Department for Business, Energy and Industrial Strategy
Taylor Review – Increasing transparency in the labour market
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.

Introduction

6. We agree with the comment in the Introduction to this consultation that "some employers seem to use … flexibility to transfer risk to workers, and there is no corresponding benefit to the worker from the flexible arrangement". This is the central issue which the government should address. We do not believe that the government has done so in its response or in the consultation documents.

Executive Summary

7. We agree that "greater transparency and clarity between workers and employers" is required. We also believe that workers' rights need to be extended and strengthened. We

welcome the government commitment to legislate to extend the right to payslips to all workers, and to improve the quality of information provided on those payslips. We believe that further action is needed and that the government should commit to extending the written statement of particulars to all workers from day one of employment. We believe that the government should commit to implementing in full the provisions of the EU Directive on Transparent and Predictable Working Conditions (published on 21 December 2017) regardless of whether that Directive is adopted prior to 29 March 2019 or subsequent to that date, and in doing so commit that UK workers will not be placed in a less favourable position than workers in the EU.

Section A – Written Statements

8. It is welcome that the government accepts the recommendation in the Taylor Review to extend the right to a written statement. The review recommended extending this to 'dependent contractors'. We oppose the creation of a wholly-unnecessary and confusing new category of dependent contractor: we refer you to our response to the consultation on employment status. The right to a written statement should be extended to all workers, using the definition of worker which we advocate in our response to the consultation on employment status.

9. We agree that basic information should be provided to all workers at the outset. We endorse the view that the written statement should be provided either before, or by the first day of, employment for all workers.

10. The proposed EU Directive on Transparent and Predictable Working Conditions would extend the right to a written statement to all workers. 'Worker' is defined (in Article 2) as "'a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration". The government should adopt this definition of worker and extend entitlement to a written statement to all such workers and, in doing so, ensure that UK workers will not be placed in a less favourable position than EU workers.

11. The proposed Directive would require the written statement to be provided "at the latest on the first day of the employment relationship". Again, the government should adopt this and commit to UK workers receiving the same rights and protections.

12. Questions 1 to 8 in the consultation are addressed to the experience of employers (questions 1-5) and individuals (questions 6-8) providing and receiving written statements, respectively. We are responding as lawyers advising on these issues and have not therefore responded specifically to those questions. We repeat our view that the right to a written statement should be extended to all workers and that the statement should be provided no later than the first day of the employment relationship.

13. Question 9 asks "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 believe that the right to a written statement should be extended to

all workers from day one. It follows from this that we believe that this should include permanent employees with less than one month's service and non-permanent staff. Any attempt to exclude those workers from the entitlement would create complexity and confusion. It would undermine the principle of providing statement on the first day of employment. It would encourage employers to seek to avoid the requirement by categorising workers as non-permanent staff. It would also encourage employers to delay provision of the statement until one month's service had elapsed.

14. The consultation also seeks responses on the information to be included in the statement – both information to be provided on day one and information to be provided within two months. We believe that all information should be provided on day one and that there is no justification for delaying the provision of any information later than the first day of employment.

15. We agree that a single standalone document should be provided on or before the first day at work. We differ from the government's view, in that we do believe that the document should be in a standard format that can be easily adapted with specific information by the employer. We believe it is important that the information is clear and comprehensible and that workers can readily understand their rights, entitlements and obligations. This is best achieved by a standard government-approved format.

16. We agree with the government that additional information should be provided on the day-one statement. We agree that the following information should be added:

    a) How long the job is expected to last, or the end date of a fixed term contract;
    b) How much notice is required to terminate;
    c) Sick leave; and
    d) Pay entitlement.

17. We also agree that the statement should include information about which specific days and times workers are required for work. This should comply with the requirements set out in the proposed EU Directive. This would mean that if the work schedule is entirely or mostly not variable, the statement must set out the length of the worker's standard working day or week and arrangements for overtime and its remuneration. If the work schedule is entirely or mostly variable, the statement should include the amount of guaranteed paid hours, the remuneration of work performed in addition to the guaranteed hours, the reference hours and days within which the worker may be required to work, and the minimum advance notice that the worker must receive before the start of a work assignment.

18. The statement should also include, as the proposed EU Directive would require, the duration and conditions of any probationary period, any training requirement, all types of paid leave and all remuneration, not just pay.

19. The statement should also include a statement about the right to join a union and the right of access to and by the union (see responses to Questions 45 to 48 below).

20. We do not agree that some information should not be provided on day one but can be delayed for up to two months. All information should be provided on day one. The example given by the government is pensions. The pension information is likely to be identical for all new workers employed by the employer and can therefore be easily provided to each new worker by the first day at work. There is no reason why two months would be required to do this.

21. In response to Question 10, we believe that all the information referred to in that question should be provided in one statement by day one.

22. In response to Question 11, we strongly agree that all the additional items referred to in that question should be included in the statement provided by day one.

23. In response to Question 12, we strongly agree that the written statement should be provided on or before the worker's start date.

24. In response to Question 13, we strongly disagree that some information should not be required in the day one statement, but provided within two months. All information should be provided in the day one statement.

25. We agree that there should be a standalone right to bring a claim to an Employment Tribunal if the written statement is not provided by day one or if the statement does not comply with the statutory requirements. There should be a standalone right to compensation for any failure by the employer to provide a statutorily compliant statement by day one, as well as the existing right to seek a declaration of what the missing particulars should have been. We therefore answer Question 17 in the affirmative and believe that the impact would be positive, as it would ensure workers were informed of their rights, entitlements and obligations and would encourage compliance by employers. Questions 14 to 16 are addressed to employees.

26. In response to Questions 18 and 19, the ACAS guidance should be updated to reflect the new requirements. As stated above, we support the adoption of a standard format for the statement. This standard format should be annexed to the ACAS guidance.

Continuous Service

27. We agree that the break in service period for continuous service should be extended beyond one week to one month. In response to Questions 20 to 23, we believe that the current rules on continuity of service deprive many workers of continuous service and thus deprive them of their statutory rights. This is particularly the case for casual and zero hours workers who have been held not to be engaged on a contract of employment and who have traditionally been unable to establish that there is a global or umbrella contract between periods of employment because they are unable to establish that there is mutuality of obligations.

28. The current rules also encourage avoidance by unscrupulous employers deliberately engineering breaks in service.

29. In response to Question 24, we believe that the period should be extended to one month, which is a clear, understandable and readily-calculable period.

30. We believe that if our definition of employment status is adopted, as advocated in our response to the consultation on employment status, the provisions on continuity under s.s 212 to 219 Employment Rights Act 1996 should be applied where there is a contract, arrangement or other relationship in place.

31. In response to Question 25, we agree that the factors to be taken into account when determining whether there has been a legitimate cessation of work should be clarified. They should include any situation where an employer has organised work in such a way as to cause the worker to lose continuity of service. There should be a presumption that work has been organised in that way so that the burden is on the employer to prove otherwise.

Holiday Pay

32. We agree that the government and employers should increase awareness of holiday pay.

33. In response to Questions 27 and 28, we agree that workers should not be deprived of their holiday entitlement, nor effectively debarred from taking holiday at a time convenient for them by the inflexible application of a 12 week reference period. However, we would be concerned that a 52 week reference period may also operate to the detriment of workers by permitting employers to refuse or defer holiday requests for long periods, effectively requiring workers to take leave at times that were inconvenient to the worker. A shorter reference period may well be more beneficial and more appropriate.

34. In response to Questions 29 and 30, we agree that workers should have greater choice in the way that they receive holiday pay. We also agree that rolled-up holiday pay would be inappropriate and is, in any event, unlawful. The essence of the right to paid annual leave is that the worker actually does take annual leave and is paid for it. The legislation must be drafted, interpreted and applied in such a way that achieves that outcome. Periods of leave must be clearly identified as such. Payments for leave should be clearly identified. The legislation should not allow or encourage leave to be 'bought out' or periods when a worker would not in any event be required to work to be treated as leave.

Right to Request

35. Question 31 asks whether the government should introduce a Right to Request a more stable contract. We agree with the TUC that "a Right to Request amounts to no real right at all" and that the government should introduce new rights providing workers with a right to a guaranteed hours contract.

36. The government should adapt the model introduced in New Zealand by the Employment Relations Amendment Act 2016, which amended the Employment Relations Act 2000. This legislation requires the employer to set out the number of guaranteed hours of work.

    The UK legislation should specify that a minimum number of hours must be guaranteed. Employers in New Zealand are only permitted to include a contractual provision requiring a worker to be available for work if there are specified agreed hours of work, including guaranteed hours, and the availability provision relates to a period in addition to those guaranteed hours of work.

    Moreover, a contract with a guaranteed minimum hours of work may only provide for additional hours of availability where there are reasonable grounds for doing so and the employer pays adequate compensation for the worker being available. If these requirements are not complied with, the worker may refuse to carry out work in excess of the minimum guaranteed hours and cannot be subjected to any detriment for so refusing. In addition, employers are not permitted to cancel a shift without providing reasonable notice or reasonable compensation, nor are they permitted to put unreasonable restrictions on workers having other jobs. The government should adopt similar provisions based upon the New Zealand model.

37. Our response to Questions 32 to 38 is without prejudice to our view that the government should introduce substantive rights along the lines of the New Zealand model.

    In answer to Question 33, we do not believe that a Right to Request helps to resolve the issues that the review recommendations sought to address. We believe that if a Right to Request is introduced, there should no exclusion of any groups of workers (Question 32) nor any exclusion of small and medium enterprises (Question 38).

    In response to Questions 34, 35, 36 and 37, the right should be no less favourable than existing Rights to Request existing in UK employment law nor any less favourable than the proposed right contemplated in Article 10 of the proposed EU Directive. We believe that the qualifying period of 26 weeks qualifying service which applies to the Right to Request flexible working under the Flexible Working Regulations 2014 is too long. The period of three months for the employer to respond to this request is also too long. The qualifying period for any Right to Request a more stable contract should be no more than one month and the employer should provide a written reply within one month of the request. The grounds for refusing a request should be extremely limited. An employer should only be able to refuse where no reasonable employer could, in the particular circumstances, provide work under a more stable contract.

Information and Consultation of Employees Regulations - ICE

38. The government is consulting on extending the Information and Consultation of Employees (ICE) Regulations to include workers who are not employees and lowering the request threshold from 10% to 2% of the workforce.

39. Questions 39 and 40 are directed to employees and employers in their own workplace.

40. In response to Questions 41, 42 and 43 we believe that the ICE Regulations can be improved in the following ways. We agree (Question 42) that the ICE Regulations should be extended to include workers in addition to employees and thus should apply to all organisations with 50 or more employees and workers combined. Those employers should automatically be required to establish compliant arrangements for information and consultation with an independent trade union, without the need for any trigger request (Questions 43 and 44). Only where no employees or workers are members of a trade union should the employer be required to set up non-union arrangements. Unions representing one or more employees or workers should be able to request the establishment of information and consultation arrangements.

41. In response to Questions 45 to 48, employee/worker engagement can be improved, and workers' views better could be better heard and taken into account by employers. This could be achieved by affording unions a legal right of access to the workplace to recruit, organise, advise and represent and by requiring the written statement of particulars provided on day one to include a statement about the right to join a union and the right of access to and by the union.

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