

The Chartered Society of Physiotherapy consultation response – implementing employee owner status.

To: Paula Lovitt MBE  
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1. The Chartered Society of Physiotherapy (CSP) is the professional, educational and trade union body for the UK's 51,000 chartered physiotherapists, physiotherapy students and support workers.
2. The CSP welcomes the opportunity to respond to the proposals published in the consultation document "Implementing employee owner status".
3. Our response is focussed on the areas of the consultation on which we feel we can most effectively contribute to the debate. We would be pleased to supply additional information on any of the points raised in our response at a later stage.

### **Introduction**

4. The Chartered Society of Physiotherapy has over 51,000 members. Over half of our members are employed in the NHS with the others working in a number of other settings such as private practice, private hospitals, charities, the Ministry of Defence and many as self employed practitioners.
5. Physiotherapy enables people to move and function as well as they can, maximising quality of life, physical and mental health and well-being. With a focus on quality and productivity, it puts meeting patient and population needs, and optimising clinical outcomes and the patient experience, at the centre of all it does.
6. The CSP will respond to the consultation in the format set out in your own consultation paper although we will not seek to provide responses to all questions. For your ease of record we will respond using the numbering system set out in your consultation document.

**Question 1 – How can the government help businesses get the most out of the flexibility offered and the different types of employment statuses?**

The question is ill thought through, it is never a good idea when looking at a relationship to focus on how one party can benefit without looking at the impact and fairness on the other party. The status of a worker or employee is something that is determined by the nature of the relationship and obligation between the parties, this question suggests that it is merely a matter of choice by the "employer", this is not the case.

**Question 3 – What restrictions, if any, do you think should be attached to the issue of shares or type of shares?**

For the scheme to be meaningful in creating "employee owners" the shares must rank on par with other shares in issue, to allow restrictions to the share capital to render them non voting shares, non dividend shares or any other restriction could easily render them both useless and worthless at the ending of the employment contract.

Shares issued that do not have the same dividend and voting rights as other shares or have restrictions on who would be able to purchase the shares when the employment ends would have little or no value and would render the scheme little more than a charter for exploitation.

**Question 4 – When an employer buys back forfeit shares, should this be at the full market value or some other level (e.g. a fraction of market value) should some other level be allowed in certain circumstances?**

It is difficult to understand why this question would be asked, what other valuation could possibly be used other than the full market value; this is the valuation that would be used to allot the shares at the start of the employee ownership contract.

If an employee is being asked to forfeit employment rights on the basis that they are a part owner in the business how could a valuation that was not the market valuation of the part of the company the employee owns be considered?

If shares were to be issued with restrictions on voting, dividends, ability to sell or future redemption value, the serious implications of these restrictions would have to be explained to the prospective employee before the contract could be entered into. The complexity of the advice and serious implications of the restrictions would mean that this advice would need to be given by a qualified financial advisor regulated under the Financial Services Act.

**Question 5 - How should a company go about carrying out a valuation of the shares?**

Only a full independent valuation of the value of the equity could ever be an acceptable measure. The employee owner is by right of this proposal a part owner of the business. Therefore a valuation carried out by the majority owner or someone not impartial of the process and the company would just lead to dispute and litigation in the future.

There would also need to be an independent valuation at the time the shares were issued at the start of the relationship. Unless the company is already floated in a recognised market a company would not be giving a sum of money to a prospective owner employee but a part of the company, for this to equate to an agreed sum of money an independent valuation would have to take place at that point.

**Question 6 – The government would welcome views on the level of advice and guidance that an individual might need to be fully aware of the implications of taking on employee owner status.**

The proposal is one where an individual would agree to sign away statutory rights to their potential detriment, this is a situation that already exists in employment law and is dealt with by independent legal advice.

The requirement for independent legal advice would have be the same in this case as the implications for the employee are the same. It is also essential that a prospective owner employee is given independent financial advice, without this level of advice any agreement could not be considered valid.

**Question 7 – What impact will allowing individuals limited unfair dismissal protection and equity shares have on an employer's appetite for recruiting?**

None. Small business owners and start-up companies are unlikely to give away parts of their business under this scheme. Larger companies and poor employers may see this as an inexpensive way to be able to deny employment rights would not employee any extra people because of it.

**Question 8 – What benefit do you think introducing the employee owner status with limited unfair dismissal rights will have for companies?**

Large companies with poor practices and lamentable employee relations history may well adopt such a scheme to enable them to carry on poor practice but this will not increase employment or aid flexibility. We can see no benefit for other organisations.

**Question 10 – What impact, if any, do you think the employee owner status will have on employment tribunal claims e.g. for discrimination?**

Experience has already shown us that employees who are badly treated yet denied the right to a fair process will seek to have their complaint heard by other recognised statutory means. If this proposal goes ahead and employees are denied the right not to be unfairly dismissed we would expect the same patterns to emerge and claims to arise via discrimination, public interest disclosure, or health and safety routes.

**Question 13 – What in your view, would employers do if employees wish to return early without giving 16 weeks notice?**

Employers will base any decision on the individual needs of the company at that time.

**Question 15 – What effect will a compulsory 16 weeks' early return notice period have on the length of maternity/adoption leave that mothers/parents will take?**

Such a provision is likely to extend the total time taken out of the workplace for maternity leave.

**Question 17 – What impact do you think these proposals would have on employee owners to access support and training?**

Employees will be aware that under this provision they could be dismissed for asking for access to training. This is likely to lead to a less well trained and suitable workforce.

**Question 19 – The government welcomes views on particular safeguards that would need to be applied in order to minimise opportunities for abuse.**

To stop the introduction of the "employee owner" classification leading to systematic abuse by poor employers a number of safeguards must be put in place.

1. Employees must have the absolute right to choose if they wish to have employment rights or to take the option of shares.
2. The decision to offer the employee ownership contract should not take place until an unconditional offer of employment has been made.
3. A right to claim unfair dismissal must be available to new employees who are dismissed for refusing to sign away their employment rights.
4. Full independent valuations of the company and independent financial and legal advice taken by the prospective employee owner prior to any rights being waived.
5. Shares must be issued on par with other shares in circulation and following a full independent valuation of the company, any other valuation will lead to this system being used as an obvious method for tax avoidance by companies "employing" their family members and giving them shares that will never become liable for Capital gains tax.

We would hope that this potential opportunity for abuse would have been looked at in some depth prior to the consultation being issued but there is nothing in the guidance or consultation document that seeks to address or allay these concerns. If nothing is put in place to address this issue we would expect this to be a well used method for tax avoidance in small businesses.

**Question 21 – What impact do you think the proposal will have on labour market flexibility- that is in relation to hiring people and letting them go?**

Very little to none



**Question 23 – What are your views on the take up of this policy by**

- a) Companies**
- b) Individuals**

A – Companies - as previously stated we see very little take up in the stated target market for this policy and would only expect it to be used by unscrupulous employers if proper safeguards and protections are not put in place.

B – Individuals - limited take up

**Question 25 – Thank you for taking your time to let us have your views. Would you like us to acknowledge receipt of your response?**

Yes- Please acknowledge receipt of our response.

For further information on anything contained in this response or any aspect of the Chartered Society of Physiotherapy's work, please contact:

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## REPRO DTP

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**From:** Barry Smith  
**Sent:** 07 November 2012 15:42  
**To:** Employee Owner Status Consultation  
**Subject:** TRIM: BIS Consultation - Implementing Employee Owner Status

**Follow Up Flag:** Follow up  
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**Attachments:** EmployeeOwnerConsultationResponse.doc  
**TRIM Dataset:** M1  
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**TRIM Record URI:** 13444013



EmployeeOwnerCo  
nsultationRespo...

Dear Madam

I refer to the above consultation and attach the response from GMB trade union.

I would be grateful if you would confirm safe receipt.

I have also sent a hard copy by post.

Many thanks and best wishes

Barry Smith  
GMB Legal Officer

GMB National Office  
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London  
NW1 2HD

(See attached file: EmployeeOwnerConsultationResponse.doc)

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**GMB**

**RESPONSE TO CONSULTATION ON IMPLEMENTING EMPLOYEE OWNER  
STATUS**

GMB, Britain's general union, represents over 600,000 members throughout the UK in both the private and the public sectors. We have members working in the following areas of:

Financial, commercial and professional services

Clothing and textiles

Construction

Furniture Manufacturing

Energy and Utilities

Engineering

Food and Leisure

Process Industries

Public Services

## Voluntary and Community/Third Sector

GMB welcomes the opportunity to respond to the consultation. GMB is fundamentally opposed to these proposals which allow employers to trade key employment protection rights for shares. This is an unjustified attack on employment protection rights. GMB calls for the proposals to be abandoned.

GMB is a TUC affiliated union, and draws attention to the evidence and information provided by the TUC in the TU response. GMB, like other trade unions, is a not for profit organisation, and exists to protect and support its members. GMB does not believe that removing employment protection rights will lead to growth. GMB believes that the evidence indicates that improvements in employment rights are accompanied by growth.

GMB has a number of major concerns about the "Employee Owner Status" proposals as follows;

### *The Lack of Consultation, Evidence, and Support*

GMB is opposed to the way in which these proposals are being rushed through. GMB opposed the introduction of No Fault Dismissals and understood that BIS had decided to drop them due to a lack of support and evidence that weakening employment protection would lead to business growth. However, GMB was, like most parties, taken aback when these proposals were announced "out of the blue" a month later by the Chancellor on 8 October 2012. The BIS Consultation started on 18 October 2012 with a closure date for responses on 8 November 2012! These proposals are being rushed into legislation via the Growth and Infrastructure Bill (itself only laid before Parliament on 18 October 2012)

and before public consultation has taken place.

There has been no examination of the impact of the proposals for employees, employers, or the wider economy. The BIS Consultation paper contains a brief and inadequate equality assessment, but no wider impact assessment. These proposals have not been subject to the level of scrutiny that ought to apply to such measures.

GMB notes that that there has been widespread condemnation of these proposals across the economy, and it is difficult to find even support from the employers' side. The Chief Executive of J Sainsbury was reported as saying at a recent retail conference that trading employment rights for company shares is

*"...not what we should be doing...What do you think the population at large will think of businesses that want to trade employment rights for money?"*

The Law Society Gazette editorial of 11 October 2012 commented:

*"George Osborne's espousal of two-tier employment rights sets a worrying precedent – that those without money and status should be encouraged to 'trade in' legal entitlements that ought to be universal in any civilised society. It is analogous to paying the poor for their organs...."*

### *Trading Rights for Shares*

GMB believes that far from creating a new form of employment status these proposals simply remove key rights from employees in exchange for company shares valued at between £2,000 and £50,000. GMB believes that it has been universally accepted for many years across all parties that it should not be possible to buy-out employee rights. Legislative provisions designed to offset the imbalance of power between employees and employers have been put in place.

These proposals give effect to aspects of Beecroft by removing unfair dismissal rights from the "employee-owners". Employers will be able to sack employees without following a fair procedure or without have a reasonable reason for doing so. Employers will only have to avoid dismissal for automatically unfair or discriminatory reasons. Following changes in April 2012 employers now have protection against unfair dismissal for the first two years of employment.

GMB notes that any payment made to an employee owner will depend on the value of shares at the time of dismissal, which will allow employer to manipulate the date of dismissal as being when shares have fallen in value or become worthless. This is by contrast to the discredited No Fault Dismissal proposals which aimed to set a figure for compensation for dismissal.

The loss of the right to a statutory redundancy payment will be unacceptably significant. Taking the example of an employee on average earnings 41 years of age who has worked for a company for 10 years, would receive a statutory redundancy payment of £6,450. If the same person had £2,000 worth of shares they would need to see a more than threefold increase in the value of their shares to receive equivalent compensation.

Business statistics indicate that business failures are at record levels and that less than half of new businesses survive over 5 years. Yet the Government says that the proposals are targeted at smaller businesses and new start-up companies. When a business fails, shares are likely to be of little value, but employee owners will not be able to claim payment from the Redundancy Payments Office. Current limits apply to other debts that might be recoverable from the Redundancy Payments Office such



as limited holiday pay, and unpaid wages, and recovery of any excess from the assets of the business is likely to be fraught with difficulties.

GMB is concerned about the proposals to extend the maternity notice period to 16 weeks and to exclude employee owners from the right to request flexible working. The extended maternity notice period is unlikely to assist employers and is likely to encourage women to take longer periods of leave or decide not to return from maternity leave if their return is made more difficult. The exclusion from the right to request flexible working runs against the argument put forward by Government that this should be a universal right which benefits all parts of society and the economy as a whole.

#### *Existing Employee Share Ownership*

There has long been a legitimate role for employee share ownership, but this has never been predicated on the loss of employment protection rights. There is presently a consultation taking place, the Nuttal Review, on Employee Ownership, which contains no mention of the present proposals. The Nuttal review was launched in July 2012 and no suggestions were made that employee rights should be traded when the Review was announced by the Deputy Prime Minister. The present proposals are likely to undermine and create confusion amongst all parties about employee share ownership schemes generally. As far as GMB is aware, there has been no call from companies that use existing employee share ownership schemes for the present proposals. Indeed GMB understands that the Employee Ownership Association has been critical of the proposals.

#### *The Value of Shares*

The target audience for these proposals appears to be "fast-growing small and medium sized companies and new start-up companies". Such companies can find their fortunes fluctuating very quickly, and there is a significant risk that shares will fall in value. Thus an employee who has traded in their rights for shares could find them to be worthless, and find that they have no entitlement to a Statutory Redundancy Payment. Such employee owners could therefore be dismissed with virtually no compensation and face a struggle to cope financially following this.

### *Tax*

The Government has indicated that gains on shares would be exempt from Capital Gains Tax (CGT). As GMB understands it, gains of up to £10,600 are exempt from CGT. An employee owner receiving £2,000 worth of shares would have to see a fivefold increase in the value of their shares before CGT is incurred. Unless individuals are given substantial numbers of highly valued shares, there is unlikely to be any benefit to most individuals.

As GMB further understands it, there are existing employee share schemes which allow employees to gain shares without paying income tax on those shares or national insurance. Employees' allocated low levels of shares are likely to better off receiving shares through an existing approved employee share ownership plan.

The response now goes on to consider the specific questions in the consultation.

## **Employment Status**

**Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment status?**

GMB believes that the Government should be working to address the exploitation of vulnerable workers and not promote more insecure employment. GMB believes the Government should address:

- The increase in the use of "zero-hours" contracts, which is particularly marked amongst women workers
- The increased use of bogus self-employment which allows unscrupulous employers to save on National Insurance and employee benefits such as holiday pay, sick pay, and pensions. There appears to be a marked increase amongst women workers, and in some industries, such as construction the problem is long-standing and endemic
- The increased use of casualization and bogus self-employment deprives many of basic and universal rights including unfair dismissal, redundancy, and family friendly rights
- The association between so called "self-employment" and low pay: the median income for self-employed workers has fallen from £11,300 pa in 2001 to £10,300 pa in 2010 (seeTUC submission)

GMB calls on the government to abandon the present proposals for employee owners and to address the above issues which will encourage the development of high productivity and high trust workplaces

**Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?**

Please see our answer to Question 1 above.

**Question 3: what restrictions, if any, do you think should be attached to the issue of shares or types of shares?**

GMB notes that the consultation paper indicates that such shares would exclude dividends, voting rights, or rights to a share in the assets of the company if it is wound up. This seems to completely undermine the claim that employees would have a stake in the company, as employees would have virtually worthless benefits in exchange for trading employment rights.

**Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (e.g. a fraction of market value) should some other level be allowed in certain circumstances?**

GMB believes that this proposal further undermines the credibility of the employee owner scheme. The idea is that the employer could buy back shares from the employee owner for less than their market value, and this illustrates the hypocrisy of the scheme: workers give up valuable employment protection rights but are not entitled to the full value of the shares when leaving. In addition, it is unclear how shares would be valued, which taken together will be likely to encourage disputes and litigation. It is also likely to encourage manipulation and exploitation of vulnerable employees.



**Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative cost impact be for a company if an independent valuation was required?**

GMB remains opposed to the employee owner scheme, but believes if it is to proceed that it is essential that there is an independent valuation of shares both at the beginning and the end of the contract/employment relationship. GMB believes that the independent valuation should be guaranteed by the Government.

**Question 6: The Government would welcome views on the level of advice that individuals and businesses might need to be fully aware of the implications on taking on employee owner status.**

GMB believes that, given the dramatic departure that these proposals have from universally accepted employment rights, that a significant level of advice will be required, both legal and financial. Employees will be asked to forgo long established statutory employment protection rights in return for shares that are likely to be of limited value. Employee owners will:

- Be vulnerable in times of lay off or insolvency
- Be at risk of leaving with little or no compensation
- Be vulnerable to arbitrary dismissal
- Lose rights to request flexible working, training, and restricted maternity rights
- Be vulnerable to negative impact on their careers and livelihoods

- Be at a disadvantage when predicting the prospects for the company and the potential value of shares

GMB is opposed to the proposals but believes that if they do proceed, given the above, that new and existing employees are given independent legal and financial advice before signing contracts. The contract should not come into force before the advice has been obtained, and the costs (not the source) of the advice should be provided by the company.

GMB fears that in many instances there will be no real choice for the employees if the employer decides to adopt the proposals. For new recruits the employee owner contract will be offered on a take it or leave it basis, and similarly for existing employees there will be little to stop an employer from "offering" the arrangement which they may feel pressurised to take if the employee wishes to retain their job.

There is nothing to prevent an employer from dismissing existing employees and offering them new employee owner contracts. If the employee refuses it would be uncertain whether a tribunal would conclude that this was unfair or not, but in practice the employee would be out of a job with a potential remedy sometime after the event.

GMB draws attention to the European Convention on Human Rights and notes that the loss of such rights would be likely to breach the Convention where there was no such informed choice to trade in employment protection rights. As a minimum GMB believes that it should be automatically unfair to dismiss an employee for refusing to accept such a contract or to subject them to any detriment.

## **The employment rights excluded from employee owner status**

### **Unfair Dismissal**

#### **Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?**

GMB believes that the proposals will have minimal positive impact in terms of encouraging recruitment. As the TUC has pointed out, the evidence from the Small Business Barometer published in October 2011, and the ONS Access to Finance Statistics, does not identify unfair dismissal rights as obstacles to growth. The factors identified include matters such as the state of the economy, obtaining finance, taxation, cash flow, competition, limited demand, and so on, with little focus on the employment law regulatory framework. As GMB understands it, in research conducted by BIS, unfair dismissal rights does not feature highly in the list of factors of concern to business. The recent Call for Evidence on compensated No Fault Dismissal led the Government to conclude that dismissal/disciplinary action featured as a factor in a very small number of responses being 0.4% of responses overall. GMB further notes that the UK already has one of the lightest employment regulated economies in the Western World.

#### **Question 8: What benefits do you think introducing the employee owner status with limited unfair dismissal rights will have for companies?**

GMB does not believe that there will be benefits for business. The response from business so far has not generally been supportive of the proposals, as this recent quote from the CIPD indicates:

*"...it is highly doubtful whether inviting employees to sign away basic employment rights will deliver the motivated, driven, high performing workforce that small firms need. Existing highly successful mutually owned firms do not thrive on employee ownership alone, but on the high trust, high engagement, all-pulling-in-the-same-direction cultures have. Employee ownership works best where it is accompanied by great management, rather than enhanced job security"*

GMB believes that the proposals will encourage bad practice and demoralise the workforce.

**Question 9: Do you think these benefits will be greater for larger, smaller, or start-up businesses?**

GMB believes that the proposals are bad news for employers of all sizes. The response from business has reflected the concerns that GMB has that it will severely damage public confidence in business, as highlighted by the comments made by the Chief Executive of J Sainsbury (see our introductory comments at page 3 above).

It is doubtful whether small firms will be able to raise the equity to run the scheme, and shares offered to employees are likely to be of limited value. For larger employers GMB believes that they will be reluctant to operate the scheme because of the impact on their existing share structures and the likely de-valuation of investments. GMB stresses the likely reputational damage for the economy as a whole in providing for such a scheme to be permissible.

**Question 10: What impact, if any, do you think the employee owner status will have on employment tribunals, e.g. for discrimination?**

GMB believes that the proposals are likely to spark litigation in other more complex areas such as discrimination, automatic unfair dismissal, and breach of contract.

There are likely to be disputes over the value of shares in the ordinary courts. This will all be more costly and time consuming for all concerned including the courts and tribunal systems.

### **Statutory Redundancy Pay**

**Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start-up businesses? What negative impacts do you anticipate and how might these be mitigated?**

GMB believes that it is wholly wrong to remove these long standing employment rights. There are likely to be few employees who will be attracted to such an arrangement and such businesses will struggle to recruit and retain high quality staff. One of the long-standing rationales for redundancy pay is to provide employees who lose their jobs and job security with some form of financial protection in order to protect them and to benefit the wider economy. The proposals will remove this, and GMB remains opposed to such a step being taken.

## **Maternity Leave Notice Periods**

**Question 12: what impact will this change to maternity notice period have on employers?**

GMB believes that women will face a particular adverse impact in this area. The long notice requirement will make it more difficult for them to plan their return to work. Arrangements for child care and so on are not always easy to put in place, and it may take time to agree arrangements with the employer. This position is exacerbated by the proposed exclusion from the right to request flexible working.

The 16 weeks' notice requirement of a return to work may mean that the return to work will be delayed or, may discourage the return to work at all. Evidence obtained by the Equal Opportunities Commission in 2005 indicates that women, who believe they have been treated unfairly during pregnancy or maternity leave, are far more likely not to return.

The experience of GMB is that most women give an indication of a return to work before taking leave to enable the best planning for all concerned. The present 8 statutory notice period is sufficient to enable proper planning and respecting the need for women and their families to make appropriate child care and other arrangements.

**Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?**

GMB believes that few employers would see an objection to allowing the employee to return to work early without giving 16 weeks' notice. Cover arrangements in most cases are unlikely to require 16 weeks' notice to be brought to an end.

**Question 14: How will these changes impact on a company's payroll provisions?**

GMB believes that the proposals will not have a beneficial impact on payroll provisions. GMB fears that bogus schemes may be established whereby employee owners are employed by a payroll company and then go to work for a larger and separate company which may be more profitable than the payroll company. GMB believes that such arrangements should be barred.

**Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?**

GMB believes that this may encourage longer leave. It will leave less time to plan for the return to work and may discourage return entirely. Families are unlikely to be in a position to determine childcare arrangements at a very early stage and confirm the actual return date.



## **The Right to Request Flexible Working**

**Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?**

GMB opposes the proposal to remove employee-owners from the right to request flexible working. This is at odds with stated Government policy to encourage flexible working (see Paragraph 41 of the consultation paper), and against the evidence provided to the Government in the consultation in 2011 on Modern Workplaces. The evidence highlights the benefits for all concerned of flexible working. The current arrangement is in any event limited only to a request to consider, and this is not an over burdensome obligation. It will encourage employers to believe that they can disregard a request without having regard to the implications of discrimination in cases such affecting disabled employees or a request to return to work after maternity leave. The separate legislation affecting disability and sex discrimination will rightly continue to exist in order to provide protection for these vulnerable groups. The position is likely to be confusing for all concerned.

## **Right to Request Time to Train**

**Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?**

GMB believes that training is a crucial element in building a strong economy but cannot understand why the proposal removes the right to request training from employee owners. For the employee owner they would lose rights to a yearly

meeting with the employer to discuss training needs, to request financial support flexible working to accommodate training needs.

In our experience training proves successful. Most employers appear to understand and accommodate the requests, and there is little by way of litigation in the tribunals over the issue. GMB fears that removing these rights will encourage employers to ignore training needs with all the negative consequences this will have for the wider economy. GMB notes that the right to request time to train only applies to employers with 250 or more employees, and the proposal to remove these rights from employee owners suggests that the proposals are also aimed at larger employers. This is at odds with Government statements the employee owners are aimed at small and medium fast growing businesses.

## **Implications for other aspects of law**

### **Company law**

**Question 18: Do you have any comments on the Government's intention not to amend Company law to implement the employee owner proposal?**

GMB notes that the consultation paper does not address a number of key issues reflecting the rushed nature of the proposals. It is not clear whether employee owners would have to comply with securities market regulation, and the relationship with company law and related provisions.

Some companies have a complex corporate structure with corporate groups, holding companies, private equity holdings. It is not clear in which body the shares would be given, and if so how they could be valued at dismissal.

## **Tax**

**Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.**

GMB believes that the proposals will encourage tax avoidance and abuse. It will allow employees who presently receive shares as part of their employment package to reduce Capital Gains Tax liabilities if shares are sold. GMB opposes this.

GMB also fears that individuals setting up new companies may classify themselves as "employee owners" with a view to making avoiding tax on future gains entirely. GMB opposes this and believes that the only way to avoid this is to withdraw the proposals in their entirety.

**Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved.**

GMB believes they should remain in place and should continue to apply whether the takeover means that employee owners are given the opportunity to regain their employment rights a part of the takeover.

**Question 21: what impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?**

GMB believes that weakening employment protection and unfair dismissal rights further will not boost growth. The UK is already lightly regulated, behind third the USA and Canada amongst more prosperous countries. As GMB understands it research indicates that employment protection does not have a detrimental impact on employment. Removing workplace rights encourages insecurity, inequality, and poverty. This in turn impacts on the confidence of consumers and demand with wider negative impacts in the economy as a whole. Few employers, according to research conducted by BIS, appear to view employment protection as an obstacle to growth and recruitment. Economic specialists, such as CIPD, question the impact of employment protection on growth, and the Government recently concluded that the proposals for No Fault Dismissal lacked evidence to support their impact on the UK labour market (and the Business Minister Jo Swinson commented in the context of the debate on the Enterprise & Regulatory Reform Bill “...*the proposals in the Beecroft report would have removed at a stroke the employment rights of 30 million individuals...*”, Hansard 17 October 2012) The same arguments apply to employee owners and GMB calls for the plans to be withdrawn.

**Question 22: Would you be likely to take up the new status? What would the impact of the statement be on your business?**

GMB believes that there will be very little take up of this practice by enlightened employers (see for example the comments by CEO Sainsbury in question 7 above).

There are also numerous practical problems and it is likely to be costly to set up and to administer.

However GMB fears that the new status will be exploited by unscrupulous employers who see it as a way to avoid employment responsibilities. This is likely to lead to workplace bullying and mistreatment.

For most employees the scheme will be unattractive and not worth trading valuable employment rights for. GMB fears that the arrangement will be presented to employees with no choice on whether they take them up or not.

**Question 23: What are your views on the take-up of this policy by:**

**a) companies?**

**b) individuals?**

Please see our answer to Question 22 above.

**Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?**

The Equality Impact Assessment is unsatisfactory:

- There is little consideration of the impact on particular groups of excluding employee owners from the right to request flexible working
- There is little focus on part-time working, and the differences between men and women in this regard (BIS research indicates differences between men

and women arise in terms of the uptake of requests for flexible working and the importance to them of flexible working, with women valuing flexible working more highly)

- It ignores the fact that they are likely to lead to women taking longer maternity leave than otherwise might be the case and to discourage them from returning to work

GMB is also concerned that there has been no Impact Assessment on the proposals, highlighting how rushed and ill-thought out the present proposals are. The proposals ignore the evidence and research obtained by the Government and in wider research. In particular the proposals follow on within a month of the decision by the Government not to proceed with the Beecroft No Fault Dismissals. The Government response concluded “...*there is insufficient support and evidence that NFD (No Fault Dismissal) would have a positive impact on the UK labour market*”. The same applies to the Employee Owner proposals and GMB calls on the Government to abandon them.

**GMB**

**National Office Legal Department**

**November 2012**







**ASLEF Response to the BIS Consultation on Implementing Employee  
Owner Status – November 2012**

1. The Associated Society of Locomotive Engineers and Firemen (ASLEF) is the UK's largest train drivers' union representing approximately 18,000 members in train operating companies and freight companies as well as London Underground and light rail systems.
2. ASLEF believes that the proposal to create an "Employee Owner" status for workers by attempting to persuade or force staff to forgo basic employment rights in exchange for shares is entirely wrong, counter-productive and will leave the British workforce vulnerable as well as creating an enormous sense of instability.
3. At the outset, ASLEF would like to state its opposition to the view that less employment regulation and a greater ability to fire employees assists economic growth. The consultation echoes the views of the OECD who assert that the UK has the third least regulated workforce in its membership. BIS suggest that this is a strong reason for the workforce "performing well."
4. However when considering at the OECD table there appears to be no link between low employment protection better employment rates as the table below demonstrates.

Countries with stronger employment protection according to OECD and lower unemployment rates than the UK	Countries with stronger employment protection according to the OECD and higher unemployment than the UK
New Zealand	South Africa
Australia	Ireland
Japan	Denmark
Switzerland	Hungary
Russian Federation	Slovakia
Israel	Estonia
Chile	Poland
Sweden	Italy
Iceland	Slovenia
Korea	Portugal
Netherlands	Greece
Brazil	France
Finland	Spain
Czech Republic	Turkey
Austria	
Belgium	
Germany	
India	
Norway	
China	
Indonesia	
Mexico	
Luxembourg	

5. The table shows that only Canada and the United States have less regulation than the UK. They have unemployment rates of 7.4% and 7.8% respectively. This is similar to the UK's current rate of 7.9%.
  
6. There are clearly many macroeconomic factors that affect unemployment rates but ASLEF finds it very difficult to find any evidence to support the Government's assertion that less employment protection leads to stronger employment rates. This view is, in fact, contradicted by the above table in fact suggesting otherwise.

7. ASLEF also opposes the premise that fear of being taken to an employment tribunal is a genuine reason for firms failing to employ people. We'd point out that increasing the time period during which staff are entitled to claim for unfair dismissal has already instantly excluded 3 million workers from protection. Employers are now able to dismiss employees for any reason (other than automatic unfair dismissals) for a two year period. This already seems extremely flexible.
8. Also the Government should reflect on how onerous unfair dismissal cases brought to tribunal are for British businesses. In 2011/12 there were 46,100 unfair dismissal claims with the vast majority of these settled, withdrawn, dismissed or struck out with only 11,200 proceeding to a hearing. Of those cases the majority lost with only 5,100 being upheld.
9. It should also be remembered that of the 5,100 cases which were upheld, 2,600 claimants were awarded no compensation at all. That means that the majority of cases that were upheld by a tribunal received no redress. Despite the employer being guilty of unfair dismissal they owed no financial award to the wronged party.
10. In the instances when compensation was awarded, the actual amounts granted were extremely limited. Of the 2,300 cases that did receive compensation the median figure for awards was just £4,560.
11. Most people going through this process just want to have their job back. It's self-evident that financial compensation is of limited use to those who need employment in order to pay the bills going forward particularly in an economic climate with such a scarcity of jobs. The average employee would feel that the best remedy in unfair dismissal cases would therefore be reinstatement yet this happened in just 5 cases or 0.01% of all cases lodged. That is about 1 in 10,000.

12. ASLEF does not believe that the current situation makes excessive demands on employers. It must also be remembered that the statutory redundancy payments are capped at £12,900 for staff working 20 years or more.

13. ASLEF does not believe that British employers must be freed from the shackles of overly onerous employment protection and are unable to employ staff for fear of expensive unfair dismissal claims or redundancy pay. This notion is far removed from the reality in which most British workers find themselves.

14. It should additionally be recalled that successful unfair dismissal claims by their very nature suggest unfair treatment of an employee. As previously stated, current provisions allow employers to defend their actions very successfully. To remove the right of an employee to have any response to unfair treatment is always wrong. An individual treated unfairly should always be supported by the state to have redress. Otherwise it stands to reason that unfair action will spread.

15. ASLEF believes there are many anomalies and complications that these proposals will lead to and many supposed benefits appear to be spurious. The consultation makes frequent mentions of the "greater attachment" to the success of the worker's employer due to the stake that they own in the company. In fact the document goes further by explaining that "employee owners will find it easier to discuss working patterns with their employer because they have a vested interest in the business." The suggestion appears to be that because the employee owns between £2,000 and £50,000 of the business they feel they have a stake in the company. But the simple reality is that this will be a tiny proportion of the company's wealth with many companies being valued in the tens of millions, or indeed billions of pounds.

16. Additionally, all types of shares will be eligible which means that employee owners may not have rights to dividends, voting rights or rights to a share in the company's assets if it is wound-up. The idea that staff will automatically have a greater attachment to the company due to owning some shares is therefore disingenuous. The shares may therefore be second rate shares with fewer rights than others.
17. Moreover the employer would be allowed to include a clause in contracts which requires the employee to surrender their shares when they leave, are sacked or made redundant. In return the Government will force the employer to buy the shares back at a reasonable value. ASLEF is not clear what reasonable value means in this context?
18. Most redundancies arise as a result of financial difficulties faced by the employer. It is therefore highly likely that should a member of staff face redundancy, the share price of the company will be extremely low leading to the individual having given up redundancy pay whilst having to sell shares of a very low value. This would be an unacceptable situation
19. Currently, many employers offer staff share schemes such as Share Incentive Plans, Save As You Earn Schemes, Company Share Option Plans and Enterprise Management Incentive Schemes. These are offered without the need to forgo employment protection. ASLEF feels that in the future, employees who were going to be offered these benefits may be asked to give up rights and become "Employee Owners" where they previously would not have needed to.
20. By taking away an employee's right to claim unfair dismissal the Government would be giving the employer increasing power to take advantage of staff. Employers already have the ability to make unreasonable requests to workers with the workforce knowing that the threat of dismissal is constantly hanging over them.

21. The consultation actually addresses many of the ludicrous scenarios that could arise from the new scheme. Not only could an employee's request for flexible working be rejected for any reason, "it would not... be automatically unfair for an employer to dismiss an employee owner who requests flexible working." In short a person who has been a long standing member of staff who may need to work flexibly due to caring responsibilities could be sacked for simply having the temerity to ask for flexible working to be considered.
22. It is inevitable that less scrupulous employers will begin to offer posts under this new basis. For a relatively small cost of a modest amount of shares they will be able to hire and fire at will with the result that the balance of power will swing strongly in favour of employers with staff having little or no powers to redress wrongdoing by their bosses.
23. Removing the right to redundancy pay would also be bad news for the taxpayer. Very often it is redundancy pay that helps workers to get by when looking for a new job. Although all workers who are made redundant would automatically be entitled to Job Seekers Allowance, any hardship that derives from a lack of redundancy pay (and the sale of shares from an underperforming company that are worth very little) could lead to many more workers requiring means tested benefits. In other words the burden goes from the employer to the state to look after individuals who lose their jobs.
24. ASLEF does not oppose employee ownership as a concept and would indeed promote it in many industries. The union agrees that employees with a stake in the success or failure of a business will have a greater motivation and more importantly, greater reward for hard work and success. However, to link this to a reduction in employment rights is unnecessary and counterproductive. This is also the view of current



employee owned organisations. The Employee Ownership Organisation which represents employee-owned businesses (such as the John Lewis Partnership) that contribute £30bn to the UK economy each year, has stated, "our Members are very aware that there is no need to dilute the rights of workers in order to grow employee ownership and no data to suggest that doing so would significantly boost the number of employee owners. Indeed all of the evidence is that employee ownership in the UK is growing and the businesses concerned thriving, because they enhance not dilute the working conditions and entitlements of employee owners."

25. ASLEF agrees with the EOO. We continue to support employee ownership. However the idea that Britain's economic recovery can only start by ridding workers of basic rights is simply untrue and immoral. British workers already have amongst the weakest employment rights in the developed world. To reduce these rights and leave the workforce in constant fear for their livelihood will push the economy backwards preventing recovery rather than enhancing it.

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## **CONSULTATION ON IMPLEMENTING EMPLOYEE OWNER STATUS**

### **USDAW RESPONSE**

**5 November 2012**

## Introduction

Usdaw – the Union of Shop, Distributive and Allied Workers – is the fourth biggest trade union in the UK with 422,000 members who mainly work in the retail, distribution and food manufacturing sectors.

Usdaw is a trade union that organises solely in the private sector so this proposal will have a particular impact on our existing and future members.

This document outlines Usdaw's response to the Government's consultation on the proposal to establish a new employment status of employee owner:

### No Conflict between Employee Share Ownership and Employment Rights

The proposal for a *'new employment status in which employee owners will not have all the employment rights of an employee but will have shares in the company they work for'* is based on the idea that this is a fair trade off – a worker gives up some rights as an employee to become a part owner of the business. But is this trade off necessary?

A number of very successful UK businesses already issue shares to their workforce. They do not require workers to give up any rights as employees. There is no conflict of interest – they are committed to the success of the business both as employees and as shareholders.

Workers can have rights as employees and be committed to the success of the business. In Usdaw's experience employment rights and employee share ownership can go hand-in-hand very successfully. There is and should be no fundamental conflict between being an employee shareholder and a worker with employment rights.

### Employment Rights are not Holding Back Employers from Hiring Staff

Throughout the consultation paper the assumption is made that the existence of employment rights is discouraging businesses from hiring staff, for example:

*'The Government wants to remove the perceived barriers around the fear of being taken to employment tribunal which are deterring businesses from hiring' (Page 4).*

*'The risk of being taken to a tribunal over employment rights and the costs of providing some rights are perceived by some as creating a barrier to hiring employees' (Page 7).*

However, the simple truth is that the 'cost' of employment rights is not what is stopping businesses from hiring staff. The main reasons for businesses not expanding and taking on more staff are instead to be found in the continuing problems in the economy, in particular, weak consumer demand, difficulty getting credit, expensive business rates and rents and other costs such as VAT. To pick on the allegedly 'high cost' of workers' employment rights is incorrect and unfair.

### Workers are Being Asked to Sign Away Basic Employment Protections

The rights that workers are being asked to give up in exchange for shares are basic rights such as:

- Protection against unfair dismissal.
- Statutory Redundancy Pay.
- The right of many workers to request flexible working.
- The right to request time to train.

Some of these rights provide basic employment protection at work; others simply provide a right to request access to training or flexible working. In addition, the extension of the notice period workers would have to give ahead of returning after maternity leave would place serious obstacles in the way of encouraging mothers to return to work.

To expect a group of workers to sign away these employment rights is a serious erosion of the basic protection that workers have at work.

### **Fair to Employees?**

The consultation paper states that the new employment status is 'fair to employees'. But is it fair?

Workers will be asked to sign away certain rights in exchange for shares when many modern businesses already have employee share schemes. This is not a fair trade off.

Workers will not have a real choice in the matter as employers will be allowed to present the potential employee with the employee owner contract as the only contract on offer.

Most job interviews are an unequal experience between the employer, who is in a powerful position, and the applicant who is usually desperate for the job. The detail of the contract is not a result of negotiations between two equal parties – the applicant is usually presented with a contract on a 'take it or leave it' basis. To provide employers with the option of new appointees signing away fundamental employment rights is not fair to the job applicant.

### **Various Types of Employment Status Already Available**

The consultation paper identifies that there are various types of employment status – 'full-time, part-time or fixed-term employees, workers (including agency workers) or self-employed individuals' – already available. Creating yet another different employment status is unnecessary.

### **Conclusion**

Usdaw does not believe that pressurising workers into giving up important employment rights will assist recovery in the economy.

Usdaw believes that employees who opt to join employee share schemes should keep the basic employment rights to protection against unfair dismissal, rights to statutory redundancy pay, have rights to request training and flexible working and be entitled to give the same notice as other employees when returning from maternity leave.

Usdaw does not believe that workers should be made to sign away basic employment protection in exchange for shares.

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## **Implementing employee owner status**

**A Department of Business, Innovation and  
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The Institute of Employment Rights is an independent charity. We exist to inform the debate around trade union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers.

This IER Response, kindly drafted by the academics named, reflects the authors' own work not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

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02 November 2012



## Introduction

In October 2012 the Chancellor of the Exchequer announced plans for the introduction of a new 'owner-employee' share ownership scheme.

On the basis of these plans the BIS launched a 'Consultation on implementing employee owner status' (18 Oct 2012). In summary, the proposal amounts to

*'creating a new employment status which will give businesses greater choice about the contracts they can offer to individuals, and ensure appropriate levels of protection are maintained. Under this new status, employee owners will receive shares between £2,000 and £50,000 which will be exempt from capital gains tax. Employee owners will have the same rights as current employees excluding unfair dismissal (except where this is automatically unfair or relates to anti-discrimination law), certain rights to request flexible working and training, and statutory redundancy pay. Individuals will also need to give longer notice to return from maternity leave or adoption leave'*

The paragraphs below seek to engage critically with the proposals and provide a set of responses to the consultation document and to the questions contained therein.

Our conclusions are that the new proposed status is unnecessary, harmful to workers and employers' interests alike, marred with legal pitfalls that could result in litigation costs, and possibly contrary to EU law. Ultimately it amounts to a socially regressive reform proposal, where workers will be bearing all the risks associated with the holding of shares without enjoying any of the benefits typically deriving from employment, self-employment, or share-ownership. It is hoped that the proposed reforms, completely divorced from the needs of British society, will never see the (legislative) light of day.

## Response to questions

**Q2. Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?**

**Q22. Would you be likely to take up the new status? What would the impact of the status be on your business?**

At present, three different employment statuses (employee, worker, or independent contractor) are generally available in English law, with certain additional categories in areas such as anti-discrimination. While this broadly tri-partite setup may not sound too difficult, there is clear evidence that it provides a significant obstacle to companies who are *already* confused by the existing scheme and by the growing number of 'employee' or 'worker' contract typologies. A recent study by the CBI pointed out that, allegedly as a consequence of the introduction of the Agency Workers Regulations, businesses have chosen to hire a large number of workers through self-employed contracts. According to this report, this was not necessarily due to the rising costs of hiring better protected agency workers, 'but more importantly due [to] the considerable compliance burden and vastly increased risk of tribunal claims' (Facing the Future, 2012, p. 35).

Even before the implementation of the proposed reforms, businesses and workers are therefore facing a considerable degree of uncertainty, and as a direct result, considerable fears

about potential litigation: many an employment tribunal claim needs to go through a complete round of hearings (including appeals) simply in order to determine the preliminary question as to the claimant's status before the tribunal can turn to the merits of the claim. The introduction of a new, fourth category, will add considerable confusion; not just by virtue of having an additional category but also because it is difficult to see how the proposed employee-owner regime would map onto the current system of common-law based categories which serve as gateways to an array of statutory rights. In addition to this it is foreseeable that employee owners whose contracts were terminated would engage in strategic litigation by alleging discriminatory dismissal in order to gain access to justice.

The recent decision by the Supreme Court in *Autoclenz v Belcher* [2011] UKSC 41 will exacerbate these problems dramatically: in that case, the court held that in determining a worker's employment status, the relevant evidence was not necessarily limited to the written contractual agreement between the parties. While the case was decided in a slightly different context, its arguments could easily be translated across into the employee-owner scenario: if the individual continues to behave and be treated as an employee on a daily basis, with weak or no evidence of ownership (e.g. because of the low value his or her shares, or a lack of voting rights attached to them), the courts are likely to disregard the employee-owner contract in favour of more traditional classifications. This would be the case especially if the transition to employee-owner contracts (or their being offered to new joiners) becomes an automatic standard practice, along the lines of the now near-universal opt-out employees are asked to sign in order to waive their rights under the provisions of the Working Time Regulations 1998.

The proposals are also premised on the assumption that the labour rights and entitlements that will be denied to 'employee owners' are outside the scope and competence of EU law, and within the exclusive competence of domestic law. This assumption is premised, first, on the belief that 'employee owners' would be missing out exclusively on rights that are not protected by EU labour law Directives, and, second, on the assumption that even where they exists, EU labour law directives tend not to engage robustly with the personal scope question. We strongly disagree with both assumptions. As we suggest below, a number of these rights are directly or indirectly covered by EU law. Moreover, in recent years EU law has moved beyond its initial deferent approach in respect of the national definitions of 'worker' and the personal scope of application of EU labour law instruments. In our view, the Court of Justice would be reluctant to accept that the UK status of 'employee owner' is genuinely separate from the EU notion of 'worker' (as developed in its equal pay, health and safety, and pregnancy case law) when the alleged distinctive features are merely notional and simply disguise an employment relationship within the 'worker' meaning.

The proposals, finally, are very unclear as regards their application in the *collective dimension*, most importantly workers' rights to organise, bargain collectively and consult with their employers on certain topics. None of the relevant provisions are listed in the indicative table of employment rights in the consultation document. Should this be interpreted as an assumption that the rights will be available to employee-owners? Or is the opposite the case? Without specific legislative amendments to key statutes such as TULRCA 1992, it is difficult to see how the proposed scheme could operate within the current tripartite classification, thus leaving employee-owners outside the scope of collective rights. Such an exclusion would open the entire scheme to challenge under the Human Rights Act 1998, given the European Court of Human Rights' recent emphasis on strengthening Article 11 of the European Convention of Human Rights (freedom of association): in *Demir v Turkey*

[2008] ECHR 1345 the court explicitly recognized workers' fundamental right to collective bargaining and industrial action.

Overall, therefore, businesses and indeed the government itself would face significant uncertainty and the threat both of long classification arguments in employment tribunals, even where an explicit employee-owner contract has been signed, and larger challenges both in domestic courts and international law.

**Q3. What restrictions, if any, do you think should be attached to the issue of shares or types of shares?**

Regulations on share issues would need to ensure that worker's entitlements reflect the fundamentals of the legal and economic position of company owners, most importantly by including both control (voting) rights and an entitlement (however residual) to the company's economic surplus. If the regulations were to allow issues structured in a way that denies some of these features (for example, by restricting voting rights, or classifying employees as a distinct group of shareholders), additional safeguards need to be put in place to ensure that other aspects (e.g. preference shares with guaranteed dividends) are sufficient compensation. This would likely involve external valuation and the resulting complications, however (see further our answer to Q5).

**Q4. When an employer buys back forfeit shares, should this be at full market value or some other level (e.g. a fraction of market value) should some other level be allowed in certain circumstances?**

The idea of share forfeiture sits very uneasily with the overall employee-owner scheme. Generally speaking, companies have no powers to force shareholders into buy-backs without further agreements (e.g. a specifically designed option); so it is likely that any such provision would be used in demonstrating to an employment tribunal that there is little genuine about the 'ownership' aspect of the status (see further answer to Q2).

Should the forfeiture scheme go ahead regardless, it would raise several serious concerns: by definition, the buyback of an employee-owner's shares following termination of the employment relationship will happen at the very moment the worker will be at his or her most vulnerable, and in need of financial support. If valuation were at market value, or even below that (with a 'fractional' amount) this raises an additional problem: structurally, most layoffs will happen in periods of depressed company performance, and thus reduced valuations. The danger is that employees would receive very little, if any, meaningful value in return for their loss of employment rights. The only way to avoid this would be to set a minimum strike price for the employer's repurchase option at the original issue value; leaving employees to capture any potential economic upside, but not exposing them to the risk of serious drops in the stock-market. This approach would also have the benefit for company's treasuries of facilitating the valuation of outstanding liabilities.

**Q5. How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation**

was required?

The biggest problem in valuation would be raised by non-traded employers generally, and dynamic, fast-growing companies in particular. Whilst fairly sophisticated models have been developed by private-market (pre-IPO) funds dealing in shares of non-listed companies, the administration of such schemes could easily become very complex (for example as regards dilution of previously-issued shares). Overall, the effect would be considerably off-putting to most companies: external third-party valuation will be intrusive and expensive, but without it, employers would open themselves up to the full range of claims and challenges that the employee ownership is not genuine, as discussed in our answer to Question 2.

**Q6. The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.**

We suggest that individuals and businesses would in practice need a very high level of advice and guidance about the implications of taking on employee-owner status, so much so as to render the taking on of this status a seriously risky and potentially costly decision on the part both of individuals and businesses.

There are many kinds of difficulty and uncertainty involved, but they can usefully be reduced to two main types:-

- a) uncertainties about the application of statutory provisions, and
- b) uncertainties about employee-owner status as a common-law contract type.

We comment on these in turn.

- a) Uncertainties about the application of statutory provisions.

The main focus of the proposals is upon the positioning of the proposed employee-owner status in relation to the principal statutory employment protections which are currently applicable to 'employees', and, to a lesser degree, to 'workers', the basic idea being to limit some of those protections for 'employee-owners' on the footing that they will enjoy a compensating set of advantages deriving from their ownership of shares in the employing company.

However, although the proposals purport comprehensively to have clarified the position of employee-owners in this respect, we think that serious uncertainties would still arise. Arguments might for example arise as to whether a given individual had *genuinely* been accorded 'employee-owner' status, the mere assertion of that on the face of the contract not in itself being decisive if the individual could show that he or she had not properly understood what was involved.

Moreover, we think that rather elaborate advice-taking would be needed to enable both individuals and businesses to decide whether contracting on the 'employee-owner' footing was really to the benefit of the respective parties to the arrangement. So the transaction costs



of entering into such contracts could be very considerably greater than for conventional contracts of employment or even for 'worker' contracts.

**b) Uncertainties about 'employee-owner status' as a common-law contract type**

We think that the above-mentioned uncertainties are enormously multiplied by an even greater set of difficulties, to which the proposals do not refer, about how the 'employee-owner status' would operate as a common-law contract type. The crucial question here is whether and how far the common law of the contract of employment would apply to it, and if so with what if any modifications.

Individuals and businesses would need to know from the outset and during the continuance and upon the termination of such contracts whether the central implied terms of the contract of employment, such as that obligation of mutual trust and confidence, applied to 'employee-owner' contracts, and whether the doctrines prescribing the remedies for breach and wrongful termination of the contract of employment applied equally or differently to these contracts. This is a matter of the utmost consequence which the proposals do not seem to address.

**Q12. What impact will this change to maternity notice period have on employers?**

**Q13. What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?**

**Q14. How will these changes impact on a company's payroll provisions?**

**Q15. What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?**

The Consultation Document takes the view that maternity leave notice periods for 'employee owners' could be increased above the equivalent notice periods presently required from employees. The underlying assumption is that EU law does not cover these matters, and therefore domestic law is free to discriminate between the parental and maternity entitlements of 'employees' and those of other workers.

We suggest that this is a risky if not altogether wrong assumption. Parental Leave in general is of course covered by EU secondary legislation (Directive 2010/18). EU law does not systematically defer to domestic law when it comes to defining the personal scope of application of the rights contained in EU labour and equality directives. Some of the areas in which the ECJ has forcefully asserted that the concept of 'worker' to which these rights apply must have an autonomous and EU-wide definition are the areas of equal pay, pregnancy rights, and health and safety legislation (broadly understood). While the Court has not yet had an opportunity to pronounce itself in respect of the personal scope of application of the Parental Leave Directive, it is plausible to assume that, should it be asked to decide whether it is possible for Member States to attribute different sets of rights to groups of employees that fall within the EU concept of 'worker', it would take a very critical view of any national measure seeking to do that. It is our firm belief that both 'employees' and 'employee-owners' would be seen as falling within the EU concept of 'worker' as developed by the Court of Justice of the EU in its more recent jurisprudence since the case of *Allonby*. As a consequence, provisions such as those suggested in Part 3 of the Consultation document

would be found to be in breach of EU law, in spite of the fact that the EU Parental Leave Directive does not explicitly cover notice periods.

**Q16. Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?**

We would like to start by reiterating the point made above. Even where a specific right or entitlement is not expressly covered by EU Law (e.g. notice periods or the right to request flexible working), and as long as that right is strictly connected with the enjoyment of a right provided or protected by an EU instrument (as in the case of parental leave), EU law may not allow Member States to create two tiers of rights and entitlements for different (national) categories of employees that the ECJ would see as falling within the broad and autonomous EU notion of 'worker'.

We therefore believe that that the Consultation paper may be mistaken in suggesting that the 'only' EU right at stake is paid parental leave (para 41). Other rights and matters that may trigger EU/ECJ competence in respect of the right to request flexible work range from pregnancy to disability discrimination, including discrimination by association. In all these cases EU law would most likely prohibit the attribution of lesser rights to 'employee-owners' if the latter were to be seen as falling within the EU/ECJ notion of 'worker'.

We also note that as presently drafted the proposals contained in paragraphs 42-44 may fall short of the right to fair trial, which is clearly protected under both EU law and the European Convention on Human Rights.

**Q18. Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?**

The employee-owner scheme can probably be accommodated under the current company law regime strictly speaking. Employee's share ownership would however throw open a series of unanswered questions in closely related fields. Would shareholders under the scheme have to comply with securities market regulation, for example when a trade union co-ordinates its members' vote and therefore acquires control over a substantial block of shares in a publicly listed company? Would employee-owners in the previous example be subject to competition law and related provisions?

A further issue not addressed in the proposal is that of complex corporate structures, such as corporate groups, holding companies, and companies that are held by outside investors such as Private Equity firms. In which entity would employee-owners be given shares? If shares will always be held in the immediate contractual counterparty, this raises a problematic issue: in a corporate group, for example, it could become very difficult to value the shares of a subsidiary given the group's freedom to continuously readjust assets and liabilities within its structure to match evolving business needs.

**Q19. The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.**

Any 'automatic' or boilerplate employee-owner terms need to be automatically invalidated under the statutory regime. Where employees do not have free choice in negotiating the

arrangement, the very point of the scheme is threatened: the acquisition of ownership in a company is, after all, a voluntary act which usually happens at arms-length between parties of reasonably equal bargaining power.

The second main area of concern is in the valuation of shares at issue, and in the provisions surrounding buy-back. Strong safeguards would be necessary to ensure that the employee-ownership scheme would stand up to judicial scrutiny; if an employee can demonstrate that at the moment of termination he or she had none of the benefits of ownership, it is likely that the courts would classify the relationship under one of the existing categories (see our answer to Question 2).

Preliminary analyses suggest, finally, that the scheme could open up a serious loophole in the existing tax structure. Senior management in particular could easily opt to become employee-owners, receive the maximum amount of tax-free equity in return, and then contract back into the full range of employment rights (and indeed contract out of the buy-back regime to ensure a truly golden, completely tax-free, parachute).

**Q21. What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?**

Our view is that the economic evidence of the effects that deregulation may have over hiring and firing decisions by businesses is scant and contradictory. The OECD has noted in its Employment Outlook of 2010 that *‘...theory predicts that strict employment protection should reduce worker flows ... although it is not always clear to what extent estimated effects are general and robust’* (see pages 181-182 of the report; emphasis supplied), and that *‘the evidence presented in the chapter also suggests that reforms involving the relaxation of regulatory provisions on individual and collective dismissals are likely to increase the number of workers who are affected by labour mobility at the initiative of the employer’* (page 200).

In a way, one could therefore only answer this question on the basis of theoretical and ideological arguments and/or hypothetical speculation. What is certain, on the other hand, is that the introduction of a fourth (and less protected) employment status would further segment the British labour market (going against the clear advice of both the OECD and the European Commission), and have a disproportionate effect on the most vulnerable sectors of the labour market and society, and in particular younger workers and women.

**Q23. What are your views on the take-up of this policy by: a) companies? b) individuals?**

Overall, it is unlikely that this scheme would see enthusiastic take-up. Whilst the lack of employment rights, notably as regards unfair dismissal, might be superficially attractive from a company's perspective, the inherent uncertainty and resulting threat of litigation as outlined in our response to earlier questions will significantly distract from any perceived benefits of the scheme. From the individual worker's perspective, the policy constitutes a dangerous risk-reallocation, where cyclical business risk is shifted onto the worker who is arguably least able to bear that risk. It is therefore likely that the most significant impact of the proposed scheme will in the end be on HM Treasury, further stretching decreasing public resources to provide basic social support for redundant employee-owners.





**REPRO DTP**

**From:** Kelvin Scorer [mailto:kelvin.scorer@repro.dtp.gov.uk]  
**Sent:** 07 November 2012 13:57  
**To:** Employee Owner Status Consultation  
**Subject:** TRIM: Implementing Employee Ownership Consultation Response  
**Follow Up Flag:** Follow up  
**Flag Status:** Completed  
**TRIM Dataset:** M1  
**TRIM Record Number:** D12/1381034  
**TRIM Record URI:** 13444008

Dear Ms Lovitt,

The Local Government Association represents local authorities in a number of ways including their role as employer. As such, bearing in mind that local authorities do not have share capital and so the facility of employee ownership will not be open to them we have not made a complete response to the consultation document on the appropriate forms.

However, I would like to make a couple of small but important points insofar as the proposal might create new burdens on the employment tribunal system but also create some potential for confusion among various parts of the public sector during procurement of services from private sector companies if there is not sufficient clarification of rights and obligations.

### **Potential for disputes**

The consultation understandably asks a number of key questions in relation to the status of shares and buy back arrangements on termination. I feel it is important to make it absolutely clear what the arrangements are in all eventualities otherwise an aggrieved employee owner may turn to the employment tribunals not to judge an unfair dismissal claim but to determine breach of contract claims. Indeed if it turned out that the employee ownership arrangements were not legitimate then arguably the employee will have been deceived and so presumably able to claim unfair dismissal in any event.

### **TUPE transfers**

The second point is really a further request for clarity in the implementing legislation or in associated guidance in the event of TUPE transfers. The public sector procures many of its services from the private sector. The TUPE regulations apply to some of these situations where services are outsourced, taken back in house or there is a service provision change from one provider to another. In such situations there needs to be clarity as to the legal status of the contract and the other contract terms because under TUPE rights and obligations usually transfer from the transferor to the transferee. Issues may therefore arise if a public sector employer which currently procures a service decides to provide it directly itself. Clearly the public sector cannot continue all of the terms of the contract such and legal status. Equally issues might arise in the event of a service provision change where employees transfer from one private sector employer with employee owner contracts to another which does not operate them. It might be that the proposed legislation will deal with this within its general proposals as to the treatment when an employee owner leaves an employer but we would specifically request great clarity on the arrangements to apply where an employee owner leaves the employment of one employer by reason of a TUPE transfer to another.

Should you wish to discuss these issues further please let me know.

I should be obliged if you could confirm receipt of this email.

Yours sincerely,

18/01/2012

**Kelvin Scorer**  
Employment Adviser  
Local Government Association

Telephone:

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Local Government House, Smith Square, London, SW1P 3HZ

[www.local.gov.uk](http://www.local.gov.uk)

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## **Consultation on implementing employee owner status - response form**

A copy of the **Consultation on implementing employee owner status**: can be found at:

<http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open>

You can complete your response online through SurveyMonkey :  
(<https://www.surveymonkey.com/s/5QJQ935>)

Alternatively, you can email, post or fax this completed response form to:

**Email:**

[implementing.employee@bis.gsi.gov.uk](mailto:implementing.employee@bis.gsi.gov.uk)

**Postal address:**

Paula Lovitt MBE  
Department for Business, Innovation and Skills (BIS)  
3 Floor Abbey 1  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**

### **Your details**

Name: Val Stansfield

Organisation (if applicable): TSSA

Address: Walkden House, 10 Melton Street, London, NW1 3EJ

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this:

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☒ Trade union or staff association
- ☐ Other (please describe)

**Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?**

**Comments:**

Businesses already have sufficient opportunities to operate flexibly. They can employ staff on contracts with any number of hours, and to any pattern of work that suits both parties. The proposed new contract will in fact reduce the opportunities for flexibility since one of the provisions that must be forfeited is the right to request flexible working. Such a provision in the new type of contract is self-defeating.

Government would be better served by encouraging employers to embrace flexible working much more readily. Currently there are restrictions on who can apply for flexible working. These restrictions could be abandoned and all employees given the right to request flexible working.

The eight statutory reasons for refusal of flexible working requests are perfectly adequate and reasonable and so a general right to request flexible working would free up many restrictions.

Selling employment rights for shares will, in and of itself, do nothing to increase flexible working. Instead of facing a potential claim for unfair dismissal employers will face the restriction of having to buy back shares when they wish to dismiss someone or indeed if they resign. If that situation involves a dispute as to the price payable for the shares, then litigation may arise in any case since there will be a different set of contractual rights to pursue.

**Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?**

**Comments:**

Businesses are already free to organise their workforce in any way they choose. However, that choice will always be fettered by the specific contractual rights and obligations that will rest on the two parties to any form of contract.

Devising a new type of employment contract will not itself free business from contractual obligations - it will merely change the nature of those obligations. By making matters more complicated it may well be that this new type of employment relationship hampers flexibility, rather than enhancing it.

No doubt the employment lawyers will make lots of money, though!

**Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?**

**Comments:**

Employee owners contracts must be voluntarily. Any suggestion that employers could start to offer only the new contract will be a disincentive to employment. While that strategy may have short term benefits of avoiding a few unfair dismissal claims it will also mean the pool of available talent to firms is restricted only to those who cannot find work on more usual terms.

There must be no penalty for those on benefits if they are not prepared to sign up to a contract of employment that they feel is not suitable to their needs.

Share ownership must include rights to dividends, voting and decision making rights and rights to a fair share of the assets if the business is wound up.

Without such assurances of equity there are likely to be few takers for so risky a contract. Such a situation will, in the longer term prove to decrease flexibility of the workforce, not increase it.

**Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?**

**Comments:**

Buy back should be at the full market value. If there is to be a sacrifice of rights at the start, and throughout the contract for employees, then there must, in all equity, be a balance of advantage at the conclusion of the life of the contract. Without such equity only those who have no alternative will agree to such a contract. For this to work for employers their staff have to be willing to weigh the short term disadvantage against some hope of future advantage. Otherwise the best workers will go where they can get better contractual arrangements.

**Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?**

**Comments:**

TSSA has no knowledge about such matters but would surmise that there are likely to be significant administrative, and very probably legal, costs involved where an employee resigns and disputes the valuation of the shares that is provided, especially where they believe they have been a driving force behind the growth in prosperity of the company, and wants further independent valuations, or indeed sues in the County Court.

**Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.**

**Comments:**



**ACAS and organisations such as the Citizens' Advice Bureau should be fully briefed about the pros and cons so that they can give proper advice to those potential employees considering such a contractual arrangement. Since such advice will have financial implications for the employee it will be covered by the Financial Services Act which means that any advice givers will also need to be duly registered.**

**Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?**

**Comments:**

**Very limited impact on employers' appetite for recruitment. Whether to recruit additional labour will still remain a question of need and affordability. A different type of employment contract will just make the decision about the type of contract to be offered more complicated - it will have nothing to do with actually deciding whether to recruit.**

**Deciding which type of contract to offer will then require an evaluation of whether to forgo part of the control of the business in order to avoid a potential unfair dismissal claim at some stage more than two years into the future. Since the vast majority of employers rarely face a claim for unfair dismissal - and the ones who follow reasonable HR practice never need to do so - the risk of giving away shares in the control of the organisation, and the limiting of the available pool of talent will feel a greater impact than will the decision to recruit.**

**These contracts are mainly going to be attractive to those employers who are seeking to undercut the employment rights of their employees. As such, whatever their appetite for recruiting, their choice is going to be limited to those who are available and who cannot obtain better terms with more rational and fair employers. This means their available pool from which to recruit will be the worst, and not the best available. Once again, this approach will lead to short term advantage over the best long term interests of the company.**

**Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?**

**Comments:**

**None because of the many disadvantages such a contract will have, as identified in the responses above. In any case it is only ordinary unfair dismissal that will be foregone. Employers will still be subject to unfair dismissal claims for the numerous types of automatically unfair dismissal - discrimination due to nine protected characteristics, TUPE transfers, whistleblowing, trade union duties, H&S violations, etc etc.**

**In fact a small employer who believes he/she is immune from an unfair dismissal claim will be more likely to fall into error in relation to automatically unfair dismissals because they will be less likely to seek good advice about appropriate measures when they do face employee problems.**

**Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?**

**Comments:**

**No benefits will accrue, but the dangers highlighted in response to question 8 will undoubtedly impact more on small and start up businesses, than larger ones who, because of their size, see the sense of adopting reasonable HR practices.**

**Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?**

**Comments:**

**Since claims for automatically unfair dismissal will remain possible there is likely to be a marked rise in such claims. Whether they succeed is not the point. The cost of defending a claim will still have to be paid, not just in terms of payments to lawyers but also in terms of the time and administrative resources needed to mount a viable defence.**

**Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?**

**Comments:**

**In this type of contract redundancy rights are sacrificed for share ownership. So, disputes will change from whether there has been a fair selection for redundancy and whether the redundancy calculation has been properly made, to whether the share valuation has been made properly. There will not, necessarily be an avoidance of a dispute, just a change of venue from ET to County Court.**

**Question 12: What impact will this change to maternity notice period have on employers?**

**Comments:**

**Notice of return to employment from maternity leave can already be changed by agreement. Such issues are best dealt with by way of mutual agreement in any case. Sometimes an employee may want the new mother to return sooner rather than later and flexibility is enhanced by allowing that. Flexibility is not best served by putting hurdles in the way of either the employee, the employee owner, or the employer. Far better for people to talk sensibly to one another to sort these matters out in a way that suits both parties. That is real flexibility, and that is what engenders a constructive and co-operative working relationship that will always serve the interests of the organisation better than relying on restrictions.**

**Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?**

**Comments:**

**A sensible employer would reach a mutually satisfactory agreement - a win-win situation, rather than relying on an assertion of legal rights, a win-lose situation that leaves one side disgruntled and dissatisfied, and hence less likely to respond positively after the return.**

**Question 14: How will these changes impact on a company's payroll provisions?**

**Comments:**

**If another employee is covering the maternity leave and the now mother is allowed her request to return early there will, of course, be a bigger wage bill. However, it may be that the surplus employee can be utilised elsewhere for the balance of their fixed term contract - that's called flexibility.**

**Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?**

**Comments:**

**Marginal. Parents usually make decisions early on about their maternity leave requirements. Changes to requirements are likely to be the exception rather than the rule.**

**Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?**

**Yes ☐ No ☒**

**Comments:**

**People's circumstances differ. Flexibility is best advanced by a flexible approach to employees by their employers, not a rigid timeline. This whole change is mooted as being about encouraging flexibility, and then every suggestion of change tries to effectively hamper the possibility of people dealing with one another in a flexible way. This, like other suggestions may well prove to be self defeating.**

**It is also a misconception that employee owners are the only ones who have a vested interest in the well being of the business. No employee with any type of**

contract, other than the shortest of fixed term contracts, will want their employer to fail. If any employer fails, they lose their job. Therefore, ALL employees have a vested interest in the business or organisation they work for.

**Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?**

**Comments:**

The stated purpose of this is supposed to be to increase the flexibility and dynamism of businesses. The best way of doing both of those things is to ensure employees have ready and easy access to good quality training. For too long one of the drags on the British economy, and especially on productive enterprise, has been the sacrifice of training at every juncture. This proposal will reinforce that disastrous approach.

**Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?**

**Comments:**

TSSA has no view on this matter.

**Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.**

**Comments:**

TSSA has no view on this matter.

**Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved**

**Comments:**

TSSA has no view on this matter.

**Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?**

**Comments:**

Businesses hire on the basis of their objective needs for work to be done. As such a new form of employee contract will have little impact on those decisions, other than the disadvantageous ones identified in responses to earlier questions.



Decisions about firing people ought to be made on equally rational grounds. There are five potentially fair reasons for dismissal. Each of those requires a fair procedure. However, a fair procedure does not have to be a lengthy procedure and so there is no real reason for inventing a new type of employment contract. In any case, employers now have two years of employment to build a view of whether someone they have employed will fit in with the organisation's requirements before they need to adopt a fair procedure.

This proposal has very little to do with labour market flexibility. Rather it appears to be a cure for a non-existent problem. The best employers get the best work and most flexibility by treating all their employees with respect, and that means dealing with internal disputes in a way that builds trust and confidence within the entire workforce. This proposal seems to be predicated on the belief that employers will get more and better work out of their employees if they are afraid to put a foot wrong in case they are sacked without a proper procedure being applied to them. That is precisely the way to engender a disengaged and dissatisfied workforce that cannot wait to find employment where they are respected and valued.

**Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?**

**Comments:**

There are no circumstances where TSSA would encourage their members to take up such contracts.

However, if the change comes in and members do, through naivety or necessity, take up such contracts we will ensure their new rights are fully protected and enforced through either Ets or the County Courts.

**Question 23: What are your views on the take-up of this policy by:**

- a) companies?
- b) individuals?

**Comments:**

a) Sensible companies will be very cautious about trading short term advantage for unknown liabilities at some future date.

b) Individuals will generally prefer a straightforward employment contract. Those who are forced to submit to these new contracts will be more likely to join an appropriate trade union to ensure such rights as they have under their contract will be secured.

**Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?**

**Comments:**

There is a direct undermining of maternity rights in relation to a request to return early from maternity leave.

**There is an intention to undermine the right to request flexible working, which again will impact mainly on new mothers.**

**The implications of this new type of contract - and especially its disadvantages are likely to have the greatest impact on the most vulnerable members of society. None of these issues are satisfactorily dealt with by the equality impact assessment.**

**Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.**

☐ **Please acknowledge this reply**

**Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?**

**Yes ☒ No ☐**

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**URN 12/1215RF**





## BIS Consultation

### *Implementing Employee Owner Status*

## Submission from UCATT

November 2012



### Contact details

- Kate Purcell on behalf of UCATT.
- UCATT House, 177 Abbeville Road, London SW4 9RL.
- Tel: 020 8750 1000
- Organisation type: trade union.

### Introduction

UCATT is the largest specialist trade union for construction workers in the UK and the Republic of Ireland, with members both in the public and private sectors. UCATT is the lead union among the signatories to the *National Working Rule Agreement of the Construction Industry Joint Council* and the *Joint Negotiating Committee for Local Authority Craft and Associated Employees*. UCATT is represented on a number of construction industry related bodies by the General Secretary including the *Strategic Forum for Construction*, the *Construction Industry Training Board* and the *Construction Skills Certification Scheme*.

UCATT's members in private companies are builders and craftspeople, refractory users, steeplejacks and lightning conductors and workers in the demolition industry. UCATT also represents workers in Local Government, the NHS and the Prison Service.

The construction industry has been badly affected by the recession and has seen a high level of redundancies in recent years: 112,000 in 2008, 166,000 in 2009, 92,000 in 2010 and 71,000 in 2011 according to national statistics.<sup>1</sup> Job creation is therefore of the utmost importance to UCATT and its members. However, UCATT does not accept the assumption made in the consultation document that reducing employment protection for workers will increase economic growth and create jobs.

There is no evidence in the consultation document to show how these proposals will improve productivity, business development or growth. It is UCATT's opinion that

encouraging employees to sell their statutory rights for company shares, that may or may not be of any value, is grossly exploitative. The proposals will result in an insecure and unfair 'hire and fire' culture; losing the right to statutory redundancy payments will force families into financial difficulties; and access to training will be reduced. Despite the claims that these proposals will increase flexibility, the flexibility is one-sided and weighted entirely in favour of the employer. The employee will actually have reduced flexibility in terms of requesting family friendly working patterns and giving notice to return from maternity leave.

**For these reasons, UCATT does not agree with the Government that removing employment rights from workers in return for a small stake in a business will improve growth and UCATT therefore calls on the Government not to introduce the proposals for establishing employee-owner status.**

**1. Question 1: How can the Government help businesses get most out of the flexibility offered and the different types of employment statuses?**

UCATT does not agree with the Government that removing employment rights from workers in return for a small stake in a business will improve growth. Introducing a new employment status will add to the confusion that employers, especially small businesses, already face. UCATT receives several calls a week from employers in construction seeking help with employment matters. We refer them to Acas or Business Link depending on the query. This demonstrates that there is a real need for small businesses to be given more information from the Government about sources of help and support, rather than introducing another employment status option, which further muddles the water and could leave employers open to legal challenge.

UCATT does not recognise 'employee-owners' as a new employment status. For all intents and purposes, these would be employees with some of their key statutory rights removed – rights that have been contracted out in return for money. The individual will still be working as an employee and it is likely that courts will classify them as employees, especially in companies where there is little benefit attached to the share ownership (for example no voting rights or dividend payments for employee-owners).

**2. Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?**

The current range of employment statuses already creates both genuine misunderstanding amongst employers as well as blatant abuse. False-self-employment is widespread throughout the construction industry. Of the 2.07 million workers employed in construction,

1.19 million are directly employed and 880,000 are self employed.<sup>iii</sup>The rates of self-employment in construction are higher than in any other sector of the workforce and are currently around 42.5%. However, much of this self-employment is false self-employment. A report commissioned by UCATT in 2008 found that 400,000 workers were falsely self-employed resulting in £1.7 billion in lost tax revenue for the Government each year. <sup>iii</sup>

Employers compel workers to declare themselves as self-employed through the Construction Industry Scheme (CIS). Companies deduct tax at source for HM Revenue & Customs but do not deduct National Insurance contributions. This system is unique to the construction industry. Falsely self-employed workers have all the characteristics of an employee. They do not risk their own money, or provide materials or equipment, nor do they supply any labour other than their own. They are paid weekly or monthly for a set amount of hours yet they are denied even basic employment rights. They suffer from instant dismissal, are rarely given notice and most do not have contracts.

This exploitation of existing employment statuses creates an unacceptable level of disputes and claims for unfair dismissal in the construction industry. Instead of introducing a further tier to a chaotic system, the Government should be tackling false self-employment by ending the CIS.

**3. Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?**

UCATT does not agree with introducing 'employee-owners' but if they are established, there should be no restrictions attached to the shares. Employee-owners should possess the same rights as any other type of shareholder and should be entitled to any shareholder benefits, voting privileges or dividend payments.

**4. Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (e.g. a fraction of market value) should some other level be allowed in certain circumstances?**

UCATT does not agree with introducing 'employee-owners' but if they are established, employer buy-backs should be at full market value. UCATT can see no justification for buying back shares at below market value. In addition, there needs to be further safeguards created to protect workers when shares are low or of no value. Many buy-backs will occur when an employee-owner faces redundancy. Redundancies occur when work is ceasing or diminishing and this will have a negative effect on share value. It is fundamentally unfair for an employee to sacrifice their statutory right to redundancy pay, only to find that they then

leave their employment, through no fault of their own, without any or with very little compensation. This will have a detrimental impact on an individual's financial circumstances and without the financial buffer of redundancy pay to help them through this difficult time, it is inevitable that families will face chronic hardship.

**5. Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?**

UCATT does not agree with introducing 'employee-owners' but if they are established, valuation of shares must be independent and transparent. Independent valuations of shares should be held on issue, at regular intervals and on buy-back. The cost of the valuations must be met by the employer. Without the protection of neutral and objective assessments, unscrupulous employers may pressure existing employees to become employee-owners at a time when the business is facing financial difficulties as a way of evading their redundancy payment obligations.

**6. Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.**

UCATT does not agree with introducing 'employee-owners' but if they are established, there will need to be comprehensive advice and guidance to both employers and employees about the implications of employee-owners.

Employers will need to be made aware of their obligations. No existing employee should be coerced into changing their employment status and no potential employee should be discriminated against and refused employment if they wish to retain their statutory rights by preferring 'employee' status to any 'employee-owner' option. There will need to be further legislation to protect employees from this loophole.

Individual workers will need access to legal and financial advice to help them assess whether 'employee-owner' status would be of benefit to them and the risks involved.

UCATT expects that these measures will increase legal costs for employers. They will increase the costs of share valuations which will need to be regular and independent and there will be greater risk of litigation as disputes arise from both employment contracts and the value of shares. Additionally, Employment Tribunal cases for relatively straightforward claims will be complicated by employment status issues.

Most cases that UCATT pursues at Employment Tribunals are connected with unlawful deduction of wages including unpaid holiday, notice claims, unpaid wages or unpaid redundancy pay. In the last 4 months, claims of this type formed 55% of all UCATT employment tribunal cases. These so-called straightforward claims are often complicated by the fact that the employment status of the claimant has to be proved first, with the employer often denying that the claimant is either an employee or a worker. As simple claims are often obfuscated by issues around employment status already, the addition of another employment status will further exacerbate the situation.

**7. Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?**

Making it easier to dismiss workers will do nothing to promote growth and employment opportunities. These changes are unnecessary as the UK already has the second most flexible labour market in the world, jointly with Canada. BIS has previously admitted that only 1% of employers cited dismissal/disciplinary regulation as the main deterrent to employing staff <sup>iv</sup>so these proposals will do little to encourage small businesses to employ more people.

**8. Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?**

UCATT does not see any benefits in these proposals for businesses. The introduction of a further employment status is confusing for employers. The Law Society believes that limiting unfair dismissal rights will produce poor management practices leading to employers mistakenly believing that they can dismiss an employee on the basis of discriminatory grounds. <sup>v</sup>

Businesses offering 'employee-owners' as outlined in the proposals may find it harder to recruit good staff if they are seen as second-rate employers in a two-tier system. It is damaging to the reputation of companies if they offer less rights at work than their competitors. This is a problem that will become more acute as the economy improves. Good employees will seek work with companies offering the greatest job security and the best terms and conditions.

As well as having no benefits for employers, these proposals could also have a detrimental impact on the wider economy. Increased insecurity at work damages consumer confidence. Workers in fear of their jobs spend less. They are less likely to make substantial financial commitments, for example buying houses, cars etc.



**9. Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?**

UCATT does not see any benefits in these proposals for businesses of any size. The consultation document claims that these changes are for the benefit of “smaller businesses” and “fast growing companies”<sup>vi</sup> yet some of the proposals are only applicable to larger companies. For example, the ‘time to train’ rights affect companies with over 250 employees. This suggests that the proposal lacks clarity and focus.

**10. Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?**

It is inevitable that there will be an increase in false discrimination claims as this will be the only form of redress open to aggrieved employees. The changes will lead to more claims of discrimination as workers try to find avenues to challenge the decision for dismissal.

**11. Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular smaller businesses and start-up businesses? What negative impacts do you anticipate and how might these be mitigated?**

As stated in the response to question 4, UCATT does not agree with introducing ‘employee-owners’ because of the negative impact on employees facing redundancy. When a business is facing difficulties and reducing its workforce, this will invariably reduce the value of shares on buy-back.

In the case of insolvency, the employee-owner could leave without any payment at all. Employees are entitled to Statutory Redundancy Pay after 2 years of employment yet according to the Federation of Small Businesses: “A third of small businesses do not survive past three years of start-up ... Nearly half of small businesses fail within their first four – five years”.<sup>vii</sup> This could result in employee-owners who join a new company at the start, who face redundancy after 2, 3, 4 or even 5 years of service and hard work, being forced to leave without any financial compensation.

Another unintended consequence which needs to be mitigated against is detailed in the response to question 5. Unscrupulous employers may pressure existing employees to become employee-owners at a time when the business is facing financial difficulties as a way of evading their redundancy payment obligations. The most effective way to prevent this type of scenario is to abandon the proposals to introduce ‘employee-owners’. Failing



this, there will need to be legislation to prevent employers compelling existing employees to change their employment status.

All of this adds up to a very high risk and unattractive option for potential employees, so as outlined in the response to question 8, businesses offering 'employee-owner' status run the risk of failing to recruit good staff as they will be seen as second-rate employers in a two-tier system. This could even jeopardise their chances of long-term business success.

In addition, employers will now have to make payments to staff who freely leave to take up alternative employment. Whilst there is the expense of recruitment and training replacement staff, there are currently no costs incurred to sever the employment relationship in this situation. Having to buy back shares could affect the development of the business.

**12. Question 12: What impact will this change to maternity notice period have on employers?**

Making it more cumbersome for women to return to work after maternity leave will result in more women not returning to work at all. This will result in vital skills and experience being lost to business and it will also generate further costs for recruitment and training of replacement staff.

**13. Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?**

Most employees should be able to accommodate such requests without any problem.

**14. Question 14: How will these changes impact on a company's payroll provisions?**

No comment to make.

**15. Question 15: What effect will a compulsory 16 week's early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?**

This will make it very difficult for women to return early as they will not have been able to confirm their child-care arrangements or nursery provision in sufficient time to give the length of notice required.

**16. Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?**

Reducing the flexibility for employees making requests to work flexibly is a complete contradiction! Restricting the consideration of such requests is confusing for both employers and employees. Employees apply to work flexibly for a whole range of reasons. These include accommodating caring responsibilities for children, sick and older relatives; managing a disability or long-term health condition; and enabling part-time study or training.

Offering flexible working generates greater loyalty from staff, reduces absenteeism, minimises staff turnover and therefore improves productivity. UCATT believes that there should be no restrictions on flexible working.

**17. Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?**

This will reduce access to training and although it applies only to business with over 250 employees, it sends a very worrying signal that training is not important and is not valued.

Research at Manchester Metropolitan University Business School based on a survey of 198 UK SMEs found a clear link between investment in training and organisational performance: "much of the observed difference between successful and unsuccessful firms lies in their decision to train and develop management skills."<sup>viii</sup>

**18. Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?**

No comment to make.

**19. Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse?**

UCATT does not agree with introducing 'employee-owners' but if they are established, there are a number of safeguards and protections that will be required:

- (a) There will need to be protection against coercion by employers who may pressure existing employees to change their employment status.
- (b) There will also need to be protection for potential employees who may be refused employment if they wish to retain their statutory rights by preferring 'employee' status to any 'employee-owner' option.
- (c) Safeguards will be required to prevent employers using their insider knowledge to inflate or deflate share valuations.
- (d) Company owners must be prevented from using this as way of exempting themselves from capital gains tax.

**20. Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issues in return for taking up the new status are involved.**

No comment to make.

**21. Question 21: What impact do you think the proposal will have on the labour market flexibility – that is, in relation to hiring and letting people go?**

These proposals will make it easier to fire people by removing rights to redundancy pay and rights to claim unfair dismissal. However, as the evidence provided in response to question 7 details, this does not create new jobs. Perversely, the proposals will make it harder to recruit quality staff as they will not be prepared to sell their statutory rights in return for shares in a company which may end up as worthless.

**22. Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?**

Not applicable.

**23. Question 23: What are your views on the take-up of this policy by (a) companies? (b) individuals?**

UCATT expects the take-up of this policy to be low. It is unattractive to individuals who will lose important rights and security in return for shares of uncertain value. It will be cumbersome, bureaucratic and expensive for the employer to implement and some will be reluctant to give up the equity in their company. If a company values its staff enough to give them a share in the company, they would normally value them enough to treat them fairly and ensure that their full employment rights are respected. Unsurprisingly, many employers have already spoken out against the proposals:

"I welcome anything which makes it cheaper and simpler to give employees shares," said Henry Stewart, founder and chief executive of training company Happy, a regular winner of best workplace awards. "But coupling it with taking away employment rights is ridiculous. If as an employer you have a problem with unfair dismissals, you need to improve management – that's what the government should be giving incentives for. I don't think it's been thought through."<sup>ix</sup>

Sainsbury's chief executive Justin King said: "Sainsbury's has well established colleague share ownership schemes but does not think this type of scheme should be linked to reduced employment rights ... What do you think the population at large will think of businesses that want to trade employment rights for money?"<sup>x</sup>

Arnold Ma, digital marketing director at Qumin.co.uk said "Offering shares as a way of trading off employees rights is based on a negative scenario. Qumin.co.uk does offer employees the opportunity to obtain company shares, but in exchange for good performance. You get something for demonstrating commitment and improving the performance of the company, not giving up rights. And what if the company is badly managed and is trading poorly? There is not much incentive in owning a bit of something that is going nowhere. It is far better to enthuse and reward."<sup>xi</sup>

Dave Chaplin, CEO and founder of ContractorCalculator.co.uk says "Osborne's plans to create 'employees-lite', who sacrifice employment rights in exchange for a tax-free share stake of up to £50,000 in the business for which they work, threaten to create a new underclass of workers: what the government is disingenuously calling the 'owner-employee.' Like so many policy initiatives that emerge from the coalition, this one provides an unwanted solution to a problem that does not really exist because there is already a solution. If small businesses need access to a particular skill-set to help grow their business but are afraid of the red tape associated with employment, then they can already hire a contractor or freelancer."<sup>xii</sup>

Even the Federation of Small Businesses has said "only a few businesses might adopt the scheme".<sup>xiii</sup>

**24. Question 24: What are your views on the equality impact assessment? Are there other equality and wider consideration that need to be considered?**

The Equality Impact Assessment is fundamentally flawed as it only considers the impact on full-time employees. Part-time employees are more likely to be women. There are currently 6 million women in part-time employment compared to 2.14 million men.<sup>xiv</sup> As women tend to have more caring responsibilities and are more likely to request flexible working, any assessment of the impact of changes to flexible working must include part-time workers.

**25. Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.**

☒ Please acknowledge this reply.

**26. Question 26: At BIS we carry out research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?**

Yes ☒      No ☐

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<sup>h</sup><http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/february-2012/table-red02.xls>

<sup>i</sup>[http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/january-2012/index-of-data-tables.html#tab-Jobs-tables,table JOB502: workforce jobs by industry.](http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/january-2012/index-of-data-tables.html#tab-Jobs-tables,table%20JOB502:workforce%20jobs%20by%20industry)

<sup>u</sup>[http://www.essex.ac.uk/sociology/CRESI/Archive/Evasion\\_economy.pdf](http://www.essex.ac.uk/sociology/CRESI/Archive/Evasion_economy.pdf)

<sup>h</sup><http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-626-dismissal-for-micro-businesses-call.pdf>, p. 29.

<sup>h</sup><http://www.lawsocietymedia.org.uk/Press.aspx?ID=1628>

<sup>h</sup><http://www.bis.gov.uk/assets/biscore/employment-matters/docs/c/12-1215-consultation-on-implementing-employee-owner-status.pdf>, p. 4.

<sup>h</sup><http://www.fsb.org.uk/policy/images/an%20ambition%20to%20grow%20uk%20enterprise%20-%20government%20proposal%20140610.pdf>, p. 4.

<sup>h</sup>[http://e-space.mmu.ac.uk/e-space/bitstream/2173/1793/1/jayawarna%20wp03\\_19.pdf](http://e-space.mmu.ac.uk/e-space/bitstream/2173/1793/1/jayawarna%20wp03_19.pdf), p. 3.

<sup>h</sup><http://www.guardian.co.uk/commentisfree/2012/oct/09/george-osborne-shares-rights-scheme>

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<sup>8</sup><http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9596927/Sainsburys-chief-executive-Justin-King-criticises-shares-for-rights-proposal.html>

<sup>9</sup><http://www.growthbusiness.co.uk/growing-a-business/business-planning-and-expansion/2127193/industry-reaction-to-george-osbornes-shares-for-rights-scheme.html>

<sup>10</sup> Ibid

<sup>11</sup><http://www.bbc.co.uk/news/business-19871245>

<sup>12</sup><http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/october-2012/statistical-bulletin.html#tab-Summary-of-labour-market-statistics-published-on-17-October-2012>



**REPRO DTP**

**From:** Victoria Todd  
**Sent:** 07 November 2012 12:37  
**To:** Employee Owner Status Consultation  
**Subject:** TRIM: LITRG response to consultation on implementing employee owner status  
**Attachments:** LITRG response\_BIS consultation\_employee owner status (final submitted version).pdf  
**TRIM Dataset:** M1  
**TRIM Record Number:** D12/1380995  
**TRIM Record URI:** 13444002

Good afternoon,

Please find attached the Low Incomes Tax Reform Group response to your consultation on implementing employee owner status.

If you have any further questions about our response, my contact details are below.

Kind regards

Victoria

Victoria Todd  
 Welfare Rights Technical Officer

M:  
 F:

Low Incomes Tax Reform Group - an initiative of the  
 Chartered Institute of Taxation

Registered Charity number 1037771

[www.litrg.org.uk](http://www.litrg.org.uk)

[www.tax.org.uk](http://www.tax.org.uk)

Artillery House, 11-19 Artillery Row, London SW1P 1RT



[www.revenuebenefits.org.uk](http://www.revenuebenefits.org.uk) - The adviser's guide to HMRC products

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## Low Incomes Tax Reform Group

*A voice for the underrepresented*

### **Implementing employee owner status Department for Business, Innovation and Skills consultation**

#### **Response by the Low Incomes Tax Reform Group**

#### **1. Our response**

- 1.1. We are responding to this consultation with the specific interests of low-income workers in mind. The law entitles all employees to certain rights and imposes obligations on employers. Whilst it is important to strike the right balance between protection of employees and burdens on employers, we are very concerned that proposals to introduce a new 'employee owner status' introduces further complexity and unnecessary burdens into a tax system which many already find totally bemusing and confusing.
- 1.2. This is particularly from the viewpoint of low-income workers, for whom there are huge risks of signing up to a scheme offered by potential employers without understanding the full ramifications. One of the objectives of the 'employee owner status' is greater flexibility and choice (both for employers and employees). In reality, prospective employers do not present such schemes as a choice and people are very often forced either to accept a contract with terms they do not understand or would have preferred not to have imposed on them, or very worryingly to have no work at all. One example of this is so-called 'travel and subsistence schemes' – a subject of continuing public interest.
- 1.3. The only 'benefit' we can see from the consultation of taking up 'employee owner status' is that a limited value of shares offered in the employing company will be free from capital gains tax. For the vast majority of employees, the trade off of certain rights for exemption from capital gains tax will not be worthwhile. It is a fact that most people never use their CGT annual exemption in any event. Making the shares exempt from income tax and national insurance contributions would be a far more attractive benefit and incentive.

- 1.4. The consultation acknowledges (page 11) that employees would need to understand the implications of their decision and that there would need to be information, guidance and advice for employees considering taking up the status. We fear that this understates the potential for confusion. 'Employee owner status' would be hugely challenging to explain, especially in view of the fact that the prospective employee might surrender certain rights on the basis they are not presently of value, but the employee cannot foresee the future. Their circumstances could change, for example by taking on care responsibilities for a family member who develops a disability, which could not possibly have been known at the time of the surrender. This example shows a potential, albeit indirect, impact on people with disabilities, if it means that family members who otherwise might have been able to care for them have foregone certain rights relating to flexible working requests (and even risk dismissal for making such a request<sup>1</sup>). This impact does not appear to be noted in the Equality Impact Assessment.
- 1.5. The consultation also acknowledges the need for safeguards and avoiding abuse of this new status. As with the above example of travel schemes, we very much fear that abusive schemes would be developed which would catch the low paid. Even if this were not the case, the consultation suggests that employee-owner status would be most relevant for 'fast-growing companies'. Those companies also have the potential to be the highest risk businesses, so it seems somewhat illogical that employees should surrender certain rights, especially their right to statutory redundancy pay, when working for a high-risk start-up company in exchange for shares which will become totally worthless should that company fail.
- 1.6. In summary, firstly we feel the consultation period from 18 October to 8 November 2012 is far too short to consider all the detail of these proposals. Secondly, from our initial reading, we conclude that the risks to employees and the additional complexity this would introduce in an already over complex system make these proposals untenable. Whilst employee share ownership may well be an important tool for some employers, there are already schemes in place to facilitate this which do not require employees to surrender important key employment rights. Furthermore, the Office of Tax Simplification (OTS) has reviewed and set out proposals for employee share schemes<sup>2</sup> with the aim of making them easier to understand and more usable. It therefore appears wholly unnecessary to introduce a separate 'employee owner status' – in effect creating a two tier system.

## 2. About LITRG

- 2.1. The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes.

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<sup>1</sup> Per page 13 of the consultation document, paras 28-30, it would no longer be 'automatically unfair' for an employer to dismiss an employee who makes a flexible working request in such circumstances. The employee would then have to rely on making a case for unfair dismissal under anti-discrimination legislation.

<sup>2</sup> See [http://www.hm-treasury.gov.uk/ots\\_essreview.htm](http://www.hm-treasury.gov.uk/ots_essreview.htm)

- 2.2. The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it - taxpayers, advisers and the authorities.

LITRG

7 November 2012





## **Consultation on implementing employee owner status - response form**

A copy of the **Consultation on implementing employee owner status**: can be found at:

<http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open>

You can complete your response online through SurveyMonkey :  
(<https://www.surveymonkey.com/s/5QJQ935>)

Alternatively, you can email, post or fax this completed response form to:

**Email:**

[implementing.employee@bis.gsi.gov.uk](mailto:implementing.employee@bis.gsi.gov.uk)

**Postal address:**

Paula Lovitt MBE  
Department for Business, Innovation and Skills (BIS)  
3 Floor Abbey 1  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**

## **Your details**

**Name:** Campbell Ritchie

**Organisation (if applicable):** HR Advantage Ltd

**Address:** ( Lancaster Court High Wycombe

**Telephone:**

**Fax:**

Please tick the boxes below that best describe you as a respondent to this:

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☐ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☒ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Trade union or staff association
- ☐ Other (please describe)

**Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?**

**Comments:**

**It has to make the scheme very simple, with no opportunity for ambiguity.**

**Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?**

**Comments:**

**Unlikely to be as expected. It will add complexity.**

**Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?**

**Comments:**

**They must only be available to bona fide employees**

**Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?**

**Comments:**

**Full value**

**Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?**

**Comments:**

**There must be a single common formula which is not open to challenge**

**Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.**

**Comments:**

**It will need to be substantial. Employers will need to understand that the scheme does not give carte blanche to abuse employment contracts and the cost and complexity of resolving other disputes the scheme may create.**

**Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?**

**Comments:**

**None**

**Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?**

**Comments:**

**None. Employees will make claims based on discrimination legislation and additional claims based on valuation unless this is prohibited.**

**Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?**

**Comments:**

**Start up companies**

**Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?**

**Comments:**

**They will increas**

**Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?**

**Comments:**

**None.**

**Question 12: What impact will this change to maternity notice period have on employers?**

**Comments:**

**It may be helpful but if this is an issue it should be the subject of a change impactign all employers and employees.**

**Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?**

**Comments:**

**Be as accomodating and flexible as possible - bith from a practical point of view and to avoid a discrimination claim.**

**Question 14: How will these changes impact on a company's payroll provisions?**

**Comments:**

**Not directly but HR record keeping complexity will increase**

**Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?**

**Comments:**

**It will increase.**

**Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?**

**Yes ☐ No ☒**

**Comments:**

**8 weeks would assist resource planning.**

**Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?**

**Comments:**

**None**

**Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?**

**Comments:**

**If this leaves ambiguity in schem operation this will be a mistake.**

**Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.**

**Comments:**

**It is essential the scheme only applies to bona fide employees. The liklelihood otherwise is that it will be used to gain tax free income for friends and family posing as employees.**

**Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply whoro shares issued in return for taking up the new status are involved**

**Comments:**

**Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?**

**Comments:**

**None**

**Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?**

**Comments:**

**No. If we want to offer shares we can use existing arrangements**

**Question 23: What are your views on the take-up of this policy by:**

- a) companies?**
- b) individuals?**

**Comments:**

**Companies - limited**

**Individuals - will be likley to accept offers on this basis.**

**Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?**



**Comments:**

**The focus on restricting flexible working and maternity rights will adversely affect women**

**Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.**

☒ **Please acknowledge this reply**

**Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?**

Yes ☒ No ☐

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**REPRO DTP**

**From:** Jennie Walsh (Thompsons Solicitors)   
**Sent:** 07 November 2012 12:23  
**To:** Employee Owner Status Consultation  
**Subject:** TRIM: Thompsons response  
**Attachments:** Thompsons response to shares for rights final.doc  
**TRIM Dataset:** M1  
**TRIM Record Number:** D12/1380979  
**TRIM Record URI:** 13443999

Please find attached out response to the consultation.

Regards

Jennie Walsh

Jennie Walsh  
 Thompsons Solicitors  
 DO:   
 Mob: 

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# IMPLEMENTING EMPLOYEE OWNER STATUS

## Analysis by/response from Thompsons Solicitors

November 2012

### About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

### Foreword

As an Investor in People Thompsons recognises the benefit to businesses of a workforce which is fully engaged with the work they do. We accept that this engagement can be enhanced where employees feel that they have a stake in the business but that 'stake' can be emotional as well as monetary.

Employee share ownership is a form of 'Fair Share Capitalism' (FSC) and can be very effective in raising productivity but we are also aware of research (and of government research in particular) into the effectiveness of different scheme types which concluded<sup>1</sup>:

- Although there was some variation across the three productivity measures used (a subjective measure of labour productivity relative to the industry average; sales per employee and value added per employee) there was a fairly consistently positive association of FSC with labour productivity.
- The productivity results differed by type of FSC scheme with share ownership schemes having the clearest positive association with productivity but only when those share ownership schemes were combined with profit-related pay (PRP) or group payments-by-results (PBR) schemes.
- **In isolation, share ownership was associated with lower productivity**, as were isolated PRP and group PBR schemes.
- The positive links between FSC and labour productivity were much stronger in workplaces where employees had greater autonomy in decision-making.
- The productivity results differed by employee coverage of FSC schemes. The positive association between share ownership and productivity was most pronounced when all non-managerial employees were covered by the scheme. Schemes just covering managerial staff were found to have little impact on workplace productivity."

Thompsons is also aware of the recent report by Graeme Nuttall and the various recommendations which are made within it to promote the benefits of employee ownership.<sup>2</sup>

Thompsons is not aware of any study, research or literature that indicates that the success of such initiatives is either dependent upon, or enhanced by, the removal of employment rights at work.

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<sup>1</sup> DTi Employment Relations Research Series No. 81, *Doing the right thing? Does fair share capitalism improve workplace performance?* 2007, page 2 [emphasis added]

<sup>2</sup> *Sharing Success, The Nuttall Review of Employee Ownership*, July 2012

Nothing in the consultation seeks views about whether the proposal is a good one or not, and significantly there are hardly any questions about possible disadvantages.

The fact that the enabling powers in the *Growth and Infrastructure Bill* and this consultation were published on the same day (18 October 2012) as well as the extremely tight timescale to respond shows utter disregard for the principle of transparent government and due process.

**For the record Thompsons deplores linking FSC with the surrender of rights in the manner proposed, considers that it goes against the very essence of FSC and the employee engagement that it seeks to achieve and believes that removing workers rights in this way will:**

- **Have no positive impact on growth.**
- **Alienate rather than engage workers**
- **Leave workers with shares of questionable and invariably no value**

We note that 80% of the public do not support the proposal.<sup>3</sup> Even the CBI has been lukewarm in its support, describing it as a *'niche idea not relevant to all businesses'*.<sup>4</sup>

#### **Q1. How can the government help businesses get most out of the flexibility offered and the different types of employment status?**

The employee-owner proposals will not apply to 'businesses' per se, just those with limited liability. There are no equivalent proposals for employees to acquire an equity stake in partnerships for instance. It will also be of no application to emanations of the state such as local government or the NHS.

If the employee-owner scheme does carry the benefits which the government hopes (an outcome we doubt), it will be interesting to see the extent to which non-incorporated businesses are adversely affected. If their decision to remain incorporated represents a commercial disadvantage then these measures will adversely affect some businesses.

As Q21 makes clear, flexibility is often used as a euphemism for the ability of employer's to fire staff.

#### **Q2. Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?**

This question is a little hard to fathom. Of all working arrangements, employment is the most common and therefore it is clear that businesses feel able to use it. The engagement of workers is also extremely common and the same point applies. Employee-owner does not exist as a status and so no one is in a position to say that they feel able to use it.

#### **Q3. What restrictions, if any, do you think should be attached to the issue of shares or types of shares?**

This is a key area for the employee-owner proposals. An employer which wishes genuinely to engage with its workforce and reap the benefit of Fair Share Capitalism will want to ensure that the shares which it issues are perceived as a benefit by the workforce. The Nuttall report refers to research which emphasises that link and ascribes benefit arising from

<sup>3</sup> YouGov poll, 10th November 2012, available at <http://research.yougov.co.uk/news/2012/10/11/employee-owners-scheme/>

<sup>4</sup> John Cridland, CBI Director-General, 8th October 2012, available at <http://www.cbi.org.uk/media-centre/press-releases/2012/10/cbi-responds-to-george-osbornes-speech-to-conservative-party-conference/>



\*...enhanced engagement with management and that this sense of engagement is positively linked with well-being. Enhanced well-being is also more likely to be generated at employee owned companies which provide employees with a greater stake and involvement in long-term collaborative goals.<sup>5</sup>

However, where an employer is less interested in engagement, and more interested in being able to fire at will, it will want to establish a scheme which gives as little as possible in return for that. This will not enhance a feeling of well-being, empower staff or give them a greater stake in the business.

Thompsons would want to see a minimum set of standards applying to shares issued to employee-owners. These should be established in order to promote the sense of well-being and engagement for the employee-owners themselves, and to limit the impact of abuse by unscrupulous employers. At the very least we would want to see shares which carry voting rights and carry rights to dividends.

**Q4. When an employer buys back forfeit shares, should this be at full market value or some other level (e.g. a fraction of market value) should some other level be allowed in certain circumstances?**

Thompsons believes that the notion of forfeiture is an inappropriate one in the context of employee-owners.

An employee-owner will only be an owner in the narrowest of technical senses. They are highly unlikely to see any fundamental change in the existing employment relationships, or in the way in which management acts towards them. The consultation's view that employees will suddenly become empowered and have more influence will, for the most part, be naïve and misplaced.

It is important to remember that at work the power-relationship very much rests with the employer. It chooses who to hire, who to fire, who to favour, and who to hold back. As the Supreme Court put it recently:

*"Employees as a class are in a more vulnerable position than employers. Protection of employees' rights has been the theme of legislation in this field for many years. The need for the protection and safeguarding of employees' rights provides the overarching backdrop to [employment law]"<sup>6</sup>*

It is common in employee share schemes to differentiate between 'good leavers' and 'bad leavers'. The former leave on good terms and are able to withdraw the value of their shares. The latter do not, and are not. They are usually the ones who are sacked for misconduct or incapability. Currently a 'bad leaver' may have the opportunity to argue unfair dismissal and seek an employment tribunal's view upon whether or not the employer was justified in applying that label. If not, then the leaver may use that to recover the value of the shares which was withheld.

That could not happen in most cases under the employee-owner proposals. An employer would be virtually unchallengeable in its ability to dismiss without cause or reason, apply any necessary label to attach 'bad leaver' status, and withhold payment of shares.

We consider that in recognition of the fact that an employee has surrendered many of their rights (and with them their ability to hold an employer to account) any shares should still receive their full value. We consider that it would be inappropriate to discount it in any way.

**Q5. How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?**

This is not really an issue for publically listed companies. It is a major issue for private (i.e. unlisted) ones and this response addresses those companies.

The consultation notes that the Government "...is keen to ensure that this new employment status does not impose any valuation requirements beyond those that already exist when valuing companies for other tax

<sup>5</sup> Paragraph 2.31

<sup>6</sup> Per Lord Kerr in Gisda Cyf v Barratt [2010] UKSC 41, at paragraph 35

purposes.”<sup>7</sup> We think however that this is unworkable.

An unlisted company will usually have no cause to engage in a valuation exercise more often than is required for the annual return to Companies House, or for tax purposes. This will be broadly annual, although it can be longer depending upon various factors. A year is a long time, and if there is to be just one valuation it is easy to envisage problems:

- The most recent valuation may be so out of date that it represents a significant under-valuation which causes the employee-owner to be significantly disadvantaged and short-changed;
- The most recent valuation may be so out of date that it represents a significant over-valuation which causes the company to be significantly disadvantaged and forced to pay out more than it would otherwise have done;
- Future valuations hold the same risks; and
- If an employee-owner has to wait up to a year or more to value their shares they risk the company ceasing to exist before the valuation compromise agreement be performed. If this is due to insolvency then they lose out on their entitlement because of that delay. If this is due to transfer then they will have no TUPE rights against the transferee and must hope that the transferor has assets.

Thompsons recognises however that preparing a valuation is a time consuming and expensive exercise. Businesses will not wish to be required to undertake one every time an employee leaves. We therefore see significant problems ascribing a fair and meaningful valuation upon an employee-owner’s shareholding.

We are also concerned about the basis of valuation. A valuation for tax purposes is not necessarily the same as a valuation for other purposes. If shares have voting rights then their face value may be exceeded by their value as a means of securing majority control. We therefore have some difficulty in reconciling the Government’s stated aims of limiting valuations to those undertaken for tax purposes, and ascribing an “unrestricted market value” to them.<sup>8</sup>

#### **Q6. The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.**

There are two broad areas of advice here: financial and legal.

A potential employee-owner will need to be informed of the current value of the business, the debt gearing, the current finances, growth projections, and some indication of management competence to manage. They will also need to be able to get professional advice about that from an independent financial advisor. They will need a right to request that information as well as to see and receive it within a reasonable timeframe.

Currently s.203 *Employment Rights Act 1996* imposes minimum independent legal advice requirements upon the surrender of unfair dismissal rights. The shorthand for this is ‘compromise agreement advice’ and the key elements are a written agreement upon which the employee has received advice from an insured independent legal advisor. That advisor may only be a lawyer, certain trade union officials or certain advice centre workers. The Government rejected calls for that category to be extended. The Government has chosen not to amend s.203 as part of its changes to introduce settlement agreements. For that reason these will need to be observed.

Although the Treasury press release referred to becoming an employee-owner as being optional for existing staff<sup>9</sup> this is in fact not realistic. Employers regularly dismiss and re-engage staff to impose brand new terms and conditions upon them.<sup>10</sup> The proposals make it clear that employers can impose that status upon new starters.

<sup>7</sup> Paragraph 19

<sup>8</sup> Paragraph 19

<sup>9</sup> [http://www.hm-treasury.gov.uk/press\\_91\\_12.htm](http://www.hm-treasury.gov.uk/press_91_12.htm)

<sup>10</sup> For a current example see North Tees & Hartlepool NHS Foundation Trust which is currently looking to use this mechanism to impose new terms on 5,400 members of staff

Thompsons considers that there is an overwhelming case in favour of providing proper professional advice to the potential employee-owner before they give their agreement. This is a cost which it is reasonable to expect the business to bear. As such it represents a very real impediment to hiring new staff and could choke the very growth that these proposals, on their face, seek to stimulate.

We would also be concerned that employers might seek to use a compromise agreement format to exclude more than simply the unfair dismissal rights. It is human nature to use familiar documents and most compromise agreement precedents include provisions to exclude all possible claims. We foresee the situation where an individual is required to sign a compromise agreement, is told that it excludes the unfair dismissal required for employee-owner status, but actually goes further and excludes other claims too. This may not be deliberate, but would be an abuse.

#### **Q7. What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?**

We believe that these measures will have no significant, measurable, positive impact upon employers' appetite for recruiting.

There is no hard evidence to show that employment rights are a genuine hindrance to hiring. Indeed Vince Cable acknowledged that recently in a speech to the EEF:

*"A recent survey of SMEs, commissioned by BIS, revealed that the proportion regarding regulation, including employment regulation, as the main obstacle to business success was only 6% - and it has halved over the last two years."<sup>11</sup>*

We emphasise that all regulation (including taxation, export rules, money laundering etc) only accounted for 6%. It is therefore difficult to see how employee-owner measures, with all the regulations which must follow, will be any more attractive when as the Nuttall report highlighted:

*"This review found a widespread perception amongst those not directly involved in the employee ownership sector that employee ownership is complex and difficult to set up."<sup>12</sup>*

In our view the CBI was right to call this a niche idea not relevant to all businesses: the administrative, regulatory and valuation elements will be unattractive to many businesses; it fails to offer any protection from the overwhelming majority of potential employment tribunal claims; the two years continuous employment requirement for unfair dismissal means that new businesses have that protection already without the hassle; and it seeks to fix a problem that simply does not apply to most businesses by offering a solution to only some.

#### **Q8. What benefits do you think introducing the employee owner status with limited unfair dismissal rights will have for companies?**

We have already noted the potential benefit to business of FSC, and that there is no research which we are aware of that links its success to limiting employment rights. We refer again to the summary of the research at the top of this document and its focus on employee buy-in. We believe that employee buy-in will be undermined where the business asks it to make a greater commitment to it but without the commitment to rights that balance that equation.

We also note the finding that in isolation, share ownership was associated with lower productivity. These employee-owner proposals are just that – an example of isolated share ownership. Even without the loss of rights this proposal is likely to under-achieve.

There is the potential for a tax-dodging benefit for companies. A sole trader, or partnership, need only

<sup>11</sup> 23<sup>rd</sup> November 2011, available at [news.bis.gov.uk/imagelibrary/downloadmedia](http://news.bis.gov.uk/imagelibrary/downloadmedia). Presumably referring to the *SME Business Barometer*, August 2011, Table 4a

<sup>12</sup> Paragraph 4.17



incorporate, make themselves employees, grant themselves £50,000 of shares and enjoy the tax breaks which accompany that move. As 'proper' owners they could not sack themselves anyway and so this is win-win for them.

The consultation says it is keen to avoid unintended consequences. One may well be that there is limited uptake for the employee-owner proposals and that the job market moves against those which go down that route. Businesses can offer share schemes without the loss of rights. Doing so nevertheless gives a clear message to the market about how you value staff. Those businesses may well find that they lose staff to competitors who leave rights intact, and cannot recruit replacements where it would involve giving up existing rights. To some extent this is already a feature of the continuous employment requirement for such rights, but the employee-owner proposals perpetuate that indefinitely beyond the two year period.

Another unintended consequence may relate to a change in position. A business may try the employee-owner model, find it does not work for them, and may wish to revert back to a 'full-rights' model. The proposals, and the Bill, are currently silent about how such a move could be achieved. There is no mechanism currently in existence which could allow the reinstatement of rights by an employer. Unfair dismissal rights cannot be granted by employers as they are a statutory right independent of individuals. Continuous employment for unfair dismissal purposes cannot be backdated and clarity would need to be given about what periods, if any, counted to any reinstated right.

**Q9. Do you think these benefits will be greater for larger, smaller or start-up businesses?**

We have no observations to make in respect of this question.

**Q10. What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?**

As there is no way of reversing the loss of the unfair dismissal right there would be a reduction in unfair dismissal claims. As we believe that the take up would be very limited, and because of the impact of the two year continuous employment requirement, we think that this reduction would be likely to be negligible.

It is likely that attempts would be made to use other jurisdictions where unfair dismissal was unavailable. This might be one of the species of unfair dismissal claims that remains intact, or discrimination. The extent of this would depend on the take-up of employee-owner schemes, and the way in which businesses conducted dismissals. We are not able to hazard an assessment of either at this stage.

**Q11. What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start-up businesses? What negative impacts do you anticipate and how might these be mitigated?**

We repeat our observations in Question 10, it is difficult to see how the statutory redundancy payment is a major issue for small firms. No-one acquires the right until they have two years continuous employment so new start-ups will not have that problem for several years. Even after two years the payment due is between one and three weeks wages capped at £430. These are small sums compared to other business costs. While multiple redundancies would increase that cost, smaller businesses by definition have fewer staff and are less likely to face that issue to any significant degree.

**Q12. What impact will this change to maternity notice period have on employers?**

We have no observations to make in respect of this question.

**Q13. What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?**

We have no observations to make in respect of this question.

**Q14. How will these changes impact on a company's payroll provisions?**

We have no observations to make in respect of this question.

**Q15. What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?**

We have no observations to make in respect of this question.

**Q16. Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?**

We do not see the need to alter this time limit at all.

**Q17. What impact do you think this proposal would have on the ability of employee owners to access support for training?**

We consider that it is likely to be reduced because employee owners will not have the right to request it.

**Q18. Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?**

We have no observations to make in respect of this question.

**Q19. The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.**

We have commented on this earlier within this response.

**Q20. The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved.**

We have no observations to make in respect of this question.

**Q21. What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?**

We consider that it is likely to have a minimal positive impact, and that is unlikely to lead to an increase in recruitment.

**Q22. Would you be likely to take up the new status? What would the impact of the status be on your business?**

No.

**Q23. What are your views on the take-up of this policy by:**

**a) companies?**

**b) individuals?**

We do not anticipate take-up by either group to be significant for the reasons given earlier.

**Q24. What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?**

We consider that employee-owner statuses may be sought for workforces perceived to be 'high risk'. This might introduce discriminatory assessments. The impact assessment's assertion that such action would be actionable in discrimination law is not necessarily accurate. The decision to make all new starters adopt this status may be discriminatory in nature, but it is a decision that an individual new starter is unlikely to be able to challenge.

The rights relating to maternity leave obviously have a disparate impact upon women, as do the flexible working aspects. The assertion that "Employee owners will find it easier to discuss working patterns with their employer because they have a vested interest in the business" shows an astonishing lack of understanding about workplace dynamics.

#### **Further comment**

In our view it is important to point out and address fundamental issues which this consultation fails to address, something which suggests that the employee-owner proposal is a misguided one. We set these out below:

1. There is some possibility that the proposals could be deemed a breach of human rights law. Some of the statutory employment rights to be relinquished could be construed as "property" for the purposes of the right to property under Article 1 of the First Protocol of the European Convention of Human Rights (the "Convention").
2. There is also a chance that the fact that it favours only incorporated businesses places it in breach of competition law
3. How simple will it be for small to medium sized companies to value the shares?
4. How simple will it be for small to medium sized companies to issue or allot new shares if they do not have Companies Act 2006 Articles of Association?
5. What will be the administrative and legal costs of doing this, including the cost of amending any Articles where necessary?
6. What proportion of companies have these types of restrictions in their Articles as opposed to having Companies Act 2006 Articles?
7. What measures will be taken to prevent Articles of Association being used to restrict the pool of potential purchasers and preventing them from purchasing a 'bad leaver's' shares?
8. How far will the above costs need to be replicated for each and every employee participating in the Share Scheme, particularly if joining or leaving at different times?

9. Will small firms want to dilute share ownership in this way?
10. If employees leave, will companies have the cash to buy back shares? Alternatively, will companies be concerned about perhaps disgruntled employees remaining shareholders?
11. What liability might attach to a business in respect of representation which it makes to induce someone to become an employee-owner?
12. To what extent will these measures see a rise in associated disputes such as shareholder actions?
13. How will businesses view the risk of employee-owners acting collectively to assert control?
14. Will companies be worried about negative PR concerning employee treatment and potential redundancies if they adopt the Share Scheme?
15. What level of budget is apportioned by small to medium sized companies to compliance with unfair dismissal, redundancy and flexible working rights, together with associated claims?
16. Do the savings arising from reduction of these rights outweigh the various financial, reputational and administrative costs associated with the Share Scheme highlighted above?
17. What proportion of small to medium sized companies have been asked these questions?
18. What sort of administrative difficulties are posed to a business of having some staff opt into the employee-owner scheme, and others not?
19. What safeguards is the Government proposing to introduction to prevent abuse of the employee-owner scheme by businesses? We note that there is no protection for impropriety as suggested for the pre-settlement agreement negotiations.
20. Would employee-owners be able to cash in their shares during their employment?
21. What is to stop company owners diluting a shares worth by issuing shares to themselves or others prior to selling out the firm or before a mass 'redundancy' situation?
22. What is to stop company owners running a company into the ground in the knowledge that employees cannot come back against them?
23. What is to stop company owners using 'protected conversations' or 'pre-termination negotiations' to force employees to accept shares?

**Contact details/further information**  
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## **Consultation on implementing employee owner status - response form**

**A copy of the Consultation on implementing employee owner status: can be found at:**

<http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open>

**You can complete your response online through SurveyMonkey :**  
(<https://www.surveymonkey.com/s/5QJQ935>)

**Alternatively, you can email, post or fax this completed response form to:**

**Email:**

[implementing.employee@bis.gsi.gov.uk](mailto:implementing.employee@bis.gsi.gov.uk)

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The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

**The closing date for this consultation is: 8 November 2012**

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☐ Business representative organisation/trade body

☐ Central government☐ Charity or social enterprise☐ Individual

☒ Large business (over 250 staff)

☐ Legal representative☐ Local government☐ Medium business (50 to 250 staff)☐ **Micro business (up to 9 staff)**☐ Small business (10 to 49 staff)☐ Trade union or staff association☐ Other (please describe)

**Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?**

**Comments:**

**Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?**

**Comments:**

**Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?**

**Comments:**

**Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?**

**Comments:**

**Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?**

**Comments:**

**Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.**

**Comments:**

**Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?**

**Comments:**

**Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?**

**Comments:**

**Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?**

**Comments:**

**Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?**

**Comments:**

**Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?**

**Comments:**

**Question 12: What impact will this change to maternity notice period have on employers?**

**Comments:**

**Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?**

**Comments:**

**Question 14: How will these changes impact on a company's payroll provisions?**

**Comments:**

**Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?**

**Comments:**

**Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?**

Yes ☐ No ☐

**Comments:**

**Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?**

**Comments:**

**Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?**

**Comments:**

**Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.**

**Comments:**

**Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved**

**Comments:**

**Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?**

**Comments:**

**The impact on labour market flexibility will depend on whether it is compulsory to offer employee ownership status.**

**Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?**

**Comments:**

**For a large corporate such as IG Group ("IG"), the new status is likely to offer minimal benefit. The scheme is more likely to attract start-ups who cannot afford high initial salaries but wish to attract high calibre employees. Employee ownership would also result in an upfront cost of 13.8% - employers NIC liability on the value of the shares at the time they are awarded which, with a large workforce, will represent a significant cost to IG. IG is therefore unlikely to take up the new status.**

**Question 23: What are your views on the take-up of this policy by:**

- a) companies?**
- b) individuals?**

**Comments:**

**(a) The proposal will represent a significant upfront cost for large corporates with little real benefit (please refer to our response to question 22) and we therefore expect limited take-up by such corporates.**

**(b) The CGT benefits to the employee would also appear to be overstated as most would benefit from the annual CGT annual exemption. Unless the company is a start-up or private equity, there would be limited capital growth. The PAYE and NIC charge on award may also act as a significant disincentive.**



**Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?**

**Comments:**

**Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.**

☒ **Please acknowledge this reply**

**Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?**

Yes ☒ No ☐

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## REPRO DTP

**From:** Phil Hall  
**Sent:** 06 November 2012 22:47  
**To:** Employee Owner Status Consultation  
**Subject:** TRIM: BIS consultation on implementing employee owner status  
**Attachments:** BIS consultation on implementing employee owner status 08.11.12.doc  
**TRIM Dataset:** M1  
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**TRIM Record URI:** 13439996



Dear Sir/Madam,

Please find attached a submission to your consultation on "employee owner status" from *ifs ProShare* who act as the voice of the employee share plans industry in the UK.

Please do not hesitate to contact me should you have any queries or require any further information either now or in the future.

Yours faithfully,  
Phil

Phil Hall  
Special Adviser to the *ifs*  
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## **ifs ProShare response to the BIS consultation on implementing employee owner status**

### **ABOUT US**

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*ifs ProShare* is a member led, not-for-profit organisation that acts as the voice of the employee share ownership industry in the UK.

Established by the Government, London Stock Exchange and a number of FTSE 100 companies in 1992, *ifs ProShare* has approximately 100 members. These include a wide range of Small and Medium Enterprises as well as larger companies such as Sainsbury's, BT, HSBC and Marks & Spencer as well as share plan administrators and advisers including Capita, Computershare, Equiniti, Killik Employee Services and Linklaters.

*ifs ProShare* provides training courses and workshops to share plan professionals; shares best practice through our annual conference; rewards best practice through our annual awards; maintains and enhances the public profile of employee share ownership through the media and lobbies various organisations, government bodies and stakeholders to ensure the employee share ownership industry can continue to operate successfully in the UK.

### **RESPONSE**

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Approximately 10,000 companies in the UK offer some form of HMRC approved employee share plan and more than 2 million employees are currently saving and investing in such plans.

In keeping with much international evidence, new research into the human impact of employee share ownership - published by the University of Loughborough in September 2012 - makes a number of positive conclusions about the effects of share ownership on employee's attitudes and behaviours. Clearly this would support the expansion of employee share schemes.

However, the proposals and the 23 questions asked in this consultation do not relate to employee share ownership in the traditional sense i.e. affording employees the opportunity to participate in an employee share plan as a means of boosting productivity, encouraging saving and investing, aligning employer/employee values, increasing employee retention, reducing staff absence and so on.

Instead these proposals are about labour laws and employment contracts i.e. the offer of a financial incentive in exchange for the waiving of various employment rights from redundancy pay and unfair dismissal rights to the right to request training and flexible working.

It is therefore regrettable that what is essentially a new form of employment contract is being sold as a new employee share scheme. It is not.

*ifs ProShare* therefore call on BIS and HM Treasury to remove any ambiguity. Government must be explicit when referring to this new contract that it in no way relates to employee share plans.

The importance of doing so has already been demonstrated by the BIS commissioned Nuttall Review published earlier this year. The review acknowledged the problem of people confusing similar but different concepts, stating employee ownership and employee share ownership "...is undermined by misperceptions and confused terminology." The very last thing the employee share ownership industry needs now is further complexity and confusion.

We look forward to forthcoming legislation in this area making no reference to employee share plans and that both BIS and HM Treasury will ensure these proposals in no way undermine the successful UK employee share ownership industry. We would be more than happy to meet with officials to discuss how this could best be achieved in practice.

### **FURTHER INFORMATION**

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Further information about employee share ownership can be found at [www.ifsproshare.org](http://www.ifsproshare.org) Alternatively, if you have any queries or require any further information about the above please do not hesitate to contact Phil Hall, Special Adviser to the *ifs* at



## **Consultation on implementing employee owner status - response form**

A copy of the **Consultation on implementing employee owner status**: can be found at:

<http://www.bis.gov.uk/Consultations/consultation-on-implementing-employee-owner-status?cat=open>

You can complete your response online through SurveyMonkey :  
(<https://www.surveymonkey.com/s/5QJQ935>)

Alternatively, you can email, post or fax this completed response form to:

**Email:**

[implementing.employee@bis.gsi.gov.uk](mailto:implementing.employee@bis.gsi.gov.uk)

**Postal address:**

Paula Lovitt MBE  
Department for Business, Innovation and Skills (BIS)  
3 Floor Abbey 1  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **8 November 2012**



## **Your details**

**Name:** Stewart Edge

**Organisation (if applicable):**

**Address:**

**Telephone:**

**Fax:**

**Please tick the boxes below that best describe you as a respondent to this:**

- ☐ Business representative organisation/trade body
- ☐ Central government
- ☐ Charity or social enterprise
- ☒ Individual
- ☐ Large business (over 250 staff)
- ☐ Legal representative
- ☐ Local government
- ☐ Medium business (50 to 250 staff)
- ☐ Micro business (up to 9 staff)
- ☐ Small business (10 to 49 staff)
- ☐ Trade union or staff association
- ☐ Other (please describe)

**Question 1: How can the government help businesses get most out of the flexibility offered and the different types of employment statuses?**

**Comments:**

**Question 2: Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?**

**Comments:**

**Question 3: What restrictions, if any, do you think should be attached to the issue of shares or types of shares?**

**Comments:**

**Shares should not have any different tax status than any other shares - to do so will complicate the tax system (which the government is against!) and introduce loopholes which will be exploited by those seeking to evade tax.. SEE ANSWER TO q19**

**Question 4: When an employer buys back forfeit shares, should this be at full market value or some other level (eg. a fraction of market value) should some other level be allowed in certain circumstances?**

**Comments:**

**(Full market value - see answer to question 4)**

**Question 5: How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?**

**Comments:**

**See answer to question 4). Value should be at standard method required for any shares**

**Question 6: The Government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status.**

**Comments:**

**Question 7: What impact will allowing individuals limited unfair dismissal protection and equity shares have on employers' appetite for recruiting?**

**Comments:**

**Question 8: What benefits do you think introducing the employee owner status in with limited unfair dismissal rights will have for companies?**

**Comments:**

**Question 9: Do you think these benefits will be greater for larger, smaller or start-up businesses?**

**Comments:**

**Question 10: What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?**

**Comments:**

**Question 11: What impact do you think introducing the employee owner status with no statutory redundancy pay will have for businesses, in particular, smaller businesses and start up businesses? What negative impacts do you anticipate and how might these be mitigated?**

**Comments:**

**Question 12: What impact will this change to maternity notice period have on employers?**

**Comments:**

**Question 13: What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?**

**Comments:**

**Question 14: How will these changes impact on a company's payroll provisions?**

**Comments:**

**Question 15: What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?**

**Comments:**

**Question 16: Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?**

Yes ☐ No ☐

**Comments:**

**Question 17: What impact do you think this proposal would have on the ability of employee owners to access support for training?**

**Comments:**

**Question 18: Do you have any comments on the Government's intention not to amend Company Law to implement the employee owner proposal?**

**Comments:**

**Question 19: The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.**

**Comments:**

**I see very considerable opportunities for abuse of the concession that these shares should be exempt from any Capital Gains Tax. I doubt that loopholes can be effectively closed and so I think that NO CGT advantage should be given.**

**Some of the opportunities I see for abuse are:**

**Owners of private equity firms could configure a company so that they (or family members?) got employee shares to receive all the capital gains in a company and pay no CGT.**

**Owners of small IT (and other) companies (already used to avoid National Insurance and lower taxes) would similarly be able to use such companies to accumulate value as a capital gain and then this would not be subject to any tax.**

**Owners of buy-to-let properties would similarly arrange for all capital gains to be accumulated in such a company structure and then avoid CGT on the sale of the company (closing the property at the same time).**

**I am sure there are many other examples which ingenious accountants would think of - and therefore I repeat that I think NO CGT advantage should be given.**

**Question 20: The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as might happen when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved**

**Comments:**

**SEe 4) above - should not be any different rules**

**Question 21: What impact do you think the proposal will have on labour market flexibility – that is, in relation to hiring and letting people go?**

**Comments:**

**Question 22: Would you be likely to take up the new status? What would the impact of the status be on your business?**

**Comments:**

**Question 23: What are your views on the take-up of this policy by:**

- a) companies?**
- b) individuals?**

**Comments:**

**Question 24: What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?**

**Comments:**

**Question 25: Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.**

☒ **Please acknowledge this reply**

**Question 26 : At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?**

Yes ☐ No ☒

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