Reforms to the Law of Unfair Dismissal

Written Evidence in response to the
Business and Trade Committee inquiry into the Employment Rights Bill

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This written evidence focuses on **the removal of the qualifying period for the right not to be unfairly dismissed, the proposed initial period of employment and associated measures** within the Employment Rights Bill 2024. In that context, the evidence answers the following questions asked by the Committee:

"Does the Employment Rights Bill adequately safeguard the workers it seeks to protect?" "Are there weaknesses or loopholes in the Bill that could be exploited or have unintended consequences?"

Overall, I express **strong support for the overarching aim of extending the protection of unfair dismissal law**, a cornerstone of UK employment law, to those with less than two years of service. The injustice that the operation of the qualifying period creates has been observed for many years and the qualifying period amounts to a breach of the UK's obligation to provide effective protection to the human rights of people at work.[1] A reform of this aspect of unfair dismissal law is therefore urgently needed and I welcome it.

Given the importance of the right not to be unfairly dismissed in guaranteeing substantive and procedural justice for employees, **any limit placed upon the entitlement of an employee to that right must be scrutinised closely.** The Government's plans to introduce a new statutory probation period are of interest in this regard and much of the detail remains to be decided. My central observations in this evidence are:

- The **initial period of employment (IPE) should be an extendable period of three months or no longer than six months**, as this meets the needs of businesses identified by the Government whilst ensuring that employees receive the full protection of unfair dismissal at the earliest point that is reasonable. A shorter IPE aligns with current business practices and avoids unintended consequences outlined below at [4].

- During the IPE, any regulations should provide either (a) that compliance with principles contained in the ACAS Code of Practice will continue to be relevant to the fairness of a dismissal *or* (b) that a dismissal will be fair only if the employer has undertaken (at least) **four stages**: conducting a **fair investigation**, providing a **written statement** of the reason and evidence for a possible dismissal, hosting a **meeting** with the employee with the support of a companion, and an **obligation upon the employer to consider a written appeal** by the employee if they decide to dismiss [12-14].

- The written statement of reasons for dismissal should be **provided automatically**, rather than upon request. Employees should also be entitled to this right from **day 1**, rather than after the IPE as proposed. Strengthening this right would **enable employees to seek to understand the reason for dismissal and have a written record of it at any stage of employment** [15].

- **Robust measures are required to tackle working relationships that do not conform to "standard" employment.** These include intermittent working and fixed term work [5-9].

- Consideration must be given to how the established principles of the law of unfair dismissal will operate during the IPE. In addition, **other reforms to the law of unfair dismissal are needed alongside these measures,** particularly relating to the definition of an 'employee' (in line with the Government's commitment to consult on a single employment status), the

[1] See *Redfearn v United Kingdom* (2013) 57 EHRR 2.

position of agency staff and other "non-standard" employees, the articulation of the fairness standard and strengthening the remedial framework.

- **Effective and timely access to justice** for employees who are newly entitled to the protection of unfair dismissal must be guaranteed. **Renewed emphasis on and capacity to facilitate quick and local dispute resolution between employers and employees is necessary** to ensure that existing systems (the Employment Tribunals, ACAS) are not placed under even greater pressure and that both parties can access a route to independent resolution quickly.

Principles that should guide the scope of unfair dismissal law

1. The right not to be unfairly dismissed protects employees from substantive and procedural unfairness in relation to the termination of their employment. Whilst some employees may have contractual protection for their job security, the UK House of Lords and Supreme Court has ruled that the law of unfair dismissal is the only legal tool available to an employee to challenge these forms of unfairness.[2] Given the importance of these statutory protections and the devastating consequences that a termination of employment can have for an individual, there must be close scrutiny wherever a group of working people are excluded from the entitlement to claim unfair dismissal.

2. Any exclusion that is adopted should be based on evidence that the exclusion is a necessary and proportionate means of serving a legitimate purpose. This principle is particularly relevant where the law of unfair dismissal is operating to protect the human rights of an individual – for example by allowing them to challenge a dismissal that was based upon factors relating to their private life, to their freedom of expression or freedom of association.[3]

3. Applying these principles to the current framework make it clear that the removal of the qualifying period is justified and urgently necessary. This commitment aligns with decades of academic commentary. These principles also call into question other constraints upon the availability of unfair dismissal protection; for example the exclusion of "workers" (the subject of a forthcoming review into a single employment status), agency workers, and specific professions where the protection is modified or excluded altogether (see Employment Rights Act 1996, Part XIII, Chapter 1). In each case, a justification is necessary for the exclusion. The courts have already made it clear that, in some instances, no justification for differences in employment protection has been provided.[4]

Length of the initial period of employment (IPE)

4. The Government has indicated an initial preference for a nine-month IPE. I would question the necessity of the proposed length in the strongest terms, noting that the Government intends to consult on this point independently. I recognise the need of employers to assess the capability and conduct of an employee in the early stages of employment but argue that a nine-month IPE would amount to a disproportionate deprivation of rights to job security for new members of staff.

a. Nine months is a substantial amount of time to receive only basic job security protections: the prohibitions of dismissing for automatically unfair reasons and whatever subset of guarantees are available during the IPE. This length of time would mean that some individuals, and indeed entire sectors of work, would never receive the full protection of unfair dismissal law because the roles are project-based or typically last less than nine months. The significant impact of the IPE on these groups should be considered carefully.
b. In most roles, three months or at most six months is sufficient to assess an individual's capability and conduct and to surface any other concerns about the individual. Where employers require longer for this purpose, they would retain the freedom to reflect that in their own policies and processes but nevertheless need to comply with the requirements of the law of unfair dismissal during any internal probation period that subsists after the IPE.
c. A shorter IPE would align with the statistics provided by the Government. Of the businesses that have a probation policy, 97% have periods that are six months or less. By setting out a longer period for the IPE, the Government risks an unintended consequence. Businesses may extend their contractual probation periods to match the statutory framework. The result would

[2] *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518.
[3] Philippa Collins, *Putting Human Rights to Work: Labour Law, The ECHR and the Employment Relation* (OUP, 2022) 116-118.
[4] See *Vining and others v London Borough of Wandsworth* [2017] EWCA Civ 1092, [2017] IRLR 1140 and *Gilham v Ministry of Justice* [2019] UKSC 44, [2020] IRLR 52.

be the loss of contractual and organisational entitlements for employees who previously benefited from shorter probation periods.

d. An upper limit of six months would align better with international standards. The Resolution Foundation report that in 25 OECD countries, the qualifying period is 5 months or less. In 10 countries, it is 2.5 months or less. Under the 2019 Directive on Transparent and Predictable Working Conditions, for example, EU member states are obliged to ensure that a probation period shall not exceed six months (Article 8). Longer probation periods within EU countries are permitted on an 'exceptional basis' and only 'where justified by the nature of the employment or in the interest of the worker'. Where employment is for a fixed term, the probation period much be proportionate to the expected duration of the contract and the nature of the work.

The Government should consider adopting a three month IPE with scope to extend that period where either (a) it is justified by the nature of the employment or (b) the employee has been absent during the IPE. If a uniform rule is preferred, six months would be more appropriate than nine.

The IPE and "nonstandard" forms of work

5. Devising rules that extend the safeguards of unfair dismissal law to a wider group of employees without placing undue administrative burdens on employers is challenging. Employment law generally is premised on a long-term contract of employment, in which work is performed regularly and consistently. There is significant evidence that this kind of "standard" work is less dominant in the workforce than it may have been in the past. In addition, continuing to frame principles around that model is likely to exclude individuals who are already precarious, vulnerable or marginalised in the workforce from the much-needed protection of employment law.[5]

6. Important to the treatment of nonstandard modes of working is reflecting where the employee has an expectation of continuing to provide work, even if that work is intermittent or seasonal for example. The law should reflect the dependence of employees upon their job (or jobs) for income, community, fulfilment and many other needs. Wherever this dependence arises, the employee should benefit from the right not to be unfairly dismissed if the engagement is terminated.[6]

7. Intermittent working: any situation where work is provided on a short-term basis (e.g. for a particular task, period of hours or days) in the context of a longer term understanding that work will continue to be provided in the future.

a. A dismissal should be considered to occur if the overarching agreement is terminated, but not upon the end of each task. This requires an amendment to the treatment of fixed term contracts. Currently, the elapse of a fixed term contract amounts to a dismissal, so very short-term contracts would trigger the process and safeguards put in place during the IPE. An exception to section 98ZZA is needed to distinguish between the end of a very short-term engagement and the termination of an arrangement that has persisted for a longer period and the employee had an expectation of further engagements.

b. To ensure that intermittent workers accrue continuous service, the existing principles for calculating continuous service contained in sections 210-219 Employment Rights Act 1996 could be refined to apply in order to apply effectively.[7] So, if an individual works for at least one day per week for three months, they would be entitled to the full protection of unfair dismissal law.

[5] See Einat Albin and Jeremias Prassl, 'Fragmenting Work, Fragmenting Regulation' in Freedland (gen ed), *The Contract of Employment* (OUP, 2016).
[6] See Guy Davidov, *A Purposive Approach to Labour Law* (OUP, 2016) 101-105.
[7] See ACL Davies, 'The Contract for Intermittent Employment' (2007) 36 Industrial Law Journal 102.

8. Fixed-term contracts: the proposed changes risk excluding fixed-term employees from the full protection of unfair dismissal law if their contracts tend to last less than three or six months. Consideration must be given to how to ensure that any probation period is proportionate to the expected length of the contract (as in Article 8(2) of the EU Directive) and how to distinguish between intermittent work above and fixed-term work that is expected to last for longer periods.

9. In relation to section 98ZZA, the power to specify circumstances in which two or more periods of continuous employment are to be treated as a single period of continuous employment, reference to the Agency Workers Regulations 2010, regulations 7 & 9, may be useful. Reg.7 establishes a 12-week period in order to qualifying for the right to equal treatment. Importantly the Regulations set out measures, including those preventing abuse, whereby the agency worker shall be treated as having completed the qualifying period where they have completed two or more assignments with a hirer.

Substantive and procedural fairness during the IPE

10. To ensure that the Bill and associated measures adequately safeguard the employees that the Bill seeks to protect, effective substantive (why?) and procedural (how?) safeguards must be provided for employees with all lengths of service. This requires consideration of any modified principles during a proposed IPE and their relationship to the wider law of unfair dismissal, in addition to addressing the longstanding criticisms of unfair dismissal law. These criticisms include the narrowness of the law's scope, the operation of the fairness test in section 98(4), and the inadequacies of the remedial regime, particularly in terms of the categories and amount of compensation available. For reasons of space, I will focus on the proposed IPE as the matter that is a priority in the Government's next steps.

11. Substantive fairness: the Bill retains the protection from day 1 of the automatically unfair reasons for dismissal and extends it to the period between recruitment and starting employment, which is a positive step and closes a loophole. The drafting of section 98ZZA draws a sound distinction between reasons relating to the employee and organisational reasons (redundancy and other substantial reasons). The drafting of section 98ZZA(3)(b) could be improved to ensure that only substantial reasons that are capable of justifying dismissal are relied upon: 'some other substantial reason relating to the employee *of a kind such as to justify the dismissal of an employee holding the position which the employee held'* (to align with section 98(1)(b)) or 'some other substantial reason relating to the employee *that affects the employee's performance of their duties and that the employer reasonably believes undermines the relationship between the employer and the employee'*.[8] A comparable amendment could be made to section 98(2)(b) on employee conduct for all fairness assessments. Such amendments would prevent dismissals for trivial reasons and strengthen the substantive fairness provided by unfair dismissal law.

12. Procedural fairness: given the success of the ACAS Code of Practice in embedding procedural fairness in grievance and disciplinary procedures since its introduction, the Code should be the starting point in crafting principles of fairness during the IPE. As with dismissals at other times of employment, failure to comply with the Code could be taken into account in deciding the fairness of a dismissal. Currently, a dismissal where the Code has not been followed can be found to be fair, but only in exceptional circumstances.

13. If, however, a modified approach is considered necessary, any approach must preserve the essence of procedural fairness and provide sufficient protection for employees. A dismissal should

[8] See Philippa Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51 Industrial Law Journal 598, 618.

only be considered fair if, and only if, the steps below are completed and the employer acted reasonably in treating one of the reasons in section 98ZZA(3) as sufficient reason for dismissing the employee. I would recommend a four stage process:

1. The employer should conduct a fair investigation into their concerns;
2. The employer should provide written information about the reason for the potential dismissal and a summary of the evidence provided to support that reason;
3. The employer should host a meeting with the employee, who should be entitled to be accompanied by a companion (colleague or union representative), to explain their concerns and hear the employee's response; and,
4. The employer should be obliged to consider a written appeal by the employee if the employer decides to dismiss them.

14. This modified process would preserve the ability of an employer to dismiss an employee after gathering some evidence, presenting it to the employee and considering both their oral and written responses to the decision. It would guarantee that the employee is adequately informed of the reasons and evidence for the employer's decision, grant an opportunity to respond to those points and give them the benefit of an appropriate companion and a written record of the decisions made.

15. In line with this recommendation, I would argue that there is a case for making the right to a written statement of reasons for dismissal automatic, rather than upon request. In addition, this should be a day 1 right, rather than commencing after the IPE. It is a key tenet of procedural justice in dismissal proceedings to understand why you have been dismissed, as well as being important to an individual's personal development by enabling the individual to understand how to improve their performance in subsequent roles. Providing such a written statement is a minimal administrative burden on businesses, particularly given that the Government has committed to other steps associated with procedural fairness during the initial period of employment.