Good work: the Taylor Review of Modern Working Practices

Consultation on measures to increase transparency in the UK labour market

Consultation response from Lewis Silkin LLP

About us

Lewis Silkin is a commercial law firm with approximately 60 partners. Our main office is in London, with smaller offices in Oxford, Cardiff, Dublin and Hong Kong. Our Employment, Immigration and Reward division is one of the largest and most highly rated in the UK. This response is submitted on behalf of Lewis Silkin LLP, rather than our clients, based on our experience in practice advising predominantly medium to large-sized employers across a variety of sectors.

We are responding only to questions in Section C (Holiday Pay) and Section E (Information and Consultation of Employees Regulations), where we have specific views based on our experience as a firm of solicitors specialising in employment law.

Section C: Holiday Pay

Question 27 – Do you agree that government should take action to change the length of the holiday pay reference period?

- Yes

Question 28(a) – If you answered yes to Q27, should government: increase the reference period from the current 12 weeks to the 52 weeks recommended in the review?

- No. We do not consider that a single reference period for calculating holiday pay in all circumstances is appropriate (see further below).
- For some sectors, a fixed 52-week reference period would be particularly inappropriate. For instance, businesses in the retail sector commonly have a high turnover of staff, so a 52-week reference period would be problematic. Consideration would need to be given to how best to deal with calculating holiday pay for workers with less than a year's service.

Question 28(b) – If you answered yes to Q27, should government: set a 52-week default position but allow employers and workers to agree a shorter reference period?

- Yes, but subject to the qualification that employers and workers should also be able to agree a reference period *longer than* 52 weeks if they consider it appropriate.
- We believe that a default 52-week reference period would be a fair and sensible solution, in particular because it would be a largely effective way of avoiding the manipulation of holiday dates resulting in "windfall" payments for holiday days (as highlighted at paragraph 46 of the consultation paper). We should also consider that this would most likely comply with EU law, given that this was the suggestion made by the Advocate General in *Lock v British Gas Trading Ltd.*
- However, we consider it is important for employers also to have discretion over the reference periods that are used, in order to ensure they are suitable for the particular business and/or remuneration arrangements. The employer and individual could as an alternative agree in advance a reasonable and appropriate reference period on the basis of a range of reference periods from, say, one to 18 months. This could be done either by written agreement or workforce agreement, which may apply to either the whole workforce or to a group of workers within it. The Working Time Regulations already enable employers to modify or exclude some of their provisions by negotiation with workers or their representatives. We suggest this

approach should be adopted in relation to choosing the appropriate reference period for calculating holiday pay.

- We acknowledge that a change in the law along these lines would have major practical implications for employers, many of whom will have systems based on the 12-week reference period and consulted with workers on that basis (some fairly recently following the *Bear Scotland* line of cases). Changing the reference period now could be disruptive when it is not clear that this would be appropriate in all cases. Ideally a comprehensive cost/benefit analysis should be carried out before implementing such a reform. If it goes ahead, employers should be given a significant transition period.

- We suggest that it would be helpful for Acas to produce guidance for employers and workers on how to select an appropriate reference period for calculating holiday pay, if departing from the 52-week default period.

Question 28(c) – If you answered yes to Q27, should government: set a different reference period?

- No. As explained above, we are against prescribing a single reference period for calculating holiday pay in all circumstances. We believe greater flexibility is required.

Question 29 – What is your understanding of atypical workers' arrangements in relation to annual leave and holiday pay?

- In relation to employment agency workers, our experience is that often are entitled to paid holiday but do not always take it. This could perhaps be addressed by some kind of requirement for agencies to checking that workers take at least their statutory minimum holiday.

- We are aware that temp/bank staff are sometimes told not to take leave during the temp working period and are then paid in lieu when they leave.

Question 30 – How might atypical workers be offered more choice in how they receive their holiday pay?

- Our main thought here is that technology could potentially provide a partial solution to these complicated scenarios. For example, enhancing the government holiday calculator into an app might allow atypical workers more easily to understand their pay/leave entitlements.

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

Question 41 – How might the ICE regulations be improved?

- I&C in the UK is generally very disjointed. This is primarily as a result of the UK having transposed EU directives over the years in quite a piecemeal way and with only limited consideration of the interaction between I&C and trade unions. This means that there are separate rules for national works councils under the ICE Regulations 2004, collective consultation under TUPE, collective redundancies under the TULR(C)A 1992 and European Works Councils under the Transnational Information and Consultation of Employees Regulations 1999. A good case could be made for rationalising these discrete legal regimes into a single and cohesive model under the ICE Regulations. However, it would be essential for sufficient thought to be given to avoiding unintended consequences in the process.

- A radical and controversial "big bang" reform would be to provide that if an employer has an I&C body (meeting certain conditions) then that operates in law as a block on a trade union making a statutory request for recognition. This could be seen as rewarding companies that have proactively chosen to engage with their own employees and excluding third-party unions from the relationship between management and staff. However, this idea goes to the heart of

a much broader philosophical question: is the UK a country in which, at its simplest, trade unions should be the mode for employee engagement or should employers engage directly with their employees?

Question 42 – Should the ICE regulations be extended to include workers in addition to employees?

- Case law indicates that it can be very difficult in practice to differentiate workers from employees under the current legal tests for employment status. There is also a good case for saying that workers have as much at stake as employees and businesses can benefit from them being engaged in any I&C process. These factors point towards both businesses and workers potentially benefiting from the legal certainty that might be created if the ICE Regulations were extended to cover workers.

Question 43 – Should the threshold for successfully requesting ICE regulations be reduced from 10% of the workforce to 2%?

- A case can be made that the percentage thresholds should be linked to the size of the overall workforce. This is because the threshold equates to a very large number of people in very large employers. However, even under the existing threshold, employees are often able to satisfy the threshold if employees really want a works council established. This is because requests for employee representation often follow trigger events causing employees to be dissatisfied and galvanised to take action.

Question 44 – Is it necessary for the percentage threshold for implementing ICE to equate to a minimum of 15 employees?

- It would be sensible to address this issue only once a decision has been made on the wider issue of thresholds addressed in Question 43.