tssa

Department for Business, Energy & Industrial Strategy
Transparency Consultation
1st Floor, Spur 2
1 Victoria Street
London
SW1H 0ET

22nd May 2018

Sent by email to: increasingtransparency.consultation@beis.gov.uk

Dear Sir or Madam,

RE: GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES CONSULTATION ON TRANSPARENCY RECOMMENDATIONS: TSSA RESPONSE

Please find enclosed the response of the Transport Salaried Staffs' Association (TSSA) to the above consultation.

TSSA welcomes the opportunity to contribute to the Government's consultation on this issue. We are an independent trade union with approximately 20,000 members throughout the United Kingdom and Republic of Ireland. Most of our members work in the UK rail industry in management, technical, professional, supervisory, retail and administration functions. TSSA is recognised for collective bargaining purposes across the rail industry, including by Network Rail and many of its contractors, the train and freight operating companies, Transport for London and London Underground as well as Northern Ireland Railways (Translink). TSSA also has similar arrangements in place with travel firms like Thomas Cook, ferry companies like Stena, etc.

TSSA policy is determined by our Annual Conference that comprises delegates from our Branches throughout the United Kingdom and Ireland.

Introduction

TSSA believes that transparency in the UK labour market should be enhanced in many ways.

All workers and employees whether under a under a contract of employment, a contract to perform work personally, who work for an agency or are fully and properly self-employed (as opposed to being in a sham SE position) should be absolutely clear what they are expected to do for the employer, and under what pay, terms and conditions their work will be rendered. Such clarity would avoid the necessity, should a dispute arise, for litigation in a tribunal or other court.

In response to the specific consultation questions, we would comment as follows:

Section A - written statements

Questions for employers

Question 1: Have you provided a written statement of employment in the last 12 months to:

a) **Your permanent employees**

Yes

b) **Non-permanent staff**

Yes

Question 2: in general, when do individuals starting paid work at your organisation receive:

a) **A written statement**
b) **A contract of employment**

TSSA, as an employer, provides written statements of terms and conditions, and a contract of employment to all permanent and/or fixed term staff on their first day of service. Staff are also provided with hard copies of all policies and automatically enrols staff into the defined benefit pension scheme. In addition, all staff policies are permanently provided on the staff shared drive and any and all changes and new policies are advised to staff.

All new staff are provided with an induction programme relevant to the job tasks and responsibilities they will be required to perform, and can access training and development opportunities through a five-year competency framework.

Varied pattern - **Employers where we have members** vary widely in their size and methods of working. Certainly, the large railways companies, whether in engineering, track construction, maintenance and operating companies tend to provide a written statement of terms and conditions, and a written contract of employment at an early stage in the employment relationship. They also tend to have intranet facilities which can be used for accessing policy advice and direction to employees, workers and agency workers and contractors.

Having said that, due to the substantial (and in TSSA's view, entirely unnecessary) number of TUPE transfer situations that have taken place since railway privatisation it is not extraordinary if neither our members, nor the company they currently work for, have a valid copy of the original documentation nor can they track the agreed variations that have taken place to that contract over the course of their careers.

In the travel sector matters are more diverse. While contracts and statements of terms and conditions are provided by the large, national travel agencies such as Thomas Cook and TUI, the picture can be very different in small and locally based travel agent operations.

TSSA, as employer, uses a limited number of former, (now retired), experienced representatives as sessional case workers. They are paid on a daily basis to support those members who work for small employers, or where our trade union organisation cannot provide a local representative, and they fall into dispute with their employer. They are provided with a written statement before they commence their representation duties for us.

Varied pattern - **Employers where we have members** use many different types of non-permanent staff including agency workers and self-employed contractors. It is not possible for TSSA to give a definitive answer about the variety of practices employed by them since, in the main, they choose not to become union members.

Question 3: How long, on average, would it take a member of staff to produce a written statement for a new starter?

For TSSA as an employer - between an hour and half a day.

Not able to provide an estimate for the employers where we have members, since it is likely to vary widely across the transport and travel sectors.

Question 4: how often do you seek legal advice when producing a written statement?

For TSSA as an employer - on an infrequent ad hoc basis.

Not able to provide an estimate for the employers where we have members, since it is likely to vary widely across the transport and travel sectors.

Question 5: are there other business costs associated with producing a written statement, in addition to personnel and legal costs that we should be aware of?

For TSSA as an employer - no.

Not able to provide an estimate for the employers where we have members, since it is likely to vary widely across the transport and travel sectors.

Questions for individuals

Question 6: if you are an employee, have you received any of the following from your employer:

a) **A written statement**

Yes

b) **An employment contract or other employment particulars**

Yes

Question 7: if yes, when did you receive the following in relation to starting paid work with your employer:

a) **A written statement**

On the first day of starting work

b) **An employment contract or other particulars**

On the first day of starting work

Question 8: if yes, was the information presented in a way that was easy to understand?

Yes, very easy to understand

Question 9: 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.

All staff should be provided with a clear statement of their contractual rights and responsibilities, as well as the terms and conditions they will be expected to work under on day one. Clarity for both parties to the employment relationship from the outset can aid performance and fair and consistent treatment by managers, thus avoiding industrial misunderstandings and disputes.

Where matters and expectations are unclear for employees, and their managers, much time and energy can be unnecessarily expended on trying to sort out what should have happened, or be happening, how, where, and when. Such avoidable confusions and misunderstandings adversely affect productivity and increase the potential for unpleasant atmospheres in the workplace.

A clear understanding by team members of what is expected helps to build effective teams, thereby enhancing overall productivity and promotes employee engagement and commitment.

Question 10: 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 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

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

Yes

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

Question 11: 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 final date of a fixed term contract?**

Agree strongly

b) **How much notice the employer and 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 entitlements?**

Agree strongly

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

Agree strongly

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

Agree strongly

Question 12: to what extent do you agree that the principal written statement should be provided on (or before) the individual's start date?

Agree strongly

Question 13: 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 - especially for pensions information and discipline and grievance policies and procedures.

Questions for employees

Question 14: have you ever worked for an organisation that has not provided you with a written statement of employment particulars within two months of starting your job?

TSSA has supported several members who have not been provided with a statement at all, never mind within the first two months. While it is rare for employees and workers within the large national organisations with whom we deal to be in that position, where it is a small employer with poor or non-existent HR practices, matters can become very fraught. This is because, when a dispute arises, each side is likely to be working on different assumptions about what is "normal" practice and reasonable expectations.

The lack of clarity simply exacerbates an already fraught situation and consequently takes longer for the problem to be resolved, and leaves parties dissatisfied and potentially resentful, whichever way the situation ends.

In such cases litigation is more likely to result, which in turn involves delay, costs and disruption of the work agenda, and may easily affect wider staff morale.

Question 15: if you answered yes to Q14, did you:

a) **Consider lodging a complaint with an employment tribunal (even if you did not end up doing it)**

When cases are referred to TSSA HQ for consideration of referral to solicitors it is standard practice to seek the contract of employment and/or terms and conditions statement. Where one has not been issued and there is another viable claim, then the failure would be included as additional head of claim. That includes notices provided subsequent to a TUPE transfer, of which there have been an inordinate number since privatisation of the

railways - often for no good reason, and always causing unnecessary cost, time and administration.

b) Pursue compensation

Yes - as above, where there is another ET claim. No - where there is no claim since it is not currently separately actionable

Section B - continuous service

Question 16: if you answered yes to question 15b, were you successful in securing compensation for failing to receive a written statement within two months of starting your job?

TSSA has no record of needing to make such a claim.

However, as an ET lay member I have in the past awarded such compensation where a represented claimant had been properly advised that such a claim could be made.

Question 17: 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?

a) Individuals

There would need to be more and better publicity to ensure all individuals knew they were entitled to a statement, and if it were not produced, that compensation could be awarded. However, consideration should be given to ways of achieving that compensation without a full ET hearing. The ET service is intending to digitalise some of its processes and procedures, and this is certainly an area that would benefit from a simple digital process for obtaining the redress that should be awarded to individual workers - workers and employees!

b) Employers

The potential for easily obtained compensation by their workers and employees would concentrate the minds of employers and ensure they comply with their long-established duties. Small employers have trade federations and ACAS from which they can obtain clear advice and there is nothing required within a section 1 statement that they are not aware of when they start to employee someone.

Most large employers with HR staff should have no difficulty in producing the statements. Indeed, there is a valid argument that large employers that fail to provide such information promptly should pay a higher level of compensation because of their neglect.

c) The tribunal service

As indicated above, the digitisation initiative currently taking place could be used to deal with these matters without the need to further burden an already under-resourced part of the civil service.

Question 18: which of the following best describes your awareness of the ACAS guidance on written statements?

As a TU officer and ET lay member I have a good knowledge of the ACAS guidance

Question 19: if you have a good knowledge of the ACAS guidance on written statements, how helpful did you find it?

Very helpful - as most of their guidance is

Question 20: what do you think are the implications for business of the current rules on continuous service?

Employers can game the system to avoid employee and worker employment rights.

The system creates unfair competition for good employers who recognise the benefits of treating staff well, such as promoting high levels of engagements and productivity, and avoiding feelings of resentment and disengagement.

Question 21: if you are employed, or represent employees what are the implications for you or those you represent of the current rules on continuous service?

The current system is weighted against employees. Employers are able to manipulate the system to deprive workers of rights - for example by laying off staff for a month during a year.

Those on zero hours contracts and in agency work are most disadvantaged. Since they are often the most vulnerable workers, they are more likely to need to resort to the benefits system in order to be able to fulfil their domestic responsibilities.

Additionally, in the constant TUPE situations caused by franchising and re-franchising across the railway sector, there is a constant requirement for the transfer of records between the numerous parties that contribute to the service. The most dramatic and recent example, of course, is the failure to properly run the because they put in an unrealistic bid in order to gobble up the route wnen it was passed back to the private sector - having been run perfectly well previously.

A good deal of this process, of course, is designed to try to deny railway workers of their established pension and redundancy rights.

Question 22: do you have example of instances where breaks in service have prevented employees from obtaining their rights that require a qualifying period. If yes, please provide examples.

Transfers between parts of the railway sector has resulted in employees losing their privileged travel benefits.

Network Rail cannot always provide a copy of their employees' contracts of employment. Since they are in the process of transferring their commercial property portfolio to the private sector - a national disgrace for taxpayers - TSSA envisages difficulties for our members in the future.

Question 23: do the current rules on continuous service cause any issues in your sector?

Yes - see above for comments on the continuous TUPE transfers across the railways sector, through franchising and re-franchising between the train operating companies (TOCs), and constant changes to the way Railtrack, previously, and Network Rail, currently, have transferred out parts of their engineering functions and then transferred them back in again.

Question 24: 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?

TSSA supports the TUC four-pronged approach to the reform of continuity rules:

- the test for determining whether continuity is maintained should be reformed to include where a contract exists and/or where the individual works for the employer
- the gap should be extended to two months to ensure that parents of school children are not disadvantaged when they need to take a break to cover the long school holidays
- the reasons for absence from work which do not break (but count towards continuity) should be extended to include:
  - all forms of statutory leave (including all variations of family leave and statutory holidays)
  - the rules on temporary cessation of work should be revised to include where no work is provided by the employer - which will have the effect of stopping employers gaming the system by engineering a break
- absences from work should not break continuity or mean the clock returns to zero. Rather each period of work should count towards continuous service - again having the effect of stopping the system being manipulated.

Question 25: do you believe existing exemptions to the break in continuous service rules are sufficient?

No - they allow for gaming of the system by unscrupulous employers seeking to avoid their responsibilities and mostly affect the most vulnerable workers in the economy.

Question 26: we intend to update guidance on continuous service, and would like to know what types of information you would find helpful in that guidance.

Read examples from case law (plus providing examples from /signposts to further information (and support agencies such as Citizens Advice Bureaux, Free Representation Unit)/information on what to do if you feel your employer has not complied with the law.

Section C - holiday pay

Question 27: do you agree that government should take action to change the length of the holiday reference period?

Yes - TSSA believes a single reference period is too restrictive. The current 12-week period should remain but other options should be available where there have been proper negotiations with the workforce through a trade union, agreement has been reached, and members consulted. For instance, TSSA has negotiated deals with a 12-month reference period - and members are perfectly happy with that arrangement. It provides them with an annual sum - usually just before Christmas that reflects their individual additional earnings over and above their basic pay.

However, we recognise that for some workers in a less secure financial situation that approach may breach the intention of the Working Time Directive (WTD) that nothing should be done to dissuade workers from taking their annual leave since it is a principled matter of health and safety.

TSSA further believes that the full holiday pay should be paid for workers' holiday rights, at the very least, under the Working Time Regulations (WTR), and should not be limited to the 20 weeks under the Directive. Our firm preference, though, is that full holiday pay should be due for all contractual leave on the same rationale as the Directive - that nothing should be done to dissuade workers from taking their full annual leave to allow for recuperation from work place stresses and strains.

Question 28: do you agree that government should take action to change the length of the holiday reference period?

See response immediately above.

It is important not to be prescriptive about the reference period since workers' employment patterns and personal lives are varied and a single formula may lead to disadvantages in many cases. What is good for geese is not necessarily good for ganders!

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

a) **Are they receiving and taking annual leave?**

Those in insecure work such as on zero hours contracts (ZHC) and in agency work are often reluctant to take leave because they are apprehensive that by doing so they will not be offered future work.

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

Agency workers and ZHC workers often receive rolled up holiday pay - which absolutely offends against the health and safety principles behind holiday pay since no work equals no pay for those weeks. Therefore, while their pay slips may say they are receiving holiday pay, in reality, that simply becomes their pay for that week and the most vulnerable, lowest paid workers are simply not going to be able to save the holiday pay element to cover their non-working time.

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

One train operating company has a system of annualised hours for most staff, but holiday periods are allowed within the framework.

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

TSSA believes all workers should be paid to take their annual leave time - whatever that is - in line with the health and safety intentions of the WTD. It is just as important for those in insecure employment situations to be able to take rest breaks from work and spend time with their families, as it is for workers on permanent employment arrangements.

Section D - right to request

Question 31: do you agree that we should introduce a Right to Request a more stable contract?

TSSA believes the right to request is to all intents and purposes no right at all. All the evidence from the flexible working (FKW) "experiment" with the right to request is that employers can use the eight statutory "get outs" to avoid allowing what should be a right to have FWK. All power remains with the employer with a right to request. The employment courts (both lower and senior) have in recent times consistently acted to redress the imbalance in the unequal power relationship - and government should do the same and avoid the need for costly, time and effort consuming litigation.

Zero hours contracts should be disallowed, and workers should be provided with improved rights to guaranteed hours supported by a contract that properly reflects their normal working hours.

TSSA supports the TUC's approach that if the government does proceed with this, then the following safeguards should be put in place:

- no qualifying period because ZHC and agency workers face obvious difficulties in accruing continuous service requirements and however they are set some less scrupulous employers will use them to game the system
- need for a face to face meeting where accompaniment/representation by an independent trade union must be allowed

- employer must be required to provide written reasons and to objectively justify all refusals
- there must be an effective protection from detriment for making a request

The government should also include distinctive rights for agency workers as indicated in the Taylor review:

- as a minimum the agency worker should have the right to request a direct contract with the hirer
- agency workers should be deemed to be permanent employees of the hirer after a given period of time, such as is the case with fixed term contracts
- hirers should be required to review assignments after six months and where there is an on-going need for the work to be done, the worker should be provided with a permanent contract, other than where the agency worker is covering a period of maternity leave.

Question 32: should any group of workers be excluded from this right?

No - all workers should have the right to a guaranteed hours contract/right to request.

Question 33: do you think this will help resolve the issues the review sought to address?

No - see above.

Question 34: should employers take account of the individual's working pattern in considering a request?

Yes - where there is an established working pattern that will either have been set by the employer to meet their needs, or will have been the result of an agreement between the employer and worker. It would be bizarre - and yet another mechanism to game the system - if such an established pattern could be disregarded.

Question 35: should there be a qualifying period of continuous service before individuals are eligible for this right?

No - as detailed above ZHC and agency workers face difficulties accruing continuous service.

Question 36: what is an appropriate length of time the employer should be given to respond to the request?

Less than a month - especially for those in insecure work and who tend to work for short periods.

Question 37: should there be a limit to the number of requests an individual can submit to their employer in a certain time priod?

No

Question 38: when considering request should small and medium enterprises (SME's) be included?

Yes - workers should be entitled to the same rights regardless of the size of their employer. Small employers also recognise the need to treat staff well in order to retain their services, and their commitment to do well for the company.

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

Question 39: are there formal provisions in your workplace for informing and consulting employees about changes that may affect their work?

Yes - TSSA is a trade union and recognises the GMB for informing and our consulting staff.

For TSSA that was initiated voluntarily by us as the employer since it is self-evident that we believe in the principles of trade unionism.

In those companies where we have recognition, being various companies across the whole broad spectrum of the transport and travel sectors we have a variety of recognition and bargaining arrangements. For instance, for some grades in some companies we have joint recognition with the RMT, Aslef and Unite. In some of those companies we have sole recognition for management grades.

Most of those arrangements are historic and stem from the British Rail closed shop position which - quite sensibly - the majority of the companies have not sought to undermine.

Quite recently , now renamed derecognised TSSA for management grades. Inevitably, however, when the franchise is up for renewal and - as is the crazy pattern across the railways since privatisation - there is a TUPE transfer away the company will be required to hold an election for employee representatives for management grades, or they will face the prospect of a protective award claim by our members.

So, instead of being able to deal with trained reps that know what their roles and duties are in relation to a TUPE consultation, the company will deal with, potentially, elected employee representatives that have little or no idea what they are doing. Again, that situation has the potential for a protective award claim where the staff are not properly advised about the situation. If that is not evidence of a short sighted and self-defeating decision, we do not know what is!

Question 40: have you ever requested ICE provisions in your workplace?

See above.

Question 41: how might the ICE regulations be improved?

Lower threshold and higher sanctions.

All available evidence shows that in companies that recognise, and work constructively with, trade unions, pay is higher and less likely to be grossly unfair to women. Health and safety standards are higher, as is staff understanding of the need for H&S requirements. Government should therefore do all it can to encourage and promote union involvement in all workplaces to increase the easily collectable tax revenues due to it, and reduce the impact of sickness absence and NHS resources through the prevention of accidents that serve to put workers out of action at a cost to either the business through contractual sick pay, or the exchequer through statutory sick pay.

Question 42: should the ICE regulations be extended to include workers as well as employees?

Yes

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

There should be no threshold

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

No

Question 45: are there other ways the government can support businesses on employee engagement?

Since it is evident that trade union recognition is good for workers, employees, businesses and government measures that promote and support collective bargaining should be taken. For instance, funding for trade union education of reps should be reinstated.

In addition, the government should consider providing a specific budget to ACAS for them to run a programme of joint TU/management training to explain and support the Code of Practice on disciplines and grievances.

In TSSA's experience, companies across the transport and travel sectors do not properly train their line managers in how to deal fairly with disciplines and grievances. That failure is likely to be reflected in other parts of the economy. Proper line management and rep training can avoid the need for litigation and therefore will reduce the pressure on the underfunded and resourced employment tribunal system.

Question 46: 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?

Initiate joint management/trade union training in employment rights and legislation.

Question 47: what steps could be taken to ensure workers' views are heard by employers and taken into account?

Provide a right of access to workplaces where workers and/or employees request that a union visit.

Extend the right not to be unfairly dismissed to workers.

Reduce the time a worker or employee must work before they have a right not to be dismissed to six months.

Include the right not to be denied representation for the investigation part of disciplinary or grievance proceedings.

Question 48: are there other ways that government can support businesses on employee/worker engagement?

Use the tax system to encourage trade union recognition and collective bargaining. Since, as identified above organised, workplaces have generally better pay and H&S provision, and more emphasis on equality in the workplace, allow a tax incentive for those companies that recognise an independent trade union. However, the tax concession should not be available to in-house employee forums or other sham devises.

Yours faithfully

Employment Rights Advisor on behalf of

Assistant General Secretary