GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

A written response to the Business, Energy and Industrial Strategy Committee's consultation on measures to increase transparency in the UK labour market

By Taylor Vinters LLP

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Taylor Vinters offices:
Merlin Place
Milton Road
Cambridge
CB4 0DP

+44 (0)1223 423444

Tower 42, 33rd Floor
25 Old Broad Street
London
EC2N 1HQ

+44(0)20 7382 8000

Taylor Vinters Via
152 Beach Road
#10-08 Gateway East
Singapore
189721

+65 6299 0212

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We are mindful that the questions in this section have been constructed to elicit responses directly from those that employ and work seekers.

As a law firm that focuses primarily on supporting employers, we have provided our answers as a representative of that group, based on our experience of advising employer clients of all sizes. Where appropriate, we have provided answers from our own perspective as a modern, forward-thinking business that employs/engages individuals as part of a diverse workforce.

Should the reader require any further detail about matters covered by our response, the contributors would be very happy to have such a discussion. Please contact
who will be able to assist.

Section A – Written Statements

Our answers to this section reflect our firm's practice and experience as an employer.

Question 1 – Have you provided a written statement of employment in the last 12 months to:

a) Your permanent employees – Yes. Such terms are typically provided and returned prior to the start date.

b) Your non-permanent staff – Yes; and much in the same way as for permanent employees; such terms are typically provided and returned prior to the start date. In the last 12 months the firm has provided around 7 (out of a total of c140 employees) written statements of employment to non-permanent staff.

Question 2 – In general, when do individuals starting paid work at your organisation receive:

a) A written statement – before paid work starts. All staff receive a full employment contract, together with an offer letter. In light of this, we do not as a matter of course provide separate written statements. The contract contains reference to an employee handbook which outlines key policies such as disciplinary, grievance, equality and diversity etc.

b) An employment contract or other employment particulars - please see above. This is so that both parties have certainty on all rights and obligations prior to commencing work and so that there is time to iron out any concerns there may be with such terms before an individual turns up to the office to start work.

Question 3 – How long, on average, would it take a member of staff to produce a written statement for a new starter?

Depending on the scope of the role in question, most employment contracts/offer letters will take between half-an-hour and an hour to produce. We have a bank of precedents which are used as the basis for any new starter and adapted to the individual circumstances, as appropriate. Our employment contract templates are deliberately straightforward and easy-to-digest which means producing new contracts is reasonably straightforward and expeditious. The process can take longer for specialist roles or senior level hires.

Question 4 – How often do you seek legal advice when producing a written statement?

Rarely. Our HR team has a lot of experience adapting our template employment contracts for new recruits and takes a pragmatic view if it is requested to negotiate specific terms.

Aside from our own organisation, our observation is that generally many larger businesses with sophisticated HR functions will rarely require assistance with producing written statements of employment other than for specialist roles. More frequently such support will be required by early stage companies who perhaps do no have a dedicated person/team responsible for this.

Question 5 – Are there any other business costs associated with producing a written statement, in addition to personnel and legal costs that we should be aware of?

There are often administrative/office costs, for example printing and photocopying, involved in producing written statements of employment.

For specific roles there can be non-financial costs for businesses, such as time spent on negotiation or losing the candidate that can play a part too.

Question 6 – If you are employed, have you received any of the following from your employer: (a) a written statement; or (b) an employment contract or other employment particulars?

This question is not applicable to us.

Question 7 – If yes, when did you receive the following in relation to starting paid work with your employer:

This question is not applicable to us.

Question 8 – If yes, was the information presented in a way that was easy to understand?

This question is not applicable to us.

Our answers to the following questions reflect our experience as a firm advising, in the main, employers.

Question 9 – To what extent do you agree that the right to a written statement should be extended to cover permanent employees with less than one month's service and non-permanent staff?

We do not feel particularly strongly that the right to a written statement should be extended to permanent employees with less than one month's service. The reality, in our experience, is that most employers do not abide by this as a hard and fast rule anyway. In most cases, all permanent employees are provided with written terms on or before the first day of employment.

However, we agree that the right to a written statement should be extended to non-permanent staff. With an increasing number of individuals working under various non-permanent arrangements, of differing durations, in our view it would assist all parties if those arrangements were clearly documented and expectations set. This alignment may also help to further bridge any perceived discrepancy in treatment of permanent staff vs fixed term staff, for example.

Supporting this view, we would also note that in many organisations it is common practice to provide written terms of engagement to all staff, regardless of whether or not they are permanent.

Question 10 – The following items are currently prescribed contents of a principal written statement. Do you think they are helpful in setting out employment particulars?

a) **The business's name** – Yes. This is particularly important where there is a complex group structure, where any of several group companies could potentially be perceived as the employing entity.

b) **The employee's name, job title or a description of work and start date** – Yes

c) **If a previous job counts towards a period of continuous employment, the date that period started** – Yes. Since the start date capturing all periods of continuous service is important for calculating a multitude of entitlements, for example statutory redundancy pay, it should be clear in the employment terms when the employee is deemed to have commenced employment.

d) **How much, and how often, an employee will get paid** – Yes. This will be important to an employee so that they have certainty on it, although the written terms should account for any fluctuations in remuneration.

e) **Hours of work (and whether employees will have to work Sundays, nights or overtime)** – Yes, to some extent. Some certainty on hours' requirements is useful, especially where these are out of the ordinary for the organisation. But being too prescriptive can hinder flexibility and lead to ambiguity. For example, if the statement specifies the individual is required to work 9am-5pm when in reality they work 10-3pm and then 7pm-10pm to accommodate home life (and this is acceptable to the employer).

f) **Holiday entitlement (and if that includes public holidays)** – Yes. Being clear on holiday entitlement is sensible in our view, since this is a particularly ripe area for dispute.

g) **Where an employee will be working and whether they may have to relocate** – Yes. Although we acknowledge that modern day practice is that employees work from several different locations, depending on the specific needs of the role, it is useful to specify a base of

work in the employment terms and recognise that from time to time it may change depending on the particular circumstances.

h) **If an employee works in different places, where these will be and what the employer's address is** – Yes. Please see answer to (g) above.

Question 11 – Do you agree that the following additional items should be included on a principal written statement:

a) **How long a temporary job is expected to last, or the end date of a fixed term contract?** Agree. Please see our answer to question 9 above.

b) **How much notice the employer and the worker are required to give to terminate the agreement?** Agree strongly. The parties will often increase the statutory minimum notice periods and it is useful to have this key term expressly documented.

c) **Sick leave and pay entitlement?** Neither agree nor disagree. Employers will often wish to keep specific terms regarding sick pay process and entitlements in a separate policy which they have flexibility to update as required. Provided employees know where they can find this information we would encourage this flexibility and do not think it was cause any undue hardship to employees.

d) **The duration and conditions of any probationary period?** Agree. For certainty we would encourage such terms to be expressly set out in the main terms of employment.

e) **Training requirements and entitlements?** Disagree. We can see why specifying these terms can assist the parties to know what is expected with regards to training. However, it is usually in both parties' interests for this to remain flexible and adaptable depending on how respective needs develop. Consequently, making this a rigid contractual term is unlikely to be productive.

f) **Remuneration beyond pay e.g. vouchers, lunch, uniform allowance?** Disagree. Please see our response to (e) above.

g) **Other types of paid leave e.g. maternity, paternity and bereavement leave?** Disagree. Please see our response to (e) above.

Question 12 – To what extent do you agree that the principal statement should be provided on (or before) the individual's start date?

We agree to a great extent – please see response to question 7 above.

Question 13 – To what extent do you agree that other parts of the written statement should be provided within two months of their start date?

We agree to a great extent. While in practice often the principal statement (normally in the form of an offer letter) is provided first to secure an employee's agreement, and the employment contract follows once it is prepared, it is beneficial for both employer and employee to have certainty of the framework governing the relationship between them as soon as possible; even if practically this is not feasible before work commences.

Question 14 – Have you ever worked for an organisation that has not provided you with a written statement of employment particulars within 2 months of starting your job?

This question is not applicable to us.

Questions 15 and 16 – These questions are not applicable to us.

Question 17 – If we introduced a standalone right for individuals to bring a claim for compensation where an employer has failed to provide a written statement, what impact do you think this would have? Please consider the impact on:

a) **Individuals.** Theoretically, we consider the impact on individuals is that they will be provided with employment particulars more often if this right becomes standalone as opposed to linked to another right; which is clearly beneficial for individuals. However, in reality such a right is unlikely is, in our view, unlikely to greatly impact individuals because it is improbable they would take any action against their employer for failure to comply (given their bargaining power on commencing employment) in any event. This is particularly the case if any compensation for failure to provide a written statement is set at a relatively low level.

b) **Employers.** We may find that with the added legal risk more employers provide employment particulars to staff. However, this right (to the extent it has practical effect – see our answer to a) above) may result in a disproportionately negative impact on overstretched and growing businesses (for example early stage companies) who often require maximum flexibility to operate effectively.

c) **The Tribunal service.** If employees become more aware of this right it could lead to more claims through the Tribunal service. In practice, as we mention above, we consider it unlikely this standalone relief will be sought very often at all (for the above reasons) and so will probably not have a significant impact on the Tribunal service.

Question 18 – Which of the following best describes your awareness of the Acas guidance on written statements?

We are aware of the Acas guidance and have some knowledge of what it says. It could however be clearer and more concise, with greater reflection on modern day common practice.

Question 19 – If you have some knowledge of the Acas guidance on written statements, how helpful did you find it?

Please see answer to 18 above.

Section B: Continuous service

Consultation Questions

20. What do you think are the implications for business of the current rules on continuous service?

We believe that the current rules on continuous service strike a fair balance between business interests and the legitimate expectations of employees. However, the rules in relation to breaks in continuous service could be made clearer, as we explain in more detail below.

The employee rights that apply after a qualifying period of two years' continuous service (for example, the right not to be unfairly dismissed – subject to certain exceptions) provide employees with the reassurance that their employer will act fairly and reasonably in matters related to their employment, and provide employees with the right to seek recourse in the Courts or Tribunals if their employer fails to do so.

These rights are important safeguards against potentially unscrupulous employers who may otherwise choose to prioritise business interests over the reasonable expectations of long-serving employees.

In addition, the requirement that employees must have at least two years' continuous service before such rights apply recognises that businesses, and employees alike, will often benefit from a period of "bedding-in"; to explore whether the individual is well suited to the organisation and the role in question without subjecting the parties to a potentially onerous and lengthy process if, for example, it is in the parties' interests to part ways sooner rather than later.

21. If you are employed, or represent employees, what are the implications for you or those you represent of the current rules on continuous service?

Please see response to Question 20 above.

22. Do you have examples of instances where breaks in service have prevented employees from obtaining their rights that require a qualifying period?

No. It is rare in our experience that businesses will seek to overcome a qualifying period taking effect by trying to break an employee's continuous service. More often than not this may happen as a consequence of the particular sector, for example where professors take breaks in lecturing in order to resume academic studies.

23. Do the current rules on continuous service cause any issues in your sector?

In our experience, the current rules on continuous service do not tend to cause any particular issues, whether in our sector (i.e. legal sector) or more generally.

24. We have committed to extending the period counted as a break in continuous service beyond one week. What length do you think the break in continuous service should be?

We do not consider that the period counted as a break in continuous service should be extended beyond one week. However, if the Government is committed to extending this period, we consider that the break in continuous service should be no more than two weeks.

In our experience, the current rules on breaks in continuous service have limited practical impact, as individuals with atypical working arrangements, including those where there may be gaps between assignments; tend to be engaged as contractors or workers. Further our observation is that typically any such breaks when they do occur are longer than one week anyway.

As such, we consider that any extension to the period counted as a break in continuous service will not adequately address the concern that employees in atypical work have difficulty in accessing employment rights. Provided that the existing exemptions to the break in continuous service are made as clear as possible (see our response to Question 25 below), we believe that the period required for a break can be kept short (no more than two weeks).

25. Do you believe the existing exemptions to the break in continuous service rules are sufficient?

Overall, we believe that the existing exemptions to the break in continuous services rules are not sufficiently clear, and both employers and employees would benefit from additional explanatory guidance in these areas.

The three main sets of circumstances in which an employee's continuous service is maintained, despite there being a *prima facie* break in service, and our views on the respective areas of ambiguity, are set out below.

- Illness or injury: Overall, we consider that the rules relating to continuity of service in connection with an employee's illness or injury are sufficiently clear.

- Temporary cessation of work: Both employers and employees would benefit from further guidance on what constitutes a "*temporary*" cessation of work. In addition, in our view, the

outcome in *Hussain v Acorn Independent College Ltd [2011] IRLR 463*, in which the EAT held that continuity of service was preserved where there was a gap between a temporary contract and a permanent contract, introduces an element of unnecessary uncertainty in respect of rights of employees engaged on two or more successive fixed term contracts. We also suggest that the legislation could be clarified so that any periods under a zero hours contract in which an employee is not required to work will count as a "temporary cessation of work", regardless of duration.

- Arrangement or custom: Further guidance on what amounts to an "*arrangement or custom*" to preserve continuity of service would be beneficial.

26. We intend to update the guidance on continuous service, and would like to know what types of information you would find helpful in that guidance.

Please see response to Question 25 above. We consider that this guidance should take the form of real examples from case law and/or signposts to further information.

Section C: Holiday Pay

Question 27: Do you agree that government should take action to change the length of the holiday pay reference period?

Yes – we think that a reference period of 52 weeks is logical, fair and should be relatively easy to calculate for employers. We suggest that, if a worker is engaged for less than 52 weeks, then the reference period will simply be the average of a week's pay over their total period of engagement.

Question 28: If you answered yes to Q27, should the government:

a) increase the reference period from the current 12 weeks to the 52 weeks recommended in the review?

Yes – see above.

b) Set a 52 week default position but allow employees and workers to agree a shorter reference period?

No – we suggest it is better to keep the approach simple in terms of the statutory obligations and for a single reference period to be applicable across the board, save where workers are engaged for a lesser period (in which case please see our response to Question 27 above). Holiday pay calculations have already become overcomplicated, because of the interaction between the Working Time Regulations, the Working Time Directive and domestic and EU case law.

c) Set a different reference period

No - see above.

Question 29: What is your understanding of atypical workers' arrangements in relation to annual leave and holiday pay?

For example:

a) Are they receiving and taking annual leave?

We mainly advise employer clients, and our experience is that employers do make a significant effort to put in place good systems for calculating holiday entitlement for atypical workers, and to encourage atypical workers to take that entitlement. However many employers (particularly smaller companies)

do get bogged down in the detail of calculating entitlement and pay for atypical workers so we would encourage any greater certainty and simplification around this.

b) Are they receiving holiday pay but not taking annual leave?

See above.

c) Do you know of any other arrangements that are used?

No.

Question 30: How might atypical workers be offered more choice in how they receive their holiday pay?

This is a difficult issue. As a starting point, there is a distinction to be drawn here between the approach to calculating annual leave entitlement and holiday pay for atypical workers.

When looking at annual leave entitlement, in our experience some employers use a basic calculation of 12.07% of hours worked to calculate holiday entitlement.

The amount of holiday pay that is attributable to those 12.07% of hours worked is a different issue. The recent EAT decision in *Brazel v. Harpur Trust* has confirmed that the employer should not use 12.07% of pay as the base calculation for holiday pay. Rather, it should calculate holiday pay in accordance with the appropriate reference period (currently 12 weeks, but potentially 52 weeks if the government presses ahead with its proposals).

An atypical worker should have sufficient flexibility under the existing rules to nominate certain periods of time when they are not working as paid holiday, thus entitling them to be paid for that time. The employer can help to facilitate that by confirming how much holiday entitlement the worker has accrued at the end of any given month and inviting the worker to confirm whether they wish to take that holiday in the next calendar month. If so, the relevant holiday pay can then be added to the next month's pay.

Section D: Right to request

Consultation Questions

31. Do you agree that we should introduce a Right to Request a more stable contract?

We strongly agree that the Right to Request a more stable contract should be introduced, to help provide more certainty for those individuals whose existing contracts are not a genuine and/or accurate representation of their working arrangements.

In addition, we agree with the BEIS proposal that the Right to Request a more stable contract should be balanced against an employer's right to reasonably reject such a request. We propose that there should be an obligation on employers to inform the individual of the reason(s) for rejecting the Request within a reasonable time period, to encourage transparency in this regard. We suggest that employers should only be entitled to refuse a Request on eligibility grounds (for example, if the individual has previously made a Request in the preceding 12 month period) or for one or more prescribed reasons, akin to the law on the right to request flexible working.

Further, we believe that individuals should be afforded the right to appeal the outcome, if they believe the Request was unfairly rejected.

32. Should any group of workers be excluded from this right?

We do not believe that any particular group of workers should be excluded from the Right to Request a more stable contract, although we propose that employers may be entitled to refuse a Request based on eligibility grounds (please see response to Question 31 above).

33. Do you think this will help resolve the issues the review recommendations sought to address?

Yes, we believe that the Right to Request a more stable contract (as explained in further detail in our response to Question 31 above) will help to resolve the issues the review recommendations sought to address.

In addition, the BEIS proposal to extend the Right to Request a more stable contract to all workers (rather than limiting this Right to Request to agency workers and those on zero hour contracts) should help to assist a wider range of individuals whose contracts do not accurately reflect their day-to-day working arrangements.

34. Should employers take account of the individual's working pattern in considering a request?

Yes, we believe that employers should be required to take account of the individual's current working arrangement when considering a Request, to help address the legitimate concern that employers may issue individuals with contracts to afford themselves with "*one-sided flexibility*".

35. Should there be a qualifying period of continuous service before individuals are eligible for this right?

Yes, we suggest that employees should only be eligible for this right after a qualifying period of service, to help enable the employer to consider whether the Request should be granted on the basis that the individual's contract does not accurately reflect their day-to-day working arrangement.

We propose that individuals must have at least 26 weeks' continuous service by the date on which they make the request, to bring it in line with the minimum continuous service requirement under the Flexible Working Regulations.

36. What is an appropriate length of time the employer should be given to respond to the request?

We propose that employers should be required to respond to an individual's Right to Request a more stable contract, including delivering the appeal outcome (if applicable), within three months of the date the Request is made, or such longer period as the parties may agree, to reflect the law on flexible working requests.

37. Should there be a limit on the number of requests an individual can submit to their employer in a certain period of time?

Yes, we believe that individuals should be limited to one Request in any rolling 12 month period. Please see response to Question 31 above.

38. When considering requests, should Small and Medium Enterprises (SMEs) be included?

Yes; we do not consider that there is any good reason to exclude individuals who may be engaged by, or on behalf of, SMEs from the scope of the Right to Request a more stable contract.

Moreover, we do not consider it necessary to apply any dispensations to SMEs. In our view, our proposals in respect of the employers' obligations to consider a Request (as set out in our responses to Questions 31 – 37 above) are not so onerous that it would be considered unreasonable and/or too

onerous to expect an SME to be able to comply. We would however recommend detailed practical guidance to accompany any Right to Request regime which all employers, but particularly smaller companies with limited HR expertise, will find useful.

Section E: Information and Consultation of Employees Regulations (2004) (ICE)

Question 39 – Are there formal provisions in your workplace for informing and consulting employees about changes that may affect their work?

As a firm, we have an employee forum made up of employee representatives, who raise issues on behalf of the various groups within the firm, and which meets once every three months.

In our advisory capacity, we do not find that employers in the UK have employee forums or works councils set up as standard. In our experience, this tends to be a decision driven by individual business culture as opposed to any sort of standard expectation in the UK. We also agree with the view that it is very rare for employers to receive requests under the ICE Regulations – across our team of 14 employment lawyers our experience is that this almost never happens.

That said, it is typical for employers to initiate direct consultation with employees if any substantive change is proposed to their working conditions (in order to minimise disruption, promote a good culture, and to address the risk of constructive dismissal arguments). It is also very common for employers to keep employees regularly informed through company-wide or team meetings, intranets, regular group email communications, handbooks and policies (amongst many other methods).

If yes, were these provisions requested by employees or initiated voluntarily by the employer/manager?

Our employee forum was initiated voluntarily by the employer.

Question 40 (for employees only) – Have you ever requested Information and Consultation of Employees provisions in your workplace?

This question is not applicable to us.

If no, please describe why you have not made a request for ICE provisions. Please select all that apply:

This question is not applicable to us.

If you answered yes, did this lead to positive outcomes for you at work?

This question is not applicable to us.

Question 41 - How might the ICE regulations be improved?

In our view, the ICE regulations have not added a great deal to the way employers and employees engage with each other, and it is difficult to see how the existing regulations could be improved in such a way that would change this position. It is our experience that, as a common part of modern working practices, a large number of employers do engage with employees on any issues that may affect them. As has been widely reported, the "single-employer career" is quickly becoming a thing of the past for employees, and so employee motivation and workplace culture are seen as a crucial part of managing a stable and successful business for modern employers. Giving employees the right level of information, and listening to their feedback, is an important part of this.

Therefore, in our view, it would not be an effective use of government resources to amend the ICE regulations. We would suggest that they are left untouched on the basis that there are other much more effective layers of protection for employees. Any changes within a business that may lead to job losses or a restructuring already require consultation as a result of well-established and understood unfair dismissal case law. In other cases, consultation is prescribed by statute – including, for example, section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 and/or Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. On a more practical note, as above, any important changes to working conditions will be subject to consultation by any sensible employer, for fear of an angry and demotivated workforce and/or constructive dismissal claims if they do not.

In addition, in our experience of working with the much more highly prescriptive and regulated employee works council and employee representative requirements in countries such as France, Germany and Italy, this by no means guarantees better employer/employee communications or a positive engagement on workplace issues. While employee works councils can be positive, they can also be a source of intense frustration for both employers and employees and can (in fact) lead to deteriorating relationships in the workplace, lack of trust between the works council and the employer, and entrenchment on both sides. In fact, it tends to put employers off having frank and open informal discussions with their workforce.

Perhaps a practical alternative might be to include some more precise guidance on employee forums, or consultation, in the Acas guide on employee communications and consultation, and give that guide a similar weight to the Acas Code of Practice on Disciplinary and Grievance Procedures. This would mean that any constructive dismissal claims arising out of any perceived failures to properly consult on workplace changes creates an added risk that a successful claim might be the subject of an uplift in compensation. We suggest that this would provide a good and practical incentive for employers to establish good information and consultation practices as standard.

Question 42 - Should the ICE regulations be extended to include workers in addition to employees?

No – please see above.

Question 43 – Should the threshold for successfully requesting ICE regulations be reduced from 10% of the workforce to 2%?

No – please see above.

Question 44 – Is it necessary for the percentage threshold for implementing ICE to equate to a minimum of 15 employees?

Please see above – we do not agree that amending the ICE Regulations is a good approach to this issue.

Question 45 - Are there other ways that the government can support businesses on employee/worker engagement?

See under question 41, our suggestions relating to a specific Acas Code on consultation practices.

Question 46 - How might government build on the expertise of stakeholders such as Investors in People, Acas and Trade Unions to ensure employees and workers engage with information about their work?

See above.

Question 47 - What steps could be taken to ensure workers' views are heard by employers and taken into account?

See above.

Question 48 - Are there other ways that the government can support businesses on employee/worker engagement?

We suggest that the government may wish to consider ways of positively rewarding commendable employee/employer engagement – for example, by establishing an accreditation scheme.