



**GOOD WORK:**

# **THE TAYLOR REVIEW OF MODERN WORKING PRACTICES**

**Consultation on measures to increase  
transparency in the UK labour market**

**KPMG LLP**  
22 May 2018



## **Personal (P) information**

- 1) Your name: KPMG LLP
- 2) Your E-mail address :
- 3) We respond in our capacity as professional advisors

## **Executive Summary**

KPMG LLP is a multi-disciplinary practice authorised and regulated by the Solicitors Regulation Authority. KPMG's legal services team comprises of over 1500 lawyers across 50 member firms offering expertise in a range of legal services including corporate, commercial, employment, immigration and tax litigation. In the UK, we offer employment and immigration legal services with local expertise and global experience. We provide a wide range of employment law services, both contentious and non-contentious, ranging from advice on contracts and policies, recruitment and termination, through to restructuring and litigation. We respond to this consultation in our capacity as professional advisors, and share knowledge from our team of Employment Law experts.

## **Written statements**

Please refer to our comments in the employment status consultation in which we question the need to continue with a "limb b" or dependent contractor employment status category. One of the main reasons we question the value of the "worker" category is because the status and associated rights are so closely aligned with that of an employee. With that in mind, we strongly agree that it would benefit employers and individuals alike to extend written statements to those engaged in such a capacity, whether temporary or permanent. Similarly, we welcome proposals to expand the information currently provided in written statements as this will inevitably improve transparency and certainty between the parties.

## **Continuity of service**

In an increasingly flexible market, continuity of service prevents many from being eligible for employment protection which requires a qualifying period of employment. Whilst we do not think that it is appropriate to ignore breaks in employment, we think review is needed to increase employment protection for those who work flexibly and with regularity over a protracted period. We propose that a two week break would be more appropriate for today's employment arrangements, provided the relationship is otherwise continuous. This should be determined by considering the period which precedes that break and the anticipated future employment relationship. We consider that this approach would bring greater certainty for employers and employment protection for casual workers, as well as enabling flexibility and improving access to holiday.

## **Holiday pay**

Ensuring that holiday pay reflects “normal pay” is important for employers and employees/workers and therefore any changes to the reference period should represent an improvement on the current 12 week reference period. Whilst we acknowledge that there are criticisms of the 12 week reference period, if a new reference period is introduced, it is likely to bring with it new practical challenges and may not necessarily be more representative of normal pay. We anticipate that there will not be a uniform solution which applies in the same way across all sectors. We do not propose that the employer of employees should determine the approach to be applied, but instead think that an objective legislative change would be preferable. We believe that a 52 week reference period would provide a more representative assessment of “normal pay” and therefore propose this should be the new default reference period.

## **Right to request**

The right to request for agency and zero hours workers is a sensible proposal aiming to offer security and certainty, and will encourage employers to bear the risk in relation to workforce planning. Provided that the proposed changes have objective criteria attached which ensure there is a framework for such requests for both the individual and the engaging business, we think this is a positive move. However, we recommend reviewing the impact of the right to request to check whether engagements are terminated early to avoid responding to the new right.

## **ICE regulations**

Employee engagement is important and certainly has benefits in terms of job satisfaction, loyalty, investment in the business and positive employee relations. Our understanding is that the ICE regulations have had relatively low impact on employee information and consultation in practice and therefore we do not propose that changes should be made to this legislation.

## **Section 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?**

Agree strongly.

Please refer to our comments in the employment status consultation in which we question the need to continue with a 'limb b' category or worker at all. In that context, we observe that providing a section 1 statement to 'workers' further narrows the gap between 'workers' and 'employees'. As such, we 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. Although there is an additional administrative burden on employers to provide such documentation, this is outweighed by the benefit of:

- Providing transparency to individuals with worker or employee status on their basic terms of employment
- Ensuring clarity between the parties which should reduce potential disputes

Given that many workers are not aware of their employment status and the associated rights, such a document would provide helpful clarity on the working terms at the outset of the working relationship.

**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**

Yes.

**b) The employee's name, job title or a description of work and start date**

Yes.

**c) If a previous job counts towards a period of continuous employment, the date that period started**

Yes.

**d) How much, and how often, an employee will get paid**

Yes. This is arguably one of the most important terms.

**e) Hours of work (and whether employees will have to work Sundays, nights or overtime)**

Yes. The link between hours of work and pay should be highlighted, and if overtime is required, it should be specified whether the overtime is mandatory or voluntary.

**f) Holiday entitlement (and if that includes public holidays)**

Yes.

**g) Where an employee will be working and whether they might have to relocate**

Yes.

**h) If an employee works in different places, where these will be and what the employer's address is**

Yes.

**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. If the employer cannot say with certainty how long a temporary job is expected to last beyond a specific period, the initial period should be confirmed. If there is scope for renewal of the contract on expiry of the fixed-term, this should also be indicated, together with any conditions or material considerations.

**b) How much notice the employer and the worker are required to give to terminate the agreement?**

Agree strongly.

**c) Sick leave and pay entitlement?**

Agree strongly.

**d) The duration and conditions of any probationary period?**

Agree strongly.

**e) Training requirements and entitlement?**

Agree slightly. If training is required before commencement of the engagement, or during the engagement the requirements should be specified. The employer should indicate who will bear the cost of such training.

**f) Remuneration beyond pay e.g. vouchers, lunch, uniform allowance?**

Agree strongly. In today's labour market there is a concept of "total reward" which gives the employee a universal summary of their remuneration. Given that reward is now often a combination of several factors, it would be helpful to provide a full

break down of all pay at the outset.

**g) Other types of paid leave e.g. maternity, paternity and bereavement leave?**

Agree strongly. Even if the leave is paid in accordance with the statutory regime, this should be highlighted for the sake of clarity.

**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. If the purpose of the written statement is to ensure that the individual understands the terms of the employment relationship at the outset, then it follows they need to have all the information concerning the employment before they start working.

By providing the principal written statement before the individual starts working, the individual can make an informed decision on whether to accept the work offered. If the principal written statement is provided after the individual has started working, this would inevitably add to the imbalance of power typically found between an employer and employee/worker: the individual can rarely negotiate terms once they have started working.

**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. We consider that all the information currently prescribed by section 1 of the ERA is important (including disciplinary and grievance details, pensions and collective agreements which are not mentioned in this document), and should be retained alongside any additional information proposed under this consultation. It would be better to provide all the information in one statement rather than providing it piecemeal, particularly as the majority of this information should be confirmed at the outset. If this is not possible, we agree that a two month period is appropriate.

## **Section A: Written Statements – Questions for all**

### **Q18: Which of the following best describes your awareness of the Acas guidance on Written Statements?**

I have a good knowledge of the Acas guidance.

### **Q19: If you have some knowledge of the Acas guidance on written statements, how helpful did you find it?**

Whilst the Acas guidance on written statements provides a helpful summary of employer obligations, for practical purposes, it might be more helpful to provide an example of a written statement so that employers have a useable checklist document they can tailor to their business.

What the Acas guidance does not address is the interaction between employment contracts and written statements. Whether an employer has provided a written statement is often academic when an employment contract includes all the necessary terms required by a written statement. It might be helpful to encourage employers to take this pragmatic approach even though this is not mandatory. This might be more practical for HR practitioners than statements such as "It is not itself a contract of employment but is evidence of the contract of employment."



## **Section B: Continuous Service**

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

In general, the current rules on continuous service are clearly understood and offer certainty and flexibility for employers. That said, unscrupulous employers can manipulate the length of employment arrangements so that they deny employees employment protection which applies after a qualifying period of continuous employment. This issue is likely to be difficult to resolve in practice.

The biggest drawback of the current rules, is that they do not offer employment protection for employees engaged on a casual basis, even though in practice they might work regularly for the same employer. We address this further at question 24 below.

### **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, subject to the additional considerations below.

The issue with the break in continuous service is that it does not sit well with flexible working patterns that are becoming increasingly popular in the UK labour market. Employees who work flexibly should not have any problem receiving day 1 rights but they are typically excluded from more generous employment protection which requires continuity of employment. For example, an individual may work for the same employer for a number of years, but have multiple “breaks” during this time because of the ad hoc, flexible work structure and therefore will have no protection against unfair dismissal or redundancy.

The current rules on continuous service do not support individuals who work flexibly but regularly for the same employer. In our view, casual workers should be able to obtain employment protection, provided that they work regularly enough with the same employer over the qualifying period. A factual analysis is needed to differentiate between individuals who work ad hoc shifts (who would typically not obtain continuity of service) and those who work with such regularity over a protracted period that they should be able to qualify for increased employment protection.

Any changes to the proposed rules should take into account the current, previous and anticipated future working patterns, to determine whether but for the break, the employment relationship would otherwise continue.

We have proposed a two week break as it is short enough that it is reasonable for the employment relationship to continue after the break. In addition, this period is long enough that it permits the individual to take holiday. Anecdotally we understand that continuity can deter individuals from taking leave so this needs to be addressed.



We have identified two potential options that we think are better suited to the current labour market:

- 1) Introduce one period which breaks continuity of employment (e.g. 2 weeks) **UNLESS** regular employment continues or is anticipated to continue following that break. If we want to protect employees and balance this against employer flexibility, we need to look backwards and forwards to understand how the relationship is intended to endure.
- 2) Allow multiple breaks in continuity and offer specific rights for flexible working patterns.

We propose that individuals who work flexibly with regularity should have the same rights and entitlements as employees who work for the same employer on a permanent basis, provided that they have continuity of employment as described above. Those who work casually and flexibly without regularity would not obtain the same rights because their breaks in employment would prevent continuity of employment.

An alternative approach would be to assign a specific set of employment rights which apply after one/two years' service, interrupted by multiple breaks of up to two weeks. However, this could create a subclass of employee and for this reason we propose that the former approach would be better in practice.

**Q25: Do you believe the existing exemptions to the break in continuous service rules are sufficient?**

No. Please refer to our response to question 24.

**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

## 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

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.

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

The aim of holiday pay is to ensure that the worker is paid their “normal pay” during the holiday period. A blanket approach for all employers is attractive as it is simple but does not take into account the individual nuances of the business’ working patterns. On the other hand, if employers or employees can choose the reference period they are likely to select the cheapest and most expensive option respectively. Therefore, on balance we think a defined period of 52 weeks is appropriate.

In agreeing with this recommendation we note that many employers have queried whether averaging pay over a 12 week period delivers “normal pay”, and have found the mechanics of making such calculations complex and challenging. Reviewing pay over a 52 week period offers the advantage of minimizing the impact of fluctuations in pay. We acknowledge that, for those whose pay does not vary significantly over a 52 week period, this approach could lead to reduced holiday pay which does not feel “normal” as the averaging exercise diminishes the effect of a recent pay rise. However, we do not think there is a perfect solution and this is the fairest approach.

**c) Set a different reference period**

No.

**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?**

Don’t know.

**b) Are they receiving holiday pay but not taking annual leave?**

Don't know specifically, but we suspect this is the case. We believe that the rules on continuity may deter casual workers from actually taking leave.

**c) Do you know of any other arrangements that are used?**

We are not aware of any other arrangements.

**Q30: How might atypical workers be offered more choice in how they receive their holiday pay?**

The approach to holiday is different for employees who work on a permanent basis and those who work flexibly. For permanent employees, "holiday" is a defined period and there is no financial incentive to work through that period, as the individual is paid as normal when on leave. For casual employees, work is so flexible it is difficult for the employer or the individual to determine a period when they should take holiday and be paid the appropriate rate of pay.

One option might be to review the working patterns on a monthly/quarterly/annual basis and pay holiday in relation to that period. This is very similar to rolled up holiday pay and may discourage individuals from taking their leave. In practice, it might be necessary to apply different rules and permit atypical workers to receive their holiday pay in this way.

## **Section D: Right to Request**

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

Yes. We believe that this proposal is aimed at scenarios where the working pattern offered to the individual is temporary and uncertain when in reality the work is ongoing, and over time, there is a degree of predictability, but the employer is unwilling to contractually formalize the arrangement. Whilst we agree with the proposed right to request, we think the following conditions will need to be applied to make the right workable in practice. It would be disappointing if individuals found themselves dismissed at the end of a 12 month period because the employer does not want to deal with requests:

We have described conditions which we think should be applied to zero hours workers below. These should also be applied to agency workers who wish to request a direct contract of employment with the hirer.

#### **- Zero hours worker right to request**

Zero hours workers have flexible work and therefore they may have been “in post” for a 12 month period, but have big gaps in between periods when they were actually working. We think the right to request should only be available to workers who have had no more than 1 month break during the 12 month period. This 12 month period can be reviewed on a rolling basis.

If the zero hour worker has been in post for 12 months, the worker's request should be linked to:

- a) the most recent working pattern (within the previous 3 months), or
- b) that from the same period the year before.

If they want to request:

- a) specific hours of work, they will need to be able to demonstrate that they have already worked those hours consistently over a 2 month period. If the employer considers that fluctuations mean that it is not possible to provide specific hours as requested, they should consider a minimum number of hours as described below;
- b) a minimum number of hours, this would need to be averaged over a 12 month period.

The employer should consider the request in the same way as a flexible working request, and only be able to refuse the request for statutory reasons.

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

No.

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

We think this may encourage businesses to manage their workforce more effectively, but it could have the result that existing permanent staff are required to work more flexibly to limit the additional staff needed. In addition, there is a risk that instead of providing agency workers and zero hours workers with stability, there is a routine termination of such contracts before 12 months to avoid dealing with the requests.

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

Yes. The request and any future contract should take into account the individual's current working pattern as well as the projected needs of the business.

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

Yes, as described above, the 12 month period is appropriate, provided there are breaks of no more than one consecutive month during that time. If there are shorter breaks these should not break continuity.

**Q36: What is an appropriate length of time the employer should be given to respond to the request?**

1 month. These requests need to be dealt with promptly given that the individual making the request works flexibly and may need to act promptly to source alternative work should the request be unsuccessful.

**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. In the same way as flexible working requests, these requests should only be permitted once in a 12 month period.

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

Yes. SMEs should be included and the same rules should apply to them.



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