

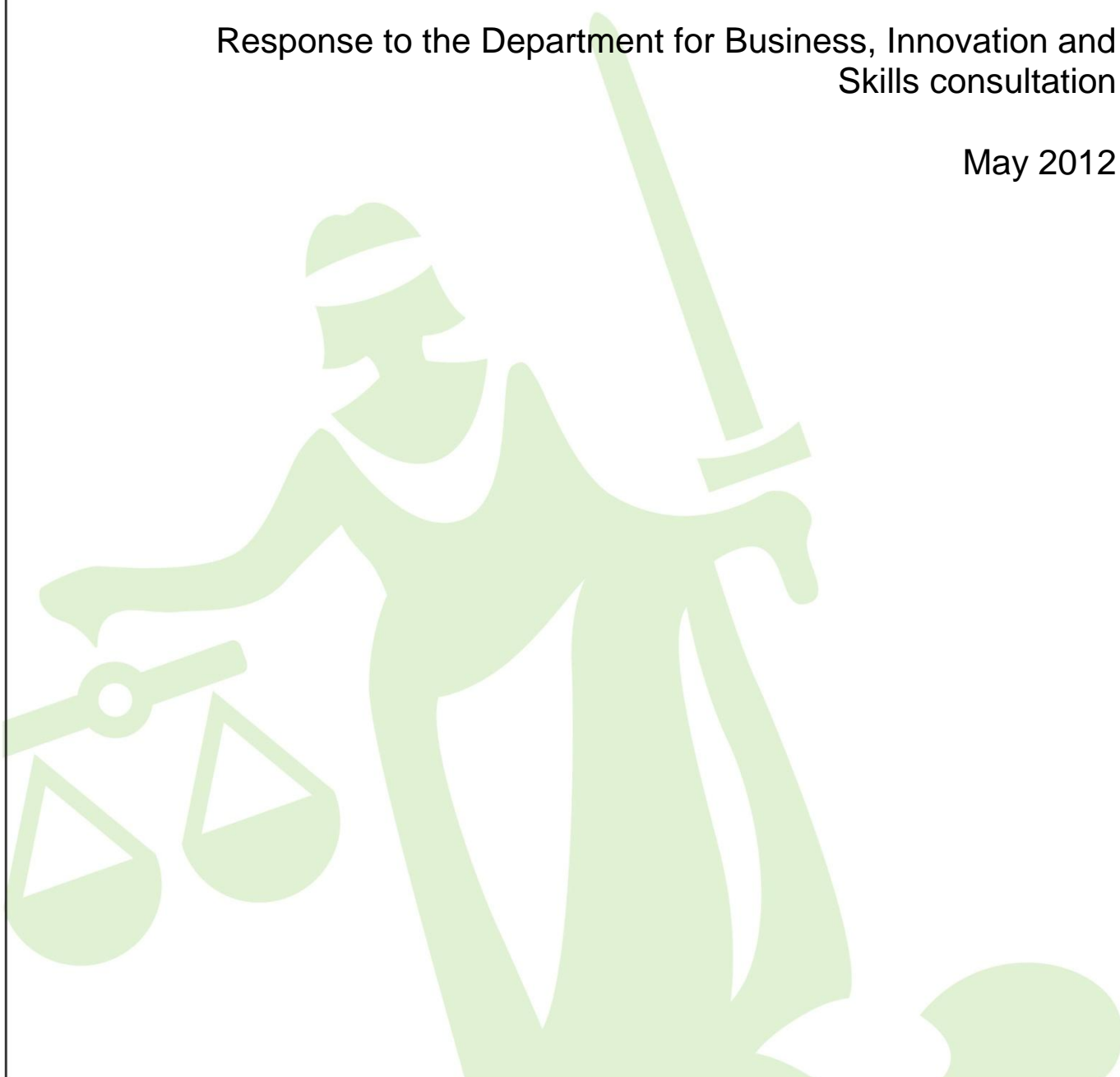


The Law Society

# **The Call for evidence: Dealing with Dismissal and 'Compensated No Fault Dismissal' for Micro Businesses**

Response to the Department for Business, Innovation and  
Skills consultation

May 2012



## Introduction

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Employment Law Committee ('the Committee'). The Committee is made up of senior and specialist employment lawyers from across England and Wales. Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are fee-paid employment judges.

Our interest in employment law and practice is to influence policy changes to secure 'good law making', to provide clarity for employers and employees, and to avoid possible unintended consequences. We welcome this opportunity to provide both general and specific comments on compensated no fault dismissal for micro businesses and the Acas Code of Practice on Discipline and Grievance. Our comments reflect the concerns of solicitors with daily experience of putting employment law procedures into practice.

We do not believe that the introduction of compensated no fault dismissal will be beneficial for micro businesses. Making it easier for small businesses to dismiss people will not help them to flourish and expand. There is a clear and well understood framework for employers, small and large. Creating a separate system for businesses with fewer than ten people will create a 'two-tier' system which will be confusing and unhelpful.

What small businesses and first time employers need is support and advice to understand that employment law is largely a matter of good practice. The Acas Code of Practice on Discipline and Grievance, which is clear and easy to understand, should be retained in its current format. Micro businesses would benefit from 'signposting' to information, guidance and advice that is already available.

## Is there a case for introducing compensated no fault dismissal for micro businesses?

As part of its strategy for a balanced economic recovery, the Government has introduced a package of employment law reforms that focus on reducing the regulatory burdens on employers and making it easier for businesses to take on new staff. The central theme running through the call for evidence paper is that micro businesses are not expanding because of fear of the employment regulations with which they have to comply, in particular unfair dismissal laws.

The call for evidence is asking for views on the current framework for dismissal to understand better the 'perceived problems'. However, before even hearing these views, the proposed solution appears to be the introduction of compensated no fault dismissal for micro businesses. The question of whether the current unfair dismissal laws (and indeed other employment law regulations) in fact prevent businesses, and in particular micro businesses, from expanding remains unanswered.

At the macro level, the United Kingdom has one of the most flexible and lightly regulated labour markets of all OECD countries. Nevertheless, recent survey evidence commissioned by the Department for Business, Innovation and Skills (BIS) showed that half of businesses with fewer than five employees felt that employment regulation put them off employing staff.

This perception does not appear entirely consistent with figures showing that micro businesses seem to be driving job creation in the economy: small businesses and start-ups were responsible for 67 per cent of the 2.61 million jobs created on average each year between 1998 and 2010 and that smaller firms have been increasing their share of total employment year on year and in 2010 their share was triple that in 1998.<sup>1</sup>

All English regions (with the exception of West Midlands), as well as the three devolved administrations, recorded a small positive net employment change on average each year between 1998 and 2010.

Businesses in the private sector may be inclined to resist regulation and promote flexibility, and in doing so equate flexibility with economic success. However, this seems to be over simplistic. By way of example, Figure 1 in the call for evidence cites OECD figures showing the strictness of employment protection in 28 countries. The top five least strictly protected were ranked 4th, 19th, 18th, 27th and 17th respectively, whereas the top five most strictly protected were ranked 34th, 1st, 16th, 30th and 7th. The figures are not conclusive either way, although more regulated employment markets are very slightly more productive.

We acknowledge that when starting a new business, the various pieces of tax, health and safety and employment legislation may well be daunting to some small and micro businesses. However, we question whether in reality the demands of employment regulation, in particular regulation relating to dismissals, deter small businesses from employing staff. We believe that it is fear of lack of demand and possible business failure that is the single most important deterrent to expansion, not employment regulation.

## Would compensated no fault dismissal be beneficial for micro businesses?

It is difficult to see how such a move would be useful to either employers or employees.

### **The impact on employees**

While the vast majority of employers try hard to meet their legal obligations to their workforce, there are some 'rogue' employers who disregard the law, and as a result, their employees do not benefit from the existing legal framework for fairness in the workplace. The most vulnerable workers (cleaners, restaurant staff, couriers, care workers and others) are often employees of small and micro businesses.<sup>2</sup> If introduced, compensated no fault dismissal would be liable to abuse, placing workers such as these in an even more vulnerable position.

For example, an employer could use it for no other reason than to replace staff by cheaper workers which would be unfair to longer serving staff. This example also illustrates the risk that more discrimination claims may be generated (as opposed to merely brought) as employers may be given a false sense of security that they are

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<sup>1</sup> Department for Business, Innovation and Skills, *Job Creation and Destruction in the UK: 1998 – 2010* (2011).

<sup>2</sup> See Citizens Advice Bureau, *Give us a Break! The CAB service's case for a Fair Employment Agency*, April 2011, p.4.

outside the scope of employment regulation such that they overlook the fact that their actions could amount to unlawful discrimination. The example above about dismissing longstanding staff illustrates this, as the employer's actions could potentially give rise to age discrimination claims.

It is entirely flawed to treat the employment relationship as though both parties are completely free to bargain and to walk away when it does not work, which is what these proposals seem to suggest. Employees are justifiably protected from being dismissed without cause because the law recognises this inequality of bargaining power. The Government should be extremely reluctant to interfere with this.

### **The impact on employers**

In a broader sense, there would be a real risk that no fault dismissals would encourage lax management practices, which will not be to the overall benefit of micro employers. If a micro business finds basic fairness too complicated then we would suggest the issue lies with the failure of these businesses to comply with the legal framework, not with the value of fairness.

The creation of a two-tier system will also lead to practical problems for the competitiveness of micro businesses. It is difficult to see how a micro business is going to attract key staff from competitor businesses. Growth will be hindered without the ability to attract key skills and personnel. Retention of talent would also be a problem for the same reasons as staff will prefer to move to firms where they would accrue unfair dismissal rights. In the absence of an ability to contract into unfair dismissal rights (which would be a radical shift from the current position) recruitment stigma is likely to attach to micro businesses.

Similarly, if the opportunity cost of employing a tenth person is that the entire workforce get unfair dismissal rights this could be a significant disincentive to growth. Other practical problems may arise, such as what happens where a micro business employs eleven people and one leaves: is everyone else thereby stripped of his or her unfair dismissal rights? If that leaver is replaced are those rights reinstated without a break in service, with a break, or under some other arrangement? If the tenth and eleventh members of staff are dismissed for fighting with each other, but have the disciplinary hearings on different days does that mean that the first to learn their fate has unfair dismissal rights and the other does not? Practical issues such as these will make the dismissal framework more confusing for micro businesses which is obviously not what is intended.

There is also the possibility that if compensated no fault dismissal is introduced for micro businesses, this will give them an incentive to opt for the level of compensation in a compensated no fault dismissal (ie, by not hiring above ten employees), rather than continue to hire and thereby fall within unfair dismissal rules. If the level of compensation is greater than might ordinarily be expected for such a dismissal under unfair dismissal rules it is likely that micro businesses will be worse off financially. If it is less, then they might be expected to be better off financially, although there will be an incentive for employees whose no fault compensation does not cover their full losses to try to bring discrimination or 'special' unfair dismissal claims, and if these claims are brought then overall it is likely that micro businesses will be worse off.

For these proposals to benefit employers, they must be more advantageous than the present system. Employers already have options under existing unfair dismissal laws to terminate an employee's employment. They can dismiss without notice in a gross misconduct case and they can dismiss for poor performance after opportunities to

improve are discussed. It should also be noted that when determining reasonableness under section 98 of the Employment Rights Act 1996, the Tribunal must take the size and administrative resources of the employer into account. Employers can also use far shorter notice periods during a probationary period.

### **The impact on consumers**

A workforce that has no means of redress is a discontented one, and an unproductive one. The call for evidence explicitly recognises this at footnote 13 which states that 'evidence of negative correlation between employee confidence/motivation and level of productivity can be found in a large amount of literature treating this subject' - see for example Hackman and Oldham (1980).

Workers are also the economy's consumers. If they are saving against the possibility of sudden dismissal then they are not spending, which in turn has implications for growth in the economy. At the start of 2011 micro businesses accounted for 21% of all UK business enterprises and employed 16% of the total of all staff employed in the private sector. If introduced, these changes are likely to affect a substantial proportion of employees and consumers.

### **No benefits to introducing compensated no fault dismissal**

We acknowledge that micro businesses may feel less confident in applying detailed disciplinary procedures and these same businesses may have a greater fear of employment tribunal claims. However, introducing compensated no fault dismissal will not achieve the goal of assisting small businesses to expand, particularly when individuals would still be able to bring discrimination claims or a claim in another jurisdiction. The Government acknowledges that this would not 'give peace of mind to an employer', particularly as the statistics show that of the 'forty per cent who agreed that employment regulation puts them off employing staff, only one per cent say that dismissal/disciplinary action is the regulation that most puts them off' (see Table 5). The majority of small businesses seem to be more afraid of discrimination claims.

When the status quo of unfair dismissal is weighed against the problems of recruitment, uncertainty inhibiting consumer spending, and the logistical issues of determining what happens when someone goes beyond the size of a small employer, there is little clear benefit to be gained by changing the existing rules.

## **Acas Code of Practice on Discipline and Grievance.**

The call for evidence states that 'micro businesses are likely to find it more difficult to access expert human resource and legal advice ... and the effect of this is that they are likely to feel less confident in applying detailed disciplinary procedures and have a greater fear of employment tribunals'. We acknowledge that small businesses may feel overwhelmed or nervous about the various pieces of employment legislation they have to adhere to when running a business. To gain the confidence they need to expand and take on more staff, small businesses need access to quality information, support and advice. This highlights the importance of the procedures outlined in the Acas Code of Practice on Discipline and Grievance (the 'Code').

### **Should the Acas code be further simplified?**

Recent survey evidence shows that employers generally welcome the Code.<sup>3</sup> However, the call for evidence suggests that the Code needs to be simplified or changed in a number of ways.

Solicitors want to see procedures that are simple, transparent and fair, backed up by an Acas Code that shares those characteristics. We would be concerned if the Code, which in our opinion has these characteristics, were simplified any further. We query whether a too short, non-prescriptive code would be capable of providing the guidance necessary for small businesses that need clarity and certainty. This must be especially the case for employers without their own human resources function or lawyer.

What is noticeable from the call for evidence is that there is no mention of the Acas Guide to Discipline and Grievances at Work which fleshes out the principles and provides specimen documents.

### **Should the requirements of the Code be different for micro businesses?**

We do not think that the requirements of the Code should be different for micro and/or small businesses. The Code is already as simple as it can be while still providing sufficient detail to be informative. The only way it could be simplified is to remove an element entirely, such as an appeal, or disapply it entirely. While the latter would be consistent with the ability to enforce a right in the tribunal, it is at least arguable that where there are no enforcement rights it makes it all the more important that there is at least some structure in the workplace to promote fairness, and to assist those employers who want to ensure that the process they follow is in line with the principles of natural justice.

The Tribunal has the power to deal with employers in different ways depending upon their resources and size. There is therefore no need to make micro businesses subject to a different code. There is considerable merit in there being one code for all to follow to the best of their abilities.

### **The Australian Small Business Fair Dismissal Code**

The call for evidence suggests that the Code may not be practicable for smaller employers and that an alternative example, the Australian Small Business Fair Dismissal Code, might provide a more suitable model. We do not believe that this Code provides a useful model for the UK because the Australian test of whether the dismissal was 'harsh, unjust or unreasonable' is much broader than ours. Applying this model to the existing 'band of reasonable responses' structure would actually result in a narrower system than the Australian model. The same is true of the redundancy test.

We are also concerned by the fact that certain allegations alone (for example, theft, fraud violence reported to the police) would disapply the system. This is unfair and ignores how often we see such instances resulting in no criminal charges being brought.

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<sup>3</sup> <http://www.acas.org.uk/media/pdf/4/r/Evaluation-of-the-Acas-Code-of-Practice-on-Disciplinary-and-Grievance-procedures-accessible-version-.pdf> (NatCen)

The Australian Code, which effectively turns dismissal into a tick box exercise, would also lull businesses into a false sense of security. An employee could still challenge an employer over whether they had actually followed the Australian Code even if they had completed the checklist. This is why demonstrating compliance as a condition of defending a claim is a good thing. It is therefore unlikely that it would lead to fewer claims being processed. Indeed, Fair Work Australia's (the national workplace relations tribunal) Annual Report for 2010/11 says that compared to the last full year of operation of the old scheme: lodgements were up 211% on the previous system; hearings were up 210% on the previous system; dispute notifications were up 636%; and applications relating to termination of employment were up 186%.<sup>4</sup>

### **The level of awareness and understanding of unfair dismissal law and the Acas Code**

The call for evidence asks what the level of awareness and understanding of unfair dismissal law and the Acas Code is. There are numerous sources of information available in person and on the internet. In addition to paid legal advice these include legal assistance provided via household insurance; the Citizens Advice Bureau; and any number of free internet sources including:

- [acas.org.uk](http://acas.org.uk)
- [direct.gov.uk](http://direct.gov.uk)
- [adviceguide.co.uk](http://adviceguide.co.uk)
- [citizensadvice.org.uk](http://citizensadvice.org.uk)
- [communitylegaladvice.org.uk](http://communitylegaladvice.org.uk)
- [emplaw.co.uk](http://emplaw.co.uk)

Much of this online advice is simple, easy to understand and straightforward to follow.

In our experience, most employers go beyond the minimum standards set out in the Acas Code. Small employers are at least vaguely aware of unfair dismissal law and the Acas Code. Whether they actively try to inform themselves about it is another issue. We query whether the problems facing some small businesses arise from the poor application of existing procedures, coupled with a lack of willingness to do something about adopting and applying a fair procedure.

This aside, small businesses are likely to benefit from 'signposting' to information and websites that provide information and advice, such as the Business Link and the Acas websites. We hope that the new *Taking on an Employee* toolkit, found on the Business Link website, will provide more information and training for small businesses not just about the law and rights, but about how employers can get the best out of their employees. With this new support for good employment practices in place there is even less impetus or justification for the no fault dismissal proposal.

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<sup>4</sup> <http://www.fwa.gov.au/>

## Conclusion

We do not believe that the introduction of compensated no fault dismissal will be beneficial for micro businesses. The Acas Code of Practice on Discipline and Grievance is clear and easy to understand and should be retained in its current format. Micro businesses would benefit from 'signposting' to information, guidance and advice that is already available.