Enforcement Consultation Response

This response has been prepared by members of the Centre for Law at Work at the University of Bristol Law School. We highlight that this consultation should be linked to the strategy of the Director of Labour Market Enforcement: see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf

State-led enforcement

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

Only qualifying employees are entitled to statutory sick pay so many workers will not receive pay during periods when they are off sick. The recent report from the Director of Labour Market Enforcement highlighted the problems of workers not receiving holiday pay. We suspect that the problem relates not only to workers not receiving any pay in respect of annual leave, but also to workers not receiving normal pay in respect of annual leave, as highlighted by recent litigation on this issue (see e.g. *Bear Scotland v Fulton* [2015] ICR 221).

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

Irregular migrant workers often suffer from the underpayment of wages or the withholding of wages by unscrupulous employers who exploit them due to their precarious immigration status. Unlike other European countries such as Sweden, Greece and Poland which have transposed the European Union (EU) Employer's Sanctions Directive, the UK does not enforce the payment of unpaid wages for irregular migrants caught working without the right to work. Any contractual claims made by undocumented workers have also, up until now, been barred in domestic law by the doctrine of illegality on the ground that the contracts were illegal from inception due to the workers' immigration status. As a result of this overarching legal framework, it is therefore possible for employers to extract free labour from those arrested for illegal working whilst avoiding financial liability under immigration law due to their 'cooperation' with the Home Office via reductions to their civil penalties (Home Office, 'Code of Practice on Preventing Illegal Working: Civil Penalty Scheme for Employers' (2014)).

Owing to their undocumented status, irregular migrants are thus prevented from enforcing rights with regards to: unpaid wages; holiday pay; unfair dismissal; or discrimination where this is based on immigration status (see Taiwo v Olagbe [2016] UKSC 31 - notwithstanding the situation of slavery, servitude and forced or compulsory labour under the Modern Slavery Act 2015). In light of the lack of available remedies facing workers who suffer discrimination on grounds of their immigration status, it was suggested by Baroness Hale in Taiwo that Parliament consider broadening section 8 of the Modern Slavery Act 2015 which allows for the reparation of compensation to victims.

Though the UK Government seeks to minimise illegal working within the UK, creating barriers to the enforcement of fundamental labour and other legal rights has the paradoxical effect of heightening the vulnerability of undocumented migrants making them more attractive to exploitative employers (Bales, K, 2017, 'Immigration raids, employer collusion and the Immigration Act 2016'. *Industrial Law Journal*, vol 46., pp. 279-288). In order to counter these issues and reduce the exploitation of irregular migrants, the government should: firstly repeal the criminal offence of illegal working under s24B of the Immigration Act 1971, as inserted by s.34 of the Immigration Act 2016, which also

allows for the confiscation of wages as proceeds of crime; secondly it should transpose the European Union Employer's Sanctions Directive and enforce the repayment of unpaid wages to irregular migrants; and finally, in line with Baroness Hale's comments, the government should consider broadening section 8 of the Modern Slavery Act 2015.

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

Some individuals may be unaware of their entitlements. Employees are entitled to a written statement of 'particulars of employment' within two months of beginning employment. This should include details of their entitlement to sick pay and holiday pay. Consideration should be given to extending the right to a written statement to all workers and from the start date of the engagement. As details of the employer must also be set out in a written statement, this would have the added benefit of aiding enforcement. It is not uncommon for workers in certain sectors (such as hospitality) to have limited understanding of their employer and to name the trading name (e.g. the Red Lion pub) as the (incorrect) respondent. Similar problems are faced by agency workers, who may not know who is the actual employer. This is highly problematic both in terms of deciding whether a claim has been brought against a correctly named respondent and in making any award. In addition, the sanction for non-compliance with provision of a s.1 statement remains inadequate. A declaration alone is a weak remedy, giving little incentive on employers to provide one. The provision in s.38 of the Employment Act 2002 for increased awards where an employer fails to provide a statement is not a sufficient deterrent, since it is of a small amount and is only activated where another claim is brought. We consider that (i) the failure to provide a statement should give rise to a free-standing claim for an award and (ii) this issue, too, should be subject to state enforcement.

It is also important to consider the more routine barriers faced by the most vulnerable individuals accessing the employment tribunal system. Busby and McDermont's 2012 small-scale study of employment tribunal users who had no legal representation (Busby and McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 (2) *Industrial Law Journal* 166) reveals a number of obstacles faced by those with no legal or other representation in navigating the system. Their report evidences, for example, how even routine tribunal correspondence could be difficult for service-users to understand.

In addition to other barriers such as the cost of ET proceedings (estimated at £1,300 before fees according to the Impact Assessment on tribunal fees), claims in the ET are hampered by the short limitation periods and two further restrictions. First, the EAT has held that any gap of three months or more breaks a 'series' for the purpose of a wages claim (see *Bear Scotland*, above); second, s.23(4A) of the Employment Rights Act 1996, introduced in the wake of *Bear Scotland*, limits the period of recovery for wages claims to two years only. Both of these restrictions should be reversed by legislation: they have the inevitable result that any claims for sick pay or holiday pay are only for small amounts, which do not reflect the loss to the worker (and may make the ET a worse option than the County Court).

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

Businesses who do not pay the correct entitlements to sick pay and holiday pay are securing an advantage over those who are compliant. Ensuring that unlawful practices are challenged will help 'level the playing field'.

Having HMRC enforce the basic set of core pay rights will mean that a single body is responsible for enforcement. It is important, however, that this new enforcement model does not prevent enforcing holiday rights through the employment tribunal system.

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

There is a need for a co-ordinated response to this area. Rather than focussing on how individual workers might enforce their rights or feel more enabled to raise concerns, it is important that employers are clear on who is entitled to holiday and sick pay, and how these entitlements are calculated. This is not always straightforward as the recent EAT judgment in *Brazel v The Harpur Trust* UKEAT/0102/17 (calculation of holiday pay for casual workers) showed. Ensuring that employers pay the correct amounts in the first place by the government (or another agency such as HMRC or ACAS) providing timely, accurate and clear information on their responsibilities is essential, supported by a robust enforcement model in cases of default.

Enforcement of awards

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

Yes. According to research conducted for the Department for Business, Innovation and Skills in 2013 (Payment of Tribunal Awards), less than half of survey respondents had been paid their tribunal award in full (49%) and only 16% in part. The most common reason for non-payment was employer insolvency/no longer existing (37%) or refusing to pay (29%). These levels of non-payment clearly make a pressing argument for reform to make it easier for successful claimants to receive the compensation awarded.

The problem of insolvent and phoenix companies should also be considered in any reform proposals. Given the ease by which companies can be incorporated and wound up, consideration might be given to more creative use of company law remedies in this area. For example, in certain circumstances awards might be made against named directors personally even if the directors have not been named as respondents. Company directors who fail to pay tribunal awards (more than once) should be disqualified. Public procurement rules might be strengthened to ensure contracts are not given to companies which have failed to pay tribunal awards. Companies might also be required to demonstrate that they are sufficiently capitalised to meet any responsibilities for pay.

7. **How best can HMCTS introduce digital entry point for users and is there anything further we can do to improve users' accessibility and provide support?**

A simplified, digital single-entry point for users starting enforcement proceedings is welcome but should be supported by a simple, non-digital means of enforcement for those without access to the internet. According to the ONS 2017 Statistical Bulletin on Internet Access: Households and Individuals, 90% of households in Great Britain have internet access. While this means that it is likely that many claimants will have internet access to allow access to a digital entry point, this is not universal. Household coverage depends on age, number of adults in the household, and whether there are children. 12% of households composed of one adult aged 16-64 do not have an internet connection.

8. **How do you think HMCTS can simplify the enforcement process further for users?**

The current model of individual enforcement has a number of weaknesses. Apart from the obvious drawbacks of relying on individuals to police poor employment practice, it generates a significant number of employment tribunal claims with associated costs/delays. Where there is evidence of poor practice from particular employers or industries, power could be given to a suitable enforcement body to conduct an inquiry into that industry/employer to tackle systemic bad practice.

9. **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?**

No response.

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

Default to High Court.

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

The new, simplified process should also be extended to agreements reached via ACAS or by negotiation to settle any employment tribunal claims.

In line with our answer to Question 6 above, when a claim is made against a company, the Registrar (Companies House) should be informed automatically. No action should be taken to wind up a company until any employment tribunal claims have been resolved and awards paid in full.

Establishing a naming scheme

12. **When do you think it is most appropriate to name an employer for non-payment?**

It is not clear why the proposed threshold for naming will be set at awards over £200. If the purpose is to highlight poor practice, it is the fact of non-payment rather than the amount of non-payment that should be made public. Setting the threshold at £200.00 disregards the impact of the non-payment of wages on those with lower earnings.

Naming employers must also be supported by a robust mechanism for ensuring that those arrears identified are actually paid. In response to a question from Caroline Lucas (asked on 23 January 2018 re how many of the 532 civil actions since 2010 have resulted in recovery of NMW arrears) the following response was given by HM Treasury: 'HMRC is unable to provide figures on the civil actions where arrears were recovered, as it does not hold this data in a readily available format.'

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

The proposal that employers will not be named if the award is paid in full bears the risk that employers will delay in making payments only to pay after a penalty notice is served. Consideration should be given to naming at an earlier stage to discourage delaying tactics.

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

The procedure in ss 37A- Q in the Employment Tribunals Act 1996 should be expanded. First, it should become a legal requirement that these provisions are mentioned in the document sending any tribunal judgment or ACAS settlement, warning the employer and notifying the claimant of the consequences of non-payment. Second, it should be a requirement that employment tribunals refer to the provisions when they give an oral judgment and that ACAS refers to them when it settles a case. Third, more information should be provided to claimants about this scheme so that they are more likely to activate it in practice.

Additional awards and penalties

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 could be considered as an aggravated breach?

No. The provision has proven to be irrelevant in practice, since the last thing tribunals wish to do is impose a financial penalty when they are concerned that a claimant may not be paid his or her award. For example, the latest data of which we are aware show that only 18 orders were made in the three-year period since s.12A of the Employment Tribunals Act 1996 came into force: see https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-07-03/2414/. The problem is not the limited penalty: it is the requirement that the breach be 'aggravated', coupled with the fact that the duty is imposed on the ET alone.

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

The better option is that an employer found to have infringed employment rights should pay a financial penalty to the state unless it can show that, for exceptional reasons, no such award should be made (for example, if the point in dispute was a novel issue of law). This was the original aim of the proposal that led to s.12A: see Resolving Workplace Disputes: A Consultation (BIS, 2011), pp 52-3.

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

No; but the requirement of aggravating features of itself makes s.12A almost irrelevant in practice.

18. When considering the grounds for a second offence breach of employment status, who should be responsible for providing evidence (or absence) of a first offence?

In principle, this should be a function of the tribunal. It would require administrative arrangements to be put in place for a search of judgments after the proceedings. In addition, the tribunal could be required to ask the parties, after judgment has been issued, if they are aware of any similar judgments.

19. What factors should be considered in determining whether a subsequent claim is a 'second offence'?

We doubt there is any simple answer, since claims differ both legally and factually. The formula to be adopted should be something like whether the earlier case was "based on facts or law which were

the same or broadly similar" (similar to the wording adopted, in a very different context, in s.65 of the Equality Act 2010).

20. How should a subsequent claim be deemed a 'second offence'?

See above.

21. Of (a) aggravated breach penalty; (b) costs order; or (c) uplift in compensation, which do you believe would be the strongest deterrent to repeated non-compliance?

A combination of the three. Costs offers the best deterrence where the claimant is legally represented, but offers almost nil deterrence where he or she is not (cf. time preparation orders). All three should be used.

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

Consideration should be given to the routine use of deposit orders in this context.