The future of working practices in Scotland: Government Response to the Committee’s Second Report

Second Special Report of Session 2017–19

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The Scottish Affairs Committee

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Committee staff

The current staff of the Committee are Ben Williams (Clerk), Laura-Jane Tiley (Second Clerk), Allen Gallagher (Inquiry Manager), Ben Rayner (Committee Specialist), Chloe Freeman (Senior Committee Assistant), Robert McQuade (Committee Assistant), and George Perry (Media Officer).

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Second Special Report


Appendix: Government Response

Introduction

The Government warmly welcomes the Scottish Affairs Select Committee report—*The future of working practices in Scotland*.

The Government agrees with the Committee’s assertion that action needs to be taken to combat unfair employment practices, ensure employment legislation reflects modern employment practices, and to look at how the UK and Scottish Governments can work together to improve employment opportunities and standards of employment across whole of the UK. I am pleased that the Committee showed such strong support for the recommendations in the Good Work report and the firm action Government is taking to drive forward implementation of these recommendations.

The Industrial Strategy, published in November 2017, I made a commitment to take responsibility for quality of work. The Government Response to the Taylor Review of Modern Working Practices, published on 7 February and the four consultations, which are currently open, demonstrate our firm commitment to tackle exploitation, improve transparency and enforcement and clarify the law for both workers and businesses. We are acting to ensure employment law and practices keep pace with modern ways of working created by rapid technological change whilst striking the right balance between labour market flexibility and worker protections.

The Government would like to invite the Committees to provide us with any further views or evidence that would help shape our thinking as we take forward this important work. The Government will provide you with an update on progress and set out the actions we will take forward later this year, after the consultations have closed and are analysed.

Employment status and modern employment practices

Conclusion and recommendation 1

New employment practices and business models have challenged traditional understandings of employment status and made it increasingly difficult for workers and employers to be confident in their judgments of when a particular employment status applies. While the majority of employers treat their workers properly, it is clear that some inappropriately treat their workers as self-employed to reduce their own obligations. Definitions that were set out in law decades ago have been tested to breaking point by new relationships between companies and their labour force, and there is a clear need to review how employment status is defined, to ensure employees and workers are guaranteed the appropriate rights and protections. We welcome the Government’s recognition of the problems resulting from
the current lack of clarity, and its consultation on how best to achieve greater clarity in this area, including legislative change. We also welcome the Government’s acceptance of the Taylor review’s recommendation that the right to a written statement of terms and conditions be extended to all workers. (Paragraph 25)

The Government shares the Committee’s view that new and emerging ways of working have brought challenges in relation to determination of employment status. The world of work and employment relationships have changed while the legislation has remained largely the same.

The Government welcomes the Committee’s support of the current consultation, authored jointly by BEIS, HM Treasury, and HM Revenue and Customs, which explores the options for reforming employment status for both employment rights and tax to achieve greater clarity and certainty, but any potential changes will need to be considered carefully. It is for this reason that the Government is consulting widely and holding regional events, including one in Scotland, in order to capture a wide range of views.

The Government agrees that everyone in work should have essential information about the working relationship they have entered into. If workers do not know their rights they cannot assert them. We have made a firm commitment to extend the right to a written statement to workers and are currently consulting on what information this statement should include, alongside additional measures which will increase transparency across a range of employment rights.

The Government would welcome the Committee’s views and contribution to both strands of work.

Conclusion and recommendation 2

We welcome and endorse the recommendations the Taylor review made for clarifying employment status in primary legislation, as well as those of the Business, Energy and Industrial Strategy and Work and Pensions Committees, and call on the UK Government to bring forward legislation to clarify the employment status of workers. We also see the merit in shifting the burden of proof for demonstrating employment status—where this is challenged—to employers, so that it is easier for individuals to access employment rights. We note that the Government has said it will return to this recommendation when it has reached decisions on possible changes to employment legislation and created an online tool to help workers determine their employment status and recommend that the Government revisit this recommendation once it has completed these processes. (Paragraph 26)

Government has already set out in its response to the joint Business, Energy and Industrial Strategy and Department for Work and Pensions Select Committees that it believes that the work to clarify employment status and, rights, along with actions to make redress less burdensome and quicker for the individual, will address the understandable concerns that prompted the Committees to make this recommendation.

We continue to keep this matter under Review, as the Committee suggests.
Conclusion and recommendation 3

Contracts which support flexible working can provide benefits for both workers and employers, but it is important that these arrangements are mutually beneficial and do not provide the employer with all of the benefits, with workers carrying all of the risks. While many people on zero hours contracts are content with them there are clearly issues with employers who use them exploitative. These issues need to be addressed without undermining the flexibility these contacts can offer, which many employers and employees find valuable. We endorse the recommendations made by the Taylor review that workers who have been on zero hours contracts for 12 months be able to request a contract which reflects actual hours worked, and that the Government should commission the Low Pay Commission to consider a higher minimum wage for hours which are not guaranteed. We welcome the Government’s acceptance of these recommendations, and urge the Government to implement them as soon as is practicable. These measures will ensure that workers cannot be kept on a zero hours contract indefinitely, where it does not reflect the reality of employment, and will also create an incentive for employers to ensure that they only use these contracts where there is a real need for them. (Paragraph 32)

The Government recognises that the issue of one-sided flexibility can cause real issues for working people and their families. Flexible working arrangements can be beneficial both for workers and employers. However, it is not right where a business transfers the business risk to the individual resulting in individuals having a job, but no security of income.

The Government wants to find ways to tackle this issue which retain the flexibility that many people find so valuable and avoid placing unnecessary burdens on business. That is why the Government has asked the Low Pay Commission to consider the impacts of introducing a higher National Minimum Wage rate for hours that are not guaranteed as part of the contract. The Low Pay Commission are currently consulting on both the potential impact of a premium, as well as alternative means for tackling the issue of ‘one sided flexibility’ where workers experience uncertain and unpredictable work schedules.

Unfair employment practices

Conclusion and recommendation 4

We are deeply concerned by the unfair and illegal employment practices we have heard about during this inquiry. Although it appears that these issues affect only a small proportion of workers, it is not known how prevalent unfair employment practices are in Scotland. We recommend that the Government commission a study to assess the extent of unfair employment practices in Scotland—to establish how many workers suffer from unfair or illegal employment practices, and whether there are particular issues in certain sectors. The Government should set out the work it is commissioning in its response to this Report. (Paragraph 35)

The Government shares the concern of the Committee that there are a small proportion of individuals who are being exploited and treated unfairly by their employers.
This is why we are taking firm action on the recommendations from the Review of Modern Employment Practices to stop this exploitation. The Review was a thorough and comprehensive examination of the current labour market and employment practices in Great Britain and we are taking action to reduce exploitation and improve the quality of work for workers in England, Scotland and Wales. Government, therefore, does not think that another review or study specifically for Scotland is necessary at this stage.

Action we are taking includes a commitment to extend state enforcement of holiday pay for the most vulnerable workers and higher penalties for aggravated breaches for those employers who ignore the law.

Conclusion and recommendations 5, 6 and 7

We note with concern the decrease in employment tribunal cases which were brought following the introduction of fees for applications to employment tribunals, and welcome their recent revocation, which in our view will increase access to justice for workers. Employees should not have to pay to enforce their rights. (Paragraph 39)

It is deeply concerning that more than half of all employees who win a case at an employment tribunal do not receive the compensation they are due, and we also recognise the concerns raised by the Business, Energy and Industrial Strategy and Work and Pensions Committees that the absence of penalties for widespread abuses may incentivise employers to “wait and see” whether individuals are willing to risk pursuing their rights. We endorse Matthew Taylor’s recommendation that employers who fail to pay employment tribunal awards should be named and shamed, welcome the Government’s acceptance of this recommendation, and call for it to be implemented as soon as is practicable. (Paragraph 44)

We concur with the conclusions and recommendations of the Taylor review and the Business, Energy and Industrial Strategy and Work and Pensions Committees, which called for the Government to create an obligation on employment tribunals to consider the increased use of higher, punitive fines and costs orders if an employer has already lost a similar case. We welcome the Government’s consultation on how best to implement this recommendation and call on the Government to bring forward stronger and more deterrent penalties, including punitive fines, for repeat or serious breaches of employment legislation, and expand “naming and shaming” to all non-accidental breaches of employment rights. The planned transfer of responsibilities for employment tribunals to the Scottish Parliament will mean that these measures will need to be discussed with the Scottish Government, and we welcome the UK Government’s commitment to working closely with the Scottish Government in this regard. (Paragraph 45)

The Government agrees that higher fines can act as a greater deterrent and has already announced it intends to legislate to allow where there has been an aggravated breach of employment law an employment tribunal will be able to award a penalty of up to at least £20,000 per worker. The current maximum penalty of £5,000 does not always reflect the higher value awards and is lower than the current penalty for non-payment of National Minimum Wage, so the Government has proposed amending the legislation as soon as practicable to quadruple the award.
The Government agrees that creating a fair and transparent framework will act as a deterrent. The Government wholeheartedly agrees that strong action should be taken against employers who repeatedly ignore both their responsibilities and the decisions of employment tribunals. Exploitation of workers cannot be allowed to become a competitive advantage and the Government cannot allow good businesses to be undercut by those who ignore court rulings.

Alongside the action that I have already set out above, the Government is consulting on proposed reform and improvement of the enforcement processes to help workers who need to enforce an award through the courts. This, alongside the naming scheme for unpaid employment tribunal awards and quadrupling the aggravated breach penalty limit to £20,000, will provide an effective package of measures to improve payment rates and deter employers from exploiting their workers. We are consulting on the specifics of the naming scheme and are discussing this with interested parties as part of our wider stakeholder strategy. Government is also seeking views on how existing sanctions should be extended and how to define when they should be applied.

**Conclusion and recommendations 8 and 9**

We welcome the Government’s commitment to tackling non-compliance of minimum wage law, and the presence of a team within HMRC specifically tasked with this issue, but we share the concerns expressed by the Business, Energy and Industrial Strategy and Work and Pensions Committees about the resourcing and effectiveness of enforcement efforts. (Paragraph 50)

We welcome the appointment of a Director of Labour Market Enforcement to set strategic priorities for employment enforcement agencies to “stamp out exploitation”, but the UK Government has not yet put in place the mechanisms and resources which are necessary to tackle unfair employment practices. We recommend that the Government put in place new mechanisms—which could include the establishment of additional enforcement agencies—to proactively identify and combat all unfair employment practices. We note that HMRC already takes a proactive approach in identifying employers which do not pay the minimum wage and recommend that similar mechanisms be used to tackle other unfair and illegal employment practices. (Paragraph 53)

Government recognises and accepts that appropriate resource must be allocated to enforcement activity and, while the Government agrees with the principle of this recommendation, it is for the Director of Labour Market Enforcement to reflect on and guide the level of future resources in his strategy and annual reports.

The Government continues to invest heavily in minimum wage enforcement, increasing the budget to over £25 million for 2018/19, up from £13 million in 2015/16. In addition, we have committed to state enforcement of holiday pay entitlements for the most vulnerable workers and introduce more protections for agency workers.
Conclusion and recommendation 10

We welcome the Minister’s evidence that there has been a reduction in blacklisting, but her acknowledgement that the practice “will not have been eradicated altogether” means there is still work to be done, and we note with concern the evidence from union representatives that blacklisting is “as bad as it ever was”. We recommend that the UK Government work with the trade unions to establish the current extent of blacklisting, and set out in response to this Report how it will do so. If blacklisting is found still to be in operation, the Government must publish any evidence of blacklisting it uncovers, and bring forward proposals to eradicate the practice and provide remedies for workers who have been blacklisted. (Paragraph 57)

This Government takes the issue of blacklisting extremely seriously. Blacklisting of trade union members and activists is illegal, is completely unacceptable and has absolutely no part to play in modern employment relations.

The Information Commissioner’s Office intends to open a call for evidence on the implications of modern employment practices in recruitment and selection, and the obligations of employers and this will look at blacklisting. This will be launched soon and that call for evidence will provide an opportunity for unions, individuals and other organisations to contribute any evidence they have on the extent of these practices continuing.

Productivity and industrial strategy

Conclusion and recommendations 11 and 12

We note that both the UK and Scottish Governments hold powers which affect the economy and labour market in Scotland, and welcome the priority both governments have placed on improving productivity and wages in Scotland. This includes the UK Government’s new industrial strategy, which covers areas of both reserved and devolved policy. Given the division of responsibilities between the UK and Scottish Governments, we ask the UK Government to—in its response to this Report—set out which areas of the industrial strategy will apply in Scotland. This should include details of what funding organisations in Scotland will be able to apply for directly, and what areas of funding will result in additional resources being transferred to the Scottish Government. (Paragraph 63)

Given the shared responsibility the UK and Scottish Governments have with regards to shaping policy which affects Scotland’s economy and labour market, co-operation between the two governments is essential. We welcome the Government’s commitment to establishing Ministerial Forums on Industrial Strategy with each of the devolved administrations, to bring together relevant UK departments and the devolved administrations to consider how the Industrial Strategy can best address key productivity barriers in Scotland. We note the then Minister for Small Business, Consumers and Corporate Responsibility’s statement that how these forums would work would “evolve”, and call on the Government to, in their response to this Report, set out in detail how these will work in practice. (Paragraph 67)

Aspects of all five foundations within the Industrial Strategy apply in Scotland, though the Committee is correct to suggest that not all policies within each will do so due to the devolution settlement. The Government would draw the Committee’s attention to three examples in particular: The Industrial Strategy Challenge Fund (ISCF), Sector Deals, and
digital infrastructure. The ISCF is a significant fund—at £1.725bn—open to innovators across the United Kingdom, including Scottish universities and businesses, with a good working relationship between Innovate UK and the Scottish Government’s own agencies encouraging an increasing number of Scottish applicants to come forward. Sector Deals offer an important opportunity for industries to come forward with proposals for their future and demonstrate how industry and Government can boost earning power and productivity in specific sectors. Proposals for Sector Deals are led by industry but should reflect the full breadth of the sector it addresses, and if a sector has particular strengths in Scotland’s economy we would challenge any proposal that fails to reflect that. Finally, the Industrial Strategy makes the case for digital infrastructure as fundamental to our future economy and Scotland is well-placed to continue to benefit from the investment that has been announced, including in 5G technologies and full-fibre broadband.

On publishing the Industrial Strategy in November, I re-committed to holding ministerial fora with each devolved administration, specifically to discuss important areas of shared interest, including the development of Sector Deals. I am pleased to inform the committee that the first of these occurred on 19 April immediately following a successful session giving evidence before the Scottish Parliament’s Economy, Jobs and Fair Work Committee. The Government agrees that these arrangements are important to raise issues of shared concern and to ensure that collaboration is proving successful throughout the Industrial Strategy, and I have made a specific commitment to the Cabinet Secretary for the Economy, Jobs and Fair Work to target meetings twice each year, supplemented as necessary and accompanied by the Secretary of State for Scotland and other ministerial colleagues where relevant.

Devolution and employment support

Conclusion and recommendation 13

Funding for employment support programmes is under significant pressure, and cuts to spending by the UK Government on programmes which have now been devolved to the Scottish Government have reduced the funds which have been transferred to the Scottish Government, which will have full responsibility in these areas. We recommend that, where the UK Government is planning to change spending in a way which will affect devolved funding, the Government engage with the devolved administrations at the earliest possible opportunity on implications for devolved policy. In the case of employment support programmes, we call on the UK Government to enter into discussions with the Scottish Government about whether there is a case for additional funds being transferred to Scotland to enable these programmes to be enhanced. (Paragraph 71)

Where appropriate, the Government agrees that we will engage as early as possible with devolved administrations with regard to changes to UK Government spending, in order to effectively assess any impacts that this could have on services. However we do not accept that further funding should be devolved. In the fiscal framework both Governments agreed that the UK government would make a baseline funding transfer to the Scottish Government for employment programmes. These were devolved from April 2017. In line with the arrangements set out in the Statement of Funding policy for all DEL programmes, the UK Government will apply the Barnett formula to any subsequent changes in UK Government spending on employment programmes in England and Wales, to determine
the consequent change in the Scottish Government’s block grant funding. It is important to note that funding for employment programmes is only one part of a full funded employment support service which is provided across the UK. We currently have record high levels of employment in the UK and there have been significant falls in the number of unemployment people. We therefore need to invest appropriately and proportionately in employment programmes and in a way that recognises this economic conditions and delivers good value for the Government and taxpayers.

I would like to thank you for your contribution to the debate and the work you have done on creating a fairer employment landscape and how to tackle exploitation in the modern economy. I look forward to discussing this with your Committee further, once the consultations have closed and before Government formally responds to them.