



Law Society
of Scotland

Consultation Response

Good Work: the Taylor Review of Modern
Employment Practices – Consultation on
Enforcement of Employment Rights
Recommendations

May 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Department for Business, Energy and Industrial Strategy and Ministry of Justice's consultation: Good Work: the Taylor Review of Modern Employment Practices – Consultation on Enforcement of Employment Rights Recommendations. The sub-committee has the following comments to put forward for consideration.

General comments

We were initially concerned that the remit of the consultation stated that it was anticipated that the reforms in relation to enforcement would only apply to England and Wales, because of the transfer of management of Employment Tribunals in Scotland to the Scottish Government in 2020. In the meantime, the consultation document stated, "Any responses received from Scottish stakeholders will be shared with the Scottish government who may then make its own decisions on whether to implement any of the proposed changes in Scotland after the transfer of functions."

This was not seen as a sufficient reason in itself for changes in this area to be delayed, and improvements denied to Scottish claimants. However, we welcomed the confirmation at a consultation meeting on 3rd May that reforms resulting from this consultation would apply across the UK.

That also accorded with the views of MPs on the Scottish Affairs Committee in their own report on The Future of Working Practice in Scotland which recommended that the Taylor recommendations in this area should all be implemented in Scotland, through cooperation of the UK and Scottish governments.¹

¹ House of Commons Scottish Affairs Committee, *The future of working practices in Scotland*, HC449 (2018)

We also note that claimants in Scotland do not have access to the same options as those in England and Wales where the state takes a much greater role, through the BEIS Employment Tribunal Award Penalty Scheme,² and where there is a Fast Track enforcement system through the county courts.³

We also draw attention to research on enforcement of employment tribunal awards in Scotland, providing empirical evidence in the form of statistics and case studies highlighting the difficulties in enforcing awards.⁴

Finally, we decline to answer questions 1-2, which are aimed at employers, and questions 9-11, as these refer to current English enforcement procedures.

Consultation questions

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

We have no comment in relation to this question.

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

We have no comment in relation to this question.

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

We believe most employers would pay Tribunal awards, but acknowledge there are some who would not do so. The barriers to employees in this position are:

² Set out in Appendix B of the consultation document

³ As described at paragraph 17 of the consultation document

⁴ E Rose, M McDermont, N Busby, A Sales, and E Kirk, *Enforcement of Employment Tribunal Awards* (2014) available online at https://pure.strath.ac.uk/portal/files/62583564/Rose_etal_2014_Enforcement_of_employment_tribunal_awards.pdf

- Risk of dismissal or no further work being given
- If post-dismissal, the risk of a small employer or sole trader becoming insolvent
- Although funding may be available through the Scottish Legal Aid Board, the 'clawback' provisions in this funding have the effect that any sums recovered have to be applied to first to legal fees, which may swallow up a smaller award entirely

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

There would be obvious advantages to the claimant in state enforcement, both in terms of saving costs and in having the powers and the resources available effectively enforce an award. This has already been noted in the enforcement ability of HMRC in National Minimum Wage cases. A possible disadvantage would be if this was not properly resourced by the state, as this would result in further delay and uncertainty.

The advantages to the employer are that it should give businesses in the same sector a level playing field by establishing the same set of rules for everyone, rather than some companies continuing to breach employment rights with the knowledge that they are likely to be able to evade enforcement of a tribunal award. Disadvantages to employers include the prospect of further government inspection and red tape.

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

One possibility is an enhanced role for ACAS, who already have a statutory role in employment tribunal claims but who, with appropriate training, could go further, by taking a role in relation to the issues of the case, rather than looking only at potential settlement. This would depend on adequate resources being provided to allow this work to be carried out

The existing legal provisions could also be given greater publicity and promotion, for example s104 the Employment Rights Act, which states:

- “(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
- (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
 - (b) alleged that the employer had infringed a right of his which is a relevant statutory right.”

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

Yes.

We agree that there is a need to simplify the process, particularly given the additional remedies now available in England and Wales to assist those with unpaid awards. We note that enforcement in Scotland remains something which an individual has to undertake by seeking an extract of the judgement from the employment tribunal, and then placing this in the hands of sheriff officers (and meeting their fee), without any assistance from the state or any certainty regarding reimbursement, which depends upon the employer's solvency and available assets.

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?

We note that employment tribunal judgements are already being published online and suggest that this be extended to include a record of whether enforcement procedures have been required, and if so, whether these were successful. Again this is a question of resources, but would tie in with the naming and shaming provisions proposed elsewhere in the consultation.

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 have no specific comments, but note that there is a need for digitisation projects to be properly funded and resourced. In addition, it is important to recognise that a digital process will not necessarily be suitable for everyone, and it is necessary to ensure that systems are in place to support those with a range of needs.

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?

We have no comment in relation to this question.

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

We have no comment in relation to this question.

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

We have no comment in relation to this 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)?

We believe that most employers would make payment if there were no grounds for appeal, but at the other extreme there are likely to be some employers who would not be deterred by prospect of being named. These employers may also take steps to avoid having to pay any subsequent penalties.

We agree that the expiry of the timescale for payment would be an appropriate time to name non-payers, although there should always be discretion not to name, depending on individual circumstances, to allow for the possibility of error or other situations where it may not be considered appropriate to name for non-payment.

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

We have no suggestions beyond those set out at paragraph 38 of the consultation document. However, as noted above, we believe there should be a more general discretion not to name an employer where the circumstances of non-payment would mean that naming them was not in the interests of fairness.

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

We note that the scheme of penalties under the National Minimum Wage enforcement legislation (50% increase if unpaid within short timescale of notice being given) is a powerful incentive. However, we recognise that the corporate structure still allows for payments to be avoided by one company and the assets to transfer to another company. We understand that BEIS is considering changes to under a

separate consultation on director's duties and it may be that a track record of non-payment could be considered as part of this.

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.

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?

Yes. This should be left to judicial discretion

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

Although an issue for proof, and therefore a question for the tribunal judge, if a causal link was found between the employee enforcing a statutory right such as seeking payment for work done or holidays due, and then a subsequent loss of employment or other detriment, we suggest that would amount to clear aggravation.

18. When considering the grounds for a second offence breach of employment status who should be responsible for providing evidence (or absence) of a first offence?

The issue of determining whether the second offence was truly the same as the first risks resulting in satellite litigation, as there are always likely to be arguable differences between two cases. In general, the onus should be on the claimant to show that there was a relevant first offence, but we note that this could result in another barrier to resolution and ultimately payment, which would deter the unrepresented from staying the course.

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

We refer to our answers at questions 17 and 18 above.

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

The assessment could be left to judicial discretion.

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

a. Aggravated breach penalty

b. Costs order

c. Uplift in compensation

We prefer option c, uplift in compensation.

Options a and b are more difficult to prove, due to the difficulties noted in establishing whether there has been an aggravation. Costs orders already result in satellite litigation, which may deter unrepresented claimants.

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

We suggest that consideration could be given to additional disclosure requirements on those who want to become company directors, regarding whether employment tribunal awards had gone unpaid in companies where they were previously directors. Online publication of decisions and enforcement, as discussed in question 7 above, should make this easier to establish.



For further information, please contact:

Marina Sinclair-Chin

Policy Team

Law Society of Scotland

DD: 0131 476 8136

MarinaSinclair-Chin@lawscot.org.uk