GOOD WORK IS FLEXIBLE AND FAIR

CBI RESPONSE TO THE GOVERNMENT'S CONSULTATIONS ON ENFORCEMENT, TRANSPARENCY AND AGENCY WORK

The CBI welcomes this opportunity to contribute to the Government's consultation on enforcement, transparency and agency work. In this paper, we present the business vision for good work, built on the principles of flexibility, transparency, fairness and dialogue.

The CBI is the UK's leading business organisation, speaking on behalf of 190,000 businesses that together employ around a third of the UK's private sector workforce. Its mission is to help businesses create a more prosperous society.

There is a misconception that flexible labour markets and fairness are in some way in conflict. But flexibility has long been the UK's competitive advantage, creating good jobs that meet people's needs and acting as a magnet for foreign investment. Flexibility is important for growth, jobs and productivity. And the UK's flexible labour market also acts as a catalyst for innovation. Working flexibly is a positive choice for most people and this should be celebrated. Research has found that over four-fifths of self-employed individuals want to keep working in this way rather than looking for employed jobs. This indicates that flexibility is usually welcomed by workers rather than imposed against their wishes by their employers.

Instead of demonising different forms of working for ideological reasons, a focus on evidence-based debates and solutions is needed. This will most effectively ensure that work is fair, flexible, engaging, and affords scope for development, which is essential to meeting the needs of businesses and workers.

Businesses are committed to developing approaches that are fair, transparent and strengthen trust between business and society. Government has an important role to play in ensuring that the legal framework puts in place the conditions for job creation and higher productivity to deliver sustainably rising wages. It is also essential to the operation of a flexible labour market that government ensures that enforcement mechanisms are effective.

Flexibility should benefit both parties – transparency, dialogue and fairness underpin this

It is widely recognised that the UK has one of the most flexible labour markets in the world. The UK employment rate currently stands at 75.6% – the highest since comparable records began. And the same holds for the unemployment rate, which at 4.2% is the lowest since 1975[1]. Flexibility plays a big part in this success. Virtually every respondent business of the CBI's 2017 Employment Trend Survey (99%) believes a flexible labour market is vital or important to competitiveness and the prospects for business investment. Businesses also agree that this competitive advantage should be preserved and enhanced.

Workers also need to be treated fairly in their workplaces – this is not at odds with a flexible labour market that offers a wide range of flexible employment options. CBI members believe that good work is fair, engaging, affords the scope for development and is flexible in ways that meet the needs of both businesses and workers. Employer and government action can help individuals flourish and enhance the quality of work with steps to improve transparency, dialogue and fairness.

[1] ONS 2018, Labour Market Update May 2018.

Transparency is important in employment relationships and should be increased through new requirements to provide basic information

Knowing your rights and how to enforce them is fundamental to all employment relationships, but they are of particular importance in the UK because of our system of individual enforcement, which rests on employment tribunals. Businesses also recognise the role of transparency in building and strengthening trust between business and their staff. The CBI believes that government action on three issues would improve transparency. These are: the introduction of written statements for all workers, itemised payslips, and a key facts page for agency workers.

The CBI's members believe that the first measure to increase transparency is to extend the right that 'employees' have to a written statement of key terms and conditions of employment to all 'workers'. This will mean that all employed persons receive a written statement summarising key rights.

Businesses also support the introduction of an itemised payslip for workers – as recommended by the Low Pay Commission and endorsed by Sir David Metcalf in the UK Labour Market Enforcement Strategy 2018/2019. This would give workers information about their hours worked and enable them to challenge situations where they might be paid less than the minimum wage because they are not being paid for all the hours they have worked. But businesses have raised concerns about one unintended consequence of this change. Providing a payslip has previously been considered, under the discretion currently available to HMRC, as an indicator of employed tax status. When introducing itemised payslips for workers to improve the enforcement of the minimum wage, the government must make sure that it does not accidentally change an individual's tax status.

When it comes to agency workers, it is important that they know who they are engaged by, how much they will be paid and whether any deductions will be made from their pay. A key facts page could make a valuable contribution by ensuring that agency workers have all this basic information, but it must reflect the realities of agency working. Some information can be provided when an agency worker is registered – such as who will be engaging the worker and the minimum rates of pay. But some information like the exact rate of pay will be specific to an assignment and agreed with a client. To reflect these realities of agency work provisions should allow for the addition of the exact rate of pay at the point of assignment and not registration.

Recommendations:

- The right of employees to receive a written statement setting out key terms of their employment should be extended to workers to give them the same clarity about their rights.
- Itemised payslips for workers should be introduced to improve the enforcement of the minimum wage. Once this is mandatory, HMRC should no longer consider a payslip as evidence of an individual's tax status.
- A key facts page should be given to agency workers when they register with an agency. It should clarify who they are engaged by and what their minimum rates of pay are. Agencies should then confirm the exact rate of pay at the beginning of each assignment.

Work cannot meet the needs of businesses and workers without dialogue

There is widespread recognition among businesses that a high level of employee engagement has a positive impact on productivity and performance. In the CBI's 2017 Employment Trend Survey 71% of businesses report co-operative employee relations currently and a similar proportion expect to maintain this over the next 12 months. Additionally, when asked what the priorities for the workplace are in the coming year – the most frequently selected option by businesses was 'high levels of employee engagement' (46% of businesses cited this as one of their top 3 priorities). Currently, employers use many strategies to engage staff both individually and collectively, but there is room for improvement - both in business practices and legislation to facilitate workplace dialogue.

The 'right to request' framework can give workers confidence to start a dialogue with their employer…

Individual dialogue is important when it comes to flexibility. The needs of both parties cannot be met if they are not first identified through dialogue. Legislation gives individuals the confidence to initiate this discussion through the right to request framework where they want more flexibility, but not when they want less flexibility. The introduction of a right to request fixed hours, just as there is a right to request flexible working, would give the individual more confidence to initiate this dialogue with their employer. It is not possible to have a 'right' to flexible working because flexible working takes so many forms, not all of which will be compatible with every job. It is also not possible to have a 'right' to more fixed hours because this work may not be available, or the business may have an ongoing need for flexibility that precludes guaranteeing these hours. But a right to request increases the likelihood that the needs of both employer and worker are understood, and this is a prerequisite for successful flexible job design.

…but a right to request a direct contract duplicates agency workers' right to be informed about vacancies

Creating a right for an agency worker to request a direct contract of employment if they have been placed with the same hirer for 12 months may also encourage dialogue. But this new right is not needed, making it unlikely that it will have much of an impact. In addition to the facts that few agency placements last 12 months and that the UK already has the best record in Europe for temporary workers moving to permanent roles (currently 57.1%)[2], agency workers already have the right to be informed about vacancies with the hirer while on assignment with them. The right to be informed about vacancies should have a similar impact on an agency worker's confidence to ask to be directly employed as a right to request framework.

Collective voice can take many forms - but to be effective it needs to be supported by a critical mass of the workforce

To effectively engage the workforce an employer will use a combination of individual and collective dialogue. Collective engagement can take many forms ranging from a staff forum to a works council or representation by a Trade Union. There is no one best form for representation. The CBI believes that the most effective way to engage a workforce collectively is the way that a workforce has freely chosen. This is why the ICE regulations and Trade Union recognition rules include proportionate support thresholds that must be met. The option that is chosen by the workforce will vary from company to company and may even vary within different parts of the same organisation.

The benefits of collective engagement are unlikely to arise from imposing a form of collective engagement that the workforce has not positively chosen to participate in. While business believes that some terms of the ICE regulations create disproportionate barriers to collective voice, the headline 10% threshold is not the problem - a critical mass of support is needed to make these bodies effective. Instead, the regulations would be improved if all employees would count equally rather than counting part-time workers on a full-time equivalent basis. The ICE trigger should also be brought into line with collective redundancy rules by operating on a business unit or entity basis rather than requiring undertaking-wide support. This would remove the barrier to workers in one location from having a collective voice because of a lack of interest from another business unit.

As well as making it easier to meet the support threshold within the ICE regulations, the minimum terms for ICE compliant consultation bodies should be brought into line with the default provisions. Doing so would end the situation where it is possible to conclude lower terms than would be defaulted to in the event that no agreement could be reached. To address the low level of understanding about the benefits of collective voice at work among workers, businesses support giving ACAS a statutory duty to promote employee voice in UK workplaces.

[2] Eurostat data (2016). Labour transitions from temporary to permanent contracts -3-year average. Available online at: http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tepsr_wc230&plugin=1

Recommendations:

- A right to request fixed hours should be introduced on the same basis as the right to request flexible working so that employees always have the confidence to discuss what they want from flexibility with their employer.
- ACAS should be given a statutory duty to promote employee voice in UK workplaces as part of a partnership between business and government to improve the levels of employee engagement across the UK.
- The existing right of agency workers to be informed about vacancies with the hiring company already fulfils the function of the proposed right to request a fixed term contract after 12 months. An additional right to request is therefore unnecessary.
- The ICE regulations should be updated to bring them in line with modern employment practices. Businesses could support the following changes to the ICE regulations to improve collective employee voice in UK workplaces where there is demand from the workforce for it:
    - All employees should be counted equally for the purposes of triggering the regulations rather than counting part-time or variable hours employees on a full-time equivalent basis;
    - The default provisions that apply if the business and employees are unable to agree on the terms for the consultation body should also be the minimum terms it is possible to conclude where the business and its workforce are able to reach an agreement;
    - While businesses must retain control to choose the appropriate level for collective representation, it should be possible for a more localised demand to trigger the regulations – for example by bringing the ICE trigger and the collective redundancy trigger into line by operating on a business unit or entity basis rather than requiring undertaking-wide support.

Fair treatment at work improves performance and trust in business

As the CBI's report *Everyone's business tracker*[3] published in January 2018 shows 'treating employees well' – offering fair pay, treating people with respect and as people rather than simply as a resource – has the biggest impact on trust in business and was cited by 69% of people who took part in the research. Fairness also matters because it increases productivity. The ACAS report *Building productivity in the UK* stresses that 'at the core of fairness is a sense of all employees being valued and treated in a consistent and even-handed way' and is firmly linked to the productivity of the workforce.

Businesses recognize that they have to continue developing approaches that enhance the fair treatment of their workforce and have identified three ways in which government action can help: (1) ensuring fairness in the calculation of holiday pay, (2) making sure that the pay between assignments model operates as intended and (3) making the calculation of continuous service more consistent.

Businesses need the flexibility to choose the reference period for holiday pay that supports their business model, before applying it consistently and transparently

Problems with the reference period for holiday pay began after new case law changed holiday pay rules to require the inclusion of aspects of variable pay. This extra variability in what is to be paid while on holiday means that a 12-week reference period is increasingly likely to be both excessively complicated for companies and unfair for workers. CBI members want the flexibility to operate a longer reference period where doing so would even out seasonal variations – one example here are roadworkers that work long hours during the summer months but short hours in winter. While employers often allow workers the flexibility to decide when to take annual leave, they retain the right to reject leave requests where they are

[3] CBI's Everyone's business tracker, 2018. Available online at: http://www.cbi.org.uk/index.cfm/_api/render/file/?method=inline&fileID=075C0F39-F35D-4FA1-8DB3C09612C9C883.

not compatible with business needs. The problem this creates is that where previously rejecting a workers' holiday request would only mean that holiday was taken at another time, it could now also mean that holiday is paid at a different rate. Employers facing two competing leave requests do not want to also be choosing which worker will be paid higher holiday pay.

The CBI supports additional flexibility rather than a new mandatory reference period of 52 weeks because many companies unaffected by recent case law would then be required to purchase new payroll software despite there being no benefit to them or their workforce. A better solution for companies and workers would be to allow businesses to choose between the two pay reference periods for holiday pay entitlements. Fairness could be ensured by requiring that the chosen pay reference period is applied consistently and transparently.

Pay between assignments delivers for businesses and for workers, but the regulation has to operate as intended

The pay between assignments (PBA) provisions within the Agency Workers Regulations – also known as the Swedish Derogation – are based on Article 5.2 of the EU's Temporary Agency Work Directive and came into force in 2011 as part of the UK's tripartite agreement on the implementation of these rules. Its inclusion in the UK regulations was part of this negotiated agreement and its retention is essential to ongoing business support for these EU rules. But since the regulation came into force it has been unfairly attacked by stakeholders as a 'loophole'. To suggest this is disingenuous. Having specifically agreed that the UK's rules would permit PBA arrangements and that it would not be used to evade the purpose of the directive, this should be the test by which PBA is judged and revised.

Despite there being very limited, if any evidence of systematic abusive PBA arrangements, the CBI has previously called for reform of these rules to ensure that they are fair. The CBI's members believe that the pay between assignment model should be retained, but that clauses should be reviewed to ensure that the regulations are used appropriately. One way to ensure the regulations are operating as intended would be to require a top-up payment when working hours are lower than an agreed threshold, in addition to a payment when there is no assignment available.

More clarity is needed about how to calculate continuous service to limit accidental non-compliance

The final issue about which CBI members believe that government action would improve fairness relates to the calculation of continuous service with an employer. Businesses support the extension of the time period to break continuous service from one week to one month. But doing so increases the risk of accidental non-compliance as an existing ambiguity become larger. Employers have received conflicting legal advice about the correct interpretation of this clause of the Employment Rights Act and government clarification would help companies to comply with the law. While some have been advised that a week is a fixed calendar period, others have been advised to calculate it as a rolling 7-day period. This can have the impact of almost doubling the length of the relevant period. The CBI is not aware of evidence that employers are firing workers and rehiring them shortly after to prevent workers from accruing employment rights. Employers' main priority is ensuring that they correctly apply the law and this is why they support the extension but seek clarification on its correct calculation.

Recommendations:

- The 'pay between assignments' (PBA) model must be retained as an integral component of the Agency Workers Regulations, but its terms should be reviewed to ensure that it is used appropriately.
- Employers should be allowed to choose between a 12 and a 52-week reference period for holiday pay entitlements on the condition that it is applied consistently and transparently.
- The period to break continuous services should be extended from one week to 'one month.' But this period should be clearly defined as '4 weeks' on a 'rolling basis' to ensure consistent application and avoid accidental non-compliance.

Improved enforcement measures must support better outcomes for individuals and for businesses

Most workplace disputes can be settled in the workplace. This is usually the preferred resolution for businesses and workers. Where it has not been possible to resolve a dispute in the workplace Employment Tribunals are an essential backstop to ensure that employment rights are upheld. The CBI has long-held the view that Employment Tribunals are in need of reform to return them to their original vision.[4] It is simply not the case any longer that they could reasonably be considered "easily accessible, speedy, informal and inexpensive".[5] The serious deterioration in service since the removal of employment tribunal fees serves neither party effectively.

Some pro-active state enforcement is also appropriate and commands the confidence of businesses when it is well-targeted on the basis of risk and intelligence. According to the CBI's 2017 Employment Trend Survey - 95% of businesses believe that the enforcement of employment law can be improved.

Government should take steps to make Employment Tribunals more effective

According to statistics (for the period October to December 2017) released by the Ministry of Justice in March 2018 the number of Single Employment Tribunal claims has increased by 90% as compared to the same period in 2016. Multiple Employment Tribunal claims have increased by 467%.[6] The reason for this surge in demand is the removal of the flawed tribunal fees system and the failure to yet replace it with a new proportionate system that dissuades weak claims while protecting access to justice. CBI members are currently reporting significant delays waiting for Employment Tribunal hearings which are being delayed by up to a year. The CBI has long advocated a wider reform of employment tribunals to support the swift resolution of cases that do require an employment tribunal ruling.

Over the last ten years Employment Tribunals have become steadily more legalistic and have drifted further from their initial purpose. They have become more like other courts and businesses believe that putting BEIS in charge of employment tribunal policy and administration is an important step in addressing this problem.[7]

The CBI did not support the design of the previous fees regime. We did not support either the policy objective of shifting the cost of the system onto its users, or the impact that fees of that level had on access to justice. But we still believe that the introduction of a proportionate fee system in Employment Tribunals is important. It would encourage claimants to make use of alternative dispute resolution and discourage weak, misguided and occasionally vexatious claims, speeding up justice for those with a robust case.

Businesses support well-targeted additional proactive enforcement, including the enforcement of unpaid employment tribunal awards

CBI members welcome the report *Informing the UK labour market enforcement strategy 2018-2019* published by Sir David Metcalf, Director of Labour Market Enforcement. They support the creation of the Intelligence Hub as a shared resource to increase individuals' and employers' knowledge of employment rights and enforcement mechanisms. And stress that the online presence of the enforcement agencies should be improved to make guidance more accessible.

The role of the EAS is to enforce the regulation of employment agencies. The CBI believes that it is important that the EAS also ensures compliance with the same regulations by relevant umbrellas and

[4] The right balance: delivering effective employment tribunals, CBI, 2013; Work that works for all, CBI, 2017
[5] Royal commission on trade unions and employers' associations 1965-1968, Report of the Donovan Commission, (reprinted 1975), Cmnd 3623
[6] Ministry of Justice, 2018. Available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686222/tribunal-grc-statistics-q3-2017-18.pdf.
[7] CBI, *The right balance,* 2013.

intermediaries. To take on this additional responsibility effectively EAS should receive additional resources. The CBI does not however, believe that the EAS should be asked to enforce the Agency Workers Regulations (AWR). To do so, the EAS would have to become an economy-wide regulator which is a radically different function to that which it is currently asked to perform. As well as having concerns about weakening the EAS's focus on the recruitment sector, the CBI does not believe that the case that the AWR needs to be proactively enforced has been proven.

Businesses believe that if you lose an Employment Tribunal case then the award made to the claimant should be paid. The proportion of unpaid awards concerns them because fair competition must be based on compliance with the law and a company failing to pay an employment tribunal award is potentially undercutting one that has complied with their responsibilities to their workers.

Businesses support naming schemes like that which currently encourages compliance with the National Minimum Wage. But CBI members believe that it is unlikely that the introduction of a naming scheme will be very effective at improving the payment of employment tribunal awards. It is effective because companies want to protect their reputation. This is unlikely to have an impact on insolvent companies or fix the 'phoenix' problem. Government needs to evaluate the effectiveness of naming schemes to better understand the situations in which it will be most effective and when another enforcement measure would be more effective.

The CBI does not believe that it is sustainable that a claimant who wins a case at tribunal can end up worse off financially than if they had not taken their claim in the first place. We therefore believe that government should take more responsibility for ensuring that employment tribunal awards are paid. In cases of insolvency the Insolvency Fund allows individuals to claim some compensation such as unpaid wages or unpaid holiday pay. This situation would be improved by government considering how to allow a wider variety of employment tribunal awards to be protected by the Fund. Government should also explore what pro-active enforcement mechanism could be introduced to reduce the instance of unpaid awards.

Recommendations:

- Employment Tribunals should recover their focus on swift resolution by being returned to the stewardship of BEIS.
- Raise the online presence of enforcement agencies through the Intelligence Hub to improve the accessibility of guidance on employment status, rights, labour standards and how to enforce employment rights.
- Umbrella organisations and other employment intermediaries should be brought in scope of the EAS inspectorate remit and the resources of EAS should be increased to allow them to take on this new responsibility. But the EAS should not be asked to enforce the Agency Workers Regulations as this would mean enforcing companies outside the employment agency sector and would stretch EAS resources unhelpfully.
- Government should take greater responsibility for the payment of employment tribunal awards. A naming mechanism may resolve some cases but will be far from a panacea.