

## Consultation on retained EU employment law Acas response

7 July 2023

This is the Acas Council response to the [government's consultation on retained EU employment law reforms](#).

### Our response

1. Acas (the Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the government's consultation on retained EU employment law reforms.

2. Acas is a statutory, non-departmental public body with a duty to improve employment relations in Great Britain. Acas has considerable practical experience of employment relations and of the issues that can be experienced by workers and employers across all areas of employment law and workplace practice. In 2022 to 2023:

- Acas handled approximately 649,000 calls from individuals and employers to our national helpline
- our website received 14.4 million visits from individuals seeking advice and support
- we provided conciliation in more than 600 collective disputes and received nearly 105,000 early conciliation notifications
- around 41,000 delegates were trained by us on a wide range of workplace-related topics

3. An independent [research paper estimating the economic impact of Acas services](#) has calculated an overall annual benefit-cost ratio of £12 for every £1 invested in Acas services (delivered during the 1 April 2018 to 31 March 2019 financial year), with a total net benefit to the economy of Acas services of £644 million.

4. In assessing the potential benefits and risks of each of the reforms under consideration in this consultation, Acas encourages the government to consider the potential impacts on workplace conflict and the costs that can result. While the government's associated Impact Assessment takes into consideration the potential legal costs of early conciliation and employment tribunal cases, Acas's evidence demonstrates that legal costs comprise only a relatively small component of the wider costs of workplace conflict. From an [estimated total annual cost of conflict](#) to UK organisations of £28.5 billion in 2018 to 2019, the total cost of management time spent dealing with potential and actual litigation is estimated at £282 million, with a further £264 million spent on legal fees and £225 million in compensation awarded against employers per year.

5. Acas very much welcomes the government's recent announcement of its amendment to the 'sunset clause' in the Retained EU Law (Revocation and Reform) Bill. In particular, we welcome the greater opportunity this brings for the government to undertake a thorough review of affected areas of law and for stakeholders to inform the reform process with relevant evidence and expertise on the practical implications.

6. The government's amendment is especially welcome in reducing the legal uncertainty that would otherwise have been faced by employers and workers as the 'sunset' approached and following it. Acas strongly emphasises the importance of clarity and predictability regarding the law in promoting the early settlement of workplace disputes and employment tribunal claims.

7. There is uncertainty as to the potential impact of changes to the interpretative effects of retained EU law on the interpretation of rights and obligations under UK law. This could impact on the scope for litigation and potentially increase early conciliation and employment tribunal case volumes. Further measures by the government to clarify its intentions regarding the preservation or reform of

retained EU law regulations and interpretive effects would be welcome in providing greater certainty to employers and employees.

## Record keeping

8. Acas recommends that the government takes a cautious approach to considering any change to record-keeping expectations. Any such change should be based on clear evidence to ensure that it does not unintentionally result in a disproportionate disruption to the current framework and current workplace practices.

9. In particular, clear evidence should be sought as to the extent to which implementing the 2019 European Court of Justice judgement would necessarily create additional burdens for most employers in Britain: whether a large scale step-up of requirements in many businesses from the expectations of the current law would be needed, or whether current practices may already largely reflect the requirements of that judgement. It would also be valuable to understand where disparities in practice might exist, for instance between larger and smaller employers or in different sectors.

10. In assessing the potential benefits and costs of this change, the government's Impact Assessment notes the potential for lower legal costs where early conciliation and employment tribunal cases can be avoided or settled more quickly due to the availability of more detailed records of working hours. It further notes that this cost saving is assumed to be of minimal impact and that the impact of implementing and maintaining the requirements of the 2019 decision could potentially be considerably higher. In this regard, Acas encourages the government to consider its assumption of the balance of costs here in light of Acas's evidence on the full costs of conflict in organisations, of which legal costs form only a relatively small component (see paragraph 4 above).

11. Acas notes that the government's Impact Assessment concludes that there are no direct impacts on groups who share a protected characteristic, and that the government has been unable to identify the overall indirect effects on specific groups based on the available evidence. Acas welcomes the government's stated intention to refine its assessment of these potential impacts and encourages the government to consider, for instance, the potential impacts on the groups most affected by irregular hours and insecure contractual arrangements.

## Rolled-up holiday pay

12. The government's consultation document observes that the right to paid annual leave is key to ensuring that workers remain adequately rested to protect their health and safety. It notes that rolled-up holiday pay is currently unlawful, following a 2006 European Court of Justice ruling, due to concerns that workers may not be incentivised to take leave because they could earn more holiday pay by staying at work. In practice, rolled up holiday pay is nevertheless heavily used in some sectors, especially for workers on irregular hours or zero-hours contracts.

13. Acas recognises that the regulation of this practice has been inconsistent for many years and agrees that it is right for the government to seek to provide clarity and certainty in this area.

14. The government's consultation document references the Taylor Review's observation that rolled-up holiday pay can bring benefits for some workers, particularly in casual working arrangements or in the gig economy. Acas also observes that, in practical terms, rolled-up holiday pay can potentially benefit specific workers, for instance, agency workers on short-term assignments. However, Acas notes that there is no evidence provided in the government's consultation document to suggest that the European Court of Justice's reasoning, regarding the potential for rolled-up holiday to disincentivise workers from taking leave, was not well-founded. We therefore recommend that a cautious approach is taken to potentially extending this option to all employers.

15. If the law is to be changed to allow rolled-up holiday pay, it must also include appropriate associated protections. In particular, Acas encourages the government to seek further evidence on the equalities impacts, and health and wellbeing impacts, on groups which may be especially vulnerable to being disincentivised from taking leave, such as those in low paid employment and those in irregular hours and insecure contractual arrangements.

16. Where workers are disincentivised to take leave there is potential for increased instances of employers providing notice to workers to require them to take leave (sometimes referred to as 'positive notice' under regulation 15). The potential impacts here merit careful consideration. There may, for example, be increased administrative burdens for employers, as well as potential for increased workplace tensions and disputes where workers are given notice to take leave at a time that does not suit them.

17. A further area that Acas recommends the government to consider is ensuring that the holiday component of pay is always clearly distinguishable for workers from their 'normal pay'. The government's consultation document suggests that employers would need to make this transparent on workers' payslips. A further area for consideration here is to ensure transparency in job adverts so that, for instance, the amount of rolled-up holiday pay is not misleadingly included within a single figure for the overall 'salary' in a role.

18. The potential remedy available to a worker who receives rolled-up holiday, but whose employer does not permit them to take their full holiday entitlement, is unclear. In this situation, there may be no meaningful redress for the worker to seek at an employment tribunal as the compensatory remedy available is not clear. This raises a question, firstly, as to whether this policy proposal, in its current form, supports the government's overarching policy objective that its reform proposals will not diminish or remove rights. Moreover, opportunities for the early settlement of disputes are reduced in cases where no clear financial remedy is available. Acas recommends therefore that, if the government decides to progress this reform, it should be accompanied by a clear route to an appropriate remedy in such cases.

19. The consultation document states that '[m]uch of the complexity of holiday pay comes from aligning it to the pay that a worker would have received if they had been at work instead of on holiday', and that '[a]llowing holiday pay to be paid as an enhancement to a worker's pay at the time that the worker performed work... would ensure that the worker's holiday pay was as closely aligned to the pay that they would have received as possible.' Calls to the Acas helpline reveal, however, that much uncertainty, confusion and conflict can arise where rolled-up holiday pay is used, including because callers cannot understand how the amount of holiday pay has been calculated. Acas recommends, therefore, that the government establishes clear evidence as to which methods of calculating holiday pay may or may not reduce complexity in order to minimise the potential for workplace tensions and disputes.

### **Merging of 4 weeks and additional 1.6 weeks holiday**

20. Acas welcomes the government's policy intention to bring simplification and clarity around annual leave entitlement. Calls to the Acas helpline and conciliation cases consistently evidence that this is an area which can cause needless confusion for both employers and workers.

21. Acas recognises the challenge facing the government in terms of the need to change the holiday pay rate should the current 4 weeks and 1.6 weeks 'pots' of leave be combined into a single 'pot'. Acas recommends that the government is guided here by its overarching policy objective not to remove rights – in this instance, the right to 'normal pay' – but rather to remove unnecessary bureaucracy in the way those rights operate.

22. Regarding the government's objective to reduce administrative burdens for employers, Acas encourages the government to consider that if the current, relatively settled understanding of 'normal pay' is changed, then this will also place an administrative burden on the many employers who have already changed their payroll systems and holiday calculation methods following the evolving case law in recent years. Any significant change to holiday pay calculations and entitlement could also require variation of employment contracts, which can create workplace tensions and conflict with associated burdens and costs. The implementation date for any change to legal entitlement here should therefore be set without unreasonable delay, but allowing time for appropriate lead-in time for employers to consult appropriately with their workforces and update their current policies and processes where necessary.

### **Accrual of holiday entitlement in first year of employment**

23. Acas notes the government's rationale that the provisions for accrual of leave under regulation 15A are at odds with regulations 13 and 13A which set out how to pro-rate holiday entitlement when a worker starts or leaves midway through a leave year, and that it wishes to remove the confusion caused by this. However, from calls to the Acas helpline, this does not appear to be a significant area

of confusion for employers or workers. Acas recommends that the government should first establish clear evidence as to whether this proposed reform is necessary, or would be welcomed, from the perspectives of employers and workers.

24. There are also some practical considerations around leave accrual which Acas recommends the government should consider carefully in view of its overarching policy objective not to diminish or remove rights. First, if leave is accrued at the end of the month (or other period) as the government proposes, then workers will have no entitlement to take annual leave during the first period of their employment. The potential benefits of this should be weighed carefully against the potential health and wellbeing impacts for workers left with no right to leave entitlement during that period.

25. A similar consideration applies to the final accrued period of paid holiday during the first year of employment. If a certain amount of leave is accrued only at the end of the final period, this will result in workers not being entitled to take that leave during the first year of their employment. Instead, such leave would need to be taken, at the earliest, during the first period of the second year of employment. However, restrictions around the 'carry over' of leave into the following leave year may mean that the leave accrued in the final period is lost in many cases. Alternatively, protecting that portion of leave may require further legislative provision ensuring its default carry over into the second leave year, which may create an additional administrative burden on employers and require changes in contractual arrangements.

### **TUPE consultation for small businesses**

26. Acas is not aware of evidence on the impact of, or issues arising from, the micro-business exemption to the TUPE consultation requirements. Similarly, while the consultation document observes that 'businesses can find certain aspects of the TUPE regulations burdensome', it does not cite evidence to suggest that the collective consultation requirements specifically are so regarded by a significant enough proportion of small businesses to support the proposal to remove those. Acas recommends that such evidence is sought by the government to inform its decisions on extending this exemption.

27. The government's rationale for this proposal states that the requirement to arrange elections for representatives can add complexity to the TUPE transfer process and that this can unduly burden employers. Complexity and burdens can also arise, however, from the need to consult directly with many individual employees rather than with one or a small number of employee representatives.

28. Moreover, in Acas's view the potential downsides of complexity should be carefully balanced against the many benefits that collective consultation can bring to both employers and employees. Collective consultation can play an important role, for example, in making sure that information is shared with all affected employees consistently, and that the views of employees are communicated effectively and efficiently to the employer through a single channel.

29. In the absence of representatives, there is a greater potential for inconsistencies and misinformation as the number of employees who need to be directly consulted increases. A further relevant consideration here is that smaller employers will usually have fewer resources to carry out consultation directly with a larger number of employees. Where such consultation is not done well this can lead to uncertainty and anxiety for employees, workplace tensions and legal disputes, as well as to detrimental impacts on employee engagement and workplace effectiveness.

30. Acas recommends, therefore, that the government should take an evidence-based approach to considering where such benefits of collective consultation may be outweighed by the potential complexity of electing representatives. If the government does decide to make changes to the regulations, Acas encourages it to take steps also to promote and encourage more generally the benefits of good collective consultation, including in TUPE transfers.

31. Acas notes the government's proposal that businesses with 50 employees or more will not need to arrange for the election of representatives if they are involved with a small transfer of fewer than 10 employees. Acas recommends careful consideration of a potential unintended consequence here of creating an incentive for employers to 'batch' and 'stagger' transfers into smaller groups of transferees to avoid collective consultation requirements. This might undermine both employee rights as well as a level playing field for businesses.

## Providing clarity and guidance on employment law reforms

32. In Acas's experience, the introduction of any new or reformed employment regulation can create uncertainty and misunderstandings among both employers and workers. The availability of clear and accessible guidance on changes is fundamental to ensuring the effective implementation of regulation and minimising the potential for confusion and disputes.

33. Acas would strongly welcome the government working closely with Acas in the interests of ensuring that timely and effective guidance is available to all parties affected by any forthcoming changes to retained EU employment law.