Business, Energy and Industrial Strategy Committee
The future world of work and rights of workers inquiry

Thompsons Solicitors' response
January 2017

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Introduction

1. Thompsons welcomes this inquiry which is long overdue. The employment relationship is one of unequal power and the technological world of work we now live in is a far cry from the standard employment relationship of full time indefinite employment. 15% of Britain's 31 million workers are categorised as self-employed and another 3 million are engaged as agency and zero hours workers[1].

2. The increasing and varied forms of non-standard employment relationships compound increasing job insecurity and deny workers access to basic employment rights. This also creates an unfair advantage for those employers who engage a significant number of their workforce on non-standard employment relationships as compared to those who offer more secure employment relationships. Not only do those exploitative employers avoid tax and national insurance liabilities by engaging workers on non-standard employment relationships but they are also not as productive[2] and so contribute less to the economy.

3. The injustices suffered by working people and those who want to work as a result of the increasing use of non-standard employment relationships and bogus self-employment is clear. They should be provided with a good, strong employment relationship and corresponding rights at work.

Question 1. Is the term 'worker' defined sufficiently clearly in law at present? If not, how should it be defined? What should be the status and rights of agency workers, casual workers, and the self-employed (including those working in the 'gig economy'), for the purposes of tax, benefits and employment law.

4. There are different categories of worker to which different statutory rights apply. Employment status is important as it signifies the level of protection available for individuals in the workplace. Being an 'employee', as opposed to a 'worker' or 'self-employed', is the gateway to the majority of employment protection rights. Rights unique to 'employees' include the right not to be unfairly dismissed, maternity and paternity rights, redundancy pay and the right to request flexible working. 'Workers' have more limited rights, which include rights such as the right to be paid the minimum wage and rights under the Working Time Regulations 1998 (including the right to paid holidays).

5. A brief consideration of the different types of employment status is important in order to judge whether the current definition of 'worker' is adequate.

[1] Office for National Statistics (ONS) (contracts that do not guarantee a minimum number of hours March 2016)
[2] Non-Standard Employment Around the World ILO – Geneva 2016

The category of 'employee'

6. An employee is defined in section 230 of the Employment Rights Act ('ERA') 1996:

> (1) In this Act, '*employee*' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this Act, '*contract of employment*' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

7. As can be seen, the definition of an employee is far from clear. Ultimately it has been left to the courts and Tribunals to determine what amounts to a 'contract of service' based on the particular circumstances of the employment relationship.

8. Devising a single test "has proved to be a most elusive question"[3], therefore Tribunals are required to carry out an objective assessment of a number of factors including whether: the individual provides personal service; there is mutuality of obligations; there is a right to control; the individual is integrated into the business and/or the individual is independent of the business and the relative bargaining power of the parties. How the parties categorise themselves is a consideration amongst these factors but the parties cannot determine the nature of the relationship themselves[4]. Nor can an employer expressly deny a particular factor applies by inserting an exclusion provision in the contract. So exclusion of the requirement for personal service[5] or of the requirement to attend on any given occasion[6] are not determinative as to whether there is a contract of service.

9. More recently, the courts have been more likely to take into account the inequality in bargaining power and the limited ability of an individual to refuse to accept terms over which s/he has no control and find where an employer attempts to contract out of obligations which truly do not reflect the intention of the parties or the reality of the situation, that these will be held to be 'sham contracts'.

10. However, section 230 of the ERA 1996 is not the only definition of employee or contract of employment. Section 2 of the Transfer of Undertakings and Protection of Employment Regulations ('TUPE') 2006 provides:

> '*contract of employment*' means any agreement between an employee and his employer determining the terms and conditions of his employment;
>
> '*employee*' means any individual who works for another person whether under a contract of service or apprenticeship ***or otherwise*** (our emphasis) but does not include anyone who provides services under a contract for services.

11. The definition of 'employee' here is broader than that set out above under s.230 ERA since it is not limited to those who have a contract of employment as defined save that it does not apply to an independent contractor.

12. The definition of a contract of employment in s.235 of the Trade Union and Labour Relations Act (TULRCA) 1992, in respect of the requirement for a ballot for industrial action, is very wide, defining it in the following terms:

> "*…references to a contract of employment include any contract under which one person personally does work or performs services for another.*"

[3] Lee v Chung and Shun Shing Construction and Engineering Co Ltd [1990] IRLR 236
[4] Young and Woods Ltd v West [1980] URLR 201 CA
[5] Staffordshire Sentinel newspapers Ltd v Potter [2004] and
[6] Autoclenz Ltd v Belcher [2011] UKSC 41

13. The effect of this is that the union must include the self-employed when balloting for industrial action all union members who it is reasonable at the time of the ballot for the union to believe will be induced by the union to take part, or continue to take part, in the industrial action.

The category of 'worker'

14. Section 230(3) of the ERA 1996 provides:

> In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under)
>
> (a) a contract of employment, or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

15. The same definition appears in s.54 of the National Minimum Wage Act (NMW) 1998[7], regulation 2 of the Working Time Regulations (WTR) 1998 and regulation 1 of the Part Time Workers (Prevention of Less Favourable Treatment Regulations) (PTW) 2000.

16. The definition is clearly intended by Parliament to apply to a wider category than employee (not least because the first limb of the test covers employees and is added to by the second limb). Yet the courts and Tribunals have interpreted the definition in a way which is akin to employee status and involves only a minor extension of the category of protected persons.

17. The recent case of Secretary of State for Justice (SoSJ) v Windle and Arada [2016] IRLR 628 is a good example. The claimants were both interpreters who worked for Her Majesty's Courts and Tribunal Service (HMCTS) on a freelance basis on multiple short term contracts. They were accepted as self-employed for tax purposes and were only paid for the work they did. There was no mutuality of obligation, that is, HMCTS had no obligation to offer them work and they were under no obligation to accept any work that was offered.

18. They brought proceedings against the SoSJ alleging race discrimination and the issue arose as to whether they could be classed as employees within the meaning of the Equality Act 2010 (EqA). Under section 83 of the EqA in order to be protected from discrimination, an individual must be an 'employee'. However the definition of 'employee' is broader than the definition of an employee under section 230 of the ERA. 'Employee' under the EqA includes those who work under a contract of employment, those who work under an apprenticeship contract and those who work under a contract personally to do work.

[7] Except to the extent that s. 54 (3) provides: In this Act "worker" (except in the phrases "agency worker" and "home worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
(a) a contract of employment; or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

19. The case turned on whether the Claimants worked "under a contract personally to do work". The Employment Tribunal had found that the Claimants were not employees and therefore not protected. It found that although each individual contract entered into with HMCTS was a contract personally to perform work, the Claimants' relationship with the service was not governed by any overarching or 'umbrella' contract. This meant that there was no mutuality of obligation to maintain an ongoing contractual relationship between the assignments themselves.

20. On appeal, the EAT overturned the ET's decision, on the basis that mutuality of obligation was relevant when considering whether someone is an employee under the ERA definition, but not so under the broader definition of employee under the EqA. The Court of Appeal disagreed with the EAT and restored the ET's decision. The issue before the Court of Appeal was whether the ET had been entitled to treat the lack of an umbrella contract as a relevant factor in deciding that the claimants were not employees. The Court of Appeal accepted that the key issue is the nature of the relationship during the period when work is actually done. However, it does not mean that the absence of mutuality between assignments may not influence or shed light on the nature of the relationship during the period of the assignment. The Court took the view that supplying services on an assignment-by-assignment basis is more likely to imply a degree of independence or lack of subordination in the relationship while at work which is incompatible with employment status, even when considering whether the individuals worked under a contract personally to do the work (the court called this category 'employee in the extended sense').

21. The above case illustrates the problem with the current definitions of 'employee' and 'worker'. It is difficult to see why the EqA and the ERA both use the term 'employee' but then define it differently. The EqA definition is wide enough to encompass freelance workers who would for other purposes be regarded as self-employed. It may well be right that the claimants were not employees in the extended sense between assignments but it cannot be right that they are not employees in the extended sense when working during each individual assignment. With the increased casualisation of work and the 'gig economy', the Court of Appeal's judgment is worryingly narrow and is likely to exclude from protection from discrimination, persons whom Parliament had no intention to exclude.

22. A further example of the confusion and uncertainty in the law is illustrated by *Gilham v Ministry of Justice EAT 0087/16*. The definition of 'worker' under s.230 ERA 1996 applies to whistle-blowers. Gilham concerned whether a judicial office holder was a worker for the purposes of the legislation protecting whistle-blowers. The EAT expressly held that judicial office holders are not employed under a contract and are therefore not workers pursuant to s.230 (3) ERA. The Claimant argued that she was a worker on the basis that she worked under a contract as there was offer and acceptance, consideration on both sides, intention to create legal relations and mutuality of obligations. The EAT held that these features could also be present for office-holders, and as such did not necessarily mean that there was a contract in existence. No private agreement exists between District Judges and the Ministry, akin to a contract of service, or for services. District Judges are appointed by the Crown, their terms of service (including pay) are derived from statute and they are ultimately governed by the Lord Chief Justice, not the Ministry of Justice. These factors are designed to reinforce the independence of the judiciary, which would be undermined by the existence of a contract.

23. However, this is at odds with the Supreme Court decision in *Ministry of Justice v O'Brien [2013] UKSC 2015/0246* which held that recorders are workers for the purposes of the Part Time Workers Regulations (2000) (PTWR). This was on the basis that the rights under the PTWR are derived from EU law and extended to those with an employment relationship so that 'worker' had to be read as having that effect, the rights under the ERA are domestic rights only and depend upon the existence of a contract. This has resulted in the unsatisfactory position of judges being workers for the purposes of the PTWR, but not for the purposes of the ERA 1996, even though the definition of worker is identical in both pieces of legislation.

Agency Workers

24. Agency workers are not defined as either employees or workers. Regulation 3 (1) of the Agency Worker Regulations 2010 (AWR) provides:

> (1) In these Regulations '*agency worker*' means an individual who –
> (a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and
> (b) has a contract with the temporary work agency which is –
> (i) a contract of employment with the agency, or
> (ii) any other contract with the agency to perform work or services personally.

25. As can be seen the agency worker can either have a contract for services with a temporary work agency or a contract of services. It excludes those agency workers who are in business on their own account which for the purposes of the AWR is where the temporary work agency (TWA) or hirer has the status of client or customer of a profession or business undertaking carried on by the individual (Regulation 3(2)).

26. Typically agency workers are engaged by a TWA. The Courts have generally applied the same test as applies when determining whether a worker is an employee. In this regard the absence of just one of the factors has proved fatal to establishing the employment status as between the agency worker and the employment business. The main difficulty in establishing employment status as between the agency and the TWA is the fact that the TWA is not generally found to have control over what the agency worker does.

27. An agency worker is even less likely to be able to establish employment status with an end user (hirer) because of the strict test established by the courts. In particular, a Tribunal will only be entitled to imply an employment contract between an agency worker and an end-user where it is necessary to do so to give business reality to the situation[8]. This means that agency workers who are placed with a hirer for lengthy periods are not treated either as employees or workers and in one case they were held not to be even agency workers[9].

Casual Workers

28. There is no definition of a casual worker. Typically 'casual' describes the situation where an individual supplies their labour or provides services to another for a temporary period. Typical examples include seasonal workers covering peaks in business, bank staff in the NHS and workers in the hospitality, construction and tourist industries but other professionals are also increasingly engaged on casual contracts for example university lecturers. UCU analysis of the Higher Education Statistics Agency revealed that 53% of lecturers are engaged in insecure non-permanent employment typically on hourly paid contacts. Significantly, the increase in zero hours contracts fall into this category.

29. The same tests as applies to workers outlined above will apply to determine the employment relationship of these casuals.

[8] James v Greenwich London Borough Council [2007] ICR 577
[9] Moran v Ideal Cleaning Services Ltd UKEAT/0274/13

The Self Employed

30. Whilst there is no statutory definition of self-employed status it is generally taken to apply to the second part of the limb (b) test in s.230 of the ERA as meaning broadly where the individual is engaged in business on their own account. An approach which is adopted by the Courts when determining who is an employee to distinguish the employed from the self-employed. Cooke J in *Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173* expressed it thus:

> *"Is the person who has engaged himself to perform these services performing them in business on his own account? If the answer to that question is "yes" then the contract is one for services. If the answer is "no" then the answer is a contract of employment."*

31. The confusing, and often conflicting, definitions and case law demonstrate why a single coherent definition of worker is required which is understood by both worker and employer to overcome the existing inconsistencies and uncertainties created by case law.

A coherent definition of worker

32. We believe that there should be a new and single definition to describe the employment relationship.

33. In *Byrne Brothers v Baird [2002] IRLR 96*, the EAT summarised the policy reasons for the distinction between workers and the self-employed:

> *"[The policy] can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto senso - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours [....]. The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-vis their employers: the purpose of [the WTR] is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's length and independent position to be treated as being able to look after themselves in the relevant respects.*
>
> *Drawing that distinction in any particular case will involve all or most of the same consideration as arise in drawing the distinction between a contract of service and a contract for services - but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc…"*

34. The legal framework, which underpins employment protection, no longer fits the reality of modern work. While the original policy reasons may have been laudable, the legal tests to identify employment status have not led to any degree of consistency or predictability as can be seen from the cases referred to above.

35. We propose a definition of 'worker' which is a slightly revised draft of the definition put forward in the Private Members' Bill on zero hours contracts tabled by in Ian Mearns MP in 2014:

> *"A worker is a person who is employed. A person is employed for the purposes of this Act if he or she is engaged by another party under a contract, arrangement or other relationship, to perform personally any work or services for that other party, save where that other party proves that those services are provided to her or him under a commercial business contract or arrangement as client or customer of any professional or business undertaking carried on by that individual"*

36. This definition creates a presumption of employment which can only be overturned if the employer proves the individual is in business on their own account.

37. Categories of worker which should have rights extended to them include casual workers, freelance workers, agency workers, home workers and workers on zero hours contracts.

38. We believe that the above definition of 'worker', which should apply to all categories of working people – unless they are providing their services under a genuine business arrangement akin to an entrepreneur – should help redress some of the imbalance of power between the worker and employer.

Question 2. For those casual and agency workers working in the 'gig' economy is the balance of benefits between worker and employer appropriate?

39. It is worth remembering that the 'gig economy' is not new and derives from the jazz musicians going from gig to gig in the 1920s. This description denotes a skilled person going in search of the next gig to earn a living at what s/he loves doing, through choice. The Cambridge dictionary describes the modern day 'gig economy' as:

> "a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer."

40. Most workers in this situation have no choice: work is only available on those terms.

41. It is true that increasing numbers of workers, especially the millennials, no longer expect to have a job for life and some may enjoy the flexibility of being able to work for short periods; for example, Uber drivers who can switch off their phone if they do not wish to work on any given day. However, for most workers in this position they have no choice. This 'flexibility' is in fact the employer passing on all risk to the worker. The reality for these workers is that there is no guarantee of being paid the National Minimum Wage, holiday pay or sick pay because they are treated as 'self-employed'.

42. One of the key issues in the Uber case was that Uber argued it merely provided a technology platform to facilitate individuals to provide a taxi service. The second issue was the extraordinary lengths Uber went to develop complex contractual arrangements in order to ensure that their workers are classified as self-employed and therefore not entitled to any employment protection. The following extract from the Tribunal's judgement is clear:

> *"In the first place, we have been struck by the remarkable lengths to which Uber has gone in order to compel agreement with it's [perhaps we should say its lawyers'] description of itself and with its analysis of the legal relationships between the two companies, the drivers and the passengers. Any organisation (a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator, but (c) requiring drivers and passengers to agree, as a matter of contract, that it does not provide transportation services (through UBV or ULL), and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of scepticism. Reflecting on the Respondents' general case, and on the grimly loyal evidence of Ms Bertram in particular, we cannot help being reminded of Queen Gertrude's most celebrated line:*
>
> *The lady doth protest too much, methinks.*
>
> *Second, our scepticism is not diminished when we are reminded of the many things said and written in the name of Uber in unguarded moments, which reinforce the Claimants' simple case that the organisation runs a transportation business and employs the drivers to that end. We have given some examples in our primary findings above. We are not at all persuaded by Ms Bertram's ambitious attempts to dismiss these as mere sloppiness of language.*

43. The judgement is a stark reminder of the extent of the inequality of power between the worker and the employer in the 'gig economy'. The reality is that the majority of workers in the 'gig economy' have little choice but to agree to work on this basis while hard fought for employment rights are being eroded and the opportunities for workers to progress are limited. Companies where the majority of workers are self-employed have no incentive to provide training and development nor do they create opportunities for more secure employment. By classifying these workers as 'self-employed', they bear the risk for the business who benefits from reduced overheads such as having no premises to pay for. It also means these same employers avoid creating more sustainable employment opportunities.

44. The 'gig economy' self-employed or agency worker typically works longer hours for less pay. Research shows that young workers' pay has fallen by 15% since 2008[10] and although workers in the 'gig economy' are supposed to enjoy greater flexibility the reality is that they feel under pressure to work longer hours for fear that they may not be offered work in the future.

45. In our view, the 'gig economy' as it currently operates reinforces the inequality in the worker/employer relationship so that any benefit enjoyed by the worker, such as flexibility, is far outweighed by the benefit to the employer of not needing to provide basic employment rights to the worker, passing on all risk to the worker, creating insecurity and getting their labour 'on the cheap'.

Question 3. What specific provision should there be for the protection and support of agency workers and those who are not employees? Who should be responsible for such provision – the Government, the beneficiary of the work, a mutual, the individual themselves?

46. The question appears to lump together agency workers as a category with those who are not employees. We are of the view that if one definition of worker is adopted to which all employment rights apply as advocated above, then there would be no requirement for separate provisions for agency workers. This would both simplify and clarify the law in this complex area[11]. It is also consistent with the fundamental principle of ensuring equal treatment between agency workers and those that work alongside them[12].

[10] The IFS Green Budget February 2015
[11] See for example the case of Moran v Ideal Cleaning Services Ltd UKEAT/0274/13
[12] Directive 2008/104/EC on temporary agency work

47. In relation to who should be responsible, we consider that there should be joint liability between the temporary work agency and the hirer (end user). This is consistent with regulation 14 (1) (2) which provides that both the temporary work agency and hirer can be liable for a breach of regulation 5 (entitlement to basic working and employment conditions) to the extent that each is `responsible for that breach'.

Question 4. What differences should there be between levels of Government support for the self-employed and for employees, for example over statutory sick pay, holiday pay, employee pensions, maternity pay? How should those rights be changed, to ensure fair protection for workers at work? What help should be offered in preparing those people who become self-employed (with, for example, financial, educational and legal advice), and who should be offering such help?

48. We reiterate our position that all workers falling within the definition above should be entitled to all employment rights which includes the right to the national living wage, holiday pay, entitlement to sick pay and maternity pay,

49. As regards the right to state benefits generally, entitlement is dependent on meeting the lower earnings limit threshold and payment of NICs. We consider that this test should remain. In no account should qualification of these rights be dependent on employment status and we do not see the need to merge qualification for state benefits to be linked to the employment relationship.

Question 5. Is there evidence that businesses are treating agency workers unfairly, compared with employees?

50. Yes. We recognise that the Government introduced measures in the Finance Act 2014[13] to tackle bogus self-employment and abuse of offshore working. However, this has resulted in further complex employment arrangements which circumvent agency workers' entitlements under the Agency Worker Regulations 2010 (AWR) to equal treatment alongside those recruited directly by the hirer.

51. In particular, we are aware of a number of cases where the temporary work agency makes it a condition to be offered work that the agency worker either set themselves up as a personal service company ('PSC') or that the agency worker becomes part of an umbrella company so that they do not then fall within scope of the AWR. Furthermore, as the contractual arrangement between the PSC or umbrella company is a commercial one, the worker is unlikely to be able to establish that they have an employment relationship with the hirer (see para 32).

52. In other cases we are aware that agency workers are encouraged to submit enhanced expense's in order to offset the loss of income where PAYE has been operated by the umbrella companies.

53. In *MOD v Kettle UKEAT/0308/06* the claimant accepted part time work but was subsequently made to sign a tender contract so that she was then treated as being self-employed.

[13] The Income Tax (Pay As You Earn) (Amendment No. 2) Regulations 2015

54. In other cases agency workers are engaged to work for a client of the temporary work agency on an indefinite contract or are placed with a client on a permanent basis. Following the decision in *Moran v Ideal Cleaning Services Ltd UKEAT/0274/13* these agency workers lose the right to equal treatment which it was intended that the AWR would provide for but which has singularly failed to do so. A point which the employment judge in the first instance decision was patently aware;

> "*I am well aware from my experience as a long serving Employment Judge that there are arrangements operating in the United Kingdom whereby significant numbers of workers may be placed by an agency with an end user, working to all intents and purposes on a permanent assignment but employed by the supplier i.e. the agency, who work alongside employees of the hirer but on less attractive terms and conditions and in particular lower wage rates, and which is of course at the heart of the claim.*"

55. We are also aware of increasing numbers of agency workers being engaged on permanent contracts by temporary work agencies. Regulation 10 of AWR (also known as the "Swedish derogation") provides that the right to equal pay under Regulation 5 (which entitles an agency worker, who has worked in the same role with the same hirer for 12 continuous weeks, to the same rate of pay as if they had been recruited by the hirer) does not apply where the agency worker has a permanent contract of employment with a temporary work agency. The permanent contract sets out the following minimum provisions:

The agency worker must have entered into the permanent contract **before** the beginning of the first assignment under that contract;

(1) the written terms of the contract must include the following terms and conditions:
  (i) the minimum scale or rate of remuneration or the method of calculating it;
  (ii) the location or locations where the agency worker may be expected to work;
  (iii) the expected hours of work during an assignment;
  (iv) the maximum number of hours of work each week of an assignment;
  (v) the minimum hours of work per week during any assignment provided it is at least 1 hour; and
  (vi) the nature of the work that the agency worker may be expected to be offered, including any relevant requirements relating to qualifications or experience.

(2) the contract must contain a statement that the employee does not, during the currency of the contract, have any entitlement to the right to equal pay under Regulation

(3) the contract must also provide that when the agency worker's assignment with the hirer comes to an end the TWA will seek suitable work and pay the agency worker during the period between assignments.

56. The rate of pay between assignments is set at 50% of the pay paid to the agency worker in a relevant pay reference period. A relevant pay reference period is the highest level of pay which fell within the 12 weeks immediately preceding the end of the previous assignment, (if the assignment lasted longer than 12 weeks) or during the assignment (where the assignment lasted for less than 12 weeks). In any event the rate of pay must not be less than the National Minimum Wage.

57. We are aware of cases where this had led to the exploitation of agency workers. This includes substantial lower rates of pay (see *Lariat v Pertemps Scotland tribunal case no. S/4104438/2012*)[14]; no guaranteed hours (see *Gregory v GI recruitment Ltd tribunal case no. 2701471/2013*); and no pay during periods of assignments. We are aware of agency workers being told to turn up for work with the hirer only to be told on arrival to wait in the canteen and being sent home after the minimum hours in the contract because no work is available. This means that they have then lost the opportunity to find other work and are out of pocket having spent money on travel fares. In other cases workers have not been paid between assignments because the work offered is simply not feasible. For example, drivers were asked to do deliveries starting at the other end of the country. Assignments are also manipulated so that the minimum pay arrangements mean that the pay rate is based on the lowest pay.

Question 6. Should there be steps taken to constrain the use by businesses of agency workers?

58. Yes. As above there should be effective constraints to outlaw bogus self-employment this could include a ban on agencies who make it a requirement that in order to receive work the agency worker has to either set up personal service companies or work through an umbrella company.

59. If agency workers are treated as any other worker with full employment rights, we consider that this would significantly reduce both the litigation risk and damage to reputation for employer.

Question 7. What are the issues surrounding terms and conditions of employees, including the use of zero-hour contracts, definitions of flexible contracts, the role of the Low Pay Commission, and minimum wage enforcement?

Zero hours contracts

61. A zero hours contract is generally understood to be one under which the employer is not obliged to provide a minimum amount of work, but the worker is generally obliged to be available for any work when offered it. The Small Business, Enterprise and Employment Act 2015 provides the first legislative definition of a zero hours contract. The Act inserted 27A (1) into the Employment Rights Act (ERA) 1996, which provides that a zero hours contract is one where:

> "*A contract of employment or other worker's contract under which (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and (b) there is no certainty that any such work or services will be made available to the worker*"

62. Zero hours contracts are probably the most extreme example of the new type of precarious work in the UK. Zero hours contracts provide very little security, stability or any employment protections. The flexibility zero hours contracts offer to employers is generated by transferring some of the risk of running a business onto individuals. A workplace reliant upon zero hours contracts is necessarily predicated upon a proportion of the workforce being treated as if self-employed. This is not necessarily economically or socially beneficial. According to the Resolution Foundation, the median self-employed salary is now £12,000 a year. A report from the Institute of Fiscal Studies (IFS) last year estimated that 40% of the self-employed were at or below the minimum wage.

[14] In that case the rate of pay was 25% less than a comparable employee.

63. The Government has attempted to curb the excess of zero hours contracts by including within the new section 27A of the ERA a ban on exclusivity clauses in zero hours contracts. This means that any provision in a zero hours contracts which prohibits a worker from working elsewhere, whether with or without the employer's consent, is unenforceable. This applies to all contracts which depend on the employer making work available to the worker, where there is "no certainty" that any such work will actually be provided. In addition, the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 provide a right for employees not to be unfairly dismissed or subjected to a detriment if the employee has failed to comply with an exclusivity clause.

64. Unfortunately the new rules lack teeth because:

- employers can avoid a ban on exclusivity clauses by providing a limited amount of "certainty" by guaranteeing a small number of hours per week, even as little as 2 hours a week;
- the unfair dismissal protection only applies to the narrower category of 'employees' and not to 'workers'. We have already pointed out the challenges in trying to establish that a worker is an employee;
- rather than dismissing an employee, employers can penalise them for working for other employers by simply starving them of work.

65. If the government is serious about tackling the unfairness of zero hours contracts, it should consider the New Zealand model. While our government has resisted calls to ban zero-hours contracts in the UK, the government in New Zealand unanimously voted to reduce the disadvantages to workers caused by zero hours contracts. From 1 April this year, it became illegal to offer any new workers a zero-hours contract and from 1 April next year, all current workers must be offered compliant employment terms as follows:

- where the employer and worker agree to hours of work, they will be required to state those hours of work in the employment agreement. The regulation does not set a minimum. Employers are perfectly free to specify that there are no guaranteed hours of work. However if the employer does not provide any guaranteed hours, it cannot require a worker to be available for work. If the employer offers work without guaranteeing any, then the worker must be free to refuse any work that is offered.

66. In addition the following practices are prohibited:

- employers requiring workers to be available to work for more than the agreed hours without having a genuine reason based on reasonable grounds;
- employers requiring employees to be available to work for more than the agreed hours without paying reasonable compensation for the number of hours the employee is required to be available.

67. The above two safeguards mean that an employer cannot circumvent the ban on zero hours contracts by guaranteeing a token number of hours e.g. two hours a week. A contract with minimum guaranteed hours cannot require the performance of additional hours unless there are reasonable grounds for doing so and the contract provides adequate compensation for the worker being available. Employers cancelling a shift without the provision for reasonable notice or reasonable compensation and employers putting unreasonable restrictions on secondary employment of workers.

68. We see no reason why a similar model for zero hours contracts cannot be put in place by the UK Government. Such a model would reduce worker exploitation and worker anxiety, increase workplace security and lead to a more settled work-life balance for employees across the country. It would also continue to provide the flexibility that proponents of zero hours contracts say is such a positive aspect of zero hours contracts.

National Minimum Wage (NMW) enforcement

69. The NMW is intended to protect low paid workers. In April 2016, a new rate called the National Living Wage (NLW), came into force for workers aged 25 or over at £7.20 an hour. In order to avoid any confusion, we shall refer to both the NMW and the NLW as 'minimum wage'.

70. It shouldn't be forgotten that the minimum wage is a right and not a privilege. This statutory right is incorporated into the contracts of the workers and enables them to sue their employer for the difference between what they are paid and their national minimum wage entitlement. A claim may be pursued:

- in the Employment Tribunal as an unlawful deductions from wages claim (but any damages is capped at two years);
- or as a breach of contract claim if the employment relationship has ended.
- Alternatively, a claim may be pursued in the County Court as a breach of contract claim.

71. In addition to the individual methods of securing the right to the minimum wage, the HMRC has the statutory power to enforce employers' obligations to pay workers the minimum wage.

72. In terms of enforcement, two questions arise:

1. Is it better for the HMRC to be the primary body (as opposed) to individual workers) to ensure that employers comply with their obligation to pay the minimum wage?
2. If so, is HMRC doing all it can to ensure compliance by employers?

73. In answer to the first question, for a number of reasons, including the following, it is better for the HMRC to use its powers to ensure compliance:

- the inequality of the power relationship between a worker and their employer. It is far better and more equitable for an arm of the state to ensure compliance by employers of a basic employment obligation. Left to enforce their rights on their own workers are often faced with prohibitive legal costs, including Employment Tribunal fees.
- one of the problems facing workers trying to enforce their right to a minimum wage is that it is often very difficult to understand how their pay has been calculated because employers who do not comply with their obligations often hide behind impenetrable payslips and contractual documents. Indeed the Low Pay Commission (LPC), in its Spring 2016 report on the NMW said:

"*A further priority is action to address uncertainty over hours – an underlying structural cause of disagreement over pay levels, and one set to grow in line with use of flexible contracts, where hours can change day by day. In the absence of this information workers cannot readily check and challenge any errors. We recommend that the Government reviews the current obligations on employers regarding provision of payslips and considers introducing a requirement that payslips of hourly-paid staff clearly state the hours they are being paid for. By definition, firms paying workers already have this information, the sharing of which impose little new burden.*"

- It is often the case that if one individual is not being paid the minimum wage the same employer is also failing to pay others the minimum wage. HMRC is much better placed to strategically tackle employers failing to pay the minimum wage to its staff then individual claims in the tribunal.

74. In answer to the second question, we do not believe that the HMRC has done enough over the years to use its enforcement powers effectively. The principal way in which HMRC enforces the NMW is through notices of underpayment together with a penalty. In more serious cases, HMRC has the power to refer the matter to the Crown Prosecution Service for a criminal prosecution. It is government policy to use civil enforcement as the main means of enforcement, and criminal prosecution is reserved for the persistently non-compliant employer who refuses to cooperate with HMRC compliance officers. The number of criminal prosecutions is pitifully low:

Year	Cases brought for prosecution
2015/16	1
2014/15	0
2013/14	0
2012/13	1
2011/12	0

75. In relation to criminal prosecutions, the Low Pay Commission (LPC), has said:

> "*We have always seen this as an under-used tool, which could potentially have a high impact on those considering deliberately flouting the law*" (paragraph 8.48 of LPC Spring Report 2016).

76. Given the widespread flouting of the minimum wage obligations by employers we do not understand why the figures for criminal prosecution are so low, not least because a successful prosecution would act as a deterrent to other employers.

77. Since 2014, HMRC has also followed a policy of naming and shaming employers that breach NMW law, which is designed to deter employers from underpaying workers. Under this system, employers issued with a notice of underpayment are named via a Department for Business, Energy and Industrial Strategy (BEIS) press notice. In 2016, the Government named nearly 200 employers owing a total of £465,291 in arrears. However an investigation by the Independent newspaper in September 2016 showed that 28 employers have escaped being named on grounds that naming them would place them at risk of personal harm.

78. The problems of non-compliance with the NMW have been most highlighted in the social care sector. Non-payment of the NMW is endemic in the care sector. The main reasons behind non-compliance in the care sector are unpaid training time, unpaid travel time between appointments and pay deducted for items such as uniforms. It is scandalous that care workers, some of the most vulnerable workers on low pay, unsocial hours and insecure jobs are not being paid the minimum wage.

79. In its spring 2016 report, the LPC urged the Government to maintain social care as a priority sector for minimum wage enforcement. The Resolution Foundation's 2015 study "The Scale of Minimum Wage Underpayment in the Social Care" estimated that 11% of the care workforce, equivalent to 160,000 direct care jobs, were paid below the minimum wage in 2013/14. Furthermore, the level of underpayment stood at £815 per worker, adding up to £130m in lost wages and £4m in reduced pension pots.

Self-employment and trade unions

80. With the rise of the 'gig economy', the numbers of 'self-employed' workers has steadily increased. According to the Office for National Statistics (ONS) figures released earlier this year, there are now more self-employed workers than at any time since modern records began. Some 4.6 million people, around 15 per cent of the workforce, are now self-employed and two thirds of new jobs in the UK created in recent years are down to self-employment. Of course, some of these workers may not be genuinely 'self-employed' but subject to arrangements contrived by employers to avoid their legal responsibilities, such as the Uber drivers.

81. A significant number of so called self-employed are low paid, and do not enjoy the employment rights and protections provided to employees and/or workers.

82. Whether someone is genuinely self-employed or treated as such by an employer, trade unions are vital in ensuring that their rights are not undermined. In certain industries self-employment has always been prevalent e.g. the media and entertainment. The National Union of Journalists (NUJ) and Broadcasting Entertainment Cinematograph and Technicians Union (BECTU), have large numbers of self-employed members.

83. Unions play a vital role in seeking to enhance their self-employed members' rights collectively. We have been involved in assisting unions gain recognition for their freelance members for collective bargaining purposes. Even though many freelancers are treated as self-employed (e.g. for tax purposes), many BECTU members are covered by collective bargaining agreements. For example BECTU applied to the Central Arbitration Committee (CAC) in 2003 that is should be recognised for collective bargaining purposes on behalf of its freelance wildlife cameramen/women engaged or seeking to be engaged on freelance contracts by the BBC Natural History Unit. BECTU's application turned on whether the freelance cameramen/women members were 'workers' for the purposes of section 296(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Section 296 (1) TULRCA defines a 'worker' as:

> "*an individual who works, or normally works or seeks to work –*
> *(a) under a contract of employment, or*
> *(b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or*
> *(c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.*"

84. The CAC held that the freelance cameramen/women were indeed workers for these purposes and BECTU was therefore recognised for collective bargaining purposes. BECTU similarly now represents freelancers on a collective basis at BBC Scotland, BBC Resources and *EastEnders*. BECTU has negotiated a collective agreement with the Society of London Theatres (SOLT) and UK Theatre.

85. Similarly, the NUJ has gained recognition with the Telegraph Group for their journalist members who were treated as 'casuals'. The NUJ submitted a recognition claim at Telegraph Newspapers. There was a lengthy disagreement about the bargaining unit. The employer argued that that it should be narrowly construed as only staff should be included rather than 'casuals' such as writers and sub-editors. Eventually the matter proceeded to a CAC hearing where it was held that journalists, whether casual, fixed-term or permanent, should be part of one bargaining unit represented by the union if it is recognised by the group's titles.

86. Trade unions also provide representation to members falsely treated as 'self-employed', in order to establish that in reality they are workers or even employees, with the aim of securing them employment rights which the employer has refused to accept.

Conclusion

87. The current legal position does not do enough to protect workers or to prevent employers from seeking to avoid their responsibilities. What is needed is a clear, universal definition of 'worker' which applies to all who work for another, save for those genuinely in business on their own account, and extends rights at work to all workers, whatever the nature of their relationship with their employer.

For more information

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