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Good Work: the Taylor Review of Modern Working Practices
Consultation on enforcement of employment rights recommendations

Submission to the Department of Business, Energy, and Industrial Strategy

Chartered Institute of Personnel and Development (CIPD)

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Background

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has over 145,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level.

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Our response

Section A: State-led enforcement

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

1. No, not all workers

Please give reasons

2. We can assume that the majority of UK employees and workers do receive the annual leave and statutory sick pay entitlements to which they are legally entitled. However, the majority of non-compliance in this area is hidden and because the current enforcement regime relies primarily on individuals asserting these rights and seeking redress, non-compliance only comes to light when there is a complaint. Just as there are no official estimates of minimum wage non-compliance[1], it is very difficult to accurately assess the level of non-compliance by employers with the statutory rights workers are entitled to for annual leave and statutory sick pay (SSP). There is very little research in the UK examining unpaid wages and the available official data does not enable us to define the scope of non-compliance. In our view the most comprehensive analysis to date, based on a range of data sources, is the research by Middlesex University[2] which finds 1 in 20 workers receive no paid holiday (4.9% of the workforce). We note the statistics from the HMRC statutory payment dispute team received 3,418 disputes about SSP in 2016/17 (cited in the consultation) but, given our previous point about the majority of non-compliance cases being hidden from view, we suspect that the real extent of under- or non-payment of SSP is considerably greater across the UK labour market.

3. We believe there is a widespread lack of awareness by workers of their SSP entitlements as well as both accidental and deliberate non-compliance on the part of some employers. An Opinium survey of a nationally representative sample of adults by DirectLine in January 2018 found widespread lack of awareness about SSP provision: just 4% of workers knew how much they would receive in SSP if

[1] *National Living Wage and National Minimum Wage: Government evidence to the Low Pay Commission on compliance and enforcement*. July 2017.
[2] *The weighted scales of economic justice*. Middlesex University. June 2017.

they were off work sick[3]. Citizens Advice says it helped people with more than 1,800 problems with sick pay and sick leave in February 2016, 11% more than average for the rest of the year[4]. It points to avoidance tactics by some employers such as cancelling shifts after people call in sick and refusing to complete the HMRC sick pay form, which would make employers explain their reasons for not paying. The TUC's 2014 research based on ONS data estimates that 1.6 million employees received less than the statutory 5.6 weeks' annual leave[5].

2. *Do you think problems are concentrated I nany sector of the economy, or are suffered by any particular groups of workers?*

4. Yes

Please give reasons

5. Employer non-compliance with holiday and SSP entitlements is likely to reflect the sectors that typically employ large numbers of low-paid workers such as those targeted for enforcement of the National Minimum Wage and National Living Wage by BEIS/HMRC in 2016/17 – social care, hair and beauty, cleaning, retail and hospitality. Research[6] identifies the sectors most likely to abuse workers, including by failing to pay wages, as 'sports activities, amusement and recreation', food and beverage services', 'other personal services', 'employment activities' and 'accommodation', to which are added ['based on other London-related characteristics'] 'arts and entertainment' and 'construction'. Anecdotal feedback from CIPD members and labour market experts to help inform this consultation response support this perspective. For definitions of low-paying sectors with a high proportion of occupations or industries comprising low-paid workers based on the SOC and SIC ONS codes see table A3.1 in the Low Pay Commission's 2016 report[7]. This also highlights food processing, agriculture, childcare and textiles and clothing, for example.

6. Some SMEs, particularly very small and newly established companies, that lack access to business and HR support, could also be more vulnerable to non-compliance with basic employment rights including statutory leave and holiday entitlements. We believe, backed up by the view of our roundtable discussions,

[3] *Brits in the dark over sick pay*. DirectLine. 30 January 2018.
[4] *Employers tricking people out of sick pay, says Citizens Advice*. Citizens Advice Bureau. January 2015.
[5] *The gig is up*. TUC. June 2017
[6] *The weighted scales of economic justice*. Middlesex University. June 2017.
[7] *National Minimum Wage Low Pay Commission Report*. Autumn 2016.

that individuals working in small companies that have no HR support are more likely not to have their statutory rights due to lack of awareness and knowledge of employment law in these companies. This is exacerbated by the lack of cohesive local business support available to small and start-up companies in the UK. Additionally, the experience and view of some of our members is that individuals on atypical contracts, particularly zero-hour contracts, have problems in receiving statutory entitlement to holiday pay because it is very difficult to calculate and record the amount to which individuals are entitled because their working hours are irregular. This is not typically due to deliberate avoidance by employers.

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

7. The barriers faced by workers seeking to ensure they receive payments for statutory annual leave and SSP are likely to be very similar to those preventing workers raising other complaints, and we concur with the view of the Director of Labour Market Enforcement[8] who reports on intelligence that workers may not raise complaints because they are:
    - 'unaware of the rules (language/cultural barriers can exacerbate this);
    - in fear of losing their job;
    - unsure of their right to work in the United Kingdom;
    - under duress; and
    - happy with their pay and conditions.'

8. In the view of our roundtables, one barrier is at a state level, with HMRC officials unable to carry out calculations for holiday pay and SSP when carrying out calculations for NMW and NLW. Individuals' statutory rights for holiday pay and SSP should also be included in the proposed new written statement of particulars from day one to help raise awareness.

9. Some of our members also highlighted the practical problems facing individuals, such as those on zero hours contracts often not being aware of what holiday pay and SSP entitlements they have accrued. They also highlighted the challenge in small companies where there is unlikely to be a HR function and therefore low awareness of statutory employment rights. As one member said 'even if an individual is informed enough to ask the right questions about their SSP or holiday pay entitlements, in smaller businesses they're unlikely to get an informed answer.'

[8] *National Minimum Wage Low Pay Commission Report*. Autumn 2016

10. Research for the Unpaid Britain project[9] found that the complexity of the bureaucracy in pursuing cases may also deter recovery action by workers, as well as 'a problem of legitimacy, workers feeling that their employer knows better than them what the legal position is' and a reluctance to pursue employers, particularly while their employment continues. This view was reinforced by some of our members, who emphasised that a vulnerable worker in particular (perhaps on an atypical contract such as a zero hours contract) would be unlikely to raise a complaint if it would risk alienating the employer.

11. If not resolved at a workplace level and there is a dispute between the employee and employer, the main formal avenue available to individuals to ensure they receive these payments is by making a claim to the Employment Tribunal or, in the case of unpaid SSP, via HMRC. However, there are other ways a worker can raise a concern and access advice and/or redress (for example, Acas, Citizens Advice) but we agree with the Director of Labour Market Enforcement[10] that 'the number and diversity of channels may lead to some confusion and the role of the different bodies may not be clear to all workers.'

12. The previous fee regime is also likely to have acted as a significant barrier to access to justice for many of the most vulnerable/low-paid workers enforcing their rights where they would have weighed up the financial viability of submitting a claim, particularly if they claim was for a relatively small amount.

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

13. We agree with the principle that there should be state enforcement in this area rather than relying primarily on individual-based enforcement as is currently the case. A key advantage would be that state enforcement could help to overcome the barriers that vulnerable workers experience in enforcing their rights via an employment tribunal or, in the case of unpaid statutory sick pay, by approaching the HMRC statutory payment dispute team. As such it would provide a more balanced approach to enforcement that covers both individual and state enforcement, with the advantages outweighing any disadvantages such as the additional cost of enforcement to the public purse. Tougher penalties to encourage compliance are to be welcomed but these need to be balanced by

[9] *The weighted scales of economic justice*. Middlesex University. June 2017
[10] United Kingdom Labour Market Enforcement Strategy – Introductory Report. Director of Labour Market Enforcement. July 2017.

adequate investment made available to the enforcement bodies and the new Gangmasters and Labour Abuse Authority.

14. The issue 'of most concern' raised by respondents to the 2015 BIS consultation[11] about tackling exploitation in the labour market 'was about resources', and it was felt that the 'expansion of the Authority's role would be more effective if it was matched by greater resources to enable it to make a greater impact across labour sectors.' We note the Director of Labour Market Enforcement's Introductory Report[12] and the doubling of HMRC's enforcement resources, and we welcome the increase in the number of trained compliance officers but believe careful evaluation of the impact of this increased funding is needed to determine if further investment is needed, in particular to undertake 'pro-active risk-based enforcement' on a big enough scale.

15. A further benefit of stronger state enforcement would be to help level the playing field for businesses, particularly those operating within tight profit margins – companies that diligently comply with employment regulation should not be undercut when competing for business by unscrupulous companies that are able to offer more competitive prices because they are not paying workers the statutory payments to which they are entitled.

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

16. One underlying cause of unpaid wages such as SSP and holiday pay is lack of awareness on the part of both employers (in some cases) and workers in relation to their employment rights, which is also a major barrier for people seeking redress. We believe there should be more investment and focus by Government to raise awareness of employers' compliance obligations, using new and existing communication channels to reach those operating in 'high-risk' sectors of the labour market where employers are most likely to abuse workers' rights by not paying, or under-paying, NMW, SSP and holiday pay.

17. Government, working with organisations such as Acas, Citizens Advice, trade unions and professional bodies, should run a high-profile 'know your rights' campaign (similar to the successful one run previously by Government to promote

[11] *Tackling exploitation in the labour market: government response*. Department for Business, Innovation and Skills. 2015.
[12] United Kingdom Labour Market Enforcement Strategy – Introductory Report. Director of Labour Market Enforcement. July 2017.

pensions auto-enrolment), which would set out information on the employment rights people should expect in relation to the NMW, statutory annual holiday and SSP, as well as where to go if they have concerns or want to make a complaint. The fact that under- or non-payment of these basic entitlements is most likely to affect the low-paid and most vulnerable in the labour market underlines the need for Government and its agencies to be more pro-active in its information, advice and guidance.

18. Although individuals can contact the HMRC statutory payment dispute team if they believe they have not received SSP, we believe that many workers may not be aware of this avenue for redress. We therefore urge the Government to consider more effective ways of raising awareness more widely about this option. For example, HMRC could use any regular communications from an employer to workers via payroll such as a P60 to highlight this provision to raise a concern, or it could be included in the proposed statement of day-one rights that should set out workers' entitlements to holiday and sick pay.

19. It is far preferable to resolve individual disputes such as unpaid pay for annual leave or sick leave in an informal manner at a workplace level by the individual raising the concern with their employer, and there should be greater emphasis on encouraging effective voice for vulnerable workers more widely in workplaces. Hopefully, proposed reform of the Information and Consultation Regulations could go some way to improving the confidence and avenues by which workers can raise concerns.

20. While we welcome the Government's intention to introduce stronger state enforcement for unpaid holiday and statutory sick pay (SSP) for the most vulnerable workers, it is equally important to strengthen individuals' ability to raise concerns with their employer or, if unresolved, with the state via the Employment Tribunal. We note that the Government is considering the Supreme Court ruling of July 2017 that ruled fees were unlawful and urge it to ensure that any proposals for a future fee regime ensures access to justice for all, particularly the most vulnerable workers who are likely to be the lowest paid and least likely to be able to afford to pay a fee to claim a relatively low amount of unpaid pay. And yet it is these workers who are financially in most need of claiming back any unpaid monies owed to them.

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Section B: Enforcement of awards

6. Do you agree there is a need to simplify the process for enforcement of employment tribunals?

21. Yes

Please give reasons

22. While we welcome the streamlining of the enforcement process for payment of employment tribunal awards, we are concerned that the proposals are not wide enough in scope to address the recommendation in the Taylor Review that the process should be simpler, without the claimant 'having to fill in extra forms or pay an extra fee and having to initiate additional court proceedings.' The proposals focus on digitisation of the enforcement process and, although this will be an improvement on the complex paper-based forms for some claimants, enforcement will still essentially rely on individuals paying a further fee and initiating further court proceedings to recoup money that is owed to them as part of a legal judgment. It will also still mean individuals having to navigate the complex different legal routes available and make a decision as to what enforcement option they should pursue. This will still place a significant burden on some claimants even if the Government's enforcement project plans to improve the collection of financial information about the employer. It is not surprising that only a small percentage of claimants pursue enforcement action to recoup their award, having already undergone court proceedings to enforce their employment rights in the first place.

23. The view of our roundtables is that the concerns raised in the Taylor Review require a more fundamental consideration of how the various avenues currently open to claimants wishing to pursue enforcement of their unpaid award could be simplified and/or reduced, and more responsibility taken by the state for enforcement at this stage. For example, it was suggested at one roundtable discussion that a similar approach could be taken to enforcing unpaid employment tribunal awards to that followed for the non-payment of child maintenance by the Child Support Agency. The CSA can officially register the debt which can affect an individual or company's ability to get credit in the future. It can also issue liability orders against offenders potentially leaving to punitive action.

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?

24. The CIPD welcomes developments to modernise the handling of Employment Tribunal claims and any increased efficiency and streamlining of follow up enforcement action that can be achieved for users through greater use of technology. We recognise that the majority of ET applications are already lodged online and many will welcome an improved digital point of entry to start enforcement proceedings. However, the ability of people to access a digital system of justice can be affected by both practical issues – such as lack of availability of high speed broadband connection which is still a significant barrier for significant parts of the country – as well as equality issues where there may be a disproportionate impact, including for some low-income individuals who do not own a computer and/or have internet access. This demographic includes older workers who may not be as 'internet savvy' and people with a disability such as a mental health condition or learning disability who may experience communication barriers. We therefore highlight the Government's previous consultation on Assisted Digital Strategy and its recognition, following the responses received, 'that appropriate targeted support will be required to ensure that those with limited or no digital capability are not disadvantaged', and request that similar considerations are taken into account here.

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

25. Digitisation and simplification of individual requests for enforcement will no doubt improve and streamline the process for some claimants. However, at this point a more balanced enforcement approach could potentially be achieved through the state taking on primary responsibility for ensuring that claimants receive the award to which they are legally entitled following the judgment. We would also welcome a wider consultation on whether or not the range of enforcement options open to the claimant to recover their award could be reduced and/or simplified.

26. When end to end digitisation of ETs is concluded, consideration could be given to centrally recording whether or not awards are paid by the respondent, for example by generating an automatic email to the claimant and thereby enabling a stronger monitoring and enforcement role for the state at this point and not relying

on the individual alone to seek further redress. We understand the data protection implications of including this information on the current online register but the information does not necessarily need to be publicly available.

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?

27. We welcome the Government's intention to establish an interim naming scheme for those employers who do not pay employment tribunal awards within a reasonable time, based on the existing naming scheme for NMW and NLW. On balance, we concur with the proposal that naming is best done at the point that a penalty notice is issued.

Please give reasons

28. With at least 42 days elapsing from the point that an individual has notified BEIS of an unpaid award before an employer is named, this time frame strikes the balance between providing enough time for the non-compliant employer to pay the award and avoid being named, and being swift enough to hopefully allow the individual to recover the award owed within a relatively short timescale.

29. It makes sense to follow the established process already followed by the enforcement regime for non-payment of the NMW and NLW, to help promote consistency of approach. The consultation estimates that establishing the scheme to name employers at the earlier point of when a warning notice is issued would name just a further 3 employers quarterly (compared with naming at the point of a penalty notice), a number that is probably not significant enough to justify adopting a different approach to the current enforcement regime for non-payment of NMW and NLW.

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

30. We do not propose that any additional representations should be accepted for employers not to be named.

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

31. We welcome the intention to introduce the naming and shaming scheme which could act as an incentive to prompt payment by companies whose brand and reputation would be adversely affected by public exposure. However, our panel of members and experts think there are some employers – particularly smaller ones operating on tight margins whose actions are driven more by cash flow and the bottom line than reputational damage – where we doubt there would be the desired behaviour change.

32. In terms of the naming scheme itself, we note the intention to name employers for failing to act under the penalty scheme via a quarterly BEIS press notice on GOV.UK but more consideration could be given to exploring additional channels for more high-profile and targeted publication of named employers, particularly within the local communities within which the company is based.

33. The fact that a long period of time can elapse between the Employment Tribunal hearing and judgment and consideration of the schedule of loss and the Remedy Hearing also doesn't help to instill a sense of urgency in the proceedings on the part of the respondent and encourage prompt payment of the award. We believe that more could be done at the point when a Remedy Judgment is issued to encourage the respondent to pay the claimant the amount owed. Currently, the Remedy Judgment does not even necessarily stipulate the date by which the sum is owed. A further template with a standard form of words could be attached to the Remedy Judgment emphasising the legal status of the award and strongly urging employers to pay within the stipulated timescale, and setting out the consequences and further enforcement action likely to be taken if there is a failure to pay. It could also require the Respondent to inform HMCTS/BEIS when the payment has been made, thereby encouraging a sense of greater accountability by employers.

34. A different template could be attached to the claimant's copy of the Remedy Judgment setting out the respondent's obligation to pay the award and the enforcement methods open to the claimant if the sum is not paid, including contact details to inform HMCTS/BEIS of any non-payment.

35. The proposed reforms in this consultation paper are put forward within the context of the current enforcement regime. We are supportive of improvements and stronger state enforcement action within the existing framework, such as a naming scheme, but would welcome a more fundamental review of the effectiveness and fairness of the UK's two-tier enforcement approach to see if a better balance could be achieved between individual and state enforcement,

particularly where individuals have already taken responsibility themselves to enforce their employment rights and have pursued a tribunal claim. The view in our roundtable discussions was that there is a culture of non-payment on the part of far too many employers who are not fearful enough of the consequences of not paying a tribunal award; more holistic and radical (including legislative) change is needed on a number of fronts to transform this culture. This could include a shift to the state – such as HMRC – collecting the award on behalf of the individual and the money owed increasing if unpaid just as it does in the case an unpaid parking ticket. Also, consideration could be given to encouraging compliance via the public sector procurement supply chain by requiring prospective contractors to disclose whether they have not paid any outstanding tribunal awards or have been the subject of a penalty notice.

36. It was also felt in our roundtables that there should be more focus on compliance by employers with employment rights in the first place, which would free up more resources for the state to focus on the more hardened cases of non-compliance. For example, there needs to be clearer and stronger guidance on basic employment rights for employers and much stronger promotion of the guidance, particularly for new and smaller companies. More resources could be given to promote awareness of Acas and to support its advisory role for employers and disseminate the guidance. Another option could be for Companies House or HMRC to send out clear guidance on core employment rights to any new business that registers.

37. It was also felt that a one-stop-shop giving advice on employment rights and people management could be helpful. CIPD research[13] exploring the value and impact of providing HR support to small firms found that the level of HR and people management capability and knowledge among small firms employing between 1 and 50 employees is typically very basic. The research found that the type of support required by the owner managers of these small firms was typically transactional, for example providing support over terms and conditions of employment and job descriptions. However it was also found to be potentially transformational as it boosted confidence among owner managers and was associated with improvements in workplace relations, labour productivity and financial performance. The research found that face to face advice was particularly valuable, suggesting that while digitally provided information and guidance is useful, owner managers need more bespoke support if they are to engage and change their approach to managing people.

[13] CIPD (2017) People Skills – Building ambition and HR capability in small UK firms.

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Section C: Additional awards and penalties

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?

38. Yes

Please give reasons

39. An aggravated breach involves an employer acting in the knowledge that the action is unlawful and therefore the actions are deliberate; this requires a consideration of the facts and evidence in each case and should therefore rely on judicial discretion.

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

40. We agree with the principle that there should be sanctions if an employer has already lost an employment status case on 'broadly comparable facts' although we believe that it could be challenging to determine in practice what constitutes 'repeated non-compliance'.

21. Of the options outlined which do you believe would be the strongest deterrent to repeated non-compliance?
a) aggravated breach penalty
b) costs order
c) uplift in compensations

41. All three options should be available to the Tribunal Judge to make a decision in each case in terms of the most effective sanction, or combination of sanctions, to be applied but it follows that the option that's likely to be the strongest deterrent is the one that will have the biggest impact, including financially, on the non-compliant employer.

Please give reasons

42. We believe that strong punitive action should be taken against employers where there is repeated non-compliance. We welcome the raising of the aggravated breach financial penalty maximum limit to at least £20,000. How effective this financial penalty will be in motivating non-compliant employers to change their

behaviour will depend on the size and finances of the company – it could represent a significant deterrent to some but pose a financial drop in the ocean to others. It could be more effective to have a sliding scale that bases the financial penalty payable on a percentage of the company's size and/or turnover. Further, the fact that only 20 aggravated breach financial penalties have been issued in the 4 years since their introduction does not suggest that extension of this approach will have wide impact in improving employer compliance. Some evidence suggests that the underuse of aggravated breach financial penalties is partly explained by the fact that it is payable to the state and does not necessarily help to reimburse the claimant for the unpaid award. While we welcome the raising of the maximum limit, we are not convinced that the higher financial penalty will be enough to address these concerns.

43. Cost orders typically require one party to reimburse the other party and have been more widely used by the Employment Tribunal, possibly because the money is paid to one of the parties involved and not the state. Although the average award is £1,000, as the consultation paper notes the maximum value was £235,776 in 2015/15 and so the greater potential financial penalty available under this approach could be more effective in influencing employer behaviour to deter repeated non-compliance. As uplifts in compensation are limited to 25% of the compensation amount and there is no centralised data available on the circumstances in which these have been awarded, it's hard to determine what impact extension of this option would have. Tribunals could be more inclined to award a compensation uplift as the money is payable to the claimant and not the state; however, a very high proportion of tribunal awards are not paid by respondents.

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

44. If an Employment Tribunal makes a judgment in a case where there has been repeated non-compliance consideration could be given to passing the information to the appropriate enforcement body for investigation.

45. On a broader level, the Taylor report highlights the 'accidental non-compliance' that takes place out of ignorance on the part of organisations to give people the statutory employment rights to which they're entitled. The UK's flexible labour market and employment framework has traditionally relied on encouraging good practice by employers; therefore, we would welcome greater consideration [as mentioned in the introductory report of the Director of Labour Market

Enforcement[7]] as to how the UK can develop an enforcement approach that provides more comprehensive information, advice and guidance by bodies such as Acas to help employers develop good practice and avoid non-compliance in the first place

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May 2018