date: 8 June 2012
embargo: 8 June 2012

Dealing with dismissal and 'no fault dismissal' for micro businesses

BIS Call for Evidence: TUC Response

TUC

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Section one

Introduction

The Trades Union Congress (TUC) has 58 affiliated unions which represent more than 6 million members working in different sectors and occupations across the UK.

Trade union officials and workplace representatives have extensive experience of agreeing workplace grievance and disciplinary procedures with employers and of representing members who face problems at work. Trade unions have a good track record in resolving disputes in the workplace through collective bargaining and the use of the right to be accompanied. Where it is not possible to resolve disputes in the workplace, unions will assist individuals in making merited claims to an employment tribunal.

Given the recent confirmation that the UK economy is in recession and with unemployment levels standing at a 17 year high, there is a pressing need for the government to take steps to stimulate growth and to encourage job creation. Proposals for deregulating the labour market, in particular removing unfair dismissal rights for some employees, will not solve the jobs crisis. Proponents of deregulation argue that watering down unfair dismissal rights will help to boost recruitment. However, this claim is not substantiated by the facts. Improvements to unfair dismissal and other employment rights in the UK have been accompanied by employment growth. Since 1997 the UK has generated more than 1.75 million new jobs.

Government research also shows that excess regulation is cited by only six per cent of small and medium sized businesses as a big barrier to growth. The depressed economy, limited demand and difficulties accessing finance are the real problems facing businesses.

Removing dismissal rights for staff in small businesses will turn them into second class citizens and make it more difficult for small businesses to recruit, particularly during any future recovery.

Weakening unfair dismissal rights will increase job insecurity and lead to more unstable employment – creating jobs which are here today and gone tomorrow. This will undermine workforce morale and productivity. It will damage consumer confidence and make it more difficult for individuals to access credit or mortgages. It is also likely to increase reliance on welfare benefits as individuals move more regularly between low paid, insecure jobs and unemployment.

Summary of key issues

The TUC's key concerns about the proposals outlined in the call for evidence can be summarised as follows:

Acas Code of Practice

There is no case for revising the Acas Code of Practice on Discipline and Grievance at this point in time. Revising the Code could disrupt existing workplace arrangements and create uncertainty for employers, workers and their representatives.

The TUC does not support the adoption of a Small Businesses Dismissal Code similar to that used in Australia. Such a Code would create a two tier dispute resolution system with staff in small or micro businesses being treated less fairly than those in larger organisations. It could also make it more difficult for small firms to attract skilled staff.

No fault compensated dismissal

The TUC is fundamentally opposed to the introduction of no fault dismissals which would generate a 'hire and fire culture' in the UK. The proposals would:

- Disadvantage employees in agriculture, construction, and the voluntary sector and other general services who tend to work in small organisations;
- Increase job insecurity for many low paid and part-time workers;
- Engender a 'climate of fear' within workplaces, with staff being reluctant to raise health and safety issues or work problems for fear of being sacked;
- Create a disincentive for micro businesses to expand;
- Encourage transient employment with the result that employers are less likely to invest in staff training. This will damage the career prospects of employees in small firms and undermine operational effectiveness.
- Encourage bad practices by line managers which will damage workforce morale, staff well-being and productivity;
- Lead to an expansion in discrimination and automatic unfair dismissal claims which are complex and costly for employers to respond to and for Employment Tribunals to determine.

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Section two

Acas Code of Practice

Introduction

The TUC believes that it is preferable to resolve disputes in the workplace using clear and effective workplace grievance and disciplinary procedures. The use of effective dispute resolution procedures can benefit both employers and employees. It can assist employees to retain employment and employers to retain skilled staff. It also helps to promote transparency, fairness and consistency in the workplace. As a result it contributes to improved workplace morale. The effective use of procedures also prevents disputes from escalating and from damaging industrial relations.

The TUC recognises that the Acas Code of Practice on Grievances and Discipline supports and promotes effective workplace dispute resolution. The current Code provides clear guidance to employers, employees and trade union representatives on the steps which should be followed and the principles which should be applied when dealing problems at work. It also helps to inform the development of organisational procedures.

The TUC believes that the current Code has largely met its intended objectives. These were to:

- Encourage the early and informal resolution of disputes;
- Encourage consistency in the way issues are handled in workplaces and in the sanctions which are imposed;
- Be sufficiently flexible so as to be effective in different types of organisations, both large and small; and
- Reduce the emphasis on procedural rules and encouraging employers to focus on the underlying causes of disputes.

The Acas Guide on Discipline and Grievances at Work also complements the Code of Practice. It provides useful step-by-step advice to employers and helpful illustrations of how the Code applies in different circumstances.

The TUC does not accept that there is a case for revising the current Acas Code of Practice. It was drafted by a sub group of the ACAS Council comprising the TUC, the CBI and a representative of SMEs. In recent years, dispute resolution legislation and procedures and the Acas Code of Practice have been the subject of repeated consultations and revisions. These have included:

- The introduction of the three step statutory dispute resolution procedures in the Employment Act 2004;
- The Gibbons Review in 2007;
- The adoption of the revised Acas Code of Practice in 2008/9 and the accompanying statutory provision in the Employment Act 2008.

The TUC is concerned that any proposals to review and revise to the current Code of Practice would unnecessarily disrupt effective workplace procedures and would generate uncertainty for employers, employees and their representatives.

We do not agree that a different Code of Practice should be introduced for small or micro businesses. The TUC believes that all workers should be treated fairly when at work. All workers should have access to clear and effective grievance and disciplinary procedures and should be able to exercise the right to be accompanied by a trade union representative or colleague. Watering down procedures in small firms could mean that their staff are treated as second class citizens. It could also make it more difficult for small organisations to attract skilled staff.

Consultation responses

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

Yes. The TUC was fully aware of the Acas Code of Practice before this call for evidence. The TUC submitted detailed comments on the draft Code during the public consultation in 2008 and was part of the ACAS Council working group that drafted it.

Following the adoption of the Code, the TUC ran a series of regional briefings on the revised Code with Acas officials. These were attended by more than 850 union officials and workplace representatives.

Question 2: Before this call for evidence were you aware that the statutory ('three step' dismissal procedures) were abolished in April 2009?

Yes. The TUC was aware that the three step statutory procedures were repealed in April 2009. The TUC largely welcomed the repeal of the statutory disciplinary and grievance procedures on the grounds that they encouraged a 'tick box mentality' amongst many line managers. There was a tendency for employers to concentrate on complying with the statutory three step procedures rather than seeking to resolve the problem at hand. This had a detrimental effect on employment relations.

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The drafting of the statutory procedures was also overly prescriptive and complex. This led to extensive satellite litigation, with employers, employees and unions all incurring additional legal costs.

Question 3: Are you aware that the current version of the Code, reflecting this legal change also came into effect in April 2009?

Yes. The TUC is aware that the current Code of Practice and the accompanying measures in the Employment Act 2008 came into effect in April 2009.

Questions 4 & 5:

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

If the answer to question 4 is 'yes', please describe what changes you have made and any impact of these changes.

In 2009, TUC Education updated training materials and courses for union representatives to reflect the Acas Code of Practice. Since 2009, more than 50,000 trade union reps have attended courses which have covered the handling of grievances and disciplinary issues in workplaces.

Reps have been encouraged to review workplace disciplinary and grievance procedures to ensure that they comply fully with the principles and procedural requirements set out in the Acas Code of Practice.

In many unionised workplaces the revised Code has had limited effect on the wording of workplace discipline and grievance procedures. This is because existing procedures already reflect or exceed the procedural steps set out the Code. In a limited number of workplaces, trade union reps have complained that employers have used the introduction of the revised Code as an opportunity to weaken existing statutory procedures. If the Code is further weakened this could happen again.

The TUC believes that the Code has had some beneficial effects on practices adopted in workplaces. These include encouraging the informal resolution of disputes. This means that it is less likely disputes will escalate. It also reduces the length of time spent by line managers, HR staff and union reps on dealing with problems in the workplace.

The changes made in 2009 also mean it is more straightforward to handle grievances raised by former employees. Under the statutory three step procedures, former employees were often required to attend formal grievance hearings with their previous employer. This was time-consuming for everyone involved and on occasions interfered with the individual's new employment.

Under the revised Code, it is possible to deal with such grievances through correspondence.

Question 6: Do you find the language of the Code easy to understand?

The TUC believes that the Acas Code of Practice is easy to understand. The language used is generally clear and accessible and is designed to be sufficiently flexible to accommodate different circumstances in different workplaces. Line managers and HR staff with responsibility for handling discipline or grievances at work should nevertheless receive training on the Acas Code and the workplace procedures. Such training will not only reduce the prospect of litigation, it is also likely to improve organisational effectiveness.

Question 7: Do you find the language of the Code appropriate for dealing with performance issues?

The TUC recognises that the Code of Practice does not set out all the factors which employers should consider when handling performance related issues. It represented an agreement between the social partners on the ACAS Council and to that extent was a compromise. For example, the Code does not state that the main aim of disciplinary procedures is for employers to assist individuals to improve their performance or conduct rather than to discipline workers. It does not contain guidance on how employers should assist employees with a disability, for example, by considering what reasonable adjustments should be made to assist the individual to perform in their job although that is included in the Guidance. If the Code of Practice is to be reviewed the TUC would argue for it to address these issues rather than simply being shortened. Failing this, the government should seek to improve awareness of the Acas Guide on Discipline and Grievances at Work amongst employers. The Guide provides useful step by step guidance for employers on misconduct, performance and capability related issues.

Questions 8 and 9:

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

If the answer to question 8 is 'yes', did you find that the Code helped you to deal with the disciplinary issue?

As stated above, the TUC has sought to improve awareness of the Acas Code through education courses and regional briefings and to encourage reps to take the Code into account when representing members.

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In many unionised workplaces, disciplinary procedures exceed the basic requirements of the Acas Code of Practice but it has provided a welcome basis for agreement on workplace procedures and a robust underpinning.

Questions 10 and 11:

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

If the answer to question 10 is 'yes', in what way do you consider them to burdensome?

No. The TUC does not consider that the disciplinary steps set out in the Code are burdensome.

The Code reflects the basic procedural steps which should be followed by employers where grievances or disciplinary issues arise in the workplace. This includes the need for a hearing and an appeal stage. The employer must also allow employees to exercise their right to be accompanied as set out in section 10 of the Employment Relations Act 1999. The Code also summarises the natural justice principles which should be observed. These include the requirements on employers investigate grievances and disciplinary issues to establish the facts of the case; to ensure that employees are informed of disciplinary charges and receive copies of relevant evidence well in advance of any hearing. This enables employees to consult a union representative and to prepare a response. The Code also states that employers are also expected to act consistently throughout procedures, including when deciding whether a penalty is reasonable and justified. This protects against discrimination and victimisation in the workplace.

These procedures and principles reflect the basic requirements of unfair dismissal law. Removing any of these steps or principles could result in the increased mistreatment of employees; could mislead employers over their obligations and could lead to an increase in employment tribunal claims.

The TUC also does not agree that the Code places excessive burdens on smaller businesses. The Code recognises that small firms will often not have an in-house human resources department or the same staffing levels as larger organisations. Paragraph 3 of the Code states:

> 'employment tribunals will take the size and resources of the employer into account when deciding on relevant cases and *it may sometimes not be practical for all employers to take all the steps set out in the Code*.' [*Emphasis added*]

The call for evidence questions whether it is reasonable to assume the appeal stages in smaller organisations can be handled by a different manager from that involved in the investigation or the disciplinary hearing. It should

however be noted that the Code already acknowledges that this may not be practical in smaller firms. Paragraph 26 states: 'The appeal should be dealt with impartially and *where possible* by a manager who has not previously been involved in the case.'

The TUC does not agree that it is unreasonable to expect owners/managers in smaller businesses to issue a series of warnings before they can safely dismiss a worker for poor performance. The main purpose of disciplinary procedures is to provide employees with the opportunity to improve their performance, with the provision of training where appropriate. Reducing the number of warnings which can be applied would mean that staff in small businesses are disadvantaged and will be given less opportunity to improve their performance or to access the training they need to support them in their job. In our opinion, employees working in small firms should not enjoy fewer entitlements than those employed in larger organisations. The Code also discourages employers from taking rushed decisions to dismiss employees and then needing to incur unnecessary recruitment and training costs.

Question 12: Do you consider that the Code provides sufficient flexibility in dealing with discipline and grievance issues?

The TUC believes that the Code provides ample flexibility for employers when dealing with discipline and grievance issues. As noted in response to question 11, the Code specifically accommodates the particular needs and constraints in small businesses.

Beyond this, the Code sets out basic stages which should be followed in every case (an investigation, hearing and appeal). The Code does not impose prescriptive procedural rules which may not be appropriate in all circumstances. Rather the procedural requirements are broadly defined reflecting the fact that '*what action is reasonable or justified will depend on all the circumstances of the particular case.*' (paragraph 3).

Question 13: Do you consider that the Code provides sufficient clarity in dealing with discipline and grievance issues?

Yes. The Acas Code is worded in a clear and accessible way. It sets out clear but flexible procedures and principles which can be applied to all discipline and grievances issues.

Some small firms have argued that they would like more certainty when dealing with grievances and disciplinary issues, notwithstanding that they also want it to be shortened. However, the facts, circumstances and merits of each grievance or disciplinary issue are likely to differ. It would therefore be impracticable for the Code to prescribe all the factors which employers will need to consider in all cases. If such an approach was adopted, the Code would need to grow exponentially and therefore is less likely to be read. The Code would also become far more complex.

The Acas guide Code which accompanies the Code provides helpful step by step guidance for employers on the steps they should take in typical scenarios. The government should seek to raise awareness of the Code amongst employers.

Questions 14 and 15:

Should the requirements of the Code be different for micro and/or small businesses?

If the answer to question 14 is 'yes' please explain how you think the requirements should differ for micro and/or small businesses.

No the TUC does not agree that the requirements of the Code should be different for small/micro businesses.

As noted above, Employment Tribunals already take the size and resources of organisations to account when determining whether a dismissal is fair.

Exempting small businesses from specific aspects of the Code would not be consistent with unfair dismissal law which applies equally to all employees who satisfy the qualifying period. The TUC also does not agree that staff in small businesses should be treated differently or less fairly than those employed in larger organisations.

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

The TUC does not believe that the Australian Small Business Fair Dismissal Code provides a useful model for the UK. We do not agree that staff in businesses should have fewer rights or treated less fairly than those in larger firms.

We understand that the Code has proved controversial in Australia not only amongst trade unions who do not agree with a two tier approach to employment protections, but also amongst parts of the small business community. They are concerned that the code has caused reputational damage. Small firms are perceived as bad practice employers and therefore find it more difficult to attract good quality staff.

The TUC recognises that the 2009 Small Business Code mirrors existing unfair dismissal law in the UK to some extent. However the TUC does not agree that employees should be denied the ability to test whether a dismissal is unfair before an Employment Tribunal simply because an employer has completed a tick box form. This may not be consistent with the requirements of Article 6 of the European Convention on Human Rights.

It is also noteworthy that cases relating to the Small Businesses Code are increasingly being considered in Australian courts. It is therefore possible that the adoption of a small business code would not deter litigation.

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

The Australian Code contains some helpful questions which prompt employers to consider when contemplating whether to dismiss an employee.

For example in section 8 employers are asked to respond to the following:

a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?

b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was given?

c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?

d. Did the employee subsequently improve his or her performance or conduct?

e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?

f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved?

It may be helpful if these or similar questions were integrated into BusinessLink guidance for employers in how to handle disciplinary issues.

Questions 18 and 19:

Do the requirements of your internal disciplinary processes differ from the requirements of the Code?

If the answer to question 18 is ‘yes’, why and in what way?

The internal disciplinary procedures in unionised workplaces often exceed the basic requirements of the Acas Code of Practice. The aim is to ensure that the procedures fully comply with the requirements of unfair dismissal law and promote transparency, fairness and good employment relations.

Examples of such additional features include:

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- The right for employees to be represented by a trade union rep in all disciplinary and grievance related meetings, including investigation meetings and where employees' grievance involves requesting improvements in their pay and working conditions.
- Additional appeal stages
- Shorter time limits for different stages of the procedure to ensure that parties are not able to delay or drag out processes
- Collective grievance procedures, where issues affecting groups of workers can be resolved through negotiations between employers and unions. Collective grievances procedures often reduce the amount of time managers, HR staff and union representatives need to spend on individual disputes. They can also ensure that systemic problems within workplaces are addressed effectively and consistently.

In some workplaces, unions and employers have agreed to the use of mediation, as a way of complementing formal workplace dispute resolution procedures. Unions recognise that mediation can in some instances help to resolve disputes amicably particularly where relations have broken down between individuals or within teams. Mediation however is only effective where it is genuinely voluntary and where the processes used have been agreed and received buy-in from employers and unions.

Question 20: If you have any further suggestions to improve awareness and understanding of the Code into practice, please detail them.

It is welcome that the BusinessLink and DirectGov websites include links to the Acas Code of Practice. It is essential that these links are maintained. Links should also be provided to the Acas Guide on Discipline and Grievances.

The TUC has concerns about proposals to streamline and simplify online guidance for employers and employees. Providing shorter guidance is often misleading and unhelpful for employers and employees. It is important that government guidance sets out all the key procedural steps which should be followed and highlights the different factors which employers should consider when dealing with misconduct and capability related issues.

The Acas Helpline also provides a valuable service to employees and employers. The TUC calls on the government to ensure that Acas are provided with adequate resources to maintain the Helpline.

Question 21: If you have further comments on putting the Code into practice, please detail them here.

The government should encourage organisations to provide training for all line managers and human resources staff involved in handling grievance and disciplinary issues.

Question 22: Any other general comments on the Code

The TUC believes that there is no case for revising the Acas Code of Practice at this point. Revisions are likely to disrupt existing working practices and will cause uncertainty.

However if the government decides to ask Acas to revise the Code the TUC believes that the following changes should be made.

Firstly, the Code should encourage employers to allow employees to be accompanied in investigation meetings and all grievance meetings, including where an employee is requesting improved pay and conditions. These changes would reassure staff that workplace procedures are transparent and fair.

Secondly, the Acas Code should be extended to cover situations where an employee is facing redundancy. There is well established case law that employers are required to carry out individual consultation meetings in redundancy situations. This is in addition to any collective consultation processes. Failure to consult individuals can result in a claim for unfair dismissal. Omitting redundancy dismissals from the Code is likely to mislead employers, particularly small firms, and may mean they are more vulnerable to unfair dismissal claims.

Thirdly, the Acas Code should be extended to cover situations where an employer decides not to renew a fixed term contract at the end of its term. Currently the Code only applies where a fixed term contract is terminated early. All these proposed changes were resisted by employers' organisations when the Code was last revised.

Since the implementation of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, fixed term employees have had the same rights unfair dismissal protection as permanent staff. This means that employers are required to:

- have a valid reason for deciding not to renew a contract,
- meet with the employee and consider ways of avoiding the dismissal.

Failure to follow these steps can result in a claim for unfair dismissal. It would therefore be consistent to extend the Code to cover such dismissals.

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Evidence topics for the Acas Code

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

The TUC continues to raise awareness of the Acas Code and unfair dismissal law amongst trade union reps and officers. Dispute resolution rules and unfair dismissal rights are integrated into TUC education courses and materials. Each year an average of 20,000 union reps participate in TUC Education courses dealing with these issues. More than 50,000 reps having taken part in such courses since the new Acas Code of Practice was adopted. Unions affiliated to the TUC also run regular training courses for reps and officers.

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

Trade union members can access to advice and representation from union workplace reps and officials. Wherever possible, union reps and officials will seek to resolve problems in the workplace using their collective bargaining influence and the right to be accompanied. Where this is not possible, unions will support union members to make merited Employment Tribunal claims. Such members will often have access to advice and legal representation by in-house union lawyers or solicitors from specialist law firms.

There is clear evidence that trade union representation in workplace disputes yields significant benefits for working people and employers and reduces the volume of litigation on employment disputes.

In 2007, the Department for Business, Enterprise and Regulatory Reform (BERR) conducted a review of the facilities and facility time available to workplace representatives. Using data from the 2004 Workplace Employment Relations Survey, this review – calculated the costs of union representatives and the benefits accrued from such representation. The key findings published as part of BERR's report were that:

- Dismissal rates were lower in unionised workplaces with union reps – this resulted in savings related to recruitment costs of £107m-£213m per annum.
- Voluntary exit rates were lower in unionised workplaces with union reps, which again resulted in savings related to recruitment costs of £72m-143m per annum.
- Employment tribunal cases are lower in unionised workplaces with union reps resulting in savings to government of £22m-43m per annum.

A 2008 an Acas research paper on 'Accompaniment and representation in workplace discipline and grievance' also concluded that union representatives make a positive contribute to resolving disputes in unionised workplaces. The report found that trade union representatives were seen by managers '*as*

playing a positive role in informal process of dispute resolution. They provided an early warning of potential problems, a channel of communication between manager and employee and were also seen to help monitor members involved in disciplinary or grievance issues.'

'*In the unionised organisations, managers found that most union representatives helped to ensure that all issues were explored and fair decisions reached. Furthermore, union representatives were able to manage the expectations of the member, which was seen as useful in avoiding unnecessary confrontation. Union representatives were generally perceived to be well-trained and knowledgeable in terms of legal and procedural issues.*' [1]

The TUC is aware that there are fewer sources of good quality, reliable advice and representation for non-union members. The removal of legal aid for employment rights advice is likely to amplify this problem. The TUC believes that the best source of advice for non-union members on dispute resolution and unfair dismissal is the Acas Helpline and the DirectGov website. The TUC would urge the government to retain both services and to ensure they are adequately resourced.

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

As section 5 of the call for evidence illustrates, the UK already has one of the weakest levels of employment protection legislation in the industrialised world. According to the OECD in 2008, only the USA and Canada had weaker rules.

The TUC would summarise the key weaknesses in UK dismissal system as follows:

- Existing UK unfair dismissal law places greater emphasis on procedural fairness rather than on substantive fairness.[2]
- The 'band of reasonableness test' which has been developed by the UK courts provides employers with significant flexibility when assessing it is reasonable to dismiss an employee in the circumstances.
- Unfair dismissal rights only apply to employees who have worked for the same employer for more than 1 year or 2 years where they have started to work for a new employer after 6 April 2012. As a result of the extended qualifying period nearly 2.7 million employees will be at greater risk of losing their job. The extension is also expected to disproportionately affect young workers, BME employees and part-time women workers.
- Unfair dismissal rights in the UK do not apply to individuals who are legally

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[1] Richard Saundry, Valerie Antcliff and Carol Jones (2008) *'Accompaniment and representation in workplace discipline and grievance'* Acas Research Paper Ref 06/08, p.6.

2 Elias, Patrick, (1981) *'Fairness in Unfair Dismissal: Trends and Tensions'* 10 Industrial Law Journal p. 201

classified as ‘self-employed’ or ‘workers’, even if they bear all the characteristics of dependent employees.

The main impact of these weaknesses is that UK workers are far more insecure than many of their counterparts in the EU and beyond.

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

Please see our responses to questions 18 and 19 for examples of the ways in which organisational disciplinary procedures often exceed the basic rules contained in the Acas Code of Practice.

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

Please see our responses to questions 18 and 19 for examples of the ways in which organisational disciplinary procedures often exceed the basic rules contained in the Acas Code of Practice.

The TUC recognises that small and micro businesses will often not have access to an in-house human resources department. As a result, some managers or owners in small or micro businesses will be required to dedicate more time to resolving employment disputes than those in larger organisations. However, this is no justification for staff in smaller organisations losing out on basic employment rights and being treated as second class employees.

Rather, the TUC believes that the government should provide Acas with increased resources to enable them to provide additional support, advice and guidance to the small business sector on how to develop suitable workplace procedures and how to handle grievances and disciplinary matters at work.

Section three

No fault dismissal for micro businesses

Introduction

The TUC is fundamentally opposed to proposals for the introduction of compensated no fault dismissal in micro businesses or indeed in any organisation, regardless of its size.

The TUC believes that every employee should have a fundamental right to protection from unfair and arbitrary dismissal.

> Article 4 of the ILO Convention 158 on the Termination of Employment states
>
> ‘*The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.*’
>
> Article 30 of the Charter of Fundamental Rights of the European Union states that:
>
> *‘Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.’*

Proponents of deregulation argue that weakening unfair dismissal rights will act as a driver for growth; will improve labour market performance and will encourage small firms to recruit more staff. However as the government’s own call for evidence (and section 3 of this submission) demonstrates, these arguments are based on myth rather than fact.

Encouraging a ‘hire and fire culture’

The TUC believes that removing rights from staff in micro businesses will turn them into second class citizens at work and will make it harder for small firms to recruit employees. These proposals, if implemented, are likely to generate a ‘hire and fire culture’ in the UK. Line managers will feel free to sack workers without a valid reason and with virtually no notice.

This is likely to have a serious impact on job security and workforce morale.

The fact that employees will retain the right to take discrimination and automatic unfair dismissal claims to an Employment Tribunal where they have been dismissed for no fault of their own is an inadequate safeguard.

Discrimination and automatic unfair dismissal claims are often difficult and complex to prove. The introduction of fees for tribunal cases will also mean that many employees are priced out of justice.

Impact of the government's proposals

The TUC commissioned an analysis of Labour Force Survey to assess how the government's proposals will affect different communities, different sectors and occupations and different income groups. The key findings are summarised below.

According the TUC research, there is no significant difference in employment patterns in small/large firms by gender. 19.3 per cent of all women employees work in micro businesses, compared with 18 per cent of male employees.

However, small firms are more likely to employ staff on a part-time basis than larger firms. 38 per cent of employees in micro businesses employing 10 or fewer employees work part-time, as compared with 24 per cent in larger workplaces.

The ethnicity profile is very similar across both types of firm. 18.9 per cent of white employees work in micro businesses employing fewer than 10 employees as compared to 18.4 per cent of BME employees.

However, small firms are more likely to have young workers (aged under than 30) and old (aged over 60) workers than large firms.

Age split

	Proportion of employees in this firm type	
Age group	**More than 10 employees (%)**	**1-10 employees (%)**
16-29	**25.34**	**27.88**
30-44	**36.12**	**31.2**
45-59	**32.16**	**31.09**
60+	**6.39**	**9.83**
TOTAL	**100.00**	**100.00**

As a result, those groups who are already facing high levels of unemployment are likely to face increased job insecurity should the government proceed with its proposals for no fault dismissals.

The workforce in small firms tends to be less well qualified on average than the large firms workforce. Only 19 per cent of employees in forms employing 10 or fewer employees have a degree or equivalent qualification, as compared with 31 per cent of those in firms with more than 10 employees. 9 per cent of employees in micro businesses have no qualifications; as compared with 5 per cent in larger firms.

Sectoral Impact

No fault dismissal for micro businesses

The TUC analysis also reveals that the introduction of no fault dismissal in micro firms is likely to a have a very different impact in different industrial sectors.

In some sectors the proportion of employees working in small firms is very low. For example:

- Only 7 per cent of those working in education are employed in organisations with 10 or less employees.
- Nearly 8.5 per cent of those in the gas and electricity sectors are employed in micro businesses
- Only 12 per cent of individuals working in manufacturing would be affected by proposals for no fault dismissal; and 10 of those working in mining and quarrying.

In contrast, employees in other sectors are far more likely to lose out on basic dismissal rights. For example:

- More than half (52 per cent) of all employees working in agriculture work in firms with 10 or fewer employees
- 31 per cent of all construction workers are employed in micro businesses

It is notable that according to HSE statistics these sectors also experienced the highest rate of death at work in 2010/11.

- In agriculture there were 34 fatal injuries in 2010/11 with a corresponding rate of 8.0 deaths per 100 000 workers.
- In construction there were 50 fatal injuries, with a rate of 2.4 deaths per 100 000 workers.[3]

The TUC is seriously concerned if the government proceeds with its proposals for compensated no fault dismissal, workers in high risk working environments could be deterred from raising health and safety concerns for fear of losing their jobs.

The vast majority of staff working for households (85 per cent) will lose out on basic dismissal rights.

Staff working in the voluntary sector are also likely to be disproportionately affected. According to research published by the NCVO '*Voluntary sector employees are mainly concentrated in small workplaces with just under one-third (31%) of voluntary sector workers in 2010 employed in workplaces with less than ten employees. This is markedly different to both the private and the public sectors (25% and 7% respectively).*'[4]

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[3] http://www.hse.gov.uk/statistics/fatals.htm
[4] http://data.ncvo-vol.org.uk/almanac/voluntary-sector/work/where-are-voluntary-sector-staff-located/

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Regional impact

TUC analysis also suggests that those living in more rural regions will be more likely to lose out on basic dismissal rights than those in urban areas. For example, South West England and Northern Ireland have the highest proportion of employees in small firms (21.46 per cent and 21 per cent respectively) whereas Inner London has the least (15 per cent).

Impact on low paid workers

TUC analysis also suggests that employees working in micro businesses tend to be paid less and are more likely to be low paid than those in larger businesses.

In small firms[5], median wages are about 30 per cent lower than those in larger firms and mean wages are 27 per cent lower. In small firms around 22 per cent of employees earn an hourly rate equivalent to the National Minimum Wage or less, as compared to just over 10 per cent of those in larger organisations.

The TUC also commissioned regression analysis aimed as assessing whether the difference in mean wages between employees in micro businesses and those in larger businesses can be explained by differences in the characteristics of the employees and / or the type of work they do. After controlling for a range of factors (including gender, ethnicity, qualifications, sectors, occupations and whether employees worked part-time or full-time), the coefficient relating on small firms is -0.115. This means that employees in small firms earn on average around 11.5 per cent less than employees in larger firms, even when all these characteristics are taken into account.

Consultation responses

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?

The TUC is firmly opposed to the introduced of compensated no fault dismissal.

The TUC is also not convinced that such proposals would be beneficial for micro businesses for the following reasons:

[5] These findings are based on an analysis of responses to the LFS question on the number of employees at workplace. It is possible therefore that some respondents will be based in small offices within larger organisations. However all employees working in micro businesses with 10 or fewer employees will be included in the findings.

- The proposals are likely to create reputational damage for small firms, who will increasingly be perceived as bad practice employers.
- This will make it harder for smaller firms to recruit good staff, particularly during any economic recovery. Employees are unlikely to be attracted to working for a firm if it means they will lose out on basic job security rights and can be dismissed arbitrarily at any point.
- Micro businesses would also have a clear disincentive to expand and to employ more than 10 staff.
- The removal of basic unfair dismissal rights will almost certainly increase the number of discrimination and automatically unfair dismissal claims which are brought against micro businesses. Such claims are more complicated, expensive and time-consuming for employers. They also more expensive for employment tribunals to determine.

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

The TUC is firmly opposed to the use of compensated no fault dismissal for micro businesses and does not believe that these proposals would bring overall benefits for micros businesses.

Question 25: Would it be necessary to set out a process for no fault dismissal in legislation; the Acas Code; both or neither?

The TUC is fundamentally opposed to proposals for compensated no fault dismissals. However should the government decide to proceed with these proposals it would be essential for legislation to be adopted securing the following safeguards.

- Employees who are dismissed under the new proposals must be provided with full compensation. See the response to question 27 for more details.
- Employees must also be entitled to receive any outstanding holiday pay or other remuneration which they are owed in connection with their employment.
- Legislation should state that it is not possible for employers to use no fault dismissal in redundancy situations. (See also the response to question 28).
- It is essential that employers are not able restructure organisations into small units in order to avoid unfair dismissal rights. The best way to achieve this would be to provide in legislation that any individuals employed by an associated employer or within a group of undertakings including the relevant firm, must count towards the 10 employee threshold.

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

The TUC does not agree with proposals for compensated no fault dismissals and therefore has no additional comments on process requirements.

Question 27: What type of compensation would be appropriate for a no fault dismissal?

The TUC believes that individuals who are sacked under any no fault dismissal arrangements must receive generous compensation.

Compensation awards should exceed individuals' entitlement to statutory or contractual redundancy pay and contractual or statutory notice pay. Employees must be fully compensated for the loss of earnings during the period of time it would have taken the employer to complete a proper and fair dismissal procedure and the time it is expected to take the individual to find new employment. Employees should also be compensated for injury to feelings and for potential damage to their career prospects arising from the dismissal.

It is important to note that the statutory caps on the amount of weekly pay and the years of service which can be taken into account when calculating statutory redundancy pay mean that many medium and better paid employees are not fully compensated for their loss of employment. Such caps should not be applied to any compensation for no fault dismissal

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

It is essential that employers are not able to use no fault dismissal rules to avoid their normal obligations in redundancy situations. Such practices would be detrimental to both employers and employees. Employees would lose out on the possibility of redeployment and retraining; whereas employers could, as a result of 'knee-jerk' decisions, lose valued skilled staff.

The TUC believes that any compensation awards for no fault dismissal must therefore exceed any statutory redundancy pay entitlements, contractual redundancy pay entitlements and any redundancy pay arrangements contained in workplace policies or collective agreements.

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

The TUC believes there is no justification for the introduction of compensated no fault dismissal arrangements. Employers already have the option of seeking to end an employment relationship by offering an employee compensation on the condition that they are willing to sign a compromise agreement. This is common practice in most sectors.

Making an Employment Tribunal claim is a very stressful and difficult experience for most employees. As a result, they will often be willing to accept compensation and sign the compromise agreement.

The TUC believes that a greater use of compromise agreements, as established in law, by micro business would be preferable for employees than the introduction of compensated no fault dismissal as it would mean that employees would consent to waive their right to go to an Employment Tribunal, rather than being deprived of this basic civil right. Employees would also be guaranteed access to independent legal advice or advice from their trade union representative and therefore any agreement to sign a compromise agreement will be based on informed consent.

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Section four

Job security rights and labour market performance

Introduction

In recent decades, economists, policy makers and business lobbyists have argued that increased labour market flexibility and the deregulation of employment protection rights are essential for economic success. This approach was a key driver for the programme of deregulation adopted by successive Conservative governments during the 1980s and 1990s.

Although the Labour government supported the principle of flexible labour markets, they also introduced a range of employment protections including the national minimum wage, improved family friendly rights and rights to trade union recognition. In spite of these improvements the UK remained one of the least regulated economies in the industrialised world. Nevertheless at the time, employers predicted the changes would lead to rising unemployment and a reduction in job creation. In practice, the UK experienced rising levels of job creation and the longest period of growth of decades.

This growth was only brought to an end by the financial crisis and the biggest downturn in the world economy since the 1920s. As a result, businesses have failed, unemployment has risen and public services have been the subject of severe spending cuts. None of these developments were caused by excessive regulation, but rather the lack of regulation, particularly in the financial services. Nevertheless, many within the business community are once again calling for unfair dismissal laws and other basic employment rights to be removed or substantially weakened.

The TUC believes there is an urgent need for the government to take steps to stimulate job creation and sustainable growth, given the persistently high levels of unemployment, particularly amongst young people. However, as argued throughout this section, we are not convinced that the removal of unfair dismissal rights in micro businesses will reduce unemployment or stimulate job creation.[6] Instead the introduction of no fault compensated dismissals in small firms would mean that more than three million people will lose out on basic rights at work. This would generate a 'hire and fire' culture in the UK and

[6] For a fuller discussion see Stewart Lansley and Howard Reed (2010) *'The Red Tape Delusion: Why deregulation won't solve the jobs crisis'* Touchstone pamphlet no.9. London TUC. http://www.tuc.org.uk/extras/redtapedelusion.pdf

encourage bad practice by employers. It would damage staff morale and business performance. It would suppress demand, undermine consumer confidence and stifle rather than stimulate growth.

The TUC therefore calls on the government to resist calls for the deregulation of unfair dismissal laws and instead to adopt proposals which will support the creation of sustainable and quality employment.

Employment protection legislation and labour market performance: A comparative approach

For many decades, proponents of deregulation have argued that economies with weak employment protection legislation, weak trade unions, low collective bargaining coverage and low unemployment benefits, perform more effectively than more regulated systems. The US - with its 'hire and fire' culture - is often held up as a beacon of success, whilst European economies have been considered a failure.

In recent years, these arguments have been increasingly discredited, with a growing body of evidence that highly flexible labour markets, including the USA and the UK, do not perform as effectively as some of their more regulated counterparts.[7] Neo-liberal economists have found it increasingly difficult to explain why a number of EU countries, including Denmark, the Netherlands and more recently Germany, have all achieved economic success despite the comparatively highly regulated nature of their labour markets.[8]

These countries were associated with high levels of collective bargaining coverage and co-ordinated bargaining, relatively strict employment protection legislation and more generous welfare benefits. Nevertheless they have performed well in terms of unemployment and employment levels (see Figures 1 & 2)[9].

For example, Sweden, the Netherlands and Denmark all have equivalent or better records than the UK and US on labour market participation, despite the supposed 'inflexibilities' of their respective labour markets. Several European States, for example Denmark, the Netherlands, Austria and Norway have also consistently outperformed the US in terms of unemployment rates since the 1950s, in spite of higher levels of regulation.[10]

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[7] Schmitt, J and Wadsworth, J (2005) '*Is the OECD Job Strategy behind US and British employment success in the 1990s?*, in Howell D. (ed*), Fighting unemployment the limits of free market orthodoxy*; Coats D, (2006) '*Who's Afraid of Labour Market Flexibility?*' London. The Work Foundation.

[8] Howard Reed (2010) *'Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance'* London: TUC.

9 Eurostat statistics are not usually cited in public policy documents and may lead to slightly different results, due to the use of different definitions.

[10] Ibid

Figure 1: Unemployment Rate (source Eurostat)

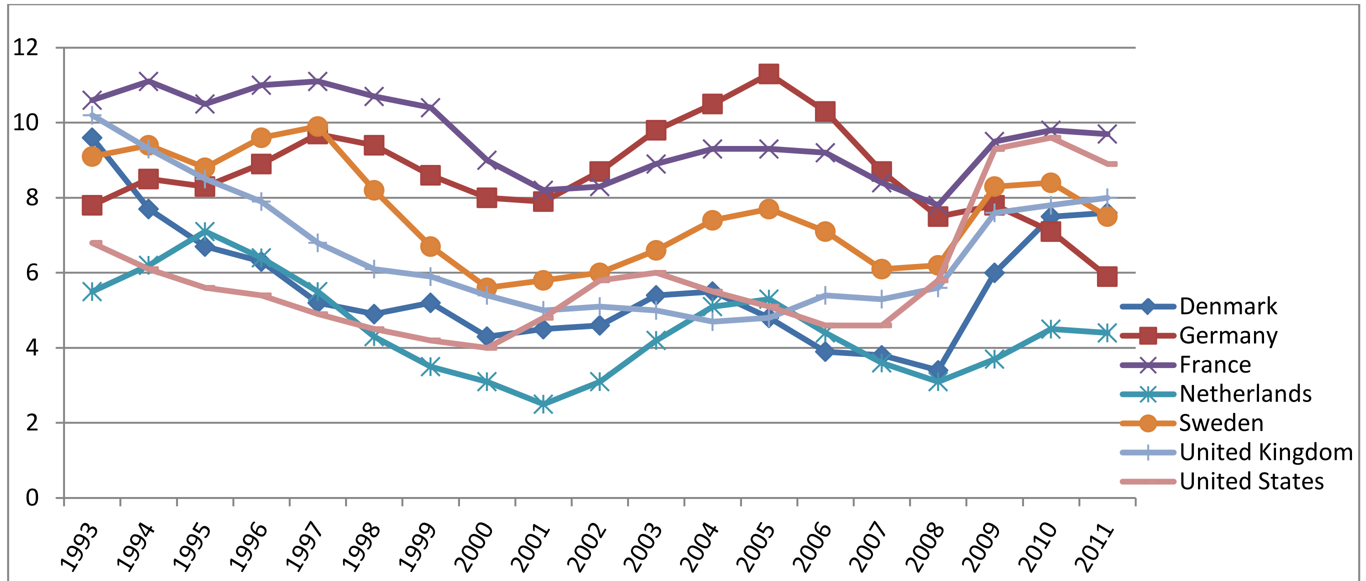
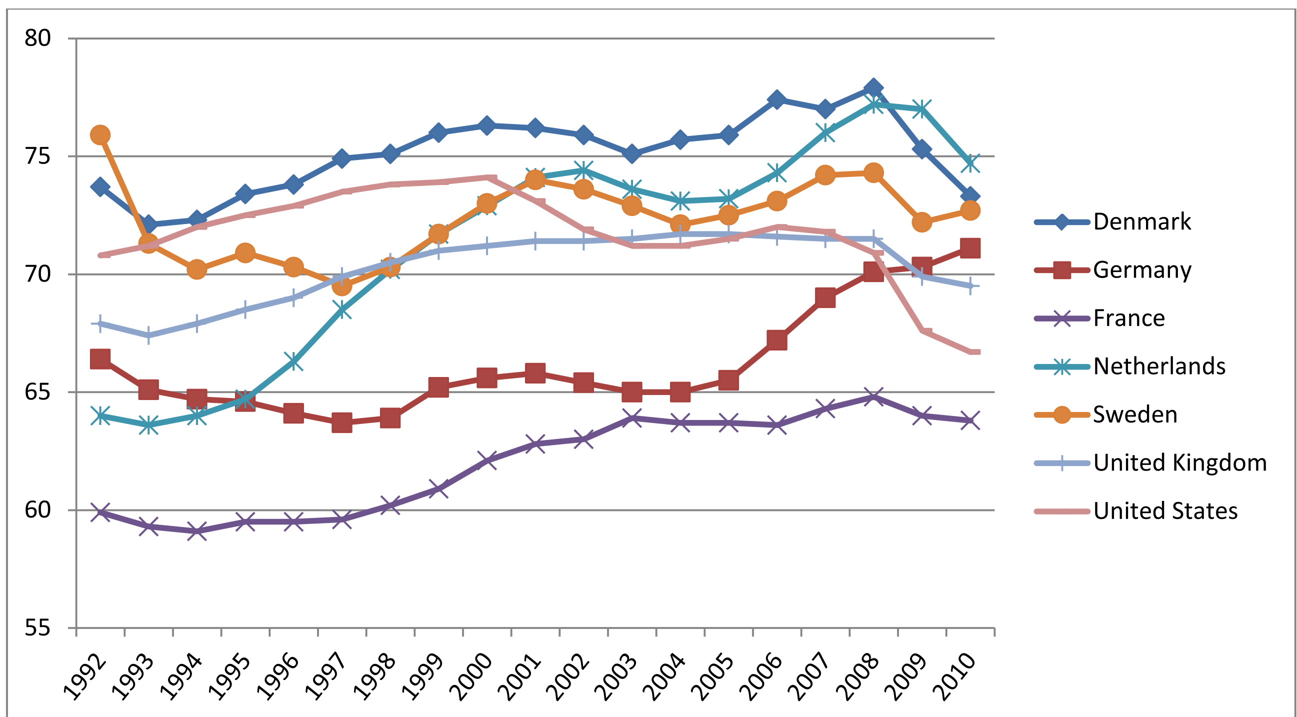


Figure 2: Employment Rate (source Eurostat)



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Since the start of the economic crisis, the German economy has also experienced falling unemployment and rising employment levels. This is in large part to due to the successful German industrial strategy and strong export record. However, there is also evidence that employment levels have been maintained as a result of the state-funded short-term working scheme and the system of collective bargaining and co-determination which has enabled the German labour market to remain flexible and responsive to changing market conditions.

The arguments promulgated by the proponents of deregulation also do not bear scrutiny when assessed against the performance of the UK labour market. Between 2000 and 2004, the UK was the only country to experience a consistent period of falling unemployment. However this growth was achieved against a backdrop of re-regulation of the labour market, including the strengthening of unfair dismissal rights and the introduction of the National Minimum Wage. Improvements in family friendly rights were also introduced, including enhanced maternity leave and parental leave. The rights enjoyed by permanent full-time workers were extended to part-time workers and fixed-term staff. In spite of these developments, the UK experienced declining unemployment, job creation and the longest period of growth witnessed in decades – totally contrary to the expectations of neoliberal economists who predicted that increased employment rights would destroy jobs and damage labour market performance.

Some commentators have also argued that the UK flexible labour market was responsible for the better-than-expected employment and unemployment performance during the 2008-2009 recession. They contend that the UK labour market is now so flexible that it means employers are able to cut production, hours and wages without the need to lay-off staff. While undoubtedly private and public sector wages have been squeezed during the economic downturn there is evidence that these are not the only factors which helped to maintain employment levels.

Regulatory policies also contributed to the maintenance of employment levels. For example, there is evidence that consultation on redundancies and TUPE transfers, and workplace negotiations between employers and unions, helped employers to retain staff and avoid redundancies during the 2008-09 recession.[11] Active labour policies including the Future Jobs Fund scheme for younger people and spending on assisting the long term unemployed to find work also helped to restrain the rise in unemployment in 2008-09. Enhanced

[11] TUC, Response to the Call for Evidence on Collective Redundancy Consultation 2012. Acas Research also reveals that during the 2008-09 recession employers were willing to take 'a more long-term view, seeking to work in partnership with unions and their employees to avoid job cuts and find new ways of working.'

http://www.acas.org.uk/CHttpHandler.ashx?id=2694&p=0

Jobcentre services similarly appeared to have a positive impact on claimant unemployment levels.[12] There is also some evidence that tax credits enabled workers and employers to agree work-sharing arrangements and to avoid redundancies during the 2008-09 recession. Regrettably many of these measures have subsequently been removed or weakened and, since 2009, the UK has experience rising unemployment and falling employment levels.

Academics have also increasingly questioned the veracity of the neoliberal critique and policies advocating deregulation. A series of studies have concluded that there is no significant relationship between labour market outcomes and levels of employment protection legislation.[13] The main exceptions to this rule have been co-ordinated collective bargaining systems and the tax wedge. While the tax wedge appears to have a limited effect on unemployment and employment rates, repeated studies have found that there is a consistent and strong correlation between unemployment levels and co-ordinated bargaining structures.[14] The conclusion is that centralised wage bargaining assists wages levels to remain flexible and respond to shifting market conditions. There is also evidence that the adoption of effective maternity rights, including enhanced maternity leave and pay have contributed significantly to increased labour market participation amongst women.[15]

Faced by this growing body of evidence in 2006 the OECD – which previously had been one of the principle advocates of labour market flexibility – decanted from the deregulation agenda. In its 2006 *Job Study,* the OECD recognised that countries with very different labour market regulatory systems have performed equally well in terms of labour market indicators. It also acknowledged that there are significant drawbacks to labour market flexibility. Highly deregulated economies such as the US may perform relatively well in terms of unemployment and employment levels. They do not perform well when it comes to inequality, in-work poverty, general health and life expectancy.[16]

The overall conclusion which can be drawn from the economic analysis is that there is more than one route to full employment. Employment protection legislation, including unfair dismissal rights, does not have a detrimental impact on unemployment or employment levels. However, the adoption of deregulatory policies is likely to lead to increased inequality and in-work poverty. The analysis also suggests that if policy makers are serious about seeking about reducing unemployment they should seriously consider policies

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[12] Stewart Lansley and Howard Reed (2010) *'The Red Tape Delusion: Why deregulation won't solve the jobs crisis'* Touchstone pamphlet no.9. pp 42-44.

[13] 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.

[14] Ibid pp 84 and 85.

[15] Ibid p88.

[16] 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.

aimed at facilitating co-ordinated bargaining and strengthening family friendly policies rather than focusing on weakening unfair dismissal rights.

Implications of no-fault dismissal on productivity, industrial relations and the wider economy

F. Reduced burden for micro businesses

The TUC does not agree that unfair dismissal rights place an unjustifiable 'administrative burden' on micro businesses. Research survey evidence commissioned by BIS[17] reveals that a higher proportion of employers agree that 'UK employment law is fair and proportionate' than disagree with this statement.

The Acas Code of Practice and unfair dismissal law are already flexible and accommodate the particular needs of small businesses. They recognise that small businesses often lack an in-house human resources department, have more limit resources and are therefore unable to follow the same procedures and processes as larger firms.

If unfair dismissal laws were weakened for micro businesses, this would mean that more than 3 million employees would lose out on basic dismissal rights and would effectively be treated as second class citizens. The costs to employees of cutting red tape would far exceed any benefits provided to small businesses.

G. Reducing unfair dismissal rights and rising discrimination cases

Removing unfair dismissal rights will almost certainly increase the number of discrimination claims brought against micro businesses, as employees seek to challenge unfair treatment by employers.

Discrimination claims are far more complex and costly for all the parties concerned. They are also more time consuming and expensive for employment tribunals to determine.

H. Impact of removing unfair dismissal rights on:

(i) Recruitment levels

Business lobbyists have argued that weakening unfair dismissal rights would help to boost recruitment. However, this claim is not substantiated by the evidence.

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[17] BIS *'Dealing with Dismissal and 'Compensated no fault dismissal' for micro businesses'* Call for Evidence, March 2012, Table 4 p.29. London: BIS

Recent research undertaken by BIS confirms that most employers do not perceive the current level of regulation as a major constraint on growth. The Small Business Barometer published in October 2011 asked 500 SMEs about their main obstacle to success.[18] The state of the economy was the biggest obstacle, listed by 45 per cent, and obtaining finance was next, mentioned by 12 per cent. After this came taxation, cash flow and competition. Just 6 per cent of respondents listed regulation as their main obstacle to growth.

Unfair dismissal regulations do not even feature in the list of top ten regulations which employers cite as a deterrent to growth according to BIS research outlined in the Call for Evidence on '*Dealing with Dismissal and 'Compensated no fault dismissal' for micro businesses'*.[19] This is perhaps not surprising given that the UK has the third lowest level of individual dismissal employment protection out of 36 countries.[20]

Labour market analysis also does not support the argument that weaker dismissal rights will lead to increased employment and lower unemployment levels. Rather it suggests that employment protection legislation (EPL) tends to discourage employers from hiring during periods of growth but it also discourages layoffs during periods of recession. Over the economic cycle as a whole, the effect on employment levels tends to be neutral. This point was illustrated in recent comments by John Philpott, the Chief Economist at the CIPD:

> 'The vast weight of evidence on the effects of employment protection legislation suggests that while less job protection encourages increased hiring during economic recoveries it also results in increased firing during downturns. **The overall effect is thus simply to make employment less stable over the economic cycle, with little significant impact one way or the other on structural rates of employment or unemployment. (emphasis added)'**[21]

The TUC is concerned that the government's proposals to weaken unfair dismissal rights will generate a 'hire and fire' culture within the UK. This will significantly increase job insecurity with workers finding themselves in jobs which are 'here today and gone tomorrow'. We therefore urge the government not to proceed with proposals for no-fault compensated dismissals. Rather they should focus on policies which support the creation of sustainable and quality employment.

(ii) 'Job matching'

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[18] BIS Small Business Barometer August 2011, published in October 2011: http://www.bis.gov.uk/assets/biscore/enterprise/docs/s/11-p75c-sme-business-barometer-august-2011

[19] BIS *'Dealing with Dismissal and 'Compensated no fault dismissal' for micro businesses'* Call for Evidence, March 2012, Table 5 p.29. London: BIS

[20] OECD Employment data 2008

[21] http://www.cipd.co.uk/pressoffice/press-releases/questionable-merit-watering.aspx

The proponents of deregulation argue that unfair dismissal rights create rigidities in the labour market, reduce labour market churn and inhibit the efficient matching between people, skills and jobs. Deregulating unfair dismissal rights, they contend, will increase labour market transitions which in turn will improve 'job matches' and facilitate innovation.

As ever, the evidence does not fully support this thesis. Chart 4[22] in the BIS Call for Evidence demonstrates Sweden has generally outperformed the US in terms of labour market movements. This is despite the fact that Sweden has far stricter levels of employment protection legislation and higher levels of out-of-work benefits. Similarly, both Germany and Finland have higher levels of 'churn' than the UK. One explanation is that employees are more willing to move to new employment and to acquire new skills where they are guaranteed a higher level of job security after starting the new job.

It therefore follows that the introduction of no fault dismissal in micro businesses could make the UK labour market less flexible. High skilled workers in particular, may become more reluctant to move to employment in small, innovative businesses due to the consequential loss of job security.

In contrast, employment is likely to become less stable for lower skilled and lower paid workers if no fault dismissal proposals are implemented. Such workers may find themselves trapped in a constant churn between unemployment and low-paid, insecure jobs. Due to the increased conditionality of out-of-work benefits, such workers are likely to be pressurised into accepting any job that is available even though it may not be suited to their skill set, and even though it would be better for them and the economy to wait longer to achieve a 'better job match', and to earn higher wages.

(iii) Employee motivation, workplace performance and productivity

The TUC believes that employment protection plays an important role in maintaining workforce motivation and productivity. Employees who benefit from higher levels of job security are more likely to be motivated and to offer a higher level of discretionary effort. Employers are also more likely to invest in the training and development of workers who stay with the organisation for a longer period. Such employees also develop firm-specific knowledge which can lead to productivity gains.

Good employment practices, including effective worker participation, are also an essential precondition for the creation of high productivity, well performing workplaces.[23] The MacLeod Report has also illustrated the relationship

[22] BIS '*Dealing with Dismissal and 'Compensated no fault dismissal' for micro businesses'* Call for Evidence, March 2012, Chart 4 p.28. London: BIS

[23] TUC *2003 UK Productivity: Shifting to the High Road: A response to the Porter Report* London: TUC

between greater employee engagement and improved innovation, performance and productivity across the economy.[24]

In contrast, the introduction of no fault dismissal proposals will create job insecurity, damage workforce morale and have negative effects on productivity. The mistreatment of staff in the workplace is likely to de-motivate employees. This will undermine long term performance and may make it more difficult for small businesses to recruit and retain staff. This point was made well by Mike Emmott, employee relations public policy adviser at the CIPD:

> *"There is no economic case to be made for the watering down of employment rights for businesses of any size. Businesses have far more to lose in lost productivity from a de-motivated and disengaged workforce than they stand to gain from the ability to hire and fire at will. The consequences for the UK's economic growth could prove particularly perverse when it comes to micro-businesses, who may be discouraged from hiring their tenth worker and may even struggle to recruit high calibre employees because they are seen as low-road employers."*

(iv) Investment in skills and training

The introduction of no fault dismissal will almost certainly make employment in micro businesses less stable and more transient in nature. This is likely to have serious implications for access to training and career development for staff in the small business sector.

Access to training and skills development are essential to career development and mean that workers fare better in the labour market. As the OECD has shown, workers who receive continual training experience higher wages.[25]

However, it is well-established that temporary workers have less access to training opportunities and career development as compared to permanent staff.[26] As the OECD highlighted in their 2002 Employment Outlook, the shift towards more transient and insecure forms of employment is likely to have cost implications for staff in the small business sector:

> *'Temporary employment is associated with a wage penalty, even after using regression techniques to control for differences in individual and job characteristics….up to one-fourth of temporary workers are unemployed two years later – indicating a far greater risk of unemployment than is observed for workers in permanent jobs – and an even larger share are still in temporary jobs. Since employers provide less training to temporary than to permanent workers, persons spending an extended period of time in*

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[24] MacLeod, D and Clarke, N (2009) *Engaging for Success: Enhancing Performance Through Employee Engagement*, London: Department of Business, Innovation and Skills.
[25] OECD (2006) *Employment Outlook: general Policies to Improve Employment Opportunities for All'* Paris: OECD pp 47 -126.
[26] Booth A, Francesoni M and Frank J (2002) "Temporary Jobs: Stepping stones or Dead Ends? *The Economic Journal* 112, June 2002, pp 189-213.

temporary jobs may be compromising their long-run career prospects.'[27]

In the medium to longer term these developments will have detrimental effects on productivity and wider economic performance.

(v) Management styles

The TUC agrees with the CIPD that proposals for no fault compensated dismissals would encourage bad management practices.[28] Managers would be free to dismiss employees for arbitrary and unfair reasons provided they pay a sum of money in advance. This is a licence for bullying tactics in small businesses and will make it more difficult for micro businesses to attract strong candidates.

The mistreatment of staff is also likely to have a serious impact on the motivation of those who remain within workplaces.

- Findings from a CIPD survey in 2009 revealed that seven out of ten employees whose organisations have made redundancies report that job cuts have damaged morale, with more than a fifth (22%) of employees so unhappy as a result of how redundancies are being handled that they are looking to change jobs as soon as the labour market improves.[29]

The use of no fault dismissal arrangements is likely to have a similar impact.

I. Impact on consumer confidence and access to credit

Increased job insecurity arising from no fault dismissal policies will damage consumer confidence and suppress demand in the economy. This policy change would not simply affect employees who are actually dismissed, but also the wider workforce, who have a heightened fear of losing their employment. Increased job insecurity is likely to reduce demand. Employees are particularly likely to be deterred from making longer term investments, for example in housing and pensions.[30]

Weakened unfair dismissal proposals will also mean that employment is likely to become more transient in nature, with workers affected facing periods of unemployment and reduced earnings when they find new employment. In a study published in 2000, Gregg, Knight and Wadsworth estimated that job losses result in wage losses of ten per cent on average.[31] The loss tends to be

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[27] OECD (2002) *Employment Outlook: Taking the measure of temporary employment*.' Paris: OECD pp127-183

[28] http://www.peoplemanagement.co.uk/pm/articles/2012/06/beecroft-no-fault-dismissals-unnecessary-says-cipd.htm

[29] '*Employee Outlook: Job seeking in a recession'* CIPD Quarterly Survey Report Summer 2009.

[30] Heery E, Salmon J (2000) '*The Insecurity thesis* in *'The insecure workforce'* ed. Edmund Heery and John Salmon, Routledge Studies in Employment Relations. London: Routledge.

[31] Paul Gregg, Genevieve Knight and Jonathan Wadsworth (2000), '*Heaven knows I'm miserable now: Job insecurity in the British Labour market'* in *'The insecure workforce'* ed. Edmund Heery and John Salmon, Routledge Studies in Employment Relations. London: Routledge

much larger for older workers and the less educated. Reduced earnings will inevitably lead to suppressed demand.

Increased job insecurity will also mean that workers will have limited access to credit which can cause extreme stress and financial worries and uncertainties.[32] Employees on insecure contracts are likely to find it difficult to access and finance housing.[33] These problems are likely to be amplified by recent changes to housing benefit rules.

J. Other implications including the ability of small firms to attract future employees

The removal of unfair dismissal rights will mean that staff in small and micro businesses will be treated as second class citizens. This will undoubtedly make it more difficult for small firms to attract quality staff. Restricting the talent pool for small firms will not be conducive to growth

Proposals for no fault dismissal will mean that employment is more precarious and that many workers are trapped in a constant churn between unemployment and low paid employment. As independent evidence demonstrates, this is likely to have significant social and health implications[34]:

- There are also strong links between job security and stress levels, with employers that are planning redundancies most likely to see a rise in mental health problems among staff. According to CIPD research, worries about job losses have meant that stress has become the most common cause of long-term sick leave in Britain, overtaking other reasons for long-term absence such as repetitive strain injury and medical conditions such as cancer.[35]
- Analysis of the BHPS in the UK has shown that healthy men and women suffer adverse health effects in insecure, low paid work and those facing low earnings and insecurity were two and a half times more likely than those in better jobs to develop an illness limiting their capacity to work.[36]
- The Marmot review on health inequalities prepared in 2010 for the Department of Health concluded: ‘work is good - and unemployment bad – for physical and mental health, but the quality of work matters. Getting people off benefits and into low paid, insecure and health-damaging work is

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[32] Fair Work Coalition (2010) ‘*Fair Work: Fighting poverty through decent jobs.’* London: TUC

[33] Richard M. Walker (2000) ‘*Insecurity and housing consumption’* in ‘*The insecure workforce*’ ed. Edmund Heery and John Salmon, Routledge Studies in Employment Relations. London: Routledge; Walker, R. M. (1997) *Bad for Business: Company Employees and their Housing Problems’.*

[34] Fair Work Coalition (2010) ‘*Fair Work: Fighting poverty through decent jobs.’* London: TUC

[35] http://www.cipd.co.uk/pressoffice/press-releases/stress-number-one-cause-long.aspx

[36] Bartley M, Sacker C and Clarke P (2004) *‘Employment Status, Employment Conditions and Limiting Illness: Prospective Evidence from the British Household Panel Survey 1991-2001’,* Journal of Epidemiology and Community Health, Volume 58, pp501-506 cited in Howard C and Kenway P (2004) Why Worry Any More About the Low-Paid? London: New Policy Institute.

not a desirable option.'[37]

K. International dismissal systems: Lessons to be learnt

Throughout this submission the TUC has cited international and comparative evidence which demonstrates that the weakening of unfair dismissal rights cannot be justified on social or economic grounds.

The international case studies published by BIS in May 2012 also demonstrate that exemptions for small firms and the weakening of unfair dismissal rights have not led to the 'hoped for' labour markets outcomes.[38] Instead these measures have often had detrimental economic, social and political outcomes.

Germany

- The adoption of the Protection against Dismissal Act (PADA), which exempted small firms from unfair dismissal laws, has not led to substantial growth in the small business sector. Between 2003 and 2007 'the growth rate of employment for micro businesses consistently fell below the overall growth rate of employment'.[39]
- In recent years Germany has however witnessed the development a two tier labour market with the growth in temporary working and 'mini jobs' following the implementation of recommendations made by the Hartz Commission. This has led to increased pay inequality and in-work poverty.

Australia

- The introduction of *Work Choices* by the National-Liberal Coalition, under which businesses with fewer than 100 employees were exempted from unfair dismissal rules, proved highly unpopular with only 20 per cent of the public supporting it. It is widely recognised that the policy led to the defeat of the incumbent government in the 2007 election.
- In 2009 Work Choices was replaced by the Fair Work Act and the Small Business Fair Employment Code applying to businesses with fewer the 15 staff. However these proposals have continued to prove controversial with the Australian small business lobby who are concerned that weaker employment rights create reputational damage for small businesses, making it more difficult to attract quality staff.
- There is no evidence that weaker unfair dismissal rules for small businesses have stimulated employment growth. Surveys commissioned by the Australian Human Resources in 2011 reveal that 'more than two thirds of employers (72.5%) have reported no change in hiring practices as a result of

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[37] Marmot M et al (2010) *'Fair Society, Healthy Lives: The Marmot Review'*, Executive Summary London: The Marmot Review

[38] BIS *'Dealing with Dismissal and 'Compensated no fault dismissal' for micro businesses: The International Case Studies'* May 2012. London: BIS

[39] Ibid p.24

the new threshold. While 15% indicated that it has in fact discouraged hiring, only 3% reported employment growth as a result'[40].

Italy

- In Italy, firms employing more than 15 staff can only fire staff if they have a just cause.
- In March 2012, these policies were criticised by Italy's own Prime Minister Mario Monti who said that hire and fire culture among small firms amounted to 'bad flexibility'. He argued that the laws penalise young people who cannot start a family to buy a house while they dance to their employer's whims.[41]
- It was also suggested that the two tier approach to employment law encouraged firms to stay small.

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[40] Ibid
[41] http://www.government-online.net/beecroft-proposals-will-hit-consumer-confidence-and-hinder-recovery/

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