Department for Business, Energy & Industrial Strategy

Ministry of Justice

GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

Consultation on enforcement of employment rights recommendations

February 2018

Consultation on enforcement of employment rights recommendations

Any enquiries regarding this publication should be sent to us at the Department for Business, Energy & Industrial Strategy.

Contents

General information

Purpose of this consultation

This consultation seeks views from stakeholders on how to implement the recommendations the government is committed to taking forward. It also invites respondents to submit evidence on the best approach to other recommendations before the government takes a decision on next steps.

Issued: 7th February 2018 **Respond**

by: 16th May 2018

Enquiries to:
Department for Business, Energy & Industrial Strategy,
Labour Markets,
1st Floor, Spur 2,
1 Victoria Street,
London, SW1H 0ET

Tel: 020 7215 5000
Email: Enforcement.emp.rights.consultation@beis.gov.uk
Consultation reference: Consultation on enforcement of employment rights recommendations

Territorial extent:
England and Wales.

How to respond
Your response will be most useful it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Please provide responses to the email address above.

Additional copies:
You may make copies of this document without seeking permission. An electronic version can be found at https://www.gov.uk/government/consultations/enforcement-of-employment-rightshttps://www.gov.uk/government/consultations/enforcement-of-employment-rights-recommendationsrecommendations

No hardcopies of this document are available.

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on the GOV.UK website. This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the Government's Consultation Principles.

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

Email: beis.bru@beis.gov.uk

Introduction

In October 2016 the Prime Minister commissioned Matthew Taylor (Chief Executive of the Royal Society of the Arts) to conduct an independent review into modern working practices, focused on assessing how employment practices might need to change in order to keep pace with modern business models.

In July 2017 the Review of Modern Working Practices (the review) was published, which included 53 recommendations. The review considered a range of issues, including the implications of new forms of work, the rise of digital platforms and the impact of new working methods on employee rights, responsibilities, freedoms and obligations.

The review noted that the UK labour-market is characterised by flexibility, meaning that individuals and businesses are free to agree terms and conditions that suit them best. It highlighted the benefits of this model, with the UK being in a position of overall strength.

Employment levels and rates are at historic highs and comparatively we perform well internationally.

Flexibility has been a key part of enabling business to respond to changing market conditions and has supported record employment rates. Individuals have the opportunity to work in a range of different ways, on hours that fit around other responsibilities.

This is workable and acceptable where these agreements are based on a statutory minimum. In that context the review is clear that removing incentives for non-compliance with employment law, clarifying the legal framework and addressing unfair risk transfer to vulnerable workers are all important steps to ensuring fair and decent work. However, these will not have the necessary impact unless people are able to enforce their rights when things go wrong. This document considers the recommendations the review made in relation to enforcement.

The enforcement of employment rights in the UK is split between individual enforcement and state enforcement.

Individual enforcement

The majority of employment rights are enforced by individuals taking their employer, or former employer, to an employment tribunal where attempts to resolve the dispute within the workplace have failed. Before they can do so, there is a statutory requirement to notify Acas of the dispute so that all parties can attempt to resolve it via the Early Conciliation process. Taking part in conciliation is optional and either party can turn it down.

If an employment tribunal finds that an individual has had their employment rights breached, it can order the respondent (the employer) to pay a financial award to the claimant (the employee/worker). This can include redress (i.e. unpaid wages or redundancy payments) and compensation (e.g. for hurt caused by discrimination). The ways to calculate awards, and limits, are set out in legislation and through case law.

Introduction

Fees were introduced for proceedings in employment tribunals and the Employment Appeal Tribunal in 2013, through the Employment Tribunals and the Employment Appeal Tribunals Fees Order 2013 (Fees Order).[1] Following a Supreme Court ruling in July 2017, the government immediately stopped charging fees in employment tribunals and the Employment Appeal Tribunal, and the Ministry of Justice has put in place arrangements to refund those who have paid the fees in the past. The government is considering the judgment very carefully and will set out any proposals for future fees in the employment tribunals systems in due course.

---

[1] Employment Tribunals and the Employment Appeal Tribunals Fees Order 2013 (Fees Order) [2] Labour Market Enforcement Strategy: Introductory Report

State-led enforcement

Other, significant, employment rights may be enforced with direct support from the state. Workers who are concerned they are being underpaid the National Minimum Wage or National Living Wage may make a complaint to Her Majesty's Revenue and Customs (HMRC). HMRC responds to 100% of such complaints, and investigates employers to ensure they are compliant with minimum wage rules. When they are not, HMRC requires employers to repay arrears of wages to their workers, and may levy a financial penalty. The Department for Business Energy and Industrial Strategy (BEIS) also considers employers for 'public naming'. The review recommended that the government should review whether state enforcement of other employment rights and employment-related entitlements could be enhanced.

The Employment Agency Standards (EAS) Inspectorate enforces the domestic regulations relating to employment agencies. EAS works with recruitment agencies, hirers and work seekers to ensure that the regulatory framework for employment rights is complied with and that anyone who uses the services of a private recruitment agency to find work is treated fairly. The review makes a number of recommendations on the remit of EAS. These are considered in the separate agency workers consultation.

The Gangmasters and Labour Abuse Authority (GLAA) operate a licensing regime for businesses that supply temporary labour in high risk sectors in the fresh food supply chain. The Immigration Act 2016 gave GLAA additional powers to investigate modern slavery and other labour abuse offences. These came into effect in April 2017.

The Immigration Act 2016 also created the statutory role of the Director of Labour Market Enforcement (the Director) who reports jointly to the Home Secretary and the Secretary of State for BEIS. Professor Sir David Metcalf was appointed to the role on 1 January 2017. The Director is responsible for producing an annual strategy setting the strategic direction for the three existing labour market enforcement bodies to ensure that enforcement efforts are coordinated and targeted. He published his introductory labour market enforcement strategy in July 2017.[2]

Devolution

The UK government committed to transfer the functions of reserved tribunals to Scotland as part of the Smith Commission Agreement. This will take effect through the process set down in section 39 of the Scotland Act 2016. Following the transfer, the Scottish government will be responsible for deciding how those tribunals in Scotland are managed. It is currently anticipated that employment tribunals will be transferred to the Scottish government by April 2020.

The UK government will continue to be responsible for managing the operations of employment tribunals and the Employment Appeal Tribunal in Scotland until they are transferred to Scotland. We recognise that any reform of the tribunals could have implications for that transfer and will continue to work closely with the Scottish government in light of decisions made following this consultation.

We are therefore consulting on the basis that any changes will apply in England and Wales (unless those changes relate to matters that are reserved). 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.

Any decision on reserved employment law will have implications for Great Britain as a whole. The UK government recognises that many stakeholders work across borders and will have an interest in employment tribunal processes and therefore encourages all interested stakeholders to contribute their views.

Courts and tribunals reform

The UK government previously consulted on changes to the employment tribunal system as part of the development of Her Majesty's Courts and Tribunal Service's (HMCTS) courts and tribunals' reform programme.

This wider reform programme is already being delivered across other jurisdictions and offers great opportunities for the employment tribunals and Employment Appeal Tribunal to benefit from investment in IT infrastructure and modernisation of procedure. This will facilitate and support innovative new ways of working that will ensure access to justice for all, and encourage greater proportionality across service delivery, whilst preserving the strengths of the current system.

As part of this work, HMCTS expects to have better access to data and management information in relation to its services as a result of the ongoing digital reforms. End to end digitisation of employment tribunals is currently anticipated to begin in 2019, at which point detailed consideration will be given to what information might be needed to manage the jurisdiction. The options outlined in this consultation are based on the management information that is available within the existing employment tribunal system, but further consideration will

be given in future to how improved data will allow HMCTS to manage services more effectively.

Executive Summary

The review noted a consistent message that enforcing rights is not as easy as it should be. For the system to work, there not only has to be clarity, but justice. Employers who break the rules must expect there to be consequences for their actions **and individuals who feel they have been wronged should feel that the system will allow their case to be heard and that a fair decision is reached.** Additionally the system must punish employers who are noncompliant so that compliant firms are not put at a competitive disadvantage.

The review makes a number of recommendations on the enforcement of employment rights:

- **HMRC should take responsibility for enforcing** the basic set of core pay rights that apply to all workers – National Minimum Wage, sick pay and holiday pay for the lowest paid workers;
- Government should ensure individuals are able to get an **authoritative determination of their employment status without paying any fee** and at an expedited preliminary hearing;
- The **burden of proof** in employment tribunal hearings, where status is in dispute, **should be reversed** so that the employer has to prove that the individual is not entitled to the relevant employment rights, not the other way round, subject to certain safeguards to discourage vexatious claims;
- Government should **make the enforcement process simpler** for employees and workers by taking enforcement action against employers/engagers who do not pay employment tribunal awards, without the employee/worker having to fill in extra forms or pay an extra fee and having to initiate additional court proceedings;
- Government should **establish a naming and shaming scheme** for those employers who do not pay employment tribunal awards within a reasonable time;
- Government should create an obligation on employment tribunals to consider the use of **aggravated breach penalties and cost orders** if an employer has already lost an employment status case on broadly comparable facts; and
- Government should allow tribunals to award **uplifts in compensation** if there are subsequent breaches against workers with the same, or materially the same, working arrangements.

The government agrees that action is needed in this area and in particular to tackle the current level of unpaid employment tribunal awards. This consultation seeks views from stakeholders

on how to implement the recommendations the government is committed to taking forward. It also invites respondents to submit evidence on the best approach to other recommendations before the government takes a decision on next steps.

Executive Summary

In response to the recommendations in the review:

- The government **is taking action by:**
    - establishing a naming scheme for employers who do not pay employment tribunal awards, and is seeking views on how it can best achieve this; o increasing the aggravated breach penalty limit to at least £20,000;
    - accepting the case for the state taking responsibility for enforcing a basic set of core rights for vulnerable workers, and gathering information to help determine the best next steps.
- The government **accepts:**
    - strong action should to be taken against employers who repeatedly ignore both their responsibilities and the decisions of employment tribunals, and through this consultation will consider how to take forward the review's recommendations;
    - the enforcement process could be simpler, and intends to undertake wide ranging and comprehensive reforms of the process for civil claims and judgments across the courts and tribunals systems.
- The government will, for reasons explained in its response, **not be taking forward at this time**:
    - any further action to ensure that claimants can get an authoritative determination of employment status without paying any fee;
    - action to reverse the burden of proof at employment tribunal hearings where status is in dispute.

Section A: State-led enforcement

Section A: State-led enforcement

Recommendation: Her Majesty's Revenue and Customs (HMRC) should take responsibility for enforcing the basic set of core pay rights that apply to all workers – National Minimum Wage, sick pay and holiday pay for the lowest paid workers.

The government accepts the case for the state enforcing a basic set of core rights for the most vulnerable workers, and intends to move in this direction. The government will first evaluate the extent of the problem faced by low paid workers in accessing these rights and, following decisions relating to statutory sick pay, examine the best way to ensure the most vulnerable receive the level of protection they deserve, bearing in mind feasibility and cost-effectiveness for the taxpayer.

Context

1. The employment law framework and other employment-related legislation provide individuals with legal entitlements to statutory sick pay and to paid holidays. These fundamental entitlements are designed to ensure individuals do not lose income if they fall sick, and that they are able to take leave from time to time without losing income.

2. Statutory sick pay ensures individuals are paid a minimum of £89.35 per week by their employer during a period of illness when they are unable to work. These payments must start after the fourth day of sickness at the latest, and can continue for a maximum of 28 weeks of sickness. Employers may provide more through an occupational sick pay scheme.

3. Holiday pay legislation provides for paid holidays for workers. Full-time workers may take up to 28 days of leave from work per year, and be paid at their regular rate of remuneration for those days.

4. Individuals worried they have not received their statutory entitlement to either may apply to an employment tribunal in order to enforce their rights. Individuals concerned they have not received statutory sick pay may also contact the HMRC statutory payment dispute team to help arbitrate with their employer.

Review recommendation

5. The review considered the ability of workers to enforce their core pay rights. For lower paid workers, even a small underpayment makes up a larger proportion of their pay. The review recommended that state enforcement of basic rights should be enhanced.

6. It is difficult to evaluate the exact extent of non-compliance with these entitlements, and particularly with statutory sick pay and holiday pay. Research suggests that 4.9% of

employees and workers in the labour market (1.3 million individuals) receive no paid holidays at all.[2] In 2016/17, HMRC's statutory payment dispute team received 3418 disputes about statutory sick pay, 233 resulting in HMRC providing a formal decision.

7. The National Minimum Wage is already enforced by HMRC, and their statutory payment dispute team support resolution of statutory sick pay disputes. The review's recommendation would enhance the remit of HMRC to cover holiday pay too.

Government response

8. The government accepts that there is merit to the state enforcing these rights on behalf of the most vulnerable workers, and intends to move in this direction. Further work is required to evaluate the exact means of doing so. It is also important that we get the existing legislation right and make decisions on the future of statutory sick pay and holiday pay before deciding how they are enforced. The government also remains mindful of the need to avoid placing unnecessary burdens on businesses, particularly those who are already compliant, and of the need to ensure that enforcement activity represents value for public money.

9. The government is therefore consulting now to gather further information on the extent of non-compliance with these rights and entitlements, to help determine how enforcement activity might best be targeted. Based on this, and following decisions regarding statutory sick pay legislation, the government will make final decisions about the best way to ensure the most vulnerable receive the level of protection they deserve.

Consultation questions

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

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

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

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

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

[2] http://www.mdx.ac.uk/__data/assets/pdf_file/0019/371017/Weighted-scales-Unpaid-Britain-Interimreport.pdf?bustCache=15096591

Section B: Enforcement of awards

Recommendation: Government should make the enforcement process simpler for employees and workers by taking enforcement action against employers/engagers who do not pay employment tribunal awards, without the employee/worker having to fill in extra forms or pay an extra fee and having to initiate additional court proceedings.

The government agrees that the enforcement process could be simpler, and intends to undertake wide ranging and comprehensive reforms of the process for civil claims and judgments across the courts and tribunals systems. The government is seeking views on how the enforcement processes for employment tribunal awards could be improved through those reforms.

Simpler enforcement process

10. The review stated that the impact of creating an environment where fair and decent work is the norm will not have the necessary impact:

    '…*unless people are able to enforce their rights when things go wrong… The State should show its support for successful claimants by acting to ensure they get paid monies due*.'

11. The employment tribunal system is there to make judgments based on the facts of the case and the courts-based enforcement system is, separately, available to assist successful claimants who have not been paid by the losing employer to enforce their award. However, whether the claimant receives their award will ultimately depend on (a) the ability/ willingness of the employer to pay and/or (b) the effectiveness of measures to prevent employers avoiding payment.

12. It is for the successful claimant to choose how to enforce the award. The civil courts offer several different enforcement methods through which a successful claimant may apply to recover money owed on a court order or judgment. These processes are individually designed to address different financial circumstances. Collectively they aim to make it as difficult as possible for judgment debtors to avoid their responsibilities. Details of the different processes available to all judgment creditors and successful claimants are at Annex D.

13. Despite the various enforcement options open to claimants, the court cannot guarantee to obtain the payment of a judgment or order, particularly where the respondent goes to great lengths to evade payment or simply does not have the means to pay.

14. The civil courts offer a variety of options to enforce an award to suit an individual's circumstances. Following the hearing at the employment tribunal, the successful claimant can choose to enforce their award in the County Court by registering the award. Once the

claim is registered the claimant must choose an appropriate method to enforce the debt. There is a fee of £44 for registering the award and one of £110 for choosing the enforcement method. Both fees are added to the value of the amount outstanding which is recoverable from the judgment debtor.

15. The claimant can choose from various means of enforcing via the County Court including Warrants of Control (bailiff), Charging Orders, Third Party Debt Orders and Attachment of Earnings. The enforcement processes are individually designed to address the different circumstances of each case. Success is largely dependent upon the information held by the claimant and the circumstances of the defendant.

16. If a claimant is uncertain about the most effective means by which the judgment can be enforced, they may apply for an Order to Obtain Information. An additional fee of £55 is payable or £110 where an application is served by a bailiff. Both fees are recoverable from the judgment debtor. This process requires the debtor to physically attend court to answer a set of questions about their means in order to help the claimant make an informed decision about the most effective means of enforcement.

17. The claimant can also use the Fast Track system which was introduced in 2010. It is operated by Registry Trust Ltd at a cost of £66 (which is recoverable from the respondent). It allows a High Court Enforcement Officer (HCEO) to be allocated to the claimant's case at the beginning of the enforcement process. The HCEO will, through a solicitor, act on the claimant's behalf to file the award with the County Court, issue a writ of control and attempt to recover the monies owed from the respondent.

18. Enforcement using the Fast Track system can begin as soon as the respondent has defaulted in payment of the award, thus reducing the potential for the employer to arrange their affairs to avoid payment.

19. However, despite all these options available to the claimant, research commissioned by the former Department for Business, Innovation and Skills in 2013 found that only 53% of successful claimants surveyed received full or part payment without enforcement action. 35% had not received any payment at all.

20. To help address this, in April 2016 the Department for Business, Energy and Industrial Strategy (BEIS) introduced the employment tribunal award penalty scheme (penalty scheme). Claimants who have not received monies awarded to them by an employment tribunal may access this service without any requirement to pay a fee.

21. In summary (detail of the process is in Annex B), a claimant is able to notify BEIS of the non-payment of the award after the statutory payment period (14 days) has passed. The penalty scheme will ascertain that the claim is genuine and follow up with the respondent by issuing a warning notice and then, as appropriate, a penalty notice making it clear that the respondent is liable for a financial sanction for non-payment of an original award.

22. The penalty scheme is different to the civil court enforcement options in that its focus is on sanction for non-payment. The penalty scheme is not a form of state enforcement to recoup an unpaid employment tribunal award. The review noted in relation to the penalty scheme that:

'*However, BEIS has no powers to pursue the actual award ….. the individual does not receive their financial award. The Review believes this to be unfair*'.

23. In practice, the process of engagement between BEIS and an employer who has not paid an award can have a nudge effect on businesses to pay the outstanding employment tribunal award to the claimant.

24. For example, since introduction in April 2016 there have been 513 notifications to the scheme which have been considered to be valid. A total of 483 warning notices have been issued to employers who failed to pay an employment tribunal award or Acas conciliated settlement by the due date. To date, following the issuing of warning notices, 92 tribunal awards have been paid with a total value of £829,343: £363,361 in 2016/17 and £465,982 so far in 2017/18.[3]

Government Response

25. Enforcement of employment tribunal awards is part of a wider enforcement system in Her Majesty's Courts and Tribunals Service (HMCTS), where individuals also enforce judgments and orders made in the civil and family jurisdictions. The government is already planning improvements to the current enforcement service across these jurisdictions, which should go a long way to meet the concerns raised in the review.

26. HMCTS set up an enforcement reform project in January 2018 to oversee the design and delivery of an improved service for the enforcement of all types of monetary award and order. The enforcement project aims to deliver:

- **improved user accessibility and support:** Introducing a digital single point of entry for users interested in starting enforcement proceedings. This will provide clear guidance, signposting and support for all users regarding the enforcement options.
- **simplified and digitised requests for enforcement:** Users will be able to apply for all methods of enforcement online. HMCTS currently rely on the claimant to initiate additional court proceedings by filling out extra paper forms. The claimant will be able to use a simplified digital system to inform HMCTS that the employer has not paid and that they

[3] Data correct as of 15/01/2018

wish to enforce the award. This will remove the current complex and paper-based system enabling swifter enforcement.

- **improved provision of information:** the claimant currently decides which enforcement option to pursue based on their knowledge of the employer's assets or ability to pay and is able to improve the chances of successful enforcement by providing information that HMCTS in many instances does not hold or have access to. The project aims to improve the collection of financial information of the employer. This will reduce the burden on the claimant and will maximise the chances of successful recovery.

- **streamlined enforcement action**: the enforcement processes will be digitised and automated where possible, thereby improving efficiency and addressing the largely manual paper-based processes currently in place.

27. The government believes that the proposed reform of enforcement processes will reduce the burden on the claimant, by making it simpler and more streamlined.

Consultation questions

6) **Do you agree there is a need to simplify the process for enforcement of employment tribunals? (yes/no /please give reasons)**

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?**

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?**

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?**

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

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

Establishing a naming scheme

Recommendation: Government should establish a naming and shaming scheme for those employers who do not pay employment tribunal awards within a reasonable time. This can perhaps be an element of the reporting which we have suggested in relation to the composition of the workforce including the proportion of atypical workers in the workforce.

The government accepts this recommendation and is seeking views on how it can best achieve this.

Context

28. The review states that more should be done to create a deterrent for employers who think they can simply ignore the law. It recommends that government should establish a naming scheme for employers who do not pay employment tribunal awards within a specified timeframe. Such a scheme should be based on the existing scheme for employers who fail to pay the national minimum and living wages.

29. The objective of implementing the naming scheme would be to increase the rates of timely payment of employment tribunal awards through having an additional deterrent to discourage employers from not paying.

30. The quickest and most effective way to implement this recommendation is to extend the current BEIS-owned employment tribunal award penalty scheme (penalty scheme) to include a naming scheme. However, this solution is reliant on claimants coming forward to notify BEIS that they have not been paid an employment tribunal award and is not an automatic scheme. Further information on the penalty scheme is at Annex B.

31. Currently only employment tribunal judgments are recorded centrally and are published on an online register. However, whilst employment tribunal awards may be published where they form part of the judgment, they are not centrally recorded. Additionally, payment outcomes are neither centrally recorded nor published. End to end digitisation of employment tribunals is currently anticipated to begin in 2019, at which point detailed consideration will be given to what information might be needed to manage the jurisdiction. The options outlined to address this recommendation are based on the management information that is available within the existing employment tribunal system, but further consideration will be given in future to how improved data may enable alternative delivery opportunities.

32. Employment tribunal judgments are already published however there is a risk with introducing a naming scheme that the claimant will also be identifiable through this process. It is proposed that, in line with data protection rules, individuals who contact the penalty scheme will be given the option of whether they wish to “opt-in” to the naming process and

will be made aware of the risks.

33. In 2010 the government announced a scheme to name employers who fail to pay the national minimum wage. Further information on the original scheme and the revised scheme introduced is at Annex A.[4]

34. Our proposal is to base the structure of the interim arrangement for an employment tribunal awards naming scheme on the existing naming scheme for national minimum and living wages.

Proposed approach

35. The premise of the proposed scheme is that employers will be named for failing to act upon a specified stage of the existing penalty scheme. Our view is that this is best done at the point that a penalty notice is issued and we are inviting views on this.

36. BEIS will only consider naming where the employment tribunal award is over £200 and the naming process will run quarterly through a BEIS press notice on Gov.uk.

Naming scheme based on the issuing of a penalty notice

37. Our proposal is to establish a naming scheme of employers who are issued with a **penalty notice** informing them that they have **incurred** a financial penalty, and have either not submitted representations, or not had them accepted, against being named. Representations would have to be made within 14 days of an employer being advised that they will be named. If the employer can demonstrate that an award is paid in that period, the employer would not be named.

38. The penalty system will follow the established procedures up to that point. The representations that will be accepted for employers to not be named are:
    - Naming carries a risk of personal harm to an individual, their family or other employees;
    - There are national security risks associated with naming in this instance;
    - Other factors which suggest that it would not be in the public interest to name the employer (employer to provide details);
    - Where the employment tribunal award has been paid in full and proof is submitted and verified.

[4] National Minimum Wage Enforcement Policy: November 2017

39. Where an employer submits representations against paying the financial penalty but not against being named, they will still be considered for the naming process. Procedures to recoup the penalty would come into play if the reduced or full penalty was not paid.

40. This option inserts the naming process at the point where employers who have incurred a financial penalty (for not paying employment tribunal awards within specified timeframe) are
notified of this fact. It is pro-active in that it is the incurring of the penalty that will trigger the naming. We estimate this option would name **33** employers quarterly

41. Under this option at least 42 days will have passed from the point that an individual has notified BEIS of an unpaid award before an employer is named. It strikes the balance between taking action to address the non-payment and providing employers multiple opportunities to pay the award. The 42 day period mirrors the timeframe under the national minimum and living wage naming scheme.

Alternative approaches for naming scheme

42. The naming element could, alternatively, be added to earlier or later stages of the existing penalty scheme.

43. The earlier option would be to establish a naming scheme of employers, who are **issued with a warning notice** advising them that they have not paid an employment tribunal award by the due date, and have either not submitted representations, or not had them accepted, against being named or paid the award within 28 days of receiving the warning notice. We estimate this would name **36** employers quarterly.

44. Employers would potentially only have 28 days before being named and so could encourage more prompt payment. However, the timeframe for payment is significantly less than the period afforded by the national minimum and living wage naming scheme. Nevertheless employers will still have had an opportunity to pay in line with the standard timeframe for payment of an award (42 days, or as otherwise specified, after an award is made) and a further 28 days from the point that a warning notice has been issued.

45. The latter option would be to establish a naming scheme of employers **who do not pay a penalty** issued under the penalty scheme. This would operate by naming employers who have, following notification through a penalty notice, failed to pay the penalty after 28 days

and have either not submitted representations, or not had them accepted, against being named. We estimate this would name **30** employers quarterly.[5]

46. Employers would have been informed through both the warning notice and penalty notice of the requirement to pay an unpaid employment tribunal award, and of the potential subsequent sanctions of a financial penalty and naming process. It will mean that at least

Section B: Enforcement of awards

56 days will have passed from the point a claimant has notified BEIS of non-payment of an award. Additionally it provides employers with the longest timeframe to comply and will have fewer employers in scope for naming than the other options.

Proposed naming scheme: impact on business

47. The policy proposal only affects businesses which have breached legislation, lost their case and might therefore be subject to the penalty scheme. The main cost to non-compliant businesses will be familiarisation costs. We estimate these to be between £280,000 and £317,000 depending on the assumptions.

48. Employers will have the option of submitting a representation against being named. We estimate the representation cost for businesses to be between £10,000 and £12,000 depending on the assumptions. These estimates are based on the labour cost for businesses.

49. The government has considered the different costs and benefits of these changes and concluded that the policy proposal qualifies for de minimis and requires proportionate lighttouch analysis.[6]

Consultation questions

12) When do you think it is most appropriate to name an employer for nonpayment (issued with a penalty notice / issued with a warning notice/ unpaid penalty/ other)? Please give reasons.

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

14) What other ways could government incentivise prompt payment of employment tribunal awards?

[5] Number for the penalty scheme updated in January 2018

[6] Under de minimis arrangements, an IA is not required or better regulation purposes and it is not required to go to the RPC for validation (both EU-Exit and business as usual). To qualify under the de minimis rules, the measure should have net direct impacts on business less than +/- £5 million annually.

Section C: Additional awards and penalties

Recommendation: Government should create an obligation on employment tribunals to consider the use of aggravated breach penalties and cost orders if an employer has already lost an employment status case on broadly comparable facts - punishing those employers who believe they can ignore the law.

Recommendation: Government should allow tribunals to award uplifts in compensation if there are subsequent breaches against workers with the same, or materially the same, working arrangements.

The government accepts strong action should be taken and is seeking views on how existing sanctions should be extended and how to define when they should be applied.

Context

50. The government accepts strong action should to be taken against employers who repeatedly ignore both their responsibilities and the decisions of employment tribunals. When an employment tribunal has reached a judgment based on facts which are the same as the facts relating to other workers in the organisation, the employer should update their contracts and employment relationships accordingly, unless there is a good justification for not doing so.

51. The review recommends a number of ways in which action could be taken against employers repeatedly ignoring the decisions of tribunals, and we are consulting to develop a detailed understanding of how these options would work in law and in practice, before determining how to take them forward.

52. The review suggests that where an employment tribunal has made a determination on employment status that in itself should provide the business with enough clarity as to whether the use of that status is acceptable in relation to other individuals on the same terms and conditions. It stated:

    '*It is neither just nor efficient for the system to operate so that every single person in an organisation has to bring a case to be recognised as a worker for the judgment to apply to the whole workforce*.'

53. The review recommends that government should create an obligation on employment tribunals to consider, and impose, sanctions to deter employers from repeated noncompliance with employment law relating to employment status. This should be through existing mechanisms; employment tribunals have existing powers to impose sanctions. These are aggravated breach penalties, cost orders and uplifts in compensation. Extending these measures would aim to level the playing field by penalising those businesses that deliberately ignore a tribunal ruling and fail to make changes to their business practices.

54. The proposed use of any of these sanctions to tackle repeated non-compliance requires both a 'first offence' being identified and being able to provide sufficient evidence of that 'first offence' in subsequent litigation. The two recommendations take a different approach to criteria for repeated instances of non-compliance. The first proposes aggravated breach penalties and costs orders for breaches on 'broadly comparable facts', while the second suggests an uplift for subsequent breaches involving workers on the same or materially the same working arrangements. For the purposes of this consultation discussion we are considering options based on 'broadly comparable facts'.

55. The government has considered the review's recommendations that this first offence should be where a respondent has already lost an employment status case on broadly comparable facts. The government believes that this should not necessarily be limited to circumstances where an employer has sought to argue that claimants (on different occasions before the employment tribunal) do not qualify for a substantive right based on their employment status. The government recognises the potential complexities in this and so proposes exploring when and how there should be an obligation on employment tribunals to consider the use of existing sanctions for subsequent breaches of rights.

An employer who has previously lost a similar case

56. The review recommends that there should be an obligation on employment tribunals to consider the use of aggravated breach penalties and cost orders if an employer has already lost an employment status case on broadly comparable facts. However, this is dependent on the claimant and those bringing the case knowing that a first offence has previously been committed.

57. Currently, data are not collected in a way that can be easily used by tribunal judges to determine whether the individual employers in front of them are repeat offenders. End to end digitisation of employment tribunals is currently anticipated to begin in 2019, at which point detailed consideration will be given to what information might be needed to manage the jurisdiction. The options outlined to address this recommendation are based on the management information that is available within the existing employment tribunal system, but further consideration will be given in future to how improved data may enable alternative delivery opportunities.

58. HMCTS introduced an online register of employment tribunal judgments in February 2017 allowing public searches of judgments by region, jurisdiction code and a free text search facility.[7] Parties can already make use of this facility to search for the name of their employer.[8] Respondents could demonstrate that there have not been any previous judgments by providing evidence of a nil return on searches or that previous judgments are not relevant in this case.

[7] Employment Tribunal Decisions

[8] If the decision was made before February 2017, parties need to contact Bury St Edmunds County Court for cases in England or Wales, or Glasgow Tribunal Hearing Centre for cases in Scotland.

59. While the online register allows parties to locate judgments they will still need to be able to familiarise themselves with the facts of the case to see whether it meets the test of being 'broadly comparable facts'. Similarly the tribunal itself will need to verify when considering claims or responses whether the cited judgment is relevant. This would involve judicial and administrative resourcing implications. The current online register has some limitations in that it lists all judgments including where parties have withdrawn their claim and no reasons are specified in the judgment.

Strengthening the use of existing sanctions and deterrents

60. The review suggests a number of sanctions to be used but does not set out a preferred choice to address repeated non-compliance. Each mechanism provides for a financial sanction from the employer but vary as to whether that increase is paid to the claimant or the state.

Aggravated breach penalty

61. Employment tribunals are already able to award penalties of up to £5,000 per worker against employers where there has been an aggravated breach of employment law. The penalty is **payable to the state** and is enforced separately from the employment tribunal award. The total penalty can be reduced by 50% if paid within 21 days.

62. The legislation does not set out what constitutes an aggravated breach but the explanatory note sets out some possible grounds:

    A. the size of the employer;

    B. the duration of the breach of the employment right; or

    C. the behaviour of the employer and of the employee.[9]

63. Any change to the current scheme would require legislation. The legislation could be amended to deem a second offence in relation to employment law breach as an aggravating factor and create an obligation for employment tribunals to consider imposing a penalty.

64. Reviewing the online information of judgments available shows that employment judges routinely consider the use of penalties in the event of a finding of a breach in employment law.[10] In considering whether to apply a penalty it is not only the criteria set out in the explanatory note but whether the breach was deliberate or malicious in nature.[12]

65. The existing penalty scheme for aggravated breach has been criticised for being underused and for the relatively low number of breaches imposed. Since introduction in 2014, only 20

[9] Enterprise and Regulatory Reform Act 2013 - Explanatory Note
[10] Online Tribunal Judgment search for "Section 12A" or "financial penalty" [12]
Cox v Sainsburys Supermarkets Limited and Jakuba v Blue Arrow Ltd

aggravated breach financial penalties have been imposed on employers. Anecdotal stakeholder accounts also suggest that part of the reason for this underuse is concern that an employer may prioritise a state debt over an award owed to the claimant.

66. The total value of the 20 penalties imposed is just over £54,400.[11] The total paid is just over £17,700 and were fully paid within 21 days so the 50% discount applied. There are six unpaid penalties at a value of £19,000. Of the 20 penalties issued seven were for the maximum value of £5,000 and two were for the minimum value of £100. The median penalty issued is approximately £3,000.

67. The legislation allows the way that the penalty is calculated and the minimum and maximum value to be amended by order.[12] The maximum amount of £5,000 was set at the time to be in line with the penalty for non-payment of the National Minimum Wage.[13] Since that time the penalty for National Minimum Wage breaches has increased to £20,000.

68. The government accepts stronger action is needed and that the current aggravated breach penalty maximum limit should be raised. The government will seek to raise the maximum limit to at least £20,000 as soon as parliamentary time allows. This consultation is seeking views on how to change the circumstances in which aggravated breach penalties can be imposed.

Cost orders

69. An employment tribunal can also make a costs order. A costs order is made, usually at the end of the process, to require **one party to reimburse the other party** for their legal costs for making their case at the employment tribunal.

70. An employment tribunal may order costs in a number of circumstances. These are set out in Rule 76 of the Employment Tribunal Rules 2013, for example where a party has acted unreasonably in the conduct of the proceedings or the claim or response had no reasonable prospects of success. Where an employer has already lost a tribunal case on a similar set of facts, it is arguable they are behaving unreasonably in forcing a second claimant to bring a case and incur costs. It may also be that it had no reasonable prospect of success given the previous findings.

71. Although the rules already allow for tribunals to consider costs orders on application of a party or on their own initiative we could create an obligation for employment judges to consider using costs orders if the claim concerns a ‘second offence’ in relation to employment status. This would require legislation.

[11] Data correct as of November 2017

[12] Enterprise and Regulatory Reform Act 2013 - Section 16

[13] Resolving Workplace Disputes: Government response to the consultation (November 2011)

72. Available HMCTS data on costs orders show that the number of cost orders has remained steady over the years even when taking into account the increase in claimant awards following the introduction of fees.[14] The average number of cost orders made in favour of claimants is 242 and 390 for respondents.[15]

73. Before the introduction of employment tribunal fees for the period 2012 to 2013 there were more cost orders made in favour of the respondent than the claimant, 522 and 129 respectively. For the period 2016 to 2017 this trend was reversed. Of a total of 479 cost orders, 279 were made in favour of the claimant and 182 in favour of the respondent.

74. Even with the introduction of employment tribunal fees the median value for costs orders has remained at approximately £1,000 over the whole period. The average value varies from £1,292 in 2007/8 to £3,747 in 2016/17. The maximum value has also varied considerably from £13,942 in 2011/12 to £235,776 in 2014/15.

75. Available data on costs orders do not differentiate between orders made to sanction abuse of process and technical issues such as postponements or orders to repay fees.

Uplifts in compensation

76. Employment tribunals can also increase and decrease levels of compensation. Where a party fails to comply with the Acas disciplinary and grievance code of practice, and the employment tribunal finds that the failure is unreasonable, the compensation **awarded to the claimant** can be increased (or decreased if the claimant is at fault) by up to 25%.

77. Similarly, it can be argued that failing to apply a previous judgment to others on similar terms and conditions is unreasonable and tribunals could apply uplift in these circumstances.

78. HMCTS does not hold centralised data on where an uplift is applied. A text search of the available judgments (covering the period from February 2017 to January 2018) identifies approximately 250 decisions containing the word 'uplift'.[16] Reviewing a sample of these judgments shows that tribunals are applying uplifts for failure to comply with the Acas code.

Impact on business

79. This policy proposal would oblige employment tribunals to consider sanctions against businesses which have been found repeatedly non-compliant on an employment status issue. The main cost to non-compliant businesses will be the cost of aggravated breach penalties. We estimate that there are around 540 cases disposed of a year that involve the determination of employment status, of which 84 result from a judgment. We considered cases referring to Section 230 of the Employment Rights Act 1996.

[14] Tribunal and gender recognition statistics quarterly - April to June 2017 and 2016 to 2017

[15] These calculations have been adjusted to take account for one multiple case in 2011/12 consisting of 800 claimants they were all made liable for a costs award of £4,000 to the respondent, i.e. £5.00 per claimant, which has skewed the median.

[16] Employment Tribunal decisions

80. Under option 1, legislation could be amended to make it mandatory for employment tribunals to consider aggravated penalties in relation to repeated employment status offences. This could have a potential impact on businesses of £914,000.

81. Under option 2, employment tribunals would be required to consider cost orders for repeated employment status offences. We estimate a potential impact on businesses of £82,000.

82. Under option 3, legislation would require employment tribunals to consider a potential 25% uplift on employment tribunal awards for claimants to deter employers from committing repeated employment status offences. The impact on businesses is estimated at around £59,000.

83. Only businesses involved in an employment tribunal case including a claim on the employment status need to familiarise themselves with this policy. The total familiarisation costs accumulate to around £13,000.

84. The burden of proof for past employment status cases could either lie with the claimants, employers or the tribunal office. If businesses had to prove their non-involvement in past unsuccessful employment status cases, we estimate a search cost of around £7,000 per annum.

85. The government has considered the different costs and benefits of these changes and concluded that the policy proposal qualifies for de minimis and requires proportionate lighttouch analysis.[17]

Consultation questions

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?

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?

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

[17] Under de minimis arrangements, an IA is not required or better regulation purposes and it is not required to go to the RPC for validation (both EU-Exit and business as usual). To qualify under the de minimis rules, the measure should have net direct impacts on business less than +/- £5 million annually.

18) When considering the grounds for a second offence breach of rights who should be responsible for providing evidence (or absence) of a first offence? Please give reasons for your answer.

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

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

21) Of the options outlined which do you believe would be the strongest deterrent to repeated non-compliance? Please give reasons

a. Aggravated breach penalty

b. Costs order

c. Uplift in compensation

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

Consultation questions

Basic Details		
	Your name	Royal College of Nursing
	Your email address	Joanne.galbraith-marten@rcn.org.uk
Stakeholder category		
	Please select the appropriate category from the following list	
	An individual	☐
	An employer	☐
	Representing employers' or employees'/workers' interests	☐X
	Member of the judiciary	☐
	Other (please specify)	Click here to enter text.
	If you represent employers' or employees'/workers' interests, are you (select appropriate option)?	
	Legal Representative	☐
	Judiciary	☐
	Trade Union	☐X

	Trade Association	☐
	Charity or social enterprise	☐
	Other (please specify)	Click here to enter text.
	If you are an employer, how would you classify your organisation?	Click here to enter text.

State-led enforcement

1.	Do you think workers typically receive pay during periods of annual leave or when they are off sick?	Yes ☐X	No ☐
	Please give reasons	We represent members in the healthcare sector and we rarely see claims for statutory sick pay. However, we do bring a number of claims for incorrectly calculated annual leave payments, particularly on termination of employment.	
2.	Do you think problems are concentrated in any sector of the economy, or are suffered by any particular groups of workers?	In the healthcare sector these problems arise more frequently in the independent sector but agency workers and those that do not work regular hours encounter problems across the board.	
	Please give reasons	The lack of transparent pay and grading structures or internal policies explaining basic employment rights contribute to this problem.	
3.	What barriers do you think are faced by individuals seeking to ensure they receive these payments?	Lack of awareness regarding their statutory entitlements and difficulty in calculating payments.	
4.	What would be the advantages and disadvantages for businesses of state enforcement in these areas?	Advantages: Correct payments may be made more frequently. Enforcement may be more accessible for individuals. Disadvantages: Possible confusion if an individual has claims that fall into this category and other claims that are under the jurisdiction	

		of the tribunal so there would be two sets of proceedings.	
5.	What other measures, if any, could government take to encourage workers to raise concerns over these rights with their employer or the state?	More publicised information for example a requirement to publicise the state-led enforcement on all pay slips. State-led enforcement to include the requirement to provide pay statements.	
Enforcement of employment tribunal awards			
6.	Do you agree there is a need to simplify the process for enforcement of employment tribunals?	Yes X☐	No ☐
	Please give reasons	Digital system would simplify the process. ACAS/Tribunal to refer details of COT3/Judgment to Penalty Enforcement Scheme on notification from the claimant that payment not been made. All enforcement powers at that stage (name and shame, aggravated damages, costs and interest). Thereafter, right to refer to HMCTS.	
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	Digital usage would be good. Links need to be improved between Employment Tribunal and Court Service. Better sign posting of information, on line submission and clearer fee listing. All enforcement information should be included in Employment Tribunal judgments.	
	and provide support to users?		
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?	All ET judgments should be uploaded to the enforcement system and a particular access code to be supplied if required. That way Claimants wouldn't have to re-enter or upload their own information before starting the process.	

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?	All the current processes would benefit from automation and encourage more Claimants to utilise the present systems.
10.	Do you think HMCTS should make the enforcement of employment tribunals swifter by defaulting all judgments to the High Court for enforcement or should the option for each user to select High Court or County Court enforcement remain?	Yes all judgments should default to the High Court as limiting enforcement to one court could simplify the process.
11.	Do you have any further views on how the enforcement process can be simplified to make it more effective for users?	No.
Establishing a naming scheme		
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)?	Do it at the first stage and/or each stage to put as much pressure on as possible to ensure payment is made.
	Please give reasons	Reputational damage may encourage employers to pay.
13.	What other, if any, representations should be accepted for employers to not be named?	None.
	Please give reasons	The system has to be robust otherwise unscrupulous employers will abuse it. The issues/merits of the case have already been decided by a tribunal/agreed at ACAS and

		therefore further representations are inappropriate.	
14.	What other ways do you think government could incentivise prompt payment of employment tribunal awards?	ACAS/Tribunal to refer details of COT3/Judgment to Penalty Enforcement Scheme on notification by the claimant that payment not been made. All enforcement powers at that stage (name and shame, aggravated damages, costs and interest). Publication of list to be up to date at all times (not just quarterly) and to name and shame those who owe less than the current £200 threshold.	
Awards and penalties at employment tribunal			
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 ☐	No ☐ X
	Please give reasons	The employment law category is not relevant the primary fact must be there has been a previous similar breach.	
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 ☐X	No ☐
	Please give reasons	It should be a matter of public record that the employer has been held liable for a similar previous breach and therefore any ETJ hearing a new case against the same Respondent having heard all the evidence, can make a finding regarding the level of damages to be awarded for a second aggravated breach.	
17.	Can you provide any categories that you think should be included as examples of aggravated breach?	All previous breaches of any employment law should be taken into account.	

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?	An onus should be on the Respondent to declare a previous breach as the Claimant may have no knowledge whatsoever.
19.	What factors should be considered in determining whether a subsequent claim is a 'second offence'? e.g. time period between claim and previous judgment, type of claim (different or the same),	The facts, time frame since last Judgment, same individuals involved and level of award sought.
	different claimants or same claimants, size of workforce etc.	
20.	How should a subsequent claim be deemed a "second offence"? e.g. broadly comparable facts, same or materially same working arrangements, other etc.	Materially the same circumstances demonstrating that the employer has not learned from the past experience before the Employment Tribunal and disregarded the previous findings.
21.	Of the options outlined which do you believe would be the strongest deterrent to repeated noncompliance? a. Aggravated breach penalty b. Costs order c. Uplift in compensation	**A.** Aggravated breach penalty
	Please give reasons	As the level of compensation sought may be lower than the breach penalty.
22.	Are there any alternative powers that could be used to achieve the aim of taking action against repeated non-compliance?	No.

Annex A – Existing naming scheme for national minimum and living wage

In 2010 the government announced a scheme to name employers who fail to pay the national minimum wage. Under the original scheme employers had to meet one of seven criteria plus a financial threshold before they could be named.[18]

From 1 October 2013, the government has operated a revised naming scheme. Under the revised approach the government names all employers that have been issued with a notice of underpayment by HMRC unless employers meet the prescribed exceptional criteria or have arrears of £100 or less. The notice of underpayment sets out the owed wages to be paid by the employer together with the penalty for non-compliance with minimum wage law.

Employers have 28 days to appeal against the Notice of Underpayment issued by HMRC. If the employer does not appeal or appeals unsuccessfully, BEIS will consider them for naming. The employer then has 14 days to make representations to BEIS outlining whether they meet any of the exceptional criteria:

- naming by BEIS carries a risk of personal harm to an individual or their family;
- there are national security risks associated with naming in this instance; and
- other factors which suggest that it would not be in the public interest to name the employer.

If BEIS does not receive any representations or the representations received are unsuccessful, the employer is named via a BEIS press release on Gov.uk.

Since the revised naming scheme was introduced, more than **1,500** employers have been named, with back pay arrears totaling more than **£5 million** for **58,000 workers**. More than **£5 million** in fines have been issued to national minimum and living wage offenders.

[18] National Minimum Wage enforcement policy

Annex B – BEIS Employment Tribunal Award Penalty Scheme

Overview of scheme

86. In April 2016, BEIS introduced the penalty scheme under the Small Business, Enterprise and Employment Act 2015. The scheme is free for any claimant who has not been paid an award set by an employment tribunal or an amount agreed by the Acas conciliated settlement by the due date. In outline:

- an individual **notifies** BEIS that an employer has failed to pay an employment tribunal award (which becomes due 14 days after judgment is given) or Acas conciliated settlement by the due date as agreed. BEIS will not take action on an unpaid award until the 42 day time limit to appeal has passed.

- if the case is accepted, a **warning notice** is issued to the employer. The warning notice advises the employer that he/she will incur a financial penalty if the employment tribunal award is not paid within 28 days.

- if the employer fails to pay the employment tribunal award in full within 28 days and has not submitted representations against the penalty, or has submitted representations but these are not accepted, a **penalty notice** will be issued.

- the **penalty notice** requires the employer to pay a penalty which equates to 50% of the unpaid employment tribunal award with the minimum penalty being £100 and the maximum being £5,000.[19]

- the employer has an option to pay the employment tribunal award and a reduced penalty (50%) if prompt payment is made, i.e. within 14 days of receipt of the penalty notice. Otherwise they must pay the full penalty within 28 days.[20]

- the penalty and reduced penalty are payable to government and where the penalty is unpaid BEIS will instigate debt recovery action.

Annex C - Further Detail of Naming Options

Option 1: Establish a naming scheme of unpaid penalties

One option is to establish a naming scheme of employers who do not pay the penalty issued under the penalty scheme. This would operate by:

- an individual **notifying** BEIS that an employer has failed to pay an employment tribunal award or Acas conciliated settlement by the due date. The individual will be asked whether they want to “opt-in” to the naming scheme.

- if the case is accepted, a **warning notice** will be issued to the employer advising that he/she will incur a financial penalty if the employment tribunal award is not paid within 28 days. The warning notice will also advise the employer that if a financial penalty is issued and is unpaid, there will be a risk of being named publicly.

- if the employer fails to pay the employment tribunal award within 28 days and has not submitted representations against the penalty, or has submitted representations but these are not accepted, a **penalty notice** will be issued.

- the **penalty notice** will issue the employer with a financial penalty and advise on the reduced penalty for prompt payment of both penalty and award in line with the current scheme. The penalty notice will also advise the employer that they will be publicly named on a government website if they fail to pay the penalty after 28 days, unless they submit representations (which are accepted) against being named.

[19] The penalty amounts are specified under Section 37F of the Employment Tribunals Act 1996 as amended by Section 150 of the Small Business Enterprise and Employment Act 2015.

[20] The reduced penalty amount and outcomes are specified under Section 37F of the Employment Tribunals Act 1996 as amended by Section 150 of the Small Business Enterprise and Employment Act 2015.

- representations that will be accepted for employers to not be named will be: o naming carries a risk of personal harm to an individual, their family or other employees o there are national security risks associated with naming in this instance o other factors which suggest that it would not be in the public interest to name the employer (employer to provide details); or
  o where the award has been paid in full, and proof submitted and verified.

- if BEIS do not receive any representations from the employer within 28 days of the date of the penalty notice, or do not accept the representations made by the employer, the employer will automatically be considered for the naming scheme. BEIS will only consider naming where the employment tribunal award is over £200.

- BEIS will send a letter to employers stating that they will be named no earlier than 10 days from the date on that letter.

- The naming process will run quarterly through a BEIS press notice on Gov.uk and will list employers that have not paid the financial penalty for that reporting period.

Option 2: Establish a naming scheme of employers issued with a penalty notice

Another option is to establish a naming scheme of employers who are issued with a penalty notice under the penalty scheme. This would operate by:

- an individual **notifying** BEIS that an employer has failed to pay an employment tribunal award or Acas conciliated settlement by the due date. The individual will be asked whether they want to “opt-in” to the naming scheme.

- if the case is accepted, a **warning notice** will be issued to the employer advising that they will incur a financial penalty if the award is not paid within 28 days.

- the **warning notice** will also advise the employer that if the employer fails to pay the employment tribunal award within 28 days and has not submitted representations against the penalty, or has submitted representations but these are not accepted, there will be a risk of being named publicly.

- once the 28 day period passes a letter will be sent to the employer, alongside the penalty notice, to advise the employer that they will be publically named on a government website unless they submit representations (which are accepted) against being named within 14 days. The **penalty notice** will still be issued to the employer with a financial penalty which can be reduced with prompt payment in line with the current scheme.

- the representations that will be accepted for employers to not be named will be the same as under Option 1.

- If BEIS do not receive any representations from the employer within 14 days of the date of the letter, or do not accept the representations made by the employer, the employer will automatically be considered for the naming scheme. BEIS will only consider naming where the employment tribunal award is over £200.

- BEIS will send a letter to employers stating that they will be named no earlier than 10 days from the date on that letter.

- The naming process will run quarterly a year through a BEIS press notice on Gov.uk and will list employers that have been issued with penalty notices for that reporting period.

Option 3: Establish a naming scheme of employers issued with a warning notice

Another option is to establish the naming scheme of employers who are issued with a warning notice under the penalty scheme. This would operate by:

- an individual **notifying** BEIS that an employer has failed to pay an employment tribunal award or Acas conciliated settlement by the due date. The individual will be asked whether they want to “opt-in” to the naming scheme.

- if the case is accepted, a **warning notice** will be issued to the employer advising that he/she will incur a financial penalty if the employment tribunal award is not paid within 28 days and has not submitted representations against the penalty, or has submitted representations but these are not accepted.

- the **warning notice** will also advise the employer that they will be publically named on a government website unless they submit representations (which are accepted) against being named within 28 days.

- BEIS will only consider naming where the employment tribunal award is over £200.The representations that will be accepted for employers to not be named will be the same as under Option 1.

- if the employer fails to pay the employment tribunal award within 28 days and has not submitted representations against being named, or has submitted representations but these are not accepted they will be publically named on a government website.

- once the 28 day period passes the **penalty notice** will still be issued to the employer with a financial penalty and advice on the reduced penalty for prompt payment of both penalty and award in line with the current scheme.

- The naming process will run quarterly through a BEIS press notice on Gov.uk and will list employers that have been issued with warning notices for that reporting period.

Annex D – Enforcement of Awards

Annex D – Enforcement of Awards

Enforcement is a court sanctioned action taken to compel judgment debtors, or losing respondents in an employment tribunal, to comply with the orders of the court.

Judgment debts are enforced by the creditor or the successful claimant. Under the legal system of England and Wales the choice of enforcement method lies with the judgment creditor or claimant.

Both the County Court and the High Court are competent for ordering enforcement in cases where they have granted judgment and, on application, from cases heard in the employment tribunals.

The following text summarises the different types of enforcement methods currently available to those wishing to enforce employment tribunal awards.

Taking control of goods

The seizure of goods for possible eventual removal and sale at auction.

To enforce by taking of control of goods it is necessary to apply to the court for a warrant of control in the County Court or writ of control in the High Court. A warrant or writ will be successful where the defendant has:

- enough goods at the address given by the judgment creditor which could be sold at auction to raise money; or
- all the money claimed for on the warrant or writ to stop goods being sold.

Before the court can issue a warrant or writ, the defendant must have:

- failed to pay the amount he or she has been ordered to pay; or
- fallen behind with at least one of his or her payments.

Enforcement agents are restricted in the goods they can remove and sell. For example, they cannot remove essential household items and tradesman's tools or goods subject to hire purchase or rental agreements. The enforcement agent will not take goods if they are not worth enough to pay the warrant after the costs of taking and selling the goods. Goods sold at auction often raise only a fraction of their original value. In addition, the defendant's goods may also already have been seized by enforcement agents acting under another warrant.

There is a procedure whereby judgment creditors can choose to transfer County Court judgments between £600 and £5,000 to the High Court for enforcement by way of writ of execution. A County Court bailiff cannot enforce any amount over £5,000 (unless enforcing an agreement regulated under the Consumer Credit Act 1974 which can only be enforced in the County Court). County Court judgments for more than £5,000 must be transferred to the High Court. High Court Enforcement Officers (HCEOs) cannot enforce judgments for amounts less than £600.

Attachment of earnings orders

Under this method of enforcement, an order is obtained whereby a fixed sum is deducted from the judgment debtor's wages or salary regularly and is forwarded directly to the judgment creditor or successful claimant.

The debtor must be employed by someone before an attachment of earnings order can be issued. An order cannot be made if the defendant is unemployed or self-employed. Also, the court may not be able to make an order, or may only make an order to pay it back in small instalments, if the defendant's living expenses are greater than what is earned.

There is no attachment of earnings procedure in the High Court; a matter has to be referred to the County Court for this method of enforcement to be used.

Charging order – including orders for sale and stop orders

A charging order prevents the defendant from selling his or her assets (such as property, land or investments) without paying what is owed to the judgment creditor. The judgment creditor is paid either from the proceeds of the sale when the judgment debtor sells the property or from the proceeds of the estate when the judgment debtor dies.

An order for sale is where the court can force the sale of the items of immovable property under a charging order. There is also a stop order, which prevents a judgment debtor from disposing of immovable property to avoid charging order proceedings being taken against him or her.

Third party debt orders

A third party debt order is obtained whereby the judgment debtor's bank accounts are frozen. An amount to cover the judgment debt is then transferred to the judgment creditor in the satisfaction of the debt. If there are insufficient funds in the bank accounts to cover the debt then such funds as are available are used to repay at least some of the amount owed.

Bankruptcy proceedings

If the amount owed is more than £750 a judgment creditor can also apply to make the judgment debtor bankrupt. These proceedings can be brought in both the County Court and the High Court.

Orders to obtain information

Although not in itself an enforcement method, this procedure allows for judgment debtors to be questioned for information regarding their assets, to enable the judgment creditor to make a more informed choice as to the enforcement method they would wish to use.

Department for Business, Energy & Industrial Strategy
www.gov.uk/beis