Ending the Employment Relationship

TUC Response to the BIS Consultation

Introduction

The Trades Union Congress (TUC) has 53 affiliated unions which represent approximately 6 million members working in a variety of sectors and occupations across the UK.

The TUC is firmly opposed to the government's proposals on ending the employment relationship. The government claims that the measures will encourage a more flexible labour market, enabling employers to recruit staff and employees to remain in employment. In practice the main effect will be to make it easier and cheaper for employers to sack employees.

The TUC recognises that compromise agreements are widely used in workplaces to resolve disputes swiftly and to avoid potential employment tribunal claims. However, in our opinion, the proposals on confidential negotiations will promote bad manage practices and are open to abuse by employers. They will send a clear signal that employers are free to sack staff for arbitrary reasons without the need to follow a fair procedure. The TUC believes that the proposals amount to little more than 'Beecroft-lite'.

The measures are also likely to have unforeseen consequences for employers. The complex rules on whether conversations and offers can be admitted as evidence at an employment tribunal will create uncertainty and confusion for employers and will generate lengthy and costly legal disputes.

The TUC is also firmly opposed to the government's proposals to reduce the limit for compensatory awards in unfair dismissal cases. These measures will mean that some employees will no longer be fully compensated for the unlawful actions of their employers. The TUC is concerned that the proposals will also disproportionately affect some of the most vulnerable in society, including the disabled and older workers. The proposal to link compensation to a single year's earnings will mean that the lower paid and employees who work part-time will also lose out.

It is a matter of serious concern to the TUC that the government has decided to legislate on these proposals before public consultation has been completed. Provisions implementing these measures are incorporated in the Enterprise and Regulatory Reform Bill, which is currently being scrutinised by the House of Lords, having already completed its passage through the House of Commons. It appears that the government is intent on driving through these proposals regardless of the findings from the public consultation and without having fully considered the implications for employers, employees and the wider economy.

Furthermore, the TUC is concerned that the government's proposals will do nothing to create jobs or generate growth. They will substantially increase job insecurity and undermine workforce morale. This in turn will damage consumer confidence and suppress demand in the economy – stifling rather than stimulating growth.

The proposals will also reduce the financial bill for those employers who adopt unlawful practices. This will create unfair competition for law abiding firms. The TUC therefore calls on the government to withdraw its plans.

Settlement agreements

The government claims that the proposed measures on confidential negotiations will make it easier for employers to open discussions with an employee where they perceive that the employment relationship is not working out. They will also assist employers and employees to reach earlier and more amicable settlements, avoiding the risk of employment tribunal claims.

The TUC does not agree and cannot support the proposals. In our opinion they will actively encourage bad management practices and will send a clear message to employers that it is acceptable to dismiss staff for arbitrary reasons and without having followed a basic disciplinary procedure. The plans do not reflect the reality of the workplace and the imbalance of power within the employment relationship. They are therefore open to abuse by employers.

The government's approach flouts the basic principles of unfair dismissal law. Employers will be free to initiate discussions about a settlement agreement before a formal dispute exists, with the result that many employees will receive no advance warning that they face problems at work. The consultation document and the proposed template letters confirm that the government expects – indeed is actively encouraging - employers to start discussions before commencing performance management policies or formal disciplinary procedures.

Whilst employees will have a theoretical right to turn the employer's offer down, many will have no genuine choice other than to accept the sum of money and leave their job. Many employees will agree to the offer because they will presume it is a foregone conclusion they will be subsequently dismissed if they do not. Others will fear that if they remain in the job they will be bullied and victimised.

The proposals for confidential negotiations will also have unintended consequences for employers, creating confusion rather than certainty. Employers are likely to develop a false sense of confidence that the new legislation will reduce the risk of ending up in an employment tribunal. In practice the proposals will have the exact opposite effect.

The TUC anticipates that the government's proposals will lead to an increase in claims for automatic unfair dismissal, discrimination, breach of contract or victimisation, etc. The protection afforded to employers by Clause 12 of the Enterprise and Regulatory Reform Bill will not apply to such claims.

Employers will also not have any certainty that conversations and offers will remain protected in unfair dismissal and constructive dismissal cases. Clause 12 makes clear that employment tribunals will be expected to take conversations and offers into account where an employer has 'behaved improperly'. The 'improper behaviour test' rightly provides protection for employees from bullying,

discrimination and victimisation by employers. However, it will also lead to lengthy and costly satellite litigation.

There is a serious risk that Clause 12 will generate a similar level of satellite litigation to that generated by the former statutory dispute resolution procedures. Whilst this may benefit employment lawyers; employees and employers will inevitably lose out. The TUC therefore believes that the government's proposals are misguided and that Clause 12 of the Enterprise and Regulatory Reform Bill should be withdrawn.

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?

As outlined above, the TUC believes that the proposals on negotiated settlements will prove seriously detrimental for employers and employees and should be withdrawn.

Failing this, the TUC recognises that an Acas Code of Practice may assist in deterring some good employers from adopting bad management practices when offering settlement agreements. We note however that as the Code will not be legally binding, it is unlikely to alleviate the worst effects of the government's policies.

If a Code is to be developed, the TUC believes it should include the following elements.

Firstly, **the Code should define the 'improper behaviour' test in very broad terms,** to include:

- Any form of discrimination on grounds of protected characteristics
- Any form of detriment, for example threatening to demote or relocate an employee if they will not agree to sign a settlement agreement
- Bullying, intimidation or undue pressure by the employer
- Any action which will amount to a breach of contract, including breach of the implied duty of trust and confidence
- Any form of victimisation, including that arising from the fact that the individual:
  - had raised a grievance
  - had raised health and safety concerns
  - was a union member, activist or a union representative
- Any undue pressure on the employee to agree to the settlement
- Where an employer provides inaccurate or misleading information

Secondly, **the Code should emphasise that settlement agreements should not be offered as a means of by-passing formal disciplinary procedures or effective performance management.** The Code should state that as a matter of good practice, settlement agreements should only be offered once a formal disciplinary procedure has started or been completed.

Thirdly, the Code should stress than **employees should not be offered settlement agreements for arbitrary or unfair reasons.**

Fourthly, given the serious nature of the confidential negotiations, the scope of abuse, the imbalance power between the employer and the employee, the TUC believes that it is essential that the Code makes clear that the **right to be accompanied by a trade union rep should apply to all discussions or negotiations with the employer on a settlement agreement.**

The presence of a union rep would help to reassure the individual, to safeguard against any mistreatment and to broker a fair settlement. The union rep should be entitled to represent, negotiate and speak on behalf of the employee. They should be able to challenge, and act as a witness to, improper behaviour by the employer.

Principle #1: The protection in legislation (inadmissibility of the offer in evidence to Employment Tribunals) only applies in Unfair Dismissal cases

The TUC agrees that the Code of Practice should clarify the limits on the rules relating to confidential negotiations. The Code should clearly state that the rules on protected conversations only apply to basic unfair dismissal cases but will not apply where an employee makes an employment tribunal claim on the basis that:

- the reason for their dismissal was automatically unfair
- they have been discriminated against
- the employer has acted in breach of contract – including by breaching the implied duty of trust and confidence, etc.

If the proposals on negotiated settlements proceed, it is incumbent on the government to ensure that the new rules are not open to abuse by employers and that employers cannot use them to circumvent basic statutory rights. To this end, the TUC believes that the rules should be limited to capability and misconduct dismissals and should not apply to redundancies and dismissals due to some other substantial reason.

In redundancy situations, there is a serious risk of abuse with employers seeking to use a protected conversation as a way of avoiding the need to carry out a fair redundancy selections or to negotiate a settlement which is far lower than the individual's entitlement under statutory or workplace redundancy arrangements.

The law also currently states that it is not possible for an employee to sign a compromise agreement in order to waive rights to collective redundancy consultation. This rule partly reflects the fact that the right to consultation pertains to recognised trade unions or workplace representatives. However, it

also ensures that all alternatives to redundancies are exhausted before individuals are made redundant. Clause 12 should be amended to confirm that the rules on protected conversation do not apply in redundancy situations, where consultation is still on-going.

The TUC is also concerned that employers will seek to rely on Clause 12 to dismiss staff for arbitrary reasons. For example, an employer who did not like an individual could initiate a protected conversation and make it clear that the individual has no future in the organisation in a manner which amounts to a fundamental breach of contract. The employer could then make a derisory offer which they know the employee will not accept. If the employee decides to leave, they may not be able to bring a claim for constructive dismissal as the fundamental breach of contract occurred during the protected conversation and cannot be considered by an employment tribunal.

The simplest way to avoid this situation would be for the ERR Bill to be amended to state that rules on 'protected conversations' will not apply where an individual claims constructive dismissal.

Principle #2: Either party may propose settlement

In most workplaces, conversations relating to a compromise agreement will normally be initiated by the employer. Where employees raise the issue of a compromise agreement, it is usually in response to comments from or actions by the employer.

However, given that the government's proposals will substantially weaken the rights of employees, the TUC agrees that the Code of Practice should state that either party take propose a settlement. In addition, the Code should state that employees should not be victimised or dismissed if they propose a settlement but no agreement is reached.

Principle #3: The reason for being offered the settlement should be made clear

The TUC agrees with this principle which is consistent with the rules on natural justice.

An employee will only be able to make an informed choice if the reason for the offer is clearly set out. It is also more likely that a settlement will be reached if it is based on an honest and open conversation.

Principle #4 Settlement offers should be made in writing and set out clearly what is being offered (e.g. settlement sum and if appropriate agreed reference) as well as what the next steps are if the individual chooses not to accept the offer;

The TUC agrees that settlement offers should be made in writing. This will help to avoid confusion and assist the employee to receive informed independent advice.

The employer should also inform employee in writing that they have a right to receive independent legal advice before being asked to sign the agreement. If the individual does not receive independent advice, the agreement will not be valid.

The Code should encourage employers to cover the costs of the legal advice, even though this is not a legal requirement. It is also good practice for the employer to provide a reference to the individual. This is consistent with the government's statement that the employee can leave employment with a sense of dignity. Wherever possible, the wording of the reference should be agreed by the parties as part of the settlement agreement.

The TUC is seriously concerned by the suggestion that the Code should set out 'what the next steps are if the individual chooses not to accept the offer'. This implies that employers will automatically initiate disciplinary / dismissal procedures if the employee turns an offer down. The Code should caution employers against this approach. It should also emphasise that employers must not victimise or discriminate against an individual because they have refused to accept an offer.

Principle #5: It would not be necessary for an employer to have followed any particular procedure prior to offering settlement

The TUC does not agree with this proposed principle. In our opinion it is inconsistent with established Acas policy, with the basic principles of unfair dismissal law and good employment practices.

The Code should state that it is good practice for an employer to follow a fair and transparent disciplinary procedure before making the decision to dismiss an employee. As a minimum, employers should carry out an investigation to determine whether there are grounds for dismissing the employee before offering a settlement agreement. The employer should also provide an employee with the opportunity to challenge the charges made against them and to set out any mitigating factors which may explain their conduct or performance. Undertaking these steps will have the added benefit of protecting an employer from subsequent successful unfair dismissal claims.

In addition the employer should also be expected to follow a fair process during negotiations on the proposed offer. For example:

- The employee should be given advance notice of a meeting with the employer, to enable them to seek advice from a trade union representative, to assess the case against them and to prepare their response.
- The employee should be notified in writing of the reasons why the employer is considering terminating the employment relationship, including specific concerns and evidence relating to their conduct or performance. Where the employer has gathered evidence, this should be made available to the employee and their rep. This will assist the employee to assess whether they should accept the offer.

- The employee must be provided with the right to be represented by a trade union representative or colleague at all meetings with the employer. This should include the right to request that a meeting is postponed to enable the individual's preferred representative to attend.
- The Code should set out guidance on how the employer should conduct negotiations, including providing examples of types of improper behaviour.
- The Code should emphasise that the employee must not be pressurised into accepting an offer at the meeting and must not be asked to sign any documents before they have received independent advice.
- Employees must be given plenty of time to consider whether they wish to accept an offer. The Code should state that employers should not impose unrealistic deadlines on employees.

If an employee refuses a settlement and the employer subsequently decides to start disciplinary action, a different manager should be responsible for conducting the disciplinary procedure. This will assist in reassuring the employee that the outcome of the disciplinary action has not been prejudged.

Principle #6: The Code will make clear that if an employer handles settlement in the wrong way (i.e. not as explained in the Code) there is a risk that this will give rise to a breach of the implied term of trust and confidence and allow the employee to resign and claim constructive dismissal

The TUC believes that this principle is fundamental and must be incorporated into the Code. It is essential that employers are aware that they are not free to mistreat their employees or to act in a discriminatory, bullying or arbitrary manner.

Principle #7: Where an individual refuses settlement, the employer must go through a fair process before deciding whether to terminate the relationship

This is also an essential principle which must be included in the Code. Employers need to be aware that the government's proposals do not give them the licence to circumvent unfair dismissal law.

The Code should also stress that the employer should not automatically commence disciplinary proceedings against an employee if the employee turns down the offer / the settlement.

Principle #8: Individuals should be given a clear, reasonable period of time to respond

The TUC fully supports this principle. The TUC is concerned that many employers impose unreasonable deadlines for employees to respond to offers, with the threat that the offer will be withdrawn if the deadline is not met.

Employees must be provided with the time to consider the offer, to receive independent advice and propose and negotiate changes to the offer.

Principle #9: The Code should give specific examples of what may constitute "improper" behaviour

It would be helpful for the Code to include examples of what may constitute improper behaviour, for example, you are getting too old for this job and therefore it's time to leave.

The examples however should not be limited to discriminatory actions or comments by an employer. Please see comments above for the range of actions which should be considered as 'improper behaviour'.

It is important the Code makes clear that the list of examples is not exhaustive. It will ultimately be for the courts to decide what constitutes improper behaviour.

Principle # 10: No undue pressure should be put on a party to accept the offer of settlement

This is a very important principle. The Code of Practice should include examples of what might amount to undue pressure.

Principle # 11: As closely as possible, the approach should reflect current practice in 'without prejudice' negotiations which many employers and legal professionals are already familiar with

The TUC has concerns about this proposal. It is vital that employers are not given the impression that they can simply label all communications as being 'without prejudice' and that this will mean that they will be 'protected' and remain confidential.

The TUC does not agree with the approach taken in Clause 12 of the Enterprise and Regulatory Reform Bill. In our opinion, the 'without prejudice' rules should only apply where there is an existing dispute between an employer and employee. Given the decision to extend the 'without prejudice' rule to situations where there is no pre-existing dispute, the TUC believes it is incumbent on the government to put in place additional safeguards to protect employees. As a minimum the Code should state that:

- Employees must be informed well in advance of the meeting that the employer wants to hold a 'without prejudice conversation'
- Employees should not be forced or pressurised into attending the meeting.
- The employee should have the right to be accompanied by a trade union representative at the meeting.
- Discussions about possible settlements should not form part of formal disciplinary procedures.
- It is important that the employee fully understands the implications of any offer, gives their informed consent to an settlement and has receive independent legal advice

- The without prejudice principle will be waived if the employer gives inaccurate information, misleads the employees or makes misrepresentations during the course of the negotiations
- The Code should make it clear that where negotiations are made public by the employer then the without prejudice rule will not apply.

As stated elsewhere, the Code should also provide a broad definition of 'improper behaviour' by the employer which will mean that any conversation, negotiation or offer will no longer remain confidential and can be scrutinised by an employment tribunal.

Principle # 12: The employer should not make discriminatory comments or act in a discriminatory way when making an offer of settlement.

We strongly agree with this principle. As argued above, the definition of 'improper behaviour' should not be limited to discrimination on the grounds of protected characteristics.

Template letters and model settlement agreements

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?

No. The TUC does not agree with the suggestion that model letters should be included in a statutory Code.

The circumstances in which an employer may consider disciplinary action or even dismissal will vary substantially. It is not possible to prepare templates which encompass all potential scenarios.

For the reasons detailed below, the proposed templates are deeply flawed. They do not reflect the even basic tenets of unfair dismissal law, let alone good practice.

The inclusion of template letters would provide employers with a false sense of security that if they use the proposed text they will not subsequently face legal challenge. Such confidence would be seriously misplaced.

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?

Many larger organisations will already have templates or have ready access to expertise to prepare them. The development of templates may however prove a useful source of information and advice for smaller employers. They should however not been seen as a replacement for expert advice on any given dispute.

Question 4:

Would model letters proposing settlement and a template for producing a settlement agreement be likely to change your use?

The TUC is seriously concerned that the government's proposals are open to abuse. We are particularly concerned that employers will seek to propose a settlement agreement as a means of circumventing unfair dismissal law and the requirement to follow fair procedures.

Question 5:

Do you have comments on the content of the model letters?

The TUC believes that the template letters are fundamentally flawed. The TUC is not convinced that the letters will serve their intended purpose – that of encouraging a settlement between the employer and the employee. Rather, on receiving such a letter, employees are likely to feel 'got at' and victimised.

The letters attempt to combine the opening stages of a disciplinary procedure with the offer of a settlement agreement. In doing so, they create confusion and fail to meet to even the basic requirements of unfair dismissal law. For example:

- The letters appear to invite an individual to a disciplinary meeting. However, contrary to the principles of natural justice, this is not clearly stated and the employee will be misled.
- The letters effectively state that it is a foregone conclusion that the employer has decided to dismiss the employee – in spite of the fact no investigation has been completed, no evidence has been gathered and the employee has not been give the opportunity to defend themselves.
- It is completely disingenuous for the letters to state that an employee will be given the opportunity to improve their performance, when the letters clearly state the employer has already decided to dismiss the employee.

If an employee decides not to accept the proposed settlement, employers may need to prove that they followed a fair procedure. The template letters will provide clear evidence that this has not been the case and the employer is unlikely to be able to defend an unfair dismissal case.

Of course it is possible Clause 12 of the ERR Bill will mean that the letter remains confidential and will not be admitted by an employment tribunal where an employee brings a claim for unfair dismissal. However in this case, the employer will have no evidence that they had adequately informed the employee of the charge against them prior to a disciplinary meeting. They will therefore find it difficult to defend a claim for unfair dismissal successfully.

This will clearly present employers with a quandary. It also illustrates why the government's proposals are so misconceived.

Question 6:

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

As stated above, the TUC does not agree that the model settlement agreement should form part of the statutory Code of Practice.

Question 7:

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

For the reasons stated in response to question 2, we do not agree that the use of the templates should be compulsory.

Guideline tariff in settlement agreements

Question 8:

Do you think it would be helpful if the Government set a guidance tariff for settlement agreements?

No. The TUC is firmly opposed to proposals to introduce a guidance tariff for settlement agreements. The TUC does not agree that price tags should be attached to rights in the workplace. Rather the TUC believes that employees should be fully compensated where an employer breaches their legal obligations.

Question 9:

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

The TUC suspects that the introduction of a guideline tariff would make it more difficult to reach settlements and would escalate expectations. Employees are likely to resist agreeing a settlement unless they are paid the set tariff or even a multiple of the tariff. This could result in an entrenchment in negotiations positions and lead to more tribunal claims.

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?

As stated above, the TUC is opposed to the development of a guideline tariff.

Given the wide range of variables which will affect the value of any claim, it would be extremely complicated, if not impossible, for the government to develop an effective formula.

Question 11:

Do you a view on what level of tariff would be appropriate?

The TUC is opposed to the development of a guideline tariff. The TUC would be particularly opposed to any attempt to link a guideline tariff to median employment tribunal awards for different jurisdictions.

This would mean that employers could be tempted to make offers which fail to compensate employees properly. As a result employees will be less willing to agree a settlement and there could be a significant increase in employment tribunal claims.

If the government decide to proceed with the guideline tariff, it would be essential that the law confirms that an employee could not be victimised or penalised, including in terms of future remedies or costs awards at an employment tribunal, if they rejected an offer which matched the guideline tariff.

Question 12:

Do you have ideas for other ways to help effectively disseminate the guidance and materials?

The TUC is seriously concerned that recent cuts in funding for statutory agencies, including the EHRC, the HSE and Acas and for the voluntary sector, and the removal of legal aid funding for employment rights advice, mean that it is increasingly difficult for employers and employees to access accurate information and advice about employment law.

If the government is serious about improving access to guidance and advice they should ensure that these various agencies and NGOs are properly resourced.

Unfair dismissal – limits on compensatory awards

The TUC is fundamentally opposed to the government's proposals to reduce the cap on compensatory awards in unfair dismissal cases. This proposal is primarily designed to make it easier and cheaper for employers to sack staff. The TUC is also seriously concerned that the government's proposals will disproportionately affect older workers and the disabled. The proposed link to one year's earnings will also mean that part time workers and the low paid will inevitably lose out.

The premise on which the proposals are based is also flawed. The government argues that unfair dismissal awards were subject to a one off 'inflation-busting' increase in 1999 and that this change has raised unrealistic expectations amongst employees, meaning that they are less likely to accept a settlement and not take a claim to an employment tribunal. The TUC contests these arguments for the following reasons.

The statutory cap for compensatory awards was subject to a one-off increase from £12,000 to £50,000 in 1999. This increase however was not inflationary. Rather it simply restored the original value of the unfair dismissal compensation awards. According to a House of Commons Library Research Paper published in November 1998, had the limit increased in line with average earnings since 1971, in 1999 the limit would have stood at £52,800. Instead the Labour Government increased the limit to £50,000.[1]

[1] *Fairness at Work*, Cm3968 House of Commons Library Research paper 1998/99.

The TUC acknowledges that the median award for compensation in unfair dismissal cases in 2011/12 was only £4,560.[2] However this figure only takes account of the outcomes in those 8 per cent of unfair dismissal cases which were successful at a hearing. It does not reflect the outcomes of the high proportion of cases which were settled between employers and employees prior to a hearing.

The main effect of the government's proposals to reduce the limit for compensatory awards will be that some employees will no longer be properly compensated for unlawful actions by their employers. The TUC therefore believes that the cap on compensation in unfair dismissal cases should be removed.

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?

No.

There is no evidence that employees have unrealistic expectations of the level of compensation they will receive in unfair dismissal claims. According to the findings from the Survey of Employment Tribunal Applicants 2008 (SETA 2008), the median award which claimants expected to receive at the start of unfair dismissal cases was £5,000.[3] These expectations match the median awards made by employment tribunals in unfair dismissal cases, which stood at £5,172 in 2008/09.[4] This suggests that employees have very realistic expectations of compensation.

In contrast, when employers were asked in the SETA survey for the maximum amount they were prepared to settle for at the start of a claim, the median level was just £2,000 and 61 per cent stated that they were not prepared to settle for any amount. This suggests that it is employers rather than employees who are reluctant to settle disputes.

The SETA findings also suggest that monetary compensation is not the only reason why employees decide to pursue their claim to an employment tribunal. At the time of putting in their application, 58 per cent of all claimants were hoping to receive money. However, around one fifth (22 per cent) wanted to receive an apology and a similar proportion (20 per cent) justice. One sixth (17

[2] MoJ Employment Tribunals and EAT Statistics, 2011-12

[3] *Findings from the survey of Employment Tribunal Applications 2008*, BIS Employment Relations Research Series No.117, March 2010, Table 9.19.

[4] Employment Tribunal and EAT Statistics (GB) 1 April 2008 to 31 March 2009, table 9

per cent) were hoping to be reinstated and 15 per cent wanted to have their case proven.[5]

The TUC also suspects that one of the main explanations for any increase in unfair dismissal claims to employment tribunals will be the state of the economy and the prospects which an employee has of finding new employment.

	2007-08	2008-09	2009-10	2010-11	2011-12
Unfair dismissal claims	40,941	52,700	57,400	47,900	46,300
All jurisdictions	296,963	266,500	392,800	382,400	321,800

Unsurprisingly, the numbers of unfair dismissal claims tend to rise during times of recession and rising unemployment. If the government is generally concerned about reducing the number of unfair dismissal claims, they should concentrate on adopting policies which increase stimulate growth and generate quality jobs.

Question 14:

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

For the reasons cited in response to question 13, the TUC sees no reason why the introduction of a cap of 12 months' pay will encourage the earlier resolution of disputes.

Findings from SETA 2008 confirm that the main reason why employers are already willing to settle a claim is to save money and time. [6] Reducing the cap on compensation awards is unlikely to encourage additional early settlements.

Question 15:

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

The government's plan to cap compensatory awards at 12 months' pay is likely increase uncertainty and costs for employers.

A reduced cap for unfair dismissal awards may encourage some employees to pursue discrimination claims in order to ensure they are fully compensated. Discrimination claims are often more complex and complex for employers to defend and can result in higher compensation awards.

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[5] *Findings from the survey of Employment Tribunal Applications 2008*, BIS Employment Relations Research Series No.117, March 2010, p. 85.

[6] Of those employers who had made an offer, 'one half (51 per cent) cited factors related to saving money (for example keeping costs to a minimum, more cost effective to settle) and one-quarter (25 per cent) said they had done so for convenience and to save time.' *Findings from the survey of Employment Tribunal Applications 2008*, BIS Employment Relations Research Series No.117, March 2010, p. 83.

Question 16:

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

The TUC is firmly opposed to the introduction of a cap on compensation of 12 months' pay.

Question 17:

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

Linking compensation limits to annual earnings will mean that low paid and part time employees will lose out.

The TUC is extremely concerned that the government is contemplating reducing the cap to 12 months' pay at the same time as long term unemployment is rising particularly among young workers.[7] The latest official statistics suggest that 35 per cent of the unemployed have been out of work for more than 12 months.[8] Capping unfair dismissal awards at 12 months' pay will mean that many employees will not receive adequate compensation to cover the period it takes them to find a new job.

Question 18:

Do you any comment about the impact of this proposal on employers?

Business lobbyists have argued that weakening unfair dismissal rights, including making it cheaper for employers to sack staff will benefit businesses and help to create jobs. However, this claim is not substantiated by the evidence.

The UK already has one of the most lightly regulated labour markets in the industrialised world. OECD research reveals that among the world's 36 most prosperous countries, only workers in the USA and Canada have weaker employment protection than UK employees.[9] The World Economic Forum's latest Global Competitiveness report ranked the UK 5th out of 144 countries for 'labor market efficiency' (based on a survey of business executives).[10]

Academic studies have repeatedly found that employment protection legislation, including unfair dismissal rights, does not have a detrimental impact on

[7] http://www.tuc.org.uk/economy/tuc-21125-f0.cfm

[8] http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/november-2012/statistical-bulletin.html#tab-Unemployment

[9] OECD Employment Data.

[10] http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf

unemployment or employment levels.[11] However, the adoption of deregulatory policies is likely to lead to increased inequality and in-work poverty.[12] Making it easier and cheaper for employers to sack staff is likely to increase job insecurity and damage consumer confidence.[13]

Question 19:

Do you any other comments on the proposal?

It is deeply disconcerting that the government has decided to introduce legislation aimed at reducing in compensation awards in unfair dismissal cases before consultation had taken place. This implies that the government is intent in driving this policy through regardless of the outcome of the consultation and the impact on employers, employees or the wider economy.

Question 20:

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

The TUC believes that the 'polluter should pay' principle should apply to breaches of employment law. In our opinion, sanctions for failure to comply with employment law should be set at a level which not only fully compensates the victims but also deters employers from future breaches. The TUC therefore believes that the current cap on unfair dismissal compensation should be removed.

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)?

As stated above, the TUC does not agree that compensation in unfair dismissal cases should be subject to a statutory cap. The TUC would therefore be strongly opposed to any changes which lower the limit for compensatory awards.

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[11] See Howard Reed (2010) '*Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance*' for a detailed review of recent research.

[12] Wilkinson, Richard and Pickett, Kate (2009) *The Spirit Level: why equality is better for everyone,* Allen Lane. See also Howard Reed (2010) '*Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance*' TUC, London.

[13] See the TUC response to the BIS consultation on Dealing with dismissal and 'no fault compensated dismissal' for micro businesses: http://www.tuc.org.uk/tucfiles/346/NoFaultdismissal.pdf ; Also see the Government Response to this call for evidence http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-1143-dismissal-for-micro-businesses-response.pdf , September 2012.

Question 22:

Do you have any other comments on the level of the overall cap?

The TUC is seriously concerned that the government's proposals to reduce the cap for compensatory awards will have a disproportionate impact on older workers and on the disabled. In our opinion the proposals may be discriminatory.

There is clear evidence that older workers tend to take a longer period to find new employment, after losing their job, as compared with younger groups.[14] Official statistics from July 2012 revealed that nearly half (44.5 per cent) of unemployed workers aged over 50 had been out of work for a year or more.[15] Older workers will also tend to have accrued larger occupational pension entitlements than workers. Reduced compensatory awards will mean that many older workers are not properly compensated for the period of time it takes to find new employment or for their lost pension entitlements.

Similarly, disabled workers also tend to face serious challenges when seeking new employment. Research undertaken by government in 2003 revealed that 34 per cent of unemployed people with disabilities were long-term unemployed compared with 20 per cent for people with no disabilities.[16] Reduced compensatory awards will mean that many disabled workers are not properly compensated for the period of time it takes to find new employment.

[14] http://www.ageuk.org.uk/Latest-press/Archive/50-plus-workers-trapped-in-long-term-unemployment/; Policy Exchange June 2012, Too Much to Lose: Understanding and Supporting Britain's Older Workers: http://www.policyexchange.org.uk/images/publications/too%20much%20to%20lose.pdf

[15] http://www.tuc.org.uk/economy/tuc-21226-f0.cfm

[16] ONS, Labour Market Trends, April 2004 *Characteristics of the short-term and long-term unemployed*