Written observations on the Employment Rights Bill

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Unfair dismissal, day one rights and probation

1. The removal of the two-year qualifying period is a welcome change, but is offset by the new provision for probation periods. If a 9-month maximum period is adopted the UK will be out of line with international practice. The relevant period is 6 months in Germany; in France, it is 4 months, but that only applies to managerial employees. In several countries there is no statutory provision for probationary periods as such, but the employer can show that a dismissal for probationary reasons is fair under the general law governing dismissal. Japan is such a case. Of those OECD countries where a maximum probation period is set by law, only Australia, Cyprus and Greece have periods of 9 months or more.

2. Consideration should be given to the Japanese approach of using general unfair dismissal law to deal with the issue of probation. UK unfair dismissal law is similar to Japan's in allowing an employer to dismiss for reasons relating to capability subject to following a fair procedure. It is not clear, therefore, that a special regime for probationary dismissals (Schedule 2, para 3(2) of the Bill) is needed. In practice it will either duplicate the general provisions set out in section 98 etc. of the Employment Rights Act 1996 ('ERA') or, in so far it as it departs from them, add to legal uncertainty.

Fire and Rehire

3. On fire and rehire, the solution set out in the Bill, of making it an automatically unfair dismissal to dismiss an employee for refusing a contractual variation, is not the most effective one available. Even if the exception for adverse financial conditions is narrowly construed, an unfair dismissal action will not bring about the outcome needed to protect terms and conditions, which is the nullification of the terms imposed by the employer and the restoration of the previous ones. Rather, what will happen is that the employee will either lose their job, or keep it but on the inferior terms, with only limited compensation in either case, given that an order for reinstatement is rarely awarded, and cannot be enforced (ERA, section 117; *McKenzie* v. *University of Cambridge*).

4. The DBT is consulting on extending the right to interim relief under ERA sections 128-132 to protect pay and conditions pending a hearing of the unfair dismissal claim. Such a reform would be useful but does not address what would happen if the employee wins in the tribunal but is ultimately unable to get reinstatement under section 117. Section 130, allowing the contract of employment to be continued, only applies at the interim stage, not to the period after the complaint has been resolved.

5. There are two possible solutions. One is to prevent an employer avoiding a reinstatement order by simply paying more compensation. A change to the law governing unfair dismissal remedies (section 117 ERA) would be needed to achieve this.

6. A second solution, which would apply where a fire and rehire is used to undercut terms negotiated in a collective agreement, would be to enable the trade union which was party to the collective agreement to make a complaint before the Central Arbitration Committee, which would have the power to reinstate the previous terms. This would have the advantage of providing a collective remedy which would avoid or at least minimise the need for individuals to bring unfair dismissal claims, and would take effect for a group of workers rather than one employee at a time. It would be a more effective disincentive for employers considering a fire and rehire, while not ruling out employers being able to show financial necessity in an appropriate case, which the CAC would be well placed to assess. There are precedents for such a mechanism ('unilateral arbitration') under previous labour legislation, for example, under the provisions of the Employment Protection Act 1975 relating to trade union recognition (section 15) and extension of sector level collective agreements (Schedule 11). This would go further, and be more effective than, the extension of the protective award provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'), which is currently being consulted on by DBT.

Enforcement

7. On enforcement, the list of 'relevant labour market legislation' in Schedule 4 Part I is narrowly defined. The Bill gives the Secretary of State the power to extend it. Extending the power of the FWA to enforce a wider range rights under the ERA and TULRCA should be the eventual goal.

8. Sanctions for breach of labour standards laws, including those relating to the minimum wage, are currently too weak to incentivise compliance by firms. The fines imposed on violators often do not cover the savings they make from non-compliance, and there is a low probability of detection and prosecution (Stansbury, 2024). Sanctions need to be stricter and the inspection rate increased.

9. There is scope to extend the role of trade unions in enforcing terms and conditions via arbitration before the CAC, as suggested above for the 'fire and rehire' situation. Collective arbitration was used up to 1980 to prevent employers from undercutting sectoral collective agreements. A collective remedy is much more effective in practice than individual claims before employment tribunals. At present there is a backlog of claims in the ETs which means that it can take several years to get a hearing, and the compensation available will often be less than the cost of bringing a claim. Unless the enforcement issue is addressed, newly enacted employment rights will not make much difference in the workplace.

Productivity and employment effects

10. There are dozens of studies exploring this question. The results vary according to the country and sector concerned. As with all statistical analyses, the results are subject to the choice of model and data, which researchers can reasonably disagree on.

11. With these caveats, the majority of recent studies show that worker-protective labour laws increase employment rather than reducing it (Brancaccio et al., 2020). Some studies report positive effects on productivity (value added per unit of labour input) and innovation (as measured by the registering of research-intensive patents and the take up of robotic technologies).

12. Analysis using the Cambridge Leximetric Database (Adams et al., 2023) reports a positive impact on employment of worker-protective labour laws in the UK. This is an average effect over the past 50 years. The same study reports positive productivity effects for some types of labour laws, although with a delay. This is consistent with stricter labour laws inducing additional training and increased capital investment by firms, but with the positive economic impacts taking some time (1-2 years on average) to be realised (Deakin and Pourkermani, 2024a, 2024b).

13. This research is historical, so it is not a forecast or prediction. There are many factors affecting productivity. Labour law reform can only be one part of a strategy to raise productivity and improve working conditions, and so needs to be understood in the context of other legal and institutional reforms.

14. The UK is currently affected by the phenomenon of 'capital shallowing'. In other words, there is relatively less capital investment per unit of labour input, compared to other countries. This implies that labour is relatively undervalued in the UK, compared to capital. Conversely, the cost of working capital, for use in the productive sector, is relatively high in the UK.

15. The cost of capital is high in the UK partly because of the way corporate governance rules operate to increase returns to shareholders in listed companies, through dividends and share buybacks, and because of the way that the markets for private equity and private debt are working, to enhance returns to these types of investment. Tackling the UK's relatively weak productivity performance will necessitate a consideration of these features of capital markets, alongside analysis of labour laws and labour market institutions.

References

Adams, Z., Billa, B., Bishop, L., Deakin, S. and Shroff, T. (2023) *CBR Labour Regulation Index (Dataset of 117 Countries, 1970-2022) Codes and Sources*, in S. Deakin, J. Armour and M. Siems (eds.) *Leximetric Datasets [Updated 2023]* Apollo - University of Cambridge Repository https://doi.org/10.17863/CAM.9130.2 (Cambridge: Centre for Business Research).

Brancaccio, E., De Christofaro, F., and Giametti, R. (2020) 'A meta-analysis on labour market deregulations and employment performance: no consensus around the IMF-OECD consensus' *Review of Political Economy*, 32: 1-21.

Deakin, Simon, and Pourkermani, Kamelia (2024a) 'The economic effects of changes in labour laws: new evidence for the UK' *Digit Policy Brief*, April 2024 https://digit-research.org/publication/the-economic-effects-of-changes-in-labour-laws-new-evidence-for-the-uk/.

Deakin, Simon, and Pourkermani, Kamelia (2024b) 'The effects of labour laws on productivity, employment, unemployment and the labour share of national income: analysis of new evidence from the Cambridge Leximetric Database, with a UK-China comparison' forthcoming, *Global Law Review* and CBR working paper series; paper available on request (email s.deakin@cbr.cam.ac.uk).

Stansbury, Anna (2024) 'Incentives to comply with the minimum wage in the United States and the United Kingdom' *ILR Review online* https://journals.sagepub.com/doi/10.1177/00197939241299417.

Bio

I am a professor of law and director of the Centre for Business Research (CBR) at the University of Cambridge (https://www.jbs.cam.ac.uk/centres/business-research-cbr/). I am also a co-investigator in the ESRC Digital Futures at Work Research Centre (https://digit-research.org/). At Cambridge I teach courses on labour law and the economics of law. Part of my research is concerned with modelling and estimating the economic effects of labour and corporate laws, using econometrics, machine learning and natural language processing. I also carry out qualitative research, and have just completed a series of interviews with venture capital funds and startups, exploring factors affecting investment.