LawWorks Consultation response BEIS/Taylor Review: Employment Status

Introduction

LawWorks is pleased to respond to the government's Employment Status Consultation which seeks views on and develops the recommendations in the "Taylor Review of Modern Working Practices".

In a rapidly changing labour market there is growing demand for greater transparency, clarity, information and advice about different work practices and the rights and obligations that they accrue. Building on our previous submission to the Taylor review,[i] we are limiting our response principally to issues concerning transparency of employment status and the legal framework, the protection of employment rights and access to an effective system of redress and adjudication. We also make some observations and comments concerning enforcement, which are subject to a parallel Consultation on enforcement of employment rights.

About LawWorks

LawWorks is the operating name of the Solicitors Pro Bono Group, an independent charity which offers a range of consultancy and brokerage services to bring together lawyers and law students, who are prepared to give their time without charge, and individuals and community groups in need of legal advice and support. LawWorks has 20 years of experience of supporting pro bono clinics and has seen the impact that good quality, timely legal advice on clients' wellbeing in dealing with employment contracts and other related legal and money matters. Several pro bono clinics provide specialist advice and support on employment law matters, with others providing initial legal advice and signposting for employment law matters.

LawWorks also runs an employment law pro bono case-work project (on a "secondary specialisation" basis) which is currently focused on unpaid wages claims. These type of cases are likely to widen in the near future. The project facilitates an inward referral network, assesses need and matches volunteer lawyers with clients in need. Volunteer lawyers provide free advice and assistance, with LawWorks providing training, supervision and professional indemnity insurance to support pro bono volunteers.

Being able to understand the law and access legal advice to deal with every day matters like employment disputes really matters. For example, following a client outcome assessment on a sample of clients last year across the network of independent clinics that LawWorks supports (receiving advice on a range of legal matters), 93% felt that they had a better understanding of the legal matter on which they were helped and 81% felt less stressed after getting the advice. Over 17% of individual advice provided by clinics in the LawWorks Clinics Network (April 2016 to March 17) was on employment law matters, with a significant increase in the number of enquiries compared with the previous year

LawWork's overall view on employment rights

We welcome this consultation which demonstrates that Government are treating the issue of employment rights in the new economy seriously, taking forward the recommendations of the Taylor review. Recent evidence from Citizens Advice shows that 4.5 million people in the UK are in insecure work including 800,000 with either zero-hours or agency contacts, 1.1 million with temporary contracts and over 2.3 million working variable shift patterns. The Citizens Advice briefing concludes that "despite record employment rates, the persistence of insecure work leaves many households at risk of economic shocks and unable to plan for

the future."[ii] We agree that work insecurity is a major challenge, pointing to a need for strengthening the framework of protective rights and standards around different models of employment, and helping people to understand and assert their rights, in order to maintain high standards of treatment and wellbeing in the labour market, and challenge discrimination.

The self-employed are a large and growing part of the UK labour force, with options of choice and flexibility in the labour market. Five million people—15% of workers—are now self-employed, and the expansion of self-employment has played a significant part in achieving current record employment levels.[iii] With new technology facilitating the growth of the "gig economy", the nature of work in many sectors is changing which has led to both positive developments and opportunities with many of the benefits that go with flexible working, but often at the expense of security. There are now an estimated 1.1 million people in Britain's 'gig economy'.

Employment rights therefore need to strike the right balance between security, flexibility and innovation. Above all though people need transparency, information and advice about what their rights and legal position may be in any particular context and relationship. With employment law issues having been virtually removed from the scope of legal aid (only cases involving human trafficking or a contravention of the Equality Act 2010 now qualify), such specialist advice is in short supply. The information and support currently available through ACAS, whilst good is often insufficient to address the complexity of modern employment relationships and the underlying law and regulation. Finally there is the ever present problem of access to redress; we are pleased that Employment Tribunal fees have at least been removed as recommended by Taylor, although it took a Supreme Court decision to make this happen.[iv]

Consultation questions

Employment status and codification: Questions 1 -5

Employment rights, status and the legal framework are not well understood. However, the question of status is crucial as rights follow status. As we argued in our submission to the Taylor review last year, there needs to be legal certainty and fairness in dealing with different types of worker and working arrangements. Clarification of the legal framework could potentially play a role in reducing disputes and promoting workplace rights.

Whilst we acknowledge and support the case for some legislative intervention to improve the position of less secure working arrangements, there are questions over whether "codification" is the right approach to address problems of uncertainty about individuals' status at work. The Taylor Review rightly identified that there is a lack of clarity, leading to uncertainty for both employers and employees as to individuals' status at work. However, codification may not offer a coherent solution; this is partly because the Taylor Review and the Government's response to the review commit to maintaining the "three tier system": employer, worker, and self-employed.

This framework entails an unavoidable minimum level of complexity, and the proposals to deal with that by codification misses the point around inequality of rights and may not address the underlying grievances. Moreover, codification has the potential to effectively 'freeze' the law in some areas in an ever and fast changing employment and working landscape. The solution instead may lie in clarification rather than codification, and with an ongoing role for case law to apply the underlying legal principles fairly to diverse situations.

We believe that a combination of smaller transparency measures, including some "levelling up" of rights, could have the potential to address some of the uncertainty; whilst accepting that a significant amount of uncertainty in the system may be inevitable as long as the current three tier system, including divergence of entitlements, protections and tax and

pension treatment as between ‘employees,’ ‘workers’ and ‘self-employed’, is maintained. Appropriate “levelling up” and transparency measures might include:

- all contracts of employment and services to include a written statement of pay and conditions (to apply across all three tiers);
- employers having a to be clear on employment conditions and status at the recruitment stage of the contracting relationship;
- workers having a right to an itemised pay statement which shows their gross pay and specified deductions;
- a right to paid time to attend ante-natal appointments and strengthening of maternity, paternity and adoption leave so that these are equalised between employees and workers;
- a right to paid facility time for union or other workplace representatives.

A statutory clarification of terminologies as proposed by Taylor may be helpful, alongside the current approach to determining disputed worker status by application to the Employment Tribunal on a case-by-case basis, whilst making the Tribunal process as user friendly and accessible as possible. As we understand it though the government’s headline proposal to address the problem of status is through the codification of *all* case law handed down by the Employment Tribunal and appellate tribunals and courts, placing not only the status categories but also the case law tests into statute through a combination of primary and secondary legislation. This appears to go beyond the Taylor review’s original recommendations, as well as those of the Work and Pensions Select committee reports on 'Self-employment and the gig economy'[v] and a "A framework for modern employment."[vi]

We are doubtful that uncertainty in the system can be entirely resolved by legislation, or can mitigate the inequality of bargaining power between employer and worker. Employment status as determined by the tribunals and courts often deals with new and complex relationships and disputed facts. Recent cases such as *Pimlico Plumbers v Smith*[vii] and *Aslam v Uber*[viii] show a willingness to get to grips with the complex factual circumstances surrounding questions of status, whilst Judgements of the Supreme Court such as *Autoclenz v Belcher* have been notable for recognising the reality of the inequality of bargaining power in the labour market. (In this case the Court held that it was necessary to look at the reality of the agreement between the parties, rather than what had been devised in the form of a written contract.) Setting out very rigid legislative definitions could potentially limit the ability of the courts to cope with novel situations which do not fit easily into a tick box format, so any new legislation will need to find the right balance to avoid being too prescriptive.

The extent to which employees would be likely to consult, understand and benefit from a statutory test in practice or improve choice and agency in the labour market is difficult to predict. We suspect that even if statutory tests were introduced, the role of straightforward guidance including online tools (eg from BEIS, ACAS, Unions and advice bodies) in providing clarity would probably be more important than the legislation itself. A strategy to improve information and guidance, alongside other similar measures, such as the provision of a key ‘facts page’ addressed in the government’s agency workers consultation have the potential to go some way to de-mystify employment status and, consequently, rights and obligations. Employment rights are not only about law but also about culture, and there are other aspects of a rights-based employment culture that could be encouraged including employer supported volunteering with community partners.

The above should not be read as discounting the need for legislative reform, but to make the case that if Government are interested in a programme of more systemic reform to employment rights law, it should take the opportunity to go beyond the “irreducible minimum” and come to a settled view in consultation with stakeholders (including Unions and business) about contemporary meanings of employment status and how this is defined in law. The Law

Society have suggested that the job of framing employment status categories in agreed legal language could be passed to the Law Commission, to undertake a more detailed review of the law and recommend how employment status can be made fair, simple and relevant to the modern world of work.[ix] This would be valuable to do in any event, as at no point in this consultation are any alternative legislative definitions offered.

Key tests – mutuality of obligation, personal service and control (the "irreducible minimum"). Questions 6-21

The consultation identifies 'key principles' (mutuality of obligation, personal service and control) to legislate from in relation to employment status, which courts and tribunals already use as common law tests to determine employment status. We would caution though that these should not be regarded as unchanging concepts.

Mutuality of obligation

We are doubtful that mutuality of obligation continues to be as relevant and helpful in the modern economy. The test often does not serve well those in insecure work, making it difficult for them to accrue sufficient continuous service to qualify for 'employee' rights such as unfair dismissal, statutory redundancy pay and maternity and paternity leave. The courts have responded to this problem by holding that 'umbrella' contracts can exist, spanning gaps between work.[x] This has improved the situation of individuals on zero-hours contracts as well as casual workers, however other types of workers remain unprotected.

Control

We consider that whilst control remains relevant in many cases, it can also distort outcomes for some workers, such as agency workers. Over-reliance on control can cause issues for those professionals who are granted a degree of independence in exercising judgment in performing their duties. It should be noted that 'subordination' was rejected as definitive of worker status in *Bates van Winkelhof v Clyde and Co*[xi] by Lady Hale in the Supreme Court. Further, in *White v Troutbeck*[xii] it was held that even in defining 'employee', it was ultimate rather than immediate control which was crucial. A greater emphasis on control could therefore be in conflict with the recent trend of case law, in a way which would exclude more people from worker status.

Personal service

The review suggested that there should be less emphasis on the need to perform the work personally. The courts have been astute to recognise that the alleged "right of substitution" (which negates worker/employee status) may frequently be a sham and have set out factors for determining when it really is an unfettered right (see Consultation, p.38). Where the right to substitution is conditional on the substitute being approved by the business, and the right is never in practice exercised. In these cases tribunals have concluded that there is not a right of substitution and that personal service exists. The consultation paper does not put forward suggestions to change the position, and we simply observe that an unfettered right of substitution could negate worker status on a practical interpretation.

Legislating status and tests for status: Questions 22-44

Our answers to these questions are partially covered in our answers in previous sections. We think that there are some significant challenges to overcome to effectively legislate for employment status including the legal tests which need to be applied, and dealing with the intersection between employment law and contract law. Ultimately employment status is not an attribute of any individual, but an attribute of an individual's contractual arrangements with their work engager. As the TUC observe, there are currently more than 12 tests of employment status within the law, including some which include or exclude agency workers from the scope of rights.[xiii] What the whole Taylor review process has highlighted is that

there may be no easy solutions to tidying up employment law, given the way that contractual obligations can be interpreted by the courts and tribunals. We would caution against legislating in a way that might limit the flexibility the Employment Tribunal to respond to new problems and issues.

As indicated above any legislative change (whether legislating for the existing test or introducing a new test) might benefit from engaging the Law Commission to formulate and stress-test the legal concepts and language. The consultation suggests various models for a new statutory test for employment status that could be adopted based on legislation from very different jurisdictions (eg Germany, Netherlands and the USA) none of which map easily onto the UK legal context. Of the suggested approaches we do not have a clear view of what would work best, but would urge Government to keep it simple.

Just as important as the legislation itself being in clear language is the issue of how the legislation can be explained and made more accessible for employers and employees alike. We support the Taylor review's proposals that an online tool needs to be developed that can provides individuals with an indication of their employment status for rights, similar to the existing Check Employment Status for Tax tool. Government could work with the information and advice sectors in co-producing this tool.

Dependent contractors: Questions 45-52 (Also ref. questions 31-33)

Reclassifying those workers covered under s.230 (3) (b) of the Employment Rights Act 1996 as "dependent contractors" was a key headline recommendation from the Taylor Review. We can see the attraction of this proposal given the ambiguities of 'worker' status in the so-called gig-economy, and to clarify the differentiation from employees. We also support the policy intention to have a clearer status and rights (including the right to be paid the minimum wage) for people who are not company employees but are also not as free as independent contractors. Case law has already moved in this direction with the *Uber* case last year.[xiv]

However, the proposal is potentially confusing because 'worker' is a term derived from European jurisprudence, Substituting 'worker' for 'dependent contractor' in the multiplicity of contexts in which it occurs could create an apparent dichotomy between our domestic legislation and the European Directives (assuming the derivative EU law will still have some relevance). Other legislative anomalies may emerge, given the usage of the term "worker" across a diverse range of legislation including working time regulations.

The main problem though with the term 'dependent contractor' is that it implies a degree of subordination which is not required for 'worker' status. If this were the result, it would be a backwards step in that some in the labour market currently defined as 'workers' might not be 'dependent contractors' and would have to fall back on self-employed status, losing the rights in question. When determining dependent contractor status, the review suggests placing greater focus on the principle of 'control' and less on whether there is a requirement to perform work personally. However, as indicated above there are problems with these concepts. An emphasis on control as the crucial test of 'dependent contractor' status would cause issues for those professionals who are granted a degree of independence in exercising judgment in performing their duties, and could come into conflict with the recent trend of case law, in a way which could potentially exclude more people from worker status.

It may help to reduce the blurring between 'workers' and 'self-employed,' especially for those who whilst integrated into a company's workforce, work independently through online platforms. However, without further labour market analytics being undertaken on the numbers of workers and contractors who might fall under this status, it is difficult to give an opinion on the proposal.

Self-employment: Questions 60-61

Looking at the evidence submitted both to the review and to previous select committee inquiries, we would suggest that it is 'self-employed', rather than 'worker', status which is most in need of reform and therefore clearer legal definition. Indeed the consultation itself identifies "the blurred line between the worker status and being self-employed as the key issue with employment status for rights." The notion of self-employment can too often be exploited by rogue employers who, by miscategorising their workers as self-employed, avoid paying both benefits and also tax and national insurance on behalf of their workers, as well as avoiding basic employment rights and protections. A recent survey of self-employed people using Citizens Advice services found that up to 460,000 people might be bogusly self-employed, costing the Exchequer £314 million a year.[xv]

A particular issue for determining employment status at tribunal level is the burden of proof. At present, as there is no clear legal definition of self-employed status, where the employer asserts that the person is self-employed, it is the worker who has to prove otherwise. So, if a worker is seeking to enforce a right based on their employment status as a worker or an employee, they are assumed not to hold employment rights unless they can clearly evidence that they meet the criteria for 'worker' or 'employee' status. It creates a lack of rights presumption until proven otherwise. We would like to see the Government pursue the Taylor review's recommendation that the burden of proof in employment tribunal hearings, where status is in dispute, should be reversed so that the employer has to prove that the individual is not entitled to the relevant employment rights, not the other way round.

With no legislative definition for 'self-employment' in the United Kingdom, the term is used to describe those working in industries ranging from professional services to consultancies. It is therefore inherently difficult to formulate a any clear definition to reflect the complexities of business relationships in these various industries. However, a single definition may nevertheless be helpful given the considerable risks assumed by this growing category of labour market activity. A simple definition may be the most appropriate, reflecting the fact that self-employed workers should be understood to assume full responsibility for the success or failure of their businesses, and hold themselves out as being independent entities. Case law already reflects this, considering self-employed persons as being in a 'sufficiently arms-length and independent position to be treated as being able to look after themselves'.[xvi] Those in this category are therefore more likely to be engaged under a "contract for services" and more likely to enjoy a genuine customer-client relationship with the other party to any contract.

Given that self-employment is a growing sector of the workforce, a legislative definition would be pre-requisite for further policy-making around self-employment. The Resolution Foundation for example have gone further than the Taylor Review and suggested that minimum wage protections could be extended to those self-employed contractors with prices fixed by firms.[xvii]

Alignment of tax treatment and employment status: Questions 62-64

We agree that in principle it would be simpler if tax and employment status and rights could be better aligned. It would be helpful for example if 'self-employed' were to mean the same for both employment rights and tax purposes. We agree with TUC and others that the use of different status tests in employment, tax and social security law can be confusing, and sometimes lead unfair outcomes for those in non-standard and insecure jobs. This issue has already been explored extensively by the Office of Tax simplification's report, so we have little to add on this.[xviii]

Enforcement – addendum: Separate consultation on enforcement of employment rights recommendation

This is a significant issue for us, as LawWorks' unpaid wages project assists employees to enforce claims which whilst relatively modest in money terms, are of real significance to the individuals concerned. Employment rights only effectively exist if they can be enforced. Without a robust and proactive enforcement system, other employment law reforms, including those proposed by the Taylor review consultations, may not have the intended impact. And as we have also observed above, the enforcement issues are closely connected with access to justice and the need for not only for good quality information, but also funded legal advice and representation where appropriate. We therefore hope that this review is able to cross reference to some extent with the Ministry of Justice's LASPO (Legal Aid, Punishment and Sentencing of Offenders Act 2012) post-implementation review to ensure that issues around access to legal information and advice are on the agenda.

The obstacles employees face in enforcing Employment Tribunal awards are clear, and have been highlighted by Citizens Advice's reports for over a decade.[xix] Employees face further hurdles and barriers against bringing enforcement proceedings against recalcitrant employers, with all the stress, technicality and cost associated with those proceedings weighing heavily in any calculation as to whether or not to enforce rights. However, the problems do not end there; employers can game the system, with inevitable delays, by (for example) notionally dissolving business that face enforcement actions, only to set up the same business operating under a new name and run by the same individuals.

Government should adopt an ambitious policy to address the problems with enforcement of Employment Tribunal awards and look at how it may be possible for enforcement to be routinely taking place in the Employment Tribunal, rather than the courts. Enforcement proceedings in the civil courts are too complex and intimidating for many employees, especially those unrepresented, not least as there is the additional consideration of costs (the paying party - i.e. the employer - being in a position to threaten costs against the receiving party - i.e. the employee - meritoriously or tactically). Government should explore whether Employment Tribunals could be given direct enforcement powers, without the employee/worker having to fill in extra forms, pay an extra fee and having to initiate additional court proceedings.

The options explored in the consultation aiming to make the process easier and more seamless are all based on defaulting to the County or High Court to obtain enforcement. Transfer to the civil courts, even where that transfer is automatic, with no additional fee, goes nowhere near to addressing the real barriers to enforcement for many employees. It is also inconsistent with the basic policy of handling employment disputes outside the normal courts by requiring employees to enforce awards in the courts system.

It seems to us that the obvious solution is to give the Employment Tribunal direct enforcement powers, backed up by a state led enforcement system targeting employers/engagers who do not pay employment tribunal awards.

For more information from LawWorks on employment law and policy please contact:

- **James Sandbach**, Director of Policy and External Affairs james.sandbach@lawworks.org.uk
- **Richard Pitkethly**, Head of Learning and Practice richard.pitkethly@lawworks.org.uk

ENDNOTES

[i] www.lawworks.org.uk/solicitors-and-volunteers/resources/taylor-review-modern-employment-practices

[ii] www.citizensadvice.org.uk/Global/CitizensAdvice/Work%20Publications/Neither%20one%20thing%20nor%20the%20other.pdf

[iii] https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploy mentintheuk/2018-02-07

[iv] www.supremecourt.uk/cases/uksc-2015-0233.html

[v] https://publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/84702.htm

[vi] https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/352/352.pdf

[vii] Case ID: UKSC 2017/0053

[viii] *Aslam v Uber* BV [2017] I.R.L.R. 4

[ix] www.lawsociety.org.uk/policy-campaigns/consultation-responses/independent-review-of-employment-practices-in-the-modern-economy-response/

[x] *Pulse Healthcare v Carewatch Care*.[2012]

[xi] [2014] UKSC 32

[xii] [2013] EWCA Civ 1171

[xiii] www.tuc.org.uk/sites/default/files/Living%20on%20the%20Edge%202016.pdf

[xiv] *Aslam v Uber* BV [2017] I.R.L.R. 4

[xv] www.citizensadvice.org.uk/Global/CitizensAdvice/Work%20Publications/Neither%20one%20thing%20nor%20the%20other.pdf

[xvi] Byrne Brothers (Formwork) Limited v Baird [2001] UKEAT 542_01_1809 30

[xvii] www.resolutionfoundation.org/publications/a-tough-gig-the-nature-of-self-employment-in-21st-century-britain-and-policy-implications/

[xviii] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/537432/OTS_Employment_Status_report_March_2016_u.pdf

[xix] www.citizensadvice.org.uk/global/migrated_documents/corporate/cab-evidence-et-awards-nov-2013.pdf