ICAEW

REPRESENTATION 56/18

MODERN WORKING PRACTICES: Consultation on measures to increase transparency in the UK labour market

Issued 23 May 2018

ICAEW welcomes the opportunity to respond to the *Consultation on measures to increase transparency in the UK labour market* published by BEIS on 7 February 2018, a copy of which is available from this link as part of the government's response to the Taylor 'Good Work' report.

This ICAEW response reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 150,000 chartered accountant members in over 160 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

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General Points

1. This response is drafted on behalf of the ICAEW as a representative body supporting small and large employers in the professional business services sector - both by way of policy work and directly through our members who operate or advise businesses.

2. The ICAEW respects the findings of the Taylor Review and the Government's response to it, and therefore this response does not comment upon the policy aspects of this consultation, other than to consider issues that would add greater clarity to employment arrangements, and in some circumstances address issues relating to fairness.

3. ICAEW's response to this consultation is given neither as an individual nor as an employer, but as a leading body of business professionals, and comments are given around particular aspects of the consultation that might affect business burden and efficiency, fully acknowledging that the Taylor Review has a much wider policy remit.

4. Transparency is one way to ensure that employees know their rights and we applaud the government's commitment to this. We note, however, this will only work if there is some sort of mechanism to review whether employees do know their rights.

5. We agree with the government that employees should be able to make 'informed decision' about the employment offers they accept but this places too much responsibility on the employee. Such is the complexity of the UK's taxation system and employment legislation it is unreasonable to expect all employees to be fully cognisant of their tax status or employment rights. The onus should be on the employer to explain the options available and for employees to be able to easily ensure that they have been presented with the full facts and if not to seek redress, again easily.

ANSWERS TO SPECIFIC QUESTIONS

Section A: Written statements – Questions for all

Q9: 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?

1. Whilst it is of course helpful for all parties to a period of employment to have clarity on the arrangements that will apply to that employment, one of the strengths of the UK labour market is its ability to move quickly and flexibly – a strength to both employee and employer. Any changes to the system should not compromise this.

2. In reality, the appointment of an employee, whether permanent or temporary, is managed not only through the employment contract, but on many other factors – mobility, references, status checks, PAYE information, banking arrangements, health and safety, accessibility, requirements around flexible working and actual hours of work, etc - and a host of other interactions both contractual and social.

3. A written statement can form part of the formal formation of this relationship, and should be encouraged as best practice, but with the existing burden on employers arising from all of the other aspects of employment, as noted above, it is possible that a detailed and definitive statement may not be able to be produced within one month or less.

4. The production of such a statement also relies upon the willingness of the employee to provide details and this is, surprisingly, often the most difficult part of engaging a new

employee. Even 'good employers' might find that delays not of their own making could cause issues and delays, and often do.

5. Too much formality prior to commencement of a period of employment could, therefore, reduce speed and flexibility in the market.

6. As a very minimum, however, if a full written statement cannot be produced at the commencement of employment, an employee should receive a formal confirmation letter that a period of employment has commenced (subject to any outstanding matters) together with 'headline information' such as the basic rate(s) of pay and initial conditions for that period of employment, with a commitment to have a full 'statement' completed at a future date (should the employment extend to that point). This confirmation letter should be in writing and be provided to the employee upon formal commencement.

Q10: The following items are currently prescribed contents of a principal written statement. Do you think they are helpful in setting out employment particulars?

7. We agree that the following would be helpful in setting out employment particulars:

   - The business's name;
   - The employee's name, job title or a description of work and start date;
   - If a previous job counts towards a period of continuous employment, the date that period started;
   - How much, and how often, an employee will get paid;
   - Hours of work (and whether employees will have to work Sundays, nights or overtime);
   - Holiday entitlement (and if that includes public holidays);
   - Where an employee will be working and whether they might have to relocate; and
   - If an employee works in different places, where these will be and the address of the employer.

Q11: Do you agree that the following additional items should be included on a principal written statement?

8. We agree that the following items should be included on a principal written statement:

   - 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
   - Sick leave and pay entitlement
   - The duration and conditions of any probationary period

9. Remuneration beyond pay e.g. vouchers, lunch, uniform allowance.
   We agree that these should be included as they are highly relevant to taxation too, and clarity over obligations of employee and employer can help with the applicability of deductions.

10. However with regard to the inclusion of training requirements and entitlements and other types of paid leave e.g. maternity, paternity and bereavement leave we are less convinced that these are necessary. This is because:

a. Training requirements and entitlement may be supplemental and perhaps should be part of the 'probationary period' expectations. If an employer is to offer employment to an individual then the employer's obligation to provide necessary training should be implicit rather than explicit.

b. With regard to other types of paid leave e.g. maternity, paternity and bereavement leave, as many of these should only need stating if they depart from legal minima or are specific to that employer, it is not essential that they are included on a principal written statement. If all such issues were included it would make the statement very long and unlikely to be read in full by the employee. We would, however, suggest that employees are informed as to what the legal minima are by some other means.

Q12: To what extent do you agree that the principal written statement should be provided on (or before) the individual's start date?

11. See response to Q9 above – noting that a formal 'confirmation' could be issued on 'day one' with a written statement at a later date.

Q13: To what extent do you agree that other parts of the written statement should be provided within two months of their start date?

12. Again, with reference to Q9, this may be possible for many employer – employee arrangements, but it cannot be prescriptively so owing to the numerous factors (and especially if it is to follow a prescribed format). However, there should be clear reasons given for not doing so.

Section B: Continuous service

Q20: What do you think are the implications for business of the current rules on continuous service?

13. The rules on continuous service are more relevant to those businesses where 'direct labour' and 'chargeable labour' are the key component of their activities and directly linked to their income. It is therefore right that the Taylor Review ensures that the workers and employees in these industries and sectors are not disadvantaged.

14. As an example of good current practice, most professional services organisations, whilst often using 'chargeable hours' as a criteria for generating income, also understand and respect the need to offer excellent working arrangements to recruit and retain the key assets - their employees – and ensure that they are properly rewarded. In this sector, gaining a reputation as a poor or uncaring employer is a barrier to sustainable growth and so the issues of 'unfair' treatment around continuous service are more limited.

15. For businesses where continuous service is an issue, clearly any tightening of rules (and extension of the break) could be detrimental to their business model, and at the margins there is a risk that low-profitability sectors (such as care homes, construction, etc) might find this a significant financial burden. Against this, the reduction of 'stop-start' periods of employment should reduce administrative burden through HR and payroll processes, and if the written statement is introduced then clearly the burden of producing frequent new written statements after each short break could be reduced if the length of the break is extended.

16. There is an unintended potential consequence that 'non statutory' benefits for staff might be reduced for all employees of a particular business if the rules on 'breaks'

expands the pool of employees for whom they apply – as a method of managing total cost. These unintended consequences do need consideration to ensure that making rights more equitable does not diminish the overall offering.

Q24: 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?

17. See answer to Q25 below

Q25: Do you believe the existing exemptions to the break in continuous service rules are sufficient?

18. There may always be circumstances where shorter breaks than the 'minimum' should be acknowledged as 'breaks' by both employer and employee, and to which both parties agree. With a flexible market and a growing group of employees undertaking multiple employments and operating in the 'gig' economy, this is likely to become more normal – as those itinerant employees 'take control' of their own working arrangements.

19. As a result, in an ideal world, there might be a need for the 'written statement' to include a clause where both parties to an employment arrangement can specify and approve a reduced period which would, for them, constitute a break in continuous employment.

20. However, in the real world there is a likelihood that some less scrupulous employers would see this as an 'opt out' which could be forced upon employees, effectively removing the benefits that a longer break brings.

21. Similarly if the minimum break period is too long, employers may simply terminate early and would be less likely to re-employ until much later, well beyond the break period. There would be little point in holding a 'bank' of names on the system who could not be given work in the medium term because of employment rights and cost issues. As a result workers might find less 'security' in such a system.

22. Overall, to maintain flexibility but to avoid unintended detrimental impact, if the minimum break is to be extended and made mandatory (other than specific exemptions, but no opt out), then it should be towards the lower end of the spectrum offered in Q24, and specific exemptions should be reviewed periodically based on societal issues.

Q26: 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?

23. As with all such guidance, it should be clear to all parties and accessible to those who need to use it; therefore it needs to be understandable by workers for whom employment matters appear complex, and for employers who do not have recourse to extensive HR support and experience.

24. Walk through guides, cases studies and FAQs are helpful in this context, as is guidance on 'where to get more help'

Section C: Holiday pay.

Q29: What is your understanding of atypical workers' arrangements in relation to annual leave and holiday pay?

25. Holiday allowance and holiday pay is an area where there is often significant misunderstanding, both by employees/workers and employers, especially where atypical hours, part time or occasional work are involved in the employment agreement.

26. There is confusion between the concept of 'taking holiday' and the allowance for such, and the issue of 'holiday pay.' For many atypical or non-standard or occasional working arrangements, 'holiday pay' is added to the hourly rate worked by the employee/worker. Whilst this discharges a legal obligation to pay (if calculated correctly), it does not ensure that the employee/worker actually takes any holiday time off work. It can sometimes be seen as 'extra pay' and in such circumstances the employee/worker may then work extra hours at this 'enhanced rate' for financial benefit, to the detriment of their wellbeing, productivity and safety.

27. There needs to be clarity between a) the rules requiring employees/workers to actually take the annual leave to which they are entitled, and b) how any pay attributable to that leave period is calculated and reimbursed. At the moment there is confusion that fulfilling (b) also fulfils (a), which it clearly does not.

28. Validated toolkits to calculate holiday entitlement and pay calculations are encouraged and should be promoted to all employees/workers and employers.

Q30: How might atypical workers be offered more choice in how they receive their holiday pay?

29. See response to Q29 above.

Section D: Right to request

Q38: When considering requests, should Small and Medium Enterprises (SMEs) be included?

30. Due regard should be given to the fact that SMEs and micro entities have limited resources and the operation of the right to request scheme could impose a significant burden. In such circumstances an unintended consequence is that, 'playing safe', they terminate arrangements and contracts with the affected employee/worker before the 'rights' become applicable. This is a similar issue faced by young people when they move from 'young person's minimum wage' to 'national living wage' and find that their employer effectively reduces their hours or terminates them to avoid extra costs.

31. It is therefore important to explain the benefits of extending rights to employees to SMEs and to make the burden from processes and requirements as light as they can be whilst meeting the objectives of protecting and enhancing rights.

Section E: Information and consultation of employees regulations (2004) (ICE)

Q41: How might the ICE regulations be improved?

32. Enlightened employers listen to the views of their employees and consult with them on a wide variety of matters. There is a growing realisation by good employers that this is a way to gain competitive advantage, and to gain better outcomes, through improved engagement with the organisation's most valuable asset – its people.

33. It should be recognised, however, that the style of consultation, and the subject matter of consultation, will vary between employers. Some organisations deal with sensitive and confidential matters that could not be consulted upon, whilst others require consultation to make them work effectively. There can be no 'one size fits all' solution.

34. ICE intentions could be supported by positive benefits (but not financial incentives) for organisations that can show they meet a consultation standard, rather than through penalties imposed by Employment Tribunals for those who do not. This could, of course, be supported by the current regulations as the 'minimum requirements' to underpin the system.

35. It should also be remembered that other legislation provides consultative and collective rights for employees around particular statutory matters, such as collective consultations around redundancies, rights over changes to contracts of employment and terms & conditions, etc. These are extensive and well understood.

Q43: In your opinion, should the threshold for successfully requesting ICE regulations be reduced from 10% of the workforce to 2%?

36. No. 2% of a workforce is not a large enough group to be representative of organisational sentiments, and is certainly too small to impose a legal requirement upon an organisation to introduce a structure which may be seen as unnecessary by the other 98% of the workforce. Such a small threshold also give rise to the possibility that organisational decision making could be stalled or adversely affected by a disaffected or disruptive minority.

37. Whilst a 10% threshold is still small, it is much more representative, and it makes sense for this to have an absolute minimum limit (currently 15 employees) so that SMEs are not subject to ICE based on the – perhaps transient – views of a very small number of employees.

Q44: Is it necessary for the percentage threshold for implementing ICE to equate to a minimum of 15 employees?

38. See Q43

Q45: Are there other ways that the government can support businesses on employee engagement?

39. See answer to Q41