

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:

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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**

Your details

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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:

****No restrictions should be applied by legislation on the issue of shares or the types of shares that may be issued to employee owners. This would be unduly inflexible and could mean that the arrangement might be regarded as a type of Revenue approved share plan.**

However, companies should have the ability to choose to apply a wide range of restrictions, if they so wish, to be attached to the shares. Companies may wish to restrict (either in total or simply in terms of priority) voting rights, dividend rights and/or capital rights on a distribution or winding up. There are various commercial reasons why this might be desirable. For example, it may be in the best interests of a company to restrict voting rights and/or income rights on employee owner shares, pending a specified event such as a sale or flotation. Equally, the existing shareholders may be willing to give employee owners income and capital rights, but not want the administrative difficulties associated with having large numbers of minority shareholders and may therefore want to restrict their voting rights, so that it is easier to administer the running of the company.

Companies may also wish or need to give preferred rights to another investor, with the result that the employee owners are treated in the same way as other manager / founder shareholders, but ranking behind that investor. This might be necessary, for example, because an institutional investor may impose conditions on its making an equity investment into the company, requiring it to have preferred income and capital rights until a specified level of return is reached.

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:

****It is imperative that a company is not obliged to buy back shares if, for example, it has insufficient funds. Companies should have the ability to agree with employee owners (through articles of association and/or a shareholders agreement), if they so wish, that the price at which those forfeited shares will be bought back by the company (or bought by other shareholders) will be less than market value in certain circumstances specified in the company's articles of association or shareholders agreement (which would typically be referred to as "bad leaver" provisions).**

Companies should have flexibility to specify any purchase price mechanism for bad leavers that is commercially acceptable to the company and shareholders. This could include, for example:

- (if the employee owner has subscribed for shares with cash) a price equal to the lower of the amount paid for the shares and market value,**
- (if the employee owner has subscribed for shares with cash) a price equal to the lower of the market value of the shares at the time or the amount paid for the shares (this will reduce the risk of an income tax charge arising on disposal of the shares where the market value of shares has decreased since subscription),**
- a price equal to a specified percentage of market value, on a sliding scale based on length of service, or**
- no proceeds at all (especially where the shares have been given to the employee, who subsequently commits gross misconduct).**

The level of price offered should be a matter for the company to determine in its articles of association.

Companies should have flexibility as to what would constitute a bad leaver event and what is appropriate will differ depending on the nature of the company.

Bad leaver provisions could apply in circumstances such as:

- where the employee owner leaves voluntarily within the first few years, or**
- where the employer has grounds for summary dismissal of the employee owner.**

Some companies may wish bad leaver provisions to be the default position, with exceptions made for departures due to, for example, retirement, death, permanent incapacity, or with specified investor consent.

It is important to note that management/ employee ownership structures are common in private equity and venture capital backed investments, which present a "well trodden path". The focus in such investments is releasing capital on an exit or partial exit, such as an acquisition by another private equity / venture capital investor or industry player or a flotation. The approach to good leaver/ bad leaver valuations in those structures reflects the need to incentivise people to stay until such an exit is achieved and the reality that cash to buy people out is likely only to be available in significant amounts at exit. Cash to buy out existing employees is typically only available before exit from incoming employees and it is generally very difficult to make this work effectively.

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:

Valuation exercises tend to be extremely expensive, not least due to the risk issues for those carrying out the valuation. We regard this issue as a serious potential stumbling-block to the success of the proposed legislation.

Before considering the subject of valuation generally, it is important to note that if an approach is taken to the valuation which is very different to the market value test for tax purposes under section 272 TCGA 1992 for the valuation of employment-related securities, there is going to be a conflict between the tax position and this legislation. This is because under the tax market value test (hypothetical open market value between a hypothetical willing vendor and a hypothetical willing purchaser) the value would be different as it would take account of discounts for size of holdings etc. Employees could be confused about what the values are if they are told that the shares have one value for the purpose of acquiring shares under the new legislation and another value for income tax purposes. Requiring only one valuation will also reduce the costs and administrative burden for businesses of implementing employee owner status.

It would be helpful if the initial market value was determined by reference to the tax market value. It would be even more helpful if there were a process to agree market values in advance with HMRC as is the case with Revenue approved share plans. This would provide certainty for the employees as to their potential income tax charge on acquisition of the shares if they do not pay full unrestricted market value for the shares. If there is an independent valuation, there is no certainty from a tax point of view. If an HMRC valuation procedure is not available, could there be some guidance to the effect that if there is a current valuation for, say, EMI purposes that it could be applicable for employee owner shares.

For start-up companies and small high growth companies the question of what amounts to (say) £2,000 worth of shares is potentially very difficult, with much being in "hope value" in the early stages. Valuation can become a little easier when significant equity funding is obtained, as that (for a time at least) provides a benchmark. Even then, revenue based valuation methodologies are likely to remain quite speculative.

The company will need to determine a sale price on the employee owner's departure. If the sale price cannot be agreed between the employee owner and the company, then it is likely that the company will need to obtain a valuation.

The cost impact for the company is likely to be significant and could deter smaller companies from issuing shares to potential employee owners. Allowing the company to stipulate that the company and employee would share the costs of the valuation might encourage more employee owners to agree a reasonable price and avoid valuation costs which might often be unsustainable.

Alternatively, if the company's articles specify that the board can determine the reasonable price, using its own discretion and on the basis of certain specified

bases of assumption, that would also avoid the need for a formal valuation and the associated costs.

The company's articles should specify the basis of the valuation, but it would be helpful for the legislation to provide for a default basis of valuation in the event that the articles are silent on the point. However, if the default basis is not linked to the tax market value then there could be income tax issues.

Typically, you might expect the basis of valuation of fair market value to be based on several assumptions, including:

- (a) that there is no premium or discount for the size of the employee owner's shareholding or for the rights or restrictions applying to the shares (notwithstanding the potential income tax liability);
- (b) that the sale is between a willing buyer and a willing seller on the open market;
- (c) that the sale is taking place on the date that the employee owner's employment terminated;
- (d) that the company will continue carrying on its business as a going concern; and
- (e) that the shares are sold free of all encumbrances.

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:

As a preliminary issue, given that currently employees must take independent legal advice prior to waiving statutory employment rights under a compromise agreement, will this be the case for employee owners? It may be that a distinction should be drawn between existing employees offered a change in status, and new joiners. Legal protection may already be available to existing employees and such advice can be made available at a proportionate cost, even where there is a grant of shares at the lower end of the required value. Taken in the round, legal advice about "downside" is only of partial benefit to an individual in understanding their position if there is uncertainty about the valuation of the shares ("upside"). It may be that the existing law relating to representations, duress and unfair dismissal provides protection to existing employees in making a choice whether to agree to a change in status, and for both existing employees and new joiners it will be possible to disseminate general information on the implications of this status through the BIS website and other sources. In addition or alternatively, employers may be required to include a form of wording in any offer stating the employee owner had the chance to take advice prior to agreeing - this at least would flag the question of rights to individuals, without requiring additional mandated cost for business.

Detailed advice should be provided to businesses and individuals to include explanations:

- (a) that companies cannot issue shares at a discount - the issuing company would need detailed advice as to who pays the capital due on the shares and how it is paid (for example, is the value of the waiver of rights at least equal to the aggregate nominal value of the shares? If not, does the company have any distributable

profits which could be capitalised so to allow the shares to be issued fully paid? If no to both of those questions, the employee owner would need to pay the nominal value for the subscription price of the shares.) One alternative would be to allow the issue of nil paid shares. Alternatively, an EBT could be used, but that would still have to be funded to pay the nominal value subscription price. There would then be the cost of setting up an EBT;

(b) that employees are acquiring shares (and may be making a payment to acquire those shares) at the start of employment and waive employment rights in return for potential gain in the value of the shares;

(c) that employee owners will bear the risk of the shares falling in value after they are acquired, with the risk of total loss;

(d) that employee owners will bear the risk of dilution (in other words, that additional shares may be issued in the future, reducing their proportionate participation in the company, and that those additional shares might be issued for a lower value than that paid for or deemed paid for the employee owner's allotment of shares);

(e) of the key provisions of the company's articles (and, if applicable, shareholders' agreement), including pre-emption provisions on issue and transfer, restrictions on transfer, compulsory transfer provisions, preferred rights (if any) in relation to income and capital, any anti-dilution protection enjoyed by other shareholders, any enhanced voting rights, and any matters requiring the consent of certain shareholders;

(e) that (depending on the company's articles of association) in particular, an employee owner may be compelled to transfer his/her shares against his/her wishes;

(f) that the shares are likely to be extremely illiquid (where the shares are unlisted) and that there is a risk that the company will be unable to buy the shares back when the employee leaves (i.e. if the company does not have sufficient distributable profits; or is unable to make a purchase out of capital, perhaps due to solvency concerns; or is unable to fund the buyback out of the proceeds of a fresh issue; or because it is unable to obtain shareholder approval). The employee owner therefore is at risk of being unable to realise the investment and there is a risk for the company of an employee owner remaining a shareholder after he/she has left the business;

(g) of the employment rights which are being waived;

(h) of the continuous service required to accrue the rights (e.g. flexible working requests, right to request training, unfair dismissal and redundancy payments);

(i) of the potential financial loss to the employee of waiving the rights / gain to the employer;

(j) that although neither a business or employee owner is bound by the statutory requirements of making or refusing a statutory flexible working request, that the

requirements and remedies under the Equality Act 2010 still apply (see answer to Question 10);

(k) that, for an employer, the offer of employee owner status would be discretionary and its acceptance by the employee entirely voluntary as well as, in any particular circumstance, the outcome of not accepting employee owner terms offered;

(l) of the tax advice for the employee owner. As the shares will be employment-related securities, there will be income tax charges on acquisition of the shares where market value is not paid on acquisition. The employee would need to understand that if the share value fell after acquisition then that income tax charge could not be re-claimed.

If the shares are restricted shares (for the purposes of Part 7 ITEPA 2003), the employer will want to insist on a section 431 election being signed on acquisition of the shares. This will ensure that any income tax charges (and possible NIC charges) will be crystallised on acquisition rather than at a later date. If the employee pays the nominal value for the shares and this is not the full unrestricted market value for the shares then there is an income tax charge on the difference between nominal value and the unrestricted market value. If the shares are readily convertible assets, then the income tax has to be accounted for through PAYE and NIC is also due. Even if the shares are not readily convertible assets, the employee will still have a "dry" tax charge through self-assessment as they will have to pay the income tax through their own resources. The tax information (and resulting cashflow implications) has to be taken into account when the employee makes their decision. Depending on the value of the employee's proposed shareholding, the potential growth of the shares and future dilution, it could have been the case that the gain on the shares would have fallen within the employee's personal CGT exemption in any case; and

(m) that for the business there will be reporting requirements on Form 42 about the acquisition of these employee owner shares. Will there be a new section in this already complex form?

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:

****Employers may recruit staff as "employees" for an initial period of up to 2 years with agreement to move to offer employee owner status at the end of that period.**

From April 2013 existing employees may also be offered these terms as a change to their terms and conditions of employment as they approach two years continuous service.

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

Comments:

Due to the likely set-up costs, tax implications and valuation issues, the benefits seem greater for small and medium sized companies, rather than new start-ups who may struggle to finance the set-up costs. The benefits for larger companies will depend on the likely tax benefit to potential employee owners and the extent of the likely further capital growth, particularly bearing in mind the existing annual CGT exemption.

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

Comments:

**** It is possible that the employee owner status may result in an increased likelihood for unlawful discrimination claims, either because:**

(a) in the absence of unfair dismissal as a remedy, employee owners who feel that they have been unfairly treated, may make other claims instead, including claims for unlawful discrimination;

(b) the Government, in its Equality Impact Assessment of implementing employee owner status, recognises that there could be an impact on hiring decisions: "Companies may be more inclined to offer an employee owner contract to those who are more likely otherwise to exercise the specific rights that are not part of the employee owner status." (e.g. the right to request flexible working). It goes on to say that this could be indirectly discriminatory and that the policy might be seen as encouraging discriminatory behaviour, but "this is an indirect effect of the policy". Employers could therefore potentially discriminate indirectly against female employees on recruitment. Such discrimination would need to be objectively justified;

(c) maternity returners denied from making a statutory request to work flexibly on return to work due to their employee owner status would not be prevented from bringing a claim of indirect discrimination under the Equality Act 2010; or

(d) there is no requirement that the new employment status is only offered to new employees. In fact, failure to offer it to existing employees could be discriminatory in some circumstances.

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 our view the relatively low figures for a statutory redundancy payment are unlikely to be a determining factor for any size of business compared with other costs involved in setting up employee owner status.**

However, a negative impact might be that an employee owner loses not only the right to receive an SRP on redundancy, but in the event that the reason for the redundancy is due to an economic downturn of the business, the value of the shares may also be low.

Smaller businesses may also have concerns about their ability to fund the buyback of shares (given the likelihood of having sufficient distributable profits to be able to purchase the shares and/or their ability to give a solvency statement necessary for a purchase out of capital and/or their ability to secure further investment with new issues of shares). The proposal to allow the purchase price to be paid in instalments will reduce these concerns to some extent but the company will still need to meet these funding requirements at some stage.

The set-up costs for small businesses (such as the valuations, need for legal advice in relation to the articles of association and compulsory transfer provisions) may deter some smaller businesses.

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

Comments:

**** The increase in length of notice period will provide employers with an earlier indication of an employee owner's return to work, but that this only applies to early returners, not those who come back to work at the end of statutory maternity leave. Overall it is unlikely that this change will have significant impact.**

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

Comments:

In our view, employers would be likely to accommodate a desire to return early without giving 16 weeks' notice, unless they already had maternity cover on a fixed term.

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:

**** We would anticipate that there would be little effect.**

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:

**** In our experience we have had very few enquiries about this statutory right from companies. Given that the Government consider that the employee owner status is aimed at small businesses, they are unlikely to achieve the threshold of 250 employees which is affected by this legislation.**

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

Comments:

**** The purchase of own shares by private companies has a very detailed procedure to be followed. In our experience (when doing due diligence on other companies) private companies undertaking buybacks of shares without legal advice often make mistakes, with very serious consequences (namely, that the intention of buying back the shares fails and the shares continue to exist).**

The reforms proposed in the Employee ownership and share buy backs: consultation on implementation of Nuttall review recommendations are helpful in making the process simpler. However, there are few further changes which would

make it easier for small and medium companies offering shares to employee owners to buy the shares back safely, including:

- Providing that failure to follow the statutory procedure relating to formal shareholder approval of the purchase contract would not invalidate the buyback.**
- Allowing shareholders to rely on the unanimous assent principle in relation to buybacks.**
- Giving companies more flexibility by confirming that the purchase price could be satisfied with non-cash assets.**

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

Comments:

**** As mentioned in question 5 above, a default statutory basis of assumptions for valuations, for the purpose of determining a reasonable price on exit, would assist companies where their articles were silent on how to determine the reasonable price and help to minimise disputes over the appropriate price. In addition, a default statutory position that valuation costs were to be shared between the company and employee owner would encourage a price to be agreed.**

In addition, as commented above, and acknowledged by the Government, that, women in particular are not required to accept employee owner terms to prevent statutory requests for flexible working.

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:

It would be inequitable to deny the CGT exemption to an employee when there is a share for share exchange. For CGT purposes, the new shares are regarded as the same asset as the original shares and therefore should attract the original exemption. There will need to be changes to the share identification rules to ringfence the shares acquired by employee owners.

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:

**** In our view, if the arrangements at the outset are complex, or the economic cost to either the employer or employee are high, then this may well outweigh the potential benefit to taking up employee owner status, particularly in cases where gains would not be expected to exceed the existing annual CGT exemption.**

Employers may find it unattractive to have to buy shares back from leavers at a "reasonable price" if the employee leaves voluntarily, or is dismissed for a potentially fair reason under the Employment Rights Act 2006.

We consider that more clarity is required on the "knock on" effects on other statutory rights.

-It is not clear what would happen to employee owners (or their shareholding) on a TUPE transfer. Should shares be cashed out on TUPE transfer? If so the employee owner would not transfer on their existing terms and conditions of employment. Would a transferee need to replicate those rights (and may not want to)?

-The employer/employee relationship is subject to the implied duty of mutual trust and confidence. Although there will be a waiver of statutory unfair dismissal rights, any termination by an employer may be in breach of an express or implied duty under the contract of employment.

With employee owners waiving rights to ordinary unfair dismissal, this may result in a rise of claims for automatic unfair dismissal e.g. whistleblowing, or for discriminatory dismissals.

We consider that this proposal could result in far reaching effects in labour relations in the workplace and create a "two tier" workforce due to the different rights which exist. For example if two individuals are dismissed for the same reason; while the employee owner has no remedy, the "employee" could successfully claim for unfair dismissal.

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

Comments:

****Not applicable**

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

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

Comments:

**** Flexibility for companies needs to be weighed up against the "fire at will" culture where employee owners may feel more vulnerable and insecure in the workplace without the definite guarantee of a reward.**

Individual companies will need to weigh up (a) the complexities and costs inherent in putting in place the necessary protection to deal with compulsory transfer, (b) the concerns about the cost of determining the "reasonable price" on termination, (c) costs of valuations and tax reporting obligations and (d) the tax consequences for the employee and company against the perceived increase in flexibility. Some companies may find this too great a cost - it will depend to some extent on how concerned they are about the employment rights being given up.

Individuals will need to understand the benefit/costs of the contract being entered into. It is a potentially complex investment for them to make and many may be unwilling to do so, without fully understanding their rights and the risk of dilution.

A few changes to the proposal would also help to promote greater take-up of this policy by companies. These are as follows:

1. Enabling shares to be owned in a different group company.

Restricting the use of this proposal to shares in the employer company will make this scheme impractical for many group companies. Employee owners ought to be able to take shares in another group company (usually, in practice, the ultimate holding company), as for many groups having minority shareholders in a subsidiary company would prevent them from taking up this policy. Enabling shares to be owned in a different group company would make the scheme more attractive to fast-growing businesses which operate in a group structure. This should be easy to fix because group plans are the norm in CSOP, EMI, SAYE and SIP plans.

2. Enabling shares to be owned in a company incorporated and registered in another jurisdiction.

Limiting the scope of this proposal to "companies" within the meaning of section 1 of the Companies Act 2006 is unnecessarily preventing UK employees of businesses registered overseas from participating in this scheme.

3. Enabling companies who "give" (either in consideration of the waiver of rights or by capitalising profits) shares to employees to take that into account when calculating the national minimum wage (NMW) which must be paid to employees. This could include a concession or relief from complying with National Minimum Wage legislation for a specified period of time, or until a certain level of income by the business in exchange for shares or share options.

4. Confirmation that the shares do not need to be issued to the employee owners at the start of the employment contract, so that they could be subject to a vesting period pending a probation period and/or pending the 2 year period during which the employee owner would otherwise have had no rights to unfair dismissal.

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

Comments:

****Please see the response to Question 10**

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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From: Marion Scovell
Sent: 08 November 2012 11:13
To: Employee Owner Status Consultation
Subject: TRIM: Consulting on implementing employee owner status
Attachments: EmployeeOwner (2).doc
TRIM Dataset: M1
TRIM Record Number: D12/1381405
TRIM Record URI: 13444051

Dear Sir/Madam

Please see the attached response to the above consultation on implementing employee owner status.

Yours faithfully

Marion Scovell

Marion Scovell

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Consultation on implementing employee owner status

Submission by Prospect to the Department for
Business Innovation & Skills

18 January 2013
www.prospect.org.uk

Introduction and summary

Prospect is an independent trade union representing over 119,000 members in the public and private sectors. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, defence, education, energy, environment, heritage, industry, scientific research, and telecommunications.

Prospect is fundamentally opposed to the proposals contained in the consultation document to introduce employee owner status. We believe the Government's proposal is simply a means of allowing unprincipled employers to buy out statutory employment rights. This removes existing employment protection in exchange for minimal value of shares which may in fact prove totally worthless.

Workers employed under this new status will lose basic rights not to be unfairly dismissed and any rights to redundancy. They will be left in a very precarious employment situation with no statutory protection.

The Government refers to giving employee/owners new involvement in and commitment to their company, however this can already be achieved through existing employee share schemes, which many employers operate to the mutual benefit of both parties in the employment relationship. By comparison the 'employee/owner' scheme is totally one sided, giving the employer the right to determine the status and have sufficient flexibility in the level and type of shares to ensure that they can use this scheme as a simple means of avoiding employment rights.

In summary Prospect believes:

- A proposal where workers are required to give up employment protection rights in exchange for minimal, or potentially worthless, shares is wholly unjust
- There should be no way for employers to 'buy out' statutory rights, which must be a minimum safety net of protection for all workers
- Employee share schemes should not in any way be used to remove employment rights.
- It is wholly unacceptable for employers to be able to sack workers without cause, identifying a reason, or following basic procedures.
- The employee/owner proposal has the same (if not worse) effect than the earlier discredited proposal to introduce 'no fault dismissals', which was roundly criticised by both employer and worker organisations.
- The value of the shares at a minimum of £2,000 in no way could replicate the existing rights to redundancy pay.
- Should a company be wound up, the employee/owner would have lesser rights than other workers as they would not be entitled to redundancy pay from the National Insurance Fund.
- The increase in notice required to return from maternity leave is unreasonable as it will remove choice from parents returning to work and will make it more difficult for mothers and adoptive parents to return to work at the time it best suits their family circumstances (the current eight week notice period provides more than sufficient notice for employers).
- The removal of the rights to request flexible working and time off for training are wholly unreasonable.

- The proposed exemption from capital gains tax is fairly irrelevant as currently gains of up to £10,600 are exempt, and very few share schemes would bring in sufficient increase in value to be over this limit.
- The scheme has not been properly consulted on and there is no evidence to support the Government's claims of it increasing employment or growth.
- It is clear from the consultation that the rights of workers are being disregarded and the whole emphasis on choice and flexibility is entirely one sided.

Prospect is wholly opposed to the introduction of the scheme. We believe fundamental rights of employment protection must be maintained and there should not be any further onslaught by the Government on the rights that currently exist.

We have addressed the separate questions below.

Question 1:

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

Prospect strongly believes that there is already more than sufficient flexibility for employers in existing employment practices. There are already extremely few safeguards against abuse in respect of workers on atypical working contracts (such as zero hours, fixed term and part time working arrangements). There is a significant problem already with workers being denied employment rights by being placed through agencies, or being on sham 'self-employed' contracts.

The existing distinctions between employee, worker and self-employed status provide for wide flexibility by employers. Many employment rights are already excluded through employment status and as a union we have seen abuse by employers of the existing flexibility. We do not believe that the labour market requires any further flexibility and workers should not be subjected to any greater vulnerability.

Question 2:

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

We see no evidence to suggest that businesses are not able to use the three employment statuses to their advantage.

Question 3:

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

We are fundamentally opposed to the proposal in principle, however if the scheme is introduced we see no need to place any restrictions on the shares. Particularly the suggestion of shares without dividends or voting rights demonstrates that the proposal is simply a means of allowing employers to cheaply buy out basic 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?

We do not see any reason for not requiring any buy back to be at full market value. Again this suggestion demonstrates the worthlessness of the proposal to the employee and the real intention of allowing employers to simply fire workers at will.

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?

If the proposal is to go ahead, we believe there must be a requirement for an independent valuation of the shares both on the commencement and termination of the contract.

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.

It is essential that workers are provided with full understanding of the new status before accepting employment on these terms. The scheme would be 'buying out' rights and therefore we believe that there should be a formal requirement for legal advice on the implications, which the employer is required to pay for. This would be similar to the existing mechanism under compromise agreements for allowing workers to sign away statutory rights.

We also believe that there needs to be protection for individuals against not being hired or dismissed or subjected to any detriment for not agreeing to the new employee/owner status.

Question 7:

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

We do not believe that there is any evidence to suggest that employers would be recruiting more staff if this proposal was introduced. As was clear from the recent consultation on 'no fault dismissals' there is no evidence that the existing unfair dismissal and redundancy protections act as a disincentive for employers to grow their businesses or to recruit staff.

Question 8:

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

We do not believe this provides real benefits for employers. It is likely to engender bad employment practices leading to an insecure volatile workforce, with little commitment to the business.

Question 9:

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

As above we do not see there will be real benefits for any size of employer.

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 likely that employees denied rights to ordinary unfair dismissal will be looking to make claims under the 'automatic' unfair dismissal provisions and Equality Act claims. These claims will be more complex and time consuming for all parties and for the Employment Tribunals.

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?

The removal of statutory redundancy pay, along with other rights, will make these contracts less desirable for workers. Particularly for small or start-up companies there may well be a loss of stability, with employees leaving to find better jobs with more protection.

Question 12:

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

We do not see any real benefit to employers in extending the period of notice for return from maternity leave. Instead it may well mean that women returning may be off longer than otherwise. The existing eight week notice period is more than sufficient, in our view, for the employer to make appropriate plans and arrangements.

Question 13:

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

This is likely to depend on the individual arrangements.

Question 14:

How long will these changes impact on a company's payroll provisions?

This is likely to depend on the individual arrangements.

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?

A longer notice period may well extend the overall period of leave, which we do not believe is beneficial for either party.

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?

We are opposed to the proposal to remove the right to request flexible working. We recognise that the consultation paper proposes only retaining this in respect of the rights under the EU law on return from parental leave. We do not agree that the right to request flexible working should be limited to four weeks following return.

Question 17:

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

Prospect has strongly supported training and learning opportunities in the workplace and firmly believe that these opportunities benefit both the worker and employee. We believe that the right to request time off for training should have been extended to businesses employing less than 250 employees. Whilst it is only a right to 'request' time off for training, a removal of the right is likely to reduce training and lead to a less skilled and motivated workforce.

Question 18:

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

Question 19:

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

We believe that 'real owners' of companies may identify themselves as employee/owners to avoid payments on capital gains tax. This would mean the introduction of the scheme would provide minimal incentives for workers losing rights, but could create tax loopholes for those with significant share values. We do not have the experience to say how, or if, this could be minimised.

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.

If the proposals go ahead, we believe the existing rules should continue to apply in respect of shares provided in the transferring company.

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?

As mentioned above we see no evidence that the proposal will act in a positive way to boost recruitment or growth. Instead it will enable employers to hire workers without providing the existing employment protection rights. We believe this will create a 'second class' employment status with businesses that workers will want to avoid wherever possible.

Question 22:

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

N/A

Question 23:

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

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

We believe that companies wanting a motivated and committed workforce will not be keen to take up this policy. Where companies genuinely believe that employee share ownership schemes are appropriate they will already have schemes in place (and of course there are many examples of this being a successful approach). We are concerned though that some unscrupulous employers will want to use the scheme and see it as an extremely cheap way to buy out rights.

We believe very few workers would choose to give up their statutory rights in exchange for such minimal return. Where workers have a genuine choice we believe they would reject such schemes.

Question 24:

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

We do not consider the equality impact assessment is adequate. It has failed to fully recognise that the most vulnerable workers are likely to be those with protected characteristics under the Equality Act.

We also are concerned that the proposal has been announced without a full impact assessment or consultation.

PROSPECT
8 November 2012

Paula Lovitt MBE
Labour Market Directorate
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

8 November 2012

Ref:

Direct link:

Email:

Dear Mrs Lovitt

Consultation on implementing employee owner status

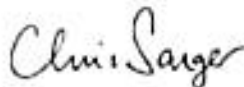
Please find attached our response to the consultation on implementing employee owner status. We welcome the opportunity to provide written feedback and have structured our comments in accordance with the questions set out in the consultation document.

Ernst & Young advises companies on the design and implementation of tax approved and unapproved employee share based incentive plans with a particular focus on the tax and valuation aspects.

We have recently responded to two consultations on share plans being conducted by HM Revenue & Customs (tax advantaged schemes) and the Office of Tax Simplification (unapproved share schemes). In our view, without a simplification of the tax legislation relating to unapproved share arrangements operated by unquoted companies, there is unlikely to be a large take up of the new employee owner status by those companies. In our consultation response we have identified many of the key tax and valuation issues which we believe need to be addressed.

If you require any further information, please contact my colleagues Giles Capon (01179 812073 or gcapon@uk.ey.com), Richard Burston (0121 535 2136 or rburston@uk.ey.com) or me. Richard attended a meeting at the BIS recently at which some of the tax and tax valuation issues associated with the new employee owner status were discussed. We are happy to participate in further meetings on this topic.

Yours sincerely,



Christopher Sanger
Partner, Head of Tax Policy
For and on behalf of Ernst & Young LLP

Enc.

Feedback Document

Response from Ernst & Young LLP to the consultation document on implementing employer owner status ("the Consultation Document") published by the Department for Business Innovation & Skills in October 2012

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

Response:

The employee owner status should be simple for an employer to introduce, administer and bring to an end without imposing additional cost burdens and compliance obligations.

If the rules are simple and straightforward then it should be relatively easy for an employee to understand the implications of the new employee owner status; how the acquisition and disposal of shares will work; the valuation aspects and the tax consequences.

We understand the reasons for keeping any legislative changes to a minimum. However, in our view if the employee owner status is to be attractive to small and medium sized unquoted companies there will need to be a simplification of the relevant income tax legislation and a new procedure will need to be adopted, similar to that in place for EMI options, which requires HMRC Shares & Assets Valuation to agree the value of employee owner shares for tax purposes in advance of their acquisition and disposal.

We would note that the lack of any specific income tax relief for share acquisitions could limit take up.

We have made representations on areas for simplification to the Office of Tax Simplification (OTS) as part of its review into unapproved share schemes and we await the final report from the OTS which is due to be published prior to the 2013 Budget. We consider that simplification is likely to be a pre requisite to the adoption of employee owner status by unquoted companies and we have therefore summarised some of the key tax points in this document.

The tax valuation aspects are considered in greater detail in our response to Q4 and Q5. Some of the key income tax issues to be addressed are set out below.

Paragraph 56 of the Consultation Document states that "The shares will however, be subject to income tax and NICs under the normal rules that apply for shares acquired by reason of employment". Whilst these "normal rules" might be well understood by quoted companies, which offer unrestricted listed shares, in our experience most unquoted companies will offer restricted shares. The tax rules for restricted shares are very complex and difficult to understand with many traps for the unwary.

We make the following observations to illustrate the complications:

1. Where an employee agrees to a change in status to become an employee owner he will be issued with shares. As a general rule, when an employee acquires shares those shares are being made available from his employment. As a result, if the employee acquires shares for a price which is less than their market value, an amount equal to the undervalue is charged to income tax as general earnings under Section 62 Income Tax (Earnings and Pensions) Act 2003 (ITEPA). Even where there is no charge to income tax under Section 62, there still could be a charge under the employment related securities provisions contained in Part 7 of ITEPA.
2. If an employee receives shares not from his employment but for some other reason then there will not be any general earnings charge under Section 62. In the case of shares to be issued to the proposed employee owner, it is arguable that the shares are being issued in return for the employee giving up certain statutory employment rights and taking on the status as an employee owner. Generally the main employment rights being given up are the rights to receive tax free payments of up to £30,000 in

the event that the employee is made redundant or is unfairly dismissed. The "normal rules" in this area are that where an employee gives up a right to receive a non-taxable payment any consideration given to the employee in return for giving up that right is not taxable as general earnings under Section 62 ITEPA (see the decision of the House of Lords in *Mairs (Inspector of Taxes) v Haughey* - [1993] 3 All ER 801)¹.

3. Even where a cash payment is not taxable as general earnings under Section 62 ITEPA, it may potentially be taxable by reason of being a "benefit" within Section 201 ITEPA. However, where it can be shown that an employee has given full consideration for the payment there is no benefit to be taxed. The decision of the Court of Appeal (Northern Ireland) in *Mairs (Inspector of Taxes) v Haughey* - [1992] STC 495 is authority for the rule that a payment received for giving up a contingent right to receive a redundancy payment is not a taxable benefit where it can be shown that the value of the contingent right given up is not less than the value of the cash payment received for giving up that contingent right.
4. In order to ensure that employees are treated fairly, the consideration paid by employee owners for their shares should take account of the value of the contingent rights given up by employees as well as any cash consideration to be paid for their shares. How the value of the contingent right to receive potential payments for unfair dismissal and redundancy is determined will depend on the facts of each case and could be a difficult and problematic exercise. When the changes relating to capital gains are made, consideration could be given to amending the capital gains tax rules to provide that the acquisition cost of the employee owner shares acquired by an employee is deemed to include a fixed amount representing the deemed value of the contingent right given up by an employee. Detailed work would be needed to determine how the contingent value should be calculated.²
5. Where Part 7 of ITEPA applies, the tax consequences for employee owners will depend on a number of factors which include:
 - a. the nature of any restrictions imposed on the shares including whether any forfeiture conditions are capable of lasting more than five years or not;
 - b. the consideration paid for the shares and the timing of the payment of that consideration;
 - c. whether or not and to what extent elections under Section 431 ITEPA are made at the time of the acquisition; and
 - d. the actual and unrestricted market value of the shares on acquisition.

In practice, employees may not be able to afford or willing to pay the full price for the shares on acquisition (even after taking account of the value of consideration given for giving up their statutory employment rights) or pay any income tax liability which may be due on acquisition of the shares. Some employers may choose to issue shares at market value but on a partly paid basis. Any amount unpaid would be treated as a notional loan for tax purposes. If on a disposal of the shares the amount owing has not been paid in full, the balance of the notional loan is treated as being discharged. Income tax is charged on an amount equal to that balance. This tax treatment could make this alternative unattractive for employee owners as they would be at risk of a tax charge on a disposal of the shares even where they have not made any profit.

6. For many employees the fact that any capital gain from the employee owner shares will be free of capital gains tax may not be a material benefit. The annual CGT exemption may cover all capital gains in any event. Alternatively, due to the complexity of the employee related securities rules, some or all of the gain made on a disposal of the shares may be deemed to be employment income subject to

¹In the *Mairs v Haughey* case employees of one company were offered new contracts by a new company on virtually identical terms except the new contracts did not contain an enhanced redundancy scheme operated by the old company. In consideration of accepting the new contracts employees were paid a cash amount equal to 30% of what they would have received had they been made redundant under the old enhanced redundancy scheme. It was held that the cash payment was not from an employment.

²Possibilities include a formula based on a combination of years of service and/or sum based on what an employee might have received had they been made redundant or been unfairly dismissed with appropriate discounts to reflect the contingent element of the right given up

income tax as opposed to capital gains tax. In practice, therefore, the CGT relief may only be attractive for directors and other senior managers.

7. The Consultation Document states that an employee owner will be given or offered shares having an unrestricted market value of a minimum of £2,000. The £2,000 limit will effectively prevent many small companies from offering the employee owner status. Just £2,000 worth of shares could represent a not insignificant percentage of the issued share capital for a small company.

In practice the £2,000 limit might result in the employee owner status only being offered to senior employees who would have been offered shares even if the employee owner status had not been introduced. The value of the equity in large private equity backed companies with significant debt might be very small compared with the overall size of the company. The £2,000 limit may therefore represent a significant disincentive to this type of company in offering employee owner status except to very senior managers, who would have been offered shares in any event.

8. It is not clear what happens if an individual who agrees to become an employee owner is issued with shares which turn out to have an unrestricted market value of less than £2,000. Is the whole transaction void or will he be treated as giving up employment law rights but without the CGT benefit? This issue links in to the need to pre-agree values with HMRC Shares & Assets Valuation so as to avoid material differences in opinions on share values at some point in the future.
9. An employee owner might be required to pay a price per share which represents the commercial value of a share and this value might be in excess of the unrestricted market value of the share for tax purposes. For example, a commercial value may not necessarily take account of the size of the holding or the fact that there is no market in the shares. The same basis of valuation may then be used for determining the price at which shares are to be offered for sale by an employee owner. As this value might be in excess of the actual market value of the shares for tax purposes any amount equal to the excess would be subject to income tax and NIC and not capital gains tax. This is yet another reason why the full CGT benefits of the employee owner status may not be available to all employee owners.
10. Where a company buys back its own shares for cancellation within five years of issue any amount paid over and above the original issue price would be a distribution for tax purposes (ie taxed as a dividend) and this would eliminate the CGT benefits of employee owner shares.

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

Response:

Whilst three employment statuses are identified for tax purposes, there are already instances where a self employed person could be deemed to be a worker and be required to fall within pensions auto-enrolment. There are also some categories of worker where the tax and NIC treatment differ, i.e. they may be self employed for tax but employed for NIC because of the Social Security (Categorisation of Earners) Regulations 1978. There has been consultation on the tax status of workers in the construction industry and if proposals go ahead this could make individuals deemed employees for tax purposes, even though they may be self employed under employment law. There is also recent consultation on Controlling Persons which could also bring individuals into employment tax.

In our experience, many businesses are already finding that the distinction between employed and self employed workers is a complex area. The concern is therefore that a further employment status will add to this complexity in practice.

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

Response:

The employer should have the flexibility to determine the restrictions which may attach to the shares, taking into account commercial requirements.

For an unquoted company the following are examples of the kinds of restrictions which employers may wish to consider adopting:

- Restrictions on the transferability of shares both as to whom shares can be transferred to and the timing of when transfers may be permitted.
- Leaver provisions so that any person who ceases to be an employee owner can be required to offer some or all of his shares for sale.
- Restrictions relating to the price to be paid for shares to be transferred.
- Separate rules relating to "good" and "bad leavers" both in respect of the proportion of shares they may be required to offer for sale on a cessation of employee owner status and the price at which those shares may be offered for sale.
- Restrictions relating to the voting and dividend rights attaching to shares.
- Rules relating to what proportion of the value of the entire issued share capital may apply to the employee owner shares on a sale or flotation with the relevant proportion potentially being determined by reference to the extent to which pre defined target values have been achieved.
- Provisions compelling all employee owners to sell their shares to a third party where the majority of shareholders have agreed to sell but on terms not materially less advantageous to the employee owners.
- Requirements for employee owners to appoint one or more directors as their attorney to manage the administration of their shares e.g. sign documents on their behalf on a disposal of their shares, attend and vote at general meetings on their behalf.

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

Response:

There needs to be a balance between burdening the employer with additional costs (potentially over and above the costs of dismissing an employee who is not an employee owner) as against treating the employee owner in a fair way. It is important therefore that any individual who is considering entering into the new employee owner status understands what the rules are in relation to the price at which shares may be required to be offered for sale on, for example, a termination of the employee owner relationship.

It may be appropriate to apply a consistent set of rules for determining the value of shares both on acquisition and on disposal following a termination of the employee owner status. Regard should also be had to the price paid or agreed to be paid for those shares on acquisition. For example, if an employee owner paid full value for his shares then he would expect to be paid full value on a disposal. On the other hand, if the employee owner was only required to pay or agreed to pay a fraction of the full value on acquisition then it might be appropriate for the employee owner to receive the same fraction of the relevant full value on a disposal of shares following a cessation of the employee owner status, subject to taking account of the relevant tax consequences.

As mentioned in the answer to Question 3, we would expect there to be a differentiation in the price at which an employee owner is required to offer his shares for sale based on whether or not the employee owner is a

good or bad leaver. A good leaver might include an employee owner who leaves in "no fault" circumstances such as by reason of ill health, injury, disability, death, retirement on or after a specified age, disposal of employing company or business outside the group and potentially, redundancy or unfair or wrongful dismissal. A "no fault" circumstance would not normally include an employee who leaves by reason of his own volition or where his employer terminates the contract other than for a "no fault" reason.

As the employee owner is giving up most of his statutory rights in relation to unfair dismissal and redundancy it is arguable that a termination for these reasons should not count as a "no fault" reason for the purposes of determining the price at which shares are offered for sale on a termination of the employee owner status. To do otherwise could be regarded as simply transferring the costs of termination of employment from a statutory basis into the price to be paid for shares.

There may also be a differentiation in price based on the length of time which has elapsed between the commencement and termination of the employee owner status.

A separate point is whether or not an employer should be required to buy back shares on a termination of employee owner status.

In most circumstances we would expect that an employer would want to buy back the shares (or procure a buyer of the shares) but the ability or willingness of an employer to complete the buyback could depend on the price to be paid for those shares. Imposing an obligation on employers to buy back at full value on a termination of the employee owner status could impose a very significant cost obligation on the employer over and above the costs of dealing with an unfair dismissal or redundancy claim by a former employee.

If the employee owner status is to be attractive to an individual, we would expect that many individuals would want to have the right to sell their shares on termination of the employee owner status. Without this right, many individuals may not find the new status sufficiently beneficial but imposing this condition could make employee owner status unattractive to employers.

A fair balance might be to provide that where an employee owner leaves in "no fault" circumstances he can require his employer to buy back his shares but where he leaves in any other circumstances there is no obligation on the employer to buy back the shares. However, even imposing a limited buy back requirement on the employer could have the effect of putting off employers from offering the employee owner status. In addition, an employer may not have financial resources available to buy back shares so there would need to be some exceptions built in to any obligation imposed on the employer. It may be too expensive or not feasible for employers to take out a special insurance policy to insure the cost of buying back shares.

Whilst it might be appropriate to have a set of guidelines or best practice in this area, we believe that imposing too many restrictions and conditions on any buy back requirement could make employee owner status untenable for many employers.

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?

Response:

The Consultation Document stipulates that employers will be able to offer their employees fully paid up shares "worth" a minimum of £2,000 and a maximum of £50,000 and for the purposes of determining these limits the shares are to be valued according to their unrestricted market value at the time they are awarded. The valuation of shares can be complex and is an art and not a science. Any valuation will depend on a number of factors, including but not limited to, the relevant facts and circumstances of a particular company, the number of shares being offered for sale, the rights attaching to the shares to be issued and whether or not the valuation is being undertaken for tax or other purposes.

Many small unquoted companies have never undertaken any valuation of their shares and it is not unreasonable to assume that they will need help and support from a third party. In addition, most employees have even less experience of valuing shares than their employers and they could find it very difficult to assess whether or not the price at which shares are being offered to them is a fair price or is equivalent to unrestricted market value for UK tax purposes. It is unreasonable to expect employees to take and pay for

their own independent valuation advice and they may look to their employers to provide details of how the price has been set and by whom.

It can be very expensive for a company to obtain an independent valuation of its shares especially where that independent valuation is to set the price at which shares are to be offered for sale to employees. A more cost effective solution but still potentially expensive is for a company to propose its own price and then seek advice from an independent valuer on whether or not that price is at or around the value of the shares for tax purposes. Even then there is always a risk that any value proposed may not be acceptable to HMRC in subsequent negotiations and this could leave employees with unwelcome tax liabilities.

In our view, a key barrier which is likely to prevent many companies and employees from adopting the employee owner status is the potential complexity and costs associated with valuing shares. It would make the process simpler and more cost effective for employers if HMRC Shares & Assets Valuation were required to agree the value of employee owner shares in advance of their acquisition. This process could operate in a similar way to the pre-agreement of values for the grant of tax advantaged Enterprise Management Incentive (EMI) options.

In addition to agreeing values in advance of their acquisition, HMRC Shares & Assets Valuation should also be required to agree values in advance of the disposal of shares by an employee owner in order to give certainty as to what the value of the shares is for tax purposes and enable the employer and employee to comply with any tax payment obligations.

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.

Response:

It is likely that businesses will require legal, tax, valuation and accounting support before they can offer the employee owner status. Legal support would include advising on the employment law aspects of the new arrangement and on the corporate changes and approvals required e.g. new articles of association, shareholder agreement, letter to shareholders and minutes and resolutions. Tax support would include both the corporate and employment tax implications of the proposals. Valuation support will be required in most cases. Some employers may require support in modelling costs and benefits, and advice on the potential accounting and financial impact of the arrangements. The financial impact could include the impact on both employer and shareholders. Support may also be required in communicating the arrangements to individuals (e.g. drafting letters of invitation, application forms, question and answer booklet, tax summary and tax elections). Some larger companies may also require assistance in administering the arrangement going forward, particularly if an employee benefit trust is to be set up and/or some form of internal market is to be put in place for share transfers.

If current employees are to be offered the new employee owner status then they may need independent advice on the employment law aspects and on the tax and commercial issues associated with the new employee owner shares. An employer would normally provide the individuals with summary guidance of the potential consequences and a recommendation that the individual take independent advice. It is arguable that an employer should be required to pay for independent employment law advice on a similar basis to when compromise agreements are made.

There is a risk that some employers may be perceived as using the potential benefits of CGT relief to encourage individuals to become employee owners and effectively give up certain statutory employment law rights when in fact there may be no realistic prospect of any CGT benefit ever materialising. Guidance for employers in this area may be desirable to help avoid any future miss selling claims.

In summary, the level of support which most employers and employees will require will not be insubstantial and should not be underestimated.

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

Response:

We doubt if it will have any material impact on an employers' appetite for recruiting. Whilst some employers will welcome the reduction of unfair dismissal protection we think this will be more than offset by the perceived costs and complications of issuing shares to, and buying shares back from, employee owners.

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

Response:

We believe there are benefits in giving employees the opportunity to acquire shares in the company for which they work. This creates an alignment of interests between the employee and shareholders. Employee share ownership can also help in recruitment and retention of employees, particularly key employees. We support the tax advantaged share plans currently in place. We note that very few unquoted companies have taken or been able to take advantage of the tax approved all employee share schemes. We consider that any benefits for companies from introducing the new employee owner status are more likely to come from the employee share ownership aspects than from reducing potential unfair dismissal claims.

As there is a two year period for employees to qualify for unfair dismissal it is arguable that this already gives employers' sufficient protection.

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

Response:

Most larger quoted companies operate all employee share plans. This can be contrasted with unquoted companies where any share arrangement is often restricted to senior management. Unless the valuation and tax issues are simplified we think that where unquoted companies do adopt this arrangement it will be restricted to more senior employees. We also consider that the prime driver for adopting the arrangement will not be because of the removal of certain statutory employment rights but because of the potential capital gains tax benefits of the proposals. The ability to offer shares with any capital growth free of capital gains tax could be a considerable help in enabling smaller companies to attract and retain senior employees. In particular smaller high tech companies including university spin outs could find the new employee owner status attractive.

Where the employee owner status is made available to senior or key employees or recruits they may be offered or be able to negotiate non-statutory contractual protection in their employment contracts which could more than offset any loss of statutory employment rights (e.g. longer notice periods for termination, enhanced redundancy terms).

We believe that many companies, particularly larger companies, will not want to take advantage of the new employee owner status. The removal of employment law rights may not be consistent with the culture and values of many larger employers who place great emphasis on being seen as a "good" or "best" employer. In addition, for quoted companies which already offer tax approved employee share plans, offering shares as part of the employee owner status could cause confusion and mixed messages. It could also restrict the shares available for issue under the company's other share schemes, particularly where they are subject to institutional guidelines on the number of new shares that should be issued under employee share schemes.

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

Response:

We have no comment on this question as it lies outside our particular field of expertise.

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?

Response:

For smaller companies the costs and complications associated with acquiring shares from employee owners who leave by reason of redundancy may be greater than the costs associated with making a normal employee with statutory redundancy rights redundant.

It is possible that where senior employees are offered the new employee owner status the employer might also offer contractual redundancy rights which are equal to (if not better than) statutory redundancy rights.

If employers offer the new employee owner status on the basis that in the event of redundancy shares must be sold back at the lower of original cost and current market value there might be some cost savings compared with making a normal employee redundant. In some cases this may also reflect the commercial reality as, if a small business is making people redundant, this might mean that the business is not performing well and that the share price is low. However, there are other examples of where a business may still be performing well and redundancies could have a positive effect on the share value.

Some individuals may not accept an offer of employee owner status but other individuals may feel that they have no choice.

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

Response:

We have no comment on this question as we have not canvassed opinion in the time available.

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

Response:

We have no comment on this question as we have not canvassed opinion in the time available.

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

Response:

When shares are issued the company will need to consider whether the issue of shares gives rise to an obligation on the employer to account for any income tax and national insurance which may be due under the PAYE system. If the shares are "readily convertible assets" then any liability due on acquisition must be paid under PAYE. It is not always easy to determine whether shares are readily convertible assets, and professional advice may be required.

If the shares are readily convertible assets then the employer will need to determine on a "best estimate" basis whether there is any liability to income tax and national insurance on acquisition of the shares. If there is such liability the employer will need to ensure that it has the appropriate authority to recover the income tax and national insurance which is due from the employee owner within 90 days of the acquisition of the shares. Otherwise a penal tax charge will be imposed on the employee owner under Section 222 ITEPA.

The employer will need to ensure that the individuals responsible for payroll have the appropriate skills required to administer the collection and payment of income tax and national insurance on share related benefits. The introduction of Real Time Information for PAYE is likely to be onerous for employers, in particular in connection with the timing of submissions for share related benefits.

Whether or not the shares are readily convertible assets the employer will need to complete and file Form 42 with HMRC on an annual basis.

For companies which already operate one or more employee share schemes, the offer of employee owner shares is unlikely to impose a significant additional burden. For unquoted companies, the shares of which are readily convertible assets, the issue of employee owner shares will result in additional administration and costs.

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?

Response:

We have no comment on this question as we have not canvassed opinion in the time available.

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?

Response:

We have no comment on this question as we have not canvassed opinion in the time available.

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

Response:

We have no comment on this question as we have not canvassed opinion in the time available.

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

Response:

There must be no doubt that for company law purposes an employee owner is still an employee for the various exemptions in relation to employees' share schemes. If there is any doubt then an amendment to company law may be required.

The legislation relating to the issue of shares for a non-cash consideration should be reviewed to ensure that where shares are issued wholly or partly in consideration of an individual giving up employment law rights it will not be necessary for there to be a valuation of the contingent right for company law purposes.

We note that the BIS is consulting on changes to the company law provisions on the purchase of own shares to take account of recommendations contained in the Nuttall Review into employee share ownership. If the legislation is amended to make it easier for private companies to purchase their own shares then any amendments should address the purchase of own shares from an employee owner.

However, as mentioned in paragraph 10 of our response to Question 1, changes to the tax treatment of buy backs from employee owners should also be considered, in order to ensure capital treatment is available to the employee owners surrendering their shares.

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

Response:

There may be a need to consider safeguards to prevent individuals who already own a "substantial interest" in the share capital of the company from benefiting from the capital gains tax relief in relation to any other shares which they may acquire if they change their status to become an employee owner.

It may be appropriate to consider introducing a safeguard to prevent employers from issuing shares to an employee owner which can never have a value above their value on issue.

If an employee owner is able, within a short time of becoming an employee owner, to become an employee and give up his status as an employee owner but retain the CGT advantages then this is an area which is potentially open to "abuse".

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

Response:

We see no reason why these rules should not apply.

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?

Response:

Without a major simplification of the tax and tax valuation rules we question whether the proposal will have a material impact on labour market flexibility in relation to hiring and letting people go.

Whilst some senior employees might be attracted by the potential CGT benefits of employee owner status, other individuals may be put off joining a company if they had to give up statutory employment law rights.

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

Response:

This question is directed at our clients rather than ourselves.

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

a) companies?

b) individuals?

Response:

Please see the answers to the previous questions.

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

Response:

We have no comment on this question as it lies outside our particular field of expertise.

From:
Sent: 08 November 2012 10:55
To: Employee Owner Status Consultation
Subject: TRIM: Response to consultation of 18 October
TRIM Dataset: M1
TRIM Record Number: D12/1381403
TRIM Record URI: 13444050

Dear Sirs

We welcome the opportunity to provide feedback on the consultation of 18 October on implementing employee owner status.

Unfortunately our review processes are such that it is difficult for us to submit our response today, as we are awaiting final review by a partner who is currently overseas. He returns tonight and accordingly we wonder if we could have a short extension, allowing us to submit our response tomorrow (Friday 9 November)

Regards, Mike



Michael Gibson | Director | Tax Knowledge

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18/01/2013

From: Imogen RADFORD
Sent: 08 November 2012 10:54
To: Employee Owner Status Consultation
Subject: TRIM: PCS response to the BIS consultation on implementing 'employee owner' status

Attachments: PCS response to BIS consultation on rights for shares Nov 2012.doc
TRIM Dataset: M1
TRIM Record Number: D12/1381396
TRIM Record URI: 13444049



PCS response to
BIS consultati...

Dear Paula

Please find attached the PCS response to the BIS consultation on implementing 'employee owner' status.

Regards

Imogen Radford

Road
SW11 2LN

PCS 160 Falcon

PCS website: www.pcs.org.uk

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PCS response to BIS consultation on implementing 'employee owner' status, or 'Trading rights for shares', November 2012

Introduction

PCS represents around 270,000 members. PCS is the largest civil service union, and 10% of our members work in the commercial/private sector.

PCS is totally opposed to the government's proposals to permit employers to trade key employment rights for shares in a company, which we see as an attack on employment rights which will do nothing to create growth, and we call on the government to withdraw them.

We endorse and support the detailed and thorough response to this consultation by the TUC.

The government suggests that these proposals will give increased flexibility for businesses and give 'employee owners' a bigger stake in their company, but in practice the proposals will strip employees of basic workplace rights.

Employees will lose out on protection from unfair dismissal and rights to redundancy pay which will make it easier and cheaper for employers to sack them. The proposals will mean substantially weaker family friendly rights for 'employee owners' by limiting the right to request to work flexibly and imposing longer notice periods for women returning from maternity leave. And employees will lose the right to request time to train.

In return individuals will receive shares valued at between £2000 and £50,000 but not be guaranteed voting rights or dividends equivalent to those enjoyed by other shareholders, and there is no guarantee that the shares will increase or even keep their value. The proposal suggests that these would be of value to individuals because any gains they make on their shares would not incur capital gains tax, however this is unlikely to benefit individuals, as gains of up to £10,600 per year are exempt anyway.

We are concerned that employees will be persuaded or even forced to trade important protections at work for shares that could turn out to be worthless, and if the company lays people off or faces insolvency the 'employee owners' will be forced to leave without receiving any redundancy payments or returns from these shares.

We are very concerned that because the new 'status' can be an option for new employees and for existing employees some companies might decide to take the opportunity to impose it wholesale on their staff.

We are not opposed to employee share ownership schemes that are properly drawn up in consultation and which don't require any loss of rights, but this scheme is different and we are opposed to it.

Lack of consultation, evidence or support for the proposals

There is a lack of evidence that the generation of growth in the economy will be helped in any way by weakening employment protection. The UK has already one of the least regulated labour markets in the industrialised world, and numerous academic studies have found that employment protection does not have a detrimental impact on employment levels. On the contrary, removing unfair dismissal rights and the consequent loss of job security is likely to damage consumer confidence, suppress demand and make it more difficult for employees to access mortgages.

Most employers do not see the current level of regulation as a constraint on growth, rather the state of the economy is what is causing them the most concern.

And even the government itself, in its response to the recent BIS call for evidence on compensated no fault of dismissal (NFD) concluded: "there is insufficient support and evidence that NFD would have a positive impact on the UK labour market... the government has therefore decided it will not taken forward proposals for NFD."

The consultation proposals are not accompanied by any impact assessment, so there has been no examination of the implications of the proposals for employees, employers or the wider economy.

Reaction from the business community has been mixed to say the least, for example Justin King, chief executive of J Sainsbury asked "What do you think the population at large will think of businesses that want to trade employment rights for money?"

However, the government has already put provisions in Clause 23 of the Growth and Infrastructure Bill before conducting this consultation, casting some doubt on the meaningfulness of this consultation exercise.

The government in putting forward these proposals appears to be doing so before full consultation has been completed, before a full impact assessment has been undertaken, and flies in the face of criticism by many including questions from the business community. It also flies in the face of the government's own research and the wider evidence it gathered recently in relation to compensated no fault dismissal less than a month ago.

We call on the government to withdraw the proposals on 'trading shares for rights', and instead to adopt an effective strategy for sustainable growth. We challenge the government either to bring forward meaningful evidence that employment rights for workers actually have a depressing effect on the economy or to cease the persistent attacks on the basic employment rights of workers, recognising that such rights are the very bedrock of a civilised advance economy, rather than any sort of barrier to it.

PCS sees these proposals as yet another attack on employment rights. We have put forward an alternative to the government's policies of cutting public services, attacking benefit claimants and employment rights -- policies which are damaging the economy and doing nothing to boost growth. Our alternative includes tackling the £120 billion tax gap of evaded, avoided and uncollected tax, creating jobs to boost the economy and cut the deficit, investing in areas such as housing, renewable energy and public transport (www.pcs.org.uk/alternative).

Implications for employment rights

These proposals do not create a new form of employment status but instead remove key employment rights from employees who receive company shares. This contradicts the basic principle that it should not be possible to contract out of basic statutory rights even in return for money, and this has been prevented by UK employment legislation that has been in place for decades.

Loss of unfair dismissal protection

If implemented the proposals would mean that employers would be free to sack employees for arbitrary reasons without needing to follow a fair procedure while doing so. All employers need to do is avoid dismissing individuals for discriminatory reasons or for an automatically unfair reason. Under these proposals 'employee owners' will not be guaranteed a reasonable level of compensation when dismissed and any payoff would depend only on the value of their shares at the point of dismissal. This will allow employers to choose to dismiss employees at the point when the value of shares has fallen or they are worthless in order to save money.

Loss of the right to statutory redundancy pay

The proposals will mean people being worse off where businesses decide to lay off staff. Unless the shares increase by an enormous amount then they will not provide compensation equivalent to that they would have received if they kept statutory rights to redundancy pay. In addition to this causing difficulties for the individuals and their families, it is likely to make more people dependent on welfare benefits.

Limiting family friendly rights

The extension of the maternity notice period to 16 weeks is likely to result in women taking longer leave than they otherwise would have, and it would mean fewer women returning from maternity leave if their return is made more difficult. It takes time for new parents to organise childcare places and make requests to employers to vary working hours. Excluding women from the right to request flexible working will make it difficult for many women to return to work, and it goes against the government intention (expressed in the 'Modern Workplaces' consultation May 2011) to create a universal right to flexible working across the economy which benefits society and the economy.

(Question 24) The equality impact assessment is inadequate. It fails to properly consider the differential impact on particular groups of these proposals. It only presents tables on full-time workers -- completely missing out on a major group of flexible workers, those who work part-time. It concludes that there are no gender or pregnancy and maternity related impacts from the proposals for extended notice periods for return from maternity leave, but in practice there will be an impact.

Loss of right to request time to train

Removing this right from 'employee owners' goes against the recognition of the importance of skills and training for businesses or organisations.

Tax avoidance

These proposals open a new tax avoidance loophole by allowing employers to give employees who currently receive shares as part of their remuneration package an opportunity to reduce the amount of capital gains tax they pay on these shares if they sell them.

PCS believes that that a risk that owners, founders or directors of new small companies will classify themselves as 'employee owners' and thereby reduce their tax liabilities.

(Question 19) There is potential to reduce the opportunity for abuse by directors/owners, for example by exempting them from becoming employee owners or limiting the amount of shares to that given to employee shareholders. But we are concerned that attempts to avoid these abuses of the proposals are likely to be limited in effectiveness and have other unintended consequences, so by far the best way to prevent these tax avoidance outcomes is to drop the proposals.

Consultation questions

We have chosen not to answer the questions in this consultation, with the exception of relating some of our points above to particular questions, because most of them are about how to implement these proposals. We disagree in principle with these proposals and therefore feel that most of the questions are inappropriate.

From: Verity O'Keefe
Sent: 08 November 2012 09:57
To: Employee Owner Status Consultation
Cc: Tim Thomas
Subject: TRIM: EEF response to BIS consultation on implementing employee owner status
Attachments: Owner employee response - FINAL.doc
TRIM Dataset: M1
TRIM Record Number: D12/1381392
TRIM Record URI: 13444048

Please find attached EEF, the manufacturers' organisation response to the BIS consultation on implementing employee owner status.

If you have any questions regarding our submission, please contact Tim Thomas, Head of Employment on [redacted] or or [redacted]

Kind regards,
 Verity

Verity O'Keefe

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**EEF, the manufacturers' organisation response to the consultation on
implementing employee owner status**

Overview:

This consultation is exceptionally short in terms of time and detail. The absence of an impact assessment further restricts the ability of organisations to meaningfully respond and the detailing of the model proposed in the consultation document is not at the same level as that usually associated with a call for evidence. With these constraints in mind, the response of EEF to this consultation is set out below.

In the time available, we have been able to conduct a limited consultation with our members. EEF, as a leading national provider of HR and Legal services, is able to draw on a wealth of experience accumulated over many years and can therefore foresee a number of issues unidentified in the consultation which require careful and sober consideration before the scheme proposed can be properly introduced. The speed at which this proposal is progressing and the limitations which this creates has in turn limited our ability to respond. We believe that whilst the proposal may initially appear straightforward, the issues which sit behind the policy, including changes to employment law and taxation, deserve greater consideration than this consultation currently permits. Our response should therefore be regarded as initial only and liable to future change as further details of the proposal emerge, in particular the publication of the awaited impact assessment.

Summary of some key issues for further consideration.

The proposal contained within the consultation raises a number of issues which will require further and more detailed consideration. These include,

1. The extent to which Government will determine the minimum benefits, if any, which shares issued to employees must carry, including the payment of dividends and voting rights.
2. Whether Government will prescribe how share ownership can be used to reduce an employee's liability to income tax and an employer's liability for national insurance contributions.
3. How Government can prevent employee-ownership becoming a system of no-fault dismissal, where a class of employee becomes unwillingly liable to dismissal for arbitrary reasons.
4. What importance Government will attach to existing employee share ownership schemes and the avoidance of any unintended consequences upon them.
5. How Government will balance the need for a straightforward model, easily implemented by small businesses with the likely complexity which will be needed to determine their treatment for tax and national insurance purposes.

6. A much clearer expression of what the policy objective to be achieved is, why this option only has been proposed and which businesses the new model is aimed at. The indicated target audience of the rapidly growing small business and start-ups ignores the fact that employers can currently recruit workers who will not acquire rights to unfair dismissal or redundancy for two years.
7. Finally, the absence of an impact assessment, which should clearly have been published at the same time as the consultation, needs urgent rectification.

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

Clearly, communicating the scheme to businesses clearly will be critical. To do this Government will need to identify what the benefits of the new scheme are for employers, and how employers can implement the changes which would be needed to introduce the scheme in their company. Government should consider supplying employers with draft agreements which will be necessary and signposting employers to the sources of information and advice which they will need. These will include employment law, company law and tax. Consideration should also be given to the possibility that employees themselves may wish to initiate the process of transferring to employee-owner status, and that therefore a process should be put in place to facilitate this.

Overall the extent to which businesses get the greatest benefit from the potential flexibility will depend upon the model adopted by Government.

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

It may be over-optimistic to refer to employee-owners as a new employment status. In reality, there are only two statuses, which consist of those who are employed, and those who are not. Additionally, the legal definition of an employee is not in practice what determines a responsible employer's behaviour, as the definition of an employee for the purposes of liability for PAYE and National Insurance is not the same definition which is used by Employment Tribunals. As long as employee-owners remain employees for the purposes of Revenue and Customs, their treatment is unlikely to change.

There are, however, clear fiscal reasons why Government would not wish employee-owners to be treated any differently from other employees, other than the stated exemption from capital gains tax (CGT), and this restriction is likely to mean that the current view of employers towards employees is unlikely to change.

Clearly, Government could create a more obvious distinction between owner-employees and other employees, but to do so would create a differential in the liabilities for the payment of income tax and national insurance contributions, (and increasingly over time pension contributions), which in addition to their impact on public revenues might also create divisions in the workplace. Whilst business ownership amongst employees is to be regarded as positive and promotes better workforce relations, a system where only some employees

owned shares and as a result paid less income tax could potentially create a divided and less productive workforce.

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

The consultation makes clear that Government is not proposing to amend the Companies Act 2006, and it must therefore be assumed that any restrictions would be indirect. Businesses can and do already allow employees to buy shares and invest in their enterprise. Any attempts to create direct restrictions might have the unintended consequence of preventing or hampering schemes which already exist, or in the extreme could even outlaw them. Similarly, any attempt at indirect restrictions, (for example by treating employee-owners differently for tax purposes, possibly by increasing the rate of corporation tax payable), would negatively impact upon existing schemes. Such existing schemes are likely to be better supported by employees, as they will have been created without employees surrendering some of their employment rights in exchange for the shares.

Given the very short opportunity to gather evidence in response to this consultation, we would urge Government to give great consideration to any changes to existing share ownership. Shares provided under the employee-ownership scheme may carry voting rights, limited voting rights, or dividends, but we believe that any attempt to legislate on the precise type of shares which would be permissible under the scheme will be very difficult. There would be no good reason to include share schemes which fall outside employee-ownership, such as existing schemes. There has been no evidence presented to justify such a change. Technical difficulties will then be encountered when employees forego some of their employment rights, (for example those to redundancy only), but not others, or accept contractual changes offered by their employers. An employee may for example receive a lump sum in lieu of contractual redundancy rights, and then choose to invest this in shares, some (but not all) of which may be "employee-owner" shares, which could be offered at a preferential rate. How would such shares then be treated for the purposes of taxation? Similarly, the payment the employee receives, subject to structure, could be tax advantageous, resulting in a significant tax saving.

Without further and considerably more detailed analysis, we do not believe that Government should attempt to prescribe what shares may or may not be offered under employee-ownership.

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 redemption of the shares will create significant practical problems for employers and employees, potentially so complex that such schemes will rarely, if ever, be utilised. Whatever the formula for the valuation of the shares, there will need to be some valuation placed upon them when they are issued and when the employer has the option to purchase them. Equally, there could be scope for disagreement at the time the employer wishes to

redeem the shares, and the potential routes for this to be resolved are unlikely to be straightforward.

In practice, a value will need to be determined when the shares are issued. This is already a complex matter and one which can be contentious between business owners and the Revenue. The added complexity of this proposal is that currently employers will generally have accounts prepared for the end of their financial year, which would allow a valuation to be determined at a fixed point in time. Shares may, however, be allotted at different times, and may therefore have increased in value, or fallen. For any scheme to be workable, employers will need some flexibility. This could be afforded by allowing employers to rely on the last valuation, and not require a valuation on each occasion shares are allotted.

The redemption of the shares will be more problematic. Even with a contractual right to redeem the shares, an employee may decline to transfer the shares, or may argue over their value. If, for example, a group of employees were dismissed at the same time, there may be relatively little goodwill, and employees may not necessarily comply with a demand from their former employer. The employer would have little option other than to enter into litigation, assuming that a legal structure was created which would permit the employer to require the shares to be redeemed. For a small employer, where a number of employees all refused to transfer their shares, this might be impractical and very costly. Potentially, the employees might hold the employer to ransom, forcing the employer to pay significantly more than the value of the shares in order to redeem them.

The risk outlined above is likely to be off-putting for smaller employers, who may instead choose to offer shares with little (or no) voting rights and no dividend. This would however offer the employee little in return for the surrender of some of their employment rights.

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?

Any small company is likely to conduct a valuation at their accounting year end, as they will in any event be incurring fees in preparing their accounts at this time. Small companies do not need to appoint an auditor, and so the year end accounts and their statutory accounts for filing will be the only time at which they will have an opportunity to value their business, and therefore shares. We suggest therefore that this valuation should be sufficient for any shares allotted until the end of the accounting period.

We are unsure as to what is meant by an "independent" valuation, but would suggest that a company valuation prepared by a qualified accountant, (whether or not employed by the business) should be regarded as final. This would reduce the cost and administrative impact for the business and prevent employees contesting the valuation of the shares.

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.

In practice, employers will seek the advice of their accountant. Accountants are already skilled in providing tax advice to businesses. Many offer services covering company incorporation and administration, and employee-ownership would be a natural extension of this. Furthermore, employers will need some additional advice and guidance on the formation of any new employment contracts. Employers are likely to seek this from organisations such as EEF, private HR advice providers or independent solicitors.

Alternatively, employers may receive proactive advice from their legal and tax advisers. Frequently, accountants seek to legitimately minimise the tax exposure of businesses. If employee-ownership is introduced in such a way as to allow employers to reduce their exposure to national insurance contributions for example, then it is likely that accountants will as part of their professional duties to their client, seek to utilise this.

The introduction of employee-owner status will need to be accompanied by a significant awareness campaign targeted at employers and their likely professional advisers. This must clearly state the limitations of the scheme and state the duties of employers.

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

Currently, the impact of employee-owner status on new recruits will in law be minimal. Employees will still retain all of their day one employment rights, for example discrimination. A new employee does not in any event have the right to bring a claim for unfair dismissal or claim redundancy pay until two years continuous service has been reached. The new scheme would have no impact upon these rights, and from this standpoint, its policy objectives must be questioned. The additional rights surrendered, (the two identified "rights to request" and longer notice of return to work for those subject to maternity leave), have less impact. For new starters then, they appear to be giving up little, although equally they may gain little.

The more apt question is one of perception. Employees may perceive that they are surrendering more than they are in practice, and may regard themselves as more exposed than other employees as a result. They may potentially enter into an employee-owner contract with little enthusiasm and see themselves as disadvantaged compared to other employees. Employees who are not employee-owners may also feel some resentment if they have not been offered the same status, irrespective of whether or not the status has had any real impact on employment rights or whether the shares carry any real benefit. The introduction of the scheme is unlikely to increase the appetite amongst employers to recruit, given the two year qualifying period for unfair dismissal and redundancy.

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

Employee ownership can have a positive effect on workforce relations. Staff ownership helps create an incentive for greater participation amongst employees, and allows employees to share in the success of the business which they work for. However, given that unfair dismissal claims can only now be brought by those with two years continuous employment,

the legal benefits for companies of the scheme will be very limited. Unfair dismissal claims make up only a small minority of overall Employment Tribunal claims (below 10%), and so employers will still be exposed to the majority of claims as they currently are. This may in itself create a further difficulty, as employers may incorrectly believe that the employee-owner status will shield them from all claims from employees, whereas in fact its practical impact will be very limited. Employers will still need to have in place appropriate policies and procedures to ensure that they comply with the great majority of employment law for both employee-owners and others.

Potentially, the reduction in employment rights could provide increased certainty for employers in the longer term. They would be free from the potential future contingent liability of redundancy costs, and after employees had completed two years' service unfair dismissal claims. The rights to request which will be lost may have some limited, lesser impact.

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

There will clearly be no direct benefit for start-up businesses as a result of the two year qualifying period referred to above. It seems likely that the scheme will require significant modification to ensure that it cannot be used as a vehicle for tax avoidance. This will in turn increase the complexity of the model and therefore result in it being less attractive to smaller businesses. It may find a constituent audience amongst small employers who would be able to employ themselves via the scheme and so avoid CGT upon the sale of the business.

Larger businesses who wish to operate share ownership schemes can and do already do so. Other than the CGT exemption, they would appear to gain little from this proposal, other than the ability to reduce their exposure to some limited extent to their workers bringing future employment claims.

To a great extent, the benefits to businesses will depend on the model which is eventually adopted. If the model permits employee-owners to be able to reduce their exposure to income tax and national insurance contributions, it will be considerably more attractive. Similarly, employers may be attracted if they are able to reduce their liability for the employer's national insurance contribution. This, however, seems unlikely, and perhaps outside the objectives of the proposal, although a tax advantage is clearly intended. What, however, may prove difficult is preventing such unintended consequences without impacting upon existing share ownership schemes.

Small companies and start-ups may seek to grow rapidly and quickly and then may either be taken over by a larger organisation or may sell to a buyer. If, for example, the employees of a fast-growing start up were employee-owners, on the sale of the business they may continue to own the shares in a business in which there was no value, as the goodwill, assets etc. of the business will have been sold. Alternatively, they might potentially be able to block any sale and in effect hold the business owner to ransom. There are a range of issues which then fall to be considered, and which the solutions for are entirely unclear. A Buyers may be put off if a group of employees owned shares which they, could not obtain. The interaction with TUPE would require careful consideration. The valuation of the shares

may rise significantly at the time of a sale or potentially the shares could be rendered worthless.

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

It is possible that the introduction of employee-ownership and the diminution of employment rights will lead to aggrieved employees bringing claims based on other heads. EEF as an adviser has experience of this. Given, however, that unfair dismissal claims as a sole head of claim currently comprises less than 10% of all claims, the wider picture is clearly one where the majority of claimants do not in any event rely on unfair dismissal as the foundation of their claim.

A more real possibility is of employees bringing claims on the basis that they were not offered the new status, or alternatively that they were only offered the new status.

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?

The loss of redundancy pay will clearly have no impact for the first two years of a new-starter's employment, and thereafter the level of statutory redundancy pay is modest. The wider impact upon such small businesses may be similar to that which EEF foresaw from the introduction of compensated no-fault dismissal. Small employers may encounter greater difficulties in recruiting and retaining workers, as workers become attracted to employers which do not seek any reduction in their employment rights. Employees working under employee-owner contracts may have an increased sense of insecurity, and as a result may be more inclined to save, and less inclined to spend. They may encounter greater difficulties in accessing credit and may be inclined to move to an alternative employer as soon as they are able.

Much will depend on the tangible benefits of share ownership. If the shares carry dividends and employees derive a real benefit from participation in the business, then employee engagement and retention may be improved. If employees find that the shares offered can carry no voting rights or dividends then they may be seen as a convenient way of depriving some employees of some of their employment rights.

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

The change to the maternity notice period may have a positive impact for some businesses. Mothers usually discuss with their employers their maternity plans in good time, and employers can plan for this. This is, however, due to change with the introduction of flexible parental leave, which could leave employers with considerably less certainty. If 18 weeks is considered to be an appropriate and workable period for mothers to give notice to their employers, then there can be little reason for this not to be the same notice period for parents wishing to take a period of flexible parental leave.

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

In the event that an employee wished to return early without having given 16 weeks' notice, it is likely that many employers would seek to accommodate this. There may be some exceptions, for example where an employer was already committed to the cost of maternity cover, but in our experience most employers will work with the returning employee.

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

This question cannot be answered without a detailed understanding of how such schemes are to be taxed. If employers and employees are permitted to utilise the schemes to their fullest advantage, then payroll schemes will be adapted to reduce the exposure of the both parties to tax and national insurance. If such benefits are prevented, then little adjustment to existing payroll schemes will be required.

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?

Probably none. The longer period of notice will simply require parents to plan further ahead and not impact upon the total period of leave taken.

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?

Whilst 4 weeks might appear attractive for employers, the reality of such a short period may be counter-productive. A returning parent will only be able to exercise a right to request flexible working in their capacity as a parent, given that the wider right to request flexible working will not apply to them. Parents may be unable within 4 weeks of returning to work to decide if they will need or want to work flexibly, or if they do what arrangements they should request. Parents may then submit a request within 4 weeks to ensure that the opportunity is not lost. This may result in the parent and the employer undertaking a process which proves unnecessary, or the parent agreeing to an arrangement which then proves to be unworkable.

We would suggest that a longer period of 12 weeks would still provide sufficient employer certainty and provide the parent with a greater opportunity to determine what working arrangements they might need following their return to work.

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

Very little. The current, limited, right to request time off for training applies only to companies employing more than 250 employees. EEF has no experience of its members having any significant experience of this right being exercised and still less of any negative impact for the employer where it has been exercised. Larger organisations in any event tend to provide greater training opportunities for their workers than smaller businesses, although this is not to say that SMEs do not make significant investments in the training of their staff.

Employees and employers are unlikely to experience any significant effect from the loss of the right to request.

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

The intention not to amend the Companies Act is likely to significantly reduce the ability of Government to create a flexible and workable model for employee-ownership, to the extent that this is possible. As we have highlighted above, without any changes to current company legislation, employers will be free to offer shares to employees which carry either no or limited voting rights and no dividends. Such shares could be viewed as little more than token ownership, with no opportunity to influence the running of the business or participate in its success. Under such a model, it is difficult to see what the benefit to the employee is, other than a presentational one which may be more aspirational than real.

Even with changes to the Companies Act, there will still be difficulties in creating a model which does not impinge on existing schemes or allow employers with ease to circumvent the provisions. Existing share ownership schemes should not be affected by any legislative or taxation changes, and so potentially this proposal would need the creation of a new class of share. Defining the benefits that should attach would be at best problematic. For example, even if legislation required the shares to carry voting rights, a business owner could issue a large number of shares to himself, thereby off-setting any impact which owner-employee shares might have. In practice therefore, without very detailed requirements specifying how such schemes should operate, employers will always have a significant discretion in choosing how such schemes should operate and whether employees will derive any tangible benefit, or not.

Any attempt to restrict a new legislative framework to employee-owner share schemes might be circumvented if an employer sought to do so. If, for example, the new law applied only to the scheme as proposed in the consultation, an employer could avoid the provisions simply by leaving out one of employment rights needed to be surrendered under the scheme. An employer might therefore offer shares in exchange for the surrender of the rights to unfair dismissal and redundancy only, and then avoid any new legislative framework.

The scheme could be designed in a way that required employers to require employees to surrender their rights in an "all or nothing" type scheme, which would prevent employers picking and choosing the rights to be forfeited, but this would be difficult to justify. If an employer was prepared to offer employee-ownership with an employee retaining all or some of their current employment rights, then this should in general be seen as positive and supported by Government.

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

We have above highlighted some of the ways in which employee-ownership may be used. Whether these amount to abuse, or the legitimate application of the scheme is unclear. Arguably, one of the policy objectives is to create a tax haven for participants, as the shares

will be exempt from CGT. However, what is clear is that the provisions which would be needed to prevent employee-ownership becoming a vehicle to legitimately avoid the payment of income tax and national insurance by employees and employers are likely to be complex. This will reduce the attraction of the scheme to small employers, (which we understand are the intended target for the policy), and further complicate the tax system, which is in urgent need of simplification. The likely gain for employers and employees resulting from the policy is, at best, limited; this then should be weighed against the complex architecture needed to prevent the scheme become a tax-efficient way of employing workers. We assume that the net costs and benefits will be addressed in detail within the impact assessment.

Q20. The Government welcomes your views on whether the existing tax rules which apply for share-to-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.

EEF is not in the time available able to respond to 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?

In the immediate future, the proposal will have little real impact. Businesses of any size can already hire new workers who will have to wait two years before they are able to commence a claim for unfair dismissal. It is therefore difficult to see how in the short term the proposal would impact upon employer behaviour.

Over a longer period of time, a greater benefit may be afforded to employers, as they will not accumulate liabilities for redundancy payments for example, but this is unlikely to affect employer or employee behaviour in the near term.

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

Given the short time period for this consultation and the level of detail we are unable to comment on this question at this time.

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

a) Companies?

Our members who in the limited time available have responded regarding this consultation have indicated that they would not implement the new status.

b) Individuals?

Unless there is a tangible benefit for employees, there appears to be little which would attract them to the proposed scheme. The exemption from CGT is alone probably insufficient to attract employees. The tax exemption will depend on there being a gain, which in current circumstances appears at best marginal. As we have

highlighted above, the concept of "owning" a business under this proposal is more illusionary than actual.



Federation of Small Businesses
The UK's Leading Business Organisation

Paula Lovitt MBE
Labour Market Directorate
Department for Business Innovation and Skills (BIS)
1 Victoria Street
London
SW1H 0ET

Dear Sir/Madam

Re: FSB response to BIS Consultation on Implementing Employee Owner Status

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above named consultation.

The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political, and with 210,000 members, it is also the largest organisation representing small and medium sized businesses in the UK.

Small businesses make up 99.3 per cent of all businesses in the UK, and make a huge contribution to the UK economy. They contribute 51 per cent of the GDP and employ 58 per cent of the private sector workforce.

In our response we have focussed on the likely take-up of the proposed Employee Owner status among small businesses, the different employment rights exemptions proposed, and practical questions surrounding share valuation and forfeiture. We trust that you will find our comments helpful and hope they will be taken into consideration.

Yours faithfully,

Mike Cherry
National Policy Chairman
Federation of Small Businesses



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FSB response to BIS Consultation on Implementing Employee Owner Status

November 2012



General Comments on Employee Owner Status

In October 2012 the Chancellor announced the Government's intention to establish a new form of employment status known as Employee Owner. The scheme will permit employers to offer their employees between £2,000 and £50,000 worth of shares in the company, which would be exempt from Capital Gains Tax (CGT) once they are sold. In exchange, employees would relinquish several employment rights.

The FSB welcomed the scheme at the time as an innovative policy that could help reduce the risks of hiring for employers. While the UK benefits from a relatively flexible labour market by European standards, we believe that the Government must do more to reduce the disproportionate burden of employment regulation on small businesses. In this respect, we also welcome plans to reform the Employment Tribunal system and to make it easier to resolve workplace disputes before they reach the tribunal stage.

The FSB believes that employee ownership has a role to play in UK business and it is encouraging that the Government is taking steps to cultivate employee ownership. For those businesses that choose to take advantage of the new status, employee ownership could cultivate greater staff commitment, loyalty and ultimately productivity. Introducing a new employment status – the Employee Owner – will also provide greater flexibility for business owners at the recruitment stage providing them with a further option to fit their business needs.

Despite this, the FSB believes that Employee Owner status is only likely to appeal to certain types of business. As the Chancellor has suggested, the scheme is primarily intended for high-growth firms in niche sectors. Larger firms that already have listed shares may also find the policy appealing.

For many small businesses, the scheme is unlikely to be appropriate. Only a small proportion of FSB members issue shares in their company, while only 5.5 per cent derive income from share holdings in other businesses¹. Many small business owners rely on their own revenues and savings and, if they are lucky enough to secure it, bank credit to finance growth. They are often reluctant to divest ownership rights, unless they are looking to sell up. Although it will be up to the employer to set the terms and conditions of shareholding schemes for employee owners, it is our view that many small business owners will not want to issue shares if this means relinquishing control over important business matters.

At the same time, many small businesses will be wary of the fact that they will have little control over when the shares might need to be repurchased, when for instance an employee-owner leaves the company. For those business operating fine margins, this could lead to cash flow problems.

One FSB member suggested:

"It's all very well giving shares/share options and the amounts are only a paper exercise when they are issued, but they become much more problematic when the time comes to repay. And more

¹ FSB Lifting Barriers to Growth (2006), Biennial Membership survey



and more problematic the smaller the business...The concept of issuing shares to a given value will immediately raise potential cash flow issues in the owner's mind, and payback is possibly one of the most difficult aspects of this.'

The scheme could however be appealing among certain high-growth start-ups. The biggest constraint facing many young start-ups is access to finance, particularly during the period when seed capital has been used up and the company is not yet making sufficient revenue to attract commercial creditors – the so-called 'valley of death'. The FSB believes that the Government is missing a trick and could use employee ownership to attract partners to invest their own capital in start-ups in exchange for shares that have the capital gains benefit suggested in this proposal. That would make explicit the trade-off with the weakening of certain employment rights. For investors in high growth businesses, this may well be a risk they are willing to accept. Top up shares could also be issued free of charge to partners that invest in the company (to compensate for the loss of employment rights). This could help bridge an important financing gap that inhibits the growth of start-ups.

How the scheme would operate

The proposal would allow employers to offer existing employees the option of becoming employee-owners with no obligation on the existing employee to accept. However, employers would be able to advertise new roles as 'employee-owner' status only.

From a shareholding perspective, there are a number of outstanding questions that need to be answered. The primary unresolved issues centre on issuance, format, valuation and exit.

The issuance of shares to new staff members would create two different types of employees (while taking into account legal status). This is not a major concern until the format of shares is considered. If the shares have voting rights associated, this could lead to disagreements between the full stock of employees. Secondly and as already mentioned, there is distinct apprehension for small business owners to relinquish decision making. A further consideration, and one for HMRC, is the risk of tax avoidance. To give two simple examples:

1. A large proportion of employee shareholder income is drawn down through dividend payments. This then avoids PAYE liabilities.
2. Shares are issued to employees who might include members of the family just before a company is bought, so avoiding CGT liabilities should the value of those shares exceed the CGT allowance.

If the shares are unlisted, share valuation is a complex and costly process and would require independent valuation. There could be an increase in disputes over the valuation of such shares, all of which costs time and money but may be needed each time an employee-owner leaves. Furthermore, it does not appear that employment tribunals will be the forum for resolving such disputes, so this would leave the civil courts where there are greater cost risks for small businesses. Four simple methods could be used by owners of small businesses in looking for estimated share value:



1. Last issuance: this could then be worked up using annualised inflation or appreciation in the businesses value
2. Last filed accounts: it may be necessary for small firms who use employee-owner status to include number and value of each share issued
3. The last valuation of the firm
4. Secondary market value: would only be appropriate where staff within the firm are allowed to trade shares

While this form of employment status is appealing to certain people and business owners, there may be more work needed to entice employees. The concern for the FSB is that this scheme will remain niche and small under the current thinking. This scheme will only become noticeable if existing firms and employees decide to switch. Currently, where an employee acquires shares by virtue of his or her employment and pays less than the market value for those shares, there is likely to be an upfront income tax and NIC charge. Not many new workers will want to fund an upfront tax charge where shares are received for no payment and many won't be able to afford to anyway. Even the minimum £2,000 of shares will result in at least a £400 tax bill.

Many employee shareholders do not pay CGT on gains anyway by virtue of the annual CGT exemption which is currently worth £10,600 – so, in fact, there may be no additional CGT saving.

One idea would be to introduce income tax exemptions in addition to CGT relief. Unless the scheme is suitably attractive from an employee's perspective, this could have unintended consequences for the flexibility of the UK labour market. At worse, employees may opt to stay in their current roles and choose not to move jobs out of concern that employee-owner status will be written into their new contract, making recruitment of the highest quality labour more difficult. The likelihood of this happening is however low given that we anticipate fairly low take up of the new status.

There is also an onus on the employer to offer a favourable option in terms of dividends, voting rights and so on given the uncertainty facing the employee-owner (for instance, there is no guarantee that their shares will have appreciable value). Without this, there is a risk that the scheme will drive a wedge between employee and employer and will undermine the very benefits to the business that employee-ownership promises – namely increasing loyalty and productivity.

While it is right that the business be left to choose the most suitable shareholder arrangement, the difficulty in striking a suitable balance is likely to affect many businesses' propensity to take advantage of employee owner status. Clear and accessible government guidance and advice, listing the pros and cons of employee ownership, will therefore be important.

Proposed changes to employment conditions for Employee Owners

The FSB welcomes the principle underpinning the Government's plan to introduce more flexible employment conditions for employers wishing to take on Employee Owners. 30 per cent of small businesses cite employment law as a barrier to taking on new staff, while 21 per cent consider the



risk of litigation or employment tribunals as significant factors limiting their recruitment.² Reducing the burden of statutory employment rights will be attractive.

However, we would question a) whether the specified rights restrictions are sufficient to make a positive impact on hiring practices, particularly given the trade off incurred by the business owner in terms of lost equity and b) why some of these exemptions should not be applicable to all small and micro firms, rather than only those that offer share options – this is particularly the case with proposals around flexible working.

Unfair dismissal: Questions 7-10.

The decision to limit the right of employee owners to claim unfair dismissal only for reasons that are automatically unfair or that relate to discrimination will be appealing to many employers. While the Government has recently increased the qualifying period of employment to claim unfair dismissal to two years, poor work performance and conduct can occur at any stage during the employment relationship. Employers are often subject to spurious and/or vexatious claims in the event that a dismissal has occurred and incur a long and costly process to defend themselves. These costs are disproportionately higher for small firms who do not have HR departments and in-house legal experts to deal with disputes in the same way that large firms do.

The FSB believes that of those companies that choose to take advantage of employee ownership, removing the right to claim unfair dismissal will be seen by most as the main benefit. However, since it will effectively only come into force once the employee-owner has more than two years service, it will be less relevant to young start up companies. The number of start-ups that find employee owner status appealing on the basis of this particular exemption could therefore be relatively small – despite the fact that they might be best suited to employee ownership as outlined above.

While we broadly welcome the proposed exemption, we have some concerns. As would have been the case with Compensated No-fault Dismissal, there is a risk that removing this right could lead to an increase in the number of discrimination and automatically unfair dismissal claims, which tend to be costlier and more challenging to defend. In addition, if companies do not operate a clear policy of offering this type of arrangement to all new staff, there is a risk that could of itself give rise to indirect discrimination claims. While we would expect that the introduction of tribunal fees will help to prevent any significant rise in discrimination and automatically unfair dismissal claims, additional guidance in this area would be welcome.

Statutory redundancy pay: Question 11

Under the proposal employee owners would not be eligible for statutory redundancy pay. In principle this is a positive benefit, however the FSB feels that it may only have a minimal effect on an employer's appetite to use employee owner status. Statutory redundancy pay is only payable

² FSB Voice of Small Business Panel Survey, June 2012



after two years continuous employment and tends only to become a significant sum if an employee has long service. And, if the employer is insolvent, SRP is paid by the Redundancy Payments Office and becomes a debt due in insolvency. Hence, while some companies will see the added benefit of SRP exemption, it is unlikely to be the motivating factor for them choosing to use employee owner status. It is also likely that companies that are most likely to use employee ownership status – for instance, high-tech start ups and larger listed companies – may in some cases have company redundancy packages that are written into individual contracts that exceed the statutory minimum.

Changes to maternity/adoption notice period: Questions 12-15

Under the proposals, employee-owners' will have to provide 16 weeks notice of their intention to return to work early from maternity or adoption leave instead of the 8 week notice currently required of employees. The FSB believes this would provide additional certainty for employers.

25 per cent of small businesses find regulations on maternity, paternity, adoption leave and pay the most time consuming and difficult to comply with³. Employers need as much up-front notice as possible with a substantial lead in period so they can forecast their business needs in advance. That said, 8 weeks is usually sufficient time for employees to dispense with any replacement employee. Where disputes occur this is usually because the employee has not given sufficient notice when returning to work, in which case the employer is within their rights to defer the date until 8 weeks from the date when the notice was given. We therefore think that a compulsory 16 week's early return notice period will have a limited impact on the propensity of small firms to use employee owner status.

The right to request flexible working: Question 16

Under the proposal, the right to request flexible working will be restricted to the EU minimum for employee-owners, meaning it can only be requested on return from 18 weeks unpaid parental leave. The FSB agrees in principle with this specific proposal, however we do not believe deregulatory measures in this area should be restricted to employee owner status. Specifically, the FSB opposes the government's plans to extend the right to request flexible working to all employees. Most small businesses by their very nature tend to work flexibly and offer flexible working benefits to their staff, usually in an informal manner. They do not need extra legislation in place to formalise it. The FSB-ICM 'Voice of Small Business' Annual Survey in 2009 showed that 47 per cent of small businesses have staff who work part-time, 29 per cent have staff that work flexible hours and 27 per cent have staff who work from home. Of those that offer flexible working, only 4 per cent restrict this to parents of small children.⁴

³ FSB 'Voice of Small Business' survey, May 2011.

⁴ *Flexible Working: Small Business Solutions*, FSB, June 2010

<http://www.fsb.org.uk/frontpage/assets/fsb%20flexible%20working%20report%20web.pdf>



Federation of Small Businesses

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Plans to extend the right to request to all employees will increase the administrative burden on small businesses and could even deter small business owners from discussing and agreeing to informal flexible working requests. Small firms have less room for staff redeployment, meaning that in some sectors, it is impractical for employees to be working from home or part time. We do not think that exemptions from certain statutory rights to request flexible working should be limited to employee owners, but instead should be considered in relation to employees in small and micro firms.

In relation to the specific proposal, we would encourage clarity from the Government in two areas. First, the consultation suggests that employee owners returning from parental leave will need to request flexible working within 4 weeks of starting back at work. To safeguard the employer, we believe clarity is needed as to how this would sit alongside discrimination claims. Indirect sex discrimination could be claimed if a refusal to grant flexible working has an adverse effect on the parent and cannot be objectively justified other than for the reason that it fell outside the 4 week period.

We also believe that the interplay between unfair dismissal and the right to request flexible working needs to be made clearer (paragraph 29 in the consultation). Employee owners will find it easier to discuss working patterns with their employer if they have a vested interest in the business, but not if they risk dismissal for requesting flexible working. Care must be given in the wording so as not to discourage employers and employee-owners from informally agreeing flexible working arrangements.

The right to request training: Question 17

The right to request flexible working applies only to staff in firms with 250 employees or more. This exemption will therefore make no difference to small firms or start-ups.

For further information

David Nash, Policy Advisor



Priyen Patel, Policy Advisor



Federation of Small Businesses
2 Catherine Place, London SW1E 6HF

From: Brian Simpson
Sent: 08 November 2012 09:06
To: Employee Owner Status Consultation
Subject: TRIM: BIS Consultation on Implementing Employee Owner Status-Law Society of Scotland Response
Attachments: EMP-Consultation on Implementing Employee Owner Status.docx
TRIM Dataset: M1
TRIM Record Number: D12/1381379
TRIM Record URI: 13444046

Dear Sirs,

Re: BIS Consultation on Implementing Employee Owner Status

In relation to the above consultation, I attach the response submitted on behalf of the Law Society of Scotland. Please contact me direct if you have any questions in relation to this.

Regards
Brian Simpson
Law Reform
The Law Society of Scotland
DD:
Mobile:
Fax



Please note, I check my e-mail inbox four times a day. If the matter is urgent please telephone me.

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BIS Consultation on Implementing Employee Owner Status

**The Law Society of Scotland's response
August 2012**

INTRODUCTION

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession.

Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors to ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession. The Society's Employment Law Sub-committee considered the BIS Consultation on Implementing Employee Owner Status and has the following comments to make and responses to put forward to the questions set out within the consultation document.

GENERAL COMMENTS

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

Response: In order to assist employers to get the most out of the flexibility offered, the Government will require to not only deal with the employment related issues but also the corporate and tax implications of the intended share ownership arrangements. The Government will require to ensure that appropriate mechanisms are in place to allow the company to acquire the shares on departure of the employees. Even with existing employee share ownership arrangements (other than public companies), there are invariably drawn out and expensive disputes that require accountant valuations. This would be expensive for both the company and the individual employee and may just simply transfer an argument from the forum of an employment tribunal to disputes about corporate valuations.

Whilst the new status is designed to be flexible and save employers having to worry about unfair dismissal claims and/or redundancy as well as issues arising from flexible working requests, the fact that even as employee owners, the individuals are able to make claims in relation to discrimination or for dismissal for automatically unfair reasons means that employers will not necessarily have the comfort that individuals will not raise claims against the Company (even if this would have an impact on the Company and therefore the value of the employee's shares). In that regard, in order to give businesses an opportunity to get the most out of this flexibility, we suggest that strict rules and guidance should be provided as to what would allow an employee owner to bring employment tribunal proceedings and more particularly, put employees at risk of costs/expenses in the event that spurious claims are raised as a means of avoiding the protection from claims which employers would otherwise have from those with employee owner status. It may be that the employee owner should be at risk of losing the value of their shares should they be unsuccessful in such an employment tribunal application.

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

Response; In our view, most medium to small employers will find it difficult to cope with the use of all three employment statuses. At present there is often confusion amongst employers over the different rights that Employees and Workers have and indeed this already leads to disputes. Adding a further category of employee owner will not make the management of human resources any easier for employers.

Having such a variety of statuses available for all workers may lead to not only confusion in management terms but also potentially disharmony amongst employees, as different rights are asserted in different ways. Employers will have to be conscious that in embracing the possibility of employing people in this new status, they may end up creating a 2 or 3 tier workforce.

Many small to medium size employers may not consider there to be benefits of creating this new category, particularly if there is no assurance that using the new category will absolutely avoid tribunal claims, given that it is likely that employees who are unable to raise an unfair dismissal claim will, should the relationship ends acrimoniously, look for some alternative means of raising a claim ie discrimination etc.

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

Response: Whilst it seems to be suggested that the shares could have voting and other rights attached to them, in our view, most owner managed businesses or small to medium sized employers are likely to find it unpalatable not only to give employees the benefit of share ownership but also the right to vote on the management of the business.

In addition, it is likely that many employers will want a limitation on the percentage of shares which are able to be owned by employees in order to avoid a situation where the employer loses control over the company. In that regard, there may require to be a restriction or at least provision to allow a restriction for employers who wish to limit the influence/control that the employee owners would have.

Shares would also require to be non-transferrable. The assumption seems to be that employee owners, having a stake in the business and obtaining a benefit in value from that, would work harder for the company and would not raise unfair dismissal proceedings or take any action which would inevitably be detrimental to the company and therefore the value of their shares. Obviously, to achieve that objective the employee would have to be the beneficiary of the shares, and these shares would have to be non-transferrable.

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?

Response: The shares should be at full market value. The disadvantage for the employee in this category is that in accepting shares and committing themselves to the company, their employment could terminate perhaps through no fault of theirs. It would therefore be unfair if the company would only require to pay a fraction of the market value for the employee owner's shares. It appears that the intention behind the whole idea is that the employee will gain by being a shareholder and that they will not require to pay capital gains tax on the increase of value. The benefit of this status, would be lost if any gain which was accrued during their

employment could simply be wiped out by the employer in a post termination entitlement only to pay a fraction of the share value.

It may be that the Government would require to specify some form of "bad leaver" provision which in particular circumstances, would allow the employer not to give the employee owner the full value for their shareholding after their employment ends. It may be considered appropriate to provide that if employment tribunal proceedings were raised or an employee owner was found to be guilty of gross misconduct or some other breach of contract, this would justify immediate termination of their employment, and in those limited circumstances the value of their shares might be reduced. Further, if the actions of the employee owner cost the company money, provision could be made for the employer to be able to off-set their loss against the value of the shares.

In employment tribunal terms, even in a gross misconduct situation, an employee is entitled to receive pay etc (including accrued holiday pay) up to the actual date of termination of their employment. It would be difficult then for any accrued increase in value of the shareholding to be simply wiped out on termination by only offering a fraction of their value. Whilst this does not arise in most current employment situations, in corporate situations where shareholders fall out or disagree, the process of valuing shares is invariably drawn out and expensive. Whilst this new status may in theory avoid unfair dismissal and employment tribunal proceedings being raised, if there was to be a dispute over the value of the shares, this would inevitably involve considerable cost to both parties in having accountants carry out a valuation of the shares and then potentially a Court action for recovery of the value of these shares.

For further information and alternative formats please contact:

Brian Simpson
Tel: 0131 476 8147
Email: briansimpson@lawscot.org.uk

The Law Society of Scotland
26 Drumsheugh Gardens
Edinburgh
EH3 7YR
www.lawscot.org.uk

Liberal Reform
13 Melrose Road
London, SW19 3HF

7 November 2012

Dear Ms Lovitt

Please find attached a response from Liberal Reform to the Consultation on implementing Employee Ownership status. Liberal Reform is a group within the Liberal Democrats who believe in 4 cornered Liberalism – Political, Personal, Social and Economic.

We are not against any change in employment legislation, but we do believe that any changes should be evidence based – we have not seen any evidence that the proposed changes will make any difference to the UK levels of growth, nor that unfair dismissal rights, the right to request flexible working and training are in fact causing problems for firms and making them less likely to hire. We cannot do no better than to quote from the document itself: *"The OECD has recognised that the UK labour market is one of the most lightly regulated in the world"*.

We are particularly concerned that the associated of owning shares with losing rights will act as a disincentive to employees to take part in existing ways of owning shares such as Save as You Earn and will tend to bring employee ownership into disrepute.

We do not feel that the questions in the consultation really get to the heart of the issues raised by 'Shares for Rights'. These are:

- What evidence is there that this change is needed or will have any effect?
- How will the legislation ensure that this really is 'voluntary' for employees particularly for those who are joining a firm?
- How will the change be used in practice? We suspect that in many cases it will be a tax avoidance device. There may be a case for reducing the rate of capital gains tax for shares in newly formed businesses but that case should be made on its own merits. We suspect what will happen is that this will be used mainly for senior management to enable them to reduce taxes, while at the same time their employment contracts will have greater right anyway.

We do not believe that the Government has made the case for this change. But given that it is likely to happen we have some proposals which would mitigate some of the adverse effects.

- There should be a clear right not to participate, including for new employees.
- There should be the right to 'opt back' into full employment rights by surrendering the shares, subject to an appropriate notice period.
- We believe that there is a high likelihood that this will be used as a tax avoidance device for senior management. In order to avoid this no CGT relief should be allowed for employees with a taxable income greater than £100,000 unless at least 10% of UK employees have been offered the opportunity to exchange their employment rights for shares. There should be a cap on the CGT relief any individual can receive of £200k.
- The 'employee owner' status should be restricted to new firms, only those in the first 5 years of their life should be able to offer this.
- Giving up employment rights is a serious step which should not be undertaken without understanding what it involves. Just as employees cannot give up their employment rights on termination by signing a Compromise Agreement without legal advice they should not be able to do so when taking up Employee Owner status without legal advice on what is involved (paid for by the employer).

I will be happy to discuss any of these points further.

Yours sincerely

Simon McGrath

Liberal Reform

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

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: Simon Mcgrath

Organisation (if applicable): Liberal Reform

Address: 13 Melrose Road, London, SW19 3HF

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) Political Group

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

Comments:

We are not convinced of the need for any change - we have seen no evidence that suggests it is needed.

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

Comments:

No Comment

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

Comments:

We believe that the CGT relief should only be available to employees earning more than £100k per annum if employee ownership status has been offered to at least 5% of UK employees. The CGT relief should be capped at a gain of £200,000.

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:

Should always be at market value (but see answer to Q5)

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:

Non Listed Companies should be allowed to use a market value determined annually unless there is reason to believe that there has been a significant change in value, in which case either the company or the employee should be allowed to ask for a valuation. There would clearly need to be anti avoidance rules around this.

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:

As in Compromise agreements, when signing away rights employees should have to have received legal advice before taking up Employee owner status.

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

Comments:

We have seen no evidence it will have any effect at all. Surely Government should have researched this point before making these proposals.

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

Comments:

It will become a standard clause for any middle and senior management roles in public companies.

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

Comments:

No Comment

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

Comments:

It will exacerbate the existing trend for employees to add discrimination claims wherever possible, in this case because they cannot bring unfair dismissal claims.

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:

Very little difference. The maximum amount of statutory redundancy is relatively small, particularly compared to the minimum of cost of Employee owned shares.

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

Comments:

No comment

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

Comments:

It would depend very much on the individual.

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

Comments:

No comment

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:

No comment

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:

No comment

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:

No comment

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

Comments:

There should be protection to ensure that existing employees cannot be coerced into taking on this status and that new employees have a genuine right to turn it down without losing the job offer.

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:

No comment

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:

Very little. There is no evidence that this is a problem.

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

Comments:

We are not an employing organisation

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

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

Comments:

We think it will have limited take up. It will be used as a tax avoidance device.

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

Comments:

No Comment

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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1 Victoria Street
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Tel: 020 7215 5000

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URN 12/1215RF

Consultation on implementing employee owner status - response form

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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

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: Rhian Edwards

Organisation (if applicable): Wales Co-operative Centre

Address: Llandaff Court, Fairwater Road, Cardiff, CF5 2XP

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) pub. sector business support body

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

Comments:

N/A

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

Comments:

N/A

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

Comments:

If issuing shares to employees is designed to support an increase in engagement of that individual to the company then realistically if that individual then leaves the company it would be advisable that those shares be sold so as not to create a broad external shareholder base which may be de-stabilising for the company and difficult to manage. Other than that, if employees are being asked to give up basic employment rights then the shares they hold should have the rights afforded to most shares e.g. right to vote, right to dividend etc. We feel this policy goes against the principles of true employee ownership that we work to promote and develop across Wales.

The very term employee-owner should mean that those employees are given appropriate 'ownership' rights within the company, and should be educated in a way so as to fully understand these rights, the responsibilities attached to this rights, and be clear on how to appropriately enact these rights. Yes these rights need to be managed in a way that isn't destabilising for the business, but placing numerous restrictions on the shares would result in employee-owners having no effective ownership role and rights within the business. Our concern also is that given the small number of shares involved, there would be no real power for employee-owners and so no true sense of employee ownership.

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:

As we understand it, the proposed rules will allow a company to require the employee to transfer the shares on termination of employment, but only for a "reasonable price". There needs to be a clear mechanism in place for valuing the

shares, particularly in the event of a disagreement or the parties will need to agree this as part of the contract otherwise this may lead to disputes between employers and employee-owners about what constitutes a "reasonable price".

Considering employees have forgone certain employee rights in return for shareholding then it seems only fair that the employees receive the equitable market value for those shares. However we recognise that this could put incredible strain on companies to have the liquid cash available to bank roll this type of buy-back as it can't necessarily control the pace at which employees will leave the organisation.

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:

We believe an independent valuation of the shares will be critical to avoid any disputes over what constitutes a "reasonable price" for the shares. We do not believe this will be a cost heavy exercise for companies and will safeguard the interests of the employees holding the shares and to ensure there is a transparent approach to ensuring the value. Companies that operate HMRC tax advantaged share schemes must submit a share valuation each year to support any dealing day processes within the company. We feel that a similar process, although not as onerous, would be appropriate. We feel it would be problematic if the government did not impose any valuation requirements beyond those which already exist when valuing companies for tax purposes.

If the company performs badly then the shares could ultimately have little or no value, which means there may be little benefit for the employee - hence it is vital there is appropriate valuation done so this is transparent for the employee making the decision on whether to accept the contract or not. There is also the possibility that an unscrupulous employer may take advantage of the new status to offer shares which are not worth anything in order to gain increased flexibility in its workforce. It is critical independent valuation takes place to best protect the interests of the employees.

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:

The effectiveness of any share scheme is only fully achieved if there is a clear understanding by both parties of how to enact their roles and responsibilities linked to shareholding. Employee-owners need to know what rights they have as shareholders and how to enact these appropriately within the company governance structure. They also need to be clear that they are an employee first and shareholder second as ultimately if they don't perform their role effectively as an employee then they won't add value to their shareholding. They need to be clear on

voting rights they have, and how to carry those votes. As a minority shareholder their voting rights will be limited but it is still important they are aware of what power they have. As an organisation we deliver many workshops to employees who have become owners in businesses to explore with them in detail the relationship between their employee status and shareholder status. We also understand that although any gain arising from the disposal of these shares will be exempt from CGT, income tax and national insurance would be payable on the initial transfer of shares. The financial framework surrounding the shares would need to be explained to employee-owners so they are clear on their financial position. As the shares carry rights to dividends it would also be useful for the employees to receive clear information relating to the company's approach to dividend distribution.

From the business perspective, if the business sees this as an opportunity to really engage employees within the structure of the business then it needs to have training on engagement process to get the most out of employees as owners. If businesses see the ownership status as just a financial relationship then it won't achieve the maximum engagement opportunity on offer. The business will also need a governance review done to assess how decisions are currently made within the business and whether new processes need to be established given a new layer of owners within the business. A full review of the articles of the company would also need to be done to ensure that appropriate provisions for buy-back are included.

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

Comments:

We do not believe these changes will have a positive impact. Ultimately the effect of the new status will be to enable SMEs to hire and fire staff at will by only paying statutory minimum notice. We are not sure this will increase an employer's appetite for recruiting and whether they can attract highly skilled staff under these terms is doubtful. We believe there will be an increased day-to-day insecurity for employee-owners, concerned that they can be fired at will, with no guarantee of additional reward.

From the employees perspective, the tax advantages this brings may be null and void. For example, the exemption from CGT may be irrelevant for small holdings, given that the employee would have a tax free CGT annual allowance which would shelter some of or all of the gain. Further more, they would have to pay income tax and national insurance on the initial transfer of shares.

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

Comments:

N/A

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

Comments:

N/A

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

Comments:

We do not expect the new employee owner status to reduce the number of employment tribunal claims. As we understand it, the new status will not allow employers to avoid liability for dismissals which are discriminatory or which are automatically unfair under EU derived legislation. Therefore, if the new employee-owner status only involves a waiver of the right to bring an ordinary unfair dismissal claim, this could result in an increase in other types of claim such as discrimination claims, therefore undermining the value of the employee-owner status for companies.

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:

N/A

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

Comments:

N/A

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

Comments:

N/A

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

Comments:

N/A

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:

N/A

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:

N/A

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

Comments:

Although we accept that the removal of this right does not prevent employers from offering training to employee owners, we recognise that in the current economic climate, businesses may be less willing to grant any training requests and will actively disengage from any active corporate development strategies. Training and professional development adds value to an individual's employment experience and ultimately adds value to the company when employees are highly skilled and can enact their work with professionalism and accuracy. Training and development is also important to support innovation and growth within companies. We do not want our economy to stand still and ultimately growth will depend on a growing knowledge economy that is embedded in our workforce. Training is a key part of this process and removing an employees right to time off for training will impact on an employees willingness and ability to grow their skills and knowledge.

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

Comments:

N/A

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

Comments:

As above, implementing appropriate provisions for share valuation will be critical to prevent an unscrupulous employer taking advantage of the new status to offer shares which are not worth anything in order to gain increased flexibility in its workforce. It is critical independent valuation takes place to best protect the interests of the employees. It is extremely likely that there will be disputes about what is a "reasonable" price for a share buyback in a private unlisted company unless legislation provides an adequate mechanism to determine this.

There is also the danger that the status may also lead to employee-owners being treated less favourably than other staff who have employment rights. The status would increase the likelihood that employee-owners would be dismissed rather than other staff as it would be easier and cheaper. Safeguards should be put in place which in some way mitigates against this risk.

The Government could also consider certain obligatory shareholding thresholds depending on the salary scale of an employee. The higher the salary the greater the risk, hence the greater the risk in forgoing certain employment rights. Perhaps a threshold which stipulates a minimum shareholding offer for certain salary levels could be considered.

There also needs to be clear guidance which prevents employers applying undue pressure on the existing workforce to enter into the contract.

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:

N/A

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:

As above, the effect of the new status will be to enable SMEs to hire and fire staff at will by only paying statutory minimum notice. This may be welcomed by the business sector, but as an organisation that supports the true meaning of employee engagement and ownership within businesses, we feel this will damage the economy in the long term.

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

Comments:

N/A

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

a) companies?

b) individuals?

Comments:

Whilst this policy might be welcomed by the SME sector, we feel these businesses will take up the policy for the wrong reasons, rather than seeing it as an opportunity to use employee ownership to support the growth of the business, they will adopt the policy to have a 'cheaper' relationship with their workforce.

From an individual's perspective, in the current economic climate they might not have much choice. At the start of an employment relationship, the bargaining power between the parties is not always straightforward. Employee-owners may not have an opportunity to negotiate, particularly in a recession where options are limited, and hence an individual may have no choice on whether they take up this offer or not. There also needs to be clear guidance which prevents employers applying undue pressure on the existing workforce to enter into the contract.

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

Comments:

N/A

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

Professor Owen Warnock, University of East Anglia Law School

EXTRACT FROM

Response to Consultation on Dealing with Dismissal and “compensated no fault dismissal” for micro-businesses

Background

I am Professor of Employment Law at the University of East Anglia. I am also an employment law partner in international law firm Eversheds LLP and I have practised as a solicitor in the field of employment law since 1981.

This response is based on 30 years of experience in the field, acting mainly, but not exclusively for employers. I have experience of advising employers of all sizes and of every degree of sophistication.

This response contains my own views and does not necessarily reflect the views or opinions of either the University of East Anglia or Eversheds.

Detailed answers on Compensated No-Fault Dismissal

Question 24 – beneficiaries (and benefits and disadvantages) of a Compensated No-Fault Dismissal system

Preamble

I have no doubt that the responses submitted to this consultation will contain a wide variety of views about what might happen if a no-fault compensation scheme were introduced. All of those views will be genuinely held, but they cannot all be right. Since all those commenting are in fact limited to speculating about what might happen, on the basis of their experience and preferences or prejudices, I submit that the only way to resolve the issue is to introduce a pilot scheme.

The current Government, like its predecessors, has identified that there are problems with our current system. In my view the past 20 years have shown that attempts to “tweak” dismissal processes and Tribunal procedures have not solved the problem. Indeed one of these tweaks, the introduction of statutory disciplinary and grievance procedures led to a permanent adverse effect on day-to-day employee relations in connection with grievances.

Since we have now established that process “tweaks” do not work, I submit that if the Government wishes to try to find a solution it must look at substance: it must see whether no-fault dismissal scheme would work fairly and efficiently. Evidence-based medicine is well accepted; evidence-based law is markedly and regrettably rare.

Discrimination claims

It is true that no fault dismissal would not prevent employees bringing discrimination claims based on dismissal. However this is not a reason for inaction, for the following reasons:

- Provided the level of compensation is sufficient, in my view many “add-on” claims of discrimination would no longer be made. There is a widespread consensus amongst employers and lawyers, which I share, that many discrimination claims are added to what are really complaints about the unfairness of dismissal because such claims assist the employee’s advisers in bargaining for a good settlement. This is an effective tactic because the employer is aware that it may have to pay extra compensation (for injury to feelings) and that the legal test applied by the Tribunal is tougher on the employer than in relation to unfair dismissal (rather than the band of reasonable responses, the Tribunal make their own decision on the facts, and if there is an issue of justification such as whether poor attendance was so bad that dismissal was justified notwithstanding that the employee had a disability then the Tribunal “second guess” this decision for the employer). There is a credible argument that if employees receive under a no-fault dismissal regime what they see as a decent level of compensation at the outset, there is much less incentive for them to bring *any* kind of claim against the employer.
- Others contend that in fact the unavailability of compensation for unfair dismissal if no-fault dismissal were introduced would increase the number of discrimination claims. I doubt that, but the obvious step for a Government that wishes to tackle the issue is to conduct an experiment: to introduce no-fault dismissal and assess what happens

Capricious dismissal

The other main criticism of no-fault dismissal is that it would be unjust for employees who have been capriciously dismissed to receive little compensation. I completely agree that the level of compensation proposed by Adam Beecroft is unjustifiably low. **However this issue could be tackled by establishing a decent level of compensation for employees.** I suggest a trial involving a compensation figure of 4 months’ pay, which would have the following merits:

- It would ensure that employees are not dismissed without compensation
- It would guarantee on average at least as good a “deal” for employees than they would achieve by bringing a successful Tribunal claim – where the median award is 9.2 times UK median pay for a full time employee 4 months’ pay. Employees would also receive this sum promptly rather than face the delay and uncertainty of litigation. (The consultation paper gives the median award for unfair dismissal in 2010/11 as £4591. UK median weekly pay for full time workers in the 2011 Annual Survey of Hours and Earnings published by the ONS on 12 March 2011 was £498.)
- It would prevent employers taking the “easy route”: hopefully many would continue to manage performance and conduct issues properly – leading either to the employee improving or to an ordinary dismissal which they are willing to defend as not unfair.
- This reform can be presented as bring advantages to both employers and employees.

I think an important piece of evidence I can give is that in 30 years of practice in employment law, I have never, whether acting for an employer or an employee, come across a case where an employer

dismissed, or wished to dismiss, an employee whose conduct was good and who was doing a good job. After all, why would an employer do so? I do not deny that there are such cases, but it is my view, based on that experience, that such cases are very rare. A theoretical example of such a rare case might be where a new manager is appointed who has racist or sexist views and he or she gets rid of an employee who is performing adequately and who had been recruited by a non-prejudiced predecessor. Clearly that is a possible scenario, but it is not in my view a likely one. However even in this unlikely scenario, under a no-fault scheme a) such an employee would have a valid discrimination claim they could make, and b) they would already have received a compensation payment equivalent to the typical level awarded for unfair dismissal.

I should add that what is more common is employers seeking to terminate the employment of employees who are not doing a satisfactory job at a point in time when fewer warnings, or less opportunity to improve, have been given than a Tribunal would expect. This would be changed by the introduction of no-fault dismissal: rather than an unhappy period of warnings, of low morale as a result of those warnings and of continued poor performance, the employee would leave and have a 4 months "pay-off".

In my view, the time has come for an appropriate experimental scheme of no-fault compensation to be adopted. This should be introduced for employers of all sizes because micro-businesses are atypical employers, and so introducing this system for micro-businesses only would not provide an effective experimental test-bed. In particular, micro-businesses may be slow to "blaze a trail" in adopting a new and untested method of termination.

Question 26 – Process requirements

I suggest the following procedural requirements:

- The employer must call the employee to a meeting to discuss a proposal to terminate on the no-fault basis. The purpose of this meeting would be to give the employee the opportunity to try to persuade the employer to change its mind. No legal review by a Tribunal of the employer's decision at that meeting would be possible.
- At or after the meeting the employer would be required to hand to the employee or to post to them a letter in a standard form confirming the no-fault dismissal and informing them that the termination payment would be paid to the employee's normal bank account
- The employer would be required to send the payment to that bank account within 14 days of dismissal – failure to do so would deprive the employer of protection.
- The termination pay would discharge any entitlement to notice (unless the notice entitlement is more than 4 months, in which case the severance payment should be the value of the notice payment plus two months pay).
- Tax law should be amended to clarify that the first £30,000 of any no-fault termination payment is free of tax and National Insurance even if the payment also discharges notice. There is endless doubt and difficulty on this issue for employers because of the lack of clarity of HMRC practice on this issue and because their practice fails to reflect the case law.

Question 28 – Interaction with redundancy payments

A no-fault termination payment should not discharge any redundancy payment entitlement: if the employee can prove that he or she was dismissed for redundancy then he or she should be entitled to recover the relevant sum. This is necessary to prevent employers using no-fault dismissal to evade obligations they have to long-service employees who have accrued substantial redundancy payment entitlements.

Summary

A no-fault compensation scheme may not work. However the only way to find out it to try one under a pilot scheme. Any such scheme should be based on a severance payment calculated to exceed the typical Tribunal award of unfair dismissal compensation. A trail could be limited by geography and/or duration, but it should include employers of all sizes.

Professor Owen Warnock

Professor of Employment Law, University of East Anglia

8 June 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

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

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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) Employer's lawyer and academic

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

Comments:

The Government should aim for maximum simplicity and clarity. For example it should be permitted for companies to buy back the shares without arranging the near impossible task of achieving a fair valuation of shares in a private company - this can be done in a way that is fair to both employers and employees - see Q4 and Q5

This proposal contains inherent complications so it is vital to ensure that wherever possible simple solutions are found.

I am highly sympathetic to the desire to reduce the problems associated with unfair dismissal protection but, as set out in my answer to Q8, I am confident that this is not an effective way to tackle the issue.

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

Comments:

Few businesses, in relation to ordinary workers, opt for seeking to make non-employee workers because of the lack of certainty that a court or tribunal - or indeed HMRC - will agree with them if many years later the issue is disputed. The risk of retrospective liability is too great. The non-employee worker category is therefore only used for atypical workers who have a lower than usual degree of connection with the employer. Non-employee worker status is therefore irrelevant to the issue addressed by this consultation namely whether people who would otherwise be employees of a company might be given lesser rights in return for an equity stake.

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

Comments:

No comment

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:

If we assume that the shares had a value at the time of issue of the minimum of £2,000, then it would be outrageous of the company could recover them on

termination of employment or on death for less than £2,000 - such a proposal would in effect remove any meaning from the £2,000 minimum. The consequence would be that rather than the minimum price at which an employee could sell his or her unfair dismissal protection being £2,000, it would be whatever lesser sum an employer would have to pay to get the shares back on termination.

The minimum buyback price should be the stated value of the shares at the time of issue unless this is an exceptional case (see below) where there is a true market in the shares in which case the price for buyback should be the current market price.

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:

In most companies there is no open market in the company's shares and often no market at all. Valuation of such shares is difficult and it is even more difficult when the shares represent a small minority stake. The reality is that such values are wild guesses and are hugely open to dispute - for the very reason that they are guesses based on correlating non-comparable factors. Such valuations are also expensive. For these reasons, making the buyback value dependent on valuation would create significant expense for the company and would be a disincentive to use this scheme. It would also make the scheme unattractive to workers who would be sceptical about what they would get back.

It is vital therefore that certainty and lack of administrative cost are achieved. This would be best done by giving reality to the company's assertion that the shares allocated are worth at least the required £2,000, by making the company have to guarantee to buy them back on termination of employment or death for that figure.

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:

A standard letter prescribed by the law would be sufficient except in cases where the worker is paying for the shares. In such cases he or she should be required to prove that he or she has taken independent legal advice - at the company's expense - on the proposal.

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

Comments:

Very little beneficial impact, for the reasons set out in answer to Q8.

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

Comments:

I am highly sympathetic to the need to reduce the burden and fear of unfair dismissal claims for employers. I am not convinced that unfair dismissal is a disincentive to recruitment to the extent claimed by small business organisations but I am sure that it keeps poor performers, lazy workers and dishonest workers in employment and thus (1) produces economic inefficiency and (2) keeps good workers out of those jobs and on the unemployment register. Much of the success of the US and Swiss economies stems from the legal ability to hire and fire in those countries.

The reality is that this proposal is an attempt to achieve indirectly no-fault compensated dismissal. It is a great pity that the Beecroft proposal for such compensation was so mean, with the consequence that it has given the whole idea a bad name. A fair level of no-fault compensated dismissal would be of huge value to business and also to the public sector, sole traders and partnership and co-ops (none of which could make use of the share proposal). It would provide employers with a secure route for dismissal at a fixed price and give employees guaranteed financial protection for a period after dismissal rather than the risk of Tribunal proceedings. The supposed fault that it would merely encourage discrimination claims is speculative - in my view guaranteed compensation on dismissal might actually result in fewer discrimination claims.

No-fault compensated dismissal should at least be given a trial - the Government demands evidence-based medicine through NICE and it should try evidence-based employment law. The way to obtain such evidence is to run a trial.

I attach a copy of my submission in June on this topic. I would urge the Government to consider that a Compensated No-Fault Dismissal system could be non-toxic politically if properly structured and properly presented.

In contrast, this share-based proposal is too complex, and will be too expensive and uncertain in practice, for it to be used by employers to any significant extent.

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

Comments:

Even if the system worked for large businesses with quoted shares, it would work less well for most companies and would of course of no use at all to small businesses and start-ups in those cases where the business medium chosen is that of sole trader or partnership.

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

Comments:

It might increase such claims since a dismissed employee would have no other remedy apart from getting his/her £2,000 for the shares. In contrast my Compensated No-Fault Dismissal proposal would give the employee 4 months' pay or more and so decrease the likelihood of the dismissed worker casting around for a legal claim to make.

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:

Statutory redundancy payments for recent employees are so low that they do not disincentivise, or even affect, small businesses or start-ups.

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

Comments:

Virtually no impact.

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

Comments:

No comment

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

Comments:

No comment

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:

Unlikely to be any impact

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:

This would lead employers into liability: the real remedy for not agreeing flexible work is not an award under the flexible working regulations it is a finding of unjustified indirect sex discrimination for refusing part-time work without "objective justification". If an employer refused flexible working merely because the request was made more than 4 weeks after return to work an Employment Tribunal would be compelled under the Equality Act to find that this was unlawful discrimination. Employers should not be misled into breach by the Government.

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

Comments:

No significant impact

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

Comments:

No comment - not my field of law

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

Comments:

No comment - not my field of law

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:

No comment - not my field fo law

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:

Only limited, because the proposal would not be taken up by any significant number of employers other than large employers - and probably only by stock market quoted employers - for the reasons set out in my answer to Q8

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

Comments:

I would advise nearly all my clients against taking this up.

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

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

Comments:

Companies: Very low for the reasons set out in my answers to Q8

Individuals and Companies would both be put off by the application of income tax and NICS to the shares - application of these taxes to the issuing of capital assets is hard for people to understand. In addition although I am not a tax expert it seems to me that this would impose a recruitment tax on workers - on being issued with shares at recruitment the employee would have to find the money to pay the tax and NI. This would hardly encourage movement from the unemployment register.

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

Comments:

It is a reasonable attempt, although the assessment in relation to flexible working is flawed by the legal misunderstanding referred to in my answer to Q16.

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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Implementing Employee Owner Status

Fawcett Society consultation response – November 2012

About Fawcett

The Fawcett Society is the UK's leading campaign for gender equality. Our vision is of a society where women and our rights and freedoms are equally valued and respected and where we have equal power and influence in shaping our own lives and our wider world.

We advance women's equality and women rights through campaigns that:

- Raise awareness and change attitudes and beliefs
- Influence changes to legislation and policy
- Promote and support better practice
- Increase women's power and influence in decision making

For more information on Fawcett and our work visit www.fawcettsociety.org.uk

1. Introduction

Fawcett's response to the Government's consultation on the Employee Owner Status (EOS) highlights the gendered impact of proposals and focuses on the risks and threats to women's workplace rights as we see them. Fawcett supports the consultation response submitted by Working Families.

The Fawcett Society does not support the introduction of the EOS for the following reasons:

- The measures outlined in the consultation are likely to impact negatively and disproportionately on women's existing workplace rights.
- The ethos of the proposals position basic employment rights as 'red tape' which should be reduced in order to enable growth. The current impact of austerity on women matters; in particular the shrinking of the public sector means women are finding it

increasingly difficult to access adequate work opportunities and Fawcett is extremely concerned that EOS proposals will make it harder still for women to access and stay in work in the private sector.

- Fawcett has serious concerns about how current proposals will actually work in practice. Employers will need very detailed advice about the new scheme as only a limited number of rights are to be waived and consideration should be given to how much more 'red tape' will be created for employers through introducing an additional employee status and in offering appropriate and robust information and guidance for employees wishing to take up EOS.
- We are particularly concerned that an unintended consequence of the proposals will be an increase in the prevalence of discrimination against women in the workplace, with the Government's own Equality Impact Assessment acknowledging that proposals may inadvertently encourage discriminatory behaviour in the recruitment process for protected groups, including women, who are more likely to exercise the rights that will be waived through the EOS.
- The impact of current proposals is likely to have a negative impact on both women's access to work, advancement in the workplace and on business' access to the widest talent pool available.
- Proposals to extend maternity leave notice periods clearly impact disproportionately on women and proposals do not suggest equivalent notice periods for fathers or partners on extended periods of leave such as Additional Paternity Leave.
- The Government is sending employers mixed messages about whether certain rights, such as the right to request flexible working, will enable labour market flexibility or will hinder growth. Government's *Modern Workplaces* consultation proposes to extend the right to request flexible working to all employees as it cites a robust business case for doing so, however in Government's latest EOS consultation, the right to request flexible working is presented as a forfeitable employee right that hinders growth.

2. Process of consultation

The Fawcett Society has concerns regarding the process around Government policy proposals to establish a new employment status, Employee Owner Status (EOS) in which an 'employee

owner will not have all the employment rights of an employee but will have shares in the company they work for that will not be subject to capital gains tax (CGT). In particular, we are concerned that Government is not consulting on *if* they will implement proposals, rather *how* they will implement proposals. Further to this, the consultation is running for only three weeks, as opposed to 12 weeks which is the norm for Government public consultation exercises. Government intends to bring forward legislation through the Growth and Infrastructure Bill to implement the Employee Owner Status and the associated capital gains tax exemption will be legislated as part of the Finance Bill 2013. Fawcett finds the pace at which these measures are being implemented alarming and believes that the rapid rate of reform does not allow for considered and responsive consultation with stakeholders. We are also concerned that the format of the questions in the consultation response form is designed to gather information predominantly from business but does not also provide space for robust assessment of the impact of the proposals on equality between women and men, as required by section 149 of the 2010 Equality Act.

3. Ethos of proposals

Fawcett has concerns about the overarching ethos of the proposals that positions employment rights as '*red tape*' and necessary to reduce in order to enable growth. Particularly in a climate where women's access to work is already precarious, it is increasingly important that measures are in place that *enable* rather than *prevent* women from working and that the right infrastructure is in place to both protect women and enable them to flourish when at work. The UK is already one of the most lightly regulated markets in the developed world; Fawcett does not believe that deregulating further will inspire growth or keep women adequately protected at work. The message that Government is sending through current policy proposals is particularly concerning; that employment rights can be exchanged for shares.

Fawcett has consistently highlighted the impact of current austerity measures on women; in particular that women are bearing the brunt of current Government cuts. Women's unemployment is at a 24 year high and women are being disproportionately affected by welfare and public sector job cuts. This context matters; women are finding it ever more difficult to find adequate work opportunities and therefore ensuring there are measures in place that support and protect women at work cannot be seen as '*red tape*'. Measures that are detailed in the consultation document are basic workplace rights and measures that ensure women are supported and protected at work.

Fawcett has consistently highlighted the benefits for women, business and the economy of

implementing progressive measures such as flexible working. Such measures allow business to widen their talent pool and enable women to enter and progress in the workplace which ultimately brings benefits for the economy and the exchequer. The Department for Business, Innovation and Skills (BIS) has itself produced research that supports the case for flexible working as an integral part of the way business works, not something to be seen as an 'add-on' but rather, an integral part of modernising the UK's workplaces in line with the 21st century. Fawcett has concerns that current Government policy and rhetoric is positioning flexibility for employers at the expense of employee rights. All the evidence from both Government and expert organisations, such as Working Families, suggests that trust and treating people well are key to high motivation and performance and there is little evidence from employers themselves that employment law is the burden that prevents them taking on staff.

Moreover, Government's message to business on implementing measures such as flexible working appears to be mixed, with parts of BIS's programme citing flexible working as having a clear and robust business case for increasing flexibility in the labour market, whilst the latest consultation positions flexible working as a measure that could potentially burden business and prevent growth. This is particularly worrying as this sends a mixed message to business and undermines a body of research undertaken by Government and others to robustly evidence the business case for measures such as flexible working.

4. Shares for rights: a flawed model

The consultation document outlines the Employee Owner Status as having two defining characteristics- an equity share and different employment rights. Under this new arrangement, an employee owner will be given between 2,000 and 50,000 pounds worth of shares. In return, the employee owner will have reduced rights compared to an employee including:

- Unfair dismissal (except for reasons that are automatically unfair or that relate to discrimination);
- The right to statutory redundancy pay; and
- 16 weeks' notice of the intention to return early from maternity or adoption leave (compared to 8 weeks' notice for other employees).

Any gain on the shares (however large) linked to the status will be exempt from Capital Gains Tax (CGT).

Fawcett has serious concerns about the proposed model of forfeiting certain employment rights

in exchange for shares. The ethos of exchanging rights for shares challenges the underlying principle of ensuring equality and protection for employees in the workplace. The evidence base for benefits related to employees having a financial and personal stake in the companies they work for are associated with those companies who offer both a full set of rights *and* shares. Therefore, though there may be benefits in employees having a stake in the company they work for, this should not come at the price of forfeiting certain employment rights.

Furthermore, the volatility of the market means that the worth of shares will fluctuate accordingly; there is no guarantee that employees will benefit from purchasing shares and could find themselves in the precarious position of having forfeited certain employment rights and owning devalued/worthless shares.

An employee's life circumstances could also change such that certain rights that they would have forfeited as part of the EOS might be more relevant and needed at a later stage in their career. For example, for an employee who initially took up the EOS without family responsibilities but later finds that they have to juggle family and work responsibilities, access to the right to request flexible working could be integral in supporting them at work.

It will be difficult for employees (especially those starting out in work) to gauge what rights they might require as their careers evolve, and the employee-owner model is one that creates a short sighted perspective for both employers and employees. For employees, they may find that this model no longer suits their lives; for employers, they will not be retaining staff who are highly motivated and skilled if they are not supported and protected in their jobs.

The consultation states that the employer would be allowed to include a clause in employees' contracts requiring the employee to surrender the shares when they leave, are dismissed or made redundant. It then states that the Government will require the employer to buy back the employees' shares at a reasonable value. Fawcett has concerns that this approach might have unintended consequences where employees could find themselves being dismissed and having their shares re-purchased by their employers at a lower rate than their original value.

Moreover, Fawcett has concerns about how these proposals will actually work in practice. Employers will need to understand how rights that can be forfeited under EOS interact with other rights directed by EU legislation or governed by domestic anti discrimination legislation. In particular, employers will need to clearly understand they will still have to adhere to anti discrimination legislation. An unintended consequence of the EOS proposals may be an increase in discrimination claims, as employers and employees navigate through an unwieldy interaction

of rights that pertain for certain employees and not others. For example, in some circumstances a woman with childcare responsibilities who is dismissed for requesting a change of hours may have a claim of indirect sex discrimination at employment tribunal.

Current proposals present real risks for employees' rights *and* crucially also for enabling business to grow.

In terms of employees' rights, proposals risk creating a system in which two tiers of employees exist; those with a full set of rights and others with reduced rights. Having two types of employees entitled to different sets of rights will not deliver a highly motivated and cohesive workforce, which in turn could have a negative impact on staff morale, productivity and retention.

From employers' perspectives, the EOS will effectively limit the available talent pool that they can recruit from, as it is unlikely that all employees will have access to equal choices around forfeiting certain rights for shares. In particular, parents, and women who rely more heavily on measures such as flexible working, will find it more difficult to take up EOS and are more likely to be discriminated against in the recruitment process as a result.

5. Information and guidance

The quality and availability of information and guidance is of paramount importance; not all employees will have the same baseline knowledge of their rights and available choices and there will be a variety of different '*push*' factors at play that affect an individual employee's decision to take on the new status. For example, it may be that some employees face difficult financial circumstances and will be motivated to take up EOS without being fully aware of the potential impact on their future working conditions as their life and career evolves. It may also be that younger employees with limited experience of work are more likely to take up EOS as they are motivated by financial gains and do not have a robust understanding of market shares, employment rights and the potential impact of EOS on their future involvement in the labour market.

Fawcett recommends that robust free legal advice and guidance is provided to employees who are offered EOS, in order that all employees are equally and fully informed about their choices.

6. Gendered Impact of Proposals

a) *Women are likely to be disproportionately affected by proposals*

Fawcett has concerns that the impact of proposals may encourage more discrimination against women in the workplace. We are concerned about the quality of the consultation's accompanying Equality Impact Assessment (EIA), in particular, that it does not robustly consider the impact of proposals on equality between women and men. The EIA itself acknowledges that the proposals may inadvertently encourage discriminatory behaviour of certain protected groups:

"Companies may be more inclined to offer an employee owner contract to those who are more likely otherwise to exercise the specific rights that are not part of the employee owner status. If these characteristics were more frequently occurring in certain protected groups, this could indirectly encourage discriminatory behaviour during the hiring process for jobs offered subject to this status. Although discriminatory behaviour might be encouraged, it is important to consider that this is an indirect effect of the policy".

Measures such as flexible working and enhanced and robust maternity provision have been key drivers of enabling women into the workforce in unprecedented numbers and driving economic growth. Fawcett is concerned that women, particularly those with caring responsibilities, are likely to be disproportionately affected, as they are likely to comprise the group who may well exercise the specific rights that are part of the employee owner status.

The EIA asserts that the estimated proportion of people that utilise flexible working is broadly similar across men and women and their corresponding assessment is that proposals will not have a disproportionate effect on either sex. Fawcett would like to highlight that the EIA only considers *full time workers* in its analysis of the take up of flexible working by men and women. The same Fourth Work Life Balance Survey as cited in the EIA shows that 50% of women, compared with 27% of men, had taken up part-time working in the last 12 months¹. Similarly, tables in the Fourth Work Life Balance Survey show that 48% of men with dependent children take up flexible working options compared with 59% of women with dependent children, and

¹ The Fourth Work-Life Balance Employee Survey, The Department for Business, Innovation and Skills (BIS), July 2012, <http://www.bis.gov.uk/assets/BISCore/employment-matters/docs/F/12-p151-fourth-work-life-balance-employee-survey.pdf>

when deciding whether to work for an employer, the survey found that 53% of women consider the availability of flexible working to be important or very important, compared with only 31% of men².

The omission of this analysis from the Government's EIA is an important and alarming oversight and could have real implications for women's working conditions. Not only are women much more likely than men to take up measures such as part-time working, women- and in particular those with caring responsibilities - are more likely to consider flexible working measures important and necessary to stay in work. Fawcett is concerned that the impact of waiving the right to request flexible working is likely to have a significantly greater impact on women than men. Women who rely more heavily on measures such as accessing part-time work, will find it more difficult to take up EOS and are more likely to be discriminated against in the recruitment process by either being pressured by employers to take up EOS as a condition of their job offer, or being disregarded from talent pool due to their likelihood to exercise these very rights.

This is likely to impact negatively on women's access to work in an already austere climate but will also have negative implications for business. Simply put, making it more difficult for women to access jobs and job security will limit the talent pool available to employers.

Rather than exchanging shares for rights, Fawcett would encourage Government to implement a dedicated women's employment strategy that enables more women to access to well-paid, secure work with robust workplace protections in place.

a) Extension of notice from maternity/adoption leave

One of the rights proposed to be changed by employee owner status is the requirement to give 16 weeks' notice of an early return from maternity or adoption leave, instead of eight weeks. For many women, planning their return to work can be a stressful experience, in particular, organising childcare and negotiating patterns of work with their employers upon their return.

The consultation document is not clear as to what quantifiable benefits an extension in the notice of maternity leave return will bring business and Fawcett has concerns that increasing

² IBID

the notice period will be onerous for many women having to begin planning for their return to work much earlier than they are currently required to.

It will also be key, in this context, that employers understand that EOS only allows the right to waive certain rights to request flexible working and that under the EU Parental Directive, parents will still have the right to request flexible working when returning from maternity/parental leave.

Fawcett is particularly concerned that proposals around extending maternity leave return notice only apply to women rather than apply equally to father/partner's existing rights to take extended periods of leave under Additional Paternity Leave (APL). The implication of current proposals is that the notice period fathers/partners should give when returning from leave taken under APL will remain at 8 weeks.

Fawcett recommends that there should be consistency and equality in terms of notice periods for both men and women taking leave, and that the requirement for giving ones employer notice to return from maternity/parental/adoption leave should remain at eight weeks.

Moreover, Fawcett is concerned that framing maternity provision as '*red tape*' will further entrench pregnancy discrimination against women in the workplace. Maternity rights and employment regulation that enables parents to balance work and family responsibilities have been key drivers in giving women greater access to work and an independent income.

Yet there is still far to go; our workplaces have not adapted to meet the needs of this changing and gender diverse workforce. Women pay a penalty in the workplace as a result of spending time away from the labour market to have and care for children, and this time away often negatively affects future career prospects and earnings in the labour market.

This '*motherhood penalty*' helps holds the glass ceiling intact. It reproduces gender stereotypes about women as the '*caring sex*' that fuel occupational segregation – jobs being characterized as men's or women's work. For too many women, it still culminates in pregnancy discrimination in the workplace.

Even before the recession began, it was estimated that up to 30,000 women had lost their jobs due to pregnancy discrimination³. There has been no national research into the incidence of pregnancy discrimination following the economic downturn, but all the indications are that it

³ ¹ Equal Opportunities Commission, *Greater expectations*, June 2005:
http://www.equalityhumanrights.com/uploaded_files/eoc_pregnancygfi_summary_report.pdf



has increased significantly. In times of austerity, when employers cannot afford to take any perceived risk to making profit and growing business, discrimination against women in the workplace is likely to rise as women, particularly of child bearing age, appear to be the riskier and less affordable choice for employers where maternity provision and flexible working measures are considered '*red tape*'.

Contact for further information:

Preethi Sundaram
Policy and Campaigns Manager

From: Elizabeth Gardiner [
Sent: 07 November 2012 17:10
To: Employee Owner Status Consultation
Subject: TRIM: Working Families response to the consultation on implementing employee-owner status
Attachments: Working Families Response to the Consultation on Employee Owner status.doc
TRIM Dataset: M1
TRIM Record Number: D12/1381311
TRIM Record URI: 13444039

Dear Paula Lovitt

Please find attached Working Families' response to the consultation on implementing employee owner status. Please do not hesitate to contact me if you need further information.

Yours sincerely

Elizabeth Gardiner
Policy and Political Campaigns Officer
Email to:

Follow Working Families on Twitter @workingfamUK

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Working Families Response to the Consultation on Implementing Employee Owner Status

Introduction

Working Families is the UK's leading work life balance charity. We work with employers to promote family friendly working and benchmark best practice. We also run a free legal helpline for parents and carers who need advice about employment rights, including maternity and paternity rights and flexible working.

Working Families does not support the introduction of employee-owners who can exchange their employment rights for shares. Our reasons are:

- The benefits of employee-ownership do not need to be achieved at the expense of employees' rights.
- The proposal will add to the complexity of employment law by creating a new category in addition to workers, employees and self-employed people.
- Employers will need very detailed advice about the new rights as only a limited number of rights are to be waived. For example, although the proposals suggest the right to request flexible working can be waived, an employer who fails to consider a request to change working hours may be indirectly discriminating against a woman with childcare responsibilities and could still face being taken to an employment tribunal. The revised EU Parental Leave Directive also proposes that all workers be offered the right to request on a return from parental leave.
- If the right to claim unfair dismissal is restricted, dismissed employees may look for more creative ways to bring a claim including discrimination claims which are more complicated and expensive to hear and defend.
- There is insufficient evidence that it is the fear of unfair dismissal and redundancy payouts that deter businesses from taking on new staff.
- Employee-owner contracts are unlikely to be attractive to those with family commitments or mortgages to pay as they create too much uncertainty for the employee. They may have the unintended consequence of reducing the talent pool for recruitment, particularly if employers offer only this new type of contract.
- We also consider that the proposals are likely to be discriminatory because they suggest that maternity leave notice periods are changed but do not refer to equivalent notice periods for fathers or partners on extended periods of leave such as Additional Paternity Leave. We are particularly alarmed by the statement in the impact assessment that discriminatory behaviour during hiring "might be encouraged". It is not sufficient to rely on the Equality Act to remedy any discrimination caused by subsequent legislation.
- The Government is sending employers mixed messages about how to get the most out of their employees: the Modern Workplaces consultation proposes to extend the right to request flexible working to "help employers to recruit, motivate and retain their workforces, and so build successful businesses as well as increasing productivity". Yet this consultation suggests that the right to request is a burden to employers and that the right should be waived for employer-owners.

Our detailed answers to the consultation questions are set out below:

1 Employment status

The consultation paper suggests that individuals choose between types of employment status. However, experience of callers on our helpline suggests that employers dictate the type of contract, and that employees have little choice. For example, some employees are labelled incorrectly as "self-employed" so that the employer can avoid obligations such as sick or holiday pay; others are put on "zero hours" contracts which have very few advantages for the employee. Working Families is concerned that, in future, job offers may be dependent on the potential employee signing away their rights. A new business may choose only to offer employee-owner contracts.

We are disappointed that the proposal will result in two tiers of employees - those with and without basic employment rights.

2 Advice and guidance

In order to waive employment rights (for example through a settlement or compromise agreement) employees should receive independent legal advice. It is vital that potential employees receive adequate advice about the risks of signing away their rights, which may result in the termination of their employment without notice and without compensation. If free legal advice is unavailable (and there is an inadequate supply of free employment law advice), the employer should pay for independent advice for potential employees. However, this will add to the burden on employers, particularly where it results in potential recruits turning down job offers.

Working Families runs a free legal helpline for parents and carers. Our advice will be that those with family responsibilities would be ill advised to sign away their rights to be treated fairly at work. Potential employees may end up with no job security or employment rights and worthless shares. An unintended consequence of the employee-owner proposal may be to deter groups of potential recruits from applying for jobs where such contracts are on offer.

Clear advice about the possibility of shares going down as well as up should also be given to potential employees.

Employers too will need careful advice about the rights which may be waived, and their continued responsibility not to dismiss an employee for an automatically unfair reason (which will be unaffected by the employee owner proposal). Employers struggle to understand the relationship between equality law and other rights, including the right to request flexible working. For example, the consultation suggests "it would not be automatically unfair for an employee to dismiss an employee owner who requests flexible working". However, employers will need to be reminded that those returning from parental leave will have different rights to request from other parents (when the revised EU Parental Leave Directive is implemented). They will also need to understand that "anti discrimination legislation will remain unaffected by these proposals". For example, in some circumstances a woman with childcare responsibilities who is dismissed for requesting a change of hours may have a claim of indirect sex discrimination at employment tribunal. In addition, an employee who is unable to bring a claim for unfair dismissal may seek to use discrimination law instead.

An unintended consequence of the proposal may be to increase discrimination claims.

3 Safeguards

a) Jobseekers

Working Families would like to see a safeguard for jobseekers included in the proposal. Under the Work Programme, failure to take a job when offered can result in benefit sanctions. It should never be a requirement on an employee to waive their employment rights in order to enter the labour market.

b) Maternity notice periods

We are concerned that the employee-owner status is discriminatory against women. One of the rights proposed to be changed by employee owner status is the requirement to give 16 weeks' notice of an early return from maternity or adoption leave, instead of eight weeks. As the impact assessment notes the maternity policy "only impacts on women as clearly only a woman can return from maternity leave". Yet there is already provision for men to take extended periods of parental leave through Additional Paternity Leave (APL). The notice requirement for an early return from APL would remain at eight weeks. The Modern Workplaces consultation proposes that fathers should be encouraged to share leave in the first year of life. There should be equality in terms of notice periods for both parents taking leave, and we suggest that this remains at eight weeks.

The impact of this proposal may be to encourage yet more discrimination against women in the workplace. We note from the impact assessment that "companies may be more inclined to offer an employee owner contract to those who are more likely otherwise to exercise the specific rights that are not part of the employee owner status....this could indirectly encourage discriminatory behaviour during the hiring process for jobs offered subject to this status". The implication is that women are more likely to exercise flexible working or maternity leave rights, and that employers will therefore be keen that they waive their rights.

We are aware that maternity discrimination has increased during the recession from the number of callers to our helpline who are dismissed or treated unfairly when pregnant or on maternity leave. The implication of the employee-owner proposal is that women on maternity leave are a burden, reinforcing negative perceptions among some employers. The impact assessment suggests that equality law will protect against potential discrimination at recruitment should the discriminatory behaviour encouraged by the proposal be realised. It is, however, extremely difficult to demonstrate that the failure to make a job offer was due to a protected characteristic. It is surely not the purpose of the Equality Act to remedy problems caused by subsequent legislation, and it would be better to ensure that no change to employment rights has the potential to encourage discriminatory behaviour.

Our experience from callers to Working Families' helpline is that very few women want to return from maternity leave unexpectedly. Those who do tend to do so for financial reasons. Increasing the notice period may cause financial hardship, or add to the cost to the state – for example, if a partner is made redundant, a woman may return from maternity leave early because otherwise the family has no income. Failure to allow her return for almost four months may mean that the family have to claim benefits instead.

c) **Flexible working**

The impact assessment accompanying this consultation suggests that "the estimated proportion of people that utilise flexible working is broadly similar across men and women". However, this analysis considers only full time workers. The same Fourth Work Life Balance Survey shows that 50% of women, compared with 27% of men, had taken up part-time working in the last 12 months.

The Fourth Work Life Balance Survey also states:

"The take up of many forms of flexible working was more common among women".

"The availability of many forms of flexible working was most commonly reported by women" and

"The gender differences in the importance of flexible working were significant across all employees, among parent employees and among those with caring responsibilities".

It is difficult to reconcile the impact assessment's statement with the detailed figures which reveal significant gender differences in flexible working.

Tables in the Fourth Work Life Balance Survey show that 46% of all men compared with 51% of all women take up flexible working options, rising to 48% of men with dependent children and 59% of women with dependent children. When deciding whether to work for an employer, Table C 4.1 shows that 53% of women consider the availability of flexible working to be important or very important, compared with only 31% of men.

In Working Families view, the impact of waiving the right to request flexible working is likely to have a significantly greater impact on women than men, according to the analysis of the Fourth Work Life Balance Survey.

There is also a danger that the removal of the right to request from employee-owners may increase the tendency to bring claims against an employer. Anecdotal evidence from our helpline callers suggests that an employee who asks for flexible working and whose employer turns it down after following a set procedure and giving a business reason, is less likely to bring a claim than one who has been told "no" outright. In this way, the clarity of the right to request process can be helpful to employers as well as employees, ensuring that employers are seen to consider their reasons for turning a request down.

4 Impact on labour market flexibility

Working Families is particularly disappointed that the right to request flexible working is included among the rights employee-owners may waive. Flexible working should be seen as a tool for business success, and promoted across government as such. Allowing a wide variety of working patterns to suit employees' needs can bring tangible benefits to the employer - the Modern Workplaces impact assessment identifies a potential £222.5 million benefit to employers from extending the right to request to all employees. Sending out a message to employers that the right to request flexible working should be waived contradicts the positive messages of Modern Workplaces.

Working Families considers that the likely impact on labour market flexibility will be small, but it is likely to be negative. Employers using these new contracts will have a

smaller pool of talent from which to recruit as those with family responsibilities, mortgages or other commitments will steer clear of employer-owner status due to the job insecurity that accompanies it. Those who take up the new contracts, working with increased job insecurity, may be more cautious in their spending patterns and thus unlikely to contribute to economic growth.

5 Take up by companies and individuals

Working Families does not anticipate a high take up of employee-owner status by established companies. There is a significant body of research evidence on employee engagement and productivity that suggests that trust and treating people well are the key to high motivation and performance. Offering shares (the value of which could go down as well as up) instead of rights doesn't suggest to potential employees that this is a great company to work for. Justin King, CEO of Sainsbury's, has expressed concern about increased distrust in business from the scheme asking "what do you think the population will think of businesses that want to trade employment rights for money?"¹ When the upturn comes, good employment practices will be rewarded by loyal employees and access to the widest talent pool at recruitment.

We also consider that the issuing and valuing of shares is unlikely to be attractive to small and start-up businesses and will add to, rather than reduce, the regulatory burden on employers.

We do not anticipate large take up by employees either. From the employee perspective few men or women with family responsibilities would want such a contract. Our advisers will point out that an employee could end up with no job security or employment rights and worthless shares.

Working Families also supports the further comments made in the Fawcett Society's submission to the consultation.

**Working Families
November 2012**

¹ "Sainsbury's chief executive Justin King criticises shares-for-rights proposal" The Telegraph, Wednesday 07 November 2012

From: Hannah Reece
Sent: 07 November 2012 17:13
To: Employee Owner Status Consultation; (Labour Market)
Cc:
Subject: TRIM: TUC response to the BIS consultation on implementing employee owner status
Attachments: Trading-rights-for-shares-TUC-response-2012.pdf
TRIM Dataset: M1
TRIM Record Number: D12/1381174
TRIM Record URI: 13444024

Please find attached the TUC response to the BIS consultation on implementing 'employee owner status'.

Please feel free to contact us if you have any questions about the submission.

With best wishes

Hannah

Hannah Reed

TUC, Congress House, Great Russell Street, London WC1B 3LS

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Trading rights for shares

TUC response to BIS consultation on 'employee owner status'

Introduction

The Trades Union Congress (TUC) has 53 affiliated unions, which represent approximately 6 million members working in a wide variety of sectors and occupations across the UK.

The TUC is fundamentally opposed to the government's proposals permitting employers to trade key employment rights for shares in a company. In our opinion, these proposals represent an unjustified attack on employment rights.

The government argues these measures will provide increased flexibility for businesses and give 'employee owners' an increased stake in their company. In practice, the proposals will strip employees of basic workplace rights. Employee will lose out on protection from unfair dismissal and the rights to redundancy pay, making it easier and cheaper for employers to sack them. The government's proposals will also substantially weaken family friendly rights for 'employee owners', by limiting the right to request to work flexibly and imposing longer notice periods for women returning from maternity leave. In return, individuals will receive shares valued at between £2,000 and £50,000. However, they will not be guaranteed the same voting rights or dividends enjoyed by other shareholders. There is also no guarantee that the shares will increase or even hold their value.

The TUC is also seriously concerned that these proposals could see employees trading valuable protections at work for shares that could turn out to be almost worthless. There is a serious risk that where companies decide to lay staff off or face insolvency, 'employee owners' will be forced to leave without receiving any redundancy payments. This may place them and their families in a financial precarious situation. It is also likely to increase reliance on welfare benefits.

The TUC recognises that in some workplaces employee share schemes have achieved benefits for both employers and employees. There are several existing tax-advantaged schemes for employee share ownership, none of which strip employees of rights. There have been no calls from companies that use employee ownership schemes for this new initiative, and the Employee Ownership Association has criticised the proposals. As recently as July, the government launched the Nuttall Report, which set out proposals to promote employee ownership further. There is a major risk that these new proposals will fatally undermine the positive employee ownership agenda that other parts of government are seeking to promote.

Trading company shares for employment rights

The government has presented its proposals as creating a new form of employment status – that of 'employee owner'. The TUC refutes this view (see the section on employment status below). Instead Clause 23 of the Growth and Infrastructure Bill simply removes key employment rights from employees who receive company shares valued at between £2,000 and £50,000.

These provisions flout the basic principle that it should not be possible to contract out of basic statutory rights, even in return for money. Since the 1970s, UK

employment legislation has included provisions preventing the contracting out of rights. These provisions were included in the legislation to reflect the imbalance of power which exists between employers and employees.

Loss of unfair dismissal protection

The government's proposals give full effect to the Beecroft report by removing basic unfair dismissal protection from so-called 'employee owners'.

As a result, employers will be free to sack employees for arbitrary reasons and would not need to follow a fair procedure when doing so. Employers will only need to take steps to avoid dismissing individuals for discriminatory reasons or for an automatically unfair reason.

Unlike under earlier proposals for no fault dismissal, 'employee owners' will not be guaranteed a reasonable level of compensation when they are dismissed. Any pay off received by the employee-owner will depend solely on the value of their shares at the point of dismissal. Employers, with their insider knowledge, will be able to choose the opportune time to dismiss employees, when the value of shares has fallen or the shares are effectively worthless.

Loss of the right to statutory redundancy pay

The removal of the right to statutory redundancy pay will mean that many individuals and families will be substantially worse off where businesses decide to lay off staff. For example, an employee aged on average earnings who is 41 years of age or older and has worked for a company for 10 years would be entitled to £6450 in statutory redundancy pay. If the same individual had received £2,000 worth of shares, they would need to see the value of their shares increase by over 300 per cent before they would receive equivalent compensation under the employee owner proposals.

The government has stated that the proposals are targeted at smaller businesses and new start up companies. However the ONS's most recent statistics show that business failures are currently at record levels across the UK, and that on average less than half of new businesses (44.4%) have a survival rate of over five years.¹

Where businesses go to the wall, an employee's shares will have very limited value or more likely they will be worthless. However, unlike other employees, 'employee owners' will not be entitled to recover any redundancy payments from the Redundancy Payments Office (RPO), meaning they will not receive any compensation for the loss of their employment. They will also lack the resources needed to fund training which is necessary to find new employment.

Although the employees will be able to recover some unpaid wages, holiday pay or notice pay from the RPO, this will be subject to statutory limits.² Individuals

¹ ONS Business Demography statistics 2010

² Employees can only recover up to 6 weeks' holiday pay and 8 weeks unpaid wages, subject to a statutory limit of £430 per week.

will also face significant difficulties in recovering contractual redundancy pay and unpaid wages above the statutory limits from the remaining company assets.

As a result, the individuals affected and their families will face major difficulties in covering household bills and are likely to be heavily dependent on welfare benefits.

Limiting family friendly rights

The extension of the maternity notice period to 16 weeks will not benefit employers, instead it is more likely that women will end up taking longer leave than they otherwise would and fewer women will return from maternity leave if their return is made more difficult.

New mothers who are employee-owners would face further barriers to their return and remaining in work if excluded from the right to request flexible working. The BIS Work-Life Balance Survey found that women were twice as likely as men to request flexible working and to say that it was “very important” to them in deciding whether to take a job.

The proposed exclusion of employee-owners from the right to request flexible working also goes against the government’s argument for creating a universal right to enable flexible working to reach “all parts of society and the economy” so that businesses can reap an estimated £52.4m a year in associated benefits.

Impact on employee share ownership

In July, the Deputy Prime Minister launched a review of Employee Ownership conducted by Graham Nuttall at a successful Employee Ownership Summit. Since then, the government has conducted a consultation on implementing proposals from the Nuttall Review. There was no mention of trading rights for shares in the Deputy Prime Minister’s initial speech announcing the Review, nor in any of the contributions to the July Summit, nor in the Nuttall Review itself, nor in the Government’s consultation on implementing the Nuttall Review.

The proposal for employees to give up employment rights in exchange for shares flies in the face of the evidence about how employee ownership can achieve benefits for both employers and employees. The Nuttall Review, which was whole-heartedly endorsed by the government, argued that *“The key condition under which employee ownership is recognised to succeed best is when it allows employee owners to exercise their voice internally. It is this combination of share ownership and employee engagement that drives higher performance.”*¹ Asking employees to trade key employment rights for shares will not create the conditions for the sort of employee engagement that the evidence clearly shows is a necessary condition for employee ownership to lead to improved business outcomes.

The proposal for employees to trade rights for shares risks creating confusion among both employers and employees about employee share ownership schemes

¹ Sharing Success The Nuttall Review of Employee Ownership July 2012

more broadly. It will undermine existing schemes and the government's policies to promote wider take-up of employee ownership by giving all employee share schemes a bad name. Employees will rightly be wary of an initiative that seeks to strip them of their rights in exchange for shares, and may assume that all employee ownership schemes work in this way. The proposal contradicts the government's wider policies and support for employee ownership and reveals tension at the heart of government over the direction of its policies on employee ownership.

The CEO of the Employee Ownership Association Iain Hasdell has made the following comment on the proposals:

"There is absolutely 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 employee ownership."

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 the workforce.**

If this proposal goes ahead, it will be essential to ensure that a clear distinction is made between employee owner contracts and existing share ownership schemes.

Share values

The TUC is extremely concerned that this proposal could see employees trading valuable protections at work for shares that could turn out to be almost worthless.

The Treasury press release setting out the Chancellor's announcement of this initiative states that it is principally intended for fast growing small and medium sized companies and that new start-ups can choose to offer only this new type of contract to new recruits. Small, fast growing companies and start-ups can find their fortunes going down as well as up very quickly, and there is a significant risk that employees who traded their rights for shares in these and other companies could find that their shares had become worth very little over time. If this meant that the company had to lay off staff, employees could find that they had no rights to any redundancy pay while the shares they had been allocated could be worthless. The TUC believes that it is irresponsible for the government to promote an initiative that could see employees forced to leave struggling companies with absolutely nothing.

Tax advantage or disadvantage?

The government is proposing that shares allocated to an 'employee owner' would be subject to income tax and national insurance, but that gains would not incur capital gains tax (CGT). However, for an individual, gains of up to £10,600 per

* <http://www.employeeownership.co.uk/news/press/bis-consult-3/>

year are exempt from CGT anyway. So an individual receiving £2,000 worth of shares would need to see the value of their shares increase by over 500% before they would incur any CGT. For individuals given small amounts of shares, the fact that the shares are not subject to CGT is unlikely to create any benefit for the individual.

There are existing employee share schemes, however, which allow employees to gain shares without paying income tax or national insurance on the shares. Most employee owners allocated low levels of shares would almost certainly be better off receiving their shares through an existing approved share ownership plan.

Lack of consultation, evidence and support

The TUC questions why the government is rushing these proposals through just weeks after plans for no fault dismissal were dropped due to lack of support and the lack of evidence that weakening employment protections will help to generate growth.

It was also deeply disconcerting that the government decided to legislate on employee owner proposals, by including detailed provisions in Clause 23 of the Growth and Infrastructure Bill, before consultation has taken place. This Bill was laid before Parliament on the same day as the public consultation was launched.

Furthermore the government has failed to examine the implications of the proposals for employees, employers or the wider economy before deciding to legislate. Whilst the BIS consultation document is accompanied by a short but inadequate equality impact assessment, no wider impact assessment has been undertaken. The government appears intent on driving these proposals through without adequately evaluating their implications for employees, business performance and the wider economy.

Since their announcement the government's proposals have been firmly opposed by trade unions, equalities groups and advice agencies. The proposals have also attracted criticism from the business community. For example:

Justin King, chief executive of J Sainsbury speaking at a recent retail conference said that trading employment rights for company shares is *"not what we should be doing"*. He also asked *"What do you think the population at large will think of businesses that want to trade employment rights for money?"*

In the light of such concerns, the TUC calls on the government not to proceed with its proposals on 'trading shares for rights'.

Responses to consultation questions

Employment status

The TUC contests the government's assertion that its proposals create a new employment status. There are numerous employment tribunal and EAT decisions which confirm that individuals who hold share options within businesses in most cases will be legally classified as employees. Employment tribunals have also found that directors should be classified as employees and are protected by employment protection legislation, depending on level of control which they exercise over the company concerned. The consultation document also confirms that the individuals concerned will still be classified as employees for all other statutory employment rights.

The TUC therefore does not accept that the government's proposals would create a new form of employment status. Rather the proposals are simply designed to enable employers to contract out of basic employment protections in return for potentially worthless shares.

It is also notable that the only rights which have been removed from 'employee owners' are those which are not protected by EU law. In other words, the government is removing these rights *simply because they can* but without giving consideration to the effects on employees, employers or the wider economy.

Questions 1 & 2:

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

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

The UK labour market is characterised by the extensive use, and often misuse, of flexible forms of employment relationship, including self-employment, casual work and agency working. For example, during the recession:

- There has been a sharp increase in the use of zero hours contracts. According to the LFS the number of zero hours contracts has risen from 75,000 in 2005 to 146,000 in 2011. The increase in casualised employment has been particularly marked amongst female workers, rising from 32,000 in 2005 to 85,000 in 2011.¹
- There has been a marked increase in self-employment, particularly among women. The TUC is concerned that much of this self-employment is bogus; a way for employers to save on National Insurance costs and key employee benefits such as pensions, paid holidays and sick pay.²
- An analysis of pay trends reveals that self-employment is increasingly associated with poor pay. The median income of self-employed workers has fallen from

¹ It is widely recognised that the LFS significantly under-estimates the numbers of atypical workers.

² <http://www.tuc.org.uk/equality/tuc-21429-f0.cfm>

£11,300 in 2001 to just £10,300 in 2010, even before allowing for inflation. The average income for employees has risen over the same period and is now nearly twice as high (£18,900).⁷

UCATT also estimates over 50% of those working in the construction industry are falsely self-employed. The CIS Scheme is the main facilitator of false self-employment. It allows companies to deduct tax at source and avoid employing workers directly.⁸ In 2008, a report commissioned by Ucat found that 400,000 construction workers were falsely self-employed, resulting in £1.7 billion in lost tax revenue each year.⁹

Casual workers and those who are falsely self-employed are also deprived of basic employment rights, including protection from unfair dismissal, the right to redundancy pay and family friendly rights.

Rather than promoting the use of more insecure employment, the TUC believes the government should work to prevent the mistreatment of vulnerable workers. Rather than concentrating on the expansion of more casualised employment, the government's should seek to encourage the creation of good quality employment which benefit working people and contribute to the development of high trust, high productivity workplaces.

“Trading rights for shares”

Question 3:

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

The consultation suggests that shares given to employee owners may not carry rights to dividends or voting rights or rights to a share in the company's assets if it is wound up. The TUC does not understand the justification for this. It leaves the government's argument that this proposal will give employees a stake in their company looking meaningless. Without voting rights or the right to dividends and with no guarantee of realising the full market value of their shares on leaving the company, what is it that employees are actually being given under this proposal? With these restrictions, it is misleading to call them 'shares'.

Question 4:

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

The consultation document suggests that it could be permissible for an employer to buy back shares at the point when the staff member is leaving the company for less than their market value. The TUC is appalled that the government is proposing a scheme whereby employees are not entitled to the full value of what

⁷ <https://www.ucatt.org.uk/false-self-employment>

⁸ <https://www.ucatt.org.uk/false-self-employment>

⁹ Mark Harvey (2008) *The Evasion Economy*

under the proposals' own terms is surely theirs in its entirety. This aspect of the proposal illustrates starkly the unbalanced approach behind the initiative: workers may give up valuable rights in exchange for shares - but then on leaving the company may be required to sell back their shares for only a fraction of their market value. This, and the lack of clarity about how shares will be valued, will create a significant potential for disputes between employers and employee owners.

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?

The TUC is firmly opposed to the government's proposals permitting employers to 'trade rights for shares'. However if the plans are to proceed, it is essential that the government guarantees that an independent valuation of shares takes place at the point when an individual is offered an 'employee owner' contract and at the end of the employment relationship.

Consequences for employees

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?

The implications for an employee who agreed to an employee owner contract are likely to be very significant.

Individuals will be asked to forego basic statutory rights in return for shares which have very limited value or even be worthless. Employees will be particularly financially disadvantaged where the company decides to lay off staff or becomes insolvent. There is a serious risk that employees will be forced to leave an organisation with little or no compensation.

Employees will also lose out on protection from arbitrary dismissal and on rights to request to work flexible or to request time to train. The loss of such rights may be difficult to quantify in financial terms, but is likely to have significant implications for the quality of the individual's working life and on their career prospects and future livelihoods.

It will also be very complex for an employee to forecast the prospects for the company and the potential future value of any share options.

The TUC is firmly opposed to the proposals on employee owner contracts. However, if the Government decides to proceed, it is essential that employees or new recruits are provided with independent legal and specialist financial advice before being asked to sign an employee owner contract. Measures akin to compromise agreements should apply to employee owner contracts. The proposed exclusion from statutory employment rights should not be effective if the employee has not received independent legal and financial advice before

signing it. The employer should also be required to cover the costs of the advice, although the employee should be free to determine the source of the advice.

The TUC is seriously concerned that employees will have no genuine choice over whether to sign up for fewer rights at work if their employer decides to adopt employee owner contracts.

- Employers will be free to decide to employ all *new recruits* on employee owner contracts. Individuals would have no choice but to contract out of their basic employment rights if they want the job.
- There is also nothing to prevent employers from threatening *existing employees* that they will only retain their jobs if they agree to sign a new employee owner contract. Existing employees could therefore be pressurised into agreeing to move on to an employee owner contract.

If existing employees refuse to agree to new contracts, the employer could decide to dismiss them and offer them reinstatement on new employee owner contracts. If the employee refuses, it could be difficult to convince an employment tribunal that they had been unfairly dismissed. In any event they would have lost their job and their livelihood.

Employees with more than two years' continuous employment with the same employer will have accrued rights to unfair dismissal protection and statutory redundancy pay. Such accrued rights are likely to be considered as property rights for the purposes of the European Convention on Human Rights. The government is under a clear obligation to ensure that employees make an informed choice to forego such rights.

The TUC therefore believes it is incumbent on the government to ensure that employees are not pressurised into agreeing to an employee owner contract and that they do not face the threat of dismissal or victimisation if they decline the offer. To this end the government should amend the law to state that:

- It is automatically unfair for an employer to dismiss an employee on grounds that they have chosen not to take up employee owner contracts.
- It is unlawful for an employer to subject an employee to any form of detriment because they refuse to sign an employee owner contract.

Loss of unfair dismissal protection

Question 7:

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

The government's recent call for evidence on proposals for no fault compensated dismissal highlighted that there is no evidence that the removal of unfair dismissal will encourage employers to recruit more staff.

The Small Business Barometer published in October 2011 asked 500 SMEs about their main obstacle to success.¹¹ The state of the economy was the biggest obstacle, listed by 45 per cent, and obtaining finance was next, mentioned by 12 per cent. After this came taxation, cash flow and competition. Just 6 per cent of respondents listed regulation as their main obstacle to growth.

There is a similar picture in the ONS Access to Finance statistics, which includes figures for 'limiting factors for business growth'. The 'general economic outlook', 'price competition', 'limited demand in domestic markets' and the 'high cost of labour' were substantially more likely to be listed by businesses than the 'regulatory framework.'¹²

As the government's own research reveals, unfair dismissal rights do not even figure in the list of top ten regulations discouraging them from recruiting staff.¹³

The government's response to the call for evidence on compensated no fault dismissal also confirmed that:

*'Of the 40% of [the respondents to the BIS commissioned survey] who agreed that employment protection put them off from hiring new employees, only 1 % identified dismissal / disciplinary action regulation as the primary regulation, which translates to 0.4% of respondents overall.'*¹⁴

These findings are not surprising given that the UK has the third lowest level of employment protection legislation out of 36 countries.¹⁵

Question 8:

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

The TUC does not agree that the use of employee owner contracts will have benefits for businesses.

The removal of unfair dismissal rights for so called employee owners is likely promote bad practices amongst managers and to generate a hire and fire culture in companies.

¹¹ BIS Small Business Barometer August 2011, published in October 2011:

<http://www.bis.gov.uk/assets/biscore/enterprise/docs/s/11-p75c-sme-business-barometer-august-2011>

¹² http://www.ons.gov.uk/ons/dcp171778_235461.pdf

¹³ <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-626-dismissal-for-micro-businesses-call.pdf> p. 29

¹⁴ BIS Dealing with dismissal and 'no fault compensated dismissal' for micro businesses: Government Response <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-1143-dismissal-for-micro-businesses-response.pdf>, September 2012 p 10.

¹⁵ OECD Employment data 2008.

The proposals will substantially increase levels of job insecurity which in turn will damage morale and productivity amongst the remaining workforce. As Mike Emmott, employee relations adviser at the CIPD said:"

"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 they have. Employee ownership works best where it is accompanied by great management, rather than enhanced job insecurity."

Question 9:

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

The TUC does not agree that the use of employee owner contracts will have benefits for businesses of any size.

Since the Chancellor's announcement, media coverage has highlighted the difficulties which businesses would face in implementing the government's proposals. Small firms in particular are likely to find it difficult to raise sufficient equity to operate the scheme. Shares offered to employees in small firms are unlikely to have any genuine value. Shareholders in larger businesses are unlikely to be willing to dilute the value of their investments.

The adoption of the government's proposals for employee owners will also lead to reputational damage for businesses, regardless of their size. In his recent speech at the retail industry's IGD Convention, Justin King warned that the government's proposals could worsen the levels of trust between the public and businesses." This will make it more difficult for businesses to recruit quality staff, thereby limiting their capacity to innovate and expand.

Question 10:

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

Some employers' organisations have lobbied for the removal of unfair dismissal rights, arguing that this will reduce the risk of employment tribunal claims being brought against them. In practice, the government's proposals are likely to lead to an increase in discrimination claims, claims for automatic unfair dismissal and breach of contract claims. Such claims are usually more complicated and time-consuming for employers to defend and more costly for employment tribunals to determine.

¹¹ <http://www.cipd.co.uk/pressoffice/press-releases/share-ownership-no-substitute-employment-rights-good-people-management-081012.aspx>

¹² <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9596927/Sainsburys-chief-executive-Justin-King-criticises-shares-for-rights-proposal.html>

The government's proposals are also likely to generate increased litigation over the value of employee owner shares in the court system.

Loss of 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?

Few employees are likely to be attracted to the option of trading basic statutory rights in return for shares which may have very limited value. The absence of rights to statutory redundancy pay and other key entitlements will mean that it will be difficult for small and starter businesses using employee owner contracts to attract and recruit quality staff.

As noted above, a majority of new starter firms do not survive for more than 5 years. Under the government's proposals, 'employee owners' working for such businesses will receive little or no compensation when the businesses fail. This will leave them and their families in a financially precarious position and increasingly dependent on welfare benefits.

It is also noteworthy that the government's proposals will increase costs for small and start-up businesses where employees choose to leave voluntarily for example to move to a new job. Generally when employees hand in their notice and leave a business, the employer is not required to pay them any money. Employee owners however will have the right to receive the value of the shares at the point they voluntarily leave a business.

Extension of maternity leave notice periods

Question 12:

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

The TUC believes employers will gain little from this proposal. Instead, women will potentially take longer leave than they otherwise would and employers could see the rate of return from maternity leave drop.

The long notice requirement together with the proposed exclusion of employee-owners from the right to request flexible working will make it more difficult for mothers to plan for their return to work. It takes time, particularly for first-time parents, to get confirmation of childcare places and to make requests of their employers to vary working hours to accommodate childcare arrangements.

If an employer ignores a request for flexible working because they believe they do not need to consider it from an employee-owner, or fails to respond in good time as they are not bound by the deadlines in the statutory procedure or guidance, then a woman will struggle to meet the 16-week notice requirement for her

preferred return date. Her return will be delayed and if she perceives the employer is treating her unfairly and making life unnecessarily difficult for her, she may decide not to return at all. An EOC survey in 2005 of over 1,000 women who had recently taken maternity leave found that those who thought they had been treated unfairly during their pregnancy or maternity leave were six times more likely to never return to work. And of those who did not return to their pre-birth employer, most suffered a significant drop in pay and status in their subsequent job.

In reality, most women give an indication of their return date prior to taking leave as this enables planning for all parties. The existing 8-week statutory notice period of the actual return date is sufficient for employers to plan and prepare for the return, while giving women and their families time to put in place childcare and other arrangements so they can confirm that date.

Question 13:

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

It is difficult to see what benefit an employer would gain from not allowing the employee to return early without giving 16 weeks' notice. Most cover arrangements will not require 16 weeks' notice to bring to an end, the standard 8 weeks' notice is sufficient.

Suspending a woman on unpaid leave until they fulfil the 16-week notice requirement is likely to sour the relationship between employer and employee-owner and could result in the woman not returning at all.

Question 14:

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

The TUC not foresee any impact on a company's payroll provision. It will be important however for the government to close any loopholes in the legislation which would enable the use of scams where employees are offered shares in, and employed by, a payroll company, or an 'umbrella company' and then placed to work on a regular basis for a larger and more profitable company.

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?

It is likely to mean that mothers or adopters take longer leave as they and their partners will have less time to plan for their actual return date prior to having to give notice. For example, a woman who might want to take 26 weeks' maternity leave would have to give notice of her actual return date when the baby was just six weeks' old if she had taken four weeks' leave prior to the birth (which is quite common). This is very early in a baby's life and parents are unlikely to feel ready or able to decide upon the best childcare arrangements at this stage and confirm the actual return date.

Loss of 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?

The proposal to exclude employee-owners from the right to request flexible working is completely at odds with the government's commitment to create a universal right to request to encourage greater take-up of flexible working.

The government's consultation on Modern Workplaces in May 2011 stated that:

"The existing right to request has been a success... But we want to go further. We think that by extending the right to request flexible working to all employees, we can spread the benefits flexible working brings to all parts of society and the economy." It went on to state that it estimated this would benefit business by an average of £52.4m per year.

The right to request has been effective in increasing the availability of flexible work options and access to flexible working in a wider range of jobs.¹⁷ It is far from being an onerous procedure for employers. It simply requires an employer to discuss a request with an employee, to respond in writing and to give the employee a chance to appeal a negative decision before making a final decision.

The TUC believes that excluding employee-owners from this right is likely to reduce the availability and range of flexible work options to this group of workers.

It would also create the impression that a request for flexible working from an employee-owner never has to be properly considered. However, an employer could find themselves facing an indirect sex discrimination claim if they do not consider a request from an employee-owner returning to work after maternity leave. While ignoring a request from a disabled employee-owner could result in an unlawful failure to make a reasonable adjustment.

The granting of the right to request only to those employee-owners returning from parental leave will further confuse employers.

Loss of the 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?

The consultation document states that 'skills and training are important to driving a business forward.' The TUC shares this view. In our opinion, access to training is central to encouraging innovation and increased productivity. It is therefore surprising that the government has decided remove the right to request time to train from employee owners.

¹⁷ http://www.equalityhumanrights.com/uploaded_files/research/16_flexibleworking.pdf

In losing the right to request time to train, employee owners would no longer have the legal right to at least one meeting a year with their employer to discuss their training needs. Employee owners would also lose the right to request financial support or to propose flexible working patterns to accommodate their training needs and to have them properly considered by their employer.

In the TUC's experience, the right to time to train has proved successful. Research undertaken by unionlearn reveals that seven out of ten requests for time to train have resulted in a positive approval or a reasonable compromise. Three quarters of employers have also had no difficulty in responding to requests with 28 days. There is also no evidence of disputes over training leading to employment tribunal claims.

Removing this right would mean that an individual's access to training would depend solely on an employer's own policies and practices. The TUC questions the government's confidence that companies who choose to have employee owners will fully integrate training" and "accessing appropriate training will be easier for employee owners". The UK Employer Skills Survey 2011 showed that 41% of UK employers say they did not train any of their staff and 46% of UK employees (around 13 million) did not receive any training. The removal of rights to request time to train for employee owners is unlikely to buck this trend.

The TUC also notes that the right to request time to train currently only applies to employers with 250 or more employees. The removal of this right appears inconsistent with the government's assertion that employee owner proposals are principally aimed at small and medium sized but fast growing businesses. Rather it suggests that the government anticipates that employee owner contracts schemes will be adopted more widely by larger firms.

Implications for company law

Question 18:

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

The TUC does not have comments on this point.

Tax and anti-avoidance

Question 19:

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

The TUC believe it will not be possible to safeguard against abuse, as these proposals effectively open a new tax avoidance loophole which will allow employers to provide employees who currently receive shares as part of their remuneration package with an opportunity to reduce the amount of CGT they pay on these shares if they sell them. The only way to fully guard against this outcome is to withdraw the proposals. The impact could be mitigated by introducing a cap on the level of gain not subject to CGT, although this would

also disadvantage employee owners who could then receive a lower value on their shares than they would otherwise be entitled to.

We also believe there is a significant risk that owners/founders/directors of new small companies will classify themselves as 'employee owners', meaning that they could then wholly exempt all gains they might make in the future from tax altogether, irrespective of capital gains tax entrepreneur's relief. Again, we can see no way to fully mitigate this risk. The legislation could specify that 'employee owner' status should not be available to owners/founders and directors, but even if such provisions were introduced it is hard to see how they could be enforced. Alternatively, Government could legislate to prevent any one individual owning more than a certain proportion of shares (for example 5%) at the point at which they became an employee owner. But again, this could serve to unfairly limit the total value of shares that genuine employee owners were provided with.

Question 20:

The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as 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.

If the Government moves ahead with this scheme the TUC believes that tax existing rules (whereby employees in companies being taken over are offered the chance to exchange their shares for shares in the new company, with the shares they are offered valued at the takeover price (rather than having to sell their existing shares and therefore incur tax)) should remain in place. These rules should apply regardless of whether the takeover means that employee owners are provided with the chance to regain their employment rights as part of the takeover process.

General questions

Question 21:

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

Business lobbyists have argued that weakening unfair dismissal rights would help to boost recruitment. However, this claim is not substantiated by the evidence.

The UK already has one of the most lightly regulated labour markets in the industrialised world. OECD research reveals that among the world's 36 most prosperous countries, only workers in the USA and Canada have weaker employment protection than UK employees.¹⁹ The World Economic Forum's

¹⁹ OECD Employment Data.

latest Global Competitiveness report ranked the UK 5th out of 144 countries for 'labor market efficiency' (based on a survey of business executives).¹⁹

Academic studies have repeatedly found that employment protection legislation, including unfair dismissal rights, does not have a detrimental impact on unemployment or employment levels.²⁰ However, the adoption of deregulatory policies is likely to lead to increased inequality and in-work poverty.²¹ The removal of unfair dismissal rights and the ensuing job insecurity is likely to damage consumer confidence, suppress demand and make it more difficult for employees to access mortgages.²²

As highlighted in the responses to questions 7&8, the government's own research also confirms that most employers do not perceive the current level of regulation as a major constraint on growth.²³ Unfair dismissal regulations do not even feature in the list of top ten regulations which employers cite as a deterrent to growth.

Labour market analysis also does not support the argument that weaker dismissal rights will lead to increased employment and lower unemployment levels. Rather it suggests that employment protection legislation (EPL) tends to discourage employers from hiring during periods of growth but it also discourages layoffs during periods of recession. Over the economic cycle as a whole, the effect on employment levels tends to be neutral. This point was illustrated in recent comments by John Philpott, the Chief Economist at the CIPD:

'The vast weight of evidence on the effects of employment protection legislation suggests that while less job protection encourages increased hiring during economic recoveries it also results in increased firing during downturns. The overall effect is thus simply to make employment less stable over the economic cycle, with little significant impact one way or

¹⁹ http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf

²⁰ See Howard Reed (2010) *'Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance'* for a detailed review of recent research.

²¹ Wilkinson, Richard and Pickett, Kate (2009) *The Spirit Level: why equality is better for everyone*, Allen Lane. See also Howard Reed (2010) *'Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance'* TUC, London.

²² See the TUC response to the BIS consultation on Dealing with dismissal and 'no fault compensated dismissal' for micro businesses:

<http://www.tuc.org.uk/tucfiles/346/NoFaultDismissal.pdf>; Also see the Government Response to this call for evidence <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-1143-dismissal-for-micro-businesses-response.pdf>, September 2012.

²³ BIS Small Business Barometer August 2011, published in October 2011:

<http://www.bis.gov.uk/assets/biscore/enterprise/docs/s/11-p75c-sme-business-barometer-august-2011>

*the other on structural rates of employment or unemployment. (emphasis added)*²⁴

In its response to the recent BIS call for evidence on compensated no fault dismissal (NFD) the government concluded:

‘that there is insufficient support and evidence that NFD would have a positive impact on the UK labour market ... The Government has therefore decided it will not take forward proposals for NFD.’

This analysis applies equally to the proposals on employee owners. The TUC therefore calls on the government to drop the proposals on trading rights for shares.

Questions 22 & 23:

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

Question 23:

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

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

The TUC expects that there will be limited take up of this policy amongst good practice employers. Many employers recognise that it would be bad practice and bad business to seek to trade employees key employment rights in return for shares. Such policies will make it more difficult for companies to recruit quality staff who will perceive few advantages in trading basic protections for potentially worthless shares. The policy will also have a damaging impact on workforce morale and productivity. It is also likely to damage the reputation of businesses with their customers and the wider public. It will also be complex and costly for businesses to set up and administer this policy. We suspect therefore that most good practice employers will be deterred from using the policy.

The TUC is, however, seriously concerned that less scrupulous employers will seek to exploit the policy as a means of avoiding employment rights obligations and treating their staff fairly. There is a serious risk that the proposals will help to generate a hire and fire culture in some businesses and will lead to staff being mistreated at work.

The TUC expects, that with the exception of some high paid individuals who wish to take advantage of the tax loopholes, this policy would prove highly unattractive to the vast majority of employees. The TUC however is extremely concerned that many employees will not be given a choice over whether to sign an employee owner contract and thereby lose out on key workplace rights.

Equality impact assessment

²⁴ <http://www.cipd.co.uk/pressoffice/press-releases/questionable-merit-watering.aspx>

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 not adequate. It fails to properly consider the differential impact on particular groups of excluding employee-owners from the right to request flexible working. Tables are presented on the proportion of people by protect characteristic who work full-time and work flexibly. But by only focusing on full-time workers it completely misses out a major group of flexible workers from the analysis – those who work part-time where there are significant differences between groups, particularly between men and women. It also ignores numerous responses to questions in the same BIS survey from which it has taken the data on full-timers, which show a significant differences between protected characteristic. For example, 28 per cent of women had made requests for flexible working in the past two years, compared to 17 per cent of men and 33 per cent of women said flexible working was “very important” to them in deciding whether to take a job compared to just 14 per cent of men.

The EIA concludes that there are no gender impacts or consequences related to pregnancy and maternity from the proposal to extend the notice period for return from maternity leave to 18 weeks. It suggests it is merely a procedural change with no consequences for new mothers. However, as stated in response to Qs.12-15 above, this procedural change, particularly in conjunction with the exclusion of employee-owners from the right to request flexible working is likely to lead to women taking longer leave than they would have otherwise intended and possibly to more women not returning from leave.

It is also a matter of serious concern to the TUC that the government has decided to introduce legislation on this proposal before full consultation has been completed and before a full impact assessment has been undertaken. The government appears intent on driving the policy through regardless of its impact on employees, employers and the wider economy.

These implications include increased job and financial insecurity for employees, particularly in redundancy or insolvency situations; the negative equality impacts outlined above; the damaging effect on workforce morale, innovation and productivity; increased difficulties for businesses operating the scheme to attract and recruit quality staff; increased costs for businesses in setting up and administering employee owner schemes; and the damage on business reputation amongst customers and the wider public.

In drawing up these policies the government also appears to have completely ignored its own research and the wider evidence that was gathered during the call for evidence on proposals for compensated no fault dismissal. This is remarkable, given that the government published a comprehensive and evidence-based response to the call for evidence less than a month before the Chancellor made his announcement. As noted above, this response concluded that ‘there is insufficient support and evidence that NFD would have a positive impact on the UK labour

market'. The same analysis applies equally to the current proposals. The TUC therefore calls on the government to withdraw its proposals and instead to adopt a clear and effective strategy for sustainable growth.

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

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: Anya Palmer

Organisation (if applicable):

Address: Old Square Chambers
10-11 Bedford Row
London WC1R 4BU

Telephone: 2'

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) Self employed barrister

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

Comments:

I'm sorry but this question does not make sense.

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

Comments:

Again this question does not make sense.

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

Comments:

A fundamental problem with this scheme is that that the so-called employee-"owner" is not really an owner in any meaningful sense, and not in control. It is too easy for the real owner(s) to dilute the value of the shares to a point where they are worthless eg by (a) increasing their own salary and perks, reducing profitability so the shares pay no dividend (b) taking out a loan from the real owner(s) at an exorbitant rate (c) choosing to invest any profit in capital investment rather than pay out dividends or (d) issuing further shares thus diluting the value (these examples are merely illustrative and by no means exhaustive).

This problem may not arise for companies that have gone public and listed; they do arise for small employers and start-ups which are precisely the target market for this scheme.

The BIS proposals do not provide any safeguards to address this problem.

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:

No comment

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:

No comment

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:

Businesses should be aware that there is a whole set of employment rights which this scheme will not exclude them from, and if they rely on this scheme to dismiss someone or make someone redundant they may find they face a more expensive claim for discriminatory dismissal instead.

Individuals who are given the choice should be aware that if they accept, they are signing away key employment rights in exchange for shares with a face value of £2,000, that the rights they are signing away are potentially worth much much more than that, and that even the shares they do get can easily be rendered worthless (see answer to question 3 above).

Further this question presupposes that individuals will be given a choice. I understand the government in fact proposes that employers be able to impose the employee-owner model in the case of new contracts. It is plainly wrong that any employee should be forced to take part in this scheme or told that if they do not accept such a contract they will not be employed. The government should reconsider this.

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

Comments:

None. This is effectively the Beecroft proposal with window dressing. The government sought evidence in support of the Beecroft theory that allowing employers to "fire at will" would lead to increased appetite for recruitment, and they never found it. In fact the theory is disproved by what happened in 1999 when Labour made it easier to claim unfair dismissal (by reducing the service qualification from 2 years to 1) and there was no adverse effect on employment figures.

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

Comments:

Very limited benefits given that employees already have to have two years' service before they can claim unfair dismissal, but can still complain to a tribunal about the dismissal before two years and/or even if they are on an "employee-owner" contract

if they believe the dismissal was discriminatory or otherwise impermissible (eg whistleblowing).

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

Comments:

As already indicated I believe the benefits will be very limited and this applies to all businesses. Small businesses are probably at a greater risk as they are less likely to have proper procedures in place and may be lulled into a false sense of security that they do not need proper procedures thanks to the employee-owner scheme.

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

Comments:

(1) employers in the scheme will be at increased risk of such claims if a claim for ordinary unfair dismissal is not available (2) discrimination claims will be more complicated factually and will take longer than ordinary unfair dismissal claims, so these claims will be more expensive to defend, and (3) employers will be at greater risk of losing if they have not followed proper procedures.

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:

As for unfair dismissal claims. The best way to mitigate the negative impacts that I can think of is not to implement the scheme in the first place.

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

Comments:

Very limited, given that the employee only has to give notice at all if she is returning to work early.

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

Comments:

It would depend on the circumstances.

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

Comments:

No idea.

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:

None if they plan in advance.

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:

This question does not make sense.

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

Comments:

No comment

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

Comments:

No comment

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

Comments:

The government needs to address the concerns I outlined in responding to question 3. Unfortunately the only real safeguard I can think of in relation to those concerns is not to implement the scheme.

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:

I am not a tax lawyer and not in position to comment on this. However, as a taxpayer I am opposed to the taxpayer subsidising with tax perks those employers who wish to buy their way out of their basic obligations as an employer.

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 - see my response to question 7 above.

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

Comments:

The question appears to presuppose that I am a business and not an employee. I would hope that you are also interested in the views of employees. I am not an employee but if I were I would not take up the scheme. As a barrister I am self employed but I am also, as a member of my chambers, a small business employer. My chambers would not be likely 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:

I noted the response to the proposal in the press. I believe only a small number of businesses will want to take it up. I believe even fewer individuals will want to take it up and that is why the scheme should remain voluntary.

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

Comments:

No comment

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

Our Ref: GS 14.0
07 November 2012

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

Dear Ms Lovitt

CONSULTATION ON IMPLEMENTING EMPLOYEE OWNER STATUS

Please find attached the CWU submission on the BIS consultation on implementing employee owner status.

I would appreciate you acknowledging receipt.

Yours sincerely

A handwritten signature in black ink, appearing to read 'W Hayes', with a stylized, cursive script.

W HAYES
General Secretary

**CWU submission to the Department of Business Innovation and Skills
consultative exercise on "Employee Owner Status"**

1. The Communication Workers Union represents over 200,000 members working in the postal, telecommunications, financial services and business services sectors. We have members in over 50 companies, ranging from large multinational employers such as British Telecommunications and Telefonica O2 to small companies in the industrial sectors concerned. The vast majority of our members work in companies that are either government owned or are publicly listed. Only a very small minority of members work in private or unlisted enterprises.

2. If the government acts on its stated intention to follow through the provisions in the Postal Services Act that enable a sale of Royal Mail, this could lead to a situation where the overwhelming majority of the CWU's members are employed in the private sector. Proposals for establishing new 'employee owner' employment arrangements are of direct interest and relevance to our membership.

3. We do not support the government's proposals and have a number of serious concerns about the process of consultation, the lack of evidence underpinning the proposals and the likely outcome of their implementation.

4. At the outset, we must express concern at the way in which this consultative exercise is being conducted. Allowing only a three-week period of consultation for proposals of such significance is not good practice. In particular, we are concerned that no full Impact Assessment has been undertaken and could not possibly take place within such a constrained timeframe. This is a clear indication of the rushed and ill-considered nature of the proposals. The Equality Impact Assessment is, we feel, inadequate as it fails to properly consider the differential impact on particular groups of exclusion from the right to request flexible working.

5. Additionally, we are surprised by the decision to incorporate provisions relating to this project into clause 23 of the Growth and Infrastructure Bill, before consultation has taken place, and to lay the Bill before Parliament on the same day as the public consultation was launched.

6. We are profoundly concerned that the principle underpinning these proposals – that statutory employment rights are effectively negotiable and can be bought out – is not being considered at any point in this process. While we oppose such a move and believe it undermines the fundamental nature of these rights, we believe the government could, at the very least, engage in a meaningful consultation on the principle of individuals being given the opportunity to effectively sell their rights. The list of current employment rights that are proposed to be 'traded' include those that have been a very well entrenched part of the employment law landscape both domestically and internationally for many years, even decades.

7. It is confusing as to why the government is seeking to reintroduce what is effectively a revised version of the rejected Beecroft 'compensated no-fault dismissal' proposals. The original Beecroft proposals, on which the government consulted earlier this year, would have allowed employers to dismiss employees where no fault was identified on the part of the employee provided that a set amount of compensation was paid. Following consultation, this proposal was dropped by the government on the grounds that: "The majority of respondents who answered the question did not agree that NFD [No-Fault Dismissals] would benefit micro businesses. Looking at employer responses in isolation, it is clear that even amongst the business community only a minority expressed support for the measure"¹

¹ BIS (2012), *Dealing with dismissal and 'compensated no fault dismissal' for micro businesses: Government response*, (September 2012)

² *Ibid.*

8. The proposals currently under consideration effectively reintroduce the idea of no-fault dismissals (NFD), replacing core employment rights with an alternative that is argued to be appropriate or effective. However, instead of compensated no-fault dismissals, the exchange proposed here is in the form of shares of questionable value, rather than cash compensation. The principal underpinning these proposals is very similar to the government's original proposal. Therefore the evidence provided to and analysed by government remains relevant. Indeed, unlike proposals for NFD compensation, the employee does not retain the 'asset' they have received in exchange for their rights beyond the ending of that employment. It is very unclear why the government is now reaching a new conclusion in contradiction to its September position.

9. We believe the rights under consideration have demonstrably improved employment relations and the economic performance of enterprises, and note, for example, the TUC's citation of a more than £50m benefit to business of the availability of flexible working patterns. We are therefore further concerned that these gains will be undermined by the proposals without adequate safeguards being proposed to remedy any detriment.

10. We are also concerned that the philosophical approach that appears to underpin this initiative has not been validated. It cannot be said with any confidence that the proposed 'employee owners' will have a transformational effect on the enterprises in which they work such that the need for the employment rights that have been traded is alleviated. No evidence has been provided. Indeed, the government's own analysis of evidence obtained in the course of its 'compensated no-fault dismissal' consultation found that: "A majority of stakeholders highlighted the potentially detrimental impacts on employees, though empirical evidence was limited. The decreased job security NFD would engender could hurt morale, job satisfaction, productivity, loyalty, and the employer/employee relationship."² There is therefore a potential significant cost for participating enterprises.

11. Of further concern is the fundamental inequity associated with the proposals in that the shares allocated would not have associated voting rights or dividends guaranteed. The proposal that they would be forfeited at the end of employment also raises for us the possibility of employment relationships being artificially ended for reasons associated with how the equity of an enterprise is allocated rather than the conduct or performance of an individual employee.

12. Moreover, there are serious practical issues about which the government's consultation document does not reach satisfactory conclusions. Of major concern, and already raised by a number of stakeholders, is how small unlisted companies will be able to adequately value the company at the beginning and end of 'employee owner' contracts. This would need to happen for the share scheme to be meaningful, but the costs are likely to be prohibitive. It is therefore unclear how the start-up firms the government is targeting will be able to engage with such a scheme.

13. It is also unclear who will benefit from such a scheme. It already possible for employee shares to be exempt from Capital Gains Tax (CGT), with an annual allowance of £10,600. To receive any advantage from the CGT exemption that the government proposes, employees would have to see very significant increases in share value. Moreover, in many cases, especially for long-serving employees, the value of share will be lower than the value of statutory redundancy pay. It is therefore unclear that the trade will be of value to many employees and there is a risk that employees trade in rights on the promise of rewards that will never materialise.

14. As well as the 'contracting out' of certain employment rights, and the uncertainty, vulnerability and cost that this, we submit, will introduce for employers, we also have particular concern at the proposal to create a new employment status. Such an act in itself does not appear to us to be cost-effective, especially in the current circumstances and given the proposed focus of this initiative on SMEs.

15. We further believe that if enacted, these proposals will have two particular unintended consequences. First we believe that they will expose corporate participants to allegations of unfair competition from competitors who may be unable to offer a similar facility to their own employees, and who will not therefore qualify for the capital gains tax exemption on share-driven profits. Second, we believe that some larger, in some cases much larger, share owning employers will feel misled by the remarks made by the Chancellor in introducing this proposal in October³) as, for the reasons outlined in this submission and elsewhere, there is no evidence to suggest that this proposal will increase a sense of corporate responsibility for the well-being of enterprises and employees by expanding and diversifying the share owning base in a meaningful way.

³ <http://www.newstatesman.com/blogs/politics/2012/10/george-osbornes-speech-conservative-conference-full-text> 33 4

16. Above all, we fear that the proposals will do little to benefit employees. There is a real risk they will be used simply to enable employers to avoid core employment rights. It is essential that employees have genuine choice over whether to enter into such an arrangement. Employers should not be able to require employees to sign up to such arrangements and they should not be able to be used as a condition of employment. It is very likely that unscrupulous employers will seek to make 'employee ownership' status a condition of employment. Employers could do this at no cost to themselves, offsetting their value by incorporating them into the remuneration package. The net result would simply be fewer protections for the employee and a proportion of their remuneration package at risk - as share value may fall – through no choice of their own.

17. We urge the government to take note of an emerging yet strong consensus that, at best, this proposal is misplaced.

18. We note that the CBI, CIPD and large employers such as Sainsbury's have indicated that at best this is a "niche idea" and at worst it will lead to deteriorating levels of trust between the public and businesses. Leading law firm Linklaters are reported as describing the proposals as "odd" and "a back-door implementation of one of Adrian Beecroft's recommendations".⁴

⁴ <http://www.wsandb.co.uk/web/news/2222090/govts-employee-owner-plans-slammed-in-damning-legal-analysis>

⁵ <http://www.bis.gov.uk/assets/BISCore/business-law/docs/S/12-933-sharing-success-nuttall-review-employee-ownership.pdf>

19. We understand why employers have such concerns: The costs to business in terms of a more complex set of administrative arrangements, an increase in the cost of voluntary exits and (especially for the SMEs at whom this is aimed) a diluting of the already limited equity are all, to our mind, strong arguments. We also note that concern about these issues is not just the preserve of employers but also our members who work in smaller enterprises in particular.

20. We are also concerned and confused as to the impact of this proposal on existing Employee Share Ownership Programs (ESOPs). These have been almost universally accepted as a positive and flexible component of many remuneration or engagement programs utilised by employers and enjoyed by employees.

21. We cannot help but anticipate that if the 'employee owner' proposals are developed further to the point of implementation, it can only confuse and have an adverse impact on the standing, efficacy and take-up of existing ESOPs.

22. Furthermore, the government's own recent review into this subjects made no reference to the notion of 'employee owners' and strongly suggested

that the characteristics of a successful employer/employee relationship did not contain the features of this proposed scheme.

23. We fully endorse the views expressed by the Trade Union Congress in their submission and for the reasons expressed therein and above we strongly urge the government to accept that whatever their intentions, there is no enthusiasm for this proposal and that the limited resources of the department is better focused elsewhere. In particular we fully support the TUC response to the specific questions posed in the consultative document.

24. For further information on the view of the CWU or should the reader have any further questions, please contact:

Billy Hayes
General Secretary
Communication Workers Union
150 The Broadway
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Tel: 020 8896 2000
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Email b.hayes@cwu.org.uk

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

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: Jenny Moss

Organisation (if applicable): Kalayaan

Address: 13 Hippodrome Place, London, W11 4SF

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:

Our organisation has a commitment to social justice and gender equality and this informs our employment policies. We would not use contracts which involve a loss of fundamental employment rights, as proposed for the Employee-Owner contracts, as this will have a negative impact on both social justice and gender equality.

In particular, we are concerned about the negative impact on gender equality of introducing additional barriers to labour force participation for new mothers, through increasing the notice period for early return from maternity leave and restricting the right to request flexible working. We are concerned that the removal of unfair dismissal rights, rights to training, and rights to statutory redundancy pay will impact harshly on the most vulnerable workers who are in the weakest negotiating position in the employment market.

We would be better able to make use of the flexibility of different forms of employment status if all basic employment rights were preserved in the Owner-Employee contracts. This would remove the ethical barriers to using this contract. We note that charities and social enterprises have a variety of corporate forms, including forms which would support the issue of shares to employees.

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

Comments:

We would not consider using a contract which involved the loss of fundamental employment rights, as proposed for the Employee-Owner contracts. A contract of this kind will have a negative impact on both social justice and gender equality and conflicts with our organisational commitment to social justice and gender equality.

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

Comments:

No answer

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:

No answer

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:

No answer

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:

As the Employee-Owner contracts involve a substantial loss of employment rights, we consider it essential that individuals receive good advice on the implications of entering into this form of employment contract. This should consist of written information, telephone advice and face-to-face advice, including advice and information in community languages.

We are conscious that the capacity of voluntary sector organisations to provide advice of this kind has been significantly reduced as a result of widespread cuts. We recommend additional funding for information and advice agencies to assist in meeting the increased need flowing from the new form of contract.

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

Comments:

We do not anticipate that the introduction of the Employee-Owner contract will have any positive impact on recruitment by ethical employers. The loss of fundamental employment rights, as proposed for the Employee-Owner contracts, contravenes social justice and gender equality principles. This will prevent ethical employers from taking up this form of employment contract.

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

Comments:

We would not consider using a contract which removes unfair dismissal rights. These are fundamental employment rights. This would be inconsistent with our commitment to social justice and gender equality.

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

Comments:

We do not think that the Employee-Owner contract will be attractive to any ethical employer, irrespective of their size.

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

Comments:

By removing the right to pursue a claim for unfair dismissal, individuals on Employee-Owner contracts will be prevented from exercising their basic employment rights. We anticipate that more vulnerable workers will experience unfair treatment as a result. We expect that fewer vulnerable workers will be able to take their cases to the employment tribunal.

Individuals on Employee-Owner contracts will retain the right to take a discrimination claim to the employment tribunal. We are conscious that discrimination claims are time consuming and difficult to pursue. Evidence from the 2005 Equal Opportunities Commission inquiry into pregnancy discrimination found that 30 000 women lost their jobs each year as a result of pregnancy discrimination. Only 3% of these women took their claim to the employment tribunal. We expect to see a further drop in the proportion of discrimination claims which go to the employment tribunal following the Government's planned introduction of substantial fees to pursue employment tribunal claims in 2013. As employers with a commitment to social justice and gender equality, we are concerned at any measures which reduce employees' access to the employment tribunal.

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:

We would not consider using a contract which removes statutory redundancy pay entitlements. These are fundamental employment rights. This would be inconsistent with our commitment to social justice and gender equality.

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

Comments:

We would not consider using a contract which increased the notice period for early

return from maternity leave. This is restricting a fundamental employment right and would be inconsistent with our commitment to social justice and gender equality. Increasing the notice period for early return from maternity leave will increase the pressure on women at a time when they should be able to focus on their new baby and on their own recovery from the birth. Many women will find it difficult to plan their arrangements for return to work 16 weeks in advance, as they will need to finalise childcare and resolve flexible working arrangements. This unnecessary pressure is likely to result in more women resigning their jobs during maternity leave. This will reduce women's labour market participation and increase the gender pay gap.

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

Comments:

No answer

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

Comments:

No answer

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:

Increasing the notice period for early return from maternity leave will increase the pressure on women at a time when they should be able to focus on their new baby and on their own recovery from the birth. Many women will find it difficult to plan their arrangements for return to work 16 weeks in advance, as they will need to finalise childcare and resolve flexible working arrangements. This unnecessary pressure is likely to result in more women resigning their jobs during maternity leave.

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:

We would not consider using a contract which reduced or restricted the current right to request flexible working. This is a fundamental employment right. This would be inconsistent with our commitment to social justice and gender equality.

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

Comments:

No answer

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

Comments:

No answer

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

Comments:

No answer

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:

No answer

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:

We do not anticipate take-up of the Employee-Owner contract by ethical employers because it contravenes social justice and gender equality principles. As a result, we do not anticipate that the introduction of the Employee-Owner contract will have any positive impact on labour market flexibility amongst ethical employers.

We anticipate that the Employee-Owner contract will have negative impacts on labour market flexibility for women. The Employee-Owner contracts substantially

reduce fundamental employment rights, including increasing notice periods for notifying early return from maternity leave and restricting the right to request flexible working. These are rights of particular importance to new mothers. We anticipate that use of the Employee-Owner contract will result in an increased proportion of women exiting the labour market during pregnancy and maternity leave.

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

Comments:

Our organisation has a commitment to social justice and gender equality and this informs our employment policies. We would not use Employee-Owner contracts of the kind described in the consultation as they involve a loss of fundamental employment rights and will have a negative impact on both social justice and gender equality.

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

- a) companies?
- b) individuals?

Comments:

We do not anticipate take-up of the Employee-Owner contract by ethical employers because it will have a negative effect on social justice and gender equality.

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

Comments:

Pregnancy and maternity: The equality impact assessment notes that the doubling of the notice period for early return from maternity leave will impact on pregnant women and new mothers. It states that this is a procedural change and concludes that there is no disproportionate equality impact on this group. We do not agree. By doubling the notice period for notice of early return from maternity leave, women face significant barriers to returning from maternity leave. 84% of women taking maternity leave return before 52 weeks and will be required to give notice of early return (DWP 2011). Many women will find it difficult to plan their arrangements for return to work 16 weeks in advance, as they will need to finalise childcare and resolve flexible working arrangements. This unnecessary pressure is likely to result in more women resigning their jobs during maternity leave.

Gender: The equality impact assessment stated that broadly similar numbers of men and women access flexible working. This is incomplete data. A significantly greater proportion of women than men request flexible working (28% compared to 17% - BIS 2012) so restricting the right to request flexible working will impact disproportionately on 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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7 November 2012

Our Ref: ANH/KS/mlt

Dear Ms Lovitt

Response to the Consultation Document on Implementing Employee Owner Status

We welcome the opportunity to comment on the proposals outlined in the consultation document on implementing employee owner status.

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

There is already uncertainty for many employers surrounding the employment status of some workers and the complication of contractors and IR35 tax rules. A further status of 'employee owner' could increase the confusion for employers.

If this does go ahead, perhaps it would be better for the 'employer owner' to have no employment rights at all and be treated as if self employed or as a partner. Whilst this is simpler to understand, it means that 'employer owners' would have less rights than say, the directors of the company who are already shareholders.

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

As above.

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

The answer would be different for listed and non listed companies:

- For listed companies there should be no restrictions attached.
- For privately held companies the restrictions would follow normal practice which would be to restrict the shares in terms of:
 - Compulsory sale on leaving employment

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- Sale of shares only to other shareholders

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?

Market value should prevail. The employee is required to pay market value to acquire the shares (or incur a tax liability if at less than market value) so it seems equitable for the sale to be at market value. The only exception might be where the employee has acted improperly against the company.

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?

For a listed company this would not be an issue. For private companies, the valuation principles under the tax legislation and case law could prevail. Arrangements could be made to have a Pre Transaction Valuation Check with HMRC's SAVD for shares under these provisions. There is a cost impact for this, as is the case for HMRC approved share plans, as most companies would require professional help with the valuation and application to HMRC. The costs are normally incurred by the Company. As a valuation is required for each transaction, this could be costly over time and could in itself outweigh the perceived benefits.

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.

A significant amount of guidance would be required for both the Company and the employee on the implications of employee owner status. Whilst much of the advice and guidance would be generic in terms of the loss of employment rights, the restrictions on the shares and investment in a particular company would differ from one company to another, the risk/reward profile for each individual would differ. It may therefore be necessary for an employee to take independent legal and financial advice before agreeing to become an 'employee owner'. This would involve further professional costs. There is also perhaps a risk that employees will be unduly influenced by their employer, with resulting litigation unless, say, each employee is required to take separate legal advice in a similar way to compromise agreements.

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

This proposal could encourage some of the more 'prudent' employers to recruit some individuals on more of a trial basis, say where they are brought in to develop a product or market, without so much concern about the cost of terminating the employee at great cost. They would, however, have the cost of recruitment, agency fees and ongoing employer NIC.

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

As above.

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

The benefits would arguably be greater for the smaller and start-up businesses which have more limited finances to take the risk of a new recruit on a trial basis. Also, the opportunity to acquire shares in a start-up or smaller company is more compelling for an employee owner as the opportunity for the value of those shares to increase in value is likely to be higher.

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

It may change the attitude of the employer /employee relationship such that those with 'employee owner' status could be put under more pressure to work later, lack of pay reviews and not be treated fairly compared to the non 'employee owner' who has retained those rights. A discrimination claim could be the only recourse for the employee and thus increase the likelihood of a tribunal claim.

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?

This proposal could encourage the smaller or start up businesses to recruit more people more quickly if there is not the financial risk of paying redundancy. Would the employer only offer a position if it is on the basis of employee owners status only? The risk rests with the employee. The employer will have to be clear when offering this position on the pros and cons of the share ownership verses employment rights.

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

Whilst an extended notice period for the return to work is welcome, and allows the employer to plan ahead, the biggest issue for smaller employers surrounding maternity leave is the cost and hassle of having to keep the position open for the employee and the need to pay for an interim.

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

For some employers this would be very welcome. Smaller employers often have to manage the business with the absent employee and with no interim cover. Where interim cover has been arranged this is often with a short notice period for change and could be terminated early. Most employers would want the business 'back to normal' as soon as possible.

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

Not aware of any impact.

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

Many mothers do not know how they will feel or manage with a new child until it has arrived. To plan at least 16 weeks in advance to decide on a return date is quite a long time and it may mean that some mothers will be cautious with any commitment to return and thus take longer maternity leave than they would have subsequently have wanted.

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 – 4 weeks seems to be the right period for notice to return from maternity leave. It is, after all, a typical notice period for most monthly paid employees for leaving employment.

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

Very little impact. The employer's attitude to the provision of training often comes with the culture and progressiveness of the business for the greater benefit of the business. If there is a good business reason for the provision of the training, then most employers would approve the cost and time investment.

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

Creation of yet more law is not necessarily welcome for business or employers. However, there needs to be appropriate safeguards for the employee owner as a minority shareholder to ensure that their rights as a minority shareholder are not abused by any majority shareholder (s). Whilst the Companies Act does provide some protection, it is necessary for the minority shareholder to have been made aware of any adverse actions of the majority. Also, where adverse actions are evident, the minority shareholder would be required to engage a lawyer (at cost) to pursue any claim. If no amendment to the Companies Act is anticipated, Government does need to provide appropriate safeguards for the employee owner from potentially unscrupulous majority shareholders. In reality a small minority holding in an unquoted company is of limited value to an employee without the real prospect of a sale of the entire company in the foreseeable future.

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

The typical areas for abuse would be surrounding:

- the valuation used to buy-back shares from an employee leaving the business. This could be dealt with by a valuation framework (akin to the statutory information standards for tax and tax case law). This framework would be used consistently for the valuation of the shares on acquisition and on disposal. See also response to Question 5.
- Artificial transactions with majority shareholders or their associated entities which would devalue the business and employee owner's shares. e.g. sale of assets for less than market value or higher than market rate remuneration or loans.

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 on return for taking up the new status are involved?

Yes. It could provide fair and consistent treatment.

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?

See response to Question 9. Also, the employer is perhaps more ready to let someone go earlier and more readily if their performance is not meeting expectation, or if the employer is facing cash flow issues.

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

Unlikely. See answers to Question 23 below.

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

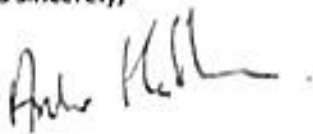
- a) **Companies** - Many privately held businesses are reluctant to have minority shareholders, opting more for HMRC approved option plans which vest on a takeover. This provides the majority shareholder to keep the business in their total control and without the need to answer to others on strategic decisions etc. Introduction of this new status adds an extra layer of complexity which most small businesses do not welcome. Given that there is likely to be an income tax charge on issues of shares this will have to be funded, presumably by the employer in most cases. To be effective the arrangement requires an exemption from this income tax charge if there is to be an acceptable level of take-up.

- b) **Individuals** - From the employee perspective the tax advantage could be relatively small as many who acquire shares via Enterprise Management Incentive options have the opportunity to acquire the shares without an immediate cash investment and may also have the benefit of Entrepreneurs' Relief on the disposal of the shares. Employment rights have been hard fought over the decades and individuals would be reluctant to give these up at the same time as being required to use personal funds to finance the acquisition of shares. EMI options are a more attractive alternative.

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

This proposal relates to the acquisition of shares at market value for between £2,000 and £50,000. Those in minority groups are generally more likely to be lower paid or working reduced hours. The potential for these individuals to have the personal funds to be able to afford to make such share acquisitions are less likely. These proposals are therefore potentially out of reach for many in these groups.

Yours sincerely,



Andrew Hubbard
Chair of Tax Practice