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GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

Submission from the Employment Lawyers Association on the Consultation documents

EMPLOYMENT LAWYERS ASSOCIATION SUBMISSION

GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

MEASURES TO INCREASE TRANSPARENCY IN THE UK LABOUR MARKET

WORKING PARTY RESPONSE

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, co-chaired by and was set up by the Legislative and Policy Committee of ELA to respond to the four consultation documents issued by the Department for Business, Energy and Industrial Strategy in respond to the Matthew Taylor Review of Modern Working Practices.

In each of the documents there are some questions which we have not answered mainly because they are directed at employers and/or employees. We have concentrated our response on the areas of legal relevance.

MEASURES TO INCREASE TRANSPARENCY IN THE UK LABOUR MARKET

Section A: Written Statements

Q9 To what extent do you agree that the right to a written statement should be extended to cover permanent employees with less than one month's service and non-permanent staff? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree strongly/Don't know. Please provide reasons for your answer.

It may well be administratively inconvenient particularly for smaller employers to be obliged to provide a written statement even to employees or other members of staff with less than one month's service. However as a number of rights for both employees and workers begin from day one, such as acquiring holiday pay and indeed some protections will be in place even before the employment begins, such as under the Equality Act 2010, on balance it would be proportionate to impose the obligation to provide the statement at a far earlier stage than one month. We also believe that it would be particularly helpful for the statement to set out the status of the relationship i.e. employee or worker. However, not all items are relevant for workers and therefore we would suggest a stripped down version or a "not applicable" statement for them.

Q10 The following items are currently prescribed contents of a principal written statement. Do you think they are helpful in setting out employment particulars?

Yes to all of the items below

a) The business's name Yes/No/Don't know. If no, please explain why.

b) The employee's name, job title or a description of work and start date Yes/No/Don't know. If no, please explain why.

c) If a previous job counts towards a period of continuous employment, the date that period started Yes/No/Don't know. If no, please explain why.

d) How much, and how often, an employee will get paid Yes/No/Don't know. If no, please explain why.

e) Hours of work (and whether employees will have to work Sundays, nights or overtime) Yes/No/Don't know. If no, please explain why.

f) Holiday entitlement (and if that includes public holidays) Yes/No/Don't know. If no, please explain why.

g) Where an employee will be working and whether they might have to relocate Yes/No/Don't know. If no, please explain why.

h) If an employee works in different places, where these will be and what the employer's address is Yes/No/Don't know. If no, please explain why.

Q11 Do you agree that the following additional items should be included on a principal written statement:

a) How long a temporary job is expected to last, or the end date of a fixed term contract? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree strongly/Don't know.

b) How much notice the employer and the worker are required to give to terminate the agreement? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree strongly/Don't know.

c) Sick leave and pay entitlement? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree strongly/Don't know.

d) The duration and conditions of any probationary period? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree strongly/Don't know.

e) Training requirements and entitlement? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree strongly/Don't know.

f) Remuneration beyond pay e.g. vouchers, lunch, uniform allowance? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree strongly/Don't know.

g) Other types of paid leave e.g. maternity, paternity and bereavement leave? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree strongly/Don't know. If you disagree that any of the above additional items should be included on a principal written statement, please provide reasons.

We agree that items a), b), d) and f) should be included in the statement. It would be certainly good practice for c) and e) also to be included but it may be difficult to express these concisely which may mean employers will shy away from producing the statement at all. A number of these would not be necessarily appropriate for workers and we reiterate that a modified version of the statement should be prepared for use with these individuals.

Q12 To what extent do you agree that the principal written statement should be provided on (or before) the individual's start date? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree 40 strongly/Don't know.

Given that a written statement currently must be provided within 13 weeks of the commencement of employment it is difficult to see how a change to requiring it to be provided on the start date imposes any greater burden. One of the central issues to the Taylor Review and this consultation is the increased level of confusion and uncertainty that has arisen over status and so it would, in our view, be a positive step towards improving this for the statement to be provided as early as possible. As noted above, we think that the argument for extending the right to workers to also receive a modified statement is strong as this is often a section of the workforce which finds it difficult to enforce its rights and this may well be because they are not aware of them/there is insufficient clarity on what they are.

Q13 To what extent do you agree that other parts of the written statement should be provided within two months of their start date? Agree strongly/Agree slightly/Neither agree nor disagree/Disagree slightly/Disagree strongly/Don't know.

All parts should be provided at the same time. Where a right or obligation only arises after a period of service – this could be made clear in the statement.

Q17 If we introduced a standalone right for individuals to bring a claim for compensation where an employer has failed to provide a written statement, what impact do you think this would have? Please consider the impact on: a) Individuals b) Employers c) The Tribunal Service

A right exists at present to refer to an Employment Tribunal the question of whether or not a statement compliant with s1 of the Employment Rights Act 1996 has been provided. Compensation of between 2 and 4 weeks' pay may be awarded where s1 has not been followed but this is only available when linked to another substantive claim. If it is considered that the provision of the statement (whether in existing or enhanced form) is desirable in itself and also a means by which greater (though not of course complete) certainty can be introduced to the relationship between a worker and the employer then there would be much to be said for simplifying the existing law by retaining the right to refer the question of compliance to a Tribunal with a power to the Tribunal to make a declaration as to the adequacy of the statement including its terms and to provide compensation. The level of that compensation would reflect the importance that is to be attached to the provision of timely accurate statements. This would clearly be to the benefit of individuals. It would expose employers to the risk of compensation if the statement is not provided and whether that risk is justified by the end sought is a matter of policy. For our part we would simply observe that a financial penalty is more likely to produce compliance than a simple reference and declaration. As to the Tribunal Service it is likely find it more difficult to cope with the influx of additional litigation and we would therefore suggest that any such claims be allocated to a fast track process through both ACAS and the tribunals.

Q19 If you have some knowledge of the ACAS guidance on written statements, how helpful did you find it? Have not used/Very helpful/Quite helpful/Not very helpful/Not helpful at all. Please provide reasons for your answer.

It states that "If an employee has a problem receiving a written statement they could make a claim at an employment tribunal." This does not make clear that the existing right is to a declaration only and

not compensation. Also it does not make it very clear that statements must be updated when changes occur. Otherwise we believe it is a useful source of information for employees

Section B: Continuous Service

Q20 What do you think are the implications for business of the current rules on continuous service?

There is a degree of uncertainty produced by the existing rules. For example on occasions it may not be clear when the employment began, particularly in a situation where an employee is based mainly from home that they are required to undertake a number of tasks before their official start date, which go beyond preparatory work and an assertion, as to start date, in a S1 Particulars may not actually be accurate.

Particular problems can arise in relation to the rules governing "temporary cessations" as the ERA does not provide a definition of "cessation of work" and in determining if a break is temporary one has to look back with a degree of hindsight as to what has taken place. Some employers turn this uncertainty to their advantage and the rules are not currently designed to punish an employer that may have a deliberate policy of breaking continuity to ensure that their employee did not accrue sufficient service to qualify for employment rights.

The complexities of the rules are such that an employee will first need to be both sufficiently sophisticated to understand the current rules and well-resourced/determined to fight an initial satellite dispute in relation to continuity of service.

Introducing some sort of disregard to breaks in continuity engineered by an employer merely to stop an employee from accruing entitlements to valuable rights could perhaps be considered but improved guidance rather than wholesale changes to the rules is perhaps a more desirable way to tackle the problem.

Perhaps some sort of Flow diagram could be produced as part of a guidance that enabled employees to consider the relevant issues in their particular case when determining continuity issues.

Q24 We have committed to extending the period counted as a break in continuous service beyond one week. What length do you think the break in continuous service should be? 2 weeks/3 weeks/One month/6 weeks/Other - please specify. Please provide your reasoning.

If one of the abuses of concern is the extent to which the current rules impact on temporary workers, then it makes sense to extend the period of time that will count as a break in continuity.

A balance is to be struck between (a) employees disingenuously claiming continuity of employment and (b) employers attempting to "game the system" by arbitrarily imposing short-term breaks in employment. An appropriate period of time to extend the period to be counted as a break in continuous service is 3 weeks, this period should be sufficiently long to deter employers from manufacturing breaks in continuity.

Section C: Holiday Pay

Q27 Do you think that the government should take action to change the length of the holiday pay reference period? Yes/~~No/Don't know~~. If no, explain your answer.

Q28 If you answered yes to Q27, should the government:

a) increase the reference period from the current 12 weeks to the 52 weeks recommended in the review? Yes/No/Don't know.

A straight 52 week reference period would iron out seasonal variations and would tend to provide greater equality of treatment as between groups of workers. It could also remove any possibility of a reference to the EU Court (even in the short time now available) that a 12 week reference period is contrary to EU law..

b) Set a 52 week default position but allow employees and workers to agree a shorter reference period? ~~Yes/No/Don't know.~~

There is a risk that employees in these circumstances will have a weak bargaining position over how the reference period is set, and it could lead to employers choosing reference periods that are unduly favourable to them. One solution may be to allow for a workforce agreement to provide for a shorter reference period.

c) Set a different reference period ~~Yes/No/Don't know~~. If yes, please specify.

Please see our response at a) above

Q29 What is your understanding of atypical workers' arrangements in relation to annual leave and holiday pay? For example:

a) Are they receiving and taking annual leave? Yes/No/Don't know.

b) Are they receiving holiday pay but not taking annual leave? Yes/No/Don't know.

c) Do you know of any other arrangements that are used? Please explain your answer.

A difficult problem that is often encountered with regard to atypical workers is defining what is meant by "holiday". If a worker is free to turn down work, and/or is only scheduled to work occasionally, can the days on which they are not working count as holiday if they are being paid for them in some other way? If not, the worker is in the strange situation of having to agree to work on a particular day in order to say that they are then taking holiday on that day. In addition, what is the situation of the worker who turns down work from one employer/decides not to work for them, but instead, works for another employer. Given that the purpose of the Working Time Regulations was to protect the health and safety of workers and ensure that they take adequate rest, it is difficult to see how an employer can enforce this if a worker, who works for multiple employers chooses to work for someone else during his or her "holiday".

Another issue relates to whether part time workers are entitled to additional holiday in circumstances where their work patterns mean that they miss out on bank holidays. This is a difficult issue for employers, with some conflicting indications of what should be done. Some statutory guidance would be welcome.

Q30 How might atypical workers be offered more choice in how they receive their holiday pay? Please provide examples including how worker's entitlement to annual leave could be safeguarded so they are not deterred from taking leave.

If workers are paid in lieu of holiday at the end of each 'assignment' (which could equate to a week's work, if there is no obligation to provide work from one week to the next), this could potentially resolve the problem identified in the answer to Q29 above. However, it is recognised that this could be construed as being perilously close to rolled up holiday pay if the worker is, in reality, unable to decline work and works a five day week on a regular basis. As such, this would not be lawful. If the worker is

shown to have worked full time for a period without a break, it may be that employers should be obliged to offer holiday on a 'comply or explain' basis.

Section D: Right to Request

Q31 Do you agree that we should introduce a Right to Request a more stable contract? Yes/No/Please explain your reasons.

This is essentially a policy issue. We would however observe that, if such a right were to be introduced, its scope (in the sense of who would fall within it) and what is meant by "stable" contract. would be key. If it is limited to zero hours contracts holders then an obvious solution to the unscrupulous employer would simply be to guarantee a single hour per week and, presumably, thereby circumvent the right.

If this were thought to be a desirable route to follow then a possible means would be to use a similar structure to the right to make a request for flexible working under sections 80F to 80I of ERA 1996 (as amended) together with the Flexible Working Regulations 2014 (SI 2014/1398) (Flexible Working Regulations). It is worth noting that, as matters stand under those Regulations, employees can in one sense already seek more permanent employment by requesting that their part time work become full time.

Also agency workers are currently excluded from the right to make a flexible working request. So perhaps a sensible starting point maybe to remove this exclusion and allow agency workers to take advantage of the existing statutory machinery already in place (subject to certain modifications), which may cause maybe a more straightforward way to introduce greater protection for Agency workers.

Q32 Should any group of workers be excluded from this right? Yes/No/Please explain your reasons.

Under the Flexible Working Regulations an employee can only make one flexible working request in any 12-month period and must have been employed for at least 26 weeks. We would suggest an equivalent qualifying period if a right to request a more stable contract were to be given also to workers.

Q35 Should there be a qualifying period of continuous service before individuals are eligible for this right? Yes/No/Please explain your reasons.

Please see our answer to Q32 above

Q36 What is an appropriate length of time the employer should be given to respond to the request? 1 month/2 months/3 months/more than 3 months.

We would suggest following the Flexible Working Regulations

Q37 Should there be a limit on the number of requests an individual can submit to their employer in a certain period of time? Yes/No. Please explain your reason for this and include a suggestion of what an appropriate limit might be and why.

See Q32 above. If this right were thought to be desirable it would seem sensible to follow the Flexible Working Regulations and limit the request to once every 12 months.

Section E: Information and Consultation of Employees Regulations (2004) (ICE)

Q41 How might the ICE regulations be improved?

The regulations are currently overly complicated.

It is important to note that the regulations are designed to improve transparency and engender better relationships between management and staff. It is hard to imagine an I&C arrangement operating effectively that has been imposed on an employer through the current regulations. Rather than taking the prescriptive approach set out in the regulations, it may be more appropriate to encourage employers to behave reasonably (as happened with the rules relating to requests for flexible working), and to operate on a "comply or explain" basis.

For instance, employers should consider agreeing to any request to institute I&C arrangements, but will have a defence if they can show that they did not believe that the request had sufficient backing from at least 2% of the workforce. A failure to act reasonably would then include a failure to respond to requests for the number of signatures required to meet the 2% threshold.

Rather than calculating the number of employees on a full time equivalent basis, this should be done solely by headcount. Otherwise, there is a risk that part time workers (who may well need the most protection) will struggle to be properly heard.

It should be possible for an employer to rely on a pre-existing arrangement to block a request for a new I&C arrangement, unless the application set out compelling reasons why the existing arrangements were unsuitable (in which case a ballot could be called, providing there was sufficient support for one. The current 40% threshold may be too high, particularly for large workforces).

Q42 Should the ICE regulations be extended to include workers in addition to employees? Yes/No/Don't know. Please explain the reasons for your answer.

Collective worker representation may be a method by which greater transparency, compliance and enforcement could be achieved. As, the most vulnerable workers in an organisation may well not meet the threshold of employee status, it may well be advantageous for them to be able to be represented by an I&C body. This is particularly the case in businesses which are heavily reliant on casual and atypical workers. There may however, be practical challenges for both employers and the I&C body itself in engaging with "constituents" and disseminating information to them if work patterns are erratic and/or irregular.

Q43 In your opinion, should the threshold for successfully requesting ICE regulations be reduced from 10% of the workforce to 2%? Yes/No/Don't know. Please explain your answer.

A complaint often made in this connection is that a significant problem for workers trying to be heard is that they will often find it difficult to mobilise support for representation within the workplace. Workers may be siloed, and only know colleagues (or be confident of speaking about matters relating to representation to colleagues) within their own teams or departments. Garnering support from 10% of the staff may , in some cases, be too daunting a task for workers to attempt – particularly in relation to employers with large workforces. Reducing the threshold would obviously make this process easier though a situation where an employer of 1000 people would be required to enter into negotiations at the request of just 20 may be questionable.

There appears generally to be limited evidence as to why the take up of the Regulations has apparently been so low. If the CAC is are only of 20 cases (presumably where a reference to it has been made or threatened) over a period of 13 years then this suggests that either the system is in some way lacking or that there is simply little interest in it. It may be that technological advances such

as organisational intranets have made the means and process of communicating with employees easier and have reduced the perceived need for formal structures such as the on-site joint consultative committees and works councils to which the Taylor review refers. It may also be that, while such bodies only are in place in 14% of organisations with 50 or more employees, there may be other structures elsewhere which fulfil similar functions. At all events it is, we would suggest, axiomatic that good communications between an organisation and those that work within it promotes better performance and productivity (and certainly "Good Work") and this would be wholly consistent with the Government sponsored "Engage for Success" campaign. To reduce the threshold would be likely to produce a greater number of requests from the workforce but it may be that increased publicity and promotion of the available rights would have a positive effect. More detailed information as to the current state of consultative structures and perceived barriers to those would be a better basis on which to consider legislative reform but the reduction proposed in the Taylor Review can only increase the likelihood of take up in the short term.

Q44 Is it necessary for the percentage threshold for implementing ICE to equate to a minimum of 15 employees? Yes/No/Don't know. Please explain your answer.

Given the threshold for requesting a consultative body applies to workforces with 50 or more employees, requiring almost a third of the staff to make the request will mean that it is unlikely that smaller businesses will face requests for I&C arrangements. While we understand that smaller businesses should not face undue administrative burdens with regard to regulatory requirements, we consider that lowering the threshold to, say, ten staff would meet the objective of strengthening worker voice without overburdening smaller businesses.

Q45 Are there other ways that the government can support businesses on employee engagement?

There appears to be a general reluctance in the UK to embrace employee consultation. This was, for instance, recognised in the drafting of the rules relating to the Societas Europeae, and the consultation obligations that apply to those companies. Government could take a more proactive approach in promoting the possible benefits of I&C arrangements through awareness campaigns.

By encouraging such arrangements to be more commonplace, the government would help to encourage a shift in culture where employees expect the arrangements in businesses, and it becomes a selling point for businesses to demonstrate that they are committed to giving workers a voice.

Q46 How might the government build on the expertise of stakeholders such as Investors in People, ACAS and Trade Unions to ensure employees and workers engage with information about their work?

Q47 What steps could be taken to ensure workers' views are heard by employers and taken into account?

The ICE regulations are not widely known. Raising awareness would improve the effectiveness of the regulations.

Members of the Working Party

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