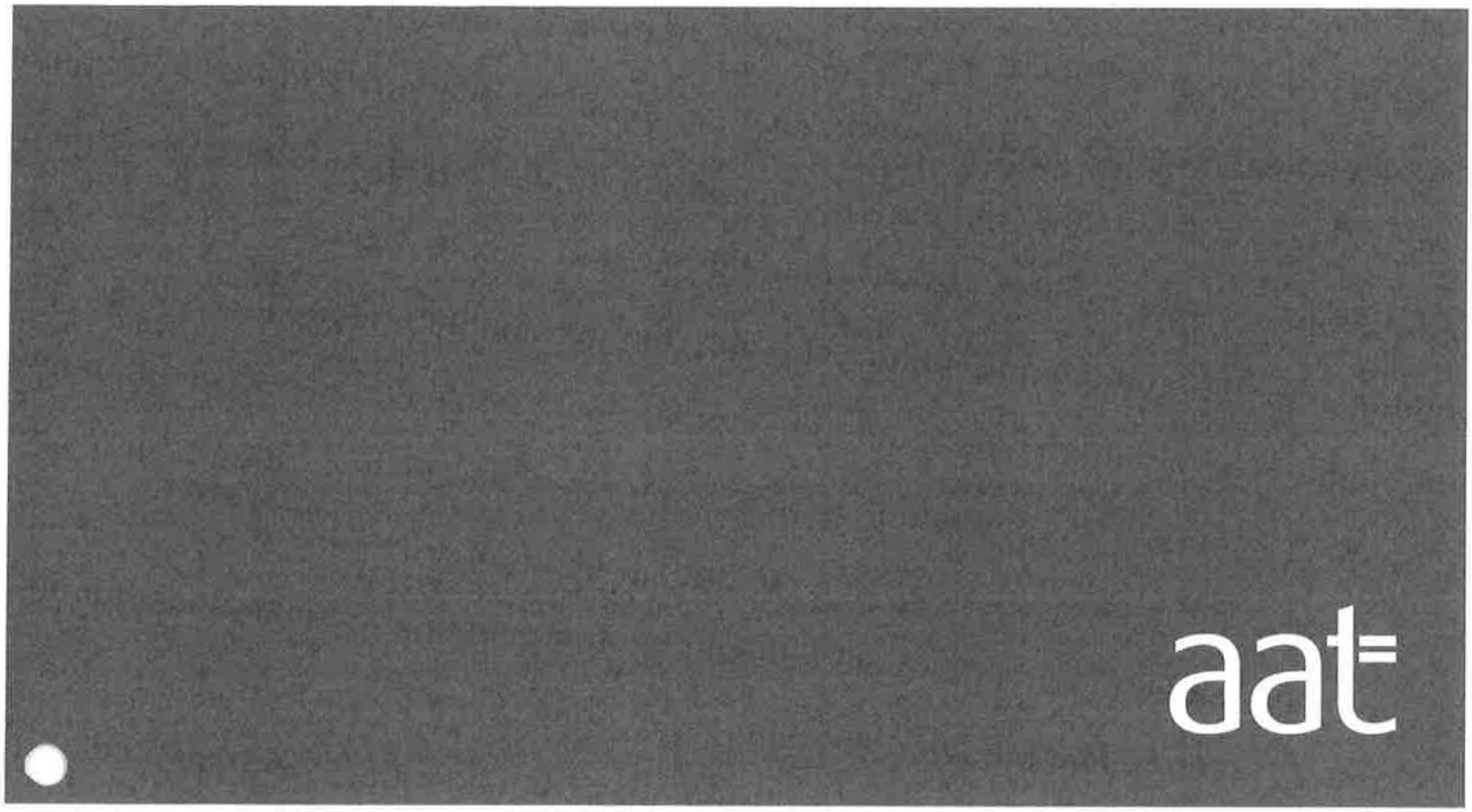

Association of Accounting Technicians response to the Ministry of Justice (MoJ) and the Department for Business, Energy & Industrial Strategy (BEIS)

Association of Accounting Technicians response to BEIS & MoJ consultation on enforcement of employment rights recommendations

1. Introduction

1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to the BEIS/MoJ consultation on enforcement of employment rights recommendations, published on 7 February 2018.

1.2. AAT is submitting this response on behalf of our 140,000 members of which 60% either work for or own their own SME. This includes 4,250 licensed accountants who provide accountancy and business advisory services to over 400,000 British businesses, the majority of which are also SME's.

1.3. AAT has added comment to add value or highlight aspects that need to be considered further.

2. Executive summary

2.1. **Over a third of successful Employment Tribunal claimants never receive any of their compensation and less than half are paid in full.** This undermines public confidence in the system, the authority of the tribunal system and the credibility of tribunals. Fundamentally, it undermines confidence in the justice system.

2.2. **There are various alternative options to the current system that should be considered.** These include the respondent (employer) making an interim payment to the tribunal before a final decision is reached; the State paying the award to the individual and then seeking to recover the costs from the employer (together with enforcement costs) and HMRC being responsible for enforcement rather than the courts system.

2.3. **The respondents time to appeal should be reduced from 42 to 20 working days**. No employer, large or small, requires more than four working weeks to decide whether to appeal an Employment Tribunal decision.

2.4. **A naming and shaming register is a tick box exercise that will have no discernible effect on the enforcement of tribunal decisions.** This is increasingly proving to be the case with National Minimum Wage and has been proven to be ineffective in relation to various other areas of the economy and society.

2.5. **The maximum penalty for aggravated breaches - employers who repeatedly ignore both their responsibilities and the decisions of Employment Tribunals – should increase from the proposed £20,000 to £500,000.** The reasoning for this recommendation is explained in more detail below at 3.33.

3. AAT response to the consultation paper

Do you think workers typically receive pay during periods of annual leave or when they are off sick and are problems concentrated in any sector of the economy, or are suffered by any particular groups of workers?

3.1. The consultation document makes clear that research shows 4.9% of employees and workers receive no paid holidays at all, so by definition more than 95% do. As a result, we are talking about a very small percentage of the business community not conforming to its responsibilities.

3.2. That said, 4.9% of the labour market still amounts to over 1 million people and it is highly likely that the majority of these will be lower paid workers and employees. It is therefore essential that more is done to enforce their rights.

Barriers to payment receipt, state enforcement and simplifying enforcement measures

3.3. Over a third of successful claimants never receive any of their compensation, and less than half are paid in full[1]. The clear majority of those failing to pay are SMEs – who make up the overwhelming majority of employers in the UK.

3.4. If applicants were made aware of these startling statistics in advance of making a tribunal application then it is likely most would not commit to wasting considerable time, effort and money in pursuing a claim, no matter how watertight they feel their case to be. This is especially the case where an employer may be a repeat offender.

3.5. A failure to enforce payment undermines public confidence in the system, the authority of the tribunal system and the credibility of tribunals. Fundamentally, it undermines confidence in the justice system.

3.6. There are a range of different approaches that could be adopted to deal with this problem:

(i) The claimant cannot ask the courts to enforce the tribunals decision for at least 42 days because the employer has 42 days to appeal. This appears to be far too long and should be reduced to 20 working days. Four working weeks is more than enough time for an employer to decide whether to appeal.

(ii) Seeking a penalty enforcement then takes a further 28 days – so the employer currently has 70 days (42 days to wait for an appeal and a 28-day period for penalty enforcement) before they must make a payment – plenty of time for the respondent to find ways of further avoiding their responsibilities and frustrating the system by transferring assets or liquidating their company.

(iii) The penalty fine is equal to half the award that is outstanding at the time the notice is issued but is subject to a maximum of £5,000. There does not appear to be any good reason for this maximum figure being imposed and its inadequacy is highlighted by the fact average awards for almost all Employment Tribunal claims - unfair dismissal, race discrimination, sex discrimination, disability discrimination, religious discrimination and age discrimination - are well over double this £5,000 limit.

(iv) The Fast Track Enforcement process costs claimants £66 with the money being repaid by the employer if successful. Likewise, the local County Court can send an enforcement officer for £44. Given these are often not successful, this means that the claimant has lost even more money through no fault of their own.

(v) Claimants should not have to pay any such fees. Furthermore, they should not have to wait for the State to be asked to act. Instead, if the money has not been paid to them within a reasonable time frame (20 working days), the State should pay the award to the individual and then seek to recover the costs from the employer. In addition, the State should add full enforcement costs to the sum recovered.

(vi) Rather than HMCTS or MoJ being responsible for this, perhaps HMRC should be tasked with the task of recovery through the tax system? HMRC have proven particularly successful at recovering monies owed in other areas and being able to take this money at source may be the most efficient means of doing so.

(vii) Alternatively, without prejudice, the tribunal should be obliged to make a relatively quick decision (14 days) as to whether or not there are reasonable grounds for the case to be considered (i.e. any vexatious or patently unfit claims would be sifted out. Where the tribunal decides there are grounds for a complaint to be heard, the employer could be compelled to make an interim payment to the tribunal. The sum of money payable could be based on the sum claimed but capped at whatever the average awards are for such claims (with the remainder payable if the case is lost and the sum payable is above the average award). For example, £16,500 for unfair dismissal, £6,000 for sexual orientation claims and £30,000 for disability discrimination cases. Where the employer wins the case,

[1] Guardian, October 2016: https://www.theguardian.com/money/2016/oct/15/employment-tribunals-tuc

their money should be returned with interest payable at a rate mirroring the Bank of England base rate. Concerns about money not being available for many years whilst the tribunal considers the case appear misplaced given the average time between starting a claim and receiving a final decision is approximately six months (28 weeks[2]).

Digitisation & Automation

3.7. AAT understands that end-to-end digitisation of Employment Tribunals is supposed to be in place by 2019 anyway and therefore has very little to recommend in relation to areas of digitisation and automation.

3.8. It is widely accepted that the existing tribunal system can be complicated and inefficient with a heavy reliance on paper documents. Sweeping away this reliance on paper and making applications simpler so that applicants can present their own cases rather than having to rely on trade union representation or costly professional assistance (86% of applicants use a lawyer[3]) is most welcome.

3.9. Although supportive, it would be remiss of AAT not to highlight the numerous failures of new Government IT platforms and to highlight the obvious need for thorough user testing before launch.

3.10. Of course, there is a need to maintain a paper route for those with protected characteristics or without access to a reliable internet connection (likely to be only a small number given the Government's legally binding Broadband Universal Service Obligation) as with any other digital service provided by Government.

3.11. Lessons may be learned here from HMRC's £1.3bn Making Tax Digital programme and so AAT suggests that MoJ and BEIS officials should discuss such matters with relevant colleagues in HMRC if they have not done so already.

3.12. Digitisation and automation may make claims less cumbersome, speed up the application process and make the system more accessible but this may not make any difference in the area of enforcement.

3.13. Simplifying and digitising requests for enforcement through the introduction of a simplified digital system are welcome but will not in itself lead to better enforcement. Without fundamental changes to the enforcement system, there is a risk of simply digitising failure.

3.14. Success can only be achieved by making wholesale changes such as those outlined in 3.8 above.

Naming & shaming

3.15. Proposals for a new "naming and shaming" scheme are woefully inadequate.

3.16. There is considerable evidence to suggest that naming and shaming is ineffective e.g. in relation to sexual offenders, high pay and tax avoidance and increasingly in relation to National Minimum Wage (NMW) enforcement.

3.17. The NMW naming and shaming scheme upon which this idea is based has already lost much of its credibility and is no longer seen as much of a deterrent to employers.

3.18. This is primarily because media attention is now exclusively fixed on household names who have made genuine payroll or technical mistakes over trivial sums, pay up immediately and ensure no employee is left out of pocket rather than the real offenders who purposefully avoid paying their staff correctly, often go to great lengths to do so and even when identified will make little or no attempt to repay their staff the monies owed.

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[2] MoJ 2018 Statistics: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667449/tribunal-and-GRC-statistics-Q2-201718.pdf

[3] 2016-2017 MoJ statistics: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644443/tribunal-grc-statistics-q1-2017-18.pdf

3.19. For example, Tesco[4] and Debenhams[5] were "named and shamed" for underpaying staff by an average of £40 and £10 respectively owing to payroll errors, immediately took action to address the problems and repaid staff. They were both included in the list of minimum wage offenders together with companies that had purposefully avoided paying their staff. Likewise, the John Lewis Group found that their use of pay averaging, which spreads pay evenly over the course of a year, meant they were unwittingly in breach of minimum wage regulations[6]. Again, they immediately acted to address the problem and repaid staff when the breach was brought to their attention.

3.20. These are companies that attach great value to their brand image and act responsibly. For them, naming and shaming was doubtless an unpleasant experience. For those who wilfully avoid their legal responsibilities, being named is of little consequence.

3.21. AAT members clearly agree with the above sentiments as almost three quarters (74%) of respondents to the *AAT Minimum Wage Survey 2017* said that they believe companies that encounter genuine technical payroll administration errors, and correct the problem as soon as they become aware, should not be subject to naming and shaming by BEIS in the same way as those companies who wilfully avoid paying staff the minimum wage.

3.22. Less than one in five (19%) believe the current system should be maintained.

3.23. Naming and shaming doesn't affect the worst offenders, it affects those concerned about brand and reputation who are ordinarily at the more responsible end of the business spectrum anyway.

3.24. In summary, a naming and shaming register for companies who have firstly treated their employee/s badly, then failed to make payment despite a tribunal ruling and multiple chances to do so, are hardly likely to see the error of their ways simply because they have been named on an obscure Government web site that few will ever visit.

Aggravated breaches

3.25. AAT accepts that much stronger action should be taken against employers who repeatedly ignore both their responsibilities and the decisions of Employment Tribunals.

3.26. Given a choice, AAT believes that what constitutes aggravated breach should be left to judicial discretion rather than setting out narrow circumstances which offer no flexibility in legislation. Such an approach will avoid frustrations arising where events could not have been foreseen and the law is deemed inadequate as the judge will have the discretion to act accordingly. It is therefore another matter whereby allowing discretion can improve confidence in the capabilities of the tribunal.

3.27. When considering the grounds for a second offence breach of rights, the tribunal should be responsible for providing evidence of a first offence because they should have appropriate records, especially after digitisation next year. In contrast, a complainant may be unaware that their employer has been brought to a tribunal before, whether in relation to a similar case or any other. That said, where a complainant is able to demonstrate that this is a second offence and the tribunal is not, this should still be accepted providing the evidence is robust.

3.28. It would seem sensible that a reasonable time period be allowed when considering if an offence is a second offence i.e. the offences must have occurred within 10 years of each other. Without this mechanism, there is a risk that an aggravated breach penalty is employed despite none of the original individuals being involved and/or despite subsequent changes in ownership/policies/culture etc.

3.29. It is also important that a second offence is broadly defined i.e. it must not have to be identical in every respect to the first claim. Again, judicial discretion here would have benefit and should avoid extensive legal arguments between parties as to the similarities or otherwise of a case. The judge must be able to decide based on the facts before him/her.

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[4] Daily Telegraph, March 2017: https://www.telegraph.co.uk/business/2017/03/09/tesco-hand-back-almost-10m-staff-minimum-wage-bungle/

[5] Daily Telegraph, February 2017: https://www.telegraph.co.uk/business/2017/02/14/debenhams-named-shamed-underpaying-shop-staff/

[6] Financial Times, May 2017: https://www.ft.com/content/e3c0dde6-3497-11e7-99bd-13beb0903fa3

3.30. The figure of £20,000 as a maximum appears to be too low. Whilst £20,000 may cover most cases, where high value cases are considered this figure could be considered somewhat derisory. For example, the maximum compensation awarded for Unfair Dismissal in 2016/7 was £1.7 million and for Race Discrimination was £500,000.

3.31. Whilst aggravated breaches will usually be below the £20,000 suggested, there will be occasions where it is simply insufficient and therefore likely to cause frustration and undermine confidence in the system. To avoid this, a maximum as high as £500,000 would seem more appropriate. Although such a maximum would very rarely be used, in some circumstances it would be appropriate to do so and would ensure the judge possessed sufficient discretion.

3.32. A higher maximum limit in the region of £500,000 may in itself also act as a considerable deterrent to repeat offenders.

3.33. The consultation documents asks whether an aggravated breach penalty, costs order or uplift in compensation is most appropriate to be the strongest deterrent to repeated non-compliance. Rather than choosing one option it would be best to leave all three on the table for judicial discretion.

3.34. In addition, a combination of the three may be appropriate in some circumstances and so it should not be limited to just a single option.

4. About AAT

4.1. AAT is a professional accountancy body with approximately 50,000 full and fellow members and over 90,000 student and affiliate members worldwide. Of the full and fellow members, there are more than 4,250 licensed accountants who provide accountancy and taxation services to over 400,000 British businesses.

4.2. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

5. Further information

If you have any queries, require any further information or would like to discuss any of the above points in more detail, please contact AAT Head of Public Affairs & Public Policy, at:

Association of Accounting Technicians, 140 Aldersgate Street, London, EC1A 4HY