

GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

Consultation on enforcement of employment rights
recommendations

**Submission by Prospect to the Department for Business, Energy
& Industrial Strategy**

16 March 2018
www.prospect.org.uk

INTRODUCTION AND SUMMARY

Prospect is an independent trade union representing over 140,000 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, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

Prospect welcomes the opportunity to respond to the BEIS consultation on the recommendations in the Taylor Review of Modern Working Practices on enforcement of employment rights. We believe it is crucial that employers are made aware of their employment responsibilities and new and emerging employment rights. It is similarly important that there is a mechanism in place whereby employers that breach their employees' employment rights face sanction.

We believe that there need to be measures adopted to ensure an increased awareness of rights amongst workers. There needs to be much stronger and more proactive state led enforcement, with sufficient funding and resources to the key enforcement bodies (such as HMRC and GLAA).

To address the scandal of non-payment of tribunal awards, we believe the tribunal should have enforcement powers and that claimants' access to these powers should be free and simple. There should be a publicly available record of employers who have failed to pay a tribunal award.

Where an employer has committed an aggravated breach of employment rights, and particularly where there have been two or more breaches, the tribunal should award an uplift of compensation to the claimant and make a costs order in favour of the claimant.

Companies who have breached employment rights should not be awarded contracts through public procurement.

We also support the TUC's proposal that there should be a system of joint and several liability for employment rights and obligations throughout supply chains.

We believe that tribunals should have power to make recommendations to an employer to ensure that they change their practices for other workers. This should apply particularly where the claim involves findings of worker or employee status. The recommendation would be based on that contained in the Equality Act, but to be extended to recommendations covering the wider workforce (as existed in the Equality Act until 2013). Recommendations – along with greater enforcement powers, uplift in compensation, and stronger penalties - would help remove barriers for workers seeking to assert their rights.

We recognise that unionised workplaces have lower levels of breaches of employment standards. This occurs through collective bargaining, increased awareness of rights, and the ability of unions to support and advise members individually and collectively. Promoting collective bargaining would improve labour standards.

We have addressed the specific consultation questions below.

Basic Details

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Stakeholder category

Please select the appropriate category from the following list

Representing employers' or employees'/workers' interests

If you represent employers' or employees'/workers' interests, are you (select appropriate option)?

Trade Union

Consultation questions

State-led enforcement

1. Do you think workers typically receive pay during periods of annual leave or when they are off sick?

No

Many agency and other precarious workers (for example; those on zero hours and other casualised contracts) are not receiving paid holidays. Whilst many of those on such a-typical working arrangements will be legally entitled to paid holidays, there are often disputes around their status, so that the employer is not accepting their responsibilities and avoiding their obligations to provide for paid holidays. This group of workers' rights are undermined and they are often in precarious work and too afraid to enforce their rights for fear of losing future work.

In many cases where workers are on a flexible working pattern, the employer contends that they have met the obligation to pay for holiday pay by saying the amount is rolled up into basic pay. This is often a sham and the worker is not getting the paid leave they are entitled to.

Many workers are ineligible to receive sick pay due to the earnings thresholds for Statutory Sick Pay, this is particularly so for many low paid workers with irregular hours and vulnerable working patterns. We believe that all workers should be entitled to a minimum sickness benefit while unable to work. Particularly the three day waiting period for SSP means many low paid workers will be unable to take time off as sick.

2. Do you think problems are concentrated in any sector of the economy, or are suffered by any particular groups of workers?

We acknowledge that problems are more widespread in certain sectors, namely health and social care, education, accommodation and food services, and the arts. Part-time workers are also significantly more exposed to risk. Prospect is concerned that recent TUC research shows than 2 million workers are not receiving any paid holiday.

Those in precarious and insecure employment experience greater difficulties in enforcing their rights. Often, they are without knowledge of the existence of rights, or have a limited awareness of them, or do not realise that they have access to them. Furthermore, they are under-represented in the workplace and tend in any case to be less inclined to raise workplace issues for fear of losing their job.

It is undoubtedly the case that zero hours contracts and precarious employment, leading to the employer's failure to accept worker status, is predominately in a few identifiable sectors as mentioned above. But this is certainly not exclusively so. Prospect has experience of atypical working arrangements and wrongful denial of worker status in the public sector as well as large established private sector employers.

3. What barriers do you think are faced by individuals seeking to ensure they receive these payments?

Because of the nature of work, many workers do not have access to platforms to raise workplace issues and this, coupled with a more general lack of awareness of employment rights, means that the sense of job insecurity is heightened, more so for migrant workers, whose experiences are compounded by language barrier problems.

Perception is also an issue. It is often wrongly thought that Zero Hours Contract workers, for example, are not entitled to receive holiday pay. These workers often do not take sick leave or holiday pay for fear that they will lose either current or future work.

We support the proposal to require employers to provide a written statement of their entitlements, as this would help get over any lack of awareness and would create a clearer culture of entitlement.

Even where one worker successfully brings a claim to assert their right to holiday pay, this does not mean that other workers in a similar position will be paid by the same employer.

We believe that tribunals should have power to make recommendations to an employer to ensure that they change their practices for other workers. This would be part of the remedy available to tribunals in successful cases. This should apply particularly where the claim involves findings of worker or employee status. For example, if a tribunal hearing a complaint of holiday pay finds the claimant to have worker or employee status and is therefore entitled to holiday pay, the tribunal should award compensation for unpaid holiday, but also recommend that the employer changes their procedures to ensure all other staff affected will also benefit from the ruling.

The recommendation should be based on that contained in section 124 of the Equality Act, but should be extended to recommendations to take specified steps for the purpose of obviating or reducing the adverse effect on the complainant or any other person (as applied in the Equality Act before 2013), so that it clearly covers the wider workforce

Recommendations – along with greater enforcement powers, uplift in compensation, and stronger penalties - would help remove barriers for workers seeking to assert their rights.

4. What would be the advantages and disadvantages for businesses of state enforcement in these areas?

Prospect supports the TUC's position that improved state-led enforcement will assist in creating a 'level playing field' for businesses in order that employers who *do* comply with the rules are not undermined by rogue employers.

5. What other measures, if any, could government take to encourage workers to raise concerns over these rights with their employer or the state?

Prospect believes that addressing job insecurity should be a priority, along with improving workers' access to trade unions and strengthening the collective bargaining arena.

It is furthermore crucial that enforcement agencies, such as The Gangmasters Labour Abuse Authority, Employment Agencies Standards Inspectorate, and HMRC, have enough funds and resources to be able to operate effectively and to be more proactive in investigations and enforcement.

In our experience the Employment Agencies Standard Inspectorate is seriously under-resourced and therefore has a fairly limited impact. We also understand that there can be a difficulty with enforcing minimum wage rights for interns through HMRC.

There is evidence that a unionised workplace will help ensure that minimum rights are maintained and enforced. The presence of a union representative at the early stages of a dispute over entitlement will often mean that the issue is resolved at an appropriate stage without escalating to litigation. Additionally unions have the knowledge and resources to pursue cases where necessary. So we believe that giving unions better rights of access to workplaces and to encourage the positive role of collective bargaining would be a very positive step to assert existing rights and entitlements.

Enforcement of employment tribunal awards

6. Do you agree there is a need to simplify the process for enforcement of employment tribunals?

Yes, BEIS' research showing that only 53 per cent of successful claimants received full or part payment without any enforcement action, and 35 per cent received no payment at all, is not acceptable. Claimants should not have to complete onerous paperwork in order to enforce payment, the current processes are too cumbersome and need to be simplified. Prospect welcomes the government's commitment to further consultation on this.

7. The HMCTS enforcement reform project will improve user accessibility and support by introducing a digital point of entry for users interested in starting enforcement proceedings. How best do you think HMCTS can do this and is there anything further we can do to improve users' accessibility and provide support to users?

Prospect recognises the benefits of digitalisation – that this will assist in improving the effectiveness and efficient of the ET system. We remain concerned, however, about a potential deleterious impact on certain groups, such as disabled or migrant workers, who may have problems with literacy, or those who may be without internet access. We would therefore prefer that there is an element of choice for individuals in these proceedings.

Prospect has provided a response to a previous consultation on Reforming the Employment Tribunal System – Taking Forward the Principles of Wider Court and Tribunal Reform in the Employment Tribunal. In this response, more detail was provided about what Prospect considers to be the benefits of digitisation, but also some of our concerns. In particular, we raised the fact that digitised systems have not always worked effectively and so should the system become

digitised further, resource would need to be invested to ensure the system can effectively deal with the increased usage. In addition, as stated above, it was also raised in this consultation that we consider that there needs to be some recognition that not everyone will feel comfortable with a digitised service.

8. The HMCTS enforcement reform project will simplify and digitise requests for enforcement through the introduction of a simplified digital system. How do you think HMCTS can simplify the enforcement process further for users?

We support the TUC's proposal that employment tribunals should monitor that payments are made and be given power and responsibility to enforce awards. There should also be greater powers for the tribunal to impose sanctions on an employer who does not pay the award.

9. The HMCTS enforcement reform project will streamline enforcement action by digitising and automating processes where appropriate. What parts of the civil enforcement process do you think would benefit from automation and what processes do you feel should remain as they currently are?

Although the use of online systems may improve efficiency and effectiveness of the enforcement system, care must be taken to ensure that further moves towards digitalisation do not disadvantage individuals or groups. See response to Q. 7 above.

10. Do you think HMCTS should make the enforcement of employment tribunals swifter by defaulting all judgments to the High Court for enforcement or should the option for each user to select High Court or County Court enforcement remain?

Prospect believes that employment tribunals should assume responsibility for the enforcement of tribunal awards. But if this does not happen, then it would probably be preferable for judgments to be defaulted to the High Court for enforcement.

11. Do you have any further views on how the enforcement process can be simplified to make it more effective for users?

Prospect does not believe that the government's response has gone far enough on this issue and supports the TUC's call for the government to take responsibility for ensuring that successful claimants receive their tribunal awards.

Prospect does not believe that the current system for enforcing employment tribunal awards is fit for purpose. At present, successful claimants are required

to proactively seek to receive their award in the event that the employer does not pay. This can be costly and cumbersome for the individual claimant and is not acceptable.

Employment tribunals should be required to take responsibility for enforcing and monitoring payment of tribunal awards and should have at their disposal the facility for sanctioning employers that do not pay tribunal awards.

The state and ET system should be jointly responsible for enforcing awards as opposed to relying on individual claimants to pursue claims against employers for non-payment.

We support the TUC's proposal that public procurement rules also need to be amended in order that employers that fail to pay tribunal awards to successful claimants are barred from tendering and not awarded contracts for the delivery of public services.

A key reason for non-payment of awards is that a company has gone into liquidation. We believe that the state, through the National Insurance Fund, should meet the full amount of any sum awarded by a tribunal, rather than the limited debts that are recoverable currently.

It is also not that uncommon for employers to go into liquidation, to avoid payment of their debts to workers, and then for the same directors to start up a new company. We agree with the TUC that there needs to be restrictions on this occurring and support their proposal that directors of company's who have failed to pay tribunal awards should be barred from holding a director position in a new company.

Establishing a naming scheme

12. When do you think it is most appropriate to name an employer for non-payment (issued with a penalty notice / issued with a warning notice/ unpaid penalty/ other)?

Prospect does not believe that the government's proposals, to rely on the penalty scheme, go far enough in terms of identifying the majority of employers who fail to pay tribunal awards. We do not think the naming scheme should be solely linked to the penalty notice scheme, as this will not capture the vast number of employers who have not paid an award.

The BEIS penalty scheme is insufficiently robust to incentivise successful claimants to use it because the government is ultimately unable to recover unpaid awards. The scheme is not fit for purpose – it is reliant upon successful claimants who have not received their award submitting a complaint, and yet such claimants are likely to be deterred from using the scheme because of the government's inability to usefully intervene.

Furthermore we understand that penalties are not made against companies who have become insolvent, so this would not reach a significant number of defaulters.

Non-compliant employers would therefore not be captured under the BEIS penalty scheme and would not qualify under the government's proposed naming scheme. The number of penalties awarded last year was extremely small. We therefore believe the naming scheme should apply to all employers who have failed to pay an award and that these should be monitored by the tribunal service.

13. What other, if any, representations should be accepted for employers to not be named?

None.

14. What other ways could government incentivise prompt payment of employment tribunal awards?

Prospect believes that sanctions against employers who fail to pay tribunal awards should be significant and meaningful and directors of companies that have failed to pay tribunal awards should be divested of the position of director.

Public procurement rules also need to be revisited with a view to ensuring that employers who have failed to pay tribunal awards are prevented for tendering for future contracts.

Prospect also believes that the HMRC should be involved in the enforcement process.

There should be a publicly available register of all employers who have not paid tribunal awards and the tribunal service should be responsible for keeping this up to date.

Awards and penalties at employment tribunal

15. Do you think that the power to impose a financial penalty for aggravated breach could be used more effectively if the legislation set out what types of breaches of employment law would be considered as an aggravated breach?

Yes

However, Prospect believes that the most effective way of fortifying sanctions would be to confer on employment tribunals the power to increase compensation, whereby claimants would receive greater compensation as opposed to the state receiving a penalty.

We believe it is important that the claimant receives the additional compensation, rather than the system of penalties payable to the state. This would not only benefit the claimant, but would also be a more effective means of creating a stronger sanction against the employer.

Increased awards and penalties should also be available to tribunals where an employer has breached employment rights for a second time.

Uplifts in compensation awarded to the claimant should be determined by the tribunal where the employer is known to have made a similar breach of workers' rights before. Uplifts should also be available where an employer has sought to use contractual provisions to prevent workers from enforcing their rights.

16. Is what constitutes aggravated breach best left to judicial discretion or should we make changes to the circumstances that these powers can be applied?

We believe there should be some judicial discretion, which allows the tribunal to use their knowledge and experience to determine when there has been an aggravated breach. But we also consider that there should be an automatic declaration of an aggravated breach where there has been a second offence by the same employer. This does not necessarily have to be a second offence against the same individual, but a second offence against the same sort of right i.e. if the employer fails to pay holiday pay to one worker, and then does not pay holiday pay to another, despite a judgment saying that they have to.

17. Can you provide any categories that you think should be included as examples of aggravated breach?

As above where there has been a repeated contravention of the same sort of right, the aggravated breach rule should apply.

18. When considering the grounds for a second offence breach of rights who should be responsible for providing evidence (or absence) of a first offence? Please give reasons for your answer.

While claimants can provide evidence, for example through their knowledge of previous cases or from searching tribunal judgments, we do not believe the onus for producing evidence should rest on the claimant.

The employment tribunal should maintain evidence of previous breaches and have a duty to search for similar breaches in the tribunal records.

The employer should also be required to declare if there has been a finding of a breach in any previous matters.

19. What factors should be considered in determining whether a subsequent claim is a 'second offence'? e.g. time period between claim and previous judgment, type of claim (different or the same), different claimants or same claimants, size of workforce etc.

Prospect believes that increased penalties should be imposed in any situations where an employer has been found to have breached the provisions of employment law on more than once occasion.

There should not be any time limit imposed for the period to determine if there has been a second breach and nor should it be limited to the same claimant.

20. How should a subsequent claim be deemed a "second offence"? e.g. broadly comparable facts, same or materially same working arrangements, other etc.

We believe the power to impose a penalty or (preferably) an uplift in compensation should apply wherever there has been a second breach of employment law.

21. Of the options outlined which do you believe would be the strongest deterrent to repeated non-compliance? Please give reasons

- a. Aggravated breach penalty
- b. Costs order
- c. Uplift in compensation

We believe that all are appropriate, but that the uplift in compensation should be the priority order, followed by costs orders, and then for the aggravated penalty.

It is particularly galling that as an organisation representing claimants, we find that we bring a successful claim against an employer, but then are approached by other members with similar issues and we have to bring further claims. This is clearly a waste of resources, both for the claimants' advisers and for the tribunal service. In these cases costs should be awarded against the employer, along with uplifts in compensation.

22. Are there any alternative powers that could be used to achieve the aim of taking action against repeated non-compliance?

Prospect would like to see enhanced recognition of the role of unions in establishing effective access to justice and improving compliance with legal rights. Strengthening rights for collective bargaining would reduce employer breaches and improve the position for the worker, to gain and enforce their rights.

**Prospect
16 May 2018**