Department for Business, Innovation and Skills

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

Response from Thompsons Solicitors

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About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

PART 1 – THE ACAS CODE OF PRACTICE

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

Yes.

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

Yes.

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

Yes.

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

Not applicable.

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

Not applicable.

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

Yes we do. However we do not understand what analytical value the information that this question is designed to elicit will have.

The stated aim of this call for evidence is establishing 'a strong evidence base.'[1] Yet if a respondent to this question says that the Code's language is difficult or very difficult there is no means of assessing why. Do they find it difficult because of a problem with the language or because their ability to understand such things is limited by, for example, their own language or reading skills?

[1] Page 4

Similarly there is no means of knowing from the responses whether all of the Code is difficult to read, or just a part of it (and if so which part), nor how that might be improved. Also, there seems to be no mechanism for asking the respondent when they last read the Code they are commenting upon, or indeed whether it is the current Code which they have in mind.

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

Again, we do not understand what analytical value the responses to this question will provide. There is no attempt to define "appropriate" or to seek to gain any understanding of how respondents are using that word in reply.

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

Not applicable.

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

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

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

Although these questions are not applicable to us a claimant representatives, we do not understand why no opportunity is provided respondents to explain how the Code helped them in dealing with a disciplinary issue. This indicates that this call for evidence is intended only to take evidence that the Code is a burden. This is not a balanced, evidence-based approach.

If the decision is to amend the Code, a golden opportunity to keep the parts of it which respondents find to be helpful will have been missed. The baby is at risk of being thrown out with the bath water.

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

The Code does nothing more than set out the basic steps that an employer should follow. It is not rigid, but it provides certainty for both sides in a discipline and grievance situation. We wonder what sort of flexibility the department envisages the Code could provide, without it leaving employers having to "make it up", and risk getting it wrong.

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

We query why there is no mention of the ACAS Guide anywhere in this call for evidence. The guide expands on the principles and provides specimen documents intended to provide clarity. Since it was government pressure that produced this dichotomy in the first place, it seems rather dissembling to imply criticism of the Code based upon its brevity.

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

No. We strongly oppose any distinction in the requirements. The Code is already bare bones. The only way it could be simplified is to remove an element entirely, such as an appeal, or to disapply it entirely.

Whilst the latter would be consistent with the ability to enforce a right in the tribunal it is at least arguable that having no right to enforce makes it all the more important that there is at least some structure in the workplace to promote fairness, and to assist those employers who do want to do it fairly.

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

See above.

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

Given that the Call for Evidence gives no information at all about the Australian code (Annex D is not attached), we cannot see how respondents are meant to make an informed judgement as to whether it would be a useful model for the UK. Responses to this question will be of no analytical value as a result.

Whether the Australian regime could provide a useful model for the UK is in any case too early to say. It is new and still settling down. This is highlighted by the fact that the leading case on the Small Business Fair Dismissal Code (SBFDC) - **John Pinawin T/A RoseVi Hair.Face.Body v Mr Edwin Domingo** (here) - was only decided in March.

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

We have carried out our own research into the Australian code and discussed its operation with Australian colleagues. This informs us that:

- The Australian test of whether the dismissal was ‘harsh, unjust or unreasonable’ is much broader than the UK’s so applying this model to the existing ‘band of reasonable responses’ structure would actually result in a narrower system than the Australian model;
- The same is true of the redundancy test;
- The fact that certain allegations alone (e.g. theft, fraud, violence reported to the police) disapply the system is deeply disturbing. It is unfair and ignores how often we see such instances resulting in no criminal charges being brought;
- Showing compliance as a condition of defending a claim is a good thing;
- Fair Work Australia’s Annual Report for 2011/12 is interesting on this point (here). That was the scheme’s first full year of operation. However section 2.1 compares it with the predecessor system (last applied 2008/09) and the transitional year (2009/10). The report says that compared to the last full year of operation of the old scheme:
  - Lodgements were up 211% on the previous system
  - Hearings are up 210% on the previous system
  - Dispute notifications were up 636%
  - Applications relating to termination of employment were up 186%

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

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

No comment.

20. If you have any further suggestions to improve awareness and understanding of the Code, please describe them here.

We refer to our response to Q13. The guide to the Code provides the detailed information, case studies and specimen documents which are intended to provide clarity. If the department were to do more to make businesses aware of the Guide then it follows that understanding of the Code would be improved.

Evidence Topics A - B

In our experience, most employers have their own systems and these all reflect the Code. In those circumstances awareness and understanding of the Code is not a big issue.

We cannot comment on awareness of unfair dismissal law, but most small employers know it exists. Whether they try and inform themselves about it is another issue. If the government’s claims that small businesses are

terrified of recruiting staff because they believe unfair dismissal laws to be too onerous are based on fact, then it would appear that they don't.

There are numerous free sources of information which small businesses can and should use in order to ensure they are properly informed about unfair dismissal laws (rather than just going on the hysteria whipped up by the media and business organisations). These include:

- 1.1. legal assistance provided via household insurance;
- 1.2. Citizen's Advice Bureau;
- 1.3. the Student Law Office at Northumbria University;
- 1.4. any number of free internet sources including, by way of example:
  - 1.4.1. acas.org.uk
  - 1.4.2. direct.gov.uk
  - 1.4.3. adviceguide.co.uk
  - 1.4.4. citizensadvice.org.uk
  - 1.4.5. communitylegaladvice.org.uk
  - 1.4.6. i-resign.com
  - 1.4.7. venables.co.uk
  - 1.4.8. emplaw.co.uk
  - 1.4.9. Thompsons.law.co.uk
  - 1.4.10. thebottomlineonline.co.uk
  - 1.4.11. takelegaladvice.com

Evidence Topic C

We note the reference to 'the current dismissal system' rather than the correct term which is the discipline and grievance procedures. It is not helpful for the department to use such emotive terms.

We are not really in a position to comment on employer difficulties. But from our extensive experience we know that employee difficulties arise from poor application of the procedures by some managers, and some pretty shoddy deductive reasoning.

As with anything, some businesses are good at getting it right, others are not. The problem is with the individual rather than the Code of Practice.

Evidence Topic D

The system provides a framework which is well known and can be applied. It is also independent of the employer and thus of a benefit from that point of view. Employees undoubtedly see the Code of Practice as being a check on the otherwise unfettered ability of an employer to act however they please without regard to fairness. That in turn promotes and facilitates the relationship of mutual trust and confidence which is so crucial to a business operating well.

Evidence Topic E

Our experience is that most employers go beyond the minimum standards of the ACAS Code of Practice. It is unusual to see the basic system as set out in the Code, or no system at all. But as we act only for trade union members, that could well be a reflection of the benefits to an organisation of working in partnership with unions to develop best practice HR policies.

Evidence Topic F

In our experience most employers have a go at adopting a process. The ones that do not are generally the family run micro-businesses. Employers of 10 or less staff potentially have fewer workplace issues than one

with in excess of that figure by sheer dint of numbers. Though that in itself may result in such employers being less willing to adopt and apply fair procedures.

PART 2 – COMPENSATED NO FAULT DISMISSALS FOR MICRO-BUSINESSES

A micro-business is one employing less than 10 employees. At the start of 2011 74.1% of all private sector businesses in the UK employed no staff at all.[2] At the same time 968,545 micro-businesses employed 3,651,000 staff which was itself 15.6% of the total of all staff employed in the private sector.[3] Micro-businesses accounted for 21.3% of all UK business enterprises.[4]

The business community regularly equates being able to do what they want, irrespective of the impact on individuals, with flexibility, and flexibility with economic success. This seems to be over simplistic and self-serving.

By way of example Figure 1 in the Call for Evidence cites OECD figures showing the strictness of employment protection in 28 countries. Of the 14 countries on or above the average level, 9 are in the OECD's top 20 productivity list.[5] Of the 14 below the average level, 8 were in the top 20. The top 5 least strictly protected were ranked 4th, 19th, 18th, 27th and 17th respectively, whereas the top five least strictly protected were ranked 34th, 1st, 16th, 30th and 7th. The figures are not conclusive either way, although the more regulated are very slightly more productive.

The lesson of history is that a workforce that is exploited and has no means of redress is a discontented and unproductive one. The Call for Evidence explicitly recognises this in foot note 13:

> *"Evidence of negative correlation between employee confidence/motivation and level of productivity can be found in a large amount of literature treating this subject. See for example Hackman and Oldham (1980)"*

Working people are the economy's consumers. If they are saving against the possibility of sudden dismissal then they are not spending. This will not boost growth.

Indeed, the best practice model Investors in People (IIP) is based upon working with a workforce to motivate and engage them. IIP's successes are well recognised (see for instance their own literature here). It is worth remembering that IIP is a government backed body as it is run by the UK Commission for Employment and Skills which is a Non-Departmental Public Body providing strategic leadership on skills and employment issues in the UK with a remit to raise skill levels to help drive enterprise, create more and better jobs and economic growth. The Commission is accountable to the Secretaries of State for BIS and DWP and Ministers in HMT, DfE and the Devolved Administrations.

If the government made policy decisions based on any other approach it would be at odds with its promotion of IIP.

It is also worth noting that micro-businesses actually seem to be driving the job creation in the economy. In BIS's own research paper *Job Creation and Destruction in the UK : 1998 – 2010* the conclusion says:

> *"The majority of jobs in the UK were created by small firms; they also demonstrated the greatest levels of churn. Out of a total of 2.61 million jobs created on average each year between 1998 and 2010 existing small firms (i.e., less than 50 employees) contributed 34 per cent (i.e., ~870,000 jobs) while start ups (of which nine out of 10 employ less than five people at birth) contributed a further third (33 per cent) – another 870,000 jobs.*

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[2] *BIS Business Population Estimates for the UK and Regions 2011*, page 4 at http://www.bis.gov.uk/analysis/statistics/business-population-estimates
[3] *BIS Business Population Estimates for the UK and Regions 2011*, page 2 at http://www.bis.gov.uk/analysis/statistics/business-population-estimates
[4] *Ibid*
[5] See http://stats.oecd.org/Index.aspx?DataSetCode=LEVEL. Productivity defined as GDP per hour worked equalised to UD$.

Smaller firms have been increasing their share of total employment year on year and in 2010 their share was triple that in 1998. Single employee firms increased from three per cent of the total employment in 1998 to 10 per cent in 2010, whilst at the large end the share of 250+ employee firms fell from 49 per cent to 40 per cent over the same period.

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

23. Under a system of Compensated No Fault dismissal, individuals would retain their existing rights not to be discriminated against or to be dismissed for an automatically unfair reason. Taking these constraints into account, do you believe that introducing compensated no fault dismissal would be beneficial for micro businesses?

It is difficult to see how such a move would be beneficial to any organisation, irrespective of size. Although some micro-businesses might welcome the move we would envisage an overall detriment to society and the economy. The Call for Evidence says that 21% of the UK workforce are employed in micro-businesses, which is 6,120,000 people.[6] If their productivity dropped, or they ceased to spend within the economy then society as a whole would lose out.

There is also the problem of creating a two tier system. It is difficult to see how a micro-business is going to attract key staff from competitor businesses if they would have significantly fewer employment rights. This problem has already been highlighted by the increase in the unfair dismissal continuous employment requirement to 2 years. But if a firm looking to recruit could offer no unfair dismissal rights then it is unlikely to encourage people with the skills it needs to give up their existing jobs to join it.

Without the ability to attract key skills and personnel, growth will be hindered. Retention of talent would also be a problem for the same reasons as staff are attracted to firms where they would accrue unfair dismissal rights.

In the absence of an ability to contract into unfair dismissal rights (which would be a radical shift from the current position) recruitment stigma would be likely to attach to micro-businesses.

Similarly, if the cost of employing an 11th person is that your entire workforce gets unfair dismissal rights and you don't want this to happen, it will act as a significant disincentive to growth. There are also practical problems about SMEs. What, for instance, happens where an SME employs 11 people and one leaves. Is everyone else thereby stripped of their unfair dismissal rights? If that leaver is replaced are those rights reinstated without a break in service, with a break, or under some other arrangement? If the 11th and 12th members of staff are sacked for fighting with each other, but have the disciplinary hearings on different days does that mean that the first to learn their fate has unfair dismissal rights and the other does not?

Serious thought to these issues needs to be given before this proposal goes any further.

If a micro-business finds basic fairness too complicated then we suggest the problem lies with the business, not with the value of fairness.

25. Would it be necessary to set out a process for no fault dismissal in

a) legislation

b) the Acas Code

c) both

d) neither?

[6] The ONS Labour Market Statistical bulletin for January 2012 shows a workforce of 31.8m comprising of 29.12m employed, and 2.68m unemployed.

In our view, primary legislation would need amending. The ACAS Code of Practice should not be amended.

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

a) a flat rate

b) a multiple of a week's or a month's wages

c) other

d) I don't agree with no fault dismissal

We do not agree with no fault dismissal.

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

No fault dismissals would remove redundancy payment rights from those working in micro-businesses.

The Office for National Statistics says that the average length of continuous employment for men is currently 9.1 years, and for women it is 7.9 years.[7] Those figures also show that 23.6% of men and 25.1% of women have continuous employment of less than the two years necessary to qualify for a statutory redundancy payment. Whether or not they effectively lose redundancy rights will depend on the level of compensation that might eventually be proposed under this scheme.

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

As this proposal relates only to unfair dismissal, and not to any other employment rights, we would expect use of compromise agreements to remain broadly the same as employers seek to cover all possible claims.

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[7] http://www.ons.gov.uk/ons/about-ons/what-we-do/publication-scheme/ad-hoc-analysis/published-ad-hoc-data/april-2012/length-of-job-tenure-with-current-employer-2001-2011.xls