



Good Work: The Taylor Review of Modern Working Practices

Written evidence submitted by HR-Inform on the enforcement of employment rights

Introduction

We are providing this response to the Department for Business, Energy and Industrial Strategy consultation on behalf of CIPD HR-inform. HR-inform is an online subscription service providing employment law information and practical guidance to help organisations with every aspect of HR throughout the employment life cycle.

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

Yes. In our experience, holiday pay and sick pay are entitlements which are commonly met by employers, particularly larger, corporate employers. Recent developments in case law may mean that employers have not been paying workers 'correctly', however, this is a situation that employers will commonly find themselves in with topics subject to case law interpretation.

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.

With our first point, we may only confirm that workers in the gig economy are susceptible to non-payment of sick pay and holiday pay but this stems, as has been shown in recent press stories, from questions over their employment status rather than an employer purposefully refusing to make these payments. Young employees who are afraid of the repercussions of raising an issue of underpayment may also be disadvantaged. We also think individuals from outside of the UK may be susceptible.

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

The issue of employment status is inherent to the question of entitlement to holiday pay and sick pay and therefore, where there is no clarity on employment status, it follows that these are the areas where the individual may be paid incorrectly. Individuals from outside of the UK may also be a focal area of underpayments where there may be a lack of awareness of UK

law, compounded by problems created where English is not the first language.

In relation to young workers, their lack of awareness of employment rights is compounded by the fact that variable hours are often worked by younger people who are tying part-time employment with education and therefore it may be difficult to keep track of their exact holiday pay entitlements or qualification for sick pay.

Ultimately, correct payment of individuals is the responsibility of employers and the correct payment of individuals is down to their discretion. Whilst we appreciate that some employers, particularly smaller ones, may genuinely misunderstand the law – for example, the law on qualification for statutory sick pay can be complicated for all – we do not accept that this is the case in every circumstance. The largest barrier, then, can be the employer themselves.

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

Making changes to the way that rights are enforced may be confusing for both individuals and businesses. Many are now used to the concept of having to go to Employment Tribunal to enforce rights in relation to their employment and to introduce a new system will require a shift in behaviour and this may be unsettling for some. A new set of paperwork and a new method of processing will represent the unknown.

We would like to ensure that both parties, employers and employees alike, are able to keep their right to representation during the enforcement system. This is imperative for both, and particularly employees, who are often unaware of their rights and require support and guidance throughout the process. Removing this, with the introduction of state enforcement, would be a disadvantage.

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

Mandatory engagement with the employer may seem to be the only method of ensuring that workers speak to their employers first before instigating formal

enforcement measures. Whilst some workers may feel able to raise an issue with their employer, others will not and therefore will always choose an option of enforcement with the least communication with their employer as possible.

Increased awareness of employment rights and the enforcement methods available may help to increase the instances of a concern being raised. Alternatively, the introduction of a new procedure – though not raised as a grievance - which both employees and employers must follow to deal with a concern until a resolution is declared (whatever that may be), which employers must document, may help.

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

Yes. However, this may come down to costs. Requiring a worker to pay a fee to enforce an award which many never be forthcoming – because the employer simply does not have the means to pay without going bankrupt – may be an area to look at because it leaves the worker out of pocket to a greater level. This may deter workers from attempting to enforce the award. It is all fine and well to charge a fee which is “recoverable” from the respondent, however, the fact that the award is not forthcoming in the first place may indicate that the fee may also fail to be recovered.

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 user’s accessibility and provide support to users?

Some workers will need support to undergo the enforcement process and may also need help to understand exactly what it is they are claiming. Complicated payment systems which are often done in arrears and include other elements of pay from other pay reference periods may make it difficult for a worker to make their claim clear. The digital system should allow entry but then the need for human contact after that point is vital.

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?

As stressed in the response to the previous question, the ability to speak to a human after the initial digital entry point is key to a user's confidence that they will be able to explain their claim if they have struggled to make it clear online.

- 9. The HMCTS enforcement reform project will streamline enforcement actions 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?**

As already suggested by the consultation document, automation of initial entry in to the system is appropriate, however, the process should then be taken offline and dealt with by humans who can react to individual circumstances and provide support to both sides during the process.

- 10. Do you think HMCTS should make the enforcement of employment judgments 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?**

We do not see why changes to the current system would be more beneficial. Choice, and familiarity with the current system, are important to the process.

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

Whilst some employers are able to pay an award and choose not to, the situation is not the same for all employers. As we have mentioned earlier, some employers would be faced with financial ruin if they were to make an award payment in one go. Their other employees may go without payment of wages which would merely compound the employer's situation with regard to susceptibility to enforcement action. The ability to make phased payments would ease the burden on the employer, and ensure payment to the worker. However, this should be done on production of accounts from the employer to be able to qualify for phased payments.

- 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.**

We would question the effectiveness of this move. Whilst naming and shaming may be effective when it shows employers who have not paid the

national minimum/living wage, it may not be so for other, less prominent enforcement action such as this. We would question who would be interested in reading this naming and shaming list. However, were it to go ahead, we would like to see a robust filtering mechanism which genuinely takes into consideration the reason for non-payment. In addition, the worker involved should also be involved in the decision making process on who is to be named and shamed; they may have good reason to keep legal proceedings they have been involved in out of the public eye.

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

As mentioned above, the worker involved may have good reasons for their employer to be excluded from a naming and shaming list. For example, they may have family members or close friends who also work for the employer and, whilst they are satisfied to ensure that infringement of their employment rights is resolved, do not wish for any potential negative effect of naming and shaming to affect the continued employment of others.

14. What other ways could government incentivise prompt payment of employment tribunal awards?

As mentioned above, we think the key to overall effectiveness is to ensure that employers are given the ability to pay in ways alternative to a single lump sum. Any default on the payment plan may be dealt with through the courts but delayed – but phased – payment to the worker is better than no payment.

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 an aggravated breach?

Yes. Failing it being set out in legislation, a code of practice could be drafted.

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

We think it should be left to judicial discretion.

17. Can you provide any categories that you think should be included as examples of aggravated breaches?

Where the employer has been told that they have little prospect of success and have been advised to settle a case but have failed to enter into meaningful discussions on settlement.

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.

The claimant should be responsible for demonstrating a second offence, however, there must be a comprehensive publically available source for information to assist with this.

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.

We think this will be a difficult exercise but a second offence should be one where the claim is the same and the facts are the broadly similar, for example, where the claim stems from the same facts as the previous one even though the claim made may be different. We feel that the time period should be taken into consideration but that time period should begin when the decision has been made public i.e. once the legal determination has been made.

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

Please see response to question 19.

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**

We think either a costs order or an aggravated breach penalty would be most appropriate. It is not for the worker to benefit from the fact that the employer has not learnt from mistakes involving previous workers. This may see an inflated number of vexatious claims made against employers.

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

We think the Government's current thinking is appropriate.