

**REPORT**  
**ON**  
**EMPLOYMENT LAW**

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## Introduction

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

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

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

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

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

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

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

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## REPORT ON EMPLOYMENT LAW

### Unfair Dismissal

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

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

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

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

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

would reward loyalty and would make the proposal more acceptable to employees and unions. As mentioned above, a lower level of compensation would also mean that employers would always choose Compensated No Fault Dismissal rather than making someone redundant.

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

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

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

### Recommendations

Compensated No Fault Dismissal should be introduced.

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

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

### **Exemptions for Small Businesses**

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

In general, complying with government regulations imposes a greater burden on small businesses than on large ones. There is a fixed element of time and therefore cost to initially setting up a system to comply with any given regulation, and the cost per employee will therefore be greatest for small businesses. Furthermore, many successful owners of small businesses may have great skills related to their trade but have limited aptitude for the type of administrative tasks that are needed to comply with regulations. The work will take them longer than it would the type of people employed in big companies to do this work. Finally, the time taken will tend in small businesses to be that of the entrepreneur running the business, and will therefore detract from his or her ability to do all the things, such as product or service development, marketing, sales and product delivery, that have to be done

if the business is to grow. Therefore the value of the time lost in complying with regulations is greater for small businesses because it is time that would otherwise be used on growth producing activities, where in a larger business the value of the time is simply the cost of the employee who does the work.

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

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

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

#### Recommendation

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

### **Discrimination Law**

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

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

#### Recommendations

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

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

## Employment Tribunal Process and Awards

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

### Process

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

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

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

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

### Fees

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

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

## Level of Awards

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

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

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

## Recommendations

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

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

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

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

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

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

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

## **Pensions**

### Automatic Enrolment

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

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

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

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

One argument against excluding micro-businesses which the Paul Johnson review apparently found persuasive was the idea that if there is a break point at any number of employees then employers would be deterred from growing beyond that size. I do not find that a particularly compelling argument as the current proposal clearly deters one person businesses from hiring anyone, which is the most important step in growing a business. It is of course true that if there was a minimum business size to which the scheme applied there would need to be a way of dealing with businesses that shrunk from above that size to below it.

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

### Recommendations

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

### Other Pension Issues

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

### Recommendations

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

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

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

## **Criminal Record Checking System**

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

### The Current System

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

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

The Bill introduces the concept of updated disclosure. From 2013 (i.e. once the necessary computer system is available) anyone applying for the first time for a job requiring a CRB check will obtain it in the current way, with the difference that only the employee will get a copy so that it can be challenged if it is incorrect before the employee gives it to the potential employer. Thereafter if the employee is

prepared to pay a fee of £8 per year they can benefit from what is called the Premium Service, which allows them to give to any potential employer online access to a constantly updated criminal record. The figure of £8 p.a. has been chosen to generate the £50m p.a. needed to run the premium service. The self-employed will be able to apply for a CRB through an “umbrella body”. This is an organisation – either a company that regularly requests CRB checks for potential employees or simply a service business – that is prepared, for a negotiable fee, to carry out the identity checks needed to allow an individual to apply for a CRB check on him or herself.

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

#### Proposed Extension of the Current System

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

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

#### Recommendation

I do not believe that it is sensible to make individuals pay £8 p.a. to be included in the premium service. The costs of collecting the money, including chasing those who have forgotten to pay or decided not to pay, will be considerable. For those who don’t pay but do apply for subsequent checks the costs to themselves and employers of getting a new check will also be high. The extra administration and complexity of the charge is not worth it for £50m p.a: the service should be free.

### **Work Permit Checks**

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

not make clear the holders' right to work in the UK, which in fact vary from one member state to another depending on their date of accession.

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

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

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

### Recommendations

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

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

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

### **Bringing Workers from Abroad**

While the system for bringing in workers from abroad was simplified in April 2011, it remains complex and bureaucratic. Employers are particularly frustrated by the requirement to advertise all opportunities in Job Centre Plus. By definition the only positions for which work permits will be issued are those where the Migration Advisory Committee has said that there is a shortage of supply. Many of these jobs require highly skilled workers who are highly paid: even if there are qualified UK-based applicants it is highly unlikely that they will have registered with Job Centre Plus. While there may be exceptions who have registered (Indian curry chefs were mentioned) it is far more likely that domestic applicants will be reached through advertisements in the relevant specialised media rather than through Job Centre Plus. The perception of employers that the Job Centre Plus requirement is simply a way of slowing down applications seems correct.

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

### Recommendations

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

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

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

## **Simplifying the Immigration System**

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

### Recommendation

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

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

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

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

The EU Directive recognised this problem and has two provisions to mitigate it. First, Member States are permitted to limit the period for having to observe the terms and conditions of a collective agreement to a period of one year or more. Second, contracts can be changed or an employee dismissed for "economic, technical or organisational reasons entailing changes in the workforce" of the transferee employer (ETO provision).

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

UK law has, however, adopted the ETO provision. Unfortunately neither the law itself nor the guidance issued by BIS makes it clear what precisely the ETO provision means, and employers have therefore been reluctant to use this provision for fear of being challenged in an employment tribunal.

When the issue has gone to a tribunal, and in at least one case to a judicial review, a broader view of what constitutes a valid ETO reason has been taken than most employers would have expected.

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

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

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

### Recommendations

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

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

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

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

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

### **Collective Redundancies**

At present employers must consult for 30 days before the first dismissal can take effect if they wish to make between 20 and 99 people redundant within a 90 day period, but for 90 days if they want to make more than 100 people redundant within a 90 day period. This penalises larger businesses, but also imposes an extra cost of 60 days’ wages on any business wanting to make more than 100 people redundant. This is generally at a time when business is by definition difficult, as otherwise such a level of redundancies would be unlikely to be needed. Added to the fact that employees with more than 12 years’ service have to be given 12 weeks’ notice, this means many workers will have to be employed for six months after the need to make them redundant became apparent though the employer can offer pay in lieu of this notice. If in the first thirty days no solution has arisen that

management at least feel is worth exploring it is highly unlikely that one will be found in the following sixty days.

### Recommendations

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

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

## **Equal Pay Audits**

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

### Recommendation

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

## **Gangmasters Licensing Authority**

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

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

### Recommendation

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

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

## **Agency Workers Regulations**

The Agency Workers Regulations that come into force on 1 October 2011 provide yet another set of regulations for employers to understand and comply with. The guidance provided by BIS is 50 pages

long, nearly half of which is about identifying who is and who isn't an Agency Worker. The provisions make it considerably less attractive to employ such workers for more than 12 weeks, after which they are treated largely as if they were full-time employees. The provisions concerning pregnant agency workers who have been employed for more than 12 weeks are particularly onerous: if they cannot do the job they were hired for because of their pregnancy they must be found less demanding work but must be paid their original wage. They will make it less attractive to employ agency workers for more than 12 weeks, leading to an artificial turnover. Many agency workers would probably prefer the possibility of longer periods of employment to the benefits which the regulations give them if they are retained for more than 12 weeks.

#### Recommendation

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

### **Employment Agency Regulations**

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

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

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

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

#### Recommendation

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

### **Employment Agency Standards Inspectorate**

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

#### Recommendation

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