Department for Business, Energy and Industrial Strategy
Taylor Review – Enforcement of employment rights recommendations
Response by Thompsons Solicitors
May 2018

1. Thompsons is the UK's largest firm representing workers and trade unions. Thompsons has acted for individuals, groups of workers and trade unions in thousands of cases concerning rights at work, including many leading cases in the UK and European courts, and has contributed to policy and campaigns on rights at work.

2. This response forms part of Thompsons' response to the consultations issued by the government as part of 'Good Work: A response to the Taylor Review on Modern Working Practices'. Thompsons is submitting a response on each of the four consultations: on Employment Status; Enforcement; Transparency; and Agency Workers.

3. It is right that the government should address the issue of insecurity and unfairness at work. However, the government's response is disappointing in the extreme. It does not address the fundamental issues. The government's response to the Taylor Review and the recommendations from the House of Commons Committees on Work & Pensions and Business, Energy & Industrial Strategy is merely to consult further. The government has not put forward any concrete legislative proposals nor indicated any timescale for legislation. This fails to address the real issues faced by many thousands of vulnerable workers. Action is needed now.

4. Thompsons has long campaigned for rights at work to be extended to all workers from day one. This should be based upon a clear definition of worker, which places the onus on the employer to prove that anyone working for the employer is not an employee but is carrying out the work in business in their own account. Workers should be given a clear statement of their rights from day one. Trade unions should be given access to workers to advise and represent. Enforcement of rights at work should be strengthened and simplified. Exploitation through zero-hours and similar contracts should be outlawed. Loopholes in agency worker legislation should be closed. The government should guarantee that the rights of UK workers will not be worse than those of workers across the EU. The government should commit that there will be no reintroduction of Employment Tribunal fees.

5. The government's response on all these areas is inadequate. We set out our detailed response to specific points in our response to each of the four consultation documents.

Section A: State-led enforcement

Recommendation: Her Majesty's Revenue and Customs (HMRC) should take responsibility for enforcing the basic set of core pay rights that apply to all workers National Minimum Wage, sick pay and holiday pay for the lowest paid workers. The government accepts the case for the state enforcing a basic set of core rights for the most vulnerable workers, and intends to move in this direction. The government will first evaluate the extent of the problem faced by low paid workers in accessing these rights and, following decisions relating to statutory sick pay, examine the best way to ensure the most vulnerable receive the level of protection they deserve, bearing in mind feasibility and cost-effectiveness for the taxpayer.

THOMPSONS SOLICITORS
STANDING UP FOR YOU

6. There has been an expansion in statutory individual employment rights over the last 30 or so years. However, little strategic thought has been given to the most effective ways in which these rights can be enforced. The Employment Tribunal (ET) remain the main forum for employment rights enforcement via individual claims.

7. There is also little doubt that some employers deliberately use devices to avoid paying workers their full entitlement to pay and other benefits. These devices include: wrongly classifying workers as self-employed to avoid paying statutory holiday pay and other payments; use of strategies to transfer accountability for employment rights to third parties and by using methods such as umbrella companies[1].

8. We are surprised at the statement on page 17 of the government's response to the Taylor Review, which states that:

   "'the two tier approach to enforcement in the UK works. Those who are most open to exploitation and abuse see basic rights enforced by the state, whereas others are able to bring their cases to an employment tribunal via ACAS and the free process of early conciliation'.

9. As far as the minimum wage is concerned, state enforcement via HMRC is not working and is woefully poor. Indeed, an extract from the Work and Pensions Select Committee's report "A framework for modern employment"[2] contains the following extract regarding the evidence of Sir David Metcalfe, Director of Labour Market Enforcement:

   'Sir David explained that such small fines were ineffective given the very limited enforcement resources:

   If you take HMRC and the minimum wage, there are 1.3 million firms with employees. They took 2,600 cases last year. That means the average firm can expect an investigation once every 500 years.

   Without larger fines, or a vast increase in enforcement action, unscrupulous employers minded to abuse minimum wage laws have a low risk of being caught and face inconsequential punishments if they are. Sir David was clear on the choice: "if you don't have enough enforcement resources, then the punishments should be larger" '.

   Clearly state enforcement is not working.

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

[1]TUC Report "Shifting the risk" - https://www.tuc.org.uk/sites/default/files/Shifting%20the%20risk.pdf
[2] https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/352/35207.htm#footnote-015

10. It is difficult to be precise about whether workers 'typically' receive holiday or sick pay. However a recent report by Middlesex University[3] found that one in 20 workers do not receive any holiday pay at all. However, this does not include workers classified as self-employed when they are not. Taking this into account the report suggests a conservative estimate of £1.8bn in holiday pay is going unpaid each year, to a total of about 1.8 million workers.

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

11. The problems are more concentrated in the private rather than the public sector. In the public sector, with a greater density of trade union membership, and with established contractual rights to holiday and sick pay, workers are, on the whole, less likely not to receive their holiday and/or sick pay. In the private sector, particularly with a non-unionised workforce, there are more likely to be breaches of workers' rights to holiday and sick pay. Workers in precarious employment, e.g. temporary employment, zero hours contracts, low pay, are more likely to have their holiday and sick pay stopped because employers are less likely to be concerned about workers taking enforcement action.

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

12. Most employment rights apply to 'employees' (e.g. unfair dismissal) or 'employees' and 'workers' (e.g. statutory right to paid holiday). However the use of non-standard or atypical employment contracts by employers means that the employment status of the worker is often not clear. This lack of clarity often leads to employers seeking to justify treating a worker as self-employed and therefore avoid their obligations as an employer, for example by failing to pay holiday pay. Uncertain employment status is clearly a barrier to receiving payments rightly due to a worker. We believe that there should be a new and single definition of 'worker' to describe the employment relationship. The definition should be wide enough to ensure that atypical workers, including casual workers, freelancers, agency workers, home workers and workers on zero hours contracts, are afforded the same rights. Please refer to our response to the consultation on employment status for further information.

13. Even for those not excluded from their employment rights because of their status there are barriers. The enforcement of employment rights is largely based on individual

[3] Unpaid Britain: wage default in the British labour market, Middlesex University and Trust for London https://www.mdx.ac.uk/__data/assets/pdf_file/0017/440531/Final-Unpaid-Britain-report.pdf

claimants bringing claims in the ET. The barriers faced by individuals looking to bring their case to the ET include:

a) A lack of knowledge of their rights;

b) A lack of access to advice and representation if they are not a trade union member;

c) A lack of access to trade unions. If unions were afforded a legal right of access to the workplace to recruit, organise, advise and represent, individuals would become more aware of their rights as well as assistance when those rights are threatened;

d) Up to July 2017, ET fees were also a major barrier, as found by the Supreme Court in UNISON's challenge to the ET Fees Order. The Court found: 'Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade'.

e) Given the overwhelming evidence of the negative impact of ET Fees, which the Court found had resulted in a 'a dramatic and persistent fall in the number of claims brought in ETs', under no circumstances should the government reintroduce fees in the future, even at a lower rate.

f) Over the years employment law has become more complex. The system of enforcing employment rights through the ET has also become more complex, with most employers using specialist employment lawyers to defend claims. This is a far cry from the original intention of the ET to provide cheap and accessible justice for workers. Also, recent reforms to the ET procedures have made the ET less accessible to workers and tipped the balance in favour of employers, for example the removal of lay members from sitting on panels to hear certain types of cases.

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

14. The current system of enforcement through individual claims in the ET is ineffective in that it only has a limited ability to bring about wider workplace changes. There is little incentive for employers to look at structural and organisational issues which may be the cause of an infringement of employment rights. Take, for example, the failure to pay holiday pay – even if the employer loses a claim in the ET, there is no penalty for infringing the worker's right to holiday pay.

15. A properly funded and resourced government agency, such as a Labour Inspectorate, could provide a more effective method for compliance by employers. Powers given to such

an Inspectorate to inspect and enforce core rights proactively could be a positive way forward in many ways:

a) Agencies could perform an advisory and educational role which would result in improvements through monitoring and inspection. A strategic approach such as this could lead to broader positive changes. There would be scope to involve others, such as trade unions, in dialogue about the improvements needed.

b) Enforcement through a state agency would overcome the aforementioned (see paragraph 9 above) problems that individuals sometimes face when bringing cases to the ET.

c) Enforcement through a state agency would highlight that the state considers fairness to workers as an important issue and in the public interest. This would send a positive message to employers of the importance that the state places on employers meeting their obligations to their workforce. If the government is serious about workers being treated fairly then the discourse needs to move away from employment rights being seen as unnecessary red tape and burdensome on employers and more towards fairness of treatment to workers.

16. We cannot emphasise enough that any government agency tasked with enforcement of the core rights should be adequately resourced, proactive, and have sufficient powers to impose effective sanctions for non-compliance.

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

17. We strongly believe that the best method for workers to raise concerns over these or any other employment rights is through a trade union. There should be an extension of collective bargaining to arrest the decline in the coverage of collective bargaining in the UK since the 1980s. Unions are best suited to identifying and articulating their members' concerns in the workplace, with a view to enacting changes in the workplace which ensure good practice through self-regulation.

SECTION B

Recommendation: Government should make the enforcement process simpler for employees and workers by taking enforcement action against employers/engagers who do not pay employment tribunal awards, without the employee/worker having to fill in extra forms or pay an extra fee and having to initiate additional court proceedings. The government agrees that the enforcement process could be simpler, and intends to undertake wide ranging and comprehensive reforms of the process for civil claims and judgments across the courts and tribunals systems. The government is seeking views on how the enforcement processes for employment tribunal awards could be improved through those reforms.

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

18. Yes. The system for enforcing tribunal awards needs strengthening. As the Taylor review confirmed, 35% of tribunal awards are not paid at all. This is far too high. There is little point in having rights if they cannot be enforced effectively.

Question 7: The Her Majesty's Courts and Tribunal Service (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?

19. We strongly believe that the enforcement process should not rest with the Claimant. After an initial referral by the Claimant to the tribunal that an award remains unpaid, any enforcement action should be taken by an enforcement body. In line with our responses to question 4 above, the power to enforce tribunal awards should rest with a state agency, which is adequately resourced, with powers to impose penalties to deter non-compliance with tribunal awards. Further employers should not be able to hide behind corporate structures to avoid paying awards.

Question 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?

20. Please see response to Question 7 above.

Question 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?

21. Please see response to Question 7 above.

Question 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?

22. Please see response to Question 7 above.

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

23. Please see response to Question 7 above.

Establishing a naming scheme

Recommendation: Government should establish a naming and shaming scheme for those employers who do not pay employment tribunal awards within a reasonable time. This can perhaps be an element of the reporting which we have suggested in relation to the composition of the workforce including the proportion of atypical workers in the workforce.

Question 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)? Please give reasons.

24. The employer should be named at the date when the warning is issued. This would ensure a more prompt payment. The Claimant should have to wait as little time as possible in order to secure payment of compensation ordered by the tribunal.

Question 13: What other, if any, representations should be accepted for employers to
not be named? Please give reasons.

25. None.

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

26. The penalties should be sufficiently high to be effective deterrents.

Section C

Additional awards and penalties

Recommendation: Government should create an obligation on employment tribunals to consider the use of aggravated breach penalties and cost orders if an employer has already lost an employment status case on broadly comparable facts - punishing those employers who believe they can ignore the law.
Recommendation: Government should allow tribunals to award uplifts in compensation
if there are subsequent breaches against workers with the same, or materially the same, working arrangements

Question 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?

27. The current powers given to tribunals to impose financial penalties for an aggravated breach were introduced in 2014 by Section 12A of the Employment Tribunals Act 1996. The Section was introduced to cover cases where an employer had not only acted unlawfully but also where its conduct had aggravating features.

    However, the measure has been an abject failure. As the consultation document says, as at November 2017, only 20 penalties were imposed by the tribunals since the legislation came into force in April 2014. The penalties imposed totalled £54,400, with only £17,700 having been paid. These are shockingly low figures. There is some suggestion that the drop in numbers of tribunal claims as a result of ET fees is the reason for the low numbers of penalties. However, as the legislation giving the ET the power to impose penalties came into force after fees were introduced, there is no precise way of comparing if the situation would have been different had ET fees not been introduced. It would be interesting to see if there has been a significant increase in the penalties imposed since fees were abolished in July 2017.

    The most recent ET statistics show an increase of single claimant cases of around 90% from October to December 2017. Unfortunately the ETs do not publish statistics of the number of penalties imposed, so it is difficult to say whether the drop in claims caused by the ET fees has had an effect.

28. Why the Tribunal has failed to use the power more is unclear. One of the reasons may be because the Tribunal is treating the power under Section 12A as predicated on the employer losing a second claim. The wording of Section 12A does not define 'aggravating features', though the explanatory notes say that one of the factors a Tribunal could take into account is whether the employer had repeatedly breached the employment right concerned. The purpose of imposing financial penalties must be to deter the employer in question and other employers from obvious breaches of worker rights. Any sanction designed to achieve this must be effective. In our view the financial sanctions must be sufficiently high so that they act as a deterrent. We agree that the sanctions should be increased from £5,000 to £20,000.

29. Where a financial penalty is imposed the Tribunal should be obliged to also consider making an order for the employer to pay aggravated damages to the Claimant.

30. Costs - the power for a tribunal to impose a costs order against an employer for pursuing a defence which had no reasonable prospects, already exists.

    Question 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?

31. We believe that it should be left to judicial discretion.

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

32. None.

Question 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.

33. The employer should provide evidence of an absence of a first offence.

Question 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.

34. This should be left to judicial discretion but the rules should make it clear that the factors to be considered should include all the factors referred to in this question.

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

35. By materially same working arrangements.

Question 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

36. All three penalties should be available for use by the ET.

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

37. We prefer the financial penalty methods imposed by way of judicial discretion, provided the ETs make more use of their discretionary powers.

For further information please contact:
Rakesh Patel
Head of Employment Rights Strategy, Thompsons Solicitors
RakeshPatel@thompsons.law.co.uk

And

Jo Seery
Professional Support Lawyer, Thompsons Solicitors
JoSeery@Thompsons.law.co.uk

THOMPSONS SOLICITORS
STANDING UP FOR YOU