

# **Consultation: Increasing transparency in the labour market**



Response from the Incorporated Society of Musicians (ISM) to the Department for Business, Energy & Industrial Strategy (BEIS)

Submitted on: Wednesday 23 May

Sent to: [increasingtransparency.consultation@beis.gov.uk](mailto:increasingtransparency.consultation@beis.gov.uk)

## **Section 1: Introduction and background**

1. This is a response from the Incorporated Society of Musicians (ISM) to the consultation on Agency Workers recommendations by the Department for Business, Energy & Industrial Strategy.
2. The ISM is the professional body for performers, composers, song-writers and music educators. Founded in 1882, we support our growing membership of nearly 9,000 professional musicians with one-to-one legal advice and professional support alongside independent advocacy and policy development.
3. This submission sets out our evidence base, raising issues of concern to the music workforce (section 2), before setting out our recommendations in relation to specific proposals in this consultation which will help address these concerns (section 3).

## **Section 2: The music sector and our evidence base**

4. In the workforce overall the number of self-employed has increased from 3.3 million people (12% of the labour force) in 2001 to 4.8 million (15% of the labour force) in 2017.<sup>1</sup>
5. There are currently 865,000 agency workers in the UK (up 30% since 2011), with the number set to reach one million by 2020, if current growth trends continue.
6. Within the creative sector this figure is higher at 43%.<sup>2</sup> And in the music sector, the proportion of musicians with portfolio careers (with more than one role) and working as self-employed is more than 90%.<sup>3</sup>
7. The ISM has two in-house lawyers who support our membership in relation to more than 1,000 legal cases a year, a significant proportion of which relate to holiday pay, sick pay, employment status and related concerns. This figure is currently increasing.

---

<sup>1</sup> Office of National Statistics, 7 February 2018

<sup>2</sup> Creative and Cultural Skills, 20 March 2015

<sup>3</sup> ISM membership analysis

8. We have heard from musicians of instances where employers and engagers have required that musicians must be members of a union; this 'closed shop' practice is illegal. All forms of 'closed shops' in the UK have been illegal since the introduction of the *Employment Act 1990*.<sup>4</sup>
9. The ISM's most recent survey of the musician workforce took place in November 2017 and asked musicians how we can improve the culture and conditions in which all musicians work. We received responses from more than 600 musicians and the survey uncovered a concerning picture of harassment and bullying within the music sector. The final report was published on 26 April 2018.<sup>5</sup>
10. Most notably, 72% of all the respondents to our survey described themselves as 'self-employed'. The majority of the music profession are not usually engaged as either employees or workers in the traditional sense. It is more common for individuals to work in a self-employed capacity, diversifying their portfolio of work to ensure an income. For example, a musician could be offered work (or a 'run') with an opera company on a seasonal basis, rather than permanently. Many musicians are 'self-employed with opportunity for deputising'. This time-honoured freelance model makes it difficult for musicians to have access to the protection and support mechanisms which are to be found in more traditional employment. As a consequence this highly talented but vulnerable workforce is afraid of reporting their experiences for fear of victimisation and losing work. One of the most frequently cited reasons for under-reporting of incidents of bullying etc. was the risk of losing work and future opportunities.
11. These incidents have taken place despite the existence of such policies in many organisations and workplaces. Nearly half of the total respondents stated they had experienced some form of sexual harassment, bullying and discrimination with reference to all nine protected in the characteristics of the Equality Act 2010.
12. These rights are not directly covered in any consultation documents associated with the Taylor Review. However, for those working in the music profession this is a significant area of concern.
13. We make a series of recommendations which will reduce this fear of reporting and give clarity to the rights of musicians. We recommend **1)** that engagements should make clear that there is a 'contract personally to do work', to ensure that the musician is within the ambit of section 83(2) of the Equality Act 2010 and **2)** that as far as possible additional information is included in the Written Statement in relation to routes for reporting concerns relating to discrimination and sexual harassment.
14. Given the power and continuing relevance of the #MeToo movement, we strongly recommend that the Government consider incorporating the protections recommended below in their response to the Taylor Review. If these are not included, this will represent a missed opportunity to protect this vulnerable section of the workforce.

### **Section 3: Specific recommendations made in the consultation**

---

<sup>4</sup> *Employment Act 1990*

<sup>5</sup> *Dignity at work, ISM, 26 April 2018*

## A) Written Statements

15. We welcome the proposed additions to the written statement set out in paragraph 18 of the consultation document which will provide additional clarity for musicians.

16. We recommend, based on the evidence gathered by the ISM, that a further three points be added to reflect the nature of work for the music profession and the specific problems highlighted above:

a. **Personal service:** As far as possible, engagements should be clarified as falling under the personal service protections within section 83(2) of the Equality Act 2010. This would ensure that protections from discrimination under the nine protected characteristics of the Equality Act 2010 would apply to these engagements.

b. **Discrimination and harassment advice:** Current written statements must contain information about 'who to go to with a grievance' and 'how to complain about how a grievance is handled.' However, issues relating to discrimination and harassment are not required to be set out. We would welcome this being included as a requirement to ensure that those who are self-employed have safe and confidential routes through which they can raise concerns.

c. **Closed-shop behaviour:** We note that according to departmental statistics, 6.2 million employees in the UK were trade union members in 2016<sup>6</sup> and that this is a significant decline since 'the peak of over 13 million in 1979.'<sup>6</sup> Many individual and gigging workers, including musicians, are represented by legal teams and professional bodies rather than trade unions. In this context, and given that our members still encounter closed-shop behaviour within the music industry, we would want a written statement make it clear to workers that membership of a particular union is not required under any agreement.

17. In addition to these three additional points, the information relating to Holiday Pay contained in the Principal Written Statement should ensure that entitlements to holiday pay reflect the decision in a recent Employment Appeal Tribunal case in which the ISM has been involved, namely *Brazel v The Harpur Trust*, 6 March 2018<sup>7</sup> which we comment on in more detail under point C below.

## B) Continuous service

18. Given the relatively lengthy threshold for employment protections now in operation (two years), we welcome any measures which maximise statutory protections for workers. We therefore welcome the direction of travel and support the Government's proposals.

---

<sup>6</sup> [Trade union membership 2016: statistical bulletin](#)

<sup>7</sup> [Brazel v The Harpur Trust, 6 March 2018](#) [2018] UKEAT/0102/17/LA

### **C) Holiday Pay**

19. Based on evidence collected by our legal team, musicians, in particular those working as peripatetic or visiting music teachers within educational establishments, work part-time during term time for a few hours a week for 30 to 35 weeks of the year. These musicians are frequently treated differently from one another for performing substantially the same work. Some of them are formally employed (generally on zero hours or flexible contracts), and as such they benefit from all the rights provided to employees, including holiday and pension rights, sick pay and maternity leave. Others are treated as self-employed, meaning that they do not benefit from any employment rights, including holiday pay and protection against unfair dismissal.

Example: in one of our cases a school, in order to comply with the provision of the IR35, decided to formalise its arrangements with its visiting teachers, and offered them the possibility to choose between a contract of employment and a contract of self-employment, but nothing would have change in the type of they were asked to do. In other words the employment status and associated rights were more an issue of label than substance.

20. These musicians often bear the financial risk of their activity, because the agreement in place with the school may be such that the teacher receives fees directly from parents, instead of the school, and if parents fail to pay, the school has no obligation to pay fee in lieu of the parents, or even to take steps to recover the unpaid fees on behalf of the teacher. However, the reality is that music teachers work for and within the school environment, and the school takes advantage of their services as part of the overall educational offer it is able to make to its current and prospective students.
21. We have previously also had to challenge inaccurate advice presented by the Advisory, Conciliation and Arbitration Service (ACAS) and have most recently supported a member in a successful case which clarified that holiday pay for part-time term-time only workers not capped at 12.07% of annual hours.
22. We would welcome additional clarity from the Government in relation to the 5.6 weeks entitlement to ensure that entitlements to holiday pay reflect recent the recent decision of an Employment Appeal Tribunal case in which the ISM has been involved, namely *Brazel v The Harpur Trust*, 6 March 2018.<sup>8</sup> The EAT decision clarified the correct basis for calculation of holiday pay for part-time, zero-hours employees. This decision supersedes the advice of ACAS and others to calculate holiday pay on the basis of 12.07% of the individual's earnings: this was found to be incorrect by the EAT, which stated that regardless of the number of weeks worked in a year, the worker is entitled to 5.6 weeks' paid holiday calculated in accordance with s. 224 of the Employment Rights Act 1996.

### **D) Right to Request**

23. Many of our members work on zero-hours contracts but with regular and expected levels of performance as orchestral, gigging and teaching musicians. Whilst accepting this as a standard pattern of working, for some the uncertainty

---

<sup>8</sup> *Brazel v The Harpur Trust*, 6 March 2018. [2018] UKEAT/0102/17/LA

can cause difficulties. We therefore recommend welcome the Government's proposals to introduce a right to request a contract of employment where appropriate.

#### **E) Information and Consultation of Employees Regulations (2004) (ICE)**

24. We support proposals which empower individual workers and ensure that full information is available. Given the decline in trade union membership<sup>9</sup> any information relating to Information and Consultation regulations must be made is available to relevant representative bodies, legal advisers or professional associations.

---

If you have any questions or would like any further information relating to this consultation submission, please contact \_\_\_\_\_, Head of External Affairs for the Incorporated Society of Musicians.

---

<sup>9</sup> Trade union membership 2016: statistical bulletin

