



## **Bar Council response to the Enforcement of Employment Rights Recommendations consultation paper**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to Department for Business, Energy & Industrial Strategy's consultation paper entitled "Enforcement of employment rights recommendations".<sup>1</sup>
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **Consultation questions**

**Question 1: Do you think workers typically receive pay during periods of annual leave or when they are off sick? Please give reasons.**

4. It is right to say that 'typically' workers will receive holiday pay and there is generally a good knowledge of the right to paid holiday. However, whilst there is knowledge of the right, it does not follow that the law is correctly applied by employers. There is both deliberate and accidental non-compliance.

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<sup>1</sup> Department for Business, Energy & Industrial Strategy (2018), "Enforcement of employment rights recommendations".

5. In respect of sick pay, the Bar does not encounter this as an issue as frequently as it would in respect of holiday pay. That is not to say that there isn't an issue, simply that we do not encounter it as frequently as we encounter issues relating to holiday pay.

**Question 2: Do you think problems are concentrated in any sector of the economy, or are suffered by any particular groups of workers? Please give reasons.**

11. There are sectoral issues in respect of holiday pay. By way of example:

11.1. Rolled-up holiday pay is prima facie in breach of the Working Time Regulations. In sectors such as higher education, we have seen rolled up holiday used in respect of hourly paid academic staff. This is because it is seen as more administratively convenient. It has also been used by employers where workers are on irregular shift or other work patterns.

11.2. Workers who undertake work on an ad-hoc basis or with a limited or zero hours contract are less likely to be provided with basic rights such as paid holiday or sick pay. Agency workers would also fall into this group.

**Question 3: What barriers do you think are faced by individuals seeking to ensure they receive these payments?**

12. The starting point with any right should be the ability to access quality advice and to have the ability to take steps to meaningfully enforce that right.

13. It requires repeating time and again that if someone has access to good quality advice they are more likely to take steps to enforce a meritorious right and less likely to take issue on a point without merit.

14. Now that Tribunal fees are gone, there will be an increased opportunity for individuals to take steps to enforce their rights, particularly over holiday pay.

15. Individuals would also benefit from a greater awareness of their basic rights. Campaigns – such as those used for the auto-enrolment of pensions – could usefully be adopted to highlight awareness of the availability of these basic rights to workers and not just those on permanent contracts of employment.

16. Some (though not a majority) individuals take the view that they would rather 'move on' than take steps to obtain sums in the hundreds of pounds. Where an employer is legally represented, the employee can sometimes feel 'at sea' in the

litigation and may be more likely to cease pursuing monies to which he or she is entitled.

**Question 4: What would be the advantages and disadvantages for businesses of state enforcement in these areas?**

17. If the system were to be effective, enforcement by a third party could be cost effective and possibly less stressful for the individual concerned. It would also be an opportunity for enforcement action to be taken on a wider scale.

18. The disadvantage would come from having an ineffective system. There is mixed anecdotal evidence about the current NMW enforcement regime with HMRC. It is possible to find examples where it has worked well, but that inevitably cannot identify the cases that have been missed or not taken up.

19. It would be particularly problematic if an ineffective scheme were set up, underfunded and without the necessary skills. Such a scheme would inevitably miss the good cases and take up time pursuing the bad cases. In short, such a scheme should only be contemplated if it were to be funded properly, continued to be funded, and staffed with knowledgeable individuals. If this was not possible, then it would be better not to have third party enforcement.

**Question 5: What other measures, if any, could government take to encourage workers to raise concerns over these rights with their employer or the state?**

20. The key action points would include:

20.1. Information campaigns

20.2. Access to good quality advice and representation.

20.3. Clear anti-victimisation (detriment) provisions applying to the broader definition of 'worker'. For example, s.45A ERA 1996 applies in respect of a WTR complaint; this could be broadened to cover all basic rights. It would not be extending unfair dismissal protection through the back door as it would only relate to protection for enforcing a basic right and

20.4. Penalties for maverick employers who close down businesses and set up phoenix companies to avoid paying employees.

**Question 6: Do you agree there is a need to simplify the process for enforcement of employment tribunals? (yes/no /please give reasons)**

21. Yes. The fast track system is welcome, but more can be done to promote its availability.

22. There is an underlying problem with enforcement and the methods available to individuals and companies to avoid paying judgment debts. The extent to which a HCEO or administrator is willing to look at assets being transferred from one individual to another or from one company to another is variable. A wider consultation looking at enforcement of Judgment debts generally, directors' duties and insolvency/company law would be worth considering.

**Question 7: The HMCTS enforcement reform project will improve user accessibility and support by introducing a digital point of entry for users interested in starting enforcement proceedings. How best do you think HMCTS can do this and is there anything further we can do to improve users' accessibility and provide support to users?**

23. The link for such a scheme should be prominently displayed when the judgment is sent out. That way both parties will be aware of its existence and the ability to enforce a Tribunal judgment. It may prompt payment from the paying party.

**Question 8: The HMCTS enforcement reform project will simplify and digitise requests for enforcement through the introduction of a simplified digital system. How do you think HMCTS can simplify the enforcement process further for users?**

24. With any digital system, it requires the information entered to be accurate and informative. Users should be able to see the specific stage of enforcement and the specific action being taken. If the update simply states that it is "being enforced", over a period of time, this is unlikely to be of use.

**Question 9: The HMCTS enforcement reform project will streamline enforcement action by digitising and automating processes where appropriate. What parts of the civil enforcement process do you think would benefit from automation and what processes do you feel should remain as they currently are?**

25. It should be possible to process the initial request and to view updates online.

26. A paper system should remain available for those who are not able to use an online system effectively.

**Question 10: Do you think HMCTS should make the enforcement of employment tribunals swifter by defaulting all judgments to the High Court for enforcement or should the option for each user to select High Court or County Court enforcement remain?**

27. The presumption should be for High Court enforcement, with the option to use County Court only if a specific request is made.

**Question 11: Do you have any further views on how the enforcement process can be simplified to make it more effective for users?**

28. No.

**Question 12: When do you think it is most appropriate to name an employer for non-payment (issued with a penalty notice / issued with a warning notice/ unpaid penalty/ other)? Please give reasons.**

29. The period should be sufficient to ensure that anyone who has paid by the deadline is not caught up in it. A date relatively soon after a failure to pay is desirable as the purpose of the measure is to ensure compliance.

**Question 13: What other, if any, representations should be accepted for employers to not be named? Please give reasons.**

30. The main reason advanced will be the suggestion that the case is subject to appeal. It is impossible to distinguish between meritorious appeals and timewasting appeals as only the EAT is in a position to do that.

31. It can take many months for a notice of appeal to be drafted and for it to be initially considered on the sift by the Employment Appeal Tribunal. If a case has got through the sift, an employer should not be on the list until the appeal is determined.

32. Whilst an outstanding appeal does not prevent enforcement of an ET award, it is possible to seek a stay from the civil courts of enforcement pending an appeal. Many individuals who know that a judgment is being appealed do not enforce, as they do not wish to go to the additional costs of enforcing a judgment subject to appeal.

**Question 14: What other ways could government incentivise prompt payment of employment tribunal awards?**

N/A

**Question 15: Do you think that the power to impose a financial penalty for aggravated breach could be used more effectively if the legislation set out what types of breaches of employment law would be considered as an aggravated breach?**

33. No. This is a power that should be used sparingly. It is draconian and sits outside the normal scope of employment rights.

**Question 16: Is what constitutes aggravated breach best left to judicial discretion or should we make changes to the circumstances that these powers can be applied?**

34. It is better that such matters are left to judicial discretion. Since the power is to be used sparingly, the Judge will be able to recognise an appropriately serious case when they see it.

**Question 17: Can you provide any categories that you think should be included as examples of aggravated breach?**

35. Essentially, the power would be at its most effective when used relating to cases of similar fact/repeated breaches, particularly where the remedy available to the Claimant is a declaration but with limited or zero compensation.

**Question 18: When considering the grounds for a second offence breach of rights who should be responsible for providing evidence (or absence) of a first offence? Please give reasons for your answer.**

36. As a general principle, the person making the assertion should be the one required to prove the assertion. This does not prevent the offending party being asked about previous events or being required to disclose such events.

**Question 19: What factors should be considered in determining whether a subsequent claim is a 'second offence'? e.g. time period between claim and previous judgment, type of claim (different or the same), different claimants or same claimants, size of workforce etc.**

37. Different Claimants should not be a distinguishing factor. There will be some mitigation or aggravation in respect of the size of the employer, but this should factor into the general discretion.

**Question 20: How should a subsequent claim be deemed a "second offence"? e.g. broadly comparable facts, same or materially same working arrangements, other etc.**

38. The most compelling factors will be similar facts relating to similar rights. A less compelling but relevant factor would be evidence of wilful breaches of the law, albeit relating to different rights.

**Question 21: Of the options outlined which do you believe would be the strongest deterrent to repeated non-compliance? Please give reasons**

- a. Aggravated breach penalty**
- b. Costs order**
- c. Uplift in compensation**

39. Of the three options, an aggravated breach penalty would be most likely to have an effect.

40. A costs order should remain as it currently is within the Tribunal rules. The circumstances in which a costs order should be made do not need to be confused with the costs associated with enforcement and which are added to the debt. An uplift in compensation would inevitably be linked to the original judgment sum. It would not assist in low value cases.

41. It is worth noting that all three of the options are financial. None of the options address regulatory points such as directors' duties or company law or insolvency points, which may potentially have the greatest effect.

**Question 22: Are there any alternative powers that could be used to achieve the aim of taking action against repeated non-compliance?**

42. Yes. As mentioned above, the financial aspect is only one motivating factor to pay an award. Dealing more robustly with situations where assets have been taken out of the company, directors' duties breached and ensuring that such points have a meaningful route of challenge would be of the greatest assistance.

**Bar Council<sup>2</sup>**  
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<sup>2</sup> Prepared for the Bar Council by the Law Reform Committee.

