

## Consultation response

Ref: 1412

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

8 June 2012

All rights reserved. Third parties may only reproduce this paper or parts of it for academic, educational or research purposes or where the prior consent of Age UK has been obtained for influencing or developing policy and practice.

Name: Christopher Brooks  
Email: [christopher.brooks@ageuk.org.uk](mailto:christopher.brooks@ageuk.org.uk)

Age UK  
1-6 Tavistock Square  
London WC1H 9NB  
T 020 8765 7200 F 020 8765 7211  
E [policy@ageuk.org.uk](mailto:policy@ageuk.org.uk)  
[www.ageuk.org.uk](http://www.ageuk.org.uk)

Age UK is a charitable company limited by guarantee and registered in England (registered charity number 1128267 and registered company number 6825798). The registered address is 207-221 Pentonville Road, London N1 9UZ.

This is the Age UK response to the Department for Business, Innovation and Skills' (BIS) call for evidence on 'compensated no fault dismissals' for micro-business. If adopted, the proposals would allow organisations employing less than 10 people the right to dismiss workers without reason, in return for a compensation payment.

## Key points and recommendations

- There is no evidence to suggest that the introduction of 'no fault dismissals' would benefit the UK economy by reducing unemployment or boosting growth. Not only is there no evidence to demonstrate the benefits of no fault dismissals, but in fact the business case is clear that job security is important for individual employees, helping them work more productively.
- Removing dismissal protection could undermine the abolition of the Default Retirement Age. There is a substantial risk that it would create a legal vacuum and allow employers to use age-based criteria in dismissal decisions while making it very difficult for ex-employees to prove that such criteria were used.
- A sufficient legislative structure for dismissing under-performing workers already exists as part of the Employment Rights Act 1996. It is management practice which needs improving, not the legal framework, and the Government should instead encourage employers to engage in more effective workforce management policies and practices.
- No fault dismissal would only serve to create a two-tier workforce where people were unwilling to work for micro-employers; and where reduced job security had a negative impact on employees' health and wellbeing and productivity.
- The evidence, including that commissioned by BIS, shows that there is no clear benefit to productivity or employment outcomes as a result of lower levels of regulation, in particular for older workers.
- While it is likely that some unfair dismissal claims would be re-submitted under an alternative jurisdiction, there is no evidence available as to how common this would be or whether claims being classified differently is even a problem.

## 1. Introduction

Evidence shows that reductions in regulation only have an impact on growth in countries which are highly regulated at the outset of such policies.<sup>i</sup> However, as the call for evidence paper points out, the UK already has the third least restrictive employment regulation in the OECD (behind the US and Canada). It is also substantially less restrictive than emerging economies.<sup>ii</sup>

The international evidence shows that macroeconomic performance is not linked to the level of employment regulation. From within the US, the Office of Economic Policy provides a strong argument to this effect:<sup>iii</sup>

*“If demand was strong but businesses were concerned about future regulations, they would increase the hours of the workers they already employ rather than hiring additional workers. We have seen no evidence of this in the data: the average work week for private employees has been roughly flat for the past year.”*

Age UK believes there is nothing to be gained from further reducing employment protection in this way. Doing so will only serve to create a two-tier workforce with those employed by micro-businesses enjoying less protection, making such employers less desirable to potential recruits.

In addition, there is a risk that it will undermine efforts to extend working lives. Once out of work, older workers often find it difficult to return to employment, meaning that many who are removed from their jobs through a no-fault dismissal would find themselves unable to return to the labour force easily or indeed at all.

## 2. Consultation questions

### **F. Whether or not no fault dismissal would lead to a reduced burden on micro-businesses and an increase in the demand for new employees**

Age UK does not believe that no fault dismissal would reduce the burdens for micro-business.

There is little real evidence that employment protection is an undue burden on employers. The latest BIS SME quarterly survey finds that just four per cent of employers seek out advice relating to employment law or redundancies, indicating there is no substantive financial burden relating to unfair dismissals for the overwhelming majority of small firms.<sup>iv</sup> When coupled with the fact that few small employers are concerned about employment regulation generally, this strongly indicates that no-fault dismissals would have very little benefit to employers.

As the consultation paper states, only 0.4 per cent of all employers consider regulations around dismissal and discipline as the primary regulatory reason for not taking on additional staff.

In addition, it would have the unintended consequence of making it more difficult for them to recruit. With all other things being equal, desirable potential employees would often be inclined to work for a larger organisation where they would enjoy greater job security.

Micro businesses would be deprived of a significant talent pool from which to recruit, rendering them less competitive. One in two micro businesses already struggle to recruit the right skill profiles<sup>v</sup> – pursuing such a policy would exacerbate this.

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

Reducing dismissal protections would potentially provide greater scope for employers to take decisions based on age-related criteria, without fear of retribution.

### ***Discrimination***

The Department for Work and Pensions' *Second survey of employers' policies practices and preferences relating to age* (SEPPP2) found that older and younger workers are both likely to be viewed as 'less suitable' for an employer's main occupational role. Of those employers for whom age is a relevant consideration, approximately 50 and 60 per cent respectively single out older and younger workers, compared to about 5 per cent for 25-39s and just over 10 per cent for 40-49s.<sup>vi</sup>

This has potential implications for dismissals, which could lead to decisions which were discriminatory against both older and younger workers. Under a system of no-fault dismissal it would, however, be very difficult to prove that discrimination had occurred.

Even under the current system, 40 per cent of workers aged 50+ believe they have been discriminated against in the workplace, which points at the likelihood of this occurring.<sup>vii</sup>

The current evidence on redundancy is also revealing. Officially, employers are unlikely to use age as a criterion for redundancy, with only two per cent admitting to doing this.<sup>viii</sup> However, more anecdotal evidence suggests use of age is still rife. Research by the recruitment agency *Wise Owls* based on freedom of information requests found that some local authorities made a disproportionate number of older workers redundant, suggesting discriminatory practices.<sup>ix</sup> While not applying directly to micro-businesses, this demonstrates that in reality such practices still continue.

It is likely that some people would submit a claim under a different jurisdiction if denied the chance to claim unfair dismissal. However, it is not possible to quantify this accurately.

In the Resolving Workplace Disputes impact assessment, BIS has attempted to calculate the rate of unfair dismissal claims being re-submitted under other auspices. However, this calculation relies heavily on assumptions which are too vague to be the basis of public policy formulation.

For example, it is assumed that all claims filed under a single jurisdiction would be dropped, whereas all claims filed under multiple jurisdictions would then be made under an alternative. There appears to be no firm evidence underpinning either of these assumptions and Age UK recommends that qualitative research would have to be undertaken to see whether this would occur.

Even if these assumptions are made, the estimated reduction in tribunal cases resulting from extending the qualifying period for unfair dismissal to two years was estimated at just 1,600 to 2,400 per year, a fall of three to five per cent.<sup>x</sup>

The impact on the number of tribunal claims on micro-businesses is therefore likely to be insignificant.

**H. The potential impact of no fault dismissal on the behaviour of employers and employees, and levels of productivity, including on a) levels of recruitment b) job-matching ('right person, right job') c) employee motivation, commitment and engagement d) investment in skills and training e) management, including effective performance management**

Employment regulation is an important tool in achieving the Government's policy objective of extending working lives in the context of employee protection; in-work measures (for example extending the right to request flexible working); and helping people back into the workplace.

As stated in section G, employers would have more scope to discriminate against older workers without fear of retribution, which could potentially undermine the abolition of the Default Retirement Age and compromise the Government's efforts to help people stay economically active for longer.

***Direct impact on individuals***

For individuals, no fault dismissal would increase levels of job insecurity and so have a negative impact on employees' job satisfaction and wellbeing, and consequently on productivity levels. Employers are likely to derive a business benefit from developing a positive relationship with employees.<sup>xi</sup>

Older workers are typically aware of the difficulty of re-entering the workplace, and are reluctant to risk finding themselves out of work. Maintaining a good relationship with their employer is an important aspect of this, and helps emphasise the importance of mutual trust. Policy measures – both government and organisational – which fail to promote this are unlikely to be business-friendly.

Employees aged 50+ are unlikely to make workplace requests which may make them seem like a difficult employee as they fear being subsequently discriminated against.<sup>xii</sup> In essence, this is a fear based on a lack of perceived job security. Such requests are often essential for individuals to be able to extend their working lives.

A lack of employment protection is also proven to lead to lower investment in training and skills by employers.<sup>xiii</sup> This would particularly impact upon older workers who already typically receive lower investment in workplace training from employers<sup>xiv</sup> as well as harming the UK's macroeconomic performance.

***Returning to work***

No-fault dismissal would unfairly penalise groups who find it difficult to re-enter the labour force, especially older workers. Once out of work people aged 50-59 take on average longer to find a job – a typical spell of unemployment lasts 3.4 months longer than someone aged 18-24 and 2.1 months longer than someone aged 35-49.<sup>xv</sup>

If businesses were able to pursue no fault dismissal, then it is likely that older workers would suffer less favourable personal outcomes without reaping any labour market benefit. This latter point is borne out by the evaluation of a Spanish reform

designed to reduce dismissal costs and payroll taxes introduced in 1997, which found that an increase in hiring rates for older workers was matched by an increase in firing rates, leading to a neutral outcome.<sup>xvi</sup>

### ***Existing provision***

The Employment Rights Act 1996 provides the legislative framework for dismissal, including for underperforming workers. Instead of reducing employee protections, the Government should help employers manage the relevant processes better and generally encourage employers to adopt good organisational workforce practices.

### ***Raising the unfair dismissal threshold***

The Department for Business, Innovation and Skills' own impact assessment for the *Resolving Workplace Disputes* consultation recognises there is no evidence for the benefits of extending the unfair dismissal qualifying period to two years – which would have a similar effect to 'no fault dismissal', although the latter would affect all employees:

*"It is not possible to directly quantify the likely impact on business confidence and in turn on hiring behaviour. Research has been carried out on Australian unfair dismissal laws, which looks both at the evidence and theory surrounding these regulations. If businesses perceive that this reduces the cost of hiring then they may increase their labour demand. However, there is no empirical work which links these effects; indeed given the number of more significant determinants of employment, detecting any effect is challenging."<sup>xvii</sup>*

This sums up the futility of trying to increase hiring through reducing employment protection.

---

<sup>i</sup> Frontier Economics (2012), The impact of regulation on growth, Department for Business Innovation and Skills

<sup>ii</sup> OECD (2008), Strictness of employment protection indicators. Also note that Canada cannot be used as a direct comparison owing the state-level control of most regulation, so in effect the UK has the second least protected labour market in the OECD.

<sup>iii</sup> Office of Economic Policy (2011), Is regulatory uncertainty a major impediment to job growth?

<sup>iv</sup> BIS SME quarterly survey (Feb 2012)

<sup>v</sup> British Chambers of Commerce (2011), The workforce survey: micro-businesses

<sup>vi</sup> Metcalfe H & Meadows P (2010), Second survey of employers' policies, practices and preferences relating to age, DWP Research Report 682

<sup>vii</sup> Chartered Institute of Personnel and Development, Chartered Institute of Managers (2010), Managing an ageing workforce.

<sup>viii</sup> Metcalfe H & Meadows P (2010), Second survey of employers' policies, practices and preferences relating to age, DWP Research Report 682

<sup>ix</sup> Local Authority budget cuts during 2009, Wise Owls, available at: <http://www.wiseowls.co.uk/Forums/index.php?action=printpage;topic=7.0> for further details.

<sup>x</sup> BIS (2011), Resolving workplace disputes final impact assessment

<sup>xi</sup> See for example Alden, E. (2012) 'Flexible Employment: How employment and the use of flexibility policies through the life course can affect later life occupation and financial outcomes', Age UK Research Report, Age UK; or CIPD/CMI (2010), Managing an ageing workforce

<sup>xii</sup> See for example Kurtulus FA, Kruse D, Blasi J (2011), Worker attitudes towards employee ownership, profit sharing and variable pay, SSRN; McNair S & Flynn M & Owen-Hussey L (2006), Older workers in the south-east, Centre for Research into the Older Workforce, Alden, E. (2012) 'Flexible Employment: How employment and the use of flexibility policies through the life course can affect later life occupation and financial outcomes', Age UK Research Report, Age UK

- 
- <sup>xiii</sup> Damiani, M., Pompei, F., (2010), Labour protection and productivity in EU economies: 1995-2005, *European Journal of Comparative Economics*, Vol. 7, n. 2, pp. 373-411
- <sup>xiv</sup> Felstead A (2010), The importance of teaching old dogs new tricks: training and learning opportunities for older workers, in Parry E and Tyson S (2010), *Managing an Ageing Workforce*
- <sup>xv</sup> *Economic & Labour Market Review* (Sept 2010), Explaining exits from unemployment in the UK, 2006-9
- <sup>xvi</sup> Kugler A, Jimeno J, Hernanz V (2002), Employment consequences of restrictive permanent contracts: evidence from Spanish labor market reforms, IZA Discussion Paper 657
- <sup>xvii</sup> BIS (2011), Resolving workplace disputes final impact assessment, p.80