

**Department for Business, Energy and Industrial
Strategy (BEIS) consultation on measures to
increase transparency in the UK labour market**

The NASUWT's submission sets out the Union's views on the key issues identified by the Department for Business, Energy and Industrial Strategy (BEIS) consultation on measures to increase transparency in the UK labour market.

The NASUWT represents teachers and headteachers.

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Executive summary

- The NASUWT is clear that there are significant concerns about the current way in which employment rights are enforced, particularly given the disparity in power between employer and worker.
- These concerns are intensifying with the increased casualisation of the workforce and the growth of supply agencies and umbrella companies.
- A lack of transparency has resulted in widespread non-compliance amongst employers, with many supply teachers being denied access to their employment rights such as those afforded under the Conduct of Employment Businesses Regulations, the Agency Workers Regulations (AWR) and other associated legislation.
- The NASUWT is aware that when supply teachers have raised concerns about their treatment and seek to enforce their employment rights, they are led to believe there is no longer any work for them. In essence, their experience is that the work just 'dries up'.
- The Union is extremely worried about such practice and the way in which it effectively denies supply teachers both access to their employment rights and access to work. This significantly disadvantages supply teachers as agency workers in comparison to permanent employees.
- Increasing the detail and clarity in what is provided in a written statement to all workers has the potential to increase transparency in the labour market, but workers must be able to prove that the information has been read and understood.
- There has to be a level of recourse for individuals where an employer has failed to provide a written statement, coupled with greater state enforcement so that employers who break the law suffer significant consequences for their actions.
- The test for continuous service needs to be reformed so that there are fewer incentives for employers to game the system and so that the rules reflect the changing UK labour market to allow all workers to access their full employment rights more quickly.

- For teachers, the Redundancy Payments (Continuity of Employment in Local Government, etc) (Modification) Order 1999 should be amended so that continuous service with any local authority maintained school, academy or free school, or other such educational institution, for the purposes of calculating sick pay or other entitlements, is recognised.
- The NASUWT believes that agency workers, such as supply teachers, are a category of workers who are particularly at risk from receiving no holiday pay and/or sick pay, but the recommendation to extend the holiday pay reference period from 12 to 52 weeks will not rectify the situation as it is flawed and risks further exacerbating unfairness in the system.
- Extending the right to full pay for all workers taking annual leave would help supply teachers as agency workers.
- The extension of the remit of HMRC to cover the enforcement of holiday and sick pay has the potential to benefit workers, provided that the appropriate level of resource is ascribed.
- Extending the right to request is no right at all and does nothing to address 'one-sided flexibility'. Instead, the Government must legislate against the inappropriate use of contracts which are used to deny workers access to permanent work.
- The reduction in the threshold for the Information and Consultation of Employees (ICE) Regulations (2004) is unlikely to have the desired effect of increasing 'worker voice' and is no substitute for the vital role played by trade unions as an important voice in the workplace.

1. GENERAL COMMENTS

- 1.1 The NASUWT welcomes the opportunity to respond to the Department for Business, Energy and Industrial Strategy (BEIS) consultation on measures to increase transparency in the UK labour market as part of the Government's response to the *Taylor Review of Modern Working Practices*.
- 1.2 The recommendations in the consultation are significant and wide-ranging and cover a number of significant areas associated with the labour market, transparency and the clarity of the employment offer made to individuals. The NASUWT submission seeks to address these issues.
- 1.3 There have been significant changes in the UK labour market over recent years which have impacted upon pay, job security and conditions of employment.
- 1.4 For example, there has been an increase in the number of people reporting that they are self-employed. According to the Office for National Statistics (ONS), this now accounts for approximately 15% of the workforce.¹
- 1.5 Between February to April 2007 and February to April 2017, self-employment rose by one million (26%) compared to just 7% for employees over the same period.²
- 1.6 Although most self-employed people work full time, it is part-time self-employment that has been growing faster in recent years. Part-time self-employment grew by 88% between 2001 and 2015, compared to 25% for full-time people.³

¹<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2001to2015>

² <http://researchbriefings.files.parliament.uk/documents/CBP-8045/CBP-8045.pdf>

³ Ibid.

- 1.7 Recent research by the McKinsey Global Institute has suggested that the true number of people working part time in the 'gig economy' is much higher than the official employment statistics suggest.⁴
- 1.8 Figures published by the Trade Union Congress (TUC) show that over three million people – one in ten of the UK workforce – now face uncertainty about their working hours and their rights and protections. Of these, 730,000 are agency workers.⁵
- 1.9 The Labour Force Survey (LFS) puts the estimate at 865,000 agency workers in the UK today, made up of those in temporary and permanent agency work, as well as those classed as self-employed but paid by an agency, and those who undertake agency work as a second job.⁶
- 1.10 The Union acknowledges that there has been a lot of public interest regarding the gig economy following the GMB case against UBER,⁷ and the more recent case involving drivers working for Addison Lee.⁸ However, the NASUWT is concerned that the Government has failed to recognise and address the issue of workers' rights and the level of protection and support that agency workers should be afforded irrespective of whether or not they work in the gig economy.
- 1.11 The Union also notes that the rise in insecure work is having a disproportionate impact upon vulnerable groups who already suffer a labour market disadvantage, such as women, and black and minority ethnic (BME) workers.⁹ The TUC estimates that BME workers are over a third more likely than white workers to be in temporary or zero-hours work.¹⁰
- 1.12 One of the sectors the TUC has identified as having the fastest growth in insecure work is the education sector, which has risen by 42% since

⁴ <http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>

⁵ <https://www.tuc.org.uk/sites/default/files/the-gig-is-up.pdf>

⁶ <http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf>

⁷ <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>

⁸ <https://www.leighday.co.uk/News/News-2017/September-2017/Victory-for-AddisonLee-drivers-as-Tribunal-finds>

⁹ <http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf>

¹⁰ <https://www.tuc.org.uk/sites/default/files/the-gig-is-up.pdf>

2011.¹¹ The NASUWT is concerned that the growing trend towards the casualisation of work, precarious employment and the use of zero-hours contracts will have a negative impact upon teaching standards, teacher morale and the entitlement of children and young people to a high-quality education.

- 1.13 The emergence of new employment relationships and a rise in atypical working has resulted in many individuals not having all the information which is vital to a transparent labour market.
- 1.14 The NASUWT maintains that everyone should be seen as an employee, with all the associated rights and entitlements this brings, unless it can be proved otherwise.
- 1.15 The Union is, therefore, committed to an education system that is fair to all teachers regardless of employment status.
- 1.16 The Government must act in order to ensure that basic rights and entitlements are extended to all other categories of worker.

The treatment of supply teachers and issues around transparency

- 1.17 Many supply teachers report that they are treated as 'second-class citizens' who are not always able to access and enforce their employment rights.
- 1.18 The NASUWT's research shows that almost four fifths (78%) of supply teachers reported that the agency through which they undertake the majority of their work does not fully disclose all fees and charges they make for the services they provide. Eight per cent indicated that they had been asked to sign an exclusivity clause with the agency in order to obtain work.¹²

¹¹ Ibid.

¹² <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

- 1.19 Other concerns around non-compliance, of which the NASUWT is aware, include supply teachers being told they will only receive £140 for a day's work when the contract they have with the agency stipulates £160 a day.
- 1.20 These are just a few examples of breaches of the Conduct of Employment Agencies and Businesses Regulations (2003),¹³ which set out quite clearly what an agency worker should expect to receive and what can or cannot be asked of them by an agency.
- 1.21 In addition to this, many supply teachers report that they are unable to access the same facilities which are available to employees. Almost a fifth (19%) stated that they do not always have access to staffrooms where they are available, over two fifths (42%) stated that they do not always have access to food and drink facilities, and over one in ten (12%) said that they do not always have access to toilet/washroom facilities. Over a third (37%) reported that they do not always have access to car parking.¹⁴
- 1.22 The Agency Workers Regulations 2010 (AWR) were intended to afford such employment rights to supply teachers as either day-one rights or rights after 12 weeks' employment.¹⁵
- 1.23 The Regulations give all supply teachers basic rights from day one when they are in school, including the right to access facilities used by other staff at the school and equal rights at work after 12 weeks.
- 1.24 However, research carried out by the NASUWT showed that many agencies do not inform workers of their rights. Many supply teachers reported that they were unaware of the provisions available to them, and when they became aware, recognised they had not been afforded them.

¹³ <http://www.legislation.gov.uk/uksi/2003/3319/contents/made>

¹⁴ <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf

- 1.25 Forty-one percent of supply teachers report that they are not made aware that after 12 weeks of working in the same workplace they are entitled to the same pay and conditions as permanent members of staff.¹⁶
- 1.26 Of even greater concern is the fact that the NASUWT has obtained evidence of the manipulation of the Regulations. For example, over a fifth (22%) of supply teachers reported that work had been cancelled on specific longer term assignments at or approaching the 12-week qualification period for AWR.
- 1.27 Some supply agencies exploit the provisions in the Regulations which provide that if a worker has a permanent contract of employment with an agency, the right to equal pay may not apply, the so-called 'Swedish Derogation'.
- 1.28 Some supply teachers are signing contracts that are so long and opaque (sometimes 27 pages long) that they do not necessarily understand what they are signing, especially in waiving their rights to equal pay, in order to gain regular supply work.
- 1.29 The NASUWT has investigated the role played by umbrella companies as a ruse for employing supply teachers. These companies essentially straddle the relationship between schools and teachers, raking off money from the public purse and delivering very little added value to the system.
- 1.30 Research conducted by the NASUWT found that two thirds of supply teachers (66%) reported that they have been asked to sign a contract or agreement with an umbrella/offshore company when working through a supply agency, and over four fifths (81%) of those respondents stated that their pay had included deductions in respect of both employee and employer National Insurance Contributions (NICs).¹⁷ There are even instances where supply teachers have reported having the apprenticeship levy deducted from their pay.

¹⁶ <https://www.nasuwt.org.uk/uploads/assets/uploaded/e7d27137-a3cb-4db8-ae6d1c34024d344a.pdf>

¹⁷ Ibid.

- 1.31 The Union asserts that at the root of this problem is a lack of transparency, coupled with a lack of regulation governing these arrangements and the lack of monitoring and scrutiny.
- 1.32 This has encouraged the growth of umbrella companies across a range of different industries and sectors, including education, draining both the public and private purse in order to maximise profits, whilst denying workers access to even basic employment rights.
- 1.33 The NASUWT's successful and well-attended supply teacher conferences, held twice-yearly, have heard from thousands of supply teachers trapped into working for agencies that force them to join an umbrella company in order to get work.
- 1.34 Furthermore, the NASUWT has received testimony that where supply teachers have raised concerns about their treatment, they have then found that they are subject to blacklisting practices by these agencies/companies. The process is that they are led to believe there is no longer any work for them. In essence, their experience is that the work just 'dries up'.
- 1.35 The Union is extremely worried about such practice and the way in which it effectively denies supply teachers and other agency workers access to work. When this occurs, there is no recourse or action that can be taken, a failure which significantly disadvantages agency workers in comparison to permanent employees.
- 1.36 However, ensuring fair practices by these agencies and umbrella companies, and seeking to close loopholes, should not be reliant upon individual teachers being prepared to challenge their practices.
- 1.37 In a context where supply teachers are already subject to intermittent and insecure work, being registered with these agencies is of critical concern, as otherwise it could deny an individual the opportunity for work.

- 1.38 Some employment intermediaries are promoting products that encourage supply teachers to set up as a limited company. The NASUWT has serious concerns about such products and the implications for supply teachers in regards to their tax liabilities, specifically in setting up a new limited company where the supply teacher is the 'sole owner', director and employee.
- 1.39 It has been suggested that using an umbrella company is the best way to maximise revenue and minimise risk. Agencies have a preferred supplier list and will decide on which umbrella company to use based not on what is best for the agency worker, but on the best margins for the employment agency.¹⁸
- 1.40 The kickbacks from umbrella companies are quite lucrative, and even where they are not, the agencies believe they will lose business if they do not work with umbrella companies.¹⁹
- 1.41 This is compounded by the fact that clients appear fairly indifferent to the type of contract that agency workers are on, and agency workers have very little recourse to redress or a formalised complaints procedure other than an Employment Tribunal or Acas's mediation services.
- 1.42 The NASUWT is concerned about the growth and prevalence of umbrella companies in education. The lack of robust data on the number of umbrella companies means that any estimates are likely to be inaccurate, but reports indicate that one of the three biggest areas for umbrella companies includes education.
- 1.43 Furthermore, many teachers report that they would prefer to have the option to be paid PAYE rather than have their money processed through an umbrella company. However, a lack of transparency means that agencies rarely provide teachers with a choice or alternative and often exploit the precarious nature of supply teaching so that teachers feel they have no option but to sign up.

¹⁸ Ibid.

¹⁹ Ibid.

- 1.44 Such practice is deeply concerning. When this occurs, there is no recourse or action that can be taken, a failure which significantly disadvantages agency workers in comparison to permanent employees. This is because it increases the length and complexity of the supply chain which makes it harder for teachers to enforce their rights.
- 1.45 When teachers are engaged through an umbrella company, there is a lack of transparency combined with misinformation about their pay rates, specifically in comparison to the rate teachers believe was advertised or agreed with the employment agency.
- 1.46 The use of umbrella companies can be seen to drive down the pay for teachers as the agency will not wish to reduce its profit margin to pay any fee owed to the umbrella company. The inevitable consequence of this is that the teacher receives less.

2. SPECIFIC COMMENTS

Written statements

- 2.1 The evidence provided demonstrates that the current balance of benefits between agency worker (i.e. supply teacher) and employer is skewed significantly in favour of the employer (i.e. the agency).
- 2.2 A lack of transparency, coupled with issues of non-compliance, demonstrate that swathes of workers, including agency workers, are unaware of their employment contract and associated rights, as well as being unsure how to report unfair practices.
- 2.3 Also, supply teachers are often unwilling to complain due to the potential impact upon their income and financial security.
- 2.4 Currently, legislation only requires an employer to provide employees with in excess of one month's continuous service and a 'written statement of

employment particulars'.²⁰ This, along with references to other key information, must be provided to the employee within two months of starting work.

- 2.5 The Union, therefore, cautiously welcomes the recommendation to increase transparency by ensuring that *all* workers are provided at the outset with basic information from their employer in a written statement, together with a statutory right to a key facts sheet.²¹
- 2.6 A consistent approach towards workers having a day-one right to a written statement document prior to the commencement of any employment, irrespective of employment status, could be a useful tool for individuals when enforcing their employment rights.
- 2.7 The NASUWT welcomes the intention to reaffirm and strengthen transparency by prescribing what should be contained within a written statement in a consistent manner, including details on: the business's name; the job title and job description; if a previous job counts towards continuous employment; rates of pay; hours of work; holiday entitlement and how it is calculated; and the workplace location.
- 2.8 A written statement would be enhanced if the following additional details were included, such as: the type and length of contract (i.e. fixed term); the notice period required by both parties; sick pay and leave entitlement; remuneration beyond pay (i.e. uniform allowance); the duration and conditions of any probationary period; and details on all other types of paid leave and statutory entitlements (i.e. maternity and paternity leave).
- 2.9 The Union also strongly believes that a written statement should contain additional information to encapsulate all types of employment status (i.e. supply teachers as agency workers) such as: whether the individual is employed by an umbrella company or intermediary, including confirmation of the fact that they are employed on a contract of employment; the hourly

²⁰ <https://www.legislation.gov.uk/ukpga/1996/18/contents>

²¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679831/2018-02-06_Agencyworkerconsultationdoc_Final.pdf

rate paid compared to what would have been received working through the agency; what fees are deducted; statutory deductions; and any additional benefits.

- 2.10 Increasing the detail in what employers must provide in a written statement will improve the level of clarity and transparency for all workers, including supply teachers as agency workers. It may also increase the predictability of work and help clarify expectations, as well as helping workers assess concerns around equal treatment.
- 2.11 Transparency in regards to continuous service, and if previous employment is used to calculate whether someone has met the relevant qualifying period, is particularly welcome for teachers, specifically those employed under the provisions of the Conditions of Service for School Teachers in England and Wales (the 'Burgundy Book').²²
- 2.12 Clarity in respect of continuous service would help alleviate confusion which may exist for teachers, given the freedoms and flexibilities within the education system in England. Academisation and the emergence of free schools have made it harder for teachers to determine what constitutes continuous service.
- 2.13 Making individuals aware of all other types of paid leave and statutory entitlements, such as maternity and paternity leave, would assist agency workers because employers would have to ensure that agency workers benefit as much from family-friendly entitlements as permanent employees.
- 2.14 However, in respect of information on the use of probationary periods for teachers, it must be noted that the overwhelming majority of teachers employed in England and Wales are still employed under the provisions of the Burgundy Book, which does not recognise or allow for the use of probationary periods. If an employer has concerns over the performance of an employee, this should be addressed through the appropriate agreed procedure and not through dismissal.

²² <https://www.nasuwt.org.uk/uploads/assets/uploaded/330e7539-3bf6-4538-a0346b6fef5994cc.pdf>

- 2.15 However, the clarity and transparency outlined above does not necessarily have an impact on those employed on more atypical and insecure work assignments, such as supply teachers. It will not address the imbalance of power in the workplace and impact on a supply teacher's decision to work. The benefits derived from such information will, therefore, be limited to those who have a genuine choice about whether or not to accept the work which has been offered to them. Most supply teachers are not in such a position, as their assignments can be intermittent and sporadic.
- 2.16 A written statement which references expected hours of work and when an individual will be asked to work could address the imbalance of power for supply teachers as agency workers, especially if there is a guarantee that they will be paid in full if an assignment is cancelled. Supply teachers would be less subjected to the vagaries of precarious and insecure work if the onus fell on the agency to pay them, even if a client cancels an assignment.
- 2.17 Supply teachers often report that there is a lack of transparency regarding who their employer is and the exact nature of the way in which their pay will be processed, including information on deductions such as NICs, for both the employer and employee, holiday pay and the Apprenticeship Levy. It is, therefore, not uncommon for there to be discrepancies between the rate advertised and that which the supply teacher receives as gross pay.
- 2.18 Supply teachers often have no choice but to sign up with an umbrella company as a pre-condition for an employment agency finding them work. Making this more transparent in a written statement does not necessarily give a supply teacher greater choice, such as whether or not they are paid on a pay as you earn (PAYE) basis as opposed to through an umbrella company. In many ways, greater transparency just shines a spotlight on what is already occurring.
- 2.19 The vagaries of insecure work mean that many supply teachers miss out on key protections when they are unable to work, such as Statutory Sick

Pay (SSP). A lack of transparency means that many supply teachers are unable to calculate their entitlements to either SSP or holiday pay. Rolled-up holiday pay further exacerbates the problem and means that many supply teachers are not accessing holiday pay.

- 2.20 Furthermore, the Conduct of Employment Agencies and Businesses Regulations already prescribe details on what should be included when an agency worker signs up with an employment agency, yet the NASUWT is aware of examples of non-compliance from supply agencies in respect of this.
- 2.21 How the information is explained and the language used is just as important as what is contained in a written statement. Unless the information is presented in a clear and unambiguous way that is easily understood, there is still the potential for employment agencies to use convoluted jargon and legalistic terminology in a written statement.
- 2.22 The consultation over the detail included in a written statement fails to address the issue of why the information is there. For example, supply teachers have contacted the NASUWT because the Apprenticeship Levy has been deducted from their income but there is no explanation as to why. In extreme cases, it appears that this has been deducted despite the employment agency not having a turnover in excess of £3 million.
- 2.23 A list of details contained within a written statement may not capture or contextualise information in such a way so that a worker's understanding is enhanced and they are empowered to challenge how the information has been provided. This is critical if the purpose is to end the unscrupulous practice of some employers, specifically those operating in the recruitment sector.
- 2.24 The NASUWT believes that greater transparency, through a statutory entitlement to a written statement, could have a positive impact, specifically for supply teachers as agency workers. It would enable them to understand

if they are receiving their full entitlements, and will also assist enforcement bodies and trade unions in assessing cases.

- 2.25 The Union believes that such an entitlement has the potential to drive up compliance levels across the labour market and could be seen as the first step to identifying employers that had adopted good practice in regards to a written statement.
- 2.26 Such a scheme, however, is not a substitute for legislation and statutory enforcement. The Union advocates a requirement to provide a written statement must go hand in hand with greater regulation and enforcement by the Government, including substantial fines and penalties and proper compensation for the worker.
- 2.27 It is essential that workers are able to provide evidence that they have read and clearly understood the information contained in the written statement. This should be done through a face-to-face meeting.
- 2.28 Any additional burden on the employer is negated as this should be seen as part of their normal compliance procedure. Such considerations are also secondary to the principle that the work seeker has had adequate time to digest the information before being engaged. For agency workers, consideration should also be given to an appropriate cooling-off period when the terms can be re-examined, and, if appropriate, renegotiated.
- 2.29 The NASUWT welcomes the proposal to introduce a standalone right for individuals to bring a claim for compensation where an employer has failed to provide a written statement. However, it is worth noting that rights are only worthwhile if they can be effectively enforced, without the worker living in fear of intimidation from their employer and the prospect of losing their job.
- 2.30 Any such proposals must be effective and give the general public and those working confidence in the system. Employers who break the law should expect there to be significant consequences for their actions, whilst

workers should be provided with the comfort and knowledge that the system works in a fair and just manner.

- 2.31 Disappointingly, the evidence outlined above demonstrates that state enforcement in its current guise is failing many workers. For many employers, the threat of detection and having a sanction applied represents a good risk.²³ For example, estimates suggest that an employer could expect a visit every 320 years from a National Minimum Wage (NMW) Inspector, or by Employment Agency Standards (EAS) Inspectorate every 39 years.²⁴
- 2.32 Underpinning all of this is better access to advice and guidance. The evidence suggests that current Acas guidance on written statements,²⁵ coupled with the availability of free legal advice should be better promoted and more readily available in all workplaces, because as workers making a claim through the tribunal service may find it daunting, particularly if they are required to establish the burden of proof.
- 2.33 However, enhanced Acas advice and guidance cannot be seen as an adequate substitute for the right to trade union representation and a voice in the workplace. This is a vital and fundamental principle that should apply to all workers, including agency workers.

Continuous service

- 2.34 Under the Employment Rights Act (1996) the current rules on continuous service only apply to employees.²⁶ Individuals who work atypically and intermittently may be workers or employees, but any break in service in-between periods of work can have a detrimental impact on an individual's ability to demonstrate periods of continuous service in order to qualify for employment rights.

²³ https://www.mdx.ac.uk/data/assets/pdf_file/0017/440531/Final-Unpaid-Britain-report.pdf?bustCache=35242825

²⁴ Ibid.

²⁵ <http://www.acas.org.uk/index.aspx?articleid=3251>

²⁶ <https://www.legislation.gov.uk/ukpga/1996/18/contents>

- 2.35 The rules as they stand are therefore weighted in favour of the employers and allow them to game the system, specifically for those who are on atypical work assignments, such as supply teachers as agency workers.
- 2.36 Supply teachers are specifically disadvantaged by the current rules on continuous service as they are only eligible to work for 195 days of the year. As a consequence, this results in successive breaks where they are unable to demonstrate the requisite period of continuous service for the purpose of accessing employment rights.
- 2.37 Supply teachers are also less likely to be able to argue that the statutory rules on continuity of employment, which allow for gaps in continuous service to be discounted, particularly those pertaining to a 'temporary cessation of work'.²⁷
- 2.38 The vagaries of insecure and precarious employment for supply teachers working on a casual 'as and when required basis', at the behest of the client as the end user, means that supply teachers are much more likely to have gaps between assignments in excess of a week.
- 2.39 The NASUWT therefore cautiously welcomes the proposal to extend the period counted as a break beyond one week. However, whatever period is suggested beyond one week (i.e. two weeks; three weeks; a month or six weeks) may still create perverse incentives for employers to manipulate the system.
- 2.40 This could be resolved if all workers, including supply teachers as agency workers, were treated as employees and therefore able to access the full suite of employment rights once they have been employed with an agency for two years.
- 2.41 Additionally, the test for continuous service could be reformed so that the reasons for absence from work that do not break continuous service are expanded to include all forms of statutory leave, including family-related leave and statutory holidays.

²⁷ <https://www.legislation.gov.uk/ukpga/1996/18/contents>

- 2.42 This should also apply in regards to the rules on temporary cessation of work. They should be revised to reflect the changing UK labour market so that if work is not provided by the employer, this would not constitute a break for the purposes of calculating the period of continuous service.
- 2.43 This would mean that absences from work would not break continuity of service or return the clock to zero. Instead, the clock would be paused, much in the same way that the clock is paused for certain circumstances under the AWR for the calculation of the 12-week qualification period for equal pay.²⁸
- 2.44 In this situation, any work undertaken by an individual would count towards continuous service. Agency workers on atypical working arrangements, such as supply teachers, would see any work contribute to the accrual of continuous service. As a consequence, agency workers would be able to access the full range of employment rights quicker.
- 2.45 In addition to this, clarity in respect of continuous service for permanently employed teachers is important as it is used to calculate redundancy payments and entitlement to some occupational and state benefits, including maternity pay.
- 2.46 The Redundancy Payments (Continuity of Employment in Local Government, etc) (Modification) Order 1999²⁹ has the effect of making local government, including local authority maintained schools and academies, associated employers for the purpose of redundancy payments and some other contractual benefits (i.e. annual leave).
- 2.47 For those teachers employed in local authority maintained schools, the position on sick leave is detailed in the Burgundy Book.³⁰ This gives a teacher sick leave based on the total of their accrued service with one or more local authorities. Therefore, if a teacher has taught for four years in

²⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf

²⁹ http://www.legislation.gov.uk/uksi/1999/2277/pdfs/uksi_19992277_en.pdf

³⁰ <https://www.nasuwt.org.uk/uploads/assets/uploaded/330e7539-3bf6-4538-a0346b6fef5994cc.pdf>

the maintained sector, they are entitled to 100 working days of sick leave on full pay and a further 100 working days of sick leave on half pay.

- 2.48 However, teachers who move from a local authority maintained school to an academy may find that continuity of service is broken, as there is no automatic right to have the service with the academy counted for the purposes of entitlements such as sick pay.
- 2.49 Some local authorities have agreed to recognise academy service, provided that the academy is within that local authority, but the NASUWT believes there is a strong argument for the Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999 being extended to cover other entitlements such as sick pay.
- 2.50 Once the rules on continuous service have been amended, then additional guidance that provides workers with detailed information, including what to do if their employer has not complied with the legislation, would be welcomed. However, it cannot go unnoticed that this is no substitute for greater Government regulation and enforcement. Without the requisite enforcement any such guidance would constitute tokenism or window-dressing.

Holiday pay

- 2.51 All workers in the UK are entitled to a total of 5.6 weeks of paid annual leave every year. Holiday pay under the Working Time Regulations is meant to equate to pay while working, to ensure no disincentive to take annual leave, whilst at the same time protecting the health and safety of workers.
- 2.52 The NASUWT believes that all workers should be able to access and take paid holidays as it is a fundamental right and entitlement which enables workers to spend time with their families.

- 2.53 However, for those who work in more casual arrangements, or have variable hours from week to week, knowing how much they are entitled to be paid for annual leave can be difficult.
- 2.54 For example, many supply teachers are unable to calculate and understand their entitlement to holiday pay. This is often because there is a lack of transparency regarding who their employer is and the exact way in which their pay is processed. Rolled-up holiday pay further exacerbates the problem and means that many supply teachers are not accessing holiday pay.
- 2.55 Many supply teachers are often reluctant to take any leave entitlement during term time because they fear that if they turn down work, then the agency will no longer offer them work in the future.
- 2.56 Unfortunately, the recommendation to extend the length of the holiday pay reference period from 12 weeks to 52 weeks is problematic. The European Court of Justice says national courts should base the calculation of holiday pay on an average over a representative reference period (currently 12 weeks).
- 2.57 Increasing the reference period to a 52-week phase is flawed as it results in individuals working 52 weeks a year, thus risking further unfairness in the system and the relationship between the employer and the worker. Evening out the holiday pay reference period might enable businesses to calculate holiday pay more clearly, but such a change would penalise and disadvantage workers with significantly increased hours during certain times of the year (e.g. supply teachers). More fundamentally, it fails to consider that work is actually done over 46.4 weeks because 5.6 weeks are considered annual leave.
- 2.58 The 12-week period should therefore be retained, although there should be the flexibility for this to be a 12-week period which benefits the worker the most during the 46.4 weeks in which they have worked.

- 2.59 Additionally, the flexibility could be extended to permit a longer reference period to be considered where it is part of either a collective (i.e. with a recognised trade union) or individual agreement, and, if it can be independently verified to maximise the worker's entitlement to holiday pay.
- 2.60 Ultimately, extending the right to benefit from full pay when taking holiday for all workers would help supply teachers as agency workers and those employed on zero-hours contracts.
- 2.61 Increasing workers' awareness of their entitlement to holiday pay is no substitute for increased state-backed enforcement and penalties for non-compliant employers.
- 2.62 To this extent, expanding the remit of HMRC to cover the enforcement of holiday and sick pay has the potential to benefit workers, provided that the appropriate level of resource is ascribed so that this can be effectively enforced without unnecessary delay.
- 2.63 Without additional capacity to manage the extra burden placed on HMRC, the extension of the responsibility for the enforcement of holiday and sick pay will not result in the level of protections workers deserve, often those who are in the most vulnerable and insecure forms of employment.
- 2.64 Furthermore, if such powers are extended to HMRC, the NASUWT would urge against a self-correction tool, such as the case with the NMW, as this may, in effect, let employers off the hook provided the error has been corrected. Additionally, this relies on the worker being able to check and understand if the correction has been made by their employer.
- 2.65 The Union would also expect that any online tools which are used to assist in the calculation of holiday pay and sick pay are amended so that they are fit for purpose and can provide accurate estimates based on a range of scenarios. Currently, calculations which rely on hours worked do not

necessarily reflect the way in which supply teachers are employed (i.e. sessional work).

- 2.66 In addition to this, the Government could also consider instructing HMRC to pay any holiday pay and sick pay owed to the worker whilst pursuing employers who do not pay. This would increase the likelihood of complaints and the Government would have a vested interest in ensuring non-payment is pursued via HMRC.
- 2.67 This could be complemented by a level of bond insurance which forces employers to demonstrate that they have sufficient funds to meet their wage obligations, including costs associated with both holiday pay and sick pay.
- 2.68 Public procurement rules should also be amended to ensure public sector bodies are prohibited from using employers which fail to adhere to minimum standards.
- 2.69 Any additional burden on the employer is negated as this should be seen as part of their normal compliance procedure. Furthermore, improved state enforcement should provide for a level playing field where businesses operating legitimately are not undercut by unscrupulous employers, as well as providing confidence in the system to workers and the wider general public.
- 2.70 However, the NASUWT recognises that greater enforcement of employment rights does not address insecurity at work and the decision to work taken by a supply teacher. As a consequence, the benefits derived from greater enforcement of employment rights is limited to those who have a genuine choice about whether or not to accept the work which has been offered to them. Most supply teachers are not in such a position as their assignments can be intermittent and sporadic.

The right to request

- 2.71 The evidence provided throughout the *Taylor Review of Modern Working Practices* demonstrates that the current balance of benefits is skewed significantly in favour of the employer, the so-called 'one-sided flexibility' the review referred to.³¹
- 2.72 However, the introduction of a right to request will not provide the certainty for individuals that the Government suggests. A right to 'request' is no right at all and will fail to shift the balance of power between employer and worker because it lacks teeth.
- 2.73 A right to 'request' is only meaningful if the grounds upon which a 'request' can be refused are specifically prescribed so that the employer cannot legitimately cite a range of different reasons for such a refusal.
- 2.74 For example, the right to request flexible working permits an employer to refuse on the basis of any one of seven reasons, including that the extra costs will damage the business and/or that flexible working will affect quality and performance.³² It cannot go unnoticed that there is also no statutory right of appeal on the part of the employee.
- 2.75 The Union is therefore right to be concerned about proposals to introduce a right to request a more stable contract. Instead, the Government should look to legislate against the inappropriate use of contracts which unscrupulous employers use to deny workers access to guaranteed hours or permanent work (i.e. zero-hours contracts).
- 2.76 However, if the Government intends to proceed with this recommendation, in order for it to be made meaningful a number of safeguards must be put in place, specifically in respect of agency workers and those on zero-hours contracts.

³¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rq.pdf

³² <https://www.gov.uk/flexible-working/after-the-application>

- 2.77 For example, there should be no qualifying period for making a request, given that supply teachers face significant difficulties in accruing continuous service.
- 2.78 The individual should also have the right to be accompanied or represented by an independent trade union. Again, supply teachers face significant difficulty in accessing trade union representation.
- 2.79 The employer must have to provide written reasons, in a timely manner (e.g. less than one month), that justify any refusal to a right to request a stable contract. This should be independently assessed and must be accompanied by a statutory right of appeal. This may prove problematic in terms of determining who should hear the appeal (e.g. the agency or the client as the end user).
- 2.80 Finally, those in atypical working arrangements (i.e. supply teachers as agency workers) should be protected from suffering any detriment for making a request.
- 2.81 Any such changes must apply to all employers, irrespective of size, in order to provide a level playing field where businesses operating legitimately are not undercut by others who are exempt.
- 2.82 It cannot go unnoticed that the Government response to the Taylor Review makes no reference to the need for distinctive rights for agency workers, which was one of the recommendations it made.³³ This is disappointing and should be addressed through agency workers having a right to request a direct contract with the hirer, or being deemed to be a permanent employee of the hirer after a set period of time.

³³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

Information and Consultation of Employees Regulations (2004) (ICE)

- 2.83 The *Taylor Review of Modern Working Practices* recommended strengthening 'worker voice' and drew a link between this and elements of 'good work'.³⁴
- 2.84 One of the mechanisms suggested by the review involved the Information and Consultation of Employees Regulations (2004) (ICE)³⁵ and whether or not the Regulations should be amended to include employees and workers and reduce the threshold for implementation from 10% to 2% of the workforce.³⁶
- 2.85 The NASUWT acknowledges the reduction to the threshold for implementation of the ICE Regulations and the desire to improve worker voice, but this is no substitute for the right to trade union recognition and representation for the purposes of collective bargaining on behalf of the workforce.
- 2.86 This is reinforced by the fact that the ICE Regulations are not widely used and are little understood, particularly amongst the workforce. For example, the Central Arbitration Committee (CAC) reports about 20 requests being made since the rights came into force.³⁷ This is partly due to the restrictive hurdles which employees have to overcome in order to instigate the ICE Regulations.
- 2.87 Reducing the threshold is therefore likely to have the desired impact if there remains a general lack of knowledge and understanding of the existence of the ICE Regulations in the workforce, especially in non-unionised workplaces.

³⁴ Ibid.

³⁵ <http://www.legislation.gov.uk/uksi/2004/3426/made>

³⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

³⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679849/Consultation-Increasing-Transparency-070218-3.pdf

- 2.88 There is extensive evidence surrounding the implementation of 'voice', which demonstrates the crucial relationship between union structures and work councils, such as those espoused in Germany.³⁸ The German White Paper Reimagining Work provides a much more coherent and comprehensive structure which outlines how to improve worker voice effectively.³⁹
- 2.89 Instead, the recommendations should include consideration of legal support for collective bargaining. The Government should also give careful consideration to placing the employer under a legal obligation to inform its workforce of the ICE Regulations and the procedure for invoking it on an annual basis.
- 2.90 Furthermore, consideration should also be given to trade unions being able to 'pull' the ICE Regulations trigger on behalf of the workforce, a system which would mirror that operating under the German codetermination system.⁴⁰
- 2.91 Alternatively, measures could be introduced to promote and support collective bargaining and the right of trade unions to access workplaces and represent individuals and groups of workers.
- 2.92 Without appropriate sanctions and the threat of further escalation, at best, the recommendations regarding ICE are tokenistic and merely skirt around the vital role played by trade unions as a legitimate voice of the workforce in the workplace. Freedom of association, collective bargaining and the right to strike are fundamental social rights, binding in international law.
- 2.93 The NASUWT notes, in this regard, comments made by Professor Sir David Metcalf on the important role played by trade unions in preventing or reversing the fissuring of employment relationships.⁴¹

³⁸ <https://core.ac.uk/download/pdf/6777811.pdf>

³⁹ <http://www.bmas.de/EN/Services/Publications/a883-white-paper.html>

⁴⁰ <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.11.pdf>

⁴¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632074/labour-market-enforcement-strategy-2018-19-summary-of-issues.pdf

2.94 Trade unions have a vital role to play in ensuring that workers are better informed and empowered in respect of their employment rights. The right to representation is a key concern for the NASUWT. The right to trade union representation and the right to withdraw labour, free from victimisation, is a vital and fundamental principle and right that should apply to all workers.