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FAIRNESS AT WORK - A LEVEL PLAYING FIELD?

As a demonstration to tackle the inequalities which currently exist in employment laws, the Theresa May government is planning to boost the rights of vulnerable persons working in atypical employment. Theresa May's vision when she became Prime Minister was of a country¹ «where everyone plays by the same rules and where every single person, regardless of their background... is given the chance to be all they want to be». Under new legislation to be introduced by the government, persons working under zero-hour contracts, in the gig economy and agency workers are to be protected by a series of workplace reforms. Persons working in the aforementioned categories will enjoy certain employment rights to which they were hitherto denied.

These reforms have their basis in the findings of, and some of the 53 recommendations made by, the Taylor Review² amongst them and within the context of this commentary, they include a national strategy to provide good work for all «for which the government needs to be held responsible». By «good work» is meant, *inter alia*, the quality of employment working conditions, work-life balance and decent wages. Everyone should enjoy a «baseline» of protection and be given ways to enable progression at work.

On 17th December 2018 the government set out its «Good Work Plan»³ in response to the Taylor Review recommendations described by the Right Honourable Gregg Clark, Secretary of State for Business, Energy and Industrial Strategy as the «largest upgrade in workers' rights in over a generation»⁴ which «is a key part in building a labour market that continues to reward people for hard work, that celebrates good employers and is boosting productivity and earning potential across the UK».

It is proposed to discuss some of the major key changes made to worker rights by the Good Work Plan. It should be noted at the outset that the government has laid a very limited number of regulations to bring into effect the planned reforms mentioned in the Good Work Plan. These regulations and their timelines are discussed below. For the majority of the proposed reforms mentioned in the Good Work Plan, draft legislation and timelines have not been presented for consultation at the time of writing.

1 Source: BBC News- Politics 5th October, 2016.

2 For a precis on the Taylor Review see the English edition of this Revue, 2018/4.

3 Policy Paper «Good Work Plan», 17th December 2018, Com. 9755: <https://www.gov.uk/government/publications/good-work-plan>

4 <https://www.bbc.co.uk/news/business-46586623>

1) Firms will be under an obligation to provide their workers with a statement of employment rights entitlement from their first day at work, adding to the already acquired worker rights their eligibility for paid leave, sick leave and sick pay, maternity, paternity and shared parental leave⁵.

2) Another proposed right is to level the playing field by closing the loophole known as the Swedish Derogation Rule, which allows firms to pay agency workers less than their permanent employee colleagues. Under the Agency Worker Regulations, 2010 agency workers employed by the same employer for 12 weeks or more are entitled to the same pay and benefits as permanent staff but because of the Swedish Derogation - which was added to the European Directive at the request of the Swedish government - exemptions are allowed.

Thus temporary agency workers can be employed by the agency directly rather than by the company. This allows them to be paid between assignments and thus not receive the same wages and employment conditions as permanent staff. Although a lawful practice, critics have argued that the loophole allows companies to create a two tier workforce with the potential of exploiting agency workers. The president of the Law Society of England posited «Agency workers can now be confident that they have a legally enforceable right to be treated and paid equally to colleagues employed directly by the employer»⁶.

3) In respect of agency workers, the government proposes to enact legislation to protect them in situations where wages are withheld, or where unjustified deductions are made by umbrella companies which very often, in that sector of the industry, pay agency workers their wages.

4) Agency workers will be given the right to be provided by their firm with specific information on the type of contract under which they are employed, how they will receive their wages and the minimum rate of pay they might expect. Where they are to be paid by an intermediary company, details must be given to agency workers regarding fees charged and deducted at source from their wages by the intermediary company as well as any other deductions to be made for transport, accommodation, etc. Furthermore, the firm will have a legal obligation to estimate agency workers' take home pay after deductions have been made.

5) Increasing the maximum fine which employers face at an Employment Tribunal to £20,000 from the current £5,000 if employers are found to have demonstrated «malice, spite or gross oversight» (aggravated breaches) towards their workers is another right granted to workers by legislation. The penalty enforcement also includes a naming and shaming scheme. If a worker wins an Employment Tribunal case (where malice, etc. is demonstrated by the employer) and the respondent employer refuses to pay compensation to the worker, he/she can apply to the Business, Energy and Industrial Strategy Department to have the respondent «fined and named publicly». The worker will need to fill in the Employment Tribunal Penalty Enforcement Form. This latter will be given a warning notice

5 The Employment Rights [Employment Particulars and Paid Annual Leave] (Amendment) Regulations, 2018, no. 1378, amending Sections 1 to 7B of the Employment Rights Act, 1996 and comes into effect on 6th April 2020.

6 The legislation on the Swedish Derogation is due for debate by Parliament in early 2019 and will come into force on 6th April, 2020.

to pay the worker within 28 days. If the employer does not pay he will be fined and may be named by the government⁷.

6) Yet another worker right granted to workers by the government is to ensure that firms calculate annual leave pay based on a fifty two weeks' period⁸ instead of the current twelve weeks, thus allowing seasonal and atypical workers - whose pay varies because either they have no normal working hours or they have normal working hours but the amount of work or days or times they work each week varies - to receive the paid time off to which they are entitled⁹. Part-time workers are entitled to the same holiday entitlement as full-time workers calculated on a *pro rata* basis. For shift workers it is normally easier to calculate how many shifts they get off and for casual workers or workers who work irregular hours it is easier to calculate holiday entitlement which accrues as hours are worked. Every worker is entitled to 5.6 weeks' annual leave which is equivalent to 12.07% of hours worked over a year. The 12.07% figure is 5.6 weeks holiday divided by 46.4 weeks (being 52 weeks- 5.6 weeks.) The 5.6 weeks are excluded from the calculation as the worker would not be at work during those 5.6 weeks in order to accrue annual leave¹⁰.

7) There are new legislative proposals which would give all workers on flexible contracts the right to request a fixed hour and more stable contract which provides them with financial security after working in precarious, atypical or vulnerable employment for twenty six weeks. However, it is understood that firms will not be required to grant automatically such a request.

8) The government is committed to legislate so as to improve the clarity of a person's employment status - namely whether an employee, a worker or an independent contractor (self-employed) - to reflect the reality of the modern working relationship. Bearing in mind the complexity of this issue where the courts have created a variety of tests over the past century¹¹, the government and legislator will have the unenviable and most strenuous task to clarify the employment status. Clarification of the employment status would assist employers in not wrongly classifying their staff.

9) Allied to (h) above, is the proposal to align the employment status used in employment law with that used by the tax authorities, namely Her Majesty's Revenue and Customs (HMRC). HMRC currently define employment status in a different way to that used in employment law to suit its own purposes. Such difference in interpretation creates a source of confusion. If differences were to exist, these should be reduced to an absolute minimum.

7 The penalty notices apply to judgments given on or after 6th April, 2019. Naming applies to judgments registered with the naming scheme on or after 18th December, 2018.

8 Regulation 16 of the Working Time Regulations, 1998 which implement Council Directive 2003/104. EC (OJ), no. L307 (as amended).

9 Employment Rights (Employment Particulars and Paid Annual Leave - Amendment) Regulations, 2018, no. 1378 which will come into effect on 6th April 2020.

10 Source: Advisory, Conciliation and Arbitration Service (ACAS) calculation.

11 For a detailed analysis on these tests see J. Carby-Hall, «New Frontiers of Labour Law: Dependant and Autonomous Workers», in B. Veneziani and U. Carabelli (Eds), *Du Travail Salarié au Travail Indépendant: permanences et Mutations*, Socrates Programme, 2003, Cacucci Editore, p. 163.

10) Other issues to be legislated upon include:

- the banning by employers from making deductions to employees' or workers' wages by reason of their receiving tips from the employer's customers;
- increasing the period required to break the continuity of employment from one, to four, weeks thus permitting workers to accrue employment rights when a gap between their assignments occurs;
- the reduction of the threshold required for a request by employees to set up an information and consultation procedure or works council in the firm, from the current 10% to 2% of employees;
- an obligation placed on Employment Tribunals to consider the use of sanctions against employers who have lost previous cases heard by an Employment Tribunal on identical, similar or comparable facts;
- taking further action to ensure that unpaid interns are not doing the job of a worker;
- revising the GLAA licensing standards to ensure that they reflect current worker rights and employers' obligations;
- giving the Secretary of State for Business, Energy and Industrial Strategy a new responsibility to ensure the quality of work.

The enforcement machinery which ensures the rights of workers, the protection of low-paid and vulnerable workers against exploitation and the improvement of quality of work already exists. It consists of the Employment Agency Standards (EAS) Inspectorate, the HMRC National Minimum Wage Team and the Gangmasters and Labour Abuse Authority (GLAA). The government has responded to the UK Labour Market Enforcement Strategy for 2018-2019 set out by the Director of Labour Market Enforcement with detailed plans to tackle exploitation of low paid workers which include, *inter alia*, bringing forward proposals in early 2019 for a single enforcement body to protect vulnerable workers.

The Good Work Plan which forms the key part of the British government's modern industrial strategy is the latest response to the 2017 Taylor Review recommendations which found that the strength of the British labour market is built on flexibility but that a clear focus was required on quality of work as well as the quantity of jobs. The reforms will have the effect of employers tightening up their employment practices so as to protect the rights of workers and, in the words of the government, «ensure that workers can access fair and decent work, that both employers and workers have the clarity they need to understand their employment relationships, and that the enforcement system is fair and fit for purpose».