

Response ID ANON-D3DV-X6NS-Z

Submitted to **Good Work: the Taylor Review of Modern Employment Practices - Consultation on enforcement of employment rights recommendations**
Submitted on **2018-05-13 12:24:24**

About you

What is your name?

Name:

What is your email address?

Email:

Which best describes you?

☐ Representing employers' or employees'/workers' interests

☐ If other, please specify :

☐ If you represent employers' or employees'/workers' interests, are you:

☐ Charity or social enterprise

☐ If other, please specify :

☐ If you are an employer, how would you classify your organisation?

Please type your response in the box below.:

Are you happy for your response to be published?

☐ Yes

Would you like to be contacted when the consultation response is published?

☐ Yes

(optional) How did you hear about this consultation?

☐ Where did you hear of this consultation?:

☐ Email from BEIS

☐ Other (please specify):

State-led enforcement

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

☐ Not Answered

Please give reasons:

The majority of workers do receive pay for annual leave, although this is sometimes in the form of "rolled up" pay, which tends to avoid the incentive to actually take a holiday.

Sick pay, particularly for short periods is dependent on contractual provisions, so does not happen for a substantial number of workers.

2 Do you think problems are concentrated in any sector of the economy, or are suffered by any particular groups of workers? If yes, please specify which sectors/ groups and give reasons.

☐ Yes

Please type your response in the box below.:

Those who are vulnerable because their contractual position does not guarantee work or conditions.

As to sectors, catering and the tourist industry, care workers and cleaners appear to be particularly affected.

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

Please type your response in the box below.:

Fear of victimisation.
Ignorance of rights
Distrust in the system
Lack of legal advice/representation.

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

Advantages:

A healthier, better motivated workforce.
For those employers who comply with their legal obligations, the elimination of the unfair competition in the form of non-compliant businesses

Disadvantages:

Those who fail to comply would face penalties.

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

Please type your response in the box below.:

Provision of helplines to the relevant section of HMRC, confidentiality assured, with adequate publicity back-up

Enforcement of employment tribunal awards

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

Yes

Please give reasons:

My experience made it clear that unrepresented claimants who had been successful were often anxious and confused as to how best to ensure that they received their legal due. They frequently sought advice from the Employment Judge as to how they should proceed. As the tribunal had no role in enforcement of awards, advice on the question was minimal.
More generally, the statistics provided in the consultation document, whilst unfortunately silent as to the reasons for failure to receive awards, provide a powerful inference that the current system is woefully deficient in achieving the aim of providing an effective remedy for those whose employment rights have been breached. Those treated unjustly as a result include those represented as well as those unrepresented.

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?

Please type your response in the box below.:

This technical response, whilst it may assist in speeding the process, falls well short of the recommendations of the Taylor Review. Those recommendations are clear, and are dealt with further in the answer to Question 8

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?

Please type your response in the box below.:

The recommendations of the Taylor Review were for the enforcement process to involve:

1. no extra fee
2. no extra form
3. no additional court proceedings.

It is obvious that the proposals set out for comment in these questions do not meet 1 or 2, and it is doubtful whether they meet 3.

What is required in order to ensure effective enforcement of the awards (which will have already been the subject of judicial determination) is a "One Stop Shop". The employment tribunal is the forum which is already engaged in the process, and it should be entrusted with the enforcement of the award.

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 processes do you feel should remain as they currently are?

Please type your response in the box below.:

The improvements made by these technical reforms will inevitably be limited. Further, it does appear that the specific problems identified in relation to employment tribunals are being ignored by the strategy of dealing with them as a (very minor) part of reforms to the "civil enforcement process" as a whole. Surely the focus of the consultation should be on the specific issue identified by Taylor, and the proposed solution, rather than subsuming it in a very general technical project?

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?

Please type your response in the box below and explain your answer.:

If HMCTS ignores the Taylor proposal and persists with the status quo as far as the forum for enforcement is concerned, the option should remain.

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

Please type your response in the box below.:

In line with previous answers, the process should be simplified by putting it within the remit of the Employment Tribunals. In order to carry out this remit, ETs would need to be given direct access to the enforcement machinery used by the courts, and the resources to deal with it. Any additional expenditure would be met by a reduction in usage of the machinery by the courts.

This consultation should have focussed on the solution put forward by the Taylor Review, and the mechanisms by which it should be achieved. No reason seems to be given as to why it has instead effectively been confined to the technical reforms of the civil enforcement process as a whole. The Taylor recommendations are quoted, and then ignored.

Establishing a naming scheme

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

Issued with a warning notice

Please give reasons for your answer and if other please specify:

Naming should take place at a relatively early stage in order to have maximum effect. The award is, after all, payable within 14 days. The successful claimant may already have had to wait a substantial time before the hearing and judgment.

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

Please type your response in the box below.:

None additional to those specified

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

Please type your response in the box below.:

See answers to other questions, particularly 6 to 11

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?

Yes

Please explain your answer:

Guidance would be of assistance to employers, and would have some effect in deterring them from illegal practices, whether deliberate or grossly negligent. It is difficult to say whether such guidance would be more appropriate as secondary legislation, or in the form of an explanatory note to it. I would tend towards secondary legislation.

Whichever way it is done, the guidance should not be exhaustive, because it is impossible to prophesy the ways in which aggravating circumstances might occur. Hence, some formula such as "including but not limited to" would be appropriate.

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?

Yes

Please explain your answer:

It is best left to discretion, because of the difficulty in predicting exact circumstances of aggravation - see answer to 15.

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

Please type your response in the box below.:

- deliberate or malicious breach
- repeated or lengthy breach against an individual
- numerous breaches against different individuals
- victimisation of those complaining about the breach
- substantial resources of employer

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?

Please type your response in the box below and explain your answer.:

Bear in mind that the employer is the party which will have first-hand knowledge of whether it has been found to have breached employment status. In many cases of course, the employee will also be aware of such a breach, but in other cases (particularly against larger employers) he or she will not have the requisite knowledge.

It would be wrong for an employer to be obliged routinely to provide evidence of the absence of previous offences.

If the tribunal is (or could reasonably become) aware of a previous breach, that will settle the matter.

If not, then a workable compromise might be for the employee to trigger an enquiry with some evidence (not necessarily convincing or conclusive). The burden would then pass to the employer to prove the absence of a breach of employment status.

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.

Please type your response in the box below.:

The crucial point is that the prior breach is in relation to employment status. Has the employer committed such a breach or not? The type of claim is not necessarily determinative e.g. the first offence could be in relation to holiday pay, the second in relation to national minimum wage. In each case, the employer has relied unsuccessfully on 'self-employed' status. That would be a 'second offence'.

As to the time element, the relevant point would be whether there was a swift effort to resolve the deficiency after the first offence.

The aggravation would be present regardless of whether the claimants were the same, or the size of the workforce.

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 type your response in the box below.:

I think both of the suggestions are relevant so a formula such as "broadly comparable facts, including materially similar working conditions" might be appropriate.

21 Of the options outlined which do you believe would be the strongest deterrent to repeated non-compliance?

Uplift in compensation

Please explain the reasons for your answers:

We have a system which is (at least to some extent) adversarial. Employment Judges, whilst they will look into circumstances where feasible, are greatly assisted by arguments on the part of the parties.

There is a clear incentive for the claimant (or representative) to seek out the information, and argue about it, in favour of an uplift. This is reflected in the appreciable number of cases where an uplift is sought and granted in relation to unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures by virtue of s 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. There is every reason to think that a similar provision in relation to repeated employment status breaches would be an effective aid to enforcement.

It is worth emphasising that the three options are not mutually exclusive. In particular, costs can be awarded for pursuing a case with no reasonable prospect of success, or where a case is conducted unreasonably. The loss of an employment status case on broadly comparable facts certainly has the potential to fall within either of these categories.

As to aggravated breach penalty, the statistics quoted tend to the conclusion that the option is not a popular one, but there would seem to be no real argument against an increase in the maximum penalty to £20,000 as mentioned.

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

Please type your response in the box below.:

Clear guidance from BEIS and from Acas would reinforce the message.