Employment Law Review – workplace disputes

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Following the Coalition agreement to review employment law, the Department for Business, Innovation and Skills announced the "Employment Law Review" in January 2011, and a consultation document on the Review's first strand, workplace disputes, was published. This followed the Gibbons Review of employment dispute resolution under the previous Government.

This paper considers the proposals, and the Government's intentions as set out in its response to the consultation published in November 2011:

a. Increase the qualification period for unfair dismissal – the Government confirmed it would increase the qualification period from one year to two years;

b. introduce fee charging mechanisms in employment tribunals – a further consultation on this proposal is due shortly, although the Chancellor has already said that fees will be introduced.

c. tackle weaker cases: striking out, deposits and awarding costs – the Government announced a fundamental review of the rules of procedure for employment tribunals, which would include the issue of striking out, but deposits and cost awards would be increased from £500 to £1,000, and £10,000 to £20,000 respectively;

d. introduce financial penalties for employers – this will be introduced, although penalties will not be automatic as proposed in the consultation;

e. withdraw the payment of expenses in tribunal hearings – this will be implemented.

The Government has stated that it intends to implement a., c. (in respect of deposit orders and cost awards), and e. with effect from April 2012, and to "bring forward a Bill as soon as the Parliamentary timetable permits to take forward those proposals requiring primary legislation".

Separate, but related, to the review, section 4 considers the issue of "compensated no fault dismissal" – the Government intends to launch a call for evidence on this issue.

Contents

1. Background

1.1 Government policy on employment law

There was a general policy commitment in the *Coalition Agreement* to conduct a review of employment law:

> We will review employment and workplace laws, for employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive.[1]

The general policy as regards employment regulation was also foreshadowed to some extent by the *Growth Review* in November 2010 which announced that "each relevant department is reviewing the employment law for which they are responsible to ensure maximum flexibility, protect fairness and promote competitiveness", on the basis that businesses see "both the stock of existing regulations and the flow of new ones as barriers to growth, particularly employment regulation".[2]

The Employment Law Review was announced on 27 January 2011; the Department for Business, Innovation and Skills (BIS) stated that it was "leading a review of employment laws across Government to make it as easy as possible for businesses to take people on", explaining that the Review was "looking at all BIS Employment Laws. In addition, all employment laws which are the policy responsibility of other government departments are within the scope of the Review".[3]

BIS subsequently provided the following information on the Review:

> The Employment Law Review will last for the lifetime of the current Parliament. It is looking across Government at all the laws and regulations that impact the functioning of the labour market, examining each stage of the employment life cycle.

The Employment Law Review themes

Taking someone on *– making it as easy as possible for businesses to recruit their first, and subsequent, members of staff*

Managing Staff *– getting the Government out of the relationship between employer and staff by removing inflexible processes and requirements and allowing grown-up conversations between employers and their staff*

Making change easier *– allowing change to happen in a way that is flexible and economically efficient, whilst remaining fair for individuals*

> Our objectives for the Employment Law Review:
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> - Look again at what each policy is seeking to achieve to ensure that the requirements and burdens are necessary and appropriate for the outcome we want;
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> - Look at whether there are other ways besides regulation to achieve the same end that allow employers and staff to decide for themselves how to respond;

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1 Cabinet Office, *The Coalition: our programme for government*, May 2010, p10

2 HM Treasury, BIS, *Path to strong, sustainable and balanced growth*, November 2010; *Voice of Small Business Annual Survey*, Federation of Small Businesses, February 2010

3 BIS, *Employment Law Review*, website [taken on 7 November 2011]

- Where the current rules need to be kept, simplify to make them easier to understand and follow;
- Make sure the right information and guidance is available, so that employers and staff are making informed decisions, not reacting to a misperceived sense of risk;
- Look at how we have implemented EU directives, seeking opportunities to consolidate and challenging where UK regulation has gone beyond what was required by Europe;
- Seek opportunities to rationalise existing legislation and support the development of modern workplaces.[4]

1.2 The Gibbons Review of employment dispute resolution (March 2007)

The previous Labour Government asked Michael Gibbons, at the time a member of the former Department for Trade and Industry's (DTI) "Ministerial Challenge Panel" and the "Better Regulation Commission", to "review the options for simplifying and improving all aspects of employment dispute resolution". This came two years after the *Employment Act 2002 (Dispute Resolution) Regulations 2004* (SI 2004/752) had been implemented. The purpose of the Review was to allow the then Secretary of State for Trade and Industry, Alistair Darling, "to take on the challenge of adapting the Regulations if it were agreed that they are not working as intended".[5]

Under the regulations, which came into force on 1 October 2004, employers had to follow three specified steps before dismissing an employee, and in most situations an employee must follow similar procedures before making an employment tribunal claim.

In his Report of March 2007, Mr Gibbons found that while the new regulations had brought "some benefits[,] … the procedures carry an unnecessarily high administrative burden for both employers and employees and have had unintended negative consequences which outweigh their benefits. Many businesses told the Review that they have caused an increase in the number of disputes".

In addition, Mr Gibbons found that the "one size fits all" approach was inappropriate, especially for small businesses. It also found that employment tribunals were "too bureaucratic and complicated", they made "inconsistent decisions", and that "too many weak and vexatious claims are being allowed through the system".

Mr Gibbons proposed that the regulations should be repealed, and in their place the Government should produce "clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace, for employers and employees", as well as reforms to the employment tribunal process to make it "simpler and cheaper for users and government".[6]

The then Government said it "welcomed" the Review, and the then Department for Trade and Industry (now BIS) immediately launched a consultation setting out measures to take it

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4 BIS, *Flexible, effective, fair : promoting economic growth through a strong and efficient labour market*, October 2011, p5, paras 11–12

5 Department of Trade and Industry, *Better Dispute Resolution – A review of employment dispute resolution in Great Britain*, March 2007, p4

6 As above, pp8–10

forward, entitled *Success At Work – Resolving disputes in the workplace*. The consultation closed in June 2007, and the DTI stated that:

> Responses to the consultation enabled the Government to identify key legislative reforms for inclusion in the Employment Bill which was published on 7 December 2007. This provides for the complete repeal of the statutory dispute procedures. It also provides for repeal of the existing law on the role of procedure in unfair dismissal. The Bill is subject to parliamentary consideration and depending on the outcome of that process the Government hopes that repeal will take place in April 2009.
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> In addition to the Bill, the Government will be introducing other non legislative measures to improve and simplify employment dispute resolution. Details of these measures will be set out in an official Government response to the consultation and posted on the website in due course.[7]

Subsequently, the *Employment Act 2008* repealed the *Employment Act 2002 (Dispute Resolution) Regulations 2004* (SI 2004/752) and the corresponding sections of the *Employment Act 2002*. These statutory procedures were replaced by a new non-regulatory system. A revised discipline and grievance code for the Advisory, Conciliation and Arbitration Service (Acas) was laid in draft in the Commons on 9 December 2008 under the negative procedure and came into force on 6 April 2009.[8]

In addition, in February 2008 the then Department for Business, Enterprise and Regulatory Reform (now BIS) announced increased financial support for Acas of "up to £37 million to prevent work place disputes unnecessarily going to employment tribunals". The then Government explained that "the extra funding, over three years, will allow Acas to boost its helpline and advice services and offer help at any stage of a dispute to make sure it is never too late to choose an informal resolution".[9]

2. Resolving workplace disputes – consultation

2.1 Summary of the consultation

In January 2011, BIS and the Tribunals Service (now HM Courts and Tribunals Service, or HMCTS) published *Resolving workplace disputes: A consultation*, which was open to responses until 20 April 2011 and related to England, Wales and Scotland. The document was jointly produced by BIS and the Ministry of Justice (MoJ): in the Ministerial foreword, Edward Davey (BIS) and Jonathan Djanogly (MoJ) said:

> Disputes in the workplace cost time and money. For individuals, the potential for personal distress is considerable. Moreover, disputes can affect morale, reduce productivity and ultimately undermine economic growth. Concerns about ending up in an employment tribunal can be a significant barrier that prevents employers, particularly small firms, from taking on staff in the first place.
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> As a Government, we need to encourage employers and employees to work together to resolve disagreements that arise in the workplace. We want to help people to help themselves. It makes good sense to preserve the working relationship where possible, and to achieve a swift resolution where it's not.[10]

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7 BERR (archived), *Gibbons Review – Review of employment dispute resolution in Great Britain*, website

8 Acas, *Code of Practice 1 - Disciplinary and Grievance Procedures*, April 2009

9 BERR, *Extra cash to aid early resolution of workplace disputes*, 6 February 2008; See also: Acas, *Independent study reveals Acas adds £800m to UK economy*, 13 November 2007

10 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, January 2011, p3

Acknowledging the Gibbons Review and the subsequent actions of the previous Government, the Ministers said that "the changes that were made in 2009, following Michael Gibbons' review were a positive step forward". They added that the "repeal of the statutory 3-step procedure and other measures began to redress the balance and demonstrated that providing parties with advice and guidance, and the opportunity to engage in early dispute resolution, could prevent disagreements from becoming tribunal claims". It went on:

> We want to build on that momentum. And we want to ensure consistency with our approach to access to justice reforms more widely in the courts and tribunals system. The proposals in this consultation do just that. In particular, we see providing all potential claimants with access to pre-claim conciliation by Acas - free of charge to all those who want it - as the critical next step in empowering individuals and their employers to take responsibility for working out a solution that is right for them.[11]

The consultation document stated that:

> The Government is seeking views on measures to:
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> - achieve more early resolution of workplace disputes so that parties can resolve their own problems, in a way that is fair and equitable for both sides, without having to go to an employment tribunal;
> - ensure that, where parties do need to come to an employment tribunal, the process is as swift, user friendly and effective as possible;
> - help business feel more confident about hiring people.
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> […]
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> The proposals set out in this consultation cover:
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> **Mediation** – Government is considering how we might enable greater use of alternative dispute resolution tools such as mediation. The consultation seeks to obtain more information about current use, costs and benefits, and barriers.
>
> **Early conciliation** – to require all claims to be submitted to Acas (the Advisory, Conciliation and Arbitration Service) in the first instance, rather than the Tribunals Service. This would allow Acas a specified period (up to 1 month) to offer pre-claim conciliation in all cases.
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> **Tackling weaker cases** – by making the power to strike out more flexible; allowing a judge to be able to issue a deposit order at any stage of the proceedings, to make the deposit order test more flexible and for the Employment Appeal Tribunal (EAT) to be able to make deposit orders; and increasing the deposit and cost limits for weak & vexatious claims from £500 and £10,000 to £1,000 and £20,000 respectively.
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> **Encouraging settlements**
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> - **Provision of information** – to provide for additional information about the nature of the claim being made and to include a statement of loss as required information for claims involving monetary compensation.
> - **Formalising offers to settle** - to develop a process for allowing offers of settlement to be "paid in" to the ET if they are rejected. In the event that the ET subsequently makes a less favourable award, then there is a mechanism for

[11] BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, , pp3–4

recognising the additional costs incurred by the other party in proceeding to hearing.

Shortening tribunal hearings

- **Witness statements to be taken as read** in all hearings, resulting in shorter hearings and therefore saved costs for the system and business.
- **Withdraw the payment of expenses** in tribunal hearings, encouraging parties to settle earlier; and to think more carefully about the number of witnesses they call, so potentially reducing length of hearings.
- **Extend the jurisdictions where judges can sit alone** in ETs to include unfair dismissal, and to remove the general requirement for tripartite panels in the EAT, allowing more efficient use of lay member resource.
- **Introduce the use of Legal officers** to deal with certain case management functions freeing up (more costly) judicial time to concentrate on matters requiring judicial expertise

Introduce fee charging mechanisms in employment tribunals, for example where claimants lodge claims (and respondents choose to counter-claim), and/or for parties in claims that proceed to full hearing.

Increase qualification periods for unfair dismissal from one to two years, which would result in some 3,700-4,700 fewer claims being made to tribunal.

Introduce financial penalties for employers found to have breached rights, to encourage greater compliance.

Review of the formula for calculating employment tribunal awards and statutory redundancy payment limits. This is to correct for anomalous effects on the level of increase each year and to provide discretion to prevent possible decreases should Ministers deem it appropriate.

An Impact Assessment has been prepared, and is published alongside this consultation document. We would welcome comments on the Impact Assessment, in particular on our analysis of costs and benefits and whether you consider there are any unintended consequences or other implications of the proposals which have not been properly identified.[12]

A number of the proposals are explained in more detail in section 3 below, together with the Government's response following the consultation.

2.2 Chancellor's announcement on unfair dismissal and tribunals fees

In his address to the Conservative Party Conference, the Chancellor announced that the Government would increase the qualifying period for unfair dismissal to two years, and introduce fees for taking a case to tribunal:

> … we respect the right of those who have spent their whole lives building a small business not to see that achievement destroyed by a vexatious appeal to an employment tribunal.
>
> So we're now going to make it much less risky for businesses to hire people.

[12] As above, pp5–6

> We will double to two years the amount of time you can employ someone before the risk of an unfair dismissal claim.
>
> And I can tell you today we are going to introduce for the first time ever a fee for taking a case to a tribunal that litigants only get back if they win.
>
> We're ending the one-way bet against small business.[13]

The *Financial Times* reported that a consultation would take place before determining the level of fees charged by those wishing to take a case to tribunal; it also reported that "The low-paid, or those without an income, may have the fee waived or reduced at the start of the process".

However, it cautioned that the proposal to increase the qualifying period for unfair dismissal to two years might see complainants "claiming on grounds of discrimination or whistle-blowing" instead (which have no qualifying period):

> Workers are facing a £150-£250 fee to launch an employment tribunal case from April 2013, and at least £1,000 if it goes to a hearing, after George Osborne said the coalition would go ahead with introducing fees in tribunal cases.
>
> The Ministry of Justice will consult on the level of the fee by the end of November. Higher fees could be charged where litigants are seeking £30,000 or more in compensation, and the fee would be returned only if the case was successful. The low-paid, or those without an income, may have the fee waived or reduced at the start of the process.
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> The chancellor also confirmed that the qualifying period for bringing unfair dismissal cases would increase from one to two years from April 2012.
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> […]
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> The government said the unfair dismissal change could save business nearly £6m a year and lead to a drop of 2,000 in the number of cases, but lawyers warned that complainants would try to get around it by claiming on grounds of discrimination or whistleblowing, which have no qualifying period.[14]

2.3 Full Government response to the consultation

After the consultation closed on 20 April, the Government considered the responses it had received, and published its own response on 23 November 2011. The Secretary of State for Business, Vince Cable, told the House in a written ministerial statement that the Government was "announcing a series of measures following outcomes from our employment law review process":

> **The Secretary of State for Business, Innovation and Skills (Vince Cable):** The Government believe the UK economy should be supported by a framework of laws that ensures we have a strong and efficient labour market which is flexible, effective and fair. Today the Government are announcing a series of measures following outcomes from our employment law review process.
>
> *Employment Tribunal Reform*

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13 "Conservative Party Conference 2011: George Osborne speech in full", *Daily Telegraph*, 3 October 2011

14 "Workers face fees for tribunal cases", *Financial Times*, 3 October 2011

Today the Government have launched their response to the Resolving Workplace Disputes consultation and announced that we are commissioning a fundamental review of the current rules of procedure for employment tribunals(1).

The publication of our response to the Resolving Workplace Disputes consultation is a significant milestone in our wider review of employment law. We believe the measures set out in our response today will deliver a more streamlined and efficient employment tribunal system, provide both employers and employees with greater access to methods of early dispute resolution and support growth by giving employers more confidence to take on new workers.

The legislative measures outlined in our package will be taken forward when parliamentary time permits.

On behalf of the Government, I have asked Mr Justice Underhill, the outgoing president of the Employment Appeal Tribunal, to lead a fundamental review of the rules of procedure for employment tribunals. A “working group”, chaired by Mr Justice Underhill, will undertake the review itself and report back to Ministers with recommendations. It is our intention that the review will develop and recommend a revised procedural code, with a view to ensuring that robust case-management powers can be applied flexibly and proportionately in individual cases coming before employment tribunals.

The review will commence in November 2011 and will run for six months. The working party will be invited to provide recommendations by the end of April 2012.

Dismissal

We are going to be seeking views on a proposal to introduce compensated no-fault dismissal for micro-firms with fewer than 10 employees. We will also look at ways to slim down existing dismissal processes, which can be, and are often perceived to be, lengthy and unfair to both employers and employees. We will therefore seek views on how we might simplify them, including potentially working with ACAS to make changes to their code, or supplementary guidance for small businesses.

TUPE and Collective Redundancies

The Government are also looking at the current rules on consultation in collective redundancy situations. Today I am launching a call for evidence on the experience of employers and employees in collective redundancies. The call for evidence will seek to identify where changes, if they are thought necessary, could be made that will help improve the ability of businesses to restructure, while ensuring that employees have access to support in finding alternative training or employment opportunities.

Some businesses have raised concerns that the current TUPE arrangements are overly bureaucratic and may in some areas, such as service provision, unnecessarily gold-plate European rules. Therefore, today I am launching a second call for evidence on the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006 in protecting employees’ rights and smoothing the process of business restructuring. This is a complex area of legislation and it is important we gather evidence from a wide range of stakeholders in considering the case for change.

Copies of the Resolving Workplace Disputes Government response document, the Fundamental Review Terms of Reference and both calls for evidence have been placed in the Libraries of both Houses.

> (1) The existing procedural rules for employment tribunals are contained in schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004.[15]

In the foreword to the Government's response, the Ministers Edward Davey and Jonathan Djanogly said:

> The consultation "Resolving Workplace Disputes" set out our ideas, which focused on the need to tackle problems early, before they got to the tribunal stage.
>
> For it is clear that the system is not working as originally intended and is often not a positive experience for either employer or employee. Employers told us that successful reform could encourage them to take on more staff, contributing to economic growth. Evidence of the stress and outcomes for employees suggested reform could also be beneficial for workers.[16]

The Government reported that "over 400 responses to the consultation were received, about 25% from individuals, about 33% from businesses and their representative organisations and the remainder from trade unions, Government agencies, charities, legal representatives and others".[17]

3. Issues considered by the consultation

3.1 Increased qualification period for unfair dismissal

Previous qualification periods

There have been a number of changes to the qualifying period since the introduction of the right to claim unfair dismissal by the *Industrial Relations Act 1971*. The table below shows the qualifying period for unfair dismissal as determined by the related legislation:

Qualifying period	Date in force	Statutory authority
2 years	28 February 1972	*Industrial Relations Act 1971 (Commencement No 4) Order 1972,* SI No 36 (section 28 of the Act)
1 year	16 September 1974	*Trade Union and Labour Relations Act 1974 (Commencement) Order 1974*, SI No 1385. (section 1 (2) of the Act)
6 months	16 March 1975	*Trade Union and Labour Relations Act 1974*, Schedule 1, para 10
1 year	1 October 1979	*Unfair Dismissal (Variation of Qualifying Period) Order 1979,* SI No 959
2 years for firms with 20 or fewer employees	1 October 1980	*Employment Act 1980 (Commencement No 1) Order 1980,* SI No 1170. (Section 8 of the Act)
2 years	1 June 1985	*Unfair Dismissal (Variation of Qualifying Period) Order 1985,* SI No 782; superseded by the *Employment Rights Act 1996* (Section 108)
1 year	1 June 1999	*Unfair Dismissal and Statement of Reasons for*

[15] HC Deb 23 November 2011 cc26–28WS

[16] BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, November 2011, p3

[17] As above, p7, para 8

		Dismissal (Variation of Qualifying Period) Order 1999, SI No 1436

Consultation proposals

The consultation document proposed increasing the qualification period for employees to bring a claim of unfair dismissal from one to two years. However, the Government noted that this change "would not affect the existing so-called 'day one rights' of people when they start work to bring a case for unfair dismissal, for example where they believe gender, race or some other form of discrimination has taken place or where someone is dismissed for exercising their legal rights, such as asking for a written statement or to be paid the National Minimum Wage".[18]

The Government set out its view on the prevailing position:

> Business have told us of their concerns that the existing legislation is too weighted against employers when it comes to the decision to take on people – making it feel a riskier step than some are prepared to take. There may also be a risk that the current one year period is too short for employers and employees to resolve differences they may have – and that the one year qualifying period acts as an incentive to some employers to bring the relationship to an end earlier than is in everyone's interests.

While increasing the period to two years was expected to have a "relatively modest direct impact" on reducing the number of tribunal cases (between 3,700 to 4,700 a year, according to BIS,[19] compared to a total of 236,100 employment tribunal claims accepted in the financial year 2009-10),[20] the Government added that:

> More important is likely to be the indirect effects of enhancing the confidence of businesses that are considering taking on people – that there is more time for the relationship to get established and work well for everyone. We do not see this as a charter for businesses to sack people unfairly.[21]

BIS justified the choice of a two-year period as follows: "The two year qualifying period existed previously and in considering this policy there were no reasons for suggesting any longer period would meet the needs of business whilst also providing adequate protection".[22]

However, BIS acknowledged that there might be "unintended consequences from a policy to reduce qualifying periods such as a higher demand for Acas services".[23]

In terms of the financial impact:

> BIS estimate an indicative cost saving to employers of £34.3 - £43.6 million per annum. This includes employers paying out fewer penalties, as well as direct cost and admin burden savings from going through employment tribunals fewer times. However, they will face familiarisation costs of £5.2 million in the first year. Claimants are estimated to save between £4.8 - £6.1 million as a result of fewer tribunals. However, awards

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18 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p51
19 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p51
20 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, January 2011, p40
21 As above, pp51–52
22 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p147
23 As above, p154

> received by claimants will fall by £15.8 - £20.1 million per annum. The Tribunals Service is estimated to save around £1.5 - £2.0 million in costs.[24]

Ahead of the Government's full response to the consultation, the Chancellor, George Osborne, announced that the proposal to increase the qualifying period for unfair dismissal to two years would be implemented (see section 3.2).

Government response to the consultation

On the proposal to extend the qualification period for unfair dismissal, the Government acknowledged that there were "clearly divergent views on the merits of the proposal":

> 110. There were over 200 responses to this part of the consultation. The majority of businesses and business groups who responded welcomed the proposed change. About a quarter of all respondents, agreed strongly that this will have a positive impact on employers' confidence to recruit and retain staff. In a survey of 1,100 of their members, the Institute of Directors told us that large numbers of businesses had expressed concerns about dismissal and the risk of tribunal claims in relation to recruitment plans. 51% of respondents to the survey said that the one year qualifying period for unfair dismissal was a 'significant' or 'very significant' factor in considering whether to take on an additional employee. A separate BCC survey of small businesses reported that dismissal was a major issue for them.
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> 111. Other business stakeholders expressed the view that the proposal will have a positive impact. For example, CBI suggested that "the extension of the qualifying period will have a positive impact on marginal hiring decisions, particularly in smaller firms", and the BCC welcomed the proposal as a strong signal from Government that it is committed to reducing the burden of employment regulation. Individual businesses agreed that extending the qualifying period would make them more confident to hire. A few argued that, particularly where there are significant training requirements for a post, a longer qualifying period would allow more opportunity to assess individuals and reduce the level of pressure on deciding whether to retain a trainee before 12 months elapse.
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> 112. Although business stakeholders were broadly supportive, the majority of consultation respondents disagreed with the proposal. This included respondents from the legal community, unions and advice providers, who argued that the measure reduces employee rights and is unlikely to achieve its aims. Arguments were also put forward that the proposal will have a disparate impact on particular groups.[25]

Although "the majority of consultation respondents disagreed with the proposal", the Government determined that "we consider that business stakeholders are best placed to evaluate the likely impact on business confidence", adding that "improving business confidence (and the economic benefits which would flow from such an improvement) is a key aim of Government policy". It continued: "we believe that extending the qualifying period is a proportionate means of achieving the legitimate aim of improving business confidence to

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[24] As above, p155

[25] BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, November 2011, pp32–33, paras 110–113

recruit and retain staff".[26] However, in the Final Impact Assessment, published alongside the Government's response to the consultation, it was noted that:

> It is difficult to quantify the likely impact of extending the qualifying period on employers' confidence to hire. However, the consultation has provided some evidence to support our view that extending the qualifying period will have a positive impact on employers' confidence to recruit and retain staff. Business representative groups and a range of businesses of all sizes agreed that this measure would improve confidence to recruit.[27]

The Government also added that there was a "potential secondary benefit" for "employees recruited into roles with a high training requirement (where there may be a risk of employers taking a cautious approach and dismissing employees before they qualify for the right not to be unfairly dismissed, if there is uncertainty that they will achieve the required standard)".[28] In the Final Impact Assessment, the Government explained further:

> We recognise that, in many cases, a 12 month period is likely to be sufficient to assess a newly recruited employee's performance. However, a number of respondents suggested that, for some businesses, the current qualifying period is not long enough to fully assess the employee's performance and to resolve any problems that may be encountered. This is particularly the case where the training requirements of a job are high and it may not be clear to the employer whether an employee in training will reach a satisfactory level of performance. In this case the qualifying period may have the unintended consequence of acting as an incentive to dismiss the worker earlier than is in everyone's best interest.[29]

The Government said it was "unconvinced" by "arguments made by some respondents to the consultation that there could be widespread substitution of current unfair dismissal claims into other jurisdictions, such as discrimination":

> There is little evidence that, where there are grounds for a discrimination claim, individuals are currently choosing to pursue an unfair dismissal claim instead. Furthermore, other Resolving Workplace Disputes proposals aim to encourage early resolution of disputes (for example, greater use of pre-claim conciliation). This will help to avoid weak claims from being pursued in other jurisdictions.

In terms of the expected impact on tribunal cases, the Government said that it was revising down its forecast to "around 1,600 – 2,100 claims", compared to "between 3,700 to 4,700 a year" as stated in the original consultation document.[30] The reduction in the estimate was for two reasons:

- "we are now assuming that all claims currently under multiple jurisdictions (and including an unfair dismissal claim) will proceed under the other jurisdiction(s). We had previously assumed[31] that half of such claims would be withdrawn";

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[26] BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, pp33 and 34, paras 113 and 117

[27] BIS and HMCTS, *Resolving workplace disputes – Final Impact Assessment*, November 2011, p76, para 301

[28] BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p33, para 114

[29] BIS and HMCTS, *Resolving workplace disputes – Final Impact Assessment*, p76, para 303

[30] BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p51

[31] "In the absence of further evidence, BIS estimates will assume all of the single-jurisdiction claims under the proposed new qualifying period would not occur and half of the remaining multi-jurisdiction claims would not be lodged" (BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p153)

- taking into account "the wider impact of early conciliation", which is "expect[ed] to see a 25.4 per cent reduction in claims".[32]

The Government stated: "we are committed to assessing the impact of policy changes and we will monitor the impact, including the equality impact, of this proposal as part of our overall assessment of the implementation of the Resolving Workplace Dispute proposals".[33]

The Government noted that "no respondents suggested a period longer than two years was needed".[34]

Reaction to the Chancellor's announcement

Following the Chancellor's announcement that the qualifying period for unfair dismissal would rise to two years, a report in *Personnel Today* included analysis of the possible impact of the changes by the Chartered Institute of Personnel and Development (CIPD) and an employment lawyer:

> Osborne also outlined the fees that must be paid by employees who want to bring a tribunal claim against an employer. From April 2013, employees must pay £250 to apply for a tribunal, and must pay a further £1,000 if a hearing is granted. The money will be refunded if they are successful, but is forfeited if they lose. The Government has said that "poor claimants" will not have to pay, although there is currently no detail as to how a claimant qualifies as "poor".
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> […]
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> Today's announcement confirms what many commentators were expecting and has received a mixed response. John Philpott, chief economic adviser at the Chartered Institute of Personnel and Development, suggested that there is "questionable merit" in the changes, which the Government has said will help to boost economic growth by removing some of the risks involved with recruiting new employees.
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> Philpott said: "The vast weight of evidence on the effects of employment protection legislation suggests that, while less job protection encourages increased hiring during economic recoveries, it also results in increased firing during downturns. The overall effect is thus simply to make employment less stable over the economic cycle, with little significant impact one way or the other on structural rates of employment or unemployment.
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> "There is no evidence that UK employment suffered significantly in the 1970s as a result of the introduction in 1975 of a six-month qualifying period for rights against unfair dismissal, or that there was any substantial benefit when the qualifying period was subsequently raised to two years in the 1980s before being lowered to one year in 1999.
>
> "In addition, it is unlikely that raising the threshold from one to two years will have its intended effect of reducing the number of employment tribunal claims because employees are increasingly bringing claims linking unfair dismissal with discrimination claims which can be made from day one of employment. ONS figures suggest that an extra 12% of employees would potentially be denied the chance to claim unfair dismissal due to length of service as a result of the change - hardly likely to make

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[32] BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p33, para 115, and BIS and HMCTS, *Resolving workplace disputes – Final Impact Assessment*, p84, para 337

[33] BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p34, para 117

[34] BIS and HMCTS, *Resolving workplace disputes – Final Impact Assessment*, p76, para 303

much of a dent in overall tribunal numbers given that only a small proportion of these would make any claim," Philpott added.

Meanwhile, Darren Newman, employment lawyer at In Company Training suggested that the announcement hinted at further measures yet to be unveiled, and said that the introduction of tribunal fees might result in a significant new responsibility for the Government. He said: "The Government announcement of a two-year qualifying period for unfair dismissal was entirely expected. But employers' groups are likely to lobby for changes to go much further than that. While to some extent the Government's hand is tied in areas covered by European law, it is worth noting that unfair dismissal law is not based on any European Directive. If the Government wanted to achieve a fundamental change, then unfair dismissal law would be the most likely area for reform.

"As for the employment tribunal fees, this is going to create a huge new administrative burden for the tribunal system. Collecting fees from upwards of 100,000 people is no mean feat - nor is refunding those fees to successful claimants. The tribunal service is currently not set up to do this and considerable fresh resources would be needed to put the right systems in place.

"Presumably, the requirement to pay a fee will not be levied on claimants who are unemployed and cannot afford it. In which case, however, relatively few claimants will actually have to pay the fee. That's the thing about people claiming unfair dismissal - they tend to be unemployed."[35]

The proposal to extend the qualifying time to claim unfair dismissal was analysed by an employment law barrister in *The Lawyer*. The commentary focused on the possible impact of this change on recruitment, and also argued that increasing the qualifying period for unfair dismissal to two years was "unlawful from the start":

The government estimates there will be 3,700 to 4,700 fewer claims in future, with savings to business and to the tribunal service, and losses to those who are prevented from bringing a claim. To give some idea of scale, there were 47,900 unfair dismissal claims last year (not 236,000 as some papers are reporting: that is all claims to employment tribunal e.g. it also includes unpaid wages claims.) But the change would affect far more than those 4,000 people: at any one time there are 3 million people with more than one year's service but less than two. Many of them are bound to feel less secure at work if they do not have basic employment protection. This will not be a popular policy.

So, how many new jobs do the government think will be created? The extent of the evidence seems to be this, from the Impact Assessment: "Business have told us of their concerns that the existing legislation is too weighted against employers when it comes to the decision to employ people – making it feel a riskier step than some are prepared to take." Amazingly, the Impact Assessment does not even ask how many new jobs might be created – a mere assertion that this is how employers feel seems to be enough. There is not even an estimate against which the success or failure of this initiative might later be measured.

It's hardly surprising that employers makes [*sic*] these assertions. One thing is certain, employers will gain if fewer people can claim unfair dismissal. But is there any objective evidence that employers look up the qualifying period for unfair dismissal claims before deciding whether to create new jobs?

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[35] "Government confirms changes to unfair dismissal and tribunal system", *Personnel Today*, 3 October 2011

> Not if you look at the unemployment statistics. If a longer qualifying period really meant more jobs, then logically a shorter period would have meant fewer jobs when Labour reduced the qualifying period from 2 years to one year in May 1999 – unemployment would have risen. The figures do not show that. Unemployment was gradually declining in 1999 and it continued that gradual decline until 2006 – there is no "blip" when unemployment rose following that change. And that indicates that whatever employers may say, it makes no difference to their recruitment decisions whether the qualifying period for unfair dismissal claims is one year or two.
>
> The question whether there is any objective evidence to support the government's claim matters legally, because the proposed change will have a significant adverse effect on younger people in particular – and age discrimination is now unlawful. The Equality Impact Assessment found that out of 2 million young people aged 18-24 who can currently claim unfair dismissal, 724,000 would lose that protection overnight, i.e. 36%, far more than the overall figure of 10%. So prima facie there is indirect age discrimination. Can the decision be objectively justified as a proportionate means of achieving a legitimate aim?
>
> In Seymour-Smith no.2 [2000] ICR 244 (an indirect sex discrimination claim) at issue was whether an earlier increase to 2 years (under Thatcher) was justified (a) at its inception in 1985 and (b) in 1991 when the claimants were dismissed. The same justification was relied on, job creation. The House of Lords accepted that there was "some supporting factual evidence" to support that case in 1985, and it was only over time that the disparate impact on women became apparent. Therefore, the change was (just about) justified both in 1985 and in 1991. The impact should be monitored, however, because "the benefits hoped for may not materialise".
>
> The present government seems to be proceeding on the assumption that because the House of Lords accepted in Seymour-Smith no.2 that a 2 year requirement was justified between 1985 and 1991, it is fine to re-introduce it now. However, there are two key differences. The first is that in 2011 we do impact assessments, so we already know that the policy will have a significant adverse impact on younger people. And the second is that we already know from the unemployment statistics that there is no correlation between the qualifying period and unemployment rates. The benefit contended for is entirely specious. Therefore in my view it is arguable that the impact on young people cannot be objectively justified and the increase to 2 years is unlawful from the start.[36]

3.2 Introduce fee charging mechanisms in employment tribunals

Consultation proposals

BIS noted that, unlike the civil and family courts, at present the cost burden of running employment tribunals and the Employment Appeal Tribunal "falls in its entirety on tax payers". It was noted that the MoJ was required to make £2bn worth of savings under the Spending Review 2010, and that this would include finding savings from "the circa £80m annual budget allocated to the running of the employment tribunal system".[37]

Against that backdrop, BIS provided three justifications for introducing a policy of charging:

> Firstly, a fees mechanism will help to transfer some of the cost burden from general taxpayers to those that use the system, or cause the system to be used. That is fair, particularly if the burden is shouldered by the party who causes the system to be used.

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[36] "Opinion: Unfair dismissal claims", *The Lawyer*, 4 October 2011

[37] BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p49

> Secondly, a price mechanism could help to incentivise earlier settlements, and to disincentivise unreasonable behaviour, like pursuing weak or vexatious claims. In turns, this helps to improve the overall effectiveness and efficiency of the system.
>
> Thirdly, and more generally, the courts have for some time charged fees for family and civil disputes. We see no fundamental difference between the courts and the employment tribunals in the sense that both consider cases between individuals (party v party disputes). Therefore, introducing a fees system will bring the Employment Tribunal and Employment Appeal Tribunal into line with other similar parts of justice system.[38]

The Government stated that it expected that the introduction of fees would lead to:

- a higher proportion of individual employment disputes being resolved without the need for the individual embarking upon employment tribunal proceedings and therefore a reduction in the number of claims made to employment tribunals
- a reduction in the number of cases that proceed to a full hearing in employment tribunals
- a reduction in the time and costs of ET [employment tribunal] proceedings for claimants, respondents and their representatives; and
- a reduction in the overall costs of administering the system for the Exchequer.[39]

In determining these benefits, the Government assumed that "the introduction of a fee charging regime would result in a decreased number of claims made to employment tribunals", but admitted that "we have not estimated what this reduction would be".[40]

The Government acknowledged that if fees were introduced, "it is assumed that an appropriate remissions and exemptions system will be implemented that would maintain access to justice". Despite the introduction of such a system, the Government acknowledged that "it is likely there would be some users who would not have a remission or exemption and who might not be able to afford the fee. These users would be prevented from using the ET service".[41]

Further, the Government queried whether there was currently a problem with a large number of cases that lacked merit being brought to employment tribunal: "it is perceived, specifically among the business/employer community, that many of the claims presented to tribunals lack merit. Although this is not directly borne out by statistics provided by the Tribunals Service".[42]

The consultation acknowledged that "there is a lot of work we need to do to design a mechanism that is as fair as we can make it – in particular to vulnerable workers whose access to justice must be protected".[43] As such, the consultation noted that the Government "propose[d] to consult on how best to implement a fees mechanism in the Spring, once we

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38 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p50
39 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p142
40 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p146
41 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p146
42 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p140
43 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, January 2011, p50

have developed options more fully, and considered the likely impacts, both on the system overall and on specific categories of tribunal user"[44] – no question was asked in the consultation on the introduction of fees. A list of the possible questions to be included in any subsequent consultation was set out in the Impact Assessment to the January 2011 consultation.[45]

Ahead of the Government's full response to the consultation, the Chancellor, George Osborne, confirmed that a fees mechanism would be introduced, and details of the possible fees were reported by the media.

Government response to the consultation

Although no questions were asked in the consultation on the issue of fees, the Government subsequently reported that:

> many respondents referred to it in their responses. Some observed that the introduction of fees may have an impact on some of the other proposals in the consultation and that, in the absence of detail on what was intended, their responses were less relevant than they might otherwise have been. We recognise that the consultation on fees, while due shortly, is later than we had originally anticipated. However, we have taken into consideration, as far as we can, how the actions we intend to take will be affected by the introduction of fees and this analysis is reflected in the accompanying Impact Assessment.[46]

As noted above, the Government said that the consultation on fees is "due shortly", and admitted that it was "later than we had originally anticipated" i.e. Spring 2011.[47]

In December 2011, the MoJ published a consultation paper, *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* which set out the proposed fee levels under two options – the consultation runs until 6 March 2012.

Reaction to the Chancellor's announcement that fees for Tribunals will be introduced

Following the Chancellor's October 2011 announcement that "we are going to introduce for the first time ever a fee for taking a case to a tribunal that litigants only get back if they win" (see section 2.2), *Personnel Today* reported the following analysis of the possible impact:

> Osborne also outlined the fees that must be paid by employees who want to bring a tribunal claim against an employer. From April 2013, employees must pay £250 to apply for a tribunal, and must pay a further £1,000 if a hearing is granted. The money will be refunded if they are successful, but is forfeited if they lose. The Government has said that "poor claimants" will not have to pay, although there is currently no detail as to how a claimant qualifies as "poor".
>
> […]
>
> Darren Newman, employment lawyer at In Company Training [said] … "As for the employment tribunal fees, this is going to create a huge new administrative burden for the tribunal system. Collecting fees from upwards of 100,000 people is no mean feat - nor is refunding those fees to successful claimants. The tribunal service is currently not set up to do this and considerable fresh resources would be needed to put the right systems in place.

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44 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p50
45 BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p144
46 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, pp6–7, para 5
47 BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p144

> "Presumably, the requirement to pay a fee will not be levied on claimants who are unemployed and cannot afford it. In which case, however, relatively few claimants will actually have to pay the fee. That's the thing about people claiming unfair dismissal - they tend to be unemployed."[48]

While the Chancellor did not refer to any figures for possible fees in his speech, media reports of his speech did include some. Subsequently, an oral question was asked by Lord Lea of Crondall on the proposed figure of £1,000 reported in the press following the Chancellor's announcement – the Government said that fee levels and charging points would be subject to consultation (i.e. they had yet to be determined):

> ***Asked By Lord Lea of Crondall***
>
> To ask Her Majesty's Government what evidence they used in deciding to introduce fees of up to £1,000 for access by workers to industrial tribunals.
>
> **The Minister of State, Ministry of Justice (Lord McNally):** My Lords, the Government will launch a consultation on the introduction of fees in employment tribunals and the employment appeal tribunals later in the year. That consultation document will set out options for proposed fee structures and the indicative levels that might be applied. No decision will be made on the level of fees to be paid until that consultation has been completed … The consultation I have mentioned today will seek views on the fee levels, charging points and so on.[49]

3.3 Tackling weaker cases – striking out, deposits and awarding costs

Consultation proposals

At present, there are already powers given to employment tribunals to strike out a case, namely "where procedural rules or directions have been flouted, or where the claim is scandalous, vexatious or has no reasonable prospect of success".[50] However, BIS noted that:

> There is, however, one important limit to the flexible utilisation of these strike-out provisions. Under Rule 18(6) and Rule 19, these powers can only be exercised when appropriate notice has been issued to any parties affected. The notice must give the parties the opportunity to request that the order proposed be considered at a hearing and if such a request is made, no order can be made otherwise than at a hearing - usually a pre-hearing review. Unlike in the civil courts in England and Wales, therefore, no judge has the power to strike out a claim on paper (i.e. without needing to list the matter for a hearing or to invite representations from the parties). Employment judges cannot even strike out a claim at a Case Management Discussion where both parties are present before him/her.[51]

In addition, a tribunal currently has the power to require a financial deposit (from either a claimant or respondent) for a matter as part of their case, or the matter could be the entire case: the limit is £500 per matter. Such a deposit could only be required if the employment judge is "satisfied that the claimant/respondent has 'little reasonable prospect of success' in pursuing the relevant matter/case" and must be made at a pre-hearing review.[52]

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48 "Government confirms changes to unfair dismissal and tribunal system", *Personnel Today*, 3 October 2011
49 HL Deb 19 October cc285–286
50 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p28
51 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, pp28–29
52 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p69

Costs (or expenses, in Scotland) may also be awarded against a party where a lawyer is acting, or where no lawyer is acting a "preparation time order"; both are statutorily limited to £10,000. However, if a greater sum is considered necessary, an employment tribunal can refer the matter to a civil court which has the power to award an amount in excess of £10,000,[53] although the Government notes that this approach "can be cumbersome and time-consuming".[54] Also, a "wasted costs order" can be made against a representative as a result of their conduct; this can amount to the whole or part of any wasted costs of any party (although not the tribunal itself), and is not capped.[55]

The Government observed that "employment tribunals do, therefore, have case management and other powers at their disposal. But it is clear that there are some limits to the circumstances in which such powers can be exercised, whether in relation to the test that must be satisfied prior to the application of the power; or to the type of hearing at which the power can be exercised; or otherwise".[56]

As a result:

> There is a view that weak, vexatious or un-meritorious claims are brought to ETs. In particular, it is perceived that the current provisions available to ETs and its judiciary to deal with such cases do not sufficiently deter claimants from bringing weak, un-meritorious or vexatious claims; or empower ETs to manage them robustly to an early disposal. It is argued that establishing stronger, more credible and more widely-used deterrence mechanisms would reduce the volume of these ET claims whilst safeguarding access to justice for claimants who bring legitimate cases (whose claims might proceed less expeditiously and/or effectively because of the presently high volumes of claims in the system).
>
> There is a perception that the current system of deposits and costs powers is not credible or widely enforced.[57]

Instead, the Government argued that there should be "greater flexibility" in the use of the powers to strike out, take deposits, and award costs (or preparation time orders) in order to "strengthen the credibility and deterrent effect of case management powers in employment tribunals". However, it cautioned that this should be done while "retaining the important safeguards of such orders being made by the independent and expert judiciary, in furtherance of the overriding objective of dealing with cases justly, and with the appropriate Review and appeal mechanisms in support".[58]

In support of this aim, the Government set out a number of proposals:

- the strike out power should be exercisable by an employment tribunal (including by an employment judge sitting alone, and whether on its own initiative or at the invitation of a party) either (a) at any hearing rather than exclusively pre-hearing reviews; or (b) without hearing the parties or giving them the opportunity to make representations. It added that "procedural safeguards will be required to ensure fairness", and that parties affected by a strike-out order made in the absence of their representations can apply to have the judgment or order set aside, varied or stayed;

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53 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p69
54 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p33
55 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p33
56 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p71
57 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, pp69–70
58 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p72

- to make it easier for Respondent employers to request that an employment judge considers a claim form right at the outset. Rather than the form being completed in full, it could simply suggest that insufficient information has been provided to justify the claim continuing, in light of their proposed new strike out powers. An employer could ask a tribunal to order the claimant to provide more information before they (the employer) is required to provide a full response, or ask the tribunal to strike out the claim on the grounds that it has no reasonable prospect of success (or under any other appropriate and relevant ground). Again, "procedural safeguards must be built in" to prevent employers acting in bad faith from using this mechanism as a delaying tactic in the hope it will deter the claimant from pursuing their claim.[59]

- to allow a deposit order to be made other than at a pre-hearing review, amending the deposit order test to "assist judges in applying deposit orders more effectively", and increasing the maximum level of the deposit order that can be made, from £500 per matter to £1,000. Powers to require a financial deposit from a party as a condition of being allowed to pursue a matter or their entire case will be extended to hearings of the Employment Appeal Tribunal.[60]

- to double the current cap on costs awards from £10,000 to £20,000, although the Government accepted that "there is a risk that parties could use this costs cap increase to put undue pressure on their opponents to withdraw from the tribunal process … We would therefore be interested in views on the steps that can be taken to mitigate this risk, whether through formal tribunal procedure, or through regulatory action taken by the relevant bodies, or otherwise".[61]

In summary, the Government said that "we envisage that … [the] measures outlined will encourage parties who pursue weak claims/responses to think carefully before initiating tribunal proceedings".[62]

Government response to the consultation

In summary, the Government found that "opinion was very much divided" to its proposals on case management:

> 72. On the one hand, business welcomed the proposals, often warmly. Without exception, the key business groups (BCC, CBI, CIPD, Forum of Private Business, FSB and IoD) agreed with the proposal to extend strike out powers to judges in Case Management Discussions (as opposed to just Pre Hearing Reviews). That said, opinion was divided on whether strike out should be possible 'on the papers', i.e. without any hearing at all. Similar views were expressed about the deposit regime, and there was broad support for the idea of raising the cap of deposits from £500 per issue to £1000. There was broad support too for the increased cap on costs awards made in the employment tribunal (with the proposal suggesting an increase from £10,000 to £20,000 – subject of course to judicial decisions in individual cases).
>
> 73. However, claimant representative groups disagreed strongly with the proposals. They questioned the evidence base on which the proposals were brought forward; and suggested that the 'problem' trying to be fixed was not in

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59 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, pp29–30
60 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, pp31–32
61 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, pp33–34
62 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p33

> fact evident at all. In short, consensus here was that the proposals were weighted unduly in favour of respondent businesses, and would have a disproportionate impact on (particularly vulnerable) claimant employees and workers.
>
> 74. Other consultees (tribunal judges and members, representative lawyer groups, and other public sector/advisory bodies) broadly sat between these poles. Most recognised the need for flexibility, but questioned the analysis in the consultation paper that the system was quite so 'plagued' by a flood of weak and vexatious cases.[63]

The Government noted that "to the extent that there was any consensus", it was that "focus on powers available to judges and tribunals is, on its own, insufficient. What is just as (if not more) important is how those powers are exercised":

> 75. […] The judiciary and lawyer groups (Law Society, Scottish Law Society, Employment Lawyers Association, Free Representation Unit) argue strongly that additional prescriptive rules are not the answer. For example, proposals such as that which would allow early reference of allegedly weak claims to a judge to consider strike out or an order for the provision of further information was broadly seen as a bureaucratic way of achieving what could already be achieved now with sensible judicial management.
>
> 76. Making that point, many pushed strongly for the root and branch review of the existing procedural rules, as opposed to further piecemeal iterations. The case put was that the rules are, collectively, unduly prescriptive and inflexible. And in that respect, the rules actually act as a barrier for tribunals to do what Government thinks is necessary: manage cases efficiently and proportionately.[64]

In response to these views, the Government announced that it "believes that there are strong arguments in favour of a fundamental review of procedural rules and has invited Mr Justice Underhill to lead this work".

The Secretary of State for Business provided further details about the review:

> On behalf of the Government, I have asked Mr Justice Underhill, the outgoing president of the Employment Appeal Tribunal, to lead a fundamental review of the rules of procedure for employment tribunals. A "working group", chaired by Mr Justice Underhill, will undertake the review itself and report back to Ministers with recommendations. It is our intention that the review will develop and recommend a revised procedural code, with a view to ensuring that robust case-management powers can be applied flexibly and proportionately in individual cases coming before employment tribunals.
>
> The review will commence in November 2011 and will run for six months. The working party will be invited to provide recommendations by the end of April 2012.[65]

On the three issued focussed on in this section – striking out, deposits, and awarding costs – the Government said:

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63 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, pp23–24
64 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p24
65 HC Deb 23 November 2011 c26WS

- "[it] is minded to expand the use of strike-out powers (e.g. what the test is, where, when and by whom the power can be exercised, and what relief from sanction should apply), but will ask the Fundamental Review to consider this";

- "we believe that there are good reasons for acting now to increase the maximum levels of deposit orders and costs awards":

    - "we will therefore take forward secondary legislation immediately to amend the Rules to increase the limit for deposit orders from £500 to £1,000 and cost awards from £10,000 to £20,000";

    - "the question of when and how the Judge can make a deposit order will be considered as part of the Fundamental Review, as will the issue of powers that should be available to an Employment Judge or tribunal in circumstances where a party seeks to apply undue pressure on the other during party-to-party negotiations/communications, where it is judged that improper threats are being made".[66]

3.4 Introduce financial penalties for employers

Consultation proposals

In the consultation, the Government proposed the introduction of the "power for employment tribunals where the ET is acting at first instance to impose financial penalties on employers who are found to have breached employment law".[67] The Government explained that at present:

> There are, however, no powers available to the tribunal to penalise an employer for the original breach. Introducing such powers would allow the tribunal to send a clear message to an employer, and employers more generally, that they must ensure that they comply with their employment law obligations. Over time, we would expect to see a fall in the number of ET claims as employers became better informed of these obligations, and so breaches will occur less often or not at all.[68]

The Government stated that the application of a penalty would be "automatic in all breaches, where the ET is acting at first instance, regardless of the jurisdiction involved", although the ET could determine that there was "exceptional circumstances (such as the size of the organisation or where there is a large multiple claim against one employer)".[69]

All penalties would be payable to the Exchequer, so representing a "transfer payment from employers to the Exchequer":[70]

> We propose to introduce a provision for the tribunal to levy financial penalties on employers found to have breached the relevant rights, to encourage greater compliance. Penalties would be payable to the Exchequer, rather than the claimant, providing some element of recompense for the costs incurred to the system through the employer's failure to comply with their obligations, and avoiding an incentive for employees to bring speculative claims.[71]

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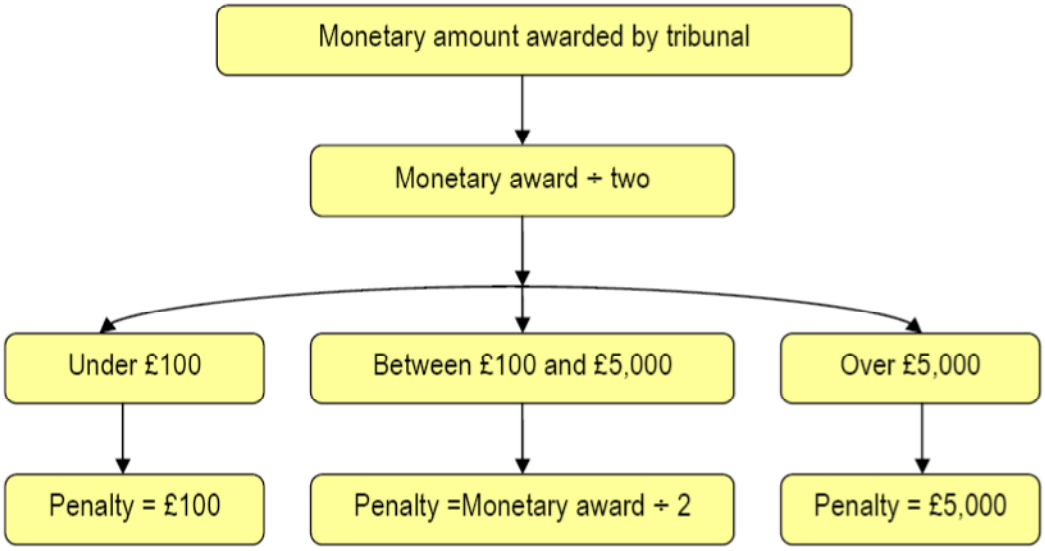
66 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p25, para 80
67 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p156
68 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p53
69 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p53
70 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p156
71 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p53

The structure of the proposed fines was set out as follows:[72]



As such, there will be a minimum threshold of £100 and an upper ceiling of £5,000. The Government noted that there were risks to the proposed fine structure, arising from whether it has been set too low or too high:

> The effect of the proposed penalty on non-compliance could have been over or under estimated. This is because the penalty may not have been set at the correct level ensuring it acts as a strong deterrent. A literature review regarding the determinants of compliance with laws and regulations commented "one counterproductive effect (of enforcement on compliance) may be that of imposing penalties insufficiently large to deter the offending behaviour. Alternatively, imposing too great penalties can result in an inability of firms to pay and have damaging wider consequences."
>
> If the £5,000 upper ceiling does not act as a strong deterrent firms will not change their behaviour and hence the penalty is not serving its purpose of decreasing non-compliance. If the £5,000 is upper ceiling is too high some firms may struggle to pay the penalty which could have damaging consequences to the business.[73]

The Government added it envisaged "that where a non-financial award is made a tribunal can ascribe a monetary value and so the appropriate financial penalty can be made".[74] It was also proposed that fines would be reduced by 50% if they were paid within 21 days.[75]

While in the consultation document the Government "assumed that the introduction of the proposed penalty will influence compliance behaviour", it admitted that "finding evidence to support this assumption is difficult as there is not a vast amount of evidence linking penalties with employment law since penalties are not currently widely used".

Instead, it drew on evidence from the impact of penalties and compliance with health and safety regulation, and found that:

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[72] BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p158
[73] BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p162
[74] BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p157
[75] BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p159

> If the labour market reacts in a similar way to penalties as the market for health and safety does then the policy aim of deterring non-compliance is feasible. This would result in cost savings for employers, the Exchequer and claimants. This dynamic change has not been quantified.[76]

Using historic data and applying the proposed fine structure, the Government calculated that "the estimated range of costs faced by employers/ revenue expected by the Exchequer as a result of the introduction of financial penalties is £0 - £11.1m, giving a mid-point estimate of £5.5m".[77]

However, in order to give firms time to comply with employment law, and so avoid the new penalties, transitional arrangements would mean that any system of financial penalties would not be introduced until "at least 6 months after the relevant legislation was introduced".[78]

The Government also acknowledged that there would be an "administrative burden" from collecting penalties, and said that it would consider how a significant burden could be avoided "in the light of consultation responses to this proposal".[79] However, the Government acknowledged the risk that "enforcement may not be perceived as credible (given that costs/deposits etc are rarely awarded anyway), or claimants may not be very aware of the costs regime, it might be that the deterrent effect does not arise, or at least might be delayed in so doing".[80]

Government response to the consultation

The responses to the consultation were divided on this issue: "55% of the 270 respondents disagreed that introducing a system of financial penalties would encourage compliance and ultimately lead to a reduction in ET claims, while 43% were in favour and 2% didn't know". Interestingly, the Government noted that the opinion of businesses and business representatives were split on the issue:

> A significant proportion of those who answered "no" were business and business representatives (around 40%) as well as the legal community. There were also some individuals and employee representatives who were against the proposal as well as advisory bodies such as Citizens Advice. Of those who were in favour, around half were individuals and trade unions although there were some businesses (including large and small businesses) and business representatives who also agreed.[81]

On the proposal in the consultation document for automatic penalties (except where exemptions applied), the Government reported views that this would "encourage settlement of weaker cases; would impose more costs on business; would be unfair, particularly where there has been a technical breach, or a small business without HR resource has unwittingly breached the law; and would not necessarily encourage compliance by employers".[82]

In summary, the Government said that it "intends to introduce a provision for employment tribunals to levy a financial penalty on employers found to have breached employment

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76 BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, pp156–157
77 BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p161
78 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p53
79 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, p54
80 BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p79
81 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p35, paras 119–120
82 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, November 2011, p35, para 122

rights", and concluded that the amount of the penalty, including the reduction for payment within 21 days, should remain as set out in the consultation, adding that the Government "believe these levels are appropriate given the existing NMW penalty regime".[83]

However, following feedback, the Government said it intends "to allow judges the discretion about whether to exercise this power, to ensure that employers are not penalised for inadvertent errors":[84]

> 130. However, we have concluded that the penalty should not be automatic. Instead, employment tribunal judges will be given discretionary powers so that they can consider imposing penalties where, in the circumstances, the employer's behaviour in committing the breach had aggravating features, rather than for all breaches as originally proposed.
>
> 131. This judicial discretion will mean that employers would not be penalised for unintended or accidental shortcomings, where these are not considered unreasonable behaviour eg a small business with limited HR resource, a concern raised by those opposed to the proposal. Penalties are likely to be imposed in fewer cases as a consequence. We expect they will be imposed in those cases where a judge determines the breach involves unreasonable behaviour, for example where there has been negligence or malice involved. It is these cases for which deterrence effects are more important.[85]

The Government confirmed that penalties would be paid to the Exchequer, rather than the complainant as to do so "could provide an incentive for employees to bring speculative claims".[86]

3.5 Withdraw the payment of expenses in tribunal hearings

Consultation proposals

Under the current arrangements, "parties and witnesses in an ET case can apply for reimbursement for a proportion of their travel and accommodation costs to attend a hearing, as well as certain other costs, such as costs for use of interpreters". The Government notes that "some of the smaller tribunals do not pay expenses, they are payable within the larger jurisdictions, i.e. Social Security & Child Support, Asylum & Immigration Tribunals and Mental Health Tribunals".[87]

The Government stated that the cost of paying expenses in 2009/10 was £290,000, which included administration costs as well as the expenses themselves.[88]

The Government argued that "the justification for this State-funded benefit now needs to be scrutinised, given the approach adopted in analogous parts of our justice system; and given the present financial climate". Citing the situation in Civil Courts, where the State does not pay expenses, the Government said:

> Ordinarily, it is considered the civic duty of relevant witnesses to give evidence in legal proceedings. Wherever a witness summons is issued, expenses can be sought. But it

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83 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p9, para 14 and p36, paras 128 and 129
84 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p9, para 14
85 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, pp36–37
86 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p36, para 129
87 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p113
88 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p116

> is the responsibility of the party calling a witness to offer/pay any costs associated with travelling to and from the hearing, and any loss of earnings. Among other things, it is the party who calls the witness who benefits, not the taxpayer. Therefore, we see little reason for the burden of the cost to fall on the Exchequer, as opposed to those individual parties.[89]

In the Impact Assessment, the Government analysed three options:

1. do nothing
2. cease payment of all expenses (the Government's preferred option)
3. cease payments of expenses but with "appropriate exemptions" in "certain circumstances" e.g. where parties are unable to bear the costs, on application to the employment tribunal.[90]

In the consultation document, the Government put forward the second option, in order to achieve cost savings of administering and paying expenses, and also argued that:

> There would be some potential benefits to the parties, in the form of better managed claims and a small reduction in judicial time, which could result in claims being resolved earlier, as parties might be more willing to consider early resolution rather than having to pay more money and meet their expenses and those of their witnesses.[91]

However, the Government acknowledged that the cost of expenses "could be considerable for some parties". Although "only the unsuccessful party would be required to pay the expenses of their own witnesses as well as those of the successful party", the Government admitted that "some parties would not have the financial resources at their disposal to be able to pay the travel expenses of any witnesses they call to give evidence. In these circumstances, parties would be adversely affected as these proposals may prevent access to justice and result in worse legal outcomes".[92]

Government response to the consultation

In terms of consultation responses on this point, the Government said "there were clear arguments for and against this proposal in the consultation responses".[93] The Final Impact Assessment provided a little more colour:

> There were 197 responses on this question: 51% were supportive and 47% opposed. The most supportive sector was individual businesses and the most critical was employee representatives. However, of the 202 consultees responding to the question about whether something akin to an exceptional funding regime should apply, 39% considered the withdrawal should be universal and 52% thought there should be some exceptional funding.[94]

The Government noted that:

> there was little evidence that withdrawing payment of state-funded expenses would impact on the number of witnesses called, but there was a concern about the impact

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89 BIS and Tribunals Service, *Resolving workplace disputes: A consultation*, pp41–42
90 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, pp114–118
91 BIS and Tribunals Service, *Resolving workplace disputes: A consultation – Impact Assessment*, p116
92 BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p115–116
93 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p30, para 98
94 BIS and HMCTS, *Resolving workplace disputes – Final Impact Assessment*, p67, para 235

on claimants (who would under this proposal be asked to pay the expenses – i.e. lost wages – of colleagues/former colleagues employed by the respondent). That said, there was an acceptance from many that the present economic conditions make blanket payments less manageable for a taxpayer funded system.[95]

In terms of the proposal, the Government set out the cases for and against removing the state funding of expenses:

> 99. Government acknowledge there are risks: that the policy could disproportionately impact on claimants as opposed to respondent employers (i.e. the claimant being asked to pay the lost wages of witnesses employed by the former employer, which respondent employers would already normally pay anyway); and that the low paid and unemployed will be particularly disadvantaged if there is no exceptional funding mechanism
>
> 100. However, those risks must be balanced against the counter arguments. Even with the introduction of fees in the employment tribunal setting, the majority of the system is likely still to be financed by the general taxpayer. There is a clear case – consistent with Government policy of transferring some of the burden of funding the system from taxpayers to users – to ask users to cover any expenses incurred by witnesses they call to give evidence, as and where necessary.
>
> 101. Further, while most expenses claims are paid to claimants and their witnesses, the current system also permits respondents and their witnesses to claim from the State for the cost of their time.[96]

The Government announced that it had "decided to proceed with this proposal", and would not introduce means-testing as this "is likely to cost more than we would save", which is £300,000 per annum, adding "we will make the necessary rule change at the earliest opportunity to ensure that tribunals and judges have powers to direct parties to bear costs of witnesses attendance, where a witness has attended pursuant to a witness order; and that the party ultimately losing a case should reimburse the successful party for any such costs already paid out".[97]

3.6 Implementation timetable

The Government set out the following timetable for implementation:

> 141. The Government will bring forward a Bill as soon as the Parliamentary timetable permits to take forward those proposals requiring primary legislation.
>
> 142. Regulations to implement proposals in relation to increasing the maximum amounts for costs and deposit orders, witness statements, witness expenses, judges sitting alone in unfair dismissal cases and extension to the unfair dismissal qualifying period will be brought forward shortly. The Government intends these regulations to have effect from April 2012, subject to Parliamentary procedures.

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[95] BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p28, para 92
[96] BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p30
[97] BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p30, para 102

143. In addition, we will undertake further consultations in relation to our proposals on compromise agreements and Rapid Resolution.[98]

4. Compensated no fault dismissal

Although not part of the original January 2011 consultation, the issue of "Compensated No Fault Dismissal" was raised in a report by Adrian Beecroft that had been commissioned by Number 10, and which was leaked to the media.

4.1 Reported leaked report of the Beecroft Review and reaction

In October 2011, the *Daily Telegraph* said that it had obtained a "final draft" of the Beecroft Review. The Review had been drafted by Adrian Beecroft, Chairman of Apax Partners (a private equity investment group); it was reported that he had been appointed by Steve Hilton, the Prime Minister's Director of Strategy, "to stimulate the red tape review being led by [BIS] after becoming frustrated by the department's perceived lack of reformist zeal".[99]

It was reported by the *Telegraph* that the final draft of the Review proposed removing provision for unfair dismissal, and replacing it with compensation for "no fault dismissal". The *Daily Telegraph* reported that in his Review, Mr Beecroft said that:

> the first major issue for British enterprise 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 report continues: "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."
>
> […]
>
> It says that British workers should be banned from claiming unfair dismissal so that firms and public sector bodies can find more capable replacements.
>
> […]
>
> However, Mr Beecroft warns that simply scrapping the law would be "politically unacceptable".
>
> He therefore recommends a replacement regulation, called Compensated No Fault Dismissal, which would allow employers to sack unproductive staff with basic redundancy pay and notice. Mr Beecroft concedes that a "downside" under his new scheme is that employers could fire staff because they "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", he says.[100]

However, the *Guardian* subsequently reported that the proposal had been rejected by the Secretary of State for Business, Vince Cable:

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98 BIS and HMCTS, *Resolving workplace disputes: Government response to the consultation*, p39, para 141–143

99 "Cable rejects scrapping unfair firing law", *Financial Times*, 26 October 2011

100 "Give firms freedom to sack unproductive workers, leaked Downing Street report advises", *Daily Telegraph*, 25 October 2011

> Plans promoted by David Cameron's chief strategist, Steve Hilton, to abolish unfair dismissal laws have been rejected by the business secretary, Vince Cable, as "unnecessary, based on no evidence and unlikely to improve labour market flexibility".
>
> […]
>
> Discussing the proposal for no fault dismissal, he said "No evidence has been advanced that I have seen that it will improve labour market flexibility in general, or have any beneficial effect, but if anyone can produce any, we will look at it." He pointed out that unemployment did not shoot up during the recession owing to flexibility in the labour market. He said: "There was a great deal of flexibility shown by our employees as well as the employers. I go round a lot of our industrial plants. The unions have their formal positions, but it is very clear they are committed to their companies and are very flexible about working practices so the world has changed an awful lot in the last 30 years in a positive way."
>
> He said the report had some good ideas such as restraining costs imposed on small businesses by the need to help government immigration controls.
>
> […]
>
> Cable's aides said the proposals would do nothing to promote growth as 25 million consumers would face job insecurity and find it more difficult to get a mortgage, hitting government efforts to boost growth.
>
> One of Nick Clegg's most senior parliamentary aides, Norman Lamb, went further than Cable, describing the proposals as madness
>
> […]
>
> Cable's aides said the report would not be published, and it was neither an official report or officially commissioned. But the ideas are likely to be pursued by some in Downing Street, and presage a separate wider attempt to claw back employment laws from the European Union, including issues such as working time directives. UK unfair dismissal law is drawn up independently of the EU.[101]

Further, the impact assessment for BIS's January 2011 consultation on workplace disputes stated that "a complete end to enabling employees to bring a case for unfair dismissal on any grounds (other than day one rights), as some business commentators have suggested, was not considered as it could have had a significant impact on employee protection".[102]

The issue was raised at Prime Minister's Questions on 9 November, when Julian Huppert asked whether "telling 25 million workers that they have no job security and can be fired at will tomorrow will boost or reduce consumer confidence?". David Cameron replied that "Clearly, we have to make it easier for firms to hire people" and set out a number of Government employment policies but did not include Mr Beecroft's proposal on unfair dismissal.

The *Financial Times* reported the exchange as follows: "David Cameron has rejected calls for employers to be given the right to 'fire at will', finally drawing a line under a corrosive debate at the heart of government about just how far the coalition should go to inject life into Britain's stalled economy". It added that "Allies say Mr Cameron has played down a controversial report by Adrian Beecroft - a Tory donor and venture capitalist hired by Mr

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[101] "Vince Cable rejects proposal to abolish unfair dismissal laws", *The Guardian*, 26 October 2011

[102] BIS and Tribunals Service, *Resolving workplace disputes: A Consultation – Impact Assessment*, p147

Hilton to ginger up the debate on employment law; no more than "one or two" ideas in the unpublished report were likely to see the light of day".[103]

4.2 Announcement of consultation

In his written ministerial statement announcing the Government's response to the consultation, the Business Secretary also told the House "We are going to be seeking views on a proposal to introduce compensated no-fault dismissal for micro-firms with fewer than 10 employees".[104] BIS confirmed that the Government had "stated its intention" to launch a "call for evidence" – at the time of writing, no call for evidence has been launched.[105]

On the day of the statement *The Guardian* reported that "Vince Cable is planning to line up with Lord Heseltine to block Downing Street from relaxing employment laws to make it easier for micro companies employing fewer than ten staff to fire staff". It added:

> Liberal Democrat sources said they were completely opposed to the idea but had agreed to seek views on no fault dismissal for micro companies under strong pressure from Downing Street. "We do not like it one bit. We do not support firing at will but the Conservatives do. We have been round and round on this and cannot agree. So we have agreed to have a wider debate."
>
> Cable said he did not expect the study to recommend changing the law on "no fault dismissal". He said: "There were quite a lot of completely uncontroversial and sensible deregulatory measures which we adopted. The bit that was most controversial is no fault dismissal. Now my view about that is where is the evidence that this will help. I don't see it, but we want to find it. We want to give people an opportunity to set out their case".[106]

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[103] "Cameron rejects bosses' right to 'fire at will'", *Financial Times*, 9 November 2011
[104] HC Deb 23 November 2011 c26WS
[105] BIS, *Employment Law Review – latest developments*, website [taken on 29 November 2011]
[106] "Vince Cable to block attempts to relax employment laws", *The Guardian*, 23 November 2011