

We note that the International Case Studies document was published by BIS this month, not long before the close of the call for evidence.

Respondents should have been provided with this much earlier in the response period, in order to be able to comment in detail on its analysis of no fault regimes in other jurisdictions. The call for evidence asks for comment on the Australian Small Business Fair Dismissal Code, the details of which were said to have been in Annex D, but as we point out in our main response to the call for evidence, Annex D was blank.

It is notable that there remain unevidenced statements in the case studies document. It offers no evidence for its assertion that “Dismissal costs significantly impact firing and hiring decisions. Theoretical considerations posit that a firm’s decisions arise from a strict comparison between the cost of dismissal and the net benefit of employing the worker (wage-output gap)”¹

That said we welcome the encouragement of evidence based debate.

In the bowdlerised version of the Beecroft report it was suggested that economic growth, and higher overall employment could not be obtained without the ability to hire and fire at will. It said,

“...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.”

What is noticeable from the case studies is that where compensated no fault dismissals have operated not only has that assertion not been proven to be correct, experience has indicated that it can actually cause micro-businesses to lag behind other businesses.

The case studies and the conclusions the document draws from them demonstrate that no fault regimes make no difference other than to staff turnover. Specifically:

- Whilst reduced employment protection increases churn (i.e. hiring and firing), and in turn reduces length of continuous employment, there is no clear evidence of any general increase in employment rates.²
- In the three years since their introduction in Germany, while there was initially an increase in dismissals, compensated no fault dismissals have made no impact at all upon the

¹ 4 – Severance payment and its impact on firing/hiring decisions, page 8

² 1- Job turnover and micro businesses, page 7

tendency of micro-businesses to hire, despite micro-businesses representing 82.4% of the economy.

- Chart A.3 “does not present any explicit evidence that the reform has triggered a stimulant effect in terms of new businesses, including in sectors comprised mainly of micro businesses (construction, real estate and business, hotel/restaurant).”:

i). The growth rate of employment for micro businesses consistently fell below the overall growth rate of employment. This trend suggests that the reform has not encouraged micro businesses to expand more quickly than larger businesses.³

ii). This reform was expected to stimulate employment and productivity. Rather, we have witnessed a consistent growth of temporary employment and the further development of a dual labour market, along with a lack of growth for micro businesses.⁴

- In Australia the number of unfair dismissal claims has yo-yo'd in recent years. Under the current system the gross number of unfair dismissal claims has dropped, but findings against the employer have increased: “Interestingly, the 15 employee reform has been accompanied by a significant increase in arbitrated unfair dismissal cases resolved in favour of the claimant.”⁵
- Very few of the dismissed claims were because of employer adherence to the statutory Small Business Code of practice (page 35). An employer perception survey⁶ found that “The majority of firms surveyed (58%) perceived an increase in labour costs following the reform while only a marginal proportion (2%) indicated a decrease. Meanwhile, two thirds (72.5%) reported no change in hiring practices as a result of the new threshold. While 15% indicated that it has in fact discouraged hiring, only 3% reported employment growth as a result.”
- In Australia and Germany, unlike in the UK, the primary remedy for unfair dismissal is reinstatement.
- In Spain (which has the most generous severance terms in Europe) there is a duty to resolve any ambiguously justified dismissals in the employee’s favour⁷. Dismissals can be either disciplinary or economic, and different outcomes attach to them. There is a system whereby an employer can unfairly dismiss, but if they pay statutory compensation within a set period then they have no further financial liability⁸.
- This has led to “a distorted use of its intention, with unfair dismissal becoming the rule rather than the exception”⁹, with dismissals on disciplinary grounds cheaper and quicker than on economic ones. In other words, these are trumped up dismissals. The trend forced the government to reform the system so that the severance payments can only be made on economic grounds.

³ A 3.3 Impact on the level of employment, page 24

⁴ A 3.4 Unintended consequences of the reform: deregulation focuses principally on temporary workers, page 25

⁵ B 3.1 Trends in unfair dismissal claims and tribunal outcomes, page 34.

⁶ Chart B.5: Business perception of unfair dismissal under the *Fair Work Act* (January 2012), page 39.

⁷ 3 2.2 Remedies and severance payments, page 45.

⁸ 3 1- Reform background 1.1 Definition, page 42.

⁹ 3 3.2 Unintended consequences of the reform: reliance on disciplinary grounds leading to reform via the *35/2010 Act*, page 47.

In our view, swapping stable employment relationships for unstable ones is economically destructive. Businesses face huge problems relating to skill retention, service continuity, administrative complexity, a loss of employee loyalty and staff morale. Their employees will also be their customers. If workers cannot rely on steady employment then they do not consume goods or services and growth is restricted. If workers do not have an expectation of regular employment then banks refuse to provide credit and the housing market falters. The importance of the housing market to economic success is well documented.¹⁰

Overall, the international case studies, rather than supporting the UK government's or Adrian Beecroft's case for no fault dismissals, show that such a system does not promote higher levels of employment, and has wide and adverse knock-on effects.

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¹⁰ E.g. the 2007 study prepared for BIS by Haibin Zhu at www.bis.org/publ/bppdf/bispap21c.pdf