

**REPORT  
ON  
EMPLOYMENT LAW**

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**12<sup>th</sup> October 2011**

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## Introduction

Britain has a deficit crisis, from which the only escape route is economic growth. Growth needs to be encouraged in every way possible.

Businesses must be able to manage their affairs in a way that allows them to become more efficient, more competitive on a domestic and global basis and hence more likely to grow and employ more people.

Yet much of employment law and regulation impedes the search for efficiency and competitiveness. It deters small businesses in particular from wanting to take on more employees: as a result they grow more slowly than they otherwise might. Many regulations, conceived in an era of full employment, are designed to make employment more attractive to potential employees. That was addressing yesterday's problem. In today's era of a lack of jobs those regulations simply exacerbate the national problem of high unemployment.

While it may seem counter-intuitive, even making it easier to remove underperforming employees will in the short run not increase unemployment as they will be replaced by more competent employees. In the long run it will increase employment by making our businesses more competitive and hence more likely to grow.

A crisis such as the one Britain's economy faces demands radical changes to encourage employers to take on more staff, and thus to grow. Some employee protections, such as those preventing discrimination or dangerous working conditions, must be maintained. Others, which encourage people to take employment but discourage employers from offering it, must be changed, permanently or temporarily, to help the country out of its difficulties.

I should like to thank all those who have helped me in the preparation of this report, which was prepared in August and September 2011. In particular I owe a great debt to Carl Creswell and his team at BIS, in particular Lakhbir Hans.

I have not covered Health and Safety Laws because I feel that Lord Young's report covered all the relevant issues, and because the Lofstedt Review, due in November, will make detailed proposals for how Lord Young's admirable recommendations should be implemented. Nor have I covered Sickness Absence because the DWP and BIS are very shortly to produce a joint report on this subject. The National Minimum Wage regulations need to be made simpler and easier to administer but I have not made recommendations because the Low Pay Commission has been asked to consider the issue. I have made limited recommendations about compliance and enforcement regimes because these are currently being reviewed by BIS.

Adrian Beecroft

12<sup>th</sup> October 2011

## **Executive Summary**

This report looks at a number of different areas of employment law and makes detailed recommendations for change in most of them. But two issues stand out as being the keys to encouraging growth and employment.

### **Unfair Dismissal**

The first is the terrible impact of the current unfair dismissal rules on the efficiency and hence competitiveness of our businesses, and on the effectiveness and cost of our public services. The rules both make it difficult to prove that someone deserves to be dismissed, and demand a process for doing so which is so lengthy and complex that it is hard to implement. This makes it too easy for employees to claim they have been unfairly treated and to gain significant compensation. The result is three serious problems. First, many firms and, particularly, public bodies are reluctant to try to dismiss unsatisfactory employees, and therefore accept inefficiency that they would not tolerate if dismissal of unsatisfactory employees was easier. Second, a proportion of employees, secure in the knowledge that their employer will be reluctant to dismiss them, work at a level well below their true capacity: they coast along. Third, smaller companies in particular are deterred from taking on employees: they would rather stay as sole traders or family businesses than take on the risk of employing unknown quantities.

It is important to note that making it easier to remove underperforming employees will not raise the overall level of unemployment. Employees for whom there is not a job are made redundant. It is only where a job needs doing but is not being done well enough that Compulsory No Fault Dismissal will be used. The result will be that a more able employee will be recruited. Indeed the fact that organisations will become more effective as a result of this greater flexibility to improve the way positions are filled will in the longer run lead to greater competitiveness, growth and employment.

To resolve the problem of the unfair dismissal process one could simply say that if discrimination was not involved an employer could dismiss an employee at any time without giving a reason and paying the employee only for his or her contracted notice period. Unfair dismissal is a UK concept and not an EU one, and so there are no legal barriers to doing this. However, this would probably neither be fair to employees nor politically acceptable. I therefore propose instead that dismissal should not be deemed to be unfair if no particular reason is specified but the notice periods and termination payments are the same as those that apply in the case of redundancy. This would give certainty to the employer that an employee can be dismissed within a relatively short period at a known cost and with no fear of a referral to a tribunal provided no discrimination is involved. It could be known as Compensated No Fault Dismissal.

The employee should be given a chance to argue his or her case, and to suggest (but not demand) that they be given time to improve or be transferred to a less demanding job at a lower wage. If no such agreement could be reached the employee would receive the same payment they would get if they had been made redundant. This would generally be more than they would receive if they were dismissed for poor performance on the terms set out in their contract of employment, but if that was not the case then they would receive the contractual payments. The reason for choosing to match redundancy payments is that a different guideline would encourage game playing as to whether redundancy or Compensated No Fault was the chosen route for dismissal.

The employer would still be able to undertake the capability based dismissal process if he or she felt that was a better route. The changes already suggested by BIS to employment tribunals will make that route more straightforward and should be implemented.

The downside of the proposal is that some people would be dismissed simply because their employer did not like them. While this is sad I believe it is a price worth paying for all the benefits that would result from the change. I believe that employers, many of whom already "create" redundancy situations in order to remove underperforming employees, will accept the higher cost in exchange for the speed and certainty it provides.

### **Exemptions for Small Businesses**



The second key issue is the burden that complying with a mass of different regulations places on the owner managers of very small businesses. The time taken in understanding and complying with a multitude of regulations is time that is not spent on growing and developing the business. Regulators often ignore the fact that many small businesses are run by people who are very proficient at the activity that is the heart of their business, be it painting and decorating, cooking, driving or whatever, but have very limited administrative skills. A form that a bureaucrat could complete in a few minutes may take them many times as long.

To resolve the problem of the burden of regulation on small businesses I propose that businesses employing less than ten people should be allowed to opt out of some or all of the following current and proposed regulations with regard to new employees (but not existing ones):

- Unfair dismissal
- Pension auto-enrolment
- Right to request flexible working (other than for parents and carers, which is required by a European Directive)
- Flexible parental leave
- Licensing for employers of children
- Gangmaster licensing
- Equal pay audits

Potential employees would be told which regulations the employer had opted out of and would be free not to take the job if they did not wish to. If employers found that they could not recruit because they had opted out of certain regulations then they would generally choose to opt in to them.

Other recommendations, described in more detail in the body of the report, include:

#### **Discrimination Law**

The part of the Equality Act 2010 that makes employers responsible for discriminatory harassment of an employee by another employee or by a customer should be rescinded.

The impact of the abolition of the Default Retirement Age on employers' propensity to hire older workers should be carefully monitored. If this or other problems are sufficiently serious then a Default Retirement Age could be reintroduced without breaching the relevant EU Directive.

#### **Employment Tribunal Process and Awards**

Recommendations for simplifying the very complex rules governing employment tribunals, and for improving the consistency of tribunals' findings should be implemented as soon as possible. The thirty point ACAS guidelines for Discipline and Grievance, which includes the unfair dismissal process, should be simplified. With one exception the government's proposals for reducing the number of cases coming before a tribunal should be implemented.

The proposal from BIS for charging fees to applicants for an employment tribunal should be implemented. The rules for remittance of those fees should be changed to take account of wealth as well as income, thereby reducing the proportion of applicants gaining remittance from an estimated 60% to probably less than 10%.

The issue of no win – no fee legal services as they affect employment tribunals should be included in the broader review of such services that is already being conducted.

Compensation for employees dismissed in cases where the correct procedure was not followed, but who would have been fairly dismissed if they had been, should be reduced significantly from current levels.

The EU Directives say explicitly or implicitly that discriminatory dismissal awards must be uncapped. The UK has implemented this by making discrimination a tort, thereby resulting in a situation whereby the person concerned must be put back in the financial position they would have been in if they had not been dismissed as a result of discrimination, and then receive payments for "injury to feelings". However the EU Directives only state that the total compensation cannot be capped: it does not say that particular aspects of the compensation cannot be capped.

Therefore UK law could be changed so as not to make discrimination a tort. Capped rules for the level of compensation for loss of employment could then be introduced, with the same limits as for unfair dismissal. "Injury to feelings" payments would not be capped, thereby making it clear that the total payment would not be capped. Fortunately the VENTO rules which provide guidance to the courts about "injury to feelings" payments suggest quite reasonable sums. This solution would greatly improve the position for employers because it is very high payments for loss of office that have been the cause of most of the problems with discrimination payments rather than the level of "injury to feelings" payments. However BIS lawyers are concerned that awards under the above proposal would not meet the EU test that awards must be effective, proportionate and dissuasive. If it is felt that this is the case a different cap for this part of the award that would be considered effective, proportionate and dissuasive could be introduced. This could be based on the employee's earnings over a period which it is felt reasonable for any employee to be able to find a new position. This might be defined as, for example, nine months. While this would in some cases result in a higher payment than the unfair dismissal cap, it would give employers (and employees) greater certainty of what the penalty would be, and this would be welcomed.

### **Flexible Parental Leave**

This proposal is very expensive for the Exchequer (roughly £150m p.a.) and will impose significant operational problems on business. The proposal should (preferably) be scrapped or alternatively be deferred until the deficit has been eliminated. If it is introduced there should at least be provisions ensuring that employers are given reasonable notice of periods of absence.

### **Extension of Right to Request Flexible Working to all Employees**

This should be introduced by a Non-Statutory Code of Practice rather than a statutory one. The justification for this proposal is a belief that flexible working is good for employers. If this is the case they will introduce it voluntarily, encouraged and helped by a Non-Statutory Code. If it is a burden to their particular business they should, in the current economic climate, be free not to introduce it.

### **Pension Auto-Enrolment**

It has been decided that this should apply to all businesses with one or more employees. However, there are strong arguments for setting the limit at less than five employees (micro businesses). It is acknowledged that 45% of the cost of the government's employer compliance regime for auto-enrolment relates to the 800,000 micro employers with less than five employees. Yet they only employ 1.2 million people in total: roughly 5% of all employees. It is also acknowledged that the costs and time involved in setting up an auto-enrolment scheme will be disproportionately heavy for micro businesses. The government's own impact assessment suggests that up to 60,000 jobs will be lost as a result of auto-enrolment, mostly in hotels, restaurants and manufacturing. Many of these will be in micro businesses. On the other hand, the arguments for including micro businesses are flimsy. It would indeed include a further 5% of the workforce, but these will include many low earners for whom the Paul Johnson report on Automatic Enrolment made it clear that the benefits of swapping current earnings for future pensions that are likely to reduce means tested benefits are marginal at best. It is claimed that identifying businesses with five or more employees would be difficult, though one feels the PAYE system could easily be amended to do this. It is also felt that a disincentive to growing from four to five employees would be created, though why introducing a higher per capita disincentive when going from zero to one employee (taking into account set up costs as well as employer contributions) is a better solution is very unclear. I believe that micro businesses should be exempt, and businesses with between five and nine employees should be given the right to opt out permanently.

In terms of the timing of the larger scheme, it is unclear why introducing from 2012 a measure that will cost employers £6 billion per year, individuals £7 billion per year and government £2 billion per year is sensible in the current economic climate. It should be delayed until the economy is stronger and the deficit lower.

### **Criminal Record Checking System**

The admirable new online criminal record system solves many of the problems caused by the current system for both individuals and employees. Once one CRB check has been made an online record will be kept that will be continually updated and will be immediately available to subsequent

employers. A change of status would be automatically notified to the individual's employer. Self-employed people will be able to get checks, which is not currently the case. My only problem with the new system is that it is proposed to charge £8 p.a. to each individual on this system: I do not believe that this is worthwhile.

### **Work Permit Checks**

The current system of making employers responsible for checking that a potential employee has the right to work in the UK places a large burden on employers and is open to abuse. The Border Agency is slowly introducing an online system for newly arrived immigrants who are entitled to work. This system should be expanded by adding the details of any immigrant who applies for a new position. When the employer has checked the applicant's papers he should send a copy of them to the Border Agency who would check the conclusion the employer reached and enter the details into the online system. This would remove the need to enter the details of every existing immigrant into the system but would make checking the status of potential employees who have been entered onto the system very easy. The existing system, expanded as described, should also record the fact that the potential employer had checked the applicant's status, and should have a "push" feature to automatically inform employers when the permission to work expires. The system should also be linked to the National Insurance Number system, such that NI numbers would cease to be valid if the permission to work expires or was never valid. This would allow workers who do not have a work permit but are being paid through the PAYE system to be identified and their employers informed.

### **Bringing Workers from Abroad**

The requirement that before this can happen the position should be advertised in Job Centre Plus should be dropped. The current online system should be made interactive so that obvious errors can be corrected without the need to re-submit the whole form and pay another fee. The form should be simplified.

### **Simplifying the Immigration System**

The previous government had prepared a Simplification Bill, aimed at dramatically reducing and simplifying the regulations in this area. The current government is not pursuing this initiative: it should be given further consideration.

### **Transfer of Undertakings Protection of Employment (T.U.P.E.)**

Harmonisation of terms between transferred employees and original employees of the transferee company is a problem under the current law and often results in harmonisation up to the best terms from each set of terms. This is expensive for employers and inhibits transfers from happening. The EU Directive generally forbids forcing transferred employees to accept the terms and conditions of existing employees of the transferee company doing an equivalent job. However, EU law does put a time limit of one year on the need to follow the provisions of collective agreements. While "collective agreements" are not defined in the Directive the UK has assumed that this means the sort of collective agreements between employers and unions that are common in Europe but unusual in the UK. I have asked BIS lawyers to see if "collective agreements" could be defined in UK law to cover the types of agreements that are commonly used between employers and employees here. This would set a one year limit on the time before harmonisation could be enforced in the UK. If this cannot be done within the current EU framework the EU should be lobbied to allow harmonisation of contracts in the UK after one year given that this is effectively the case in other European countries.

Terms and conditions of transferred employees can be changed for "economic, technical and organisational (ETO) reasons entailing changes in the workforce". Precisely what would constitute such a reason is not defined in EU or UK law or in the guidance provided to employers. Employers therefore often do not understand the considerable degrees of flexibility this gives them, which is best illustrated by case law. A much more detailed review of the implications of case law should be made available to employers and employees.

True redundancy is an ETO but the current rules specify that an employee must be taken on by the new employer before he or she can be made redundant. Transferring employers should be allowed to take action, including redundancy, with regard to potential transferees on the basis of valid ETO

reasons within the transferee company. This would stop employees having to take up employment with a transferee company only to be immediately declared redundant.

The EU T.U.P.E. Directive states that employees of companies in administration have T.U.P.E. rights if the business is saved by an acquirer. This makes it more likely that the business will be liquidated rather than saved. The EU should be lobbied to change this provision, and if it is changed UK law should be changed accordingly.

To clarify the question of whether a transfer of a group of employees to a new employer (e.g. outsourcing) was a transfer for the purposes of the UK act, the EU Directive on which it is based was gold-plated by specifying that if a contract for a service was moved from one supplier to another, employees of the first supplier who had only worked on the contract concerned could insist on being transferred to the new supplier on the terms and conditions they were previously on. This service provider provision, which is not in the EU Directive, has caused considerable problems, partly because it applies to suppliers of professional services as much as it does to manual workers. This element of gold-plating should be repealed and replaced by a better way of identifying whether or not a transfer is subject to T.U.P.E.

### **Collective Redundancies**

The statutory consultation period for employers wishing to make more than one hundred people redundant is currently ninety days whereas for redundancy programs for between twenty and ninety-nine employees the period is thirty days. The period for larger redundancy programs should be reduced to thirty days. In the event that the business is in a formal insolvency process the period for all collective redundancy consultations should be further reduced, perhaps to five days.

### **Equal Pay Audits**

These should not be introduced.

### **Employment of Children**

The law should be brought up-to-date in terms of total working hours and hours between which children can work. However the DofE's preferred route of licensing employers of children should not be adopted.

### **Gangmaster Licensing Authority**

This should be scrapped.

### **Employment Agency Regulation**

There are thirty three regulations and six schedules covering employment agencies. Many of these are redundant and nearly all those that are still relevant should be put into a Non-Statutory code of practice to be administered by an industry body. This code would also deal with issues arising relative to internet sites that facilitate the bringing together of candidates and companies. Probably the only area needing statutory regulation is the issue of agencies charging fees to job seekers.

### **Employment Agency Standards Inspectorate**

The Employment Agency Standards Inspectorate does a reasonable job but the current review of enforcement should probably conclude that a separate body to inspect employment agencies is not required.

### **Agency Workers Regulations**

The EU Directive on Agency Workers Rights is to be implemented in the UK on 1<sup>st</sup> October 2011 in a way which at least results in the new set of rights for agency workers largely not coming into force until they have been with an employer for twelve weeks rather than being day one rights. However on balance it can be argued that many agency workers would prefer not to be subject to the regulations, which make it more likely that they will not be taken on at all or not retained for longer than twelve weeks. The EU Directive states that the member states must introduce the regulations before the end



of the year. The dangers of infraction if the regulations are not implemented on time should be weighed against the benefits of delaying implementation until the economy is stronger.

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## REPORT ON EMPLOYMENT LAW

### Unfair Dismissal

The ability to dismiss an employee who is not performing is an essential element in managing any business. The current proposal to extend the time period during which an employer can dismiss an underperforming employee from one year to two years is a step in the right direction. It deals with the case of a new employee who turns out not to be up to the job: this often does not become clear during the first year of employment. Employers regularly say that they dismiss employees about whom they are uncertain after eleven months because they don't want to face the hassle of the process of dismissing someone after the unfair dismissal rules come into play.

However, extending the period to two years does not deal with the difficulty of removing an employee whose performance, once felt to be satisfactory, is no longer acceptable. This can be for reasons to do with the employee's motivation or with changes in the demands of the job concerned as the company grows, technology changes, customer needs evolve and so forth. Or it can result from promotion to a higher level for which the person concerned proves not to be competent.

Four approaches are possible. First, the whole concept of unfair dismissal where discrimination is not involved could be removed from UK law (apart from a few provisions where employees are protected against dismissal under the EU-derived rights under the Working Time Directive, Fixed Term/Part Time Workers Directives and T.U.P.E.). There is no EU concept of "unfair" non-discriminatory dismissal, so there are no other EU constraints on what the UK can do in this area. Second, the period within which an employee can be dismissed without being able to claim unfair dismissal could be extended beyond two years. The exact period might depend on the size of the business concerned. A longer period could be allowed for smaller businesses that find the specified processes for dealing with unfair dismissal harder to understand and follow than do larger businesses which can justify employing an HR specialist. Third, the process for proving that an employee is no longer up to the job could be streamlined. The burden of proof on the employer could be reduced, making it harder for the employee to claim to a tribunal that the process was flawed. Reducing the burden of proof would also address the problem of employees claiming that dismissal was for discriminatory reasons rather than performance reasons since if it is easier to prove that dismissal was for underperformance it is harder to say that it was for discriminatory reasons. The steps currently proposed to change the system, including the obligation to suggest ACAS conciliation, fees for employees starting the employment tribunal process and greater use of cost orders for frivolous complaints are all sensible steps in the right direction.

However if it is felt to be politically unacceptable to simply do away with the concept of unfair dismissal I strongly favour a fourth approach which allows an employer to dismiss anyone without giving a reason provided they make an enhanced leaving payment. New legislation would prescribe that it is not unfair dismissal if the employer simply states he is not happy with the employee's performance and then consults, gives notice and pays a defined level of compensation linked to the employee's salary and length of employment. I am proposing for two reasons that the compensation should be that specified in redundancy situations. First, these will typically be higher than those specified in the employee's contract of employment, thus providing compensation for the no fault nature of the dismissal. Second, if the payments were different from redundancy payments there would be financial incentives for game playing as to which sort of dismissal was chosen. This type of dismissal could be known as Compensated No Fault Dismissal.

There should be a brief period for consultation to see if there is an alternative solution that is acceptable to both parties. However there would be no obligation on an employer to accept any proposed solution and the employer's decision would not be subject to challenge. A brief consultation process seems reasonable and in some cases would probably result in a compromise being agreed, possibly involving a move to a less demanding job at lower pay. If no alternative solution is agreed there would then be, as in redundancy situations, a notice period of one week for every year of employment up to a maximum of twelve weeks together with a tax-free payment related to the employee's salary, age and years of service, up to a maximum of £12,000. This process and level of compensation would be applied to Compensated No Fault Dismissal unless the employee's contract

of employment would give a higher payment in those circumstances. While the principle of matching the payment for redundancy (which is not the fault of the employee) might seem generous for dismissal for poor performance (which is arguably usually the fault of the employee), such generosity would reward loyalty and would make the proposal more acceptable to employees and unions. As mentioned above, a lower level of compensation would also mean that employers would always choose Compensated No Fault Dismissal rather than making someone redundant.

A further benefit of this approach is that constructive dismissal claims would largely become a thing of the past. Somebody feeling that they are being constructively dismissed would have to ask their employer if the employer would like them to leave. If the answer is yes, the employer would either choose the traditional dismissal route or the redundancy terms route. If the answer was no the resulting conversation would in many cases clear up the reason why the employee erroneously felt they were being constructively dismissed.

The result of this change would be that the onus would then be squarely on the employee to perform well enough for the employer to value them as an employee. It would no longer be possible to coast along, underperforming in a way that is damaging to the enterprise concerned but not bad enough for the employer to want to undertake the whole rigmarole of the unfair dismissal process with its attendant threats of tribunals and discrimination charges. However the current list of reasons why an employee can claim unfair dismissal regardless of how long they have been employed (which are basically not related to the employee's ability to do the job but rather a list of unacceptable reasons, largely related to union activity, why an employer might unreasonably wish to dismiss an otherwise well-performing employee) would remain in place. So too would the right of the employer to follow the current unfair dismissal process, which would often have a lower cost.

Such a change would, in my view, produce an instant improvement in performance in a significant part of the national workforce while providing major encouragement to those contemplating increasing their workforce. Very importantly, it would transform the situation in public services, where managers are far more reluctant to embark on a dismissal process than they are in the private sector.

### Recommendations

Compensated No Fault Dismissal should be introduced.

This would require changes to the primary legislation including the Employment Rights Act 1976.

BIS should also proceed with its proposal to extend the qualifying period for unfair dismissal from one to two years.

### **Exemptions for Small Businesses**

There is a good reason for most of the regulations with which businesses have to comply. Some are designed to prevent some form of physical, mental or economic harm being done to employees. Others are designed to promote some form of societal good, such as maternity/paternity leave and automatic enrolment in pensions. The direct cost and the benefits of these well-meaning regulations can be measured to an extent and this is done by the relevant department when each new regulation is introduced. For example, automatic pensions enrolment is projected to reduce the number of jobs in the country by up to 60,000: this is felt to be a price worth paying. But what is never addressed is the cumulative impact on the nation's businesses of all these regulations. It is clear that they cumulatively act to reduce the profitability (both through direct costs and increased administrative costs) of our businesses, and hence damage their growth prospects and their ability to employ more people. In addition, their very existence serves to deter sole traders from taking the giant step of employing another person, and, once they have experienced the workings of some of these regulations, to deter larger employers from taking on more staff.

In general, complying with government regulations imposes a greater burden on small businesses than on large ones. There is a fixed element of time and therefore cost to initially setting up a system to comply with any given regulation, and the cost per employee will therefore be greatest for small businesses. Furthermore, many successful owners of small businesses may have great skills related to their trade but have limited aptitude for the type of administrative tasks that are needed to comply with regulations. The work will take them longer than it would the type of people employed in big



companies to do this work. Finally, the time taken will tend in small businesses to be that of the entrepreneur running the business, and will therefore detract from his or her ability to do all the things, such as product or service development, marketing, sales and product delivery, that have to be done if the business is to grow. Therefore the value of the time lost in complying with regulations is greater for small businesses because it is time that would otherwise be used on growth producing activities, where in a larger business the value of the time is simply the cost of the employee who does the work.

Quantifying the loss of jobs arising from the burden of regulation, and the economic value of those jobs, is an impossible task. How many more businesses would there be, how many people would they employ, how many more people would existing businesses employ, how profitable would all these businesses be? Who knows? But there is a growing feeling that, for the small business sector, the price is not worth paying. This report suggests some ways in which the burden of individual regulations could be reduced or removed. Of those that remain, some, such as CRB checks and right to work checks, need to apply to all sizes of company. But there are many others from which small businesses could be given the option to opt out. These include among current and potential regulations (if implemented):

- Unfair dismissal
- Pension auto-enrolment
- Right to request flexible working (other than for parents and carers, which is required by a European Directive)
- Flexible parental leave
- Licensing for employers of children
- Gangmaster licensing
- Equal pay audits

Businesses could choose which to opt out of, and would make this clear to potential employees. Nobody would be forced to join a company that had opted out of a regulation that they felt any company they worked for must follow.

#### Recommendation

I believe that the opt out described above should be implemented for all businesses with less than ten employees.

#### **Discrimination Law**

The Equalities Act 2010 has extended employers' obligations to preventing third party harassment of their employees by other employees or by customers. If they fail to do so they can be taken to an employment tribunal by the employee concerned. The legislation clearly creates a temptation for employees to conspire with each other or with customers to create a harassment situation which might result in substantial financial compensation from their employer. Leaving that aside, the idea that an employer can control the actions in this regard of his employees and customers is naive in the extreme.

The abolition of the Default Retirement Age (DRA) has recently been implemented, partly because it was felt that having a DRA would not meet the EU requirement that one can only have such an age discriminatory measure if it is "objectively justified as a proportionate means of meeting a legitimate aim". There remains, however, a concern that in the absence of a DRA employers will be strongly deterred from hiring older workers, and that it will be difficult to remove older workers who are underperforming. If over a number of years it became clear that these concerns were valid then it might be possible to show that a DRA, perhaps at a higher age than sixty-five, could be objectively justified as a proportionate means of meeting the legitimate aims of encouraging businesses to hire older workers and improving the effectiveness of the workforce.

#### Recommendations

The third party harassment provisions of the Equality Act 2010 Law should be rescinded.

The impact of the removal of the DRA on employers' willingness to recruit older workers and on the overall effectiveness of the workforce should be closely monitored. If the impact is very negative a DRA, probably at a higher age than was recently the case, should be reintroduced.

## **Employment Tribunal Process and Awards**

Employers in general deeply dislike employment tribunals, a feeling shared by most employees. They are expensive, time consuming and personally stressful. But some employers do treat employees in an unfair or discriminatory fashion and some employees feel they have been treated badly when in fact they have not been. Where those cases cannot be settled by negotiation between the parties concerned a legal process to determine the appropriate resolution is required.

### Process

Employers and employees share many of the same concerns about tribunals. The rules are very complicated and there is a feeling that the outcomes are inconsistent because different panels take different views of similar cases. These concerns are being addressed by government. There will be a judge led review of the current rules, of which there are one hundred and fifteen, split over six schedules, with many rules breaking down to various sub-provisions. There has already been a report by the Employment Tribunal System Steering Board (ETSSB) into consistency which did find that outcomes were not as consistent as they should be and made eight major recommendations.

The government has also announced that it intends to implement a number of steps designed to reduce the number of cases that end up in a tribunal. These include a requirement to offer ACAS lead conciliation (resulting in a recommendation that is binding on both parties) before an individual can request a tribunal, clarification of the likely levels of compensation on the tribunal application form and extension of the unfair dismissal qualification period from one year to two years. Deposit and cost order limits will also be increased as a way of deterring weak and vexatious claims.

The government has consulted on a proposal to fine employers who lose cases of unfair dismissal. The intention is presumably to encourage employers to follow the rules surrounding unfair dismissal. However in my view the majority of employers do attempt to do this, but the thirty point ACAS rules defining the approved process are so complex that it is very easy unintentionally to break them. The result of a system of fines is therefore more likely to be an increase in the number of higher than is reasonable out of court settlements rather than a better following of the rules. In any event the employer will have been 'punished' by the existing guidelines that they have to pay higher compensation to the employee concerned by virtue of not having followed the rules. There is no balancing suggestion that employees who bring frivolous or vexatious cases should be fined.

Whether or not the ACAS rules should be simplified is an interesting question. Larger and hence more sophisticated employers prefer a closely defined system as they have professional HR staff who know the rules and can follow them, thereby ensuring that a tribunal will find that they acted reasonably because they did follow the rules. Smaller, less sophisticated employers favour a more flexible, less rule driven and probably quicker system. I believe the rules should be reviewed in detail to see if each prescribed step actually does make an amicable resolution more likely rather than simply adding to the complexity and length of the process.

### Fees

A more radical step being considered by BIS to reduce the number of frivolous or vexatious claims is to levy a charge for every claim made. The level of fee in the department's preferred scheme is between £200 and £750 for claims up to £29,999, depending on their size and complexity, and £3,750 for higher claims. It seems likely that such a step would indeed sharply reduce the number of unjustified claims: at present many claimants who have unfortunately not found a new job have time on their hands and view a free employment tribunal as a no cost option on winning an award. The question arises as to whether the fee should be remitted if a potential claimant is judged unable to pay it. In principle this is clearly appropriate, though one would expect that very few people who have recently been in employment would be unable to pay the fee for claims below £30,000, which are the large majority of claims. However the ability to pay is judged on income but not on wealth. As most claimants have recently lost their job they have very little income: hence BIS estimates that 60% of all

claimants would have their fees fully or partly remitted. This clearly defeats the object of the enterprise: the test should be changed to include wealth when assessing eligibility for fee remittance.

The fact that no win – no fee legal services are available to employees also increases the number of claims.

### Level of Awards

With one exception the rules setting out the level of compensation for unfair dismissal seem reasonable. There is a basic award based on the employee's age, length of service and weekly pay, with a maximum equivalent to thirty weeks' pay. There is then a compensatory award based on loss of earnings (and company benefits/pension, car, etc.) up to the date of the dismissal hearings and probable future loss depending on the claimant's job prospects. The exception referred to above is the "Polkey" reduction, which derives from a House of Lord's judgement in *Polkey v A.E. Dayton Services Ltd* 1988. This provided that even if a dismissal would not have been unfair if the correct procedures had been followed, if the procedures were not followed the basic award should still be paid. The compensatory award, on the other hand, could be reduced or eliminated depending on the likelihood that the dismissal would have gone ahead anyway if the correct procedures had been followed. It seems disproportionate that the basic award should not also be reduced in the same way. For example, an employee whose contract provided for four weeks' notice could receive an additional twenty-six weeks' salary as compensation for a poorly run process despite the fact that he or she deserved to be dismissed.

The EU Directives say explicitly or implicitly that discriminatory dismissal awards must be uncapped. The UK has implemented this by making discrimination a tort, thereby resulting in a situation whereby the person concerned must be put back in the financial position they would have been in if they had not been dismissed as a result of discrimination, and then receive payments for "injury to feelings". However the EU Directives only state that the total compensation cannot be capped: it does not say that particular aspects of the compensation cannot be capped.

Therefore UK law could be changed so as not to make discrimination a tort. Capped rules for the level of compensation for loss of employment could then be introduced, with the same limits as for unfair dismissal. "Injury to feelings" payments would not be capped, thereby making it clear that the total payment would not be capped. Fortunately the VENTO rules which provide guidance to the courts about "injury to feelings" payments suggest quite reasonable sums. This solution would greatly improve the position for employers because it is very high payments for loss of office that have been the cause of most of the problems with discrimination payments rather than the level of "injury to feelings" payments. However BIS lawyers are concerned that awards under the above proposal would not meet the EU test that awards must be effective, proportionate and dissuasive. If it is felt that this is the case a different cap for this part of the award that would be considered effective, proportionate and dissuasive could be introduced. This could be based on the employee's earnings over a period which it is felt reasonable for any employee to be able to find a new position. This might be defined as, for example, nine months. While this would in some cases result in a higher payment than the unfair dismissal cap, it would give employers (and employees) greater certainty of what the penalty would be, and this would be welcomed.

### Recommendations

The recommendation of the ETSSB for improving the consistency of employment tribunal findings should be implemented.

The recommendations of the forthcoming judge lead review of the current rules for employment tribunals should be implemented as soon as possible after they are published.

The steps already announced by the government for reducing the number of cases that result in a tribunal should be implemented as soon as possible, with the exception of the proposal to fine employers who are found not to have followed the unfair dismissal rules. The thirty point ACAS guidelines for the unfair dismissal process should be reviewed. If possible they should be made simpler and more easy to follow without losing their specificity which is helpful in defending accusations that they were not followed correctly.



Charging a fee for employees who apply for an employment tribunal should be introduced as soon as possible. The fee levels proposed by BIS should be accepted. The rules for the remittance of fees should be amended to allow account to be taken of the applicants' wealth as well as their income.

The issue of no win – no fee legal services as they affect employment tribunals should be included in the broader review of such services that is already being conducted.

Legislation should be introduced to ensure that the 'Polkey' reduction applies to the basic award as well as the compensatory award.

The compensation for loss of earnings part of the award for discriminatory dismissal should be capped as described above.

## **Flexible Parental Leave**

The current proposal is to extend parental rights to include two hospital visits by working fathers, entitlement to Flexible Parental Leave and Pay (four weeks reserved for working fathers, four weeks reserved for working mothers and 17 weeks shared with partner) and unpaid parental leave extended to all parents with children under a certain age (options range from under 5 to under 18).

There is no claim that this will help employers: the best estimate of the cost to them for extra administration and cover for absence is £20.5m p.a. (extension to children under 5), to £64.5m p.a. (extension to children under 18). The best estimate of the cost to the Exchequer is £143m p.a.

The benefits to families are intangible but real: more flexibility over childcare arrangements, increased opportunity for fathers to spend more time with their children so increasing fairness; and, according to some EU research, children's subsequent levels of attainment, greater connection of women to the workplace; and reduced gender gap in employment.

The estimate of the financial impact on employers ignores their loss of productivity through losing employees for relatively short irregular periods. In the recent consultation process 50% of employers were against the proposals for flexible parental leave. The legislation is likely to further reduce the attractiveness of hiring women of childbearing age.

If this legislation is introduced much greater attention needs to be paid to the length of time employers are given to plan for periods of absence of employees. This is one of the major complaints of employers about maternity leave: they do not receive enough notice about when the employee concerned will return (or will not return) to work. While I accept that with very young children circumstances will sometimes change very rapidly there ought to be a defined point in time before parental leave is taken where notice must be given to the employer of the start date and duration of the absence. Given, say, six weeks' notice of an absence an employer can plan alternative arrangements and discuss alternative dates with the employee to see if they would be mutually more convenient. Similarly for maternity leave there should be an obligation on the employee concerned to give notice a defined period of time before she intends to return to work or of her decision not to return to work.

### Recommendations

The benefits to family life may be real, but in the current economic climate do not seem to compensate for the additional costs to employers and, particularly, the Exchequer. The legislation (or at least its implementation) should be delayed until the deficit has been eliminated.

When it is introduced there should be an obligation on employees to give their employer reasonable notice of when they intend to be absent.

## **Right to Request Flexible Working**

The current plan is to extend this right to everyone in 2013: at present it is restricted to parents of children up to 17 (18 if the child is disabled), and carers. The government believes that flexible working for employees results in an economic benefit to employers, but that most employers don't realise this. It therefore prefers a legislative change to extend the Right to Request to all, supported by a Statutory Code of Practice rather than a Non-Statutory Code of Practice as the former would

lead to greater take up and hence greater benefits to employers. There is assumed to be no cost to the Exchequer.

### Recommendations

I recommend a Non-Statutory Code of Practice: this will reduce the number of flexible working related employment tribunals and the general feeling among employers that they are weighed down by ever increasing employment legislation.

If flexible working really is good for employers they will adopt it of their own accord, albeit possibly more slowly than if it is forced on them. For some employers it would clearly create real problems and they should not be forced to carry this cost.

This change would be implemented through repealing the existing regulations and amending the current legislation (e.g. Flexible Working (Procedural Requirements) Regulations 2002).

The European Parental Leave Directive requires parents returning from parental leave to have the right to request flexible working. This would need to be retained regardless. The draft Pregnant Workers Directive which is at first reading stage would require those returning from maternity or adoption leave to be given the right to request flexible working.

## **Pensions**

### Automatic Enrolment

The major issue on pensions is the new Automatic Enrolment system where any employee in any business will have to be put into a pension scheme if he or she meets a number of criteria and has not chosen to opt out. The criteria include having been employed for three months or more, being 22 or over, and earning more than the tax threshold level. Despite the fact that the DWP expects the scheme to result in up to 60,000 less jobs a few years after its introduction than would otherwise have been the case (roughly 0.25% increase in unemployment) there is no general resistance to the scheme as a whole among employers or employers' representative bodies. Furthermore 75% of individuals support the scheme, a figure which is expected, based on Australian experience, to rise after the scheme is introduced. When a similar scheme was introduced there the pre-introduction support level of 30% rose to 80% once the scheme was up and working.

The issue that has exercised both the Paul Johnson review of Automatic Enrolment and employers' organisations has been whether or not the scheme should apply to employers with a very low number of employees.

The arguments against including small businesses are numerous. It is acknowledged that 45% of the cost of the government's employer compliance regime for auto-enrolment relates to the 800,000 micro employers with less than five employees. Yet they only employ 1.2 million people in total: roughly 5% of all employees. It is also acknowledged that the costs and time involved in setting up an auto-enrolment scheme will be disproportionately heavy for micro businesses. The introduction of the National Employment Savings Trust which offers a simple to manage, competitively priced pension scheme for those making contributions of less than £4,200 p.a. will help to mitigate this problem but will by no means eliminate it. The government's own impact assessment suggests that of the 60,000 jobs that will be lost as a result of auto-enrolment, most will be in hotels, restaurants and manufacturing. Many of these will be in micro businesses.

On the other hand, the arguments for including micro businesses are flimsy. It would indeed include a further 5% of the workforce, and it can be argued that a higher proportion of the employees of such businesses than those of larger businesses are the sort of people the scheme should catch: often relatively lowly paid, often changing jobs fairly frequently and generally unlikely to have a pension scheme. However the Paul Johnson report on Automatic Enrolment made it clear that for low paid employees the benefits of swapping current earnings for future pensions that are likely to reduce means tested benefits are marginal at best.

One argument against excluding micro-businesses which the Paul Johnson review apparently found persuasive was the idea that if there is a break point at any number of employees then employers would be deterred from growing beyond that size. I do not find that a particularly compelling

argument as the current proposal clearly deters one person businesses from hiring anyone, which is the most important step in growing a business. It is of course true that if there was a minimum business size to which the scheme applied there would need to be a way of dealing with businesses that shrunk from above that size to below it.

I feel that in deciding that the scheme should apply to even the smallest employer the nature of such employers has been overlooked. In many, many cases they are run by people who have mastered a practical skill or craft but have very few academic qualifications. Such people often find administrative work, whether paper or internet based, an enormous trial and are likely to be still more deterred by this scheme from employing someone than they already are by the intricacies of PAYE, employment law and so on. I believe that the Department's calculation of 60,000 jobs lost or not created could well be an understatement.

### Recommendations

Micro businesses with less than five employees should be excluded from the auto-enrolment scheme. This would require an amendment to the Pensions Bill, which is currently going through Parliament. Businesses with between five to ten employees should be given the right to opt out of auto-enrolment.

### Other Pension Issues

- **Funding Gaps and Restructurings:**  
At present if there is a funding gap in a company pension scheme this crystallises if there is a restructuring of the company for perfectly sound business reasons, such as splitting a company's two different activities into separate companies. This results in otherwise desirable restructurings not taking place.
- **EU Institutions for Occupational Retirement Provision (IORP) Directive Proposal:**  
This updated Directive, due later this year, will change the definition of the funding gap of a defined benefit pension plan to a solvency to capital requirement which will mean that the overall funding gap of such schemes will need to be reduced by £500m more quickly than would otherwise have been the case, leading more companies to close defined benefit schemes to new employees. Both these consequences are felt to be undesirable by the Department, but there is little support from other EU countries which typically have different pension structures that are unaffected by the changes.
- **Individuals with multiple pension schemes:**  
The automatic enrolment scheme will mean that employees who change jobs often (and the average worker has roughly eleven jobs in his working lifetime) will probably have many small pension pots. Sensibly NEST will only create one pension pot for each person, regardless of how many employers have made contributions to NEST on his or her behalf. However for employees whose employers have not used NEST the department is considering how the pots could be put together, thereby saving the insurers administrative costs and hopefully resulting in lower fees for employees.

### Recommendations

The funding gap of a pension scheme should not crystallise if a restructuring of the company concerned is for legitimate business reasons.

The introduction of the part of the EU IORP Directive that changes the solvency rules for defined benefit plans should be resisted.

A simple, flexible way should be found to put together multiple pension pots.

## **Criminal Record Checking System**

The issues here relate to the workings of the current system and its proposed extension to larger numbers of employees and volunteers.

### The Current System

There are three main problems with the current system: checks are too slow, a new check is required when the employee changes jobs, and self-employed people cannot get checks, thereby barring them from some contracts. Other problems include the fact that once employed an employee can commit crimes or raise suspicions without the employer being notified unless he requests another check. Checks are currently sent simultaneously to both the employer and the potential employee, which can be unfortunate if the report is incorrect.

However, the Department is well aware of all these problems and is introducing a new Bill which it is expected will receive Royal Assent in May 2012. It seems that this Bill will address many of the problems mentioned above. Unfortunately the Bill has received little publicity.

The Bill introduces the concept of updated disclosure. From 2013 (i.e. once the necessary computer system is available) anyone applying for the first time for a job requiring a CRB check will obtain it in the current way, with the difference that only the employee will get a copy so that it can be challenged if it is incorrect before the employee gives it to the potential employer. Thereafter if the employee is prepared to pay a fee of £8 per year they can benefit from what is called the Premium Service, which allows them to give to any potential employer online access to a constantly updated criminal record. The figure of £8 p.a. has been chosen to generate the £50m p.a. needed to run the premium service. The self-employed will be able to apply for a CRB through an "umbrella body". This is an organisation – either a company that regularly requests CRB checks for potential employees or simply a service business – that is prepared, for a negotiable fee, to carry out the identity checks needed to allow an individual to apply for a CRB check on him or herself.

The new Bill does not itself address the issue of the time delay the first time a potential employee needs a CRB check, though it does solve that problem for subsequent CRB checks for people who sign up to the Premium Service. The delay arises for people applying for jobs that require an Enhanced CRB check, which involves not only checking convictions but also records held by police forces about an individual who has given rise to suspicion but has not been convicted. There is now a database that records the names of people who have such a record so an Enhanced CRB check can be issued promptly for anyone who does not have such a record. However it is not currently possible for the Criminal Records Bureau to access online the records held by all the separate police forces. Getting those records from the police forces is what takes the time, though performance has improved and most Enhanced checks where there is a record are now completed within 28 days. Further improvement depends on the development of a national system of police records.

#### Proposed Extension of the Current System

The scheme proposed by the previous government required checks on everyone, employed or volunteer, who works in 'designated places', such as schools and hospitals, and would have covered 9.2 million people. The scheme proposed by the current government reduces the number of people down to 5.5 million by eliminating people who do not work on an unsupervised basis with children, and by limiting those who need checks by schools to those who are on the employee list. This eliminates, for example, painters and decorators who may work in the school and might end up being unsupervised in the presence of children. For such people employers will have access to two lists: all those who are barred from working with children, and all those who are barred from working with dependent adults. These lists will be accessible to employers by phone or letter after suitable security checks to make sure they are an employer entitled to the information. The fact that a person is barred will not be put on a CRB check as it may not be relevant to applicants for some jobs requiring CRB checks. However the information that leads to the barring will be on the check.

At the time of our meeting with the Home Office it had been decided that people employing a nanny would not be entitled to ask for a CRB check, as the applicants are often known to the employer and might be embarrassed by a check that disclosed convictions not relevant to the job of a nanny. We questioned that decision at the meeting given the opportunities offered to paedophiles by the nanny's role. As a result Schedule 7 of the Act has been amended to allow individuals proposing to employ a nanny to check that the chosen candidate is not on a barred list.

#### Recommendation

I do not believe that it is sensible to make individuals pay £8 p.a. to be included in the premium service. The costs of collecting the money, including chasing those who have forgotten to pay or



decided not to pay, will be considerable. For those who don't pay but do apply for subsequent checks the costs to themselves and employers of getting a new check will also be high. The extra administration and complexity of the charge is not worth it for £50m p.a: the service should be free.

## **Work Permit Checks**

It is the responsibility of an employer to check that a potential employee has a valid work permit. The process is time consuming and complex, and employers are concerned that they will be prosecuted if they misinterpret employees' documents. While some people granted permission to work since 2008 have been given Biometric Residency Permits (BRP) that specify their rights to work, the large majority of people who have the right to work in Britain have a wide range of paper documents, which the employer must understand and retain copies of until two years after the employee has left. BRPs are a result of an EU Directive, and are issued by all member states. However many member states don't follow the Directive in terms of the form of the BRP and many issue weak documents which do not make clear the holders' right to work in the UK, which in fact vary from one member state to another depending on their date of accession.

There is a web-based database of BRP holders that can be accessed by employers, but at present the system does not keep a record of when an employer checks an employee's BRP on the web, and therefore paper copies of the physical BRP must still be kept by the employer.

The obvious answer to the problem is to extend the web-based BRP system to cover all those who have the right to work in the UK and are actively seeking employment, and to implement the record keeping aspect of the system referred to above. As with the new CRB system there should be a push feature that would warn employers when an employee's work permit was about to expire. The system could then be linked to the National Insurance Number system in a way that would allow HMRC, and thus the Home Office, to identify illegal workers who are being paid through the PAYE system.

The Home Office's objection to this scheme is that they have literally millions of paper-based records stored in aircraft hangars around the country and the cost of transferring all these records would be prohibitive.

### Recommendations

Rather than updating the BRP system to include the records of everyone with a right to work in the UK, a record should be created for each person who applies successfully for a job after a certain date. Having decided to offer the applicant a job the potential employer would examine their documents and send them to the Border Agency whether or not he felt the applicant had the right to work. As at present he could immediately hire an applicant who he felt did have the right to work. The Home Office would check the documents and enter the details of the person concerned into the system. The employer would automatically be informed of the record created, and would have to dismiss anyone who the Border Agency said did not have the right to work. He would not need to keep any records and would automatically be told by the system when an employee's right to work is about to expire. With the link to the NI number policing the system would be straightforward. Thus a modest amount of one-off work by the Home Office would eliminate the need for the first employer to keep records and the need for subsequent employers to spend significant amounts of time checking new employees' paperwork. It would identify workers who do not have work permits but are being paid through the PAYE system. It would eliminate any risk of well-meaning employers fearing or facing prosecution for honest mistakes.

Many of the features of the enhanced work permit computer system would be identical to those in the soon to be introduced online CRB system.

Consideration should also be given to issuing each person whose records have been added in this way to the BRP system with a physical BRP.

## **Bringing Workers from Abroad**

While the system for bringing in workers from abroad was simplified in April 2011, it remains complex and bureaucratic. Employers are particularly frustrated by the requirement to advertise all opportunities in Job Centre Plus. By definition the only positions for which work permits will be issued are those where the Migration Advisory Committee has said that there is a shortage of supply. Many

of these jobs require highly skilled workers who are highly paid: even if there are qualified UK-based applicants it is highly unlikely that they will have registered with Job Centre Plus. While there may be exceptions who have registered (Indian curry chefs were mentioned) it is far more likely that domestic applicants will be reached through advertisements in the relevant specialised media rather than through Job Centre Plus. The perception of employers that the Job Centre Plus requirement is simply a way of slowing down applications seems correct.

Employers are also frustrated by the process of applying for a licence. There is an online, but not interactive, form that has over 100 questions, including the birth dates of applicants' dead parents. Employers lose their application fee if an honest mistake is made in completing the form. They must apply again, and pay the fee again.

### Recommendations

The application form should be an interactive online form which would not permit application until the mandatory questions had been answered. If mistakes have been made the applicant should be able to amend the existing application (rather than completing a whole new one) and should not have to re-pay the fee each time this happens.

The requirement to register each position with Job Centre Plus should be dropped.

We believe this would require overturning past recommendations of the Migration Advisory Committee and amending UKBA Codes of Practice for Sponsored Workers.

### **Simplifying the Immigration System**

The legal basis of the immigration system has been described as a complete mess. There are 13 relevant Acts giving rise to eight regulations and 10,000 pages of guidance. There are 1,400 categories of immigrants and the handbook for the Border Agency's 22,000 staff is 1,300 pages long. Under the previous government a Simplification Act that would have replaced the previous 13 acts was proposed and drafted. However, while it would have brought a lot of benefits to all concerned, including employers, it was controversial and the current government has decided not to proceed with it. I understand this was partly due to lack of time in Parliament for further bills.

### Recommendation

The Simplification Act should be introduced as soon as possible, even though it has one hundred and forty two pages, three hundred and forty seven clauses and seven schedules.

### **The Transfer of Undertakings Protection of Employment (T.U.P.E.)**

The UK law on the transfer of undertakings (The Transfer of Undertakings (Protection of Employment) Regulations 2006) is based on an EU Directive which was updated in 2001. However the Directive has been "gold-plated" in a number of ways, not all of which seem sensible. The principle is that when a group of employees are transferred to a new employer en masse their terms and conditions should not be capable of being freely changed by the new employer. However this regulation can give rise to significant problems. Such transfers are often associated with outsourcing where it is believed that an external organisation (the transferee) can deliver the service concerned more efficiently and hence more cheaply than the transferor. Here the regulations make it harder for the transferee to reduce costs by reducing the size of the workforce or the level of pay of the transferred workers. These regulations therefore serve to reduce the likelihood of a transfer that would result in greater efficiency or, if a transfer goes ahead, makes it harder to achieve greater efficiency.

Particular problems arise where the transferee's existing staff are on different terms and conditions from those of the transferred staff: harmonising these terms can often result in adopting the best provisions from the employee's point of view from each set of terms and conditions. These are often the most expensive provisions from the employer's point of view.

The EU Directive recognised this problem and has two provisions to mitigate it. First, Member States are permitted to limit the period for having to observe the terms and conditions of a collective agreement to a period of one year or more. Second, contracts can be changed or an employee

dismissed for “economic, technical or organisational reasons entailing changes in the workforce” of the transferee employer (ETO provision).

The UK law has not taken up the option to limit to one year the period before which terms and conditions of collective agreements can be changed because the UK does not operate the same system of collective agreements as other EU Member States. However the term “collective agreement” is not defined in the Directive and I wonder whether it could be defined in UK law to cover the types of agreements that are commonly in place between employers and employees here. BIS lawyers are considering this but are not hopeful. If this is not possible the EU should be lobbied to change the Directive to give UK employers the same rights to harmonise terms and conditions after one year that European employers enjoy.

UK law has, however, adopted the ETO provision. Unfortunately neither the law itself nor the guidance issued by BIS makes it clear what precisely the ETO provision means, and employers have therefore been reluctant to use this provision for fear of being challenged in an employment tribunal. When the issue has gone to a tribunal, and in at least one case to a judicial review, a broader view of what constitutes a valid ETO reason has been taken than most employers would have expected.

True redundancy is an ETO but the current UK case law is that an employee must be taken on by the new employer before he or she can be made redundant. The law could be changed so that transferring employers would be allowed to take action, including redundancy, with regard to potential transferees on the basis of valid ETO reasons within the transferee company. This would stop employees having to take up employment with a transferee company only to be immediately declared redundant. BIS lawyers feel that this would not breach the provisions of the Directive.

This change would also facilitate the process of rescuing a business which is in administration by relieving an acquirer of the business of the burden of redundancy costs for those employees he did not wish to take on because one of the reasons for the administration was overstaffing. It does not however address the question of the employees of a business which is in administration who are felt by a possible acquirer to be essential but overpaid. This is because the relevant EU Directive states that T.U.P.E. rules apply to employees transferring out of a business that is in administration. T.U.P.E. only does not apply if a business is in liquidation. The result is that some businesses that are in administration will be liquidated where they could be saved if T.U.P.E. did not apply.

The Directive has been “gold-plated” in a number of ways, not all of which seem sensible. For example, to clarify the question of whether a transfer of a group of employees to a new employer (e.g. outsourcing) was a transfer for the purposes of the UK act, the EU Directive on which it is based was gold-plated by specifying that if a contract for a service was moved from one supplier to another, employees of the first supplier who had only worked on the contract concerned could insist on being transferred to the new supplier on the terms and conditions they were previously on. This service provider provision, which is not in the EU Directive, has caused considerable problems, partly because it applies to suppliers of professional services as much as it does to manual workers.

### Recommendations

The UK law should be changed to incorporate the concept inherent in the EU Directive that harmonisation of the terms and conditions of transferred and original employees of the transferee company can be enforced after one year. If this cannot be done within the provisions of the EU Directive the EU should be lobbied to amend the Directive to reflect the UK’s different structure of employment contracts.

A much more detailed explanation, based on case law, of the meaning of the ETO exemption should be made available to employers.

The UK law should be changed such that a transferring employer can make redundant employees who if transferred would immediately be made redundant for valid ETO reasons by the transferee employer.

The EU should be lobbied to change its T.U.P.E. Directive to state that T.U.P.E. does not apply to the employees of a business that is in administration. If this change is accepted then UK law should be changed accordingly.



The service provider provisions of the UK law should be repealed and replaced by a better way of identifying whether or not a transfer is subject to T.U.P.E.

## **Employment of Children**

This is an area where major changes to the current regulatory framework are proposed by the responsible department, the Department for Education. Much of the current legislation dates back to 1933. Furthermore the current legislation is largely ignored by employers. The law states that employers should apply for a permit for each child employed, but in practice only 10% of working children have a permit. Clearly local authorities, who set their own by-laws within the general framework of the legislation, are not enforcing them. However the most important point to note in this area is that there is not perceived to be a problem with child employment. The safety of working children is governed by health and safety regulations and these are effective. There are few, if any, cases of children working excessive hours. For this reason successive governments have decided not to change a system that is felt to be working. Employers are largely happy with the system, though the hours between which children are allowed to work (7am to 7pm) are viewed as unduly restrictive for some types of work typically undertaken by children, such as newspaper delivery rounds. Indeed these limits, and the limits on the total number of hours children can work, are more restrictive than those specified in the EU Directive on the protection of young people at work.

The DoE's proposed legislation would do away with LA by-laws and would bring up to date many of the rules about the type of work children can do. It would address the times between which children can work and the total hours they can work, but these would in general remain more restrictive than those in the EU Directive, and it has not yet been decided whether or not to accept BIS 's suggestion of an earlier permitted start time.

The major issue, however, is how to enforce the new rules, and here two options are being considered. In both options the child employment permit system, which requires employers to get a permit for each child employed (but which is largely ignored) would be abolished. The first option, referred to as negative licensing, would be that no licence would be required. Employers would be free to employ children within the rules of the new law, against the threat of prosecution or fines for non-compliance and 'prohibition orders' for serious or persistent offences. LA inspection would be complaints driven. The second option would be a 'Light touch local registration scheme'. Employers would initially have to notify their LA of their intention to employ children, perhaps through an online application form. The LA would check that the type of work and intended hours of work were lawful. Employers would be required to notify LA's of the name, age and school of any child it planned to employ so that schools could be notified in case of possible implications for the child's education. The Department is inclined to favour the second option.

### Recommendation

In the context that there is not perceived to be a problem with child employment I have no problem with simply tidying up the law and getting rid of the largely ignored child permit system. However I have a major problem with the Department's preferred employer registration scheme. This creates a further bureaucratic burden on employers, LA's and schools. It is likely that employers would feel more need to comply with the new rules than they do with the old ones, LA's would have to deal with all the new forms and would probably feel a need to spend more money on enforcing the legislation and schools would be similarly burdened. All this for something where there isn't a problem!

Negative licensing – i.e. no licensing, is clearly the way forward, and should be included in the DfE's proposals before they are published.

## **Collective Redundancies**

At present employers must consult for 30 days before the first dismissal can take effect if they wish to make between 20 and 99 people redundant within a 90 day period, but for 90 days if they want to make more than 100 people redundant within a 90 day period. This penalises larger businesses, but also imposes an extra cost of 60 days' wages on any business wanting to make more than 100 people redundant. This is generally at a time when business is by definition difficult, as otherwise such a level of redundancies would be unlikely to be needed. Added to the fact that employees with more than 12 years' service have to be given 12 weeks' notice, this means many workers will have to

be employed for six months after the need to make them redundant became apparent though the employer can offer pay in lieu of this notice. If in the first thirty days no solution has arisen that management at least feel is worth exploring it is highly unlikely that one will be found in the following sixty days.

### Recommendations

The consultation period for collective redundancies should be 30 days (or five days in the case of insolvency) regardless of the number of employees to be made redundant. If the business is in a formal insolvency process speed is of the essence if the business is to be saved and the consultation period for all types of collective redundancy should be further reduced, perhaps to five days.

This would require amending the Trade Union and Labour Relations (Consolidation) Act 1992 via secondary legislation.

### **Equal Pay Audits**

The Government (GEO) has recently consulted on a proposal that if an Employment Tribunal finds that there has been sex discrimination in setting salaries then the business concerned should be forced to have an Equal Pay Audit, a time consuming and expensive process. However, there are only 100 such findings per year, and logic says that if an employer has lost one case, he is unlikely to persist with unequal pay. Furthermore, if he does persist then other employees, emboldened by their colleague's successful claim, are likely to bring further claims. The Equal Pay Audit is therefore unlikely to identify any problems that would not be resolved in any event. However it may further deter employers from wishing to employ women.

### Recommendation

Equal Pay Audits should not be required if an employer loses an equal pay case at a tribunal. This would involve announcing that the Government is not going to proceed with the proposal on which it has recently consulted and which has been poorly received by business organisations.

### **Gangmasters Licensing Authority**

The Gangmasters Licensing Authority (GLA) came into being through the Gangmasters Licensing Act (2004) which was largely a result of the tragic deaths of twenty-one cockle pickers at Morecambe Bay earlier that year. Its mission, set out in its Annual Report and Accounts 2010-11 is to "safeguard the welfare and interests of workers .." in a number of food and agriculture related industries. Despite this the GLA keeps no record of how many people are injured or killed in the industries it covers! Employers of such workers must be licensed, and 1,200 are, though it is estimated that a further 400 are not, despite the attempts of the GLA to identify them. In the GLA's 47 page Annual Report 2010-11 only part of one page mentions the problems identified in that year: 845 workers underpaid by a total of £2.5m, 78 cases of serious non-compliance with the regulations including the identification of 36 unlicensed businesses, 33 license revocations and 12 prosecutions. The cost of the GLA in that year was £4.7m, funded roughly 25% by the industry and 75% by DEFRA. Furthermore, the scheme imposes a considerable financial and administrative burden on the companies it licenses.

The McDonald review of the farming industry did not recommend that the GLA should be abolished but did make suggestions for improvement.

### Recommendation

Abolishing the GLA should be seriously considered. It does not attempt to even measure the extent of the injuries suffered by the workers whose mission it is to safeguard. It devotes less than 1% of its Annual Report to outlining the other problems it has identified that might affect these workers. It is hard to believe that the Health and Safety Executive and the normal processes of the law would not achieve a similar result at far less cost.

This would require repeal of the current Gangmasters Licensing Act and accompanying regulations.

## **Agency Workers Regulations**

The Agency Workers Regulations that come into force on 1 October 2011 provide yet another set of regulations for employers to understand and comply with. The guidance provided by BIS is 50 pages long, nearly half of which is about identifying who is and who isn't an Agency Worker. The provisions make it considerably less attractive to employ such workers for more than 12 weeks, after which they are treated largely as if they were full-time employees. The provisions concerning pregnant agency workers who have been employed for more than 12 weeks are particularly onerous: if they cannot do the job they were hired for because of their pregnancy they must be found less demanding work but must be paid their original wage. They will make it less attractive to employ agency workers for more than 12 weeks, leading to an artificial turnover. Many agency workers would probably prefer the possibility of longer periods of employment to the benefits which the regulations give them if they are retained for more than 12 weeks.

### Recommendation

The Government should decide if the likely consequences, including infraction, of not implementing the Agency Workers Directive before the deadline of the end of 2011 are worth bearing in order to avoid the damaging results of the Directive.

## **Employment Agency Regulations**

It is right that standards should be set for the activities of employment agencies. Some of the clients of these agencies, particularly those who are seeking temporary work where the payment is collected from the employer by the agency and then passed on to the worker, are vulnerable. Unlike gangmasters, agencies do not have to be licensed, so the burden on them is limited to understanding and following the regulations. Most of these are sensible and not particularly onerous: most agencies would wish to meet the standards required by the regulations even if the regulations didn't exist.

However there are at present thirty three separate regulations and six schedules. The regulations could therefore be simplified. The large majority of the provisions should be replaced by a Non-Statutory Code of Practice monitored by an industry body, of which there are many.

Probably the only area that needs to be regulated by statute concerns agencies charging fees to job seekers.

In setting up the Non-Statutory Code of Practice it should be noted that the current regulations have not kept up with changes to the way potential employees and employers come together through the internet. Web sites designed to facilitate this process that are based in the UK have been treated by the Employment Agency Standards team as if they were traditional employment agencies. This they clearly are not, and the problem is made worse by the fact that several non-UK based sites offer this service in the UK and are not subject to our Employment Agency regulations. The new Code of Practice should eliminate this problem.

### Recommendation

The new Non-Statutory Code of Practice referred to above should be introduced, and a much simplified regulation enacted to replace the current thirty three regulations and six schedules. Meanwhile the Employment Agency Standards Inspectorate should be told to behave as if the new Code of Practice as it will relate to internet agencies of the type described above had been implemented.

## **Employment Agency Standards Inspectorate**

This appears to be a reasonably well run if occasionally over-zealous body. However it is unclear why employment agencies will need a Standards Inspectorate once the changes referred to above have been implemented.

### Recommendation

The Employment Agency Standards Inspectorate should be closed when the Non-Statutory Code of Practice has been introduced.