



Law Society
of Scotland

Consultation Response

Retained EU employment law reforms

July 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Department for Business & Trade consultation: *Retained EU employment law reforms*.¹ The sub-committee has the following comments to put forward for consideration.

Response to the consultation questions

Reducing the administrative burden of the Working Time Regulations

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

- **Agree**

In light of the pre-Brexit ECJ decision in *Federacion de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, clarification as to the obligations on employers in relation to record-keeping under the Working Time Regulations 1998 ('WTR') is welcome. The proposal to make this obligation proportionate to the risk and avoid mandatory daily recording is a sensible one.

There are benefits to recording daily working hours for employers and workers insofar as it assists monitoring of compliance with WTR requirements, potentially preventing disputes arising between parties and resolving them more quickly when they do arise. However, there is a cost and administrative burden to introducing and maintaining systems which accurately record time, particularly in light of the move to more

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1156206/retained-eu-employment-law-consultation.pdf

flexible working and GDPR restrictions. This may have a specific impact on smaller employers who could not afford automated systems or do not have dedicated payroll/HR teams.

It is unclear how many employers in the UK keep sufficiently 'specific' records of working hours, as required by EU law, and we are not aware that the HSE has ever prosecuted an employer for breach of the specific records duty.

However, suggesting that there is no obligation could lead to unintended consequences as those workers most at risk of non-compliance are the ones who are least likely to have access to other paper-based evidence to support a claim. There will be situations where there will be obligations on employers from time to time to keep appropriate records, and clarification of the obligations arising from the WTR should not be seen as removing the obligation to keep records entirely. There should also be an ongoing recognition that the respective positions of the business/worker are different, such that the recommended status quo for good practice is that businesses retain adequate records.

We also note that the record-keeping requirements under section 9 of the National Minimum Wage Act are likely to remain in force.

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

• Neither important nor unimportant

A robust system of record keeping under the WTR could prevent disputes arising and be used as an evidence base to dispute those claims which do arise, especially where they are mutually agreed (i.e. the worker enters their time worked, and the employer approves it). They provide contemporaneous and objective evidence to allow decisions to be made. Where claims arise, it would be difficult to establish a breach without verifiable evidence spanning the correct reference period(s). However, in many cases records are only part of the picture and other evidence will be available.

Disputes about working time under the WTR rarely arise in practice, as the majority of employees working long hours will have opted out of the 48 hour cap on weekly hours. That said, record keeping would be considered a matter of good practice by most employers to ensure evidence is available in the event a dispute does arise, and to ensure that salaried workers are being paid national minimum wage for hours worked.

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

If an obligation to keep records of working hours is retained, it would be helpful to have clarity about what exactly should be recorded, and for how long records should be retained. At present WTR requires 'adequate' records are kept whereas EU Law requires 'records of specific hours worked'.

Questions for employers

Questions 4-6 are for employers, and we have no comments in response to these questions.

Questions for workers

Questions 7 and 8 are for workers, and we have no comments in response to these questions.

Holiday pay and entitlement reform

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

• Agree

Following exit from the EU there is no principled reason to retain the distinction between 4 weeks (EU-derived) statutory leave and the additional 1.6 weeks statutory leave. The different legal requirements pertaining to each separate leave entitlement (e.g. re calculation of pay, carry forward) is confusing for employers (particularly small employers) and likely to be administratively burdensome. In our experience the majority of employers do not currently distinguish between the portion of annual leave prescribed by EU law, and that prescribed by WTR. Creating one entitlement will facilitate better and more consistent understanding for workers and businesses overall, and may reduce the risk that some are not aware of the distinction which leads to employees being underpaid for holiday (i.e. if Regulation 13A calculation is applied to all holiday entitlement).

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

We have no comments.

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

We have no comments.

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

• Other (please explain)

The rate of holiday pay is a policy decision on which we do not seek to comment. Depending on the approach taken, there is the potential for a benefit to be removed for some, or for increased costs to be imposed on employers. On any approach, it is important that the law provides clarity and certainty for workers and employers. As above, we support the creation of a single statutory leave entitlement resulting in one calculation that both employers and workers can easily understand.

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

• Agree

We support an approach that will lead to greater certainty for employers and worker, particularly having regard to the wider range of work patterns now common in the work force.

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

• No

No - due to the passage of time, most workers who have been impacted by COVID to such an extent that they require to carry-over holidays now will have protections elsewhere (via prolonged sickness). Even if there are sector specific issues, such as in health-care, those are now likely to be operational in nature which go beyond COVID.

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

• **Yes, rolled-up holiday pay should be introduced as an option for employers in relation to all workers**

It should be up to the employer and worker to decide whether to take the rolled-up holiday pay option – with suitable safeguards against a worker being unfairly pressurised into taking rolled-up holiday pay if they would prefer not to do so.

Over the last decade or so, the labour market has changed significantly with the proliferation of atypical working arrangements. ‘Rolled up holiday pay’ can offer a fair, consistent and understandable method for calculating holiday pay which offers certainty to employers and workers alike.

Rolled up holiday pay may be particularly helpful for certain categories of workers for example casual workers working in the ‘gig economy’ where workers have a high degree of flexibility and can choose when to accept offers of work, or those with a “side hustle” job on top of their principal employment. In those circumstances allowing rolled up holiday is likely to be easier and more desirable for both the employer and the worker, provided the extra ‘holiday pay’ element of pay is clearly itemised in payslips. Our experience is that many employers already operate a system of rolled up holiday pay in any event.

If rolled up holiday pay is introduced then we would suggest a number of safeguards, consistent with the safeguards set out in previous case law:-

- The amount of the rolled up holiday pay is transparent
- It is clearly an additional sum
- The amount is clearly identified in the written terms of employment
- Where reasonably practicable steps are taken by the employer to require workers to take their holidays

There would require to be agreement between worker and employer to provide for rolled up holiday pay and consideration should be given as to whether it might be better to give workers a unilateral right to withdraw their consent to rolled up holiday pay on providing a certain period of notice.

Clear statutory guidance on rolled up holiday pay would be particularly welcome in Scotland where the decision of the Court of Session in *MPB Structures -v- Munro 2003 IRLR 350* which does not allow for set off where rolled up holiday pay has been used is at odds with the position in England where, following *Lyddon -v- Englefield Brickwork 2008 IRLR 198* set off is allowed. It is not desirable to have uncertainty and different approaches north and south of the border when dealing with the same piece of legislation.

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

We have no comments.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

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

We recognise that there are arguments in support of, and against, this proposal.

Direct consultation routinely happens in many cases, and does not in itself detriment the affected employees. The proposed change would simplify and expedite the process whilst reducing the sense of distance that can be created via the employee representative model. This will also allow a more nuanced approach for each individual and will reflect common practice used already.

Many employers believe the existing rules about having to elect representatives only add to the complexities of TUPE without really helping workers, yet there can be very significant compensation awards if an employer fails to inform and consult correctly with appropriate representative. The aim of the TUPE legislation is to protect employment, to make sure that staff know about what is happening if their jobs are affected by a TUPE transfer, and to protect terms and conditions from being changed because of the TUPE transfer except in limited circumstances. It is not clear that the requirement to consult through appropriate representatives significantly contributes towards the aim of the legislation.

The option of arranging the election of representatives could be retained, for cases where an employer believes this would be the best way to proceed for their business.

However, the proposed change would potentially permit a business with 49 employees all of whom are transferring to consult individually with affected employees. There may be challenges experienced by a business of this size consulting on an individual basis with this many employees which could have adverse implications for the effectiveness of the consultation. A possible alternative approach may be to provide that the legislation is amended to clarify that an employer with fewer than 50 employees can consult directly with their employees *if* a majority of the affected employees agree (and, otherwise, consultation must be with representatives of affected employees).

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

- Yes

Very often in large employers, the specific team impacted by the transfer will still have nuanced needs that are not necessarily best represented at a pre-determined collective level. This proposal will allow a more nuanced approach for each individual and will reflect common practice used already. Genuine and effective consultation with individual affected employees should be entirely feasible when fewer than 10 employees are transferring.

It would also be useful to clarify that employee representatives can waive the scope of their appointment for small transfers of a scale 'up to' that set by this proposal so that individual consultation can also take place in those circumstances.

Consideration could also be given to increase the number from 10 to 19 to enable greater flexibility.

We would note that the obligation imposed by Regulation 13(1) of the TUPE regulations is to consult affected employees of the transferor and transferee, not only those employees who are transferring. Small transfers may nonetheless affect a larger number of employees. Legislation should be clear on whether it is intended to apply based on the number of employees transferring, or the number of employees affected.

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

We have no comments.

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

The TUPE regulations broadly work as intended. However, we would suggest that there are some areas where clarification or improvement would be desirable:

- The provisions regarding failure to inform / consult– and, in particular, the apportionment of liability for such failures between the transferor and transferee– are over-complex and could be improved. In particular we believe it would be helpful to give Employment Tribunals the power to apportion liability as between transferor and transferee in respect of any protective award in such a way that would allow the paying party to recover from the non-paying party. We understand why for policy reasons both transferor and transferee should be jointly liable for the full amount to the employees – but can see no reason why there should not be a mechanism for the paying party to recover from the non-paying party.
- It would be helpful to have clarity about whether TUPE applies only to employees (there is an employment tribunal decision (Dewhurst -v- City Sprint Limited 220111/2018) which suggests that TUPE can potentially apply to workers, a far wider group).

- There is a tension between the provision of employee liability information (ELI) and data regulations which can sometimes be relied upon to frustrate better understanding of the employees in scope to transfer. Clarification in this area would be welcomed to facilitate earlier ELI transfer where one party can demonstrate a business/operational need as opposed to reliance on the data controller/processor legitimate purpose (or other processing ground) only.
- Regulation 4(5) of the TUPE Regulations which requires a variation to a contract of employment, to be valid, to be one in respect of which there is both agreement and that “the sole or principal reason for the variation is an economic, technical or organisational reason **entailing changes in the workforce..**”. We consider that the requirement for the variation to meet a threefold test of agreement, ETO reason and in addition for it to entail changes in the workforce is unduly restrictive. It is very difficult in practical terms for an employer to meet all three of these requirements and there does not seem to be any logical basis for requiring that any variation must entail changes in the workforce. This also sits at odds with the ability to change collectively agreed terms as provided under Regulation 4(5)(B). To provide a safeguard for employees we would suggest that if the requirement for the variation to “entail changes to the workforce” were removed then a similar provision to that found in 4(5)(B)(b) could be added “following that variation, the rights and obligations in the employee’s contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation.”

For further information, please contact:

Jennifer Paton

Policy Team

Law Society of Scotland

DD: 0131 476 8136

JenniferPaton@lawscot.org.uk