



The Taylor Review of Modern Working Practices

Consultation on Enforcement of employment rights recommendations

Department for Business, Energy & Industrial Strategy

February 2018

May 2018

Good Work: The Taylor Review of Modern Working Practices

Consultation questions

Basic Details		
	Your name	Birmingham Law Society Employment Law Committee
	Your email address	info@birminghamlawsociety.co.uk
Stakeholder category		
	Please select the appropriate category from the following list	
	An individual	
	An employer	
	Representing employers' or employees/workers' interests	
	Member of the judiciary	
	Other (please specify)	
	If you represent employers' or employees/workers' interests, are you (select appropriate option)/	
	Legal Representative	
	Judiciary	
	Trade Union	
	Trade Association	
	Charity or social enterprise	
X	Other (please specify)	Law Society - Birmingham representing employees and employers
	If you are an employer, how would you classify your organisation?	Legal Profession
State-led enforcement		
1.	Do you think workers typically receive pay during periods of annual leave or when they are off sick?	<p>Yes</p> <p>Our experience is that whilst employees normally receive holiday pay. Sick pay is a different issue. Employees receive SSP but contractual sick pay will be dependent upon role and seniority and will vary. Workers on the other hand may not always receive SSP</p>

		and holiday pay as there is often a dispute as to whether they fall within the definition of a worker
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	Those working on living wage or zero hours contract concentrated in leisure, retail, private care sector and construction tend to be treated less favourably. . Availability of labour.
3.	What barriers do you think are faced by individuals seeking to ensure they receive these payments?	Difficulty in understanding precisely what they are due. The Working Time Regulations and National Minimum Wage Regulations are too complex. They need simplification. The Working Time Regulations in themselves do not implement the Working Time Directive correctly making it difficult for employer and employee. Often the amount in dispute for workers is not worth the aggravation of raising a claim. There is no statutory certainty around how holiday and sick pay shall be calculated.
4.	What would be the advantages and disadvantages for businesses of state enforcement in these areas?	The critical question is what is the state enforcing. Business needs certainty. The main disadvantage will be the state misinterpreting the legislation as is sometimes seen with NMW enforcement. Further it is in the State's discretion as to what enforcement action they take that can lead to uncertainty. On the positive side it may avoid for the employee the hassle of bringing a claim personally.
5.	What other measures, if any, could government take to encourage workers to raise concerns over these rights with their employer or the state?	Clear, simple and accessible messages as to their rights and ability to enforce eg on line examples/Q and As.
Enforcement of employment tribunal awards		
6.	Do you agree there is a need to simplify the process for enforcement of employment tribunals? Please give reasons	No The existing regime through the County Court appears to work well.
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?	Online enforcement options would obviously assist.

8.	The HMCTS enforcement reform project will simplify and digitise request for enforcement through the introduction of a 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?	No comment.
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 processed do you feel should remain as they currently are?	No comment.
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?	No comment.
11.	Do you have any further views on how the enforcement process can be simplified to make it more effective for users?	No Comment.
Establishing a naming scheme		
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	At the first opportunity when an award could and should have paid and the employer was clearly aware of its obligations and still failed to make payment. Any decent employer would not need to be named as would have paid immediately.
13.	What other, if any, representations should be accepted for employers to not be named? Please give reasons	If they pay within a rescheduled short time period.
14.	What other ways do you think government could incentivise prompt payment of employment tribunal wards?	Penal rate of interest.
Awards and penalties at employment tribunal		
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? Please give reasons	Yes, but not a fine as a penalty but through a mechanism that would pass the money to the Claimant. They have been warned already on the basis of a lost case so if they persist in their practices they should bear the consequences.
16.	Is what constitutes aggravated breach best left to judicial discretion or should we make changes to the circumstances that these powers can be	Yes

	<p>applied?</p> <p>Please give reasons</p>	<p>There will always be circumstances that need to be taken into account but may be guidance at a national level would assist.</p>
17.	<p>Can you provide any categories that you think should be included as examples of aggravated breach?</p>	<p>To be discussed.</p> <p>Any claims that involve an obvious offence and are in effect strict liability e.g deliberate unlawful deductions. Any offence where the employer has deliberately ignored the clear legal position.</p>
18.	<p>When considering the grounds for a second offence breach employment status who should be responsible for providing evidence (or absence) of a first offence?</p>	<p>Claimant will not have it. Employer should be asked to demonstrate it is a first offence.</p>
19.	<p>What factors should be considered in determining whether a subsequent claim is a 'second offence'? eg time period between claim and previous judgment, type of claim (different or the same), different claimants or same claimants, size of workforce etc.</p>	<p>Prior Judgement Factual Similarity Time Period Identity of Employing Entity Structure</p>
20.	<p>How should a subsequent claim be deemed as "second offence"? e.g. broadly comparable facts, same or materially same working arrangements, others etc.</p>	<p>See above.</p>
21.	<p>Of the options outlined which do you believe would be the strongest deterrent to repeated non-compliance?</p> <p>a. Aggravated breach penalty</p> <p>b. Costs order</p> <p>c. Uplift in compensation</p> <p>Please give reasons</p>	<p>All are the same in deterrent terms as they are cost related but in encouraging enforcement it would be b. or c. as they would compensate the Claimant. Of the two c. is preferred on the basis it will go direct to the Claimant and not their representative. Costs has the advantage of not falling within any cap. It may be sensible to specifically make sure that any uplift is outside the cap.</p> <p>See above</p>
22.	<p>Are there any alternative powers that could be used to achieve the aim of taking action against repeated non-compliance?</p>	<p>Personal liability for directors.</p>

14 May 2018

President
Birmingham Law Society

