



Bar Council response to the Department for Business and Trade consultation on Retained EU Employment Law

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business and Trade consultation on Retained EU Employment Law.¹

2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

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

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

4. We strongly disagree.

5. A significant proportion of all employment disputes that come before the Employment Tribunal relate to pay in some form. The vast majority of these disputes are of relatively low value, but of potentially high worth to the parties involved. There have also been many group

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

actions in recent times in which the collective worth of the claims has run to the millions (e.g. litigation which concerned whether workers on what are known as sleep-in shifts were entitled to be paid the National Minimum Wage and a range of equal pay claims).

6. Many of these lower value disputes are heard without lawyers being involved. They do not receive publicity, but they do take up judicial and tribunal time. The evidence is often put forward in a haphazard form, with the judge trying to work out what the case is about in a limited time frame. Many judges, in these scenarios, will revert to first principles: who has the burden of proof to prove something and whether have they proven it.

7. The burden is on the worker to prove their claim, but many do not expect to be the sole keepers of accurate records of working records and are much less well equipped to do so. For most employers, a payroll system will necessarily require a record of hours worked which is relevant not only to the computation of wages and annual leave, but in order to ensure obligations under the Working Time Regulations as to rest breaks and other general health and safety duties can be observed.

8. Litigation of essential worker rights will become more protracted if accurate records are not maintained and retained by employers whether in low or high value claims.

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

- Very important
- Important
- Neither important nor unimportant
- Unimportant
- Don't know

9. We believe it is very important.

10. Unless there is a proper basis for going behind these records and doubting their accuracy, then the records will be the first and best line of defence an employer has to a claim for unpaid wages, holiday pay, breach of contract.

11. A tribunal is likely to view documents as a relevant starting point in determining which party is right. For example, in a pay claim without records, the tribunal would be wholly reliant on witness evidence or secondary evidence to establish the hours worked by an employee.

12. In any event, there is a legal obligation to produce an accurate pay statement. An employer has to have a basis for a pay statement or subsequent witness statement produced at Tribunal. The consultation has not engaged as to why this obligation is a burden on employers when all the obligation does is ensure that wider legal obligations are complied with.

13. It follows that it is also unclear, from the consultation, why, if this legal obligation were removed, this would reduce the burden on an employer. What specific activity would cease, given the wider legal obligations would remain and would the ceasing of that activity leave the employer in a worse position at an Employment Tribunal?

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

14. The Bar Council did not submit a response to this question.

Questions for employers.

Question 4. Do you keep records to specifically meet the requirements set out in the Working Time Regulations?

- Yes
- No
- Don't Know

15. The Bar Council did not submit a response to this question.

Question 5. Do you keep working time records that go beyond the existing requirements set out in the Working Time Regulations?

- Yes
- No
- Don't Know

16. The Bar Council did not submit a response to this question.

Question 6. Do you currently have a system in place that records the daily working hours of all your staff?

- Yes
- No
- Don't Know

17. The Bar Council did not submit a response to this question.

Questions for workers

Question 7. Are you: paid hourly; paid by task; or paid a salary or fixed amount, for example for each day, week, or month, regardless of the hours you work?

- I am paid hourly
- I am paid by task

- I am paid a salary or a fixed amount for each day, week, or month
- Don't know
- Other (please explain)

18. The Bar Council did not submit a response to this question.

Question 8. Does your employer keep records of your daily working hours?

- Yes
- No
- Don't know

19. The Bar Council did not submit a response to this question.

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

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

20. We agree.

21. It is obvious that having a single entitlement is easier to understand for both employers and workers.

22. The difficulty is in respect of where the line is to be drawn in order to create that entitlement. At present, the discussion appears to be that the homogenisation of holiday calculation will result in the lowering of the amount of pay a worker would currently receive for annual leave, e.g. removing commission from calculations.

23. The specific proposal requires considerable thought. There is a proportion of the workforce paid the national minimum wage or near to it with the remainder of their pay coming from commission. Altering the legislation could, in effect, be in real terms a pay cut.

24. In addition, the right to carry over leave for disabled and pregnant workers is another important, practical element that should remain. It has a rationale, protects specific individuals and is already known to employers and understood by them.

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

- 5.6 weeks of statutory annual leave at normal pay (including certain types of overtime, commission, and bonuses)

- 4 weeks of statutory annual leave at normal pay and 1.6 weeks of statutory annual leave at basic pay
- Don't know
- Other (please explain)

25. The Bar Council did not submit a response to this question.

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

- 5.6 weeks of statutory annual leave at normal pay (including certain types of overtime, commission, and bonuses)
- 4 weeks of statutory annual leave at normal pay and 1.6 weeks of statutory annual leave at basic pay
- Don't know
- Other (please explain)

26. The Bar Council did not submit a response to this question.

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

- 5.6 weeks of statutory annual leave at basic pay
- 5.6 weeks of statutory annual leave at normal pay
- Don't know
- Other (please explain)

27. The Bar Council did not submit a response to this question.

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

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

28. The Bar Council did not submit a response to this question.

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

- Yes
- No
- Don't know

29. The Bar Council did not submit a response to this question.

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

- Yes, rolled-up holiday pay should be introduced as an option for employers in relation to all workers
- No, rolled-up holiday pay should not be introduced
- Don't know
- Other (please explain)

30. Rolled up holiday pay should be introduced for specific circumstances.

31. At present, notwithstanding its illegality, many sectors in the UK continue to use rolled-up holiday pay. There is clearly a demand for it in some sectors. At the same time, there are some employers who do not pay any holiday pay and then after the event claim holiday pay was rolled up all along.

32. The balance to be struck is in relation to its administrative usefulness versus the scope for abuse. It is important to bear in mind that underpinning the right to holiday in EU law, but inevitably forming part of how holiday has been viewed since 1998, is the recognition that the ability to take holiday has a health and safety benefit in respect of which both the worker and wider society benefits.

33. Rolled up holiday pay that is transparent, is agreed with a trade union and has built in safeguards is less objectionable than holiday pay that is said to be included in the pay packet received at the end of the week.

34. The government should introduce a framework that would permit some employers, in some circumstances to roll up holiday pay. A general right, unspecified is likely to lead to greater uncertainty and more litigation.

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

- Yes
- No
- Don't know

35. The Bar Council did not submit a response to this question.

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

- Yes
- No

36. No, we do not agree.

37. The current obligation is widely understood by employers.

38. The regulations provide a framework for consultation and compliance with that framework is the basis for a discussion.

39. There is a risk that consultation outside the framework would ultimately be a HR/lawyer driven process in which set letters are sent with the valuable elements of discussion and reflection being seen as unnecessary. This must be avoided.

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

- Yes
- No

40. Yes, we agree.

41. Where there is only a small group of workers, it makes sense for an employer to consult directly with workers. This derives from the practicality of consulting with ten workers. In these specific circumstances, there is less value in holding an election.

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

42. The Bar Council did not submit a response to this question.

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

43. The Bar Council did not submit a response to this question.

Bar Council²
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² Prepared by the Law Reform Committee