



# Good Work: The Taylor Review of Modern Working Practices

Written evidence submitted by Croner Group Ltd

Consultation on enforcement of  
employment rights

## Introduction

This submission to the Department for Business, Energy and Industrial Strategy is made on behalf of Croner Group Ltd. Our organisation is a workplace business partner for thousands of organisations providing award winning support for businesses in the fields of HR, health and safety, tax and Reward solutions. We have been passionate champions of professional management for over 70 years.

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## Consultation Questions

### **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, rights of this type can appear more obvious to employers and are, in some ways, less difficult to grasp than the procedural aspects of employment law which may be involved in, for example, a medical capability or a grievance relating to discriminatory behaviour. They are arguably more of a “yes” and “no” answer than an “it depends on multiple factors” answer.

Our analysis would tell us that the vast majority of workers are paid correctly when we compare the number of queries we receive on holiday pay with the number of claims for holiday pay made against the employers to whom we provide advice. It may seem logical that employers would make the correct choices on paying holiday pay once they have taken advice on this issue, however, we must remember that, despite access to our service, clients still make decisions on many aspects of every day employment law practicalities without seeking advice first.

A separate aspect which this question does not address is whether the correct amount of pay is paid, particularly in the area of holiday pay. This is where employers tend to find the situation more complicated, for example, with zero hours and term time workforce.

### **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.**

As can be seen by recent tribunal claims and issues raised in the press, workers within the gig economy appear to most susceptible to incorrect payment of holiday pay i.e. failure to receive it at all. However, this stems from a misunderstanding/incorrect designation of the status of the individual which employers make which then informs their decision to pay no holiday pay, rather than miscalculating the amount to be paid. However, the Government is aware of this issue and questions on employment status are subject to current consultation. Separately, as previously mentioned, employers can also find the correct calculation of holiday pay complicated with non-standard types of work such as zero hours or other casual workers when a week's pay varies and, also, when elements of pay exist other than standard basic pay.

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

The imbalance of power that is inherent in the employer-employee/worker relationship may discourage the workforce to make an initial complaint to their employer. Many may feel that their job security will be at risk if they question the employer's practices and in order to maintain job security, make a decision to not create an issue.

Sometimes workers are not aware of the law themselves and will therefore not be aware of their rights, or not be confident enough to be able to express them to their employer. Particularly when working hours vary, it can be difficult for a worker to be able to identify whether they have been paid correctly or not. Some will simply choose to take their employer's word for it owing to the fact that they believe a corporate employer must know what they are doing. Similarly, with sick pay, the rules on waiting days, periods of incapacity for work and linking can be very confusing for employees and the difficulty in trying to understand what they should have been paid may discourage any action from them if they have believe they have been underpaid.

Some employees, in our experience, simply do not check their pay slip and are unaware of anomalies until months later.

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

Advantages: There would be a reduction in workload on the employment tribunal which may be preferable due to the increased number of employment tribunal claims in many areas not related to unlawful deductions of holiday pay. It is anticipated that claims will continue to rise and exacerbate the current problems with judge and hearing centre availability.

Disadvantages: An approach which did not require a hearing may have the effect on employers that the enforcement system was not as serious as other employment law claims because there was no requirement to go to 'court'. This may increase the instances of wilful incorrect payment.

The Government would need to consider the cost of resourcing this shift in enforcement system because, in a similar vein to the point made above, workers who may previously have been discouraged from making a claim because it meant attendance at a hearing during which they would have to face their employer in a court type environment may no longer be discouraged. If allegations of underpayment can be reported via a phone line which then leads to the process of state enforcement, it becomes 'easier' and less threatening to instigate a complaint which may lead to an increase in demand on the enforcement process.

Would allegations/concerns of underpayment still need to go through the Early Conciliation process?

Currently, employers are given the chance to make representations at tribunal regarding their actions and the opportunity to do so verbally is an important part of fair justice. Removing this element, essentially making it a paper exercise, would reduce the ability of the deciding body to assess wilful refusal to pay against an accidental and unintended mistake.

The Government would also need to consider whether a fee to raise an issue would be necessary. The introduction of a new mechanism of employment tribunal fee has not been ruled out by the Government: would be same system (if and when introduced) apply to enforcement of holiday pay claims too?

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

It may be difficult to do without significant changes to the current system.

Raising with employers: There is already the right not to be unfairly dismissed for asserting a statutory right but this alone does not prevent an employer from actually doing so. Employees would need to then make a claim through the normal tribunal process to enforce their rights in this regard. One possibility would be a requirement, pre-Early Conciliation, to prove that efforts had been made to address an issue with their employer. Consideration could be given to the threat of a financial penalty, likely to be through a costs order, for failure to attempt to resolve an issue with their employer before taking other action.

Raising with the state: More awareness of employee rights and enforcement methods would increase knowledge that the concept of enforcement of these particular rights exist.

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

A large barrier to enforcement is the ability of a successful claimant to receive their award. Despite more recent measures in this regard, claimants still find themselves without receipt of monies. In many cases, a failure of an employer to pay an award is not through wilful refusal, but an indication that payment of the award would cause significant difficulty for their business to continue operating. The enforcement system at tribunal applies equally to large and small employers but does not take into consideration the vastly different circumstances that small employers can find themselves in when faced with paying a tribunal award in comparison to large employers. Rather than 'simplifying' the enforcement system in favour of employees being able to make claims in a quicker and simpler way, efforts should be put into a system which could bear real results in seeing employees receiving an award they are due rather than further punishing employers financially who cannot afford to pay an award and continue trading at the same time. Phased payment plans are one such option to ensure this.

**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?**

Despite the attraction of moving into a digital world, the government must not forget those who cannot, or find it extremely difficult, to move with technology. Not everyone has access to a computer; not everyone can afford one. Not everyone finds a computer easy to use. By making access to the enforcement system an online only scheme, there is a huge risk of excluding a large proportion of society.

Giving such people another option to access the system is essential, whether that be in libraries, community hubs or at Citizens Advice Bureaux.

**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?**

Where possible, clickable checklists could be used to help users identify the options available to them and which one is preferred. For the initial point of contact, claimant should not need to fill in copious amounts of information.

**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?**

The claim to be made and its surrounding details should be automated.

There should be no automation involved in determining the outcome of a case. Despite earlier comments on the comparable clarity within the employment law system on the requirement to pay sick pay and holiday pay, actual determination of the matters is not an automated exercise. We reiterate here our assertion that physical attendance in a court environment, with the option for parties to be represented and given the opportunity to explain their case, must remain.

**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 think that there is a necessity to change the process from the current one.

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

We refer to the response previously given at question 6. Any kind of system will have more integrity if it removes barriers to the instigator achieving what the system is intended to do. If an employer is held to have breached employment law then the claimant is entitled to be compensated for this. However, barriers in place for employers to pay this money mean that the system will not work, in some circumstances, for claimants and these need to be addressed. There is no real reason why a phased payment system cannot be applied. For example, when future losses are represented in an award, the claimant effectively receives payment reflecting all of the 'future' payments up front. We are not suggesting that payment systems be set up on this logic. However, companies are often faced with bankruptcy because of an award, with job losses as a result. This cannot continue and measures taken to address this will also ensure that successful claimants will receive the compensation due.

**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.**

Not all employers who breach employment laws or do not pay employment tribunal awards are those who 'ignore the law'. This is our greatest concern regarding a naming and shaming scheme for those who fail to pay tribunal awards. We ask that the government consider the following two scenarios:

- A small employer with no specialised HR support who unintentionally breached the law, where the claimant refused to take part in Early Conciliation and is left with serious concerns as to the continued viability of their business if they paid the full award at once.

- A large corporate employer with a comprehensive HR department and extensive administration resources at hand (an aspect which is taken into consideration often by employment tribunals) who chose not to enter into Early Conciliation and wilfully refuses to pay the award which would have no real effect on their annual profit margin.

We do not see the merit in treating both of these scenarios in the same way, and we do not feel that a £200 trigger will provide sufficient protection to the smaller employer.

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

- Where the claimant has not sought enforcement of the award
- Where the employer makes valid representations over the harm that naming and shaming is envisaged to create
- Where the employer is not engaged in economic activity e.g. in receipt of direct payments for care.

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

Recognition needs to be given that sometimes employers cannot pay a full award in a short period of time. While there is an incentive for paying a financial penalty quickly through reducing the amount to be paid there is no such incentive in relation to any award.

If penalties could be reduced further or removed when respondents can demonstrate a willingness to pay but a genuine need to stagger payments then this is more likely to be successful.

No-one benefits if a company goes into liquidation because it cannot meet an employment award. While ideally the claimant will receive the full value of their award, it is better that they receive the maximum possible given the employer's resources. It may be necessary to consider review of an award like a debt to determine if payment can be made in instalments with the potential for some to be



written off if payment is simply not going to be achieved in order to obtain the best outcome.

If the enforcement scheme differentiates between those who are unwilling and those who are unable to pay then it will ensure that any shaming is fixed to those who deserve it.

**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?**

We do not believe that specifics on what constitutes an aggravated breach should be enshrined in legislation. Very careful thought would need to be given to such a list if it were to be sufficiently prescriptive and this may leave the unintended effect of certain breaches which had not been included excluded from scope, even though they may have, on the face of it, warranted inclusion. We think a code of practice may be the preferred vehicle.

**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 note the comments about criticisms of the scheme because it is rarely used. With respect, we would suggest that this is a flawed complaint. Tribunals have discretion to determine where or not a penalty should be applied and the low numbers indicate that the vast majority of employers are not running unreasonable defences so as to warrant an award of this kind. We would contend that the low number of awards indicates that the scheme may be operating exactly as intended, namely a threat to encourage an appropriate response to claims.

If there were high numbers of awards being made, and these were regularly hitting the cap, it would indicate that the current scheme was not acting as an appropriate inducement to approach disputes sensibly. We contend that the data shows the scheme is working correctly and should not be changed.

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

Aggravated breaches should be limited to the unreasonable defence of proceedings in circumstances where the respondent has already been warned of the low likelihood of success or something comes out in the course of the proceedings to indicate wholly unreasonable behaviour.

**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 this: it is for them to establish that a breach may have occurred.

**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.**

The determination should be made on whether the second offence is on the same facts as the first. If not the same, then a broadly similar offence should also count.

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

It will need to consider all the aspects of the case. If the issue of a second offence is being considered then there should be a preliminary hearing to consider the likelihood of that applying with a warning from the judge if there appears to be little or no reasonable prospects of achieving a different outcome the second time that this will be considered a second offence and giving the reasons for that.

If those specified weaknesses lead to the decision against the respondent then consideration of whether or not this should be deemed a second offence should take place.

**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**

Costs order. This will reflect the impact of continuing with litigation where it is not justified and if combined with an earlier deposit order raises the issue sooner with a much clearer indication of how it is likely to be viewed.

There are strict rules surrounding compensation in order to reflect loss. That loss is not increased by the dispute being a second offence and so it is inappropriate to add an uplift. Where the claim is of the type eligible for damages then this can be already be considered.

The costs system is in place to address when a party has acted unreasonably in the conduct of proceedings so that is where this issue should sit.

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

No.