Transparency Consultation Response

This response has been prepared by members of the Centre for Law at Work at the University of Bristol Law School, comprised of leading academics and practising lawyers in the field of employment law. It is in response to the consultation in response to the Taylor Review, entitled *Consultation on Measures to Increase Transparency in the Labour Market*. We have not responded to all questions on the consultation.

Section A: Written Statements

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 agree strongly with this proposal. Consideration should be given to extending the right to a written statement to all workers and from the start date of the engagement. But it needs to be backed by effective sanctions for non-compliance: see below.

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

The current content of a section 1 statement should be maintained. If the employer is a company, the name of the employer should include the registered company name together with any trading name. Not only will this help employees understand the correct identity of their employer; it will assist employment tribunal judges in ensuring that any judgments/awards are made against the correct entity. There should also be a requirement that the scale, rate or method of calculating remuneration is set out with sufficient clarity, since a persistent issue in relation to under-payment of the national minimum wage is that workers do not fully understand the basis on which their pay is calculated.

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? b) How much notice the employer and the worker are required to give to terminate the agreement? c) Sick leave and pay entitlement? d) The duration and conditions of any probationary period? e) Training requirements and entitlement? f) Remuneration beyond pay e.g. vouchers, lunch, uniform allowance? g) Other types of paid leave e.g. maternity, paternity, bereavement?**

Yes. Certainty and clarity will benefit both parties. Providing comprehensive and transparent information at the outset of any engagement is likely to avoid employers having to deal with misunderstandings later on in the relationship. The statement should also include details of unpaid as well as paid leave entitlements.

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

We strongly agree with this proposal. While there may be instances where an individual is hired to start work immediately, it is far more common for there to be a period between accepting a job offer and starting work. For this reason, it does not seem unreasonable for an employer to be asked to provide a written statement on or before the start date, unless there are exceptional reasons which prevent this. The wording could be phrased so as to require the statement to be provided

before or at the time employment begins or, where that is not reasonably practicable, as soon as is reasonably practicable and in any event within fourteen days of starting employment.

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

Ideally all information should be provided by the start date, subject to a qualification where this is not reasonably practicable (see above). This is likely to be most administratively convenient for an employer rather than providing information in tranches.

In addition, the sanction for non-compliance with provision of a s.1 statement remains inadequate. A declaration alone is a weak remedy, giving little incentive on employers to provide one or on workers to enforce their rights. The provision in s.38 of the Employment Act 2002 for increased awards where an employer fails to provide a statement is not a sufficient deterrent, since it is of a small amount and is only activated where another claim is brought. We consider that (i) the failure to provide a statement should give rise to a free-standing claim for an award of compensation, fixed at a sufficient level to ensure a genuine deterrence (there could be an increased sanction, for example, for repeat offenders); and (ii) this issue should be subject to state enforcement, along similar lines to the enforcement of the national minimum wage.

18. Which of the following best describes your awareness of the ACAS guidance on written statements?

We have good knowledge of the ACAS guidance.

19. If you have some knowledge of the ACAS guidance, how helpful did you find it?

The guidance is helpful but more could be done to raise awareness that this guidance (and other helpful guidance) exists. By its nature, the guidance is relatively 'top line' and so cannot cover the more difficult issues that may arise. This inevitably means that it is limited and employers may need to supplement the guidance with advice.

Section B: Continuous Service

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

The current rules can be confusing for employers when calculating length of service (e.g. judging retrospectively whether a cessation in work is temporary). Employers are likely to benefit from greater clarity about what periods count towards continuous service and how this is calculated.

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 our answer to Q20. In addition, the current rules are particularly problematic for those working in the 'gig economy', agency workers and those on zero hours contracts. It is likely that some of these workers satisfy the test of employment while working or while on an engagement – that is they are employees not workers. The problem, however, is that they may only be employed for the short period (e.g. one day) that they are working. Owing to the absence of 'mutuality of obligation' during their 'off time', these employees often do not accrue sufficient length of service to

entitle them to fundamental employment rights such as the right not to be dismissed unfairly from one's job. Treating each break as a cessation in employment essentially has the effect of resetting the start clock to zero.

We would abolish the current rules regarding continuity of employment as a precondition for fundamental employment rights, such as unfair dismissal (see below).

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

Sectors in which casualisation is particularly pronounced (e.g. domestic care, agriculture, hospitality, higher education) are likely to offer examples.

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

Yes. The University and College Union's report *Stamp Out Casual Contracts* notes that 54% of academic staff are engaged on insecure contracts in some form. According to figures published by the UCU in March 2018, on average 27% of university teaching is carried out by hourly-paid staff.

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?

Please see our answer to Q21. We note that the Taylor Review offered two proposals: (i) to increase the gap which breaks continuity from one week to a month; and (ii) to consider widening the circumstances in which the statutory bridges apply.

Increasing the minimum break period to one-month is superficially attractive and it is perhaps therefore not surprising that the proposal is adopted in its entirety by the subsequent Parliamentary committees' report (2018). However, the danger is that it will create an incentive on employers to engineer gaps of more than this length, thus exacerbating precisely the problem of unreliable, low income employment which the Taylor Review highlights.

We consider that the government should not impose a minimum qualifying period for employees to obtain fundamental employment rights; alternatively if some rules are preserved, they should operate as a ratchet, subject to a break of (say) a year (see below).

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

We believe that these are insufficient, since they are bedevilled by uncertainty (e.g. in assessing what is a temporary cessation of work). We have four proposals.

1. At the very least the law should make clear that continuity should (i) continue to accrue whenever a worker takes statutory annual leave or any other form of statutory entitlement to leave, which at present it fails to do. The rules only preserve continuity if the absence can be treated as falling within s.212(3)(c), which may or may not be the case depending on the facts (cf. *Vernon v Event Management* UKEAT.0161/07/LA).

2. The qualifying periods should be removed or greatly reduced, at least for unfair dismissal. If, for example, the right not to be dismissed is an important social right and dismissal can affect reputation and hence employability, why should a worker need two years to accrue it? Normal

probation periods are much shorter than two years, providing an indication of how long an employer needs to assess a person's competence for a job. The International Labour Organization (ILO) Tripartite Committee considered a two-year qualifying period (needed for most unfair dismissal claims) went beyond the period required to assess if workers are capable in their job and so was not justified. Protection of reputation is an integral element of private life, according to the Court of Human Rights, and an unjustified dismissal affects prospects of future employment, regardless of length of service, so why require two years' service? It also has potentially discriminatory effects, as illustrated by the *Seymour-Smith* litigation in the past. Thus two years' continuous service as a precondition for the right to be unfairly dismissed is, in essence, no more than a restriction on access to justice.

3. An alternative, simpler mechanism is that any week in which a person works *qua* employee counts towards continuity, and periods of non-employment do not break continuity at all: in effect, a ratchet mechanism. This would be subject to an exemption where the break is, say, a year or more and the relationship was genuinely entirely new. So a worker who works for a week for an employer should return to accruing continuity each week they work for the employer, so addressing the problem with workers who may have lengthy breaks between assignments but who in practice work for long periods for the same employer (e.g. term time teachers).

4. Alternatively, we would wish to see an express statutory mechanism for establishing when an umbrella contract arises with respect to a casual or zero hours worker, as in *Pulse Healthcare Ltd v Carewatch Care Services Ltd & 6 Others* UKEAT/0123/12/BA. In this way, the entitlements of those hired in the 'gig economy' and others will be more transparent and enforceable.

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?

The guidance will need to clearly explain rules which are pretty opaque to most lay readers.

Section C: Holiday Pay

27. Do you think that the government should take action to change the length of the holiday pay reference period?

Yes.

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

A reference period will disadvantage workers over the existing rules in many cases and cause all kinds of practical problems. First, the divisor of 52 weeks is wrong in any case, since it *includes* the 5.6 weeks' annual leave: a permanent worker who works 46.4 weeks for £200 each week should receive normal weekly pay for the remaining 5.6 weeks, not pay discounted by dividing the total annual wages by 52 - (48.6 x £200)/ 52 = £186.9 a week. Second, it will cause insuperable difficulties for casual workers, since the parties will not know at the end of the first assignment (for which a payment under regulation 14 of the Working Time Regulations (WTR) is due) what will be the 52-week average. Third, it will result in workers being better or worse off than if they worked during the relevant period, in breach of EU law (see below). Fourth, it will cause problems for e.g. workers who

are off sick for periods, a particular problem with disabled workers, meaning that the average yearly pay will be lower than if they were not off sick. The proposal has been poorly thought out.

The existing EU case law makes clear that normal remuneration must be paid in respect of annual leave, and this will continue to apply after Brexit by virtue of the EU (Withdrawal) Bill. It is a rule based on the purpose of paid annual leave, that a worker should not suffer a financial loss as a result of taking annual leave, so giving a financial incentive not to exercise the right. The same rule is reflected in ILO Convention C132, by which workers must receive their normal or average remuneration in respect of annual leave. Tribunals and employers apply similar rules when they assess, for example, lost earnings in the notice period in claims for breach of contract. The rules on a week's pay already provide for a flexible method – see s.228 ERA, allowing a tribunal to award such sum as 'it considers appropriate' (though not incorporated into the rules on working time).

In that light we suggest the best solution is to follow the existing case law and to require employers to pay 'normal or average remuneration in respect of paid annual leave'. In practical terms, so long as an employer adopted a method which was reasonable, this would withstand scrutiny, just as takes place with payments in lieu of notice or with those regulations on paid annual leave which do not adopt a formula based on a week's pay (see e.g. the Civil Aviation (Working Time) Regulations 2004, considered by the Supreme Court in *Williams v BA* [2012] ICR 1375). Alternatively, and preferably, the rules on a week's pay should be reformulated (see below).

If a derogation is permitted from the above, it should only be by means of collective bargaining: any provision by which employers or employees could 'agree' a reference period will only lead to disadvantages to employees.

We consider a more fundamental appraisal should be made of the rules on a week's pay. The rules are complicated, opaque and relate to an earlier era typified by full-time permanent employment and can produce anomalous results (e.g. on the domestic approach, non-guaranteed overtime, even if worked every week, is excluded: see *Bamsey* [2014] ICR 1083). It would be more straightforward if the rules apply a simple average for the purpose of calculating a week's pay, along the lines of s.224 (which currently only applies where there are no normal working hours). That section already provides, via s.228, for a tribunal to apply different rules where an employee has not been employed for a sufficient period.

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? b) Are they receiving holiday pay but not taking annual leave? c) Do you know of any other arrangements that are used?

There is already a large body of evidence on the extent to which annual leave is underpaid: see the recent report of the Director of Labour Market Enforcement, United Kingdom Labour Market Enforcement Strategy 2018-19 at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf.

There is much anecdotal evidence, too, that workers are not paid annual leave (see e.g. the recent 'gig' economy cases, in each case of which workers were not paid annual leave). Rolled up holiday payments, too, remain common despite being ruled unlawful by the Court of Justice. We consider

the case of Don Lane an excellent illustration of the current situation encountered by atypical workers. He was a DPD courier, whose written contract described him as an 'independent contractor', aiming to ensure that he was neither an 'employee' nor a 'worker' and therefore was not entitled to the legal rights such as protection against dismissal, the national living wage, paid holidays, or even statutory sick pay. He suffered from diabetes and, having already been fined £150 for attending a hospital appointment earlier in the year, died in January 2018 after working through the Christmas season despite illness. His employers knew that he had suffered from a diabetic collapse at work but adopted a system which strongly discouraged him taking any time off for sickness: no income for sick leave and, worst of all, fines. We note that the Government does propose consultation on Taylor's proposal to move 'sick pay' from a right of 'employees' only to one also applicable to 'workers', but this would not be a default entitlement of anyone hired as an independent contractor (if they have sufficient 'control' over their own work). Don Lane would still remain without holiday pay and annual leave.

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

What is important is that all those providing labour to another and not in business on their own account, like Don Lane, receive annual leave and holiday pay.

Section D: Right to Request

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

Yes. This should be supported by a right not to be subjected to a detriment for making such a request. In addition, there should only be a limited right for any employer to refuse such a request.

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

No. There is no reason to limit the right to ask as it is only a right to request. If it is not feasible or appropriate to give a more stable contract in an individual case, the employer has the right to refuse with good cause. Moreover, if the intention is only to include those workers who have been engaged for 12 months, this will already exclude many workers from its scope.

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

Perhaps. The obvious risks with this approach are: (i) employers may ensure that no individual is hired for 12 months so as not to trigger the right to request; and (ii) the risk that an individual is removed from a contract or subjected to some other detriment for having made the request.

These risks can be mitigated if: (i) the qualifying period to make a request is reduced; (ii) employers have only limited grounds upon which they are legally entitled to refuse a request; and (iii) rules are introduced preventing an employer from subjecting an individual to a detriment for having made a request.

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

It is not clear why working patterns should be determinative. It is perfectly possible for an individual to be engaged on a stable employment contract with a flexible working pattern.

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

It is not clear why a qualifying period is necessary. One aim of a qualifying period is presumably to ensure that employers do not waste time dealing with requests from those recently engaged where it is not clear that more regular work is available. The grounds for refusal should be drafted so that an employer could justifiably refuse a request in such circumstances. Equally, if it is clear from early on in the engagement that an individual will receive regular work from the same hirer, there appears no good reason why that individual should not be given a more stable contract to reflect this.

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

We would recommend reversion to the procedures previously required in respect of requests for flexible working. The current requirements for this purpose, namely that there be a 'reasonable' response in a reasonable manner within a three month period (s.132 of the Children & Families Act 2014) has led to the inefficacy of what was a significant development in UK employment law. We would therefore advocate a procedure which required (in a manner consistent with earlier legislation, namely the Employment Act 2002) that:

- the request must be in writing, be dated and state whether a previous application has been made to the employer and (if so) when;
- within 28 days the employer must hold a meeting with the employee and the employee has the right to be accompanied;
- the employer than has 14 days in which to give their decision, which must be in writing and can either specify the variation to contract or reject the request giving a sufficient explanation;
- the employee has a right to appeal within 14 days;
- within 14 days the employer must respond to the appeal again giving reasons.

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

A request should be able to be made at least every six months. (Drawing on the experience of the operation of the right to request flexible working when there was a 26 week qualifying period.)

38. When considering requests shall SMEs be included?

Yes. If there is a genuine reason why a stable contract cannot be given, that is a matter for consideration after the request is made. There is no reason why certain groups of employers should be excluded from having to consider any request in the first place.

Section E: ICE Regulations

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

Yes, for e.g. informing and consulting relevant trade unions in redundancy situations under Ordinance 27 of the University of Bristol http://www.bristol.ac.uk/hr/policies/ord27index/ordinance27.html.

41. How might the ICE Regulations be improved?

Under the current Regulations, an information and consultation arrangement can be triggered either by the employer voluntarily commencing negotiation of an agreement or by a request from the employees. This can be blocked by a pre-existing agreement (PEA) on information and consultation *unless* 40% of the workforce and at least 50% of those voting want fresh negotiations.

We would recommend the following:

1. The employer could be placed under a legal obligation to inform its workforce of the ICER procedure on a regular basis. Many workers do not know of their entitlements in this regard and regular advice would be helpful. The government could give employers a summary that they should use for this purpose.
2. It would also be possible to give independent trade unions a freestanding right to 'pull' the ICER trigger on behalf of the workforce, as under the German codetermination system. This could provide trade unions with an organisational opportunity to use ICER more effectively as an organisational resource. In turn, the quality of consultation procedure is likely to be enhanced where trade unions provide independence and expertise to the negotiation of consultation arrangements.
3. There should be a basic requirement that no newly negotiated information and consultation agreement is inferior in protection of employees to that previously in operation or statutory entitlements, for example as previously established through a European Works Council or union recognition agreement. This is vital in the context of Brexit, where there may be pressure in workplaces to move away from agreements previously negotiated through European Works Councils.

42. Should the ICE Regulations be extended to include workers?

These Regulations should have the broadest application possible covering workers and atypical workers. However, if the latter are included, meaningful steps must be taken to ensure that they can be contacted by trade unions seeking to represent them within the request procedures. All workers have the right to collective bargaining and likewise should have access to information and consultation rights.

43. In your opinion, should the threshold for successfully requesting ICE regulations be reduced from 10% of the workforce to 2%?

The lowest threshold possible will offer the greatest possible scope for workforce participation. We consider that the trigger should also be there for any independent trade union with one or more members in the workforce. See above.

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

No – see our answer to 43 above.

45. Are there other ways that the government can support businesses in employee engagement?

Yes. The government should reconsider its approach to trade union activity under the Trade Union Act 2016 which is designed to impede effective representation by trade unions of their members in the workplace. Information and consultation is an inadequate replacement for effective collective bargaining, with potential recourse to industrial action.

46. How might the 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?

Trade unions require greater rights of access to British workplaces. This should be readily available in most digitised contemporary British workplaces, such that information regarding contact details can be placed on a readily accessible home page of the employer's website (without any additional click to another page – so that an employer cannot keep tabs on 'hits').

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

Access to effective collective bargaining would secure this; alongside effective protection from detriment on grounds of trade union membership and participation in information and consultation procedures.

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

Reform of Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992, so as to prevent employers defeating a legitimate request for trade union recognition by voluntary recognition of non-independent or clearly non-representative trade unions or other staff bodies.