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# Response to Department for Business and Trade Consultation on Retained EU employment law reforms

**July 2023**

**Response of the Employment Law Committee of the Birmingham Law Society to the Retained EU employment law reforms**

This response has been prepared by the Employment Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of the Employment Committee whose members are specialist lawyers practising in all aspects of employment law and are from all branches of the legal profession.

**1. Do you agree or disagree that the Government should legislate to clarify that employers do not have to record daily working hours of their workers?**

Strongly disagree

**Please explain your answer, including consideration of the costs and benefits that may affect employers and/or workers.**

The WTR should not be seen in isolation. They form part of a matrix of legislation governing work, working time, rest, health and safety and potential civil and criminal liability.

Whilst professional and financial services and other historically "white collar" roles may be paid on a salaried basis – where remuneration does not vary with time worked – there are large sectors of the economy where hourly based pay is still the norm. It benefits both employer and employee to have a clear record of hours worked to ensure accuracy of remuneration. The proposed legislation will not obviate the need for that level of record keeping.

Whether remunerated by time spent or not, employees are entitled to breaks after specified periods of work and between periods of work. These provisions are being retained. To evidence compliance employers will need to record "worked time" to evidence compliance. Again, the proposed legislation will not obviate the need for that level of record keeping.

Employers are obliged to pay National Minimum Wage. They can only be compliant if they have accurate records of time worked (or time which is treated as "worked"). Again, the proposed legislation will not obviate the need for that level of record keeping

**2. How important is record keeping under the Working Time Regulations to either enforcing rights (for workers) or for preventing or defending disputes (for employers)?**

Very important.

**Please explain your answer.**

Please see answer to Question 1.

**3. What is your experience of record keeping under the Working Time Regulations? Beyond the proposal above, how, if at all, do you think they could be improved?**

Birmingham Law Society (in this case, operating through its Employment Law Committee) does not have direct relevant data or experience. Our comments here relate to the experience gained from committee members who all act as employment law advisers.

**Questions for employers**

**The following questions focus on what, if any, system your business currently has for recording the working hours of your workforce.**

As a representative organisation, we are not able to offer a collective view. We have not therefore answered Q4 to Q8 inclusive

**HOLIDAY PAY AND HOLIDAY ENTITLEMENT REFORM**

**9. Would you agree that creating a single statutory leave entitlement would make it easier to calculate holiday pay and reduce administrative burden on businesses?**

Strongly Agree

**Please explain your answer.**

As the consultation paper explains there are clear disadvantages to having two separate holiday entitlements. As there will be a common source for that entitlement going forward there is no purpose in separating out the different types of holiday.

What should be made clear to employers and employees is whether that 5.6-week entitlement is or is not inclusive of statutory and bank holidays

**10. (For employers): What rate do you currently pay holiday pay at?**

As a representative organisation, we do not respond

**11. (For workers): What rate do you currently receive holiday pay at?**

As a representative organisation, we do not respond

**12. What rate do you think holiday pay should be paid at?**

5.6 weeks of statutory leave at "normal pay".

**Please explain briefly in your answer what you think should be included as part of the holiday pay rate you have selected.**

If employees are to be encouraged to take time off, then they should be no worse off during a holiday week than in a normal week. For that reason, it is our view that it would be preferable for holiday pay to be based on "normal pay", subject to what we have noted below.

For employees whose pay does not vary with hours worked or productivity then "normal pay" is the relevant proportion of their annual salary – the usual formula being 1/260th part of annual salary of each day of holiday.

For those with variable elements the issue is which of them should form part of "normal pay". An employee with regular or contractual overtime will, over time, come to regard that additional income as "normal". The same will be the case where commission earned on a regular basis from week to week will form a normalised element of income. Those on variable pay based on productivity should have their "normal pay" based on an average in any statutory reference period.

We consider there is a credible argument about the receipt of regular but infrequent bonus payments and their inclusion in any averaging process. If, for instance, an employee has contractual entitlement to a bonus every 6 or 12 months, and that has been paid over a period of years to the point where it is not only a right in any one year but expected, should that then form part of "normal pay" ? The argument is about whether it would have a distorting effect if, for instance, the averaging period covered the date of payment thereby artificially increasing the "normal pay" to a level (potentially) higher than would be the case for "normal pay" at other times.

**13. Would you agree that it would be easier to calculate annual leave entitlement for workers in their first year of employment if they accrue their annual leave entitlement at the end of each pay period?**

Agree.

**Please explain your answer.**

Having a single, clear accrual system gives clarity for employees and employers. It does not preclude holiday being taken as an adjustment which can be made on exit if needs be.

It must however, be made clear that the holiday is accrued on a pro-rata basis during each pay period but that the accrued amount becomes recordable and therefore useable by the employee at the end of each pay period. If an employee is not entitled to any holiday accrued during part of a month worked this is effectively diminishing employee rights. For example, if an employee commences employment on the 1st of the month and is not successful, they are given notice of one week on the 22nd of the month and their employment terminates on the 29th of the month, the employee has, in effect, worked for a full month but, as they were not employed on the 30th day, at the end of the payment period, they have not accrued any leave entitlement and have lost 2 1/3 days of pay. This is a small but real diminution of employee rights.

**14. Are there any unintended consequences of removing the Working Time (Coronavirus) (Amendment) Regulations 2020 that allow workers to carry over up to 4 weeks of leave due to the effects of COVID?**

No.

**15. Do you think that rolled-up holiday pay should be introduced?**

Other.

**Please explain your answer.**

For those who work on an irregular basis, with potentially many employers each paying a relatively small proportion of the employees’ total remuneration, we can see that "payment as you go" based on a clear formula and method gives certainty and simplicity for both sides. It does undermine the basic premise that "holiday pay" should be paid at times when the employee does not work. It passes to the employee the obligation to save the money when it is received rather than have it retained by the employer and gives rise to a possible disincentive to take time off as the money may have been spent. It is also inconsistent with the existing prohibition on employers paying in lieu of holiday (save on termination of employment). However, we believe the advantages outweigh the disadvantages in atypical working cases. An alternative being that entitlement is accrued on the suggested basis of 12.7% of hours of work done which would be a flexible method of holiday calculation applicable to all working patterns.

That should be the exception to a general rule that holiday pay is paid when holiday is taken.

For that reason, our recommendation is to allow it in some but not all cases.

**16. Would your existing payroll system be able to calculate holiday pay using the rolled-up holiday pay calculation as well as the 52-week holiday pay reference period?**

We are a representative body and cannot respond to this question

**TRANSFER OF UNDERTAKING (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 (TUPE)**

**17. Do you agree that the Government should allow all small businesses (fewer than 50 employees) to consult directly with their employees on TUPE transfers, if there are no employee representatives in place, rather than arranging elections for new employee representatives?**

No.

**Please explain your answer.**

We understand that there should be some wider application of the principle enshrined in the micro-business exception. However, if there is to be a wider application of the current principle then it is our view that it should apply to transfers where there are no more than 20 people. In any event it is essential that the same level of information is given and that the same level of consultation is carried out.

This would be consistent with the collective consultation principles under s188 of the Trade Union and Labour Relations (Consolidation) Act 1992 where the issues are no more and no less complex than those in relation to a TUPE transfer.

Direct consultation with a labour force of up to 50 people would, in our view, create a greater burden on an employer than would be the position if they were obliged to consult via elected representatives where there are more than 20 employees affected by the transfer. In many environments "mass" communication cannot be achieved by the use of email or video-conferencing and the only practicable means would be by bringing the workforce together in a single meeting or series of meetings. It would be easier and less disruptive for elected representatives to proceed as they do now, representing the position and interests of fellow workers.

As an alternative, where 20-50 employees are affected by the transfer, the employer could be given the choice to consult directly or via elected representatives.

**18. Do you agree that the Government should allow businesses of any size involved with small transfers of employees (where fewer than 10 employees are transferring) to consult directly with their employees on the transfer, if there are no employee representatives in place, rather than arranging elections for new employee representatives?**

Yes.

**Please explain your answer.**

This is a manageable number.

**19. What impact would changing the TUPE consultation requirements (as outlined above) have on businesses and employees?**

It would enable a more direct process where there are small numbers (under 10).

**20. What is your experience of the TUPE regulations? Beyond the proposals above, how, if at all, do you think they could be improved?**

As a representative organisation, we can draw only upon the experience of our clients.

TUPE has now been around for more than 40 years. It is understood in the context of business transfers and service provision changes (Reg 3(1)(a) and (b). The basic principle is that employment should be preserved where a business or service transfer should be maintained.

That said we recommend that the Government considers the following (by reference to Regulation numbers in TUPE):

1. Under Reg 3(3)(a)(i) the "organised grouping" should be defined by reference to their purpose at the date of the service provision change rather than the purpose for which they were recruited. The case law is yet to clarify “immediately before” and clarity on this point would be helpful;
2. Under Regulation 4 – that an amendment be considered to preclude the transfer of part of an employment contract where there is a service provision change resulting in, for example, 20% of an employee’s work being transferred. Whilst this may be possible in legal terms, so that they are employed by two employers, in practice this can be impractical and can create uncertainty. We would suggest it is made clear that an employee transfers only when more than 50% of their work activity is subject to the transfer;
3. Under Regulation 4(4) – this be removed thereby allowing the transferee to seek to reach an agreement post transfer in the same way as the transferor can pretransfer and that employees be permitted to waive their rights to bring claims under TUPE by way of a settlement agreement. This represents a position in which the transferee is no better and no worse off than the transferor, and the employees have the same rights rather than an enhancement of their rights prior to the transfer. It would avoid the uncertainty of transferees in seeking to agree posttransfer variations which they may find are later challenged under Reg 4(4).
4. If Reg 4(4) is to be retained then Reg 4(5) should be amended so that the qualification in Reg 4(5)(a), regarding changes in the workforce, be removed. This would allow the transferee the same right to seek a variation by agreement as the transferor has before the transfer.
5. Reg 9 – This should be simplified. If the proposed changes (above) to Regulation 4(4) regarding reaching an agreement post transfer are adopted these regulations could simply state that the insolvency of the transferor does not affect the ability of the parties to reach an agreement.
6. Reg 13 – We believe this Regulation should be retained but refined. We can see no reason why details of agency workers used by the employer (rather than ‘in the undertaking’) are necessary or required.
7. Reg 16(3) – that this be amended to clarify the criteria against which the default is measured. The wording of the regulation appears to have been overridden by case law to provide for the protective award to be 13 weeks' pay and subject to just and equitable reasons for a discount, rather than the intended just and equitable award subject to a maximum of 13 weeks.