TUC
Changing the world of work for good

Enforcement of employment rights

TUC Response to the Consultation on enforcement of rights recommendations

Introduction

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

The TUC welcomes the opportunity to respond to the BEIS consultation on the recommendations in the Taylor Review of Modern Working Practices on enforcement of employment rights. Unions play a vital role making sure that employment rights are respected and upheld, by:

i) Collective bargaining, negotiating improved terms and conditions for working people and putting in place mechanisms to remedy breaches of these terms and conditions where necessary

i) Raising employers' awareness of their employment responsibilities, including when new employment rights are introduced

ii) Resolving employment disputes using grievance and disciplinary procedures and the right to be accompanied

iii) Where merited, supporting members to take cases to employment tribunal

iv) Supporting strategic cases which clarify legal duties and set the norms to be followed by employers in similar workplaces and sectors.

There is large scale non-compliance with basic employment rights in the UK labour market. Up to 580,000 workers are being paid below National Minimum Wage rates. At least 2 million workers do not receive legal minimum paid holiday entitlements, missing out on £1.6bn in paid holiday per year[1]. Existing enforcement mechanisms are clearly failing many workers.

The Taylor Review missed the opportunity to put forward recommendations that would counter the systemic problems in the UK labour market that cause large-scale non-compliance with employment rights. Nevertheless, the Review proposed improvements to the enforcement system which could make it easier for working people to enforce their rights. The government has accepted some of these recommendations and the TUC welcomes this consultation as an opportunity to make sure these proposals help improve the enforcement of employment rights for working people. However, it must be recognised that the scope of this consultation is narrow. Wider action is needed to make sure working people have access to an effective system for enforcing employment rights.

We would like to take this opportunity to recommend actions which would tackle the problems in our enforcement system. These include:

[1]TUC analysis of LFS Q4 2016

- Promoting collective bargaining as the primary vehicle for raising workplace standards and ensuring compliance with labour standards;
- Boosting the effectiveness of state led enforcement activity, by making sure that agencies are sufficiently resourced;
- Reinstating the power for employment tribunals to make recommendations where employers are found to have breached employment standards. The power to make recommendations should not be limited to claims brought under the Equality Act 2010, but should apply to all statutory employment rights.
- Extension of the existing GLAA licensing scheme. The TUC would like to see the licensing model[2] currently used by the Gangmasters Labour Abuse Authority (GLAA), in the shellfish-gathering, agriculture and horticulture sectors, extended further across the labour market. Licensing requires organisations operating in a particular sector to prove that they can comply with minimum employment standards. This involves providing evidence of compliance with core labour standards through initial and ongoing inspections.
- Establishing a system of joint and several liability throughout supply chains for basic employment standards. Parts of UK employment law already provide for joint and several liability arrangements[3]. The TUC is calling for this approach to be extended, so that organisations who use strategies to transfer their obligations to other parties, can still be found liable for any breaches of the core employment rights of the people who do work for them.

It is welcome that David Metcalf, the Director of Labour Market Enforcement, recently recommended the introduction of a system of joint responsibility through supply chains, with companies being 'named and shamed' where they fail to address problems of non-compliance by their suppliers and sub-contractors with basic employment standards. These recommendations represent a step in the right direction. However, in our opinion, there is a compelling case for establishing a full system of joint and several liability:

- Organisations should take greater responsibility for the people that do work for them
- Joint and several liability opens up multiple avenues for a worker to seek compensation
- Joint and several liability ensures that in phoenixing cases, where company directors put companies into insolvency to avoid their employment and tax obligations, workers would still have a course of action to enforce their rights
- Widening liability would ensure contractors are more diligent and careful in choosing their subcontractors
- Widening liability would strongly incentivise the lead contractor to risk assess, monitor and tackle potential breaches of employment standards in their supply chains

[2] http://www.gla.gov.uk/i-am-a/i-supply-workers/i-have-a-glaa-licence/
[3] https://www.tuc.org.uk/sites/default/files/Shiftingtherisk.pdf

- Joint and several liability may also have the benefit of incentivising the creation of more secure, permanent employment, as fewer contractors are willing to take the risk of working with subcontractors who might create liabilities for them.
- Full joint and several liability provisions would ensure the enforcement process is transparent and that workers are fully informed of any action taken to remedy breaches of employment standards.

The remainder of our response relates to the specific sections of the consultation.

Section A - State Enforcement

The TUC supports the extension of the remit of HMRC NMW Team to cover enforcement of contractual and statutory holiday pay and statutory sick pay.

Q1. Do you think workers typically receive pay during periods of annual leave or when they are off sick?

The required earning thresholds for Statutory Sick Pay mean that many workers do not qualify for statutory sick pay, particularly those in insecure employment where irregular working hours mean income can fluctuate considerably. Many workers do not earn the £116 average per week, required to be eligible for statutory sick pay. In 2017, over two million workers earned less than £116 a week.[4]

Many workers, especially agency workers and zero hours contract workers, miss out on holiday pay whilst taking leave because of the widespread, unlawful, practice of "rolled-up" holiday pay. This results in many low paid workers, in insecure employment, not receiving any pay whilst they are on leave. It makes it more difficult for workers to budget and afford to take time off from work. It also deters individuals from taking time off from work which inevitably can have negative health and safety implications.

Unions have reported that there is a common perception amongst employers that zero hours contract workers, agency workers and other people in insecure employment are not entitled to paid holidays. This misconception results in many workers missing out on holiday pay that they are entitled to.

In 2017, the TUC carried out an online survey of insecure workers. A large number of respondents worked in the hospitality sector. Lack of awareness of the right to statutory sick pay was prevalent. Despite being eligible for statutory sick pay, many workers were not aware of this right and would not receive any pay whilst off sick.

Furthermore, many of the respondents avoided calling in sick as they couldn't afford an unpaid or low paid period of leave. Many respondents reported that they were fearful of taking sick leave as repercussions could include losing an assignment or future paid work.

[4] TUC Analysis of Labour Force Survey - average of quarters across 2017.

Q2. Do you think problems are concentrated in any sector of the economy, or are suffered by any particular groups of workers?

Recent TUC analysis has shown that 2 million workers are not receiving their paid holiday entitlement, at a cost of £1.6bn.

Analysis of data from the ONS Labour Force Survey, Q4, 2016 reveals several at-risk groups. The problem is most serious for workers in four sectors; education, accommodation and food services, health and social care, and the arts. More than 850,000 employees in these sectors say that they have no paid holidays at all. These workers account for 64% of all employees who say that they receive no paid holidays.

A significant number of part-time workers do not receive any holiday pay. 919,000 part-time employees say that they do not receive any holiday pay, accounting for 69% of all workers who say that they receive no paid holidays.

408,000 young employees aged 16-24 report that they do not receive any paid holiday.

People in insecure employment face much more difficulty enforcing their rights. A lack of job security means that many people are afraid of raising workplace issues as they fear losing their job. Evidence from our recent survey of workers in insecure employment identified significant under payment of holiday and sick pay, with respondents from the hospitality sector particularly prominent.

Q3. What barriers do you think are faced by individuals seeking to ensure they receive these payments?

Individuals seeking to ensure they receive holiday and sick pay face many barriers. Workers in insecure employment face additional hurdles.

- For many workers, a lack of awareness of their employment rights prevents them from enforcing their rights in relation to holiday and sick pay.

  ACAS research from 2014 and 2015[5], shows that zero hours contract workers and agency workers are often unaware of their employment rights and afraid of raising workplace concerns due to fears over job security.

  Providing all workers with a right to a written statement which specifies holiday pay and leave entitlements and explains how holiday pay will be calculated would assist in raising awareness of rights.

- Unions have reported that the confusion and uncertainty created by employment status rules means that some employers, and workers believe that zero hours contract workers and agency workers are not entitled to holiday pay, even though the legal reality may be very different.

[5] http://www.acas.org.uk/index.aspx?articleid=5234

- Unscrupulous employers take advantage of this uncertainty. They also falsely classify workers as 'self-employed' - to avoid responsibility for holiday pay –Even where one worker successfully brings a claim for holiday pay, this does not mean that other workers in the same workplace will receive holiday pay. Employment tribunals should have power to make recommendations to ensure that employers change their practices for other workers. The power for employment tribunals to make recommendations should be reinstated in the Equality Act 2016 and should be extended to all statutory employment rights.
- Research[6] has shown that migrant workers face further problems when trying to enforce their employment rights. The EU Migrant Worker Project found that some agencies in the food processing sector, have taken advantage of migrant workers and denied them their employment rights. The research also showed that some agencies don't pay their workers holiday pay as this is seen as a normal part of agencies' profit margin. Language barriers also make it more difficult for migrant workers to understand their rights, raise complaints when they feel exploited and find out where they can go for help to enforce their rights.
- We are also concerned that, since the Immigration Act 2016, it has been a criminal offence to work without leave to remain, or beyond the restrictions of a visa, and that wages earned in such employment have been classified as the proceeds of crime. Unions report that this has dissuaded undocumented migrants from reporting exploitative employers to the authorities as they face imprisonment and deportation if their status is investigated. Bad employers also threaten to report undocumented workers to the authorities if they complain about bad treatment or try to join a union and claim their rights. The TUC believes undocumented migrants should be able to claim employment rights separate from their immigration status so they can report bad employers and be treated decently, and on equal terms with local workers. This principle is enshrined in Article 23.1 of the Universal Declaration of Human Rights which states 'everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'.
- Regulatory bodies such as the GLAA, HSE, HMRC and EASI should support undocumented migrants to be able to enforce their employment rights. We are opposed to these bodies sharing information gained from enforcement activities with the Home Office to be used for immigration enforcement.

Q4. What would be the advantages and disadvantages for businesses of state enforcement in these areas?

Improved state enforcement would help create a level playing field for businesses. Effective state enforcement of basic workplace rights would help to ensure that exploitative

[6] http://blogs.lse.ac.uk/brexit/2016/05/11/why-the-failure-to-enforce-eu-workers-employment-rights-matters/

employers (who seek to save on labour costs by contravening employment law, not paying holiday pay for example) cannot undercut employers, who comply with employment law.

Q5. What other measures, if any, could government take to encourage workers to raise concerns over these rights with their employer or the state?

Increased resources for state led enforcement agencies

It's important that enforcement agencies are properly resourced so that they can carry out their work effectively. There should be a review of the resources at the enforcement agencies' disposal to determine whether they have adequate resources to fulfil their enforcement obligations. There are some key areas for concern:

- The Gangmasters Labour Abuse Authority has a newly expanded remit, meaning they will be responsible for enforcing labour market offences for roughly 10 million working people. They previously covered 500,000 workers in the licensed sectors.
- The Employment Agencies Standard Inspectorate is inadequately resourced. In the current year (2017/18) the EAS only has a budget of £725,000[7] to ensure that 23,980[8] recruitment agencies comply with the Conduct Regulations. They have a total of 12 full time equivalent staff. The resources available to the EAS make it impossible for them to stamp out abuse in the agency sector.
- The Low Pay Commission has estimated that the 2020 target for the National Living Wage would raise coverage from around 5 per cent of the labour force in 2015 to around 14 per cent by 2020, meaning that the HMRC NMW team will have a larger proportion of the workforce to police. The Low Pay Commission has also estimated that between 300,000 and 580,000 people are currently being paid below the National Minimum Wage levels[9].
- Compared with other countries in Europe, the UK enforcement agencies are inadequately resourced. For every 100,000 workers the UK has 0.9 labour market inspectors (excluding health and safety inspectors). In France, there are 18.9 inspectors for every 100,000 workers[10].
- Effective implementation of any of the suggestions of the Taylor review will be affected by ongoing resource issues generally across government departments including the closure of HMRC offices under the government's "Building our Future" proposals, which will have a particular impact on NMW enforcement. PCS report that in February 2018,

---

[7] http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332

[8] https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf

[9] https://www.gov.uk/government/news/low-pay-commission-report-on-non-compliance-with-the-minimum-wage

[10] http://www.labourexploitation.org/news/uk-falling-behind-labour-inspection-combat-modern-slavery-new-flex-policy-blueprint

while the Government was responding to the Taylor report, HMRC was closing the offices of HMRC Cambridge and HMRC Oxford, with the consequent loss of the NMW enforcement teams in these offices. The skills and experience that are needed to retain to effectively "police" holiday pay are being lost as people take redundancy. There are also NMW enforcement teams in HMRC offices at Leicester, Stockton, Exeter, Maidstone, Aberdeen, East Kilbride, Sheffield, Bradford and Portsmouth all threatened with closure.

- There are also ongoing issues regarding staffing levels at ACAS, in light of the rise in Tribunal applications following UNISON's win in the Supreme Court.
- There is also a need for a substantial increase in resources for the employment tribunal service. In July 2017, UNISON secured a landmark legal victory, with the Supreme Court deciding that the employment tribunal fees system was unlawful as they limited access to justice and meant that working people no longer had access to effective remedies where employers breached the law. Since this decision, the number of cases submitted to an ET has risen by over 60 per cent. However, the employment tribunal system has not been provided with sufficient additional resources to respond to the increased workload. This is leading to a major backlog in cases. The delays inevitably cause problems for employers, workers and unions and can have a detrimental impact on employment relations. The Ministry of Justice needs urgently to identify additional resources to ensure that working people and employers can secure swift resolution of workplace disputes.

The TUC fully endorses the Director of Labour Market Enforcement's recent recommendation that the Employment Agency Standards should receive additional resources. But it is disappointing he stopped short of recommendation an across the board increase in funding.

More proactive state led enforcement

Most enforcement activity is triggered by complaints made to the state enforcement agencies, particularly in respect of Employment Agency Standards (EAS). HMRC's NMW team also prioritises complaints, but now also undertakes some proactive behavioural and enforcement work. Whilst complaint-based work is important, a supplementary, targeted, proactive approach to enforcement could also reap enormous benefits, as HMRC's results show. This is particularly true in sectors where workers are unware of their rights or too afraid to raise complaints through fear of reprisals.

Voice at work – trade union access to workplaces and greater collective bargaining

Collective bargaining remains the best way to protect and enforce workers' rights. There is a strong correlation between collective bargaining and lower levels of non-provision of holidays. In 2015, only 2.7% of workers covered by a collective agreement reported no paid holiday entitlement, compared with 6.1% of those who were not covered[11].

[11] https://www.mdx.ac.uk/__data/assets/pdf_file/0017/440531/Final-Unpaid-Britain-report.pdf, page 44.

The government should recognise the role of unionisation and collective bargaining in ensuring standards of decent work.

The TUC believes the government should introduce wide-ranging measures aimed at promoting and extending collective bargaining. This should include the creation of new sectoral bodies which bring together unions and businesses to negotiate pay, progression, training and conditions – these should be piloted in the low-paid sectors where the need to improve conditions is greatest. There are many examples of this happening already, where unions and employers voluntarily enter into collective agreements.

Unions should also be given a right to access workplaces to tell individuals about the benefits of joining a union. The right to be accompanied should also be strengthened to ensure that workers have the right to be represented by a union rep in meetings with employers, including whether they are seeking improved pay and conditions. And ACAS' duty to promote collective bargaining should be reinstated.

SECTION B - Enforcement of tribunal awards and establishing a naming scheme

Enforcement of tribunal awards

The current system for enforcing employment tribunal awards is not fit for purpose. Successful claimants must take further action to receive their award if the employer chooses not to pay. 35 per cent of successful claimants do not receive any compensation12. It can cost a successful claimant over £320 to pursue the compensation they have been awarded. The BEIS Penalty Scheme, created in 2016, is inadequate as it fails to recoup any award for the claimant. Instead, penalties issued against non-compliant employers are paid to the state.

Q6. Do you agree there is a need to simplify the process for enforcement of employment tribunals?

YES

Q7. 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?

12https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf, Payment of Tribunal Awards, IFF report for BIS, 2013

We recognise that the use of online systems may assist in improving the efficiency and effectiveness of the enforcement system. However, it is vital that any further moves towards digitalisation do not disadvantage individuals or groups, in particular disabled workers, those with literacy issues, migrant workers, unrepresented claimants and respondents, and those without internet access. There must be viable, accessible routes of enforcement, open to people who are excluded from the digital route.

Q8. 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?

There should be proactive enforcement of unpaid tribunal awards. Enforcement of employment tribunal awards should not be dependent on a claimant having to make an application to recover their tribunal award. The current enforcement system places a further cost and time burden on a claimant who has had their claim upheld.

Employment Tribunals should be responsible for monitoring the payment of tribunal awards and should be given the powers and responsibility for enforcing awards. New powers should be introduced enabling employment tribunals to recover compensation owed to workers and to impose sanctions on employers who do not pay tribunal awards.

Q9. 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?

We recognise that the use of online systems may assist in improving the efficiency and effectiveness of the enforcement system. However, it is vital that any further moves towards digitalisation do not disadvantage individuals or groups, in particular for disabled workers, those with literacy issues, migrant workers, unrepresented claimants and respondents, and those without internet access. There must be viable, accessible routes of enforcement, open to people who are excluded from the digital route.

Q10. 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?

The TUC's preference is for employment tribunals to be given responsibility for the enforcement of tribunal awards.

However, failing this, it would be a positive step for all judgments to be defaulted to the High Court for enforcement. This would mean that the enforcement process of tribunal awards would be undertaken automatically by the High Court and would not rely on a claimant having to jump through further costly and bureaucratic hoops.

Q11. Do you have any further views on how the enforcement process can be simplified to make it more effective for users?

- The onus should rest with the state and employment tribunal system to enforce awards. The system should not be dependent on an individual pursuing a claim against an employer.
- The Taylor Review proposed that the government should take responsibility for enforcing unpaid tribunal awards[13]. The government response overlooks this point. The TUC is calling for the government to accept the Taylor Review's recommendation and to take responsibility of ensuring that a successful claimant receives their tribunal award.
- The government should explore whether HMRC should have powers to recoup unpaid tribunal awards via the tax system.
- Public procurement rules should be amended so that employers who fail to pay tribunal awards to successful claimants are barred from tendering for and are not awarded contracts for the delivery of public services. The UK government awards £45 billion worth of government contracts to private firms each year. This is an effective lever to incentivise employers to pay tribunal awards. The TUC is proposing that Regulation 57 of the Public Contracts Regulations 2015 should be amended so that a bidder who has failed to pay a tribunal award should be prevented from participating in a public procurement procedure.
- To ensure that government can effectively ensure that it is not contracting with companies who have breached employment law, central government should create a register of companies with whom they, local government, and other public bodies, are contracting. To give one example of how the present situation limits the effectiveness of enforcement, when it comes to social care, officials from HMRC, BEIS, and the Dept of Health and Social Care do not know how many care companies carry out sleep-in shifts and where they operate in the country. Not only would this information help to inform enforcement activity it would help facilitate employers who have breached employment rights being barred from being awarded contracts - wherever they operate.
- Directors of companies that are found to have failed to pay employment tribunal awards, should be barred from holding the position of Director. This would help to deal with the problem of "phoenixing", where exploitative companies avoid their liabilities by going into liquidation and springing up under a new name. Over half of claimants who

[13] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf, page 63, recommendation

stated that their employer had not paid their tribunal award because they had gone insolvent, reported that the company they had worked for was now trading again under a different name or at a different location.

- BEIS research has identified that the most common reason for non-payment of tribunal awards is because that the employer against whom the claim was made has since gone insolvent. Insolvency legislation should be amended to ensure that where an employer goes into liquidation, the state will fully reimburse workers for all unpaid tribunal awards.

Establishing a naming scheme

The proposals put forward by the government are inadequate. As they stand, they will fail to name and shame a significant number of employers who do not pay their tribunal awards.

The government is proposing to use information collected under the BEIS penalty scheme, to name employers who have failed to pay tribunal awards. There is little incentive for successful claimants to use the scheme as the government cannot recoup unpaid awards for applicants. This means that the details of most noncompliant employers are unlikely to be collected under the BEIS penalty scheme.

Most noncompliant employers would, therefore, fall outside the scope of the government's proposed scheme.

The government's proposal would only deal with the tip of the iceberg. Using data from last year, the government confirms that only 33 employers would be named under their proposals.

Q12. 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)?

The government's proposed naming scheme is too lenient and would not incentivise noncompliant employers to pay tribunal awards promptly. The government is proposing to link the naming scheme to key touchstones in the BEIS penalty scheme. Under the BEIS penalty scheme, after receiving a complaint from a successful claimant, a warning notice will be issued to that employer. This warning notice is issued 42 days after receiving the complaint, giving the employer a period of time to appeal. If the employer still fails to pay the ET award within 28 days, BEIS will issue a penalty notice. It is at this stage, that the government is proposing to "name" the employer. The TUC believes that an employer who hasn't paid a tribunal award should be named at the earliest possible opportunity. Employment tribunals should collect data on unpaid tribunal awards which should be compiled into a central register. Every quarter, the names of parties that fail to pay their awards, should be published.

Q13. What other, if any, representations should be accepted for employers to

not be named?

None.

Q14. What other ways do you think government could incentivise prompt payment of employment tribunal awards?

- Effective sanctions should be imposed upon all employers who fail to pay their tribunal awards. Section 150 of the Small Business, Enterprise and Employment Act 2015, enables the government to impose a fine of up to £5,000 on employers who fail to pay their awards. This fine is only imposed on employers who are reported to BEIS by individuals who have not received their award. The principle of imposing sanctions on employers who fail to pay their awards should be extended to all employers who fail to pay, not just those reported to BEIS.
- The power for employment tribunals to make recommendations to employers should be reinstated in cases brought under the Equality Act 2010 and should be extended to all statutory employment rights. Currently where one worker successfully brings a claim for a breach of a statutory right, for example holiday pay or sexual harassment, this does not mean that employers will automatically change their practices in relation to other workers in the same workplace. Employment tribunals should have power to make recommendations to ensure that employers change their practices for other workers. The power for employment tribunals should be reinstated in the Equality Act 2016 and should be extended to all statutory employment rights. The power to make recommendations should particularly be applied in cases where the issue of employment status is contested and workers secure employment rights. Tribunals should have the power to recommend that all workers on similar contracts should be entitled to and receive their statutory rights.
- Public procurement rules should be amended so that employers who fail to pay tribunal awards to successful claimants are barred from tendering for and from being awarded contracts to deliver public services. The UK government awards £45 billion worth of government contracts to private firms each year. This is an effective lever to incentivise employers to pay tribunal awards. The TUC proposes that that Regulation 57 of the Public Contracts Regulations 2015 should be amended so that a bidder who has failed to pay a tribunal award should be prevented from participating in a public procurement procedure.
- Managers who are found to be in breach of failure to pay employment tribunal awards, should be disqualified from holding the position of a company Director.
- HMRC should be involved in the enforcement process. The tax system could be used more effectively to recoup unpaid tribunal awards from employers.
- Employment law infractions and naming and shaming issues should be included in the information held on companies by Companies House (or in other publicly available

information on companies), including non-payment of the NMW or non-payment of ET awards.

- Companies should also be required to report on workforce policies and practices within their annual report.

SECTION C - Additional awards and penalties

It is welcome that the government is proposing to increase the awards and penalties where an employer has already lost an employment status case on broadly comparable facts; and where there are subsequent breaches against workers with the same, or materially the same, working arrangements.

The TUC proposes that the government should focus their attention on allowing tribunals to award uplifts in compensation in these circumstances. Whilst an increase in aggravated breach penalties would be welcome, this is not the TUC's preferred option. Aggravated breach penalties are paid to the state, rather than the individual, so would not benefit the individual who has suffered a loss because of the employer's actions.

Uplifts in compensation should not just be limited to situations where there are subsequent breaches against workers with the same, or materially the same, working arrangements.

Increased penalties and awards should be available where employers use contractual terms to prevent staff from enforcing their employment rights. Examples of this behaviour were highlighted in the recent inquiry by the Work and Pensions select committee into "self employment and the gig economy[14]".

Q15. 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?

The TUC proposes that the government should focus their attention on allowing tribunals to award uplifts in compensation in these circumstances.

If the government proposes that tribunals should use aggravated breach penalties as the primary sanction for employers, then these penalties should be used in any situation where an employer has been found to breach statutory employment rights more than once. If an employer is found to have flouted employment law more than once by a tribunal, they should be subject to an aggravated breach penalty.

[14] https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/847.pdf

Aggravated breach penalties should also be imposed on employers who have unsuccessfully defended a multiple claim. For example, if 20 workers successfully claim for unpaid holiday then an aggravated breach penalty should be imposed on the employer.

Q16. Is what constitutes aggravated breach best left to judicial discretion or should we make changes to the circumstances that these powers can be applied?

The government should revise the circumstances in which aggravated breach penalties can be applied, to make it clear that:

- These penalties should be used in any situation where an employer has been found to contravene employment law more than once.
- They should also be imposed on employers who have unsuccessfully defended a multiple claim. For example, if 20 workers successfully claim for unpaid holiday then an aggravated breach penalty should be imposed on the employer.

Q17. Can you provide any categories that you think should be included as examples of aggravated breach?

Please see the answer above.

Q18. 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?

The tribunal should keep records of successful claims against respondents – including the names of relevant company directors. It should also be possible for claimants to present evidence of a second offence to a tribunal. However, the onus should not lie solely with the claimant.

It is also not clear what is meant by a second offence of employment status. All claims considered by employment tribunal will consider the issue of status as it is a qualifying criterion for all claims.

The TUC presumes that it is the government's objective to prevent and deter employers from seeking intentionally to avoid employment responsibilities or to take advantage of an individual's uncertain status to avoid statutory rights. We suggest that standalone provisions should be introduced which require employment tribunals to award a significant uplift in compensation to claimants where it is clear than an employer has used contractual terms in order to avoid employment law obligations. The same approach should apply where an employer has informed an individual that they have no rights, even though the legal reality may be very different or where employers have sought to intimidate individuals into not making an ET claim.

Q19. 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.

Increased sanctions should be imposed in any situation where an employer has been found to contravene employment law more than once. This should be the determining factor in imposing a sanction on an employer. See comments above.

Q20. How should a subsequent claim be deemed a "second offence"? e.g. broadly comparable facts, same or materially same working arrangements, other etc.

Increased sanctions should be imposed in any situation where an employer has been found to contravene employment law more than once. This should be the determining factor in imposing a sanction on an employer. See comments above.

Q21. 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

All of the above. Although priority should be given to "Uplift in compensation" as it benefits the claimants who has been wronged.

Q22. Are there any alternative powers that could be used to achieve the aim of taking action against repeated non-compliance?

There is a strong correlation between collective bargaining coverage and lower levels of non-provision of holidays. In 2015, only 2.7 per cent of workers covered by a collective agreement reported no paid holiday entitlement, compared with 6.1 per cent of those who were not covered[15].

The government must recognise the role of unionisation and collective bargaining in ensuring standards of decent work.

While an employer can ignore the views of a single worker, when workers come together in a union, employers have to listen. Collective bargaining raises pay and improves terms and conditions of work too.

[15] https://www.mdx.ac.uk/__data/assets/pdf_file/0017/440531/Final-Unpaid-Britain-report.pdf, page 44.

The TUC believes the government should introduce wide-ranging measures aimed at promoting and extending collective bargaining. This should include the creation of new sectoral bodies which bring together unions and businesses to negotiate pay, progression, training and conditions – these should be piloted in the low-paid sectors where the need to improve conditions is greatest. There are many examples of this happening already, where unions and employers voluntarily enter into collective agreements.

Unions should also have a right to access workplaces to tell individuals about the benefits of joining a union. And ACAS' duty to promote collective bargaining should be restored.