



Trading rights for shares

TUC response to BIS consultation on 'employee owner status'

Introduction

The Trades Union Congress (TUC) has 53 affiliated unions, which represent approximately 6 million members working in a wide variety of sectors and occupations across the UK.

The TUC is fundamentally opposed to the government's proposals permitting employers to trade key employment rights for shares in a company. In our opinion, these proposals represent an unjustified attack on employment rights.

The government argues these measures will provide increased flexibility for businesses and give 'employee owners' an increased stake in their company. In practice, the proposals will strip employees of basic workplace rights. Employee will lose out on protection from unfair dismissal and the rights to redundancy pay, making it easier and cheaper for employers to sack them. The government's proposals will also substantially weaken family friendly rights for 'employee owners', by limiting the right to request to work flexibly and imposing longer notice periods for women returning from maternity leave. In return, individuals will receive shares valued at between £2,000 and £50,000. However, they will not be guaranteed the same voting rights or dividends enjoyed by other shareholders. There is also no guarantee that the shares will increase or even hold their value.

The TUC is also seriously concerned that these proposals could see employees trading valuable protections at work for shares that could turn out to be almost worthless. There is a serious risk that where companies decide to lay staff off or face insolvency, 'employee owners' will be forced to leave without receiving any redundancy payments. This may place them and their families in a financial precarious situation. It is also likely to increase reliance on welfare benefits.

The TUC recognises that in some workplaces employee share schemes have achieved benefits for both employers and employees. There are several existing tax-advantaged schemes for employee share ownership, none of which strip employees of rights. There have been no calls from companies that use employee ownership schemes for this new initiative, and the Employee Ownership Association has criticised the proposals. As recently as July, the government launched the Nuttall Report, which set out proposals to promote employee ownership further. There is a major risk that these new proposals will fatally undermine the positive employee ownership agenda that other parts of government are seeking to promote.

Trading company shares for employment rights

The government has presented its proposals as creating a new form of employment status – that of 'employee owner'. The TUC refutes this view (see the section on employment status below). Instead Clause 23 of the Growth and Infrastructure Bill simply removes key employment rights from employees who receive company shares valued at between £2,000 and £50,000.

These provisions flout the basic principle that it should not be possible to contract out of basic statutory rights, even in return for money. Since the 1970s, UK

employment legislation has included provisions preventing the contracting out of rights. These provisions were included in the legislation to reflect the imbalance of power which exists between employers and employees.

Loss of unfair dismissal protection

The government's proposals give full effect to the Beecroft report by removing basic unfair dismissal protection from so-called 'employee owners'.

As a result, employers will be free to sack employees for arbitrary reasons and would not need to follow a fair procedure when doing so. Employers will only need to take steps to avoid dismissing individuals for discriminatory reasons or for an automatically unfair reason.

Unlike under earlier proposals for no fault dismissal, 'employee owners' will not be guaranteed a reasonable level of compensation when they are dismissed. Any pay off received by the employee-owner will depend solely on the value of their shares at the point of dismissal. Employers, with their insider knowledge, will be able to choose the opportune time to dismiss employees, when the value of shares has fallen or the shares are effectively worthless.

Loss of the right to statutory redundancy pay

The removal of the right to statutory redundancy pay will mean that many individuals and families will be substantially worse off where businesses decide to lay off staff. For example, an employee aged on average earnings who is 41 years of age or older and has worked for a company for 10 years would be entitled to £6450 in statutory redundancy pay. If the same individual had received £2,000 worth of shares, they would need to see the value of their shares increase by over 300 per cent before they would receive equivalent compensation under the employee owner proposals.

The government has stated that the proposals are targeted at smaller businesses and new start up companies. However the ONS's most recent statistics show that business failures are currently at record levels across the UK, and that on average less than half of new businesses (44.4%) have a survival rate of over five years.¹

Where businesses go to the wall, an employee's shares will have very limited value or more likely they will be worthless. However, unlike other employees, 'employee owners' will not be entitled to recover any redundancy payments from the Redundancy Payments Office (RPO), meaning they will not receive any compensation for the loss of their employment. They will also lack the resources needed to fund training which is necessary to find new employment.

Although the employees will be able to recover some unpaid wages, holiday pay or notice pay from the RPO, this will be subject to statutory limits.² Individuals

¹ ONS Business Demography statistics 2010

² Employees can only recover up to 6 weeks' holiday pay and 8 weeks unpaid wages, subject to a statutory limit of £430 per week.

will also face significant difficulties in recovering contractual redundancy pay and unpaid wages above the statutory limits from the remaining company assets.

As a result, the individuals affected and their families will face major difficulties in covering household bills and are likely to be heavily dependent on welfare benefits.

Limiting family friendly rights

The extension of the maternity notice period to 16 weeks will not benefit employers, instead it is more likely that women will end up taking longer leave than they otherwise would and fewer women will return from maternity leave if their return is made more difficult.

New mothers who are employee-owners would face further barriers to their return and remaining in work if excluded from the right to request flexible working. The BIS Work-Life Balance Survey found that women were twice as likely as men to request flexible working and to say that it was “very important” to them in deciding whether to take a job.

The proposed exclusion of employee-owners from the right to request flexible working also goes against the government’s argument for creating a universal right to enable flexible working to reach “all parts of society and the economy” so that businesses can reap an estimated £52.4m a year in associated benefits.

Impact on employee share ownership

In July, the Deputy Prime Minister launched a review of Employee Ownership conducted by Graham Nuttall at a successful Employee Ownership Summit. Since then, the government has conducted a consultation on implementing proposals from the Nuttall Review. There was no mention of trading rights for shares in the Deputy Prime Minister’s initial speech announcing the Review, nor in any of the contributions to the July Summit, nor in the Nuttall Review itself, nor in the Government’s consultation on implementing the Nuttall Review.

The proposal for employees to give up employment rights in exchange for shares flies in the face of the evidence about how employee ownership can achieve benefits for both employers and employees. The Nuttall Review, which was whole-heartedly endorsed by the government, argued that “*The key condition under which employee ownership is recognised to succeed best is when it allows employee owners to exercise their voice internally. It is this combination of share ownership and employee engagement that drives higher performance.*”³ Asking employees to trade key employment rights for shares will not create the conditions for the sort of employee engagement that the evidence clearly shows is a necessary condition for employee ownership to lead to improved business outcomes.

The proposal for employees to trade rights for shares risks creating confusion among both employers and employees about employee share ownership schemes

³ Sharing Success The Nuttall Review of Employee Ownership July 2012

more broadly. It will undermine existing schemes and the government's policies to promote wider take-up of employee ownership by giving all employee share schemes a bad name. Employees will rightly be wary of an initiative that seeks to strip them of their rights in exchange for shares, and may assume that all employee ownership schemes work in this way. The proposal contradicts the government's wider policies and support for employee ownership and reveals tension at the heart of government over the direction of its policies on employee ownership.

The CEO of the Employee Ownership Association Iain Hasdell has made the following comment on the proposals:

*“There is absolutely no need to dilute the rights of workers in order to grow employee ownership and no data to suggest that doing so would significantly boost employee ownership.”*⁴

Indeed all of the evidence is that employee ownership in the UK is growing and the businesses concerned thriving, because they enhance not dilute the working conditions and entitlements of the workforce.”⁴

If this proposal goes ahead, it will be essential to ensure that a clear distinction is made between employee owner contracts and existing share ownership schemes.

Share values

The TUC is extremely concerned that this proposal could see employees trading valuable protections at work for shares that could turn out to be almost worthless.

The Treasury press release setting out the Chancellor's announcement of this initiative states that it is principally intended for fast growing small and medium sized companies and that new start-ups can choose to offer only this new type of contract to new recruits. Small, fast growing companies and start-ups can find their fortunes going down as well as up very quickly, and there is a significant risk that employees who traded their rights for shares in these and other companies could find that their shares had become worth very little over time. If this meant that the company had to lay off staff, employees could find that they had no rights to any redundancy pay while the shares they had been allocated could be worthless. The TUC believes that it is irresponsible for the government to promote an initiative that could see employees forced to leave struggling companies with absolutely nothing.

Tax advantage or disadvantage?

The government is proposing that shares allocated to an 'employee owner' would be subject to income tax and national insurance, but that gains would not incur capital gains tax (CGT). However, for an individual, gains of up to £10,600 per

⁴ <http://www.employeeownership.co.uk/news/press/bis-consult-3/>

year are exempt from CGT anyway. So an individual receiving £2,000 worth of shares would need to see the value of their shares increase by over 500% before they would incur any CGT. For individuals given small amounts of shares, the fact that the shares are not subject to CGT is unlikely to create any benefit for the individual.

There are existing employee share schemes, however, which allow employees to gain shares without paying income tax or national insurance on the shares. Most employee owners allocated low levels of shares would almost certainly be better off receiving their shares through an existing approved share ownership plan.

Lack of consultation, evidence and support

The TUC questions why the government is rushing these proposals through just weeks after plans for no fault dismissal were dropped due to lack of support and the lack of evidence that weakening employment protections will help to generate growth.

It was also deeply disconcerting that the government decided to legislate on employee owner proposals, by including detailed provisions in Clause 23 of the Growth and Infrastructure Bill, before consultation has taken place. This Bill was laid before Parliament on the same day as the public consultation was launched.

Furthermore the government has failed to examine the implications of the proposals for employees, employers or the wider economy before deciding to legislate. Whilst the BIS consultation document is accompanied by a short but inadequate equality impact assessment, no wider impact assessment has been undertaken. The government appears intent on driving these proposals through without adequately evaluating their implications for employees, business performance and the wider economy.

Since their announcement the government's proposals have been firmly opposed by trade unions, equalities groups and advice agencies. The proposals have also attracted criticism from the business community. For example:

Justin King, chief executive of J Sainsbury speaking at a recent retail conference said that trading employment rights for company shares is "*not what we should be doing*". He also asked "*What do you think the population at large will think of businesses that want to trade employment rights for money?*"

In the light of such concerns, the TUC calls on the government not to proceed with its proposals on 'trading shares for rights'.

Responses to consultation questions

Employment status

The TUC contests the government's assertion that its proposals create a new employment status. There are numerous employment tribunal and EAT decisions which confirm that individuals who hold share options within businesses in most cases will be legally classified as employees. Employment tribunals have also found that directors should be classified as employees and are protected by employment protection legislation, depending on level of control which they exercise over the company concerned. The consultation document also confirms that the individuals concerned will still be classified as employees for all other statutory employment rights.

The TUC therefore does not accept that the government's proposals would create a new form of employment status. Rather the proposals are simply designed to enable employers to contract out of basic employment protections in return for potentially worthless shares.

It is also notable that the only rights which have been removed from 'employee owners' are those which are not protected by EU law. In other words, the government is removing these rights *simply because they can* but without giving consideration to the effects on employees, employers or the wider economy.

Questions 1 & 2:

How can the government help businesses get the most out of the flexibility offered and the different types of employment status?

Do businesses feel able to use all three employment statuses? If not, what restricts the use of different statuses?

The UK labour market is characterised by the extensive use, and often misuse, of flexible forms of employment relationship, including self-employment, casual work and agency working. For example, during the recession:

- There has been a sharp increase in the use of zero hours contracts. According to the LFS the number of zero hours contracts has risen from 75,000 in 2005 to 146,000 in 2011. The increase in casualised employment has been particularly marked amongst female workers, rising from 32,000 in 2005 to 85,000 in 2011.⁵
- There has been a marked increase in self-employment, particularly among women. The TUC is concerned that much of this self-employment is bogus; a way for employers to save on National Insurance costs and key employee benefits such as pensions, paid holidays and sick pay.⁶
- An analysis of pay trends reveals that self-employment is increasingly associated with poor pay. The median income of self-employed workers has fallen from

⁵ It is widely recognised that the LFS significantly under-estimates the numbers of atypical workers.

⁶ <http://www.tuc.org.uk/equality/tuc-21429-f0.cfm>

£11,300 in 2001 to just £10,300 in 2010, even before allowing for inflation. The average income for employees has risen over the same period and is now nearly twice as high (£18,900).⁷

UCATT also estimates over 50% of those working in the construction industry are falsely self-employed. The CIS Scheme is the main facilitator of false self-employment. It allows companies to deduct tax at source and avoid employing workers directly.⁸ In 2008, a report commissioned by Ucatt found that 400,000 construction workers were falsely self-employed, resulting in £1.7 billion in lost tax revenue each year.⁹

Casual workers and those who are falsely self-employed are also deprived of basic employment rights, including protection from unfair dismissal, the right to redundancy pay and family friendly rights.

Rather than promoting the use of more insecure employment, the TUC believes the government should work to prevent the mistreatment of vulnerable workers. Rather than concentrating on the expansion of more casualised employment, the government's should seek to encourage the creation of good quality employment which benefit working people and contribute to the development of high trust, high productivity workplaces.

“Trading rights for shares”

Question 3:

What restrictions, if any, do you think should be attached to the issue of shares or types of shares?

The consultation suggests that shares given to employee owners may not carry rights to dividends or voting rights or rights to a share in the company's assets if it is wound up. The TUC does not understand the justification for this. It leaves the government's argument that this proposal will give employees a stake in their company looking meaningless. Without voting rights or the right to dividends and with no guarantee of realising the full market value of their shares on leaving the company, what is it that employees are actually being given under this proposal? With these restrictions, it is misleading to call them 'shares'.

Question 4:

When an employer buys back forfeit shares, should this be at full market value or should some other level (e.g. fraction of market value) be allowed in certain circumstances?

The consultation document suggests that it could be permissible for an employer to buy back shares at the point when the staff member is leaving the company for less than their market value. The TUC is appalled that the government is proposing a scheme whereby employees are not entitled to the full value of what

⁷ <https://www.ucatt.org.uk/false-self-employment>

⁸ <https://www.ucatt.org.uk/false-self-employment>

⁹ Mark Harvey (2008) *The Evasion Economy*

under the proposals' own terms is surely theirs in its entirety. This aspect of the proposal illustrates starkly the unbalanced approach behind the initiative: workers may give up valuable rights in exchange for shares - but then on leaving the company may be required to sell back their shares for only a fraction of their market value. This, and the lack of clarity about how shares will be valued, will create a significant potential for disputes between employers and employee owners.

Question 5:

How should a company go about carrying out a valuation of the shares? What would the administrative and cost impact be for a company if an independent valuation was required?

The TUC is firmly opposed to the government's proposals permitting employers to 'trade rights for shares'. However if the plans are to proceed, it is essential that the government guarantees that an independent valuation of shares takes place at the point when an individual is offered an 'employee owner' contract and at the end of the employment relationship.

Consequences for employees

Question 6:

The government would welcome views on the level of advice and guidance that individuals and businesses might need to be fully aware of the implications of taking on employee owner status?

The implications for an employee who agreed to an employee owner contract are likely to be very significant.

Individuals will be asked to forego basic statutory rights in return for shares which have very limited value or even be worthless. Employees will be particularly financially disadvantaged where the company decides to lay off staff or becomes insolvent. There is a serious risk that employees will be forced to leave an organisation with little or no compensation.

Employees will also lose out on protection from arbitrary dismissal and on rights to request to work flexible or to request time to train. The loss of such rights may be difficult to quantify in financial terms, but is likely to have significant implications for the quality of the individual's working life and on their career prospects and future livelihoods.

It will also be very complex for an employee to forecast the prospects for the company and the potential future value of any share options.

The TUC is firmly opposed to the proposals on employee owner contracts. However, if the Government decides to proceed, it is essential that employees or new recruits are provided with independent legal and specialist financial advice before being asked to sign an employee owner contract. Measures akin to compromise agreements should apply to employee owner contracts. The proposed exclusion from statutory employment rights should not be effective if the employee has not received independent legal and financial advice before

signing it. The employer should also be required to cover the costs of the advice, although the employee should be free to determine the source of the advice.

The TUC is seriously concerned that employees will have no genuine choice over whether to sign up for fewer rights at work if their employer decides to adopt employee owner contracts.

- Employers will be free to decide to employ all *new recruits* on employee owner contracts. Individuals would have no choice but to contract out of their basic employment rights if they want the job.
- There is also nothing to prevent employers from threatening *existing employees* that they will only retain their jobs if they agree to sign a new employee owner contract. Existing employees could therefore be pressurised into agreeing to move on to an employee owner contract.

If existing employees refuse to agree to new contracts, the employer could decide to dismiss them and offer them reinstatement on new employee owner contracts. If the employee refuses, it could be difficult to convince an employment tribunal that they had been unfairly dismissed. In any event they would have lost their job and their livelihood.

Employees with more than two years' continuous employment with the same employer will have accrued rights to unfair dismissal protection and statutory redundancy pay. Such accrued rights are likely to be considered as property rights for the purposes of the European Convention on Human Rights. The government is under a clear obligation to ensure that employees make an informed choice to forego such rights.

The TUC therefore believes it is incumbent on the government to ensure that employees are not pressurised into agreeing to an employee owner contract and that they do not face the threat of dismissal or victimisation if they decline the offer. To this end the government should amend the law to state that:

- It is automatically unfair for an employer to dismiss an employee on grounds that they have chosen not to take up employee owner contracts.
- It is unlawful for an employer to subject an employee to any form of detriment because they refuse to sign an employee owner contract.

Loss of unfair dismissal protection

Question 7:

What impact will allowing individuals limited unfair dismissal protection and equity shares have on employer's appetite for recruiting?

The government's recent call for evidence on proposals for no fault compensated dismissal highlighted that there is no evidence that the removal of unfair dismissal will encourage employers to recruit more staff.

The Small Business Barometer published in October 2011 asked 500 SMEs about their main obstacle to success.¹⁰ The state of the economy was the biggest obstacle, listed by 45 per cent, and obtaining finance was next, mentioned by 12 per cent. After this came taxation, cash flow and competition. Just 6 per cent of respondents listed regulation as their main obstacle to growth.

There is a similar picture in the ONS Access to Finance statistics, which includes figures for 'limiting factors for business growth'. The 'general economic outlook', 'price competition', 'limited demand in domestic markets' and the 'high cost of labour' were substantially more likely to be listed by businesses than the 'regulatory framework.'¹¹

As the government's own research reveals, unfair dismissal rights do not even figure in the list of top ten regulations discouraging them from recruiting staff.¹²

The government's response to the call for evidence on compensated no fault dismissal also confirmed that:

*'Of the 40% of [the respondents to the BIS commissioned survey] who agreed that employment protection put them off from hiring new employees, only 1 % identified dismissal / disciplinary action regulation as the primary regulation, which translates to 0.4% of respondents overall.'*¹³

These findings are not surprising given that the UK has the third lowest level of employment protection legislation out of 36 countries.¹⁴

Question 8:

What benefits do you think introducing the employee owner status with limited unfair dismissal rights will have for companies?

The TUC does not agree that the use of employee owner contracts will have benefits for businesses.

The removal of unfair dismissal rights for so called employee owners is likely promote bad practices amongst managers and to generate a hire and fire culture in companies.

¹⁰ BIS Small Business Barometer August 2011, published in October 2011:

<http://www.bis.gov.uk/assets/biscore/enterprise/docs/s/11-p75c-sme-business-barometer-august-2011>

¹¹ http://www.ons.gov.uk/ons/dcp171778_235461.pdf

¹² <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-626-dismissal-for-micro-businesses-call.pdf> p. 29

¹³ BIS Dealing with dismissal and 'no fault compensated dismissal' for micro businesses: Government Response <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-1143-dismissal-for-micro-businesses-response.pdf>, September 2012 p 10.

¹⁴ OECD Employment data 2008.

The proposals will substantially increase levels of job insecurity which in turn will damage morale and productivity amongst the remaining workforce. As Mike Emmott, employee relations adviser at the CIPD said:¹⁵

“it is highly doubtful whether inviting employees to sign away basic employment rights will deliver the motivated, driven, high performing workforce that small firms need. Existing, highly successful mutually owned firms do not thrive on employee ownership alone, but on the high trust, high engagement, all-pulling-in-the-same-direction cultures they have. Employee ownership works best where it is accompanied by great management, rather than enhanced job insecurity.”

Question 9:

Do you think these benefits will be greater for larger, smaller or start-up businesses?

The TUC does not agree that the use of employee owner contracts will have benefits for businesses of any size.

Since the Chancellor’s announcement, media coverage has highlighted the difficulties which businesses would face in implementing the government’s proposals. Small firms in particular are likely to find it difficult to raise sufficient equity to operate the scheme. Shares offered to employees in small firms are unlikely to have any genuine value. Shareholders in larger businesses are unlikely to be willing to dilute the value of their investments.

The adoption of the government’s proposals for employee owners will also lead to reputational damage for businesses, regardless of their size. In his recent speech at the retail industry’s IGD Convention, Justin King warned that the government’s proposals could worsen the levels of trust between the public and businesses.¹⁶ This will make it more difficult for businesses to recruit quality staff, thereby limiting their capacity to innovate and expand.

Question 10:

What impact, if any, do you think the employee owner status will have on employment tribunal claims, e.g. for discrimination?

Some employers’ organisations have lobbied for the removal of unfair dismissal rights, arguing that this will reduce the risk of employment tribunal claims being brought against them. In practice, the government’s proposals are likely to lead to an increase in discrimination claims, claims for automatic unfair dismissal and breach of contract claims. Such claims are usually more complicated and time-consuming for employers to defend and more costly for employment tribunals to determine.

¹⁵ <http://www.cipd.co.uk/pressoffice/press-releases/share-ownership-no-substitute-employment-rights-good-people-management-081012.aspx>

¹⁶ <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9596927/Sainsburys-chief-executive-Justin-King-criticises-shares-for-rights-proposal.html>

The government's proposals are also likely to generate increased litigation over the value of employee owner shares in the court system.

Loss of statutory redundancy pay

Question 11:

What impact do you think introducing the employee owner status, with no statutory redundancy pay will have for businesses, in particular smaller businesses and start-up businesses? What negative impacts do you anticipate and how might these be mitigated?

Few employees are likely to be attracted to the option of trading basic statutory rights in return for shares which may have very limited value. The absence of rights to statutory redundancy pay and other key entitlements will mean that it will be difficult for small and starter businesses using employee owner contracts to attract and recruit quality staff.

As noted above, a majority of new starter firms do not survive for more than 5 years. Under the government's proposals, 'employee owners' working for such businesses will receive little or no compensation when the businesses fail. This will leave them and their families in a financially precarious position and increasingly dependent on welfare benefits.

It is also noteworthy that the government's proposals will increase costs for small and start-up businesses where employees choose to leave voluntarily for example to move to a new job. Generally when employees hand in their notice and leave a business, the employer is not required to pay them any money. Employee owners however will have the right to receive the value of the shares at the point they voluntarily leave a business.

Extension of maternity leave notice periods

Question 12:

What impact will this change to maternity notice period have on employers?

The TUC believes employers will gain little from this proposal. Instead, women will potentially take longer leave than they otherwise would and employers could see the rate of return from maternity leave drop.

The long notice requirement together with the proposed exclusion of employee-owners from the right to request flexible working will make it more difficult for mothers to plan for their return to work. It takes time, particularly for first-time parents, to get confirmation of childcare places and to make requests of their employers to vary working hours to accommodate childcare arrangements.

If an employer ignores a request for flexible working because they believe they do not need to consider it from an employee-owner, or fails to respond in good time as they are not bound by the deadlines in the statutory procedure or guidance, then a woman will struggle to meet the 16-week notice requirement for her

preferred return date. Her return will be delayed and if she perceives the employer is treating her unfairly and making life unnecessarily difficult for her, she may decide not to return at all. An EOC survey in 2005 of over 1,000 women who had recently taken maternity leave found that those who thought they had been treated unfairly during their pregnancy or maternity leave were six times more likely to never return to work. And of those who did not return to their pre-birth employer, most suffered a significant drop in pay and status in their subsequent job.

In reality, most women give an indication of their return date prior to taking leave as this enables planning for all parties. The existing 8-week statutory notice period of the actual return date is sufficient for employers to plan and prepare for the return, while giving women and their families time to put in place childcare and other arrangements so they can confirm that date.

Question 13:

What, in your view, would employers do if employees wish to return early without giving 16 weeks' notice?

It is difficult to see what benefit an employer would gain from not allowing the employee to return early without giving 16 weeks' notice. Most cover arrangements will not require 16 weeks' notice to bring to an end, the standard 8 weeks' notice is sufficient.

Suspending a woman on unpaid leave until they fulfil the 16-week notice requirement is likely to sour the relationship between employer and employee-owner and could result in the woman not returning at all.

Question 14:

How will these changes impact on a company's payroll provisions?

The TUC not foresee any impact on a company's payroll provision. It will be important however for the government to close any loopholes in the legislation which would enable the use of scams where employees are offered shares in, and employed by, a payroll company, or an 'umbrella company' and then placed to work on a regular basis for a larger and more profitable company.

Question 15:

What effect will a compulsory 16 weeks' early return notice period have on the length of maternity leave that mothers take or adoption leave that parents take?

It is likely to mean that mothers or adopters take longer leave as they and their partners will have less time to plan for their actual return date prior to having to give notice. For example, a woman who might want to take 26 weeks' maternity leave would have to give notice of her actual return date when the baby was just six weeks' old if she had taken four weeks' leave prior to the birth (which is quite common). This is very early in a baby's life and parents are unlikely to feel ready or able to decide upon the best childcare arrangements at this stage and confirm the actual return date.

Loss of the right to request flexible working

Question 16:

Do you think 4 weeks is the right period? If not, why not? What would be the impact of a shorter or longer period?

The proposal to exclude employee-owners from the right to request flexible working is completely at odds with the government's commitment to create a universal right to request to encourage greater take-up of flexible working.

The government's consultation on Modern Workplaces in May 2011 stated that:

"The existing right to request has been a success... But we want to go further. We think that by extending the right to request flexible working to all employees, we can spread the benefits flexible working brings to all parts of society and the economy." It went on to state that it estimated this would benefit business by an average of £52.4m per year.

The right to request has been effective in increasing the availability of flexible work options and access to flexible working in a wider range of jobs.¹⁷ It is far from being an onerous procedure for employers. It simply requires an employer to discuss a request with an employee, to respond in writing and to give the employee a chance to appeal a negative decision before making a final decision.

The TUC believes that excluding employee-owners from this right is likely to reduce the availability and range of flexible work options to this group of workers.

It would also create the impression that a request for flexible working from an employee-owner never has to be properly considered. However, an employer could find themselves facing an indirect sex discrimination claim if they do not consider a request from an employee-owner returning to work after maternity leave. While ignoring a request from a disabled employee-owner could result in an unlawful failure to make a reasonable adjustment.

The granting of the right to request only to those employee-owners returning from parental leave will further confuse employers.

Loss of the right to request time to train

Question 17:

What impact do you think this proposal would have on the ability of employee owners to access support for training?

The consultation document states that 'skills and training are important to driving a business forward.' The TUC shares this view. In our opinion, access to training is central to encouraging innovation and increased productivity. It is therefore surprising that the government has decided remove the right to request time to train from employee owners.

¹⁷ http://www.equalityhumanrights.com/uploaded_files/research/16_flexibleworking.pdf

In losing the right to request time to train, employee owners would no longer have the legal right to at least one meeting a year with their employer to discuss their training needs. Employee owners would also lose the right to request financial support or to propose flexible working patterns to accommodate their training needs and to have them properly considered by their employer.

In the TUC's experience, the right to time to train has proved successful. Research undertaken by unionlearn reveals that seven out of ten requests for time to train have resulted in a positive approval or a reasonable compromise. Three quarters of employers have also had no difficulty in responding to requests within 28 days. There is also no evidence of disputes over training leading to employment tribunal claims.

Removing this right would mean that an individual's access to training would depend solely on an employer's own policies and practices. The TUC questions the government's confidence that companies who choose to have employee owners will fully integrate training" and "accessing appropriate training will be easier for employee owners". The UK Employer Skills Survey 2011 showed that 41% of UK employers say they did not train any of their staff and 46% of UK employees (around 13 million) did not receive any training. The removal of rights to request time to train for employee owners is unlikely to buck this trend.

The TUC also notes that the right to request time to train currently only applies to employers with 250 or more employees. The removal of this right appears inconsistent with the government's assertion that employee owner proposals are principally aimed at small and medium sized but fast growing businesses. Rather it suggests that the government anticipates that employee owner contracts schemes will be adopted more widely by larger firms.

Implications for company law

Question 18:

Do you have comments on the Government's intention not to amend Company Law to implement the employee owner proposal?

The TUC does not have comments on this point.

Tax and anti-avoidance

Question 19:

The Government welcomes views on particular safeguards that would need to be applied, in order to minimise opportunities for abuse.

The TUC believe it will not be possible to safeguard against abuse, as these proposals effectively open a new tax avoidance loophole which will allow employers to provide employees who currently receive shares as part of their remuneration package with an opportunity to reduce the amount of CGT they pay on these shares if they sell them. The only way to fully guard against this outcome is to withdraw the proposals. The impact could be mitigated by introducing a cap on the level of gain not subject to CGT, although this would

also disadvantage employee owners who could then receive a lower value on their shares than they would otherwise be entitled to.

We also believe there is a significant risk that owners/founders/directors of new small companies will classify themselves as ‘employee owners’, meaning that they could then wholly exempt all gains they might make in the future from tax altogether, irrespective of capital gains tax entrepreneur's relief. Again, we can see no way to fully mitigate this risk. The legislation could specify that ‘employee owner’ status should not be available to owners/founders and directors, but even if such provisions were introduced it is hard to see how they could be enforced. Alternatively, Government could legislate to prevent any one individual owning more than a certain proportion of shares (for example 5%) at the point at which they became an employee owner. But again, this could serve to unfairly limit the total value of shares that genuine employee owners were provided with.

Question 20:

The Government welcomes views on whether the existing tax rules which apply to share-for-share exchanges (such as when a company is taken over) and schemes of reconstruction should apply where shares issued in return for taking up the new status are involved.

If the Government moves ahead with this scheme the TUC believes that tax existing rules (whereby employees in companies being taken over are offered the chance to exchange their shares for shares in the new company, with the shares they are offered valued at the takeover price (rather than having to sell their existing shares and therefore incur tax)) should remain in place. These rules should apply regardless of whether the takeover means that employee owners are provided with the chance to regain their employment rights as part of the takeover process.

General questions

Question 21:

What impact do you think the proposals will have on labour market flexibility – that is in relation to hiring and letting people go?

Business lobbyists have argued that weakening unfair dismissal rights would help to boost recruitment. However, this claim is not substantiated by the evidence.

The UK already has one of the most lightly regulated labour markets in the industrialised world. OECD research reveals that among the world's 36 most prosperous countries, only workers in the USA and Canada have weaker employment protection than UK employees.¹⁸ The World Economic Forum's

¹⁸ OECD Employment Data.

latest Global Competitiveness report ranked the UK 5th out of 144 countries for 'labor market efficiency' (based on a survey of business executives).¹⁹

Academic studies have repeatedly found that employment protection legislation, including unfair dismissal rights, does not have a detrimental impact on unemployment or employment levels.²⁰ However, the adoption of deregulatory policies is likely to lead to increased inequality and in-work poverty.²¹ The removal of unfair dismissal rights and the ensuing job insecurity is likely to damage consumer confidence, suppress demand and make it more difficult for employees to access mortgages.²²

As highlighted in the responses to questions 7&8, the government's own research also confirms that most employers do not perceive the current level of regulation as a major constraint on growth.²³ Unfair dismissal regulations do not even feature in the list of top ten regulations which employers cite as a deterrent to growth.

Labour market analysis also does not support the argument that weaker dismissal rights will lead to increased employment and lower unemployment levels. Rather it suggests that employment protection legislation (EPL) tends to discourage employers from hiring during periods of growth but it also discourages layoffs during periods of recession. Over the economic cycle as a whole, the effect on employment levels tends to be neutral. This point was illustrated in recent comments by John Philpott, the Chief Economist at the CIPD:

'The vast weight of evidence on the effects of employment protection legislation suggests that while less job protection encourages increased hiring during economic recoveries it also results in increased firing during downturns. The overall effect is thus simply to make employment less stable over the economic cycle, with little significant impact one way or

¹⁹ http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf

²⁰ See Howard Reed (2010) 'Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance' for a detailed review of recent research.

²¹ Wilkinson, Richard and Pickett, Kate (2009) *The Spirit Level: why equality is better for everyone*, Allen Lane. See also Howard Reed (2010) 'Flexible with the Truth? Exploring the Relationship between Labour Market Flexibility and Labour Market Performance' TUC, London.

²² See the TUC response to the BIS consultation on Dealing with dismissal and 'no fault compensated dismissal' for micro businesses: <http://www.tuc.org.uk/tucfiles/346/NoFaultdismissal.pdf> ; Also see the Government Response to this call for evidence <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-1143-dismissal-for-micro-businesses-response.pdf> , September 2012.

²³ BIS Small Business Barometer August 2011, published in October 2011: <http://www.bis.gov.uk/assets/biscore/enterprise/docs/s/11-p75c-sme-business-barometer-august-2011>

the other on structural rates of employment or unemployment. (emphasis added)²⁴

In its response to the recent BIS call for evidence on compensated no fault dismissal (NFD) the government concluded:

‘that there is insufficient support and evidence that NFD would have a positive impact on the UK labour market ... The Government has therefore decided it will not take forward proposals for NFD.’

This analysis applies equally to the proposals on employee owners. The TUC therefore calls on the government to drop the proposals on trading rights for shares.

Questions 22 & 23:

Would you be likely to take up the new status? What would the impact of the status be on your business?

Question 23:

What are your views on the take-up of this policy by:

a) Companies?

b) Individuals?

The TUC expects that there will be limited take up of this policy amongst good practice employers. Many employers recognise that it would be bad practice and bad business to seek to trade employees key employment rights in return for shares. Such policies will make it more difficult for companies to recruit quality staff who will perceive few advantages in trading basic protections for potentially worthless shares. The policy will also have a damaging impact on workforce morale and productivity. It is also likely to damage the reputation of businesses with their customers and the wider public. It will also be complex and costly for businesses to set up and administer this policy. We suspect therefore that most good practice employers will be deterred from using the policy.

The TUC is, however, seriously concerned that less scrupulous employers will seek to exploit the policy as a means of avoiding employment rights obligations and treating their staff fairly. There is a serious risk that the proposals will help to generate a hire and fire culture in some businesses and will lead to staff being mistreated at work.

The TUC expects, that with the exception of some high paid individuals who wish to take advantage of the tax loopholes, this policy would prove highly unattractive to the vast majority of employees. The TUC however is extremely concerned that many employees will not be given a choice over whether to sign an employee owner contract and thereby lose out on key workplace rights.

Equality impact assessment

²⁴ <http://www.cipd.co.uk/pressoffice/press-releases/questionable-merit-watering.aspx>

Question 24:

What are your views on the equality impact assessment? Are there other equality and wider considerations that need to be considered?

The Equality Impact Assessment is not adequate. It fails to properly consider the differential impact on particular groups of excluding employee-owners from the right to request flexible working. Tables are presented on the proportion of people by protect characteristic who work full-time and work flexibly. But by only focusing on full-time workers it completely misses out a major group of flexible workers from the analysis – those who work part-time where there are significant differences between groups, particularly between men and women. It also ignores numerous responses to questions in the same BIS survey from which it has taken the data on full-timers, which show a significant differences between protected characteristic. For example, 28 per cent of women had made requests for flexible working in the past two years, compared to 17 per cent of men and 33 per cent of women said flexible working was “very important” to them in deciding whether to take a job compared to just 14 per cent of men.

The EIA concludes that there are no gender impacts or consequences related to pregnancy and maternity from the proposal to extend the notice period for return from maternity leave to 18 weeks. It suggests it is merely a procedural change with no consequences for new mothers. However, as stated in response to Qs.12-15 above, this procedural change, particularly in conjunction with the exclusion of employee-owners from the right to request flexible working is likely to lead to women taking longer leave than they would have otherwise intended and possibly to more women not returning from leave.

It is also a matter of serious concern to the TUC that the government has decided to introduce legislation on this proposal before full consultation has been completed and before a full impact assessment has been undertaken. The government appears intent on driving the policy through regardless of its impact on employees, employers and the wider economy.

These implications include increased job and financial insecurity for employees, particularly in redundancy or insolvency situations; the negative equality impacts outlined above; the damaging effect on workforce morale, innovation and productivity; increased difficulties for businesses operating the scheme to attract and recruit quality staff; increased costs for businesses in setting up and administering employee owner schemes; and the damage on business reputation amongst customers and the wider public.

In drawing up these policies the government also appears to have completely ignored its own research and the wider evidence that was gathered during the call for evidence on proposals for compensated no fault dismissal. This is remarkable, given that the government published a comprehensive and evidence-based response to the call for evidence less than a month before the Chancellor made his announcement. As noted above, this response concluded that ‘there is insufficient support and evidence that NFD would have a positive impact on the UK labour

market'. The same analysis applies equally to the current proposals. The TUC therefore calls on the government to withdraw its proposals and instead to adopt a clear and effective strategy for sustainable growth.