BEIS Consultation

Taylor Review: Measures to increase transparency in the Labour Market

UNISON Submission

May 2018

Introduction

1. UNISON is the UK's largest public service union with 1.26 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers, working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

2. As a trade union working to tackle exploitation, bad conditions of service and to help vulnerable workers, UNISON welcomes the opportunity to comment on any attempts to tackle labour market exploitation and improve enforcement of basic employment rights. Trade unions play an active part at workplace and national level to improve conditions, tackle breaches of the law, support our members in access to workplace justice and seek redress.

3. UNISON believes that the most vulnerable workers are those not covered by collective bargaining or trade union organising. The imbalances of power in the workplace, within the labour market and in our legal system, means that most workers face insurmountable obstacles in tackling unscrupulous employers as individuals.

4. While this consultation focuses on transparency, it does not cover payslip transparency, a major issue for UNISON members in the social care sector. This response will therefore outline critical issues around transparency and working time and highlight areas for Government action before responding to the consultation questions.

Payslip transparency

5. There is a major problem with payslip transparency in the homecare sector. Many homecare workesr are only paid for the time spent in the homes of the people they care for (contact time) and do not get paid for the time they spend travelling between appointments. This model results in endemic non-payment of the NMW with the Resolution Foundation estimating that care workers are "collectively cheated of £130m" a year.[1]

6. In the Low Pay Commission's recent report of Spring 2016, the commission expressed support for having greater transparency around payslips, stating:

   "We recommend that the government reviews the current obligations on employers regarding provision of payslips and considers introducing a requirement that payslips of hourly-paid staff clearly state the hours they are being paid for."

7. In early 2018, the government finally responded and introduced legislation requiring employers to list the hours that workers have been paid for on payslips. However, UNISON has serious concerns that this measure will not do anything to address the problems in the social care sector where employers routinely issue payslips that mask non-compliance with the National Minimum Wage.

8. Most homecare workers are only paid for the time they spend in the home of a person they are providing care for and not for their travel time, even though it counts as working time that must be included in calculating pay covered by the National Minimum Wage. It is estimated that homecare workers spend a fifth of their working time travelling between visits. The failure to pay for this time has the effect of pulling their average hourly rate, which is usually already very low, down below the legal minimum.

9. Unfortunately, many homecare employers seek to mask this by producing payslips that are either incredibly complex or very short on detail, with the result that many homecare workers are unable to determine whether they are being for all their working time. Some payslips will just state how much a worker is being paid, without any calculations to show how that figure was reached, while others do break down the pay by call but the failure to provide information on the travel time accounted for in the pay calculation renders the payslip meaningless in compliance calculation terms. These more detailed pay advices purported to provide the worker with more information, yet in reality they are a voluminous exercise in saying very little in relation to minimum wage compliance. In 2017, UNISON asked 1,000 homecare workers whether they could tell from their payslips whether they are being paid for all the hours that they are working. In response, 63% said that they

[1] https://www.resolutionfoundation.org/app/uploads/2015/02/NMW-social-care-note1.pdf

could not, which gives a sense of how widespread the lack of pay transparency is in the sector.

10. UNISON has continually raised this issue with government ministers and officials, but whilst they have recognised that this is a problem, they have failed to take the necessary steps to deal with it.

11. Our solution was to provide the government with draft regulations for section 12 of the 1998 National Minimum Wage Act which, if enacted, would have required employers to provide homecare workers with a written statement with their payslip, containing sufficient information to allow them to determine if they had been paid the minimum wage for all of their time. Given that it is already down to employers to show that they are compliant with the minimum wage, rather than for workers to prove that they have not been paid properly, this was a natural step for the government to take. All UNISON's proposal effectively does is move the timeline on existing requirements – such are the requirement to maintain and produce NMW records for inspection - to the point of payment and on a proactive, rather than reactive basis. This is a marginal issue for the compliant employer yet crucial for the vulnerable worker in a precarious employment arrangement. Workers would be enabled to judge for themselves whether they have been paid properly or not and then either challenge their employer or report them to HMRC. UNISON is firmly of the view that, for increased payslip transparency to occur in practice, with the aim of providing workers with more information to assist with assessment of NMW compliance, the regulations must be made under the relevant act – ie the NMWA.

12. Employers are already required to pay workers the NMW, are required to maintain NMW records for a period of 3 years and have the payroll information to demonstrate compliance, so it would not result in any increased burden upon them. They would simply be required to provide workers with the details of a calculation of compliance that they must already be undertaking and provide it to the worker at the point of payment. By doing so, workers will be able to verify to their own satisfaction that they are being paid in compliance with the NMW. Where they are not, they will be better able to challenge that non-compliance in a timely manner. This is especially important given the current stance of HMRC to allow employers found to be non-compliant with the NMW to be able to self-correct for their wider workforce.

13. The new measures introduced by the government will allow employers to obscure the fact that they are not paying homecare staff for all the working

hours to which the minimum wage applies and allows them to pay illegal wages. This is because the regulations do not require employers to separate out contact time from travel time.

14. Because homecare workers are routinely not paid for all of their travel time – which counts as working time - the government's new requirement will allow employers to continue to provide payslips that hide the fact that they have not paid workers properly. The government even recognised this problem in their Equality Impact Assessment of the new payslip legislation:
"For employees that are paid the same rate of pay for all the different types of hours they have worked (i.e. overtime and travel hours) and do not receive additional payments (e.g. bonuses) or deductions, employees would be able to identify NMW non-compliance by dividing their gross pay with this number of hours stated. Therefore, as an additional benefit of this proposal, for those employees with relatively straight-forward pay arrangements, we expect underpayment and the percentage of NMW non-compliance to decrease. ***This will not be the case for all employees and, where pay arrangements are more complex, further interpretation would be required in order to determine NMW compliance****."*

15. The government must get tougher with care employers who play the system, and deny workers a proper wage. Such unenviable working conditions mean the care sector suffers from a huge turnover of staff, which has a huge impact on the kind of care that the most vulnerable in our communities receive.

Problems with payslip records

16. Allowing care employers to not maintain sufficient minimum wage pay records is at the heart of the problem of the widespread levels of non-compliance in the sector. There should be rigorous enforcement on the issue of record keeping.

17. The failure for many social care employers to provide workers with clear and understandable payslips is also linked to their failure to maintain sufficient pay records and to HMRC's failure to take any action against employers over this problem.

18. Section 10 of the National Minimum Wage Act 1998 gives workers the statutory right to inspect their pay records if they have reasonable grounds to believe they have been paid below the minimum wage. Employers have 14 days to produce records for inspection on receipt of a statutory request. In our submission last year we revealed how, in nearly all instances where UNISON

members made statutory requests to inspect their NMW records, social care employers were ignoring the requests.

19. In the limited instances where NMW records were produced, UNISON's experience is that the records were indecipherable and could not used to be determine whether the employer was compliant with the minimum wage. This is very concerning given that the purpose of the s10 right is for the worker to determine whether or not they had been in receipt of the National Minimum Wage. The failure to compile clear and understandable minimum wage pay records has frustrated care workers and their representatives in their efforts to determine whether are being paid legally.

20. Regulation 59 of the 2015 National Minimum Wage regulations clearly states the level of minimum wage records employers must keep.

Records to be kept by an employer

59. (1) The employer of a worker who qualifies for the National Minimum Wage must keep in respect of that worker records sufficient to establish that the employer is remunerating the worker at a rate at least equal to the National Minimum Wage.

(2) The records required to be kept under paragraph (1) are to be in a form which enables the information kept about a worker in respect of a pay reference period to be produced in a single document."

21. However, HMRC has failed to take action against care employers to ensure that they maintain proper pay records as the law requires. When UNISON has raised this issue with HMRC and BEIS officials they have claimed that the failure to prosecute any social care employers for failing to keep sufficient records, despite the requirements of Regulation 59, is because the regulations are too vague. The lack of a clear definition about the standard of records that must be kept hinder prosecutions.

Consultation Questions

Section A – Written Statements

Q9-19

UNISON believes that a written statement of rights is a helpful step forward to improving transparency in the workplace and increase awareness both amongst employers as well as employees of the rights to which workers are entitled. We therefore welcome the Government's proposal to extend the right to a written

statement to all workers as a day one right. Requiring all employers to adopt this good practice approach could create a level playing field for reputable employers, ensuring they cannot be undercut by unscrupulous ones. Agencies are already required to provide job seekers with written information when they first register with the agency and before each new assignment. Extending the right to a written statement to agency workers is therefore unlikely to create additional administrative burdens for compliant agencies.

To assist employers, the government should develop an online tool to assist them to prepare written statements.

However, providing workers with additional information by itself will not change the power dynamic in the workplace or mean workers will have an increased choice whether to accept insecure work. For many working people insecure and low paid employment is the only option available in the current labour market.

Day one rights

- UNISON believes that a written statement should be a day one right. Ideally, workers should receive details about their job before they start work – but this should not happen any later than the first day of employment.
- UNISON believes that that the information, where possible, be included in a single document – workers are more likely to retain this.
- UNISON also has concerns about written statements provided in an electronic format. They are easily changed or altered by the employer without informing workers or seeking their consent in advance. This makes it difficult for individuals to enforce their rights and it might also amount to a breach of contract where changes to terms and conditions are not agreed by a trade union or the individuals concerned.
- If an employer provides the statement electronically , the worker must be able to download, store and print the information. Preferably, workers should also be provided with a backup paper copy. If an employer decides to change any information about pay and conditions, they must inform any affected workers directly in writing and secure their agreement to the proposed changes.

Existing content of the written statement

UNISON believes that all workers should continue to receive the current list of prescribed information, including details about their pay and working hours. However, the legislation and accompanying guidance should be revised to ensure that all workers are informed of their expected hours and patterns of work , as suggested in the BEIS consultation. This has the advantage of encouraging employers to plan their workforce needs in advance and may lead to a fairer

distribution of working hours for those employed on zero-hours and short hours contracts.

The employer - informing people who their employer is will assist individuals to enforce their rights. Many who work for umbrella companies and sub-contractors often do not know who their employer is.

Job Description - informing individuals about their job description clarifies work expectations and enables people to assess whether they are receiving equal treatment at work.

Start date - notification of the start date will help people calculate their entitlement to rights.

Whether employment in a previous job will count towards their period of continuous employment: employees affected by TUPE transfers should be informed that their continuity of employment is preserved when they start working for a new employer. In parts of the public sector, including public authorities and the education sector, employees can take employment with a previous employer into account when calculating their entitlement to redundancy pay. We believe these provisions should be extended to other statutory rights.

Pay – It is important that workers are informed how much they will be paid and how their pay will be calculated. People should also be informed about all forms of remuneration including overtime pay, commission or bonuses.

Holiday Pay - It is vital that workers are informed about holiday pay and how it is calculated. This is particularly important for agency workers and those on zero hour contracts who often miss out on paid holidays. Extending the right to a written statement to all workers may improve compliance with holiday pay rules and assist workers to enforce their rights.

Place of work - individuals should also be informed of their place of work and if they will be expected to relocate. Identifying the place of work assists them in calculating their right to pay for travel time.

Additional content

We agree that the range of information to be included in written statements should be expanded, in line with recommendations emerging from the EU. This should include:

- **How long** a temporary job is expected to last, or the end date of a fixed term contract.

- **How much notice** the employer and the worker are required to give to terminate the agreement. In line with proposals from the EU, employers should also be required to inform workers in the written statement about the disciplinary procedures which will be followed before they can be dismissed.

- **Sick leave and pay entitlement** – this could encourage employers to ensure that all workers benefit from the same sick pay and leave entitlements. It could also improve workers' awareness of their rights to statutory sick pay.

- **All forms of remuneration** beyond pay – including vouchers, lunch, uniform allowances and rights to personal protective equipment and travel expenses. Including such information would increase transparency and reduce the risk of discrimination experienced by those in part time and insecure work.

- **All types of paid leave** – including maternity, paternity and adoption leave, shared parental leave, time off for dependents, time off for ante-natal appointments and compassionate and bereavement leave. This may encourage employers to ensure that all workers, not just permanent employees benefit from the full range of family friendly entitlements.

Effective enforcement

Extending the right to a written statement will only be meaningful if it is accompanied by effective enforcement.

- Workers should be able to take free standing complaints to an Employment Tribunal to enforce their rights.
- Employers who fail to comply with their duties should face substantial penalties and the worker should be fully compensated.
- In all other cases, tribunals should check if a worker has received an accurate written statement. If not, the worker should be entitled to a minimum award or a 25% uplift in compensation, whichever is the greater.

Section B

Continuous Service

Questions 20-26

UNISON welcomes the Government's recognition that the rules on continuous employment need to be reformed. Currently, it is too easy for employers to manipulate the system, to prevent individuals from qualifying for basic workplace rights, including maternity and paternity leave, the right to request flexible working, statutory redundancy pay and protection from unfair dismissal. Unscrupulous

employers can gain a competitive advantage over reputable businesses by avoiding the costs of redundancy payments when laying off staff. Revising the rules would provide a level playing field for companies.

The currently rules also mean that those most in need of protection in the workplace – including zero hours contract workers, agency workers and casual workers – are those most likely to lose out on rights because they experience gaps in employment.

However, the Government's proposal to extend the period counted as a break in employment from one week to one month does not go far enough. It will not prevent unscrupulous employers from gaming the system to deprive people of their statutory rights.

UNISON believes that all workers should have **day one rights** including to maternity leave, statutory redundancy pay, protection from unfair dismissal and the right to request flexible working. The creation of day one rights would remove the problems of the lack of continuity of employment and ensure all working people benefit from the same decent floor of rights.

Failing this, UNISON believes that the Government should **reform the rules on continuity of employment** so that:

- Any calendar month during which an individual does any work for an employer or which is party, or wholly governed by an employment contract, will count towards a workers' continuous service. Workers would accrue service month by month.

- Any periods of statutory leave, including holiday and any form of parental leave, will count towards a worker's continuous service.

- Where are worker has a gap in work of more than a month, their continuous service will not be broke and the clock will not return to zero. Instead it will pause and restart whenever they do future work for the same employer.

These measures will assist those who work intermittently for employers, including agency workers and those on zero hour contracts to qualify for key employment rights.

Failing this, the government must ensure that any legal changes must reflect existing working practices. In our opinion, extending the period which does not break continuity from one week to one month would be insufficient. A longer period must be prescribed – for example, 6 months.

Section C – Holiday Pay

Questions 27- 30

UNISON **does not agree** that the reference period for calculating holiday pay for those who work variable hours should **be extended from 12 to 52 weeks**. We believe extending the reference period in this way might disadvantage low paid workers hwo work for short but intense periods for employers, including zero hour contract workers and agency workers.

It is not uncommon for employers to hire staff to cover peak periods in demand. Such workers who sacrifice time with their families during holiday periods are often keen to take time off soon after the busy period. Under the current proposal they could lose out financially. Their right to holiday pay would be diluted if it was calculated on the basis of their average earnings over the course of the year rather than their earnings from the last three months.

We recognise that in some workplaces, employers and working people may benefit from increased flexibility on holiday pay rules. We therefore propose that employers and unions should have the ability to negotiate longer reference periods through **collective agreements**. Requiring agreement on a longer reference period would ensure that the interests of workers are protected alongside the interests of the employer.

Rolled up holiday pay

UNISON agrees with the Government's assessment that paying workers rolled up holiday pay is unlawful under EU law. But too many employers abuse the rules to reduce their costs and derpive workers of the right to paid time-off.

UNISON believes that:

The HMRC NMW team should be given responsibility for enforcing holiday pay, alongside the employment tribunals. But such enforcement will only be effective if the HMRC is properly resourced and equipped to take on the role.

Such holiday pay abuses will only be prevented if the growth in insecure contracts is reversed and the government takes urgent action to ensure all workers benefit from stable regular employment.

Section D – Right to Request

Questions 31- 38

UNISON believes that a right to request a more stable hours contract will not amount to a genuine right and will not provide the security required by those on zero hours,

short hours and insecure contracts. Such workers will often be reluctant to request for fear they will be sacked or 'zero-ed down'. The real problem with zero hour, short hours or insecure contracts is that the steep imbalance of power between the employer and the worker leads to one-way flexibility, exploitative working conditions and an employment relationship characterised by fear and anxiety. Many of these workers face great uncertainty about what hours they will work or what wages they will take home each month.

Too often, workers on insecure contracts can be offered work at the last minute (and be kept waiting around by their employer) or have it taken away just as quickly. According to recent TUC polling, almost three-quarters (73%) of zero hours contract workers have been offered work with less than 24 hours notice, with 27% saying this is a regular experience. Half (51%) have had hours cancelled with the same amount of notice. Around a third of respondents (35%) had been threatened with not being given shifts in the future if they turn down work.[2]

UNISON believes that the government should restrict the use of zero hours contracts:

- Most individuals on zero hours and short hours contracts work regular hours for their employer. Workers should have a written contract which guarantees their normal hours of work.
- Financial incentives should be created for employers to reduce their reliance on zero hours and short hours business models. Workers employed on such contracts should have a right to a premium rate of pay, for any non-contracted hours worked. The enhanced hourly pay rate should be linked to the individuals normal pay rather than an enhanced national minimum wage rate. This would ensure individuals are properly remunerated for the flexibility they provide employers.
- All workers should have a right to reasonable notice of work shifts and of shift cancellations.
- Employers who fail to provide reasonable notice of shifts should face substantial financial penalties.
- Where a shift is cancelled without notice, the workers should have a right to full pay for the planned shift and to be reimbursed for any costs they incur including transport and childcare costs.

If the government presses ahead with a right to request, UNISON believes a number of safeguards should be put in place, including:

- The right to request must be a day one right. A qualifying period would have the effect of excluding ZHC workers, agency workers and those on temporary contracts from the right to ask for a more stable contract.

---

[2] https://www.tuc.org.uk/sites/default/files/great-jobs-with-guaranteed-hours_0.pdf

- Workers should be able to request a meeting with the employer at which they have the right to be accompanied by a union rep or a full time official.
- Effective detriment provisions should be introduced to ensure workers are not sacked, refused future work or suffer other forms of victimisation because they requested a more stable contract.
- Employers should be required to provide written reasons and to justify any decision not to provide the individual a stable contract.
- Agency workers should have a right to request a direct and permanent contract with a hirer. After three months, the hirer should be required to review whether the need for work is ongoing. If so, they should be required to offer the agency worker direct employment.

Section E – ICE regulation

Questions 41- 48

UNISON supports the Taylor Review recommendation that the ICE regulations should be extended to all workers. The statutory thresholds for requesting ICE arrangements should also be substantially reduced. Employers should be required to enter negotiations on establishing ICE arrangements when requested by a recognised trade union. In non-unionised workplaces, a request by 5 employees should also trigger negotiations with an employer.

However, UNISON believes that ensuring all workers have a right to a voice at work and to be represented by an independent trade union is critical in tackling stagnating wages, labour market exploitation and increasing economic productivity. The government should:

- Ensure unions have a right to access workplaces so they have the opportunity to tell workers about the benefits of union membership
- Strengthen the right to be accompanied to ensure individual workers have the right to be represented by a union rep, including when seeking an improvement in pay and conditions
- Adopt measures which promote and extend collective bargaining, including in low paid, low productivity sectors.