



Law Society
of Scotland

Consultation Response

Good Work: the Taylor Review of Modern
Employment Practices – Consultation on measures
to increase transparency in the UK labour market

May 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Department for Business, Energy & Industrial Strategy's consultation: Good Work: the Taylor Review of Modern Working Practices – Consultation on measures to increase transparency in the UK labour market. The sub-committee has the following comments to put forward for consideration.

General comments

This response should be read in conjunction with our response to the separate consultation on employment status, where we have come to the view that the present distinctions between employees, workers and self-employed should be reduced to two categories only: employees and self-employed, with those who are presently workers being given the status of employees. This is relevant to many of the questions in this consultation, and we answer in the context of this position.

We have not answered questions 1-8, 14-16, 18-19 and 39-40 as these are aimed at employers and individuals, rather than the legal profession.

Consultation questions

A: Written Statements – Questions for all

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?

We see no need to amend the current timescale of two months. However, consistent with the response to our consultation on employment status, the right should be extended to those who are presently 'workers'.

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

- a) The business's name
- b) The employee's name, job title or a description of work and start date
- c) If a previous job counts towards a period of continuous employment, the date that period started
- d) How much, and how often, an employee will get paid
- e) Hours of work (and whether employees will have to work Sundays, nights or overtime)
- f) Holiday entitlement (and if that includes public holidays)
- g) Where an employee will be working and whether they might have to relocate
- h) If an employee works in different places, where these will be and what the employer's address is

We agree that the currently prescribed contents are helpful, and see no need to amend the current minimum requirement.

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?
- b) How much notice the employer and the worker are required to give to terminate the agreement?
- c) Sick leave and pay entitlement?
- d) The duration and conditions of any probationary period?
- e) Training requirements and entitlement?
- f) Remuneration beyond pay e.g. vouchers, lunch, uniform allowance?
- g) Other types of paid leave e.g. maternity, paternity and bereavement leave?

As noted in Q10, we believe the currently prescribed contents represent an appropriate minimum standard, and do not feel that there is a need to require additional items. However, we recognise that if workers become employees, as we suggest in our response to the employment status consultation, then there would be a benefit in certain "day one" rights such as maternity leave being recognised and reflected in the employment contract.

Q12 To what extent do you agree that the principal written statement should be provided on (or before) the individual's start date?

As discussed in our response to Q9, we do not believe there is a need to change the current timeframes for providing written statements.

Q13 To what extent do you agree that other parts of the written statement should be provided within two months of their start date?

We refer to our response to Q9 and Q12, and support retaining the current timeframes for providing written statements.

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

We do not agree that a new standalone right should be created. This new right could have a negative impact on the employment relationship, as it would arise so early in the relationship (two months being our proposed period for a written statement to be provided). While the right could enhance protection for the Individual, it might have the unintended effect of undermining job security.

Section B: Continuous Service

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

We support the Taylor Review's recommendation of one month as a sensible way forward. This would help reduce the potential dubiety about whether an employee had been told not to come back due to temporary cessation, or had in fact been given leave, or had taken unauthorised leave.

Q21 If you are employed, or represent employees what are the implications for you or those you represent of the current rules on continuous service?

As discussed in our response to Q20, we support the recommendation to move to a period of one month, as this would increase clarity for both businesses and employees.

Q22 Do you have examples of instances where breaks in service have prevented employees from obtaining their rights that require a qualifying period?

We believe that the majority of responsible employers will not seek to introduce breaks in service to prevent employees qualifying for rights. For any employers who would take this approach, the longer, one month, period would make it more difficult for them to do so.

Q23 Do the current rules on continuous service cause any issues in your sector?

We recognise that, from time to time, employers may struggle to know what their rights and duties are. In addition, as indicated by Q22, there is the potential for the current rules to be used to the disadvantage of the individual employee.



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.

One month.

Q25 Do you believe the existing exemptions to the break in continuous service rules are sufficient? If no, do you have views on additional circumstances that should be added?

We believe that the proposal to increase the period to one month would improve the operation of the rules, and that additional exemptions should not be required.

Q26 We intend to update the guidance on continuous service, and would like to know what types of information you would find helpful in that guidance?

Select all that apply: Real examples from case law/Signposts to further information/Information on what to do if you feel your employer has not complied with the legislation/Other - please specify.

We suggest that the circumstances where continuous employment is recognised, as set out in paragraph 35 of the consultation paper, should be retained, as to abolish any of these while introducing the new timescale had the potential to generate more confusion than it would avoid.

C: Holiday Pay

Q27 Do you think that the government should take action to change the length of the holiday pay reference period?

Yes.

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, the Committee felt that 52 weeks would be an improvement on 12 weeks, in terms of fairness.

- b) Set a 52 week default position but allow employees and workers to agree a shorter reference period?

In addition to our answer at Q28 a) above, we also suggest that an employer and individual should be entitled, if they so wished, to set their own timescales for this, provided the legislation included the usual safeguards for the individual in terms of this being a choice freely made etc.

- c) Set a different reference period

No.

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

Our experiences are largely positive and in favour of freedom being retained for individuals to work for a continuous period and then take an extended break, or even terminate the contract, with the benefit of additional payment through accrued holiday pay. We recognise that this position does not align with the European Court of Justice in the case of *Robinson-Steele v RD Retail Service Ltd*¹ and acknowledge that that the individual should always have the right to take leave instead if they wish, and that due regard should be given to the health and safety aspect of paid holidays.

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.

We believe that the onus should be on the employer to communicate the options in advance.

¹ *Robinson-Steele v RD Retail Service Ltd* [2006] E.C.R. I-2531

Section D: Right to Request

Q31 Do you agree that we should introduce a Right to Request a more stable contract?

We do not agree that there is demand or requirement for any reform of the law in this respect. Introducing such a right may over-complicate matters. We suggest that overall simplification of the law would be preferable, including by removing the category of 'worker' as discussed above.

Q32 Should any group of workers be excluded from this right?

We do not agree with introducing this right.

Q33 Do you think this will help resolve the issues the review recommendations sought to address?

No, we do not believe that this would provide any benefit in practice.

Q34 Should employers take account of the individual's working pattern in considering a request?

While we do not support the introduction of such a right, if one were introduced, yes, we consider that working pattern would be a relevant consideration.

Q35 Should there be a qualifying period of continuous service before individuals are eligible for this right?

While we do not support the introduction of such a right, if one were introduced we consider that a qualifying period would be appropriate. A minimum of 1 year although we could see some grounds for making it 2 years to accord with other employment rights.

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.

While we do not support the introduction of such a right, if one were introduced, a two month period to consider such a request would seem reasonable.

Q37 Should there be a limit on the number of requests an individual can submit to their employer in a certain period of time?

While we do not support the introduction of such a right, if one were introduced, one request per year would appear reasonable.

Q38 When considering requests, should Small and Medium Enterprises (SMEs) be included?

If yes, do you think they should have any dispensations applied e.g. longer to respond?

While we do not support the introduction of such a right, if one were introduced, it would be better to have a uniform application rather than exclude certain businesses. Casual working arrangements are likely to affect smaller businesses, so excluding that sector would be unhelpful.

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

Q41 How might the ICE regulations be improved?

Our experience suggests that these regulations are very rarely used, so there is no noticeable requirement for reform. It may be appropriate to review the need for the regulations more generally.

Q42 Should the ICE regulations be extended to include workers in addition to employees?

We suggest that the category of 'worker' should be removed, and for individuals to be either employees or self-employed.

Q43 In your opinion, should the threshold for successfully requesting ICE regulations be reduced from 10% of the workforce to 2%?

No. We do not agree with proposal to reduce the threshold from 10% to 2%, as we feel this would be too low to be seen as a reasonable representation of the workforce.

Q44 Is it necessary for the percentage threshold for implementing ICE to equate to a minimum of 15 employees?

We suggest that it would be appropriate to retain the 10% threshold without a minimum number.

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

It may be of benefit to provide case studies on employee engagement models that operate within UK businesses and that are perceived to be successful by both employers and employees.

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?

We believe that it will be challenging to create any system that 'ensures' employees and workers engage with information about their work – however making information from relevant bodies such as trade unions, ACAS and IIP available and accessible to employees may assist.

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

We believe it will be challenging to 'ensure' workers views are heard by employers – but short of further statutory intervention would support the promotion of the benefits to businesses of effective employee engagement.

Q48 Are there other ways that the government can support businesses on employee/worker engagement?

We refer to our answer to Q45 above.