employer friendly sometimes hampering a common sense resolution.”

“The frustrating thing about the process is that, whilst it is not difficult to dismiss an employee who genuinely and consistently fails to perform, it is a very long-drawn out process.

“The increasing use of the Tribunals by dismissed employees now requires employers to be much more circumspect in making these decisions today.”

“The only time I've had to dismiss anybody it proved much easier to concoct a redundancy scenario.”

“The problem is in the amount of management time which needs to be allocated to monitoring and appraising personnel in order to be eventually on good grounds if proceeding to dismissal for performance or misconduct.”

“To manage out an employee requires significant records to build up evidence. In practice many people start to do this when they want to actually remove someone.”

“Very bureaucratic and Slow approach which is not Helpful for both sides - employee and employer”

“We have successfully dismissed staff on lack of capability grounds and on poor performance. It's a case of methodically recording the problems, fairly treating the employee with opportunities for extra training, consideration of other ways in which the

staff might be retained, following due process and in the end if no improvement and no reasonable solution dismissal can be fair. It is however a process that takes several months."

"When you say difficult, it is not technically difficult just exceedingly time consuming"

"Whilst employees can be dismissed for poor performance it is sometimes a long drawn out process and spurious counter claims by an employee can muddy the waters"

"Without professional advice from qualified employment lawyers it is almost impossible for an SME to take dismissal action and be reasonably certain that the dismissal will not land the employer in an Industrial Tribunal hearing."

"It's not so much that it deters me from dismissal, it's just that it makes the process so much more stressful, often more unpleasant for the employee (e.g. things have to be done in an overly formal way, to try to protect us, rather than in a more compassionate and 'casual' way), and certainly more expensive"

"The time it takes to get a successful dismissal through is very costly. The member of staff know they are going to leave during this time so are unproductive or a liability. You still have to pay them for weeks until everything is completed and they go. Anyone that is a marginal option to employ is not employed. The matter is more difficult again when it relates to women or ethnic minorities."

"We have continued to manage the performance of employees and dismiss them where necessary, but the hoops we have to go through to achieve the end are extremely time consuming and therefore expensive."

(2) It can be very costly for the employer.

"From my own experience, I started to performance manage a poor performer...where upon they made a complaint re bullying and harassment. The B&H was formally investigated by independent third parties...dismissed...appealed...and dismissed again. The employee then took the organisation to an Employment Tribunal...finally, it was decided that it would be cheaper and easier to settle (which is what the employee was after all along)...so the end result: got rid of the employee...but it cost over £80,000 plus nearly £100k in legal costs, huge waste of time (over a year), stress and massive disruption to the business. Altogether a nightmare..."

"I have spent £25 000 in past year on proven poor performance and proven misconduct."

"This is particularly concerning for small - medium sized businesses where recruitment decisions are vital, difficult to get right, and very expensive to correct"

"Despite having in-house and external HR resources, with the current law we would still seek specialist solicitor's advice before dismissing an employee and the cost of this can be prohibitive"

"I have never dismissed an employee, only asked them to leave in return for several months pay. Not satisfactory."

"Given the cost of defending tribunal claims we have previously settled claims in the order of £5,000 to £20,000 to avoid both the legal cost and management time cost of defending claims. All of these were claims where we had good defences."

(3) There is little or no disincentive for the employee to bring a tribunal claim.

"It's too easy for the employee to claim unfairness, though I think it's not too difficult to win at ET - but it can be expensive and time consuming"

"The key is inequality; a dismissed employee can take action with no downside whereas the employer always experiences downside even if the employee's claims are unfounded. Clearly employees need defending against large corporations, but should be on a pretty even footing with small employers. I find more and more that small businesses have to insure against employee action."

"The system is too one sided - tribunals are at no risk to the employee"

"Unfortunately the dismissal laws are designed with a bureaucratic mentality and they're ripe for gaming. Even if a wilfully spurious claim is brought there is no penalty for the employee and significant cost for the employer."

"We have had ex-staff handing in their notice and bringing a claim just for 'fun' to burn our money and cost them nothing. They all know how to do this and are using the system."
"we regularly advise clients to pay off employees to avoid tribunal costs even where the employee is 100% in the wrong."

"We would always go the compromise agreement route. Although we have won a tribunal case it was a hollow victory – an unpleasant process for all involved, cost a fortune in legal fees and a huge distraction for management and time involved ridiculous."

(4) Discrimination laws are a particular problem:

“The balance has swung very much in the favour of the employee who, if minded, can easily construct fictitious/ malicious claims under topics like sexual/racial discrimination which are virtually impossible to defend. The principle of 'probation periods' has also been eroded with the proliferation of 'causes' that an employee could take to tribunal regardless of length of service.”

“Disability discrimination legislation and case law is complex and has made it more difficult/increased uncertainty in dealing with health & capability related issues.”

“Due to the age discrimination laws one of the most difficult areas of HR is having to take an older employee through disciplinary procedure if they don't want to voluntarily retire!”

“It is more difficult, but not because of dismissal laws but because of discrimination laws and the increase in the likelihood that people being strongly performance managed will claim bullying/harassment or discrimination.”

“The difficulty is fear of discrim ET cases not UD cases”

“The problem at the moment is the fairly loose arguments the employee can use (discrimination, constructive) where this is not part of the decision at all. Because of this the employer can end up incurring a lot of costs.”

In relation to discrimination claims, we noted with interest the statistics for proportion of employment tribunal claims won by the claimant recently deposited by the Ministry of Justice in the House of Commons Library. These showed that in the past three years less than a quarter (23%) of discrimination claims were won by the claimant, and just 20% in the current year to date. This compares with a figure of 49% of unfair dismissal claims won by the claimant and 65% of all claims. This suggests that far too many weak discrimination claims are being made. The fact that the employer has successfully defended more than three-quarters of claims is little consolation given the significant management time and cost involved in defending a claim at tribunal.

(5) A feeling that the balance of employment law has shifted too far in favour of the employee

“Balance has swung too far in favour of employee.”

“Employment law is heavily weighted in the employees favour and puts unreasonable demands on employers.”

“If employment tribunals often get it wrong (decision overturned on appeal) then an employer stands no chance unless (a) it's an open-and-shut case or (b) they employ expensive legal advice”

“No matter how tight your employment procedures are, the balance of risk always lies with the employer even if it is a clear cut case!!”

“Regulation and legislation over recent years seem to favour employees and make it harder for employers to dismiss.”

“The law has been modified but still the employee has the advantages irrespective of their behaviour. The onus is on the employer to make the case not the employee to provide the defence.”

“The law is now skewed in favour of the employee and poor performance seems to be acceptable in law”

“The rights of the employee seem to out strip those of the employer. Due to the pandering of the last Labour Government and European legislation.”

“The tide has turned too far - I understand protecting employees interests is good but not at the expense of being able to run a business properly. Poor performance must be able to be stopped.”

The impact of these difficulties for IoD members are:

(1) It diverts management resources away from running the business

“I have access to the rules on fair termination procedures, but would have to take significant time away from running the main business to ensure that I tried to conform to these procedures; and as i am a small business, this would have a deleterious effect on the day to day running of it. I would only resort to effecting a dismissal where clear evidence and agreement from the rest of my team indicated that we could not turn round the situation.”

“We have gone the redundancy route, even though when, from our viewpoint, we had an open and shut case. Management time taken in dismissal cases is colossal.”

“SME's simply don't have the time or the resources to waste time on employees who have already invariably caused them great problems and significant amounts of money. They simply want 'shot of the problem' as quickly and easily as possible. They have a business to run.”

(2) It discourages growth in employment

“Absolute policy of no employees to be taken on as no one can handle the grief of integration and management process involved and dealing potentially with a 'high risk problem'.”

“Fatuous Industrial Tribunal claims are costing industry £billions and are a deterrent to us employing additional staff.”

“[It] supports endemic conservatism in hiring and slower growth of the organisation. It also has a negative effect on an organisation when poor performers are seen to be getting away with it.”

“Rather than dismiss I have been forced to reach a 'Compromise Agreement' which cost money, profit and stopped further recruitment.”

“The rigidity of the system and the tendency to lean towards the employee and their rights rather than the employer restricts the creation of jobs in the UK.”

“This has been an increasing disincentive to employing people for 35 years”

“Employment law does restrict more employment opportunities being offered. Employers have to be really careful which makes the risk of getting it wrong too big for some employers to take staff on.”

“Employment law is really quite strict and that makes employers think very carefully before taking on a new employee, especially I think in the case of small businesses.”

“I now look for technology options first, instead of human resources”

“We certainly think very carefully before we take anyone new on and if they are less than perfect we won't employ whereas in the past we might have taken a chance and seen if it worked or not.”

“We're cautious about taking people on at the best of times, the rules make it unnecessarily hazardous”

“We have probably taken the view 'if in doubt don't' given current Employment law rather than giving a potential employee the benefit of the doubt.”

(3) It adversely affects other employees, and the business generally

“Employers, rightly or wrongly, believe that they have to lean over backwards to prove that they have extended every opportunity to the employee to relent and repent, irrespective of whether the situation is beyond recovery, and of the adverse effect on the morale of other employees who are having to bear the extra load created by the underperforming employee, or who are disgruntled by the failure of the management to properly exercise appropriate discipline. These situations are usually viewed as being matters involving simply the under-performing or misbehaving employee and his/her manager, but in fact it is the impact on the whole team of protracted uncertainty and unfairness which can be so debilitating to a business.”

“Businesses cannot stand still we have to recruit and we have to dismiss but it is wrong to allow some employees to not be dismissed for poor performance when their peers see them getting away with bad performance and nothing happens to them. It disincentivises others to do a good job and is very bad for morale.”

“Fortunately those employees whose performance and behaviour should have resulted in their dismissal have in the end left of their own accord, but not before the corrosive effects of their overstayed welcome has adversely affected overall company performance.”

(4) It protects poor performers:

“Dismissal rules protect poor performers which is wrong. we should be rewarding good work and replacing poor performers with people who want to work hard. It’s a lot easier at our USA location!”

“Employees in a 3 month trial period are impossible to dismiss even if they keep claiming sick days or poor performance. Employers in the Health Service are frightened to tackle employees, and tend more now to live with poor performance and accept deteriorating standards. This is contrary to what the Government claims. Work discipline and the will to work has been shot to pieces during the past 10 years.”

“Reform is needed to facilitate the dismissal of any employee at any time with simple and appropriate monetary award. Too many poor performing employees are able to escape dismissal simply because of the risks or perceived risks faced by the employer.”

“Whilst I believe I know when dismissal is justified, I'm always worried "what if I’ve missed something". The cost of being sued for unfairly dismissing someone whether I win or lose maybe greater than just putting up with bad staff!”

(5) It encourages use of other, less protected, forms of working or non-UK employment:

The risks and costs associated with employing someone cause business owners to use for example, self-employed contractors, interims, short-term and fixed-term contracts, and unpaid internships, or to employ people in other countries.

“Main deterrent is the sheer complexity of employment regulations: easier to have self-employed for all kinds of reasons.”

“Now using interims rather than increase permanent employees.”

“Rules to dismiss have encouraged more short term contracts, and unpaid internships.”

“This [ie dismissal laws] is only one small aspect of the case for not employing people due to employee biased rights legislation. We introduced a 'rent' not 'employ' policy five years ago to achieve a more flexible workforce.”

“This is why we try to operate outside this system by, where possible, contracting on a freelance basis.”

“This year we have decided to fully change from employed trainers to the use of contract self-employed trainers.”

“We have been forced to look at fixed term temporary contracts rather than permanent employment.”

“Would avoid actually hiring any staff as long as possible, stick to using outsourced labour.”

“I have moved all my manufacturing to China primarily because of UK labour laws”

“We need flexibility in our work force so we have to use an off-shore facility which we can turn off at our convenience. If it was easier to dismiss employees then we would undoubtedly recruit more in the UK.”

“The extra difficulty and costs of dismissing just add to the cost base of employing staff in the UK and increase the argument for moving jobs to other countries.”

“We will always outsource work (including abroad) as staff rights & benefits deter us from employing more people. It’s a huge risk these days so we avoid it where possible.”

(6) It encourages a “pay-off” culture:

In our survey we asked IoD members whether they thought there was a significant problem of a “pay-off culture” as it relates to employment regulation:

79% considered that the problem is significant or very significant, while just 7% did not.

More than half (55%) of respondents have been advised by lawyers that they had a good defence against an employee or ex-employee, but that it would be cheaper to settle than to proceed.

Almost half (48%) have paid off an employee who might otherwise have taken them to an employment tribunal, even though the company was confident of its case and felt that the pay-off was unjustified.

Members commented:

“I've paid off an employee to leave as it was cheaper in time and effort than going through poor performance dismissal proceedings and potential tribunals.”

“the biggest issue is no win no fee legal service which encourages a quick payment even if due process has been observed”

“No win no fee tribunal cases are too attractive for employees and carry no risk Employers will tend to pay out rather than waste time and further money going to court, on cases they would probably win.”

“We had a complicated situation involving an employee that started to perform poorly after she passed her probation period but also announced she was pregnant. She duly took her one year off, returned and soon began to again perform poorly. After a few months she again announced she was pregnant. Because of the nature of the person, it became clear that every disciplinary action was being viewed as sex discrimination (this despite we are 50% owned by a woman and 50% of staff at all levels are women). Prior to returning after her second period of leave she began to make claims and to try and inflame feeling so as, in our view (and our solicitor’s)to encourage an unfair dismissal. To cut a long story short, we settled out of court in order to avoid a tribunal. However, this was clearly a case where the system made it almost impossible for us to demonstrate that dismissal was

due to poor performance and to take action in a sufficiently timely manner to not become overshadowed by the maternity complications. The current system is unfair to employers and extremely difficult for small companies to deal with."

"As an HR consultancy we advise SMEs and we are regularly having to reach commercial settlements with claimants on behalf of our clients as the ET process is lengthy, costly in time and resources and it is impossible to predict the outcome!!!!!!!"

"Employees, Union Representatives and Lawyers are all aware that the management cost, HR cost, legal costs and potential final settlement mean that the Employer is virtually forced to pay off an employee when there is little or no grounds for the employee's action."

"Employment law seems to have tipped far too much in favour of the employee, so now the employer is often held to ransom. I faced this exact example last year where the claims were completely outrageous, but "it's your word against theirs" and "you could be unlucky in a tribunal" were the types of advice I received. I ended up having to pay this employee off via compromise agreement a ridiculous sum.....looking back - wish I'd risked it."

"It is a simple formula a barrister and solicitor for a Tribunal will cost for two days between £5,000 and £10,000, if you are at this point and you can settle for under £5000 then you pay off the employee."

"Lawyer advised that our local tribunal is so biased against employers that it would always be a huge risk to not pay off the employee. It cost me £5,000 plus legal fees to get rid of an alcoholic fantasist who had done serious damage to my business."

"Paid out £4000 during 2011, two cases which we were 100% confident of winning but the cost of attending court/solicitors would have been higher."

" The cost of defending a tribunal case (legal fees, management time etc) knowing that it will be very unlikely to receive any form of compensation back if one wins is excessive. The commercial reality therefore is that the case, where possible, is settled as this is a much more commercially viable option even if one knows that the case is very strong and so one is unlikely to lose."

"We have been Employment Law Specialists for 42 years and nowadays usually advise settlement irrespective of merit. Tribunals have become the plaything of ambulance-chasing lawyers and have lost their role of solving claims quickly, simply and informally"

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

From responses to our survey it is apparent that the main "benefit" of the current dismissal system is to force employers to put in place strong procedures for tackling poor performance or misconduct, which should serve to protect some employees from unfair decisions by some bad employers. But it is equally apparent that this is greatly outweighed by the problems created by the present system, as described above.

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

We did not survey our members on this question.

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

We did not survey our members specifically on differences in practice or in impact of employment disputes, but the following comments give an indication of the particular difficulties faced by small firms. It needs a certain set of skills to carry out effective monitoring and tackling of poor performance, and it is a fact of life that a small organisation is less likely to have these skills in-house, or the time and resources to devote to it.

"As a small business it is too draining to try to dismiss based on poor performance. Sometimes we have made comments; on occasions this has resulted in the employee deciding to leave."

"I have access to the rules on fair termination procedures, but would have to take significant time away from running the main business to ensure that I tried to conform to these procedures; and as I am a small business, this would have a deleterious effect on the day to day running of it. I would only resort to effecting a dismissal where clear evidence and agreement from the rest of my team indicated that we could not turn round the situation."

“In a small company - say up to 50 employees, it is not only the sheer hassle involved but the stress & strain of knowing that the implied threat of unfair/constructive dismissal is likely to result from any/all intentions to discipline leading to procedures to dismiss.”

“It is significantly harder for SMEs to know how to dismiss correctly unless they use an HR provider. Solicitors are far too cautious and more expensive”

“This is particularly concerning for small - medium sized businesses where recruitment decisions are vital, difficult to get right, and very expensive to correct”

“Without professional advice from qualified employment lawyers it is almost impossible for an SME to take dismissal action and be reasonably certain that the dismissal will not land the employer in an Industrial Tribunal hearing.”

“Too many small business owners have too much fear because the process is emotive and creates a difficult atmosphere by upsetting some work relationships. Ideally this should be externalised from the company, perhaps the Job Centre could offer mediation / assistance with outsourced HR services.”

Questions on compensated no fault dismissal

Question 23 Under a system of Compensated No Fault dismissal, individuals would retain their existing rights not to be discriminated against or to be dismissed for an automatically unfair reason. Taking these constraints into account, do you believe that introducing compensated no fault dismissal would be beneficial for micro businesses?

We surveyed IoD members on the system of Compensated No Fault Dismissal described in the Call for Evidence. Of the more than 1100 members who responded, **more than three-quarters (76%) considered it would reduce the burdens on their organisation (34% strongly agreeing), while just 11% disagreed.** This view was felt most strongly among firms with 100-200 employees (86%) and 11-50 employees (84%), suggesting that the Government should not be considering confining the system to micro businesses.

Question 24 If answer to question 23 is 'yes', who would benefit and why?

Based on the responses to our survey, the benefits would be:

1. To the employer, who would not have to spend the time and expense of proving poor performance or misconduct, or of defending a tribunal claim using expensive lawyers. Instead, such time and resources could be invested in growing the business.

2. To other employees, who would not have to bear the extra load created by the underperforming employee, or witness what they might perceive to be an under-performing or disruptive colleague apparently "getting away with it" while the performance/disciplinary procedures are being gone through.

3. To potential employees, for whom job opportunities will open up as a result of dismissing an under-performing worker. **In our survey of IoD members, more than a third (36%) said compensated no fault dismissal would contribute to their organisation employing more new employees than otherwise.**

Fewer respondents considered that Compensated No Fault Dismissal would contribute to their organisation dismissing someone than would otherwise be the case (26% compared to 36%). Given that these dismissals would be of employees demonstrating poor performance or misconduct, who one would expect them to be replaced by new hires.

4. To the dismissed employee him/herself, who will hopefully see that poor performance or misconduct will be swiftly dealt with, and so be less likely to repeat it in future.

5. To the economy as a whole thanks to better business efficiency and productivity resulting from rooting out poor performance, less wasted time and money, and investment of the savings in the business;

6. To the taxpayer, who would not have to fund so many employment tribunal cases.

Our answers to the "Evidence Topics for Compensated No Fault Dismissal" give further details on IoD members' views on this subject.

Question 25 Would it be necessary to set out a process for no fault dismissal in a) legislation, b) the Acas Code, c) both, d) neither?

In response to our survey of members, some expressed concerns about unscrupulous employers being able to dismiss on a whim or without following any process at all, and that this would be unfair for some employees. Consequently, we believe there should be some minimum process to be followed, but one that is much clearer, and considerably shorter, than the present confusing mixture of the Acas Code and tribunal case law. This need involve no more than one warning, and a defined period – we would

suggest one month – in which to rectify the problem, followed by dismissal with the normal statutory or contractual notice period if performance or conduct had not improved to the employer's satisfaction. This should be set out in a Code rather than legislation, but legislation should make clear that compliance with the Code would render the dismissal fair. The Code should also set out the grounds for summary dismissal without notice, and like the Australian Small Business Code, should include the sufficiency of an allegation of theft, fraud etc to the police. Adrian Beecroft's Report on employment law suggests there should be a short period for consultation between the employer and employee to see if an alternative solution to dismissal can be agreed upon, for example a move to a less demanding job at lower pay. Whilst this might be appropriate for larger firms, it would not be appropriate for all, especially for small firms.

Question 26 Any comments on process requirements. What would need to be considered when developing the process?

The criteria for developing a process should be:

- Clarity as to what is required and the timescale, so that employers can know whether they have complied and are not left guessing whether their actions were "reasonable"
- A short timescale so that employers can act quickly and decisively

Question 27 What type of compensation would be appropriate for a no fault dismissal?
a) a flat rate, b) a multiple of a week's or a month's wages, c) other, d) I don't agree with no fault dismissal.

Compensation could be at the same rate as statutory redundancy pay, as proposed by Adrian Beecroft in his report on employment law, or it could be at a modest premium to redundancy pay in recognition of the fact that the employer had not had to go through the normal procedure for dismissing someone, and was not running the risk of a tribunal claim for unfair dismissal.

The relationship between financial compensation and any restrictive covenant in the employee's contract would need to be considered. An employer should not be able to impose a non-compete clause without compensation that would adequately cover the duration of the non-compete period.

Question 28 Further comments on the above, including any comments on possible impacts on redundancy and redundancy payments.

By setting the compensation at the same level as redundancy pay or above, it will not have an effect on redundancy payments. If the compensation were set at the same level as redundancy pay or less, it would be likely to result in employers using the Compensated No Fault Dismissal option instead of redundancy.

Question 29 Any comments on the relationship between compromise agreements and the topics set out in this call for evidence.

We support the Government's aim of simplifying compromise/settlement agreements, and the process for making them, and we would want to see this introduced alongside Compensated No Fault Dismissal so that an employer could use a simplified compromise/ settlement agree to protect against discrimination or other types of claim outside the scope of Compensated No Fault Dismissal.

Evidence topics for Compensated No Fault Dismissal

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

IoD surveyed its members on the system of compensated no fault dismissal described in the Call for evidence. **Of the more than 1100 members who responded, more than three-quarters (76%) of respondents said it would reduce the burdens on their organisation (34% strongly agreeing), while just 11% disagreed.**

More than a third (36%) of respondents said compensated no fault dismissal would contribute to their organisation employing more new employees than would otherwise be the case. 34% disagreed with this.

The following are some comments from members on the idea:

"A good proposal-- we only dismiss employees who do not perform at work. Therefore, it allows us to run the company more efficiently, but would not increase the number of dismissals - just allow us to get on with it quicker"

"Depending on the cost per year of this approach (i.e. it not being too high) then this could be of interest. It could have the advantage of strengthening the employee base as we would have more opportunity to remove poor performers."

"Dismissal is about performance – those dismissed would have failed to do the job properly - I don't think the number dismissed would increase. I think the time scale and work involved would lessen."

"Fortunately we have only had a problem with one employee and we would not hope to be in a situation where we had to dismiss anyone else. But it would reduce our fears over employing someone that we were uncertain about."

"I don't think it will increase dismissals but perhaps timescales for dismissal will be shortened i.e. sooner rather than later."

"I hire the people I need for the levels of business. I fire the ones that don't work out and can't be developed. Anything that makes this process simpler I approve of and if it takes up less time, makes the business more profitable then I will be able to hire new people as the business grows."

"I don't think there would be more dismissals, I think some current poor performers would improve if they knew that was a possibility"

"If an employee needs to be dismissed we do so. The argument that if it is easier to dismiss people more employers will do so is spurious. The problem is that under current legislation doing the right thing is made more difficult."

"It would make budget planning a lot easier and take the grind out of HR issues"

"[it] would take the downside risk out of employing someone and is likely to encourage employers to take the plunge."

"yes We would dismiss more employees but they would be replaced by more suitable staff"

"The removal of the burden of dismissal would not create more jobs, but it would certainly give more opportunities to other staff members within the company if it was simpler to remove those who were under performing."

"Where we currently use compromise agreements, such as in cases where it is difficult or time consuming to demonstrate poor performance, this could speed up the process and make it cheaper."

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

We tested the level of support amongst IoD members for the form of compensated no fault dismissal described in the Call for evidence against an alternative model – one where the employee must agree to the dismissal but where the employer would be protected against any type of tribunal claim (including a discrimination claim). There was less support for this alternative model though, implying that IoD members would prefer to be able to unilaterally dismiss someone, even if that person may still be able to bring a discrimination claim.

Nevertheless, a number of survey respondents commented on the problem of still being able to bring discrimination claims:

"Age, gender, race, disability? There's still a lot of scope in there for mischief' makers and speculative claims"

"Concern that discrimination would then become the chosen route of challenge for those able to (i.e. not white male) with corresponding open liability. This could skew terminations decisions."

"Concerns about how a claim for discrimination arises. An agreement can be reached, and then suddenly you are facing a discrimination claim."

"Experience suggests that if there are avenues open for discrimination claims, the end result will still be claims which have to be defended. Model A [ie the version in the Call for evidence] would not appear to offer any real benefit unless it included much clearer definitions of discrimination and concrete ways of preventing spurious claims."

"My concerns are that dismissed employees tend to throw the "ageism" "racism" tickets around as they can get unlimited compensation and "it's worth a go". Would this solve that situation?"

"Plan would leave an organisation open to bogus discrimination claims; unlike Plan B [the alternative model]."

"The problem may be that difficult employees may well look for a 'discrimination' angle to get round this model."

"There could be more problematic discrimination based claims as this would be the only way dismissals could be challenged and employees might be encouraged to do that."

These concerns would be reduced by introducing a simplified form of compromise agreement which could be used alongside no fault dismissal, and also by taking other action to rein in the number of discrimination claims. To date, the Government has done little if anything to address concerns about discrimination claims.

The statistics on the proportion of employment tribunal claims won by the claimant recently deposited by the Ministry of Justice in the House of Commons Library are instructive. They show that in the past three years less than a quarter (23%) of discrimination claims were won by the claimant, and just 20% in the current year to date. This compares with a figure of 49% of unfair dismissal claims won by the claimant and 65% of all claims. This suggests that far too many weak discrimination claims are being made. The fact that the employer has successfully defended more than three-quarters of claims is little consolation given the significant management time and cost involved in defending a claim at tribunal.

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

(a) As noted earlier, more than a third (36%) of respondents to our survey of IoD members said compensated no fault dismissal would contribute to their organisation employing more new employees than would otherwise be the case, while 34% said it would not for their organisation.

(b) A simpler dismissal process could be expected to promote more effective job matching. As one member commented: "yes we would dismiss more employees but they would be replaced by more suitable staff". Another commented: "it would certainly give more opportunities to other staff members within the company if it was simpler to remove those who were under performing."

(c) We do not have any substantial evidence on the potential impact on employee motivation, commitment or engagement. Instinctively one would expect the greater threat of dismissal for poor performance or misconduct to engender greater motivation, commitment and engagement. As one member commented: "some current poor performers would improve if they knew that was a possibility". Any evidence that suggested the contrary should be examined critically. It would be interesting to know if there is any evidence of the impact on motivation etc of the German small firm exemption from unfair dismissal law. It could also be instructive to compare motivation and engagement in the US workforce with that of countries having stronger employee protections.

(d) and (e) We do not have substantial evidence from our survey on the impact on skills/training investment or on performance management, but again it would be interesting to know if there is any evidence of the impact in these areas of the German small firm exemption.

I. The impact on consumer confidence and credit provision.

We note assertions that have been made about a damaging impact on consumer confidence, but these assertions have been made without any supporting evidence. It would be interesting to know if the exemption for German small firms had a negative impact on consumer confidence or credit provision.

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

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

The Department for Business published some international case studies on dealing with dismissal during the course of this Call for evidence, and invited views on them.

Overall, the case studies do not seem to add a great deal to the debate in the UK partly because of the differences between the legal changes in the three countries – Germany, Australia and Spain – and partly because of the different context in which those changes were made.

The case studies of Australia and Spain were strange choices. The Australian "reform" in 2009 was in fact a tightening of the law applying to employers, and so was the opposite situation to what is being discussed for the UK. The Spanish example is not specific to small firms, so again its relevance is questionable. Nevertheless, we have a number of comments on the case studies.

Germany

This is the closest parallel to the idea suggested in the Call for evidence. Since 2004, establishments with less than 10 employees have been exempt from unfair dismissal law (but not discrimination claims). This seems to have led to a substantial and consistent reduction in the number of cases filed in labour courts – from a high of 620,000 in 2003 to around 450,000 in 2008 (a fall of 27%). Apparently though, it did not lead to above average growth in employment amongst small businesses. The document concludes "This trend suggests that the reform has not encouraged micro businesses to expand more quickly than larger businesses." It goes on to suggest that an unintended consequence of the change was to encourage the growth of temporary employment and the "further development of a dual labour market" as a result of the relaxation of rules around temporary workers in 2002. The document says it is also possibly the result of micro businesses using temps to keep below the 10 employee threshold. The point we would make is that the apparent lack of growth in permanent employment amongst small businesses following the exemption would not necessarily be replicated in the UK because of the different conditions here, especially the fact that temporary employment is already well-used in the UK and has been for many years. Even if it did lead to growth in temporary employment, this is still employment growth, and therefore to be welcomed. Temporary workers now have equal treatment with directly-recruited workers as a result of the Agency Worker Regulations.

We would also point out that the German experience shows that an exemption from unfair dismissal laws can be accepted in a country which, according to the Secretary of State[2], has "a model of employee relations where they treat their employees as a resource, an asset". In other words, such an exemption can co-exist with a positive approach to employees – the two are not mutually exclusive. So for the Secretary of State to describe the idea of Compensated No Fault Dismissal as "nonsense" and "bonkers" is a severe exaggeration, and seems incongruous with the Secretary of State's praise for the German model of employee relations.

Australia

As noted above, the Australian case study is a strange one to choose. In 2005 the previous Government introduced the *Work Choices* legislation which exempted business with <100 employees from unfair dismissal rules. In 2009 the Labour Govt replaced it with the *Fair Work Act* which made businesses with <15 employees subject to simpler dismissal rules – the Small Business Fair Dismissal Code cited in the BIS call for evidence. So there is no direct comparison with what is being considered for the UK – in fact the 2009 tightening of the law was the opposite of what we are talking about. Unfortunately, unlike the

[2] Vince Cable speech "Reforming employment relations", 23 Nov 2011

German case study, the document does not look at the impact on employment of the changes. It does look at the number of unfair dismissal claims, but they actually showed a steep increase after the 2005 Work Choices legislation came in. This needs some explanation, since one would expect the radical changes from *Work Choices* to have led to a sharp fall in claims. All in all, this is not a good comparator and of little value for present purposes.

Spain

The Spanish case study is also not particularly relevant. A 2002 reform sought to make it easier for all firms to dismiss without cause or process, but subject to relatively high compensation of up to 2 years pay. The effect was a significant rise in the number of dismissals, and large-scale use of the compensated "unfair" dismissal option to around 65-70% of all cases. Unfortunately the document again does not seek to analyse the impact on employment of the changes, although a graph near the end shows that Spanish unemployment fell steadily from 2002 to 2007, but has rocketed since then. One lesson that can be taken from the Spanish case study though is that employers will use a simplified dismissal process if given the chance, even if it involves relatively high compensation.
A more instructive case study than the Australian and Spanish examples would have been the USA, which is well-known for its "employment at will" approach.

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

Regards,

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