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15th December 2016
Business, Energy and Industrial Strategy Committee

Re: The future world of work and rights of workers inquiry

Dear Committee,

Please find attached our response to the above consultation by ContractorCalculator. We would be pleased to expand on any of the points raised in our response – don't hesitate to contact me directly using the details below.

We believe that legislation is miles behind changing work patterns, and that recent technological advances have given rise to the so called "gig-economy", but that in many cases firms are using this as a way to lower costs by creating false self-employment. Vulnerable workers are losing their protections and rights. It needs addressing.

On the flip side, the UK's highly skilled flexible knowledge based workforce are not vulnerable. So any changes to help vulnerable workers should not impact this sector.

If you would like to speak then please do not hesitate to get back in touch.

Yours faithfully

Web: www.ContractorCalculator.co.uk
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Consultation response by ContractorCalculator.co.uk

What we understand about your inquiry:

- Examining the future world of work
- Focusing on the rapidly changing nature of work
- Expectation of further changes driven by increased automation through technology
- Status and rights of agency workers, the self-employed, and those working in the 'gig economy'.
- Low-pay and working conditions for non-traditional employees.

What we understand about your concerns:

- Poor working practices. Some agency workers paid less than the minimum wage
- Exploitation through dubious voluntary schemes
- Workers in 'gig economy' being exposed to poor working conditions.
- Concerns over employment status and lack of worker rights.
- Balance between flexibility and choice for some, but insecurity and squeezed working conditions for others.
- It's important that workers are protected.

What we understand about your goal:

To foster a vibrant, dynamic, innovative economy with laws that deliver the benefits of flexibility but which prevent exploitation.

About us – some context – ContractorCalculator.co.uk

Our website Contractor Calculator was started in 1999 (under a different name at the time) and has since become the go to website for professional UK based freelancers and contractors to learn about all aspects relating to freelancing – legislation changes, taxes, writing CVs, dealing with legal disputes, and much more. We are visited by over 100,000 people per month and call ourselves “Your Expert Guide to Contracting”

Dave Chaplin, the founder, has been involved in the flexible workforce since 1997. He became a freelance contractor himself in the City of London, working for blue-chip clients to lead teams of developers to build internet finance solutions. Since 2004 he has been working tirelessly on ContractorCalculator.co.uk and has monitored the ongoing transformation of the workforce and growing flexible workforce.

His comprehensive knowledge has seen him consult with the Department for Business, Innovation and Skills (BIS), HM Treasury and HM Revenue and Customs and on the office of tax simplification. In addition to this he regularly participates in industry-shaping roundtable events.

Executive Summary:

- The rise of technology, particularly smart phones, has enabled the on-demand economy to flourish. This is great for UK business who can access cost-effective resources globally. But it can also be used to replace full time workers with falsely self-employed “gig-workers” who really should be employees. See our Bob example.
- Exploitation exists due to carefully constructed situations that are designed to circumvent employment law – see the recent Uber case.
- But, not all flexible workers are vulnerable and exploited.
- Legislation needs be able to prevent exploitation without burdening the highly paid flexible workforce.
- Flexible workers who are judged as “employees” based on employment case law should automatically get employment rights.
- The £60bn elephant in the room is Employers NI at 13.8%. This massively encourages employers to use flexible workers whenever possible. We need a tax overhaul.

ContractorCalculator: Your expert guide to contracting

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False self-employment – driven by technology – the “Bob-Economy”

False self-employment is now becoming a major issue. In the never ending drive towards profits firms are finding more ways to cut costs. For many firms employees are a large cost and by removing rights and hiring on a gig basis (or self-employed basis) to squeeze out the cost of downtime is attractive for some employers.

Consider Bob, a warehouse man:

Bob's job for the last 10 years has been to work in a warehouse. He works 8 hours a day, and reacts to incoming orders that pop up on a computer screen. He collects and packages together the required items and puts them in the collections bay for the outsourced couriers. Couriers come and go every hour, so it's important he completes each job for the next delivery. Each order takes about 10 minutes to complete. It tends to be very busy in the morning, slower around 11pm-3pm, but then busy from 3pm to 5pm. Bob has two co-workers who work the other shifts.

So, Bob spends some of his day doing nothing, perhaps reading a book, whilst he waits for the next order. But his employers need him there, ready to react.

His employer, who has 250 warehouses around the UK, decides to become buzzword compliant and embrace the “gig economy”. So, they set up the concept of “Packageroo”. They build a smart phone application and encourage local people to join. The concept is simple – they put the packaging jobs on the application, and if someone local wants to nip in, and prepare the order just like Bob, they can, and they will get a fixed payment. All these people are hired on a self-employed basis, because they are able to also work for other local firms too, which include Deliveroo, DIYeroo, Cleaneroo, Nannyeroo, and so on. What freedom they have!

Bob is made redundant, and so are his two other co-workers. Because Bob cannot find work, he joins the “gig-economy”. Bob then picks up gigs working for his ex-employer. In fact the same three workers that used to work there all end up doing all the gigs, but the difference is they don't get paid for sitting their being ready, being “on-demand”. They only get paid for the actual work they do. They earn less money, and there is no guarantee of work, and they have no job security or protections what-so-ever.

Do we really want to build a Bob-Economy in the UK?

A person doing multiple gigs for the same firm day-in-day-out is a Worker under employment law, as the Uber case perfectly highlighted, and they should have protections.

Clearly we need legislation that makes this clear. Otherwise we are reversing the clock on years of employment protections.

Fixing the gig economy

The gig economy is perfect for people who wish to dip in and out of work as and when they please, and firms using the gig model rely upon enough supply to meet demand. We ourselves use Upwork to get software development projects completed.

But, we are seeing people work in the gig-economy as their full-time choice because they cannot get other work and firms aren't offering it. Firms are needing to compete with their competitors who are shifting their structure more towards a Bob-Economy (see earlier section). They have no choice but to copy them, which further encourages false self-employment.

Example: When gigs aren't really gigs

Take 10 people all working in the same town doing low skilled labour, but working full time at 10 different employers. Each person does 10 tasks per day. They are employed, they get rights, and are happy.

Now make them redundant. All of them. The 100 tasks still need to be done, so the firms all use JobRabbit to advertise the individual "gigs" that need to be done. The firms also ensure they never use the same person more than once per day.

These people are no longer "employed". They have no rights. They earn less money. The firms pay less costs, and make higher profits. But all they have done is squeeze that extra profit by effectively reducing the wages and rights offered to the lower paid.

Because these people no longer get paid for the time between jobs, they need to do many more tasks to earn the same money, even though they are making themselves available 'on-demand'.

Is this how we want some workers to live in the UK? Hopefully not.

But how can Government solve the problem above? Are we finally seeing the need for some sort of Universal Basic Income (UBI) that covers the 'on-demand' part of the puzzle that firms are squeezing out of paying by moving to gigs?

Some on-demand "gig workers" say that they are often working below minimum wage and would be better off just working at a famous fast food chain. Is the answer to simply raise the minimum wage? Or have different minimum wages depending upon how many hours are worked?

A UBI is probably years away, and providing rights to gig-workers is a difficult legislative problem, especially considering the current complexity of employment status law.

The simple answer might be to create the commercial conditions whereby workers simply won't accept the poor conditions that gig-working offers, or make it too expensive to "exploit" workers.

Employment status issues

We read a great deal about employment status legislation, mainly because it is used in the IR35 tax legislation to establish tax status – which has been a burden for the contracting community for 17 years. We therefore monitor all cases through tribunals to ensure we understand the latest thinking.

The overriding issue with employment status, contrary to the common sense, is that there is no simple test, and no thick dividing line to easily judge whether someone is employed or not. For example, read the recent Uber judgement, and try and stop your brain slowly seeping out your ears.

Employment status sits on a spectrum.

Whilst our own focus is on the non-vulnerable sector, highly paid knowledge workers, we have observed the issues arising for the lower end of the market, particular with the rise of the “gig-economy”. At what point does someone who is happy gigging or working on a zero hours contract really move from being self-employed to becoming a worker or employee and should therefore get rights?

This whole area is something that global Governments have struggled with for many years, and there are no easy answers.

On the one hand there are people in our sector, who are happy working on this basis. But then there are firms who use this same model to hire people on an almost full time basis without giving them rights. And for the former who are happy as they are, they are then attacked by HMRC who claim that they really are employees and should pay more tax.

The late Richard Feynman, a theoretical physicist who contributed immensely to the theory of quantum physics famously said “Anyone who thinks they understand quantum mechanics, doesn’t understand quantum mechanics”. The same could be said for the employment status case law – it’s an absolute mess. Great for status lawyers. Terrible for business. Terrible for the low paid worker to access.

As a first exercise we would suggest starting with a blank piece of paper, and drawing a picture of where we want to be in terms of employment status and the laws – split it down based on wage levels and sectors rather than use a one-size-fits-all approach. Then either plan a route to get there by incrementing towards it. Or if that’s not actually possible, plan to rip up and replace. After all, if you are at the top of K2, you cannot get to the top of Mount Everest without going down first and starting a new expedition.

Employment status and taxes – make a clear decision

We are increasingly concerned that the messages coming out of HMRC and Government are mixed, and do not align with actual law. In the accompanying notes to draft legislation released in Dec 2016 HMRC said that they considered that if two people were doing the same type of work then they should be taxed the same. And the supporting guidance confirmed that the Government supported this position.

However, this is not actually what employment status law says. Historically the Government has supported the notion that flexible workers are effectively entrepreneurs and should be supported by the tax system.

In addition, as part of the IR35 tax reforms in the public sector, they have said that those caught should not automatically get employment rights, even though the rules for IR35 and the rules for employment status are identical. This has always been the case – whereby a person could be considered employed for tax reasons, but judged self-employed for employment rights reasons – all based on exactly the same set of rules. It's clearly nonsense. But that is the actual law today.

Perhaps HMRC and the Government “miss-spoke” when they stated their positions on tax recently, but it is worrying that both seem to think flexible workers should not get a tax advantage, and at the same time not get rights. The brief of this inquiry states “Concerns over employment status and lack of worker rights” – so we would expect this particular area to be addressed. Our view is that **any employment status decision should apply across the board to both employment rights and tax**, with one automatically applying to the other. This should help reduce the exploitation that the report is concerned about.

And please, can the Government make a firm decision on whether they want everyone taxed the same (or not), irrespective of how they earn their income.

The £60bn elephant in the room – Employers NI

There are tax reasons why firms hire self-employed, and that is the £60bn elephant in the room called Employers NI, currently charged at 13.8%. It's a huge cost of taking people on the payroll and technology that enables easy access to workers on demand makes it much easier for firms to bypass hiring people and therefore avoid this cost together with all the other rights associated with it. It's why so many public sector bodies hire contractors themselves.

Merging NI and Income Tax would do this. But would any Government be brave enough to do this, and reveal to the electorate that actually they aren't paying 20% tax at basic rate.

If the tax system was changed so that the only cost difference between hiring an employee and a contractor was rights then we would see more firms hire employees and a reduction in false self-employment.

Specific answers to questions – draft ideas

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?

Answer:

Your question is like asking “Is Einstein’s General Theory of Relativity sufficiently clear at present? If not, how should it be defined?” !!

The recent Uber judgement had multiple pages that went into great detail that defined how to arrive at the decision whether someone was a worker or not. And to the layman it is hardly clear.

When you say “is it sufficiently clear” it depends to whom. To employment law specialists it probably is, but to firms hiring people who do not have legal expertise it’s very complex indeed. And for potential employees it’s near on impossible to navigate.

There is no statutory definition of employee and we rely upon case law. It’s very complicated for all parties concerned, but there is no silver bullet here – if there was it would have been solved years ago. The same problem exists in many countries and no one has solved it yet.

The only way to make it clearer is to rip up the rule book and start again, using the UK’s finest legal minds. But the answer is likely to consist upon hundreds of pages, and not a few simple paragraphs.

Our views are that whatever changes are made:

1. there should be freedom to contract.
2. stiff penalties on employers who game the system to create false self-employment.
3. the tax man should have no right to interfere and create uncertainty by using employment case law to challenge tax status.

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

If the balance was inappropriate and there were better alternatives then free market forces would result in people choosing NOT to work in the gig economy where there were little rights.

But the whole free market argument works two ways. Issues arise based on supply / demand whereby people who cannot find work can only get gigs, and then start relying on it full time. This can drive down earnings to below the minimum wage (after costs) and if there are no full time minimum wage jobs available, what option do these people have? None. So they need some sort of protection whereby there are minimum standards.

A drive by firms to lower wages is implemented in many ways across many sectors. We hear of freelancers working in the medical sector where they do house-to-house visits, but are not paid for the time between assignments, or if they are they are not given enough time to travel between them. The squeeze is on everywhere in the drive for reducing costs to increase profits. Where there is no economic growth, increased profits come from a reduction in costs which can mean pressure on the bottom of the workforce to work for less. It's standard economics – and technology is enabling this kind of activity, just in some sectors relabelling it as the “gig economy” when in fact just false self-employment and people are being exploited.

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?

There needs to be some level of support for those who use the same firm for multiple gigs, effectively turning it into a full time or part time job. Only legislation can do this, and it will need to be provided by the hiring firm. Perhaps something based on meeting a minimum threshold of work. That kind of legislation would create an economic behavioural effect that could reduce the supply into the gig economies thereby raising prices and wages. It could put a brake on the race to the bottom.

Our feeling is that employment legislation won't solve this (see our examples) because it can be easily gamed. But legislation that changes the commercials might make a difference, like increasing the minimum wage, or have a tiered minimum wage.

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?

Our experience is based around the non-vulnerable end of the market, where people choose to be contractors, are knowledge based workers and earn considerably above the NMW and many above £50K per year.

These people, according to our survey do not want rights at all and are quite happy making their own provision. In fact our very recent survey proved that 80% of them do not want rights.

So there needs to be a way of helping the vulnerable workers whilst at the same time not putting undue red tape on the part of the flexible workforce that simply does not want protecting.

Just because someone owns a one-person business, they are still a business, and they conduct themselves on a business-to-business relationship with their clients and customers. That must not become an issue.

These people tend to incorporate for all the benefits it entails, which post the dividend tax changes in 2016 are certainly not tax driven.

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

We don't have any direct evidence of this. But it's not something we are focused on.

We have anecdotal evidence whereby some contractors ask us what their rights are, expecting to have some, but they tend to be new to contracting and not realise that as one-man businesses they do not have rights – the rights are whatever is agreed in the contract. It's just first-timer naivety and they do not need protecting.

This lack of understanding is why we set up ContractorCalculator, to teach highly skilled people how to be successful self-employed contractors and freelancers. Just because someone might be a great engineer they won't necessarily be a great small business owner. We fill that gap, to the tune of circa 100,000 visitors per month, who need to learn how to overcome hurdles and be successful in their chosen flexible way of working. We've been doing it for 17 years.

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

No, that would be a terrible move. Small firms, of which we are one, use agencies as an effective outsourced semi HR department. They exist because businesses need them.

Businesses need access to flexible on demand resources. Using agencies an effective route to finding people. They can also use more direct methods like online work portals that can access global resources.

Agencies provide a very valuable service in that they deliver compliance too. They are not adding to any problems here. They are alleviating it and can be a fantastic help in trying to ensure workers get a good deal.

One has to be aware of the negative consequences of legislation. The Agency Workers Legislation which came out of the EU has resulted in cases where firms will flip staff before the 12 week qualifying period, just so that they do not have to give them rights. Once again, the law of unintended consequences appear.

When markets are booming and there is near full employment, firms cannot get away with offering poor pay and conditions. But when we have high levels of unemployment in specific geographic areas workers can be exploited, because they do not have other attractive options.

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?

There's one main issue. Enforcement. It's all well and good inventing laws, but if they cannot be enforced then they are irrelevant. Excessive regulation over recent years has attempted to create a level playing field, but often the legislation is not thought through and is unenforceable. You then have a two tier system where those who want to be compliant are undercut by firms who decide to step over the line.

Make the fines enormous. And make company directors personally liable. Pay a large proportion of any penalty collected to the worker who whistle blows. If Government cannot enforce the laws, they need to outsource enforcement to the workers - encourage whistle blowing.

8. What is the role of trade unions in representing the self-employed and those not working in traditional employee roles?

Sadly the trade unions cannot help much. The self-employed are now a very disparate unconnected group of people. Unless they can somehow unionize they won't be able to exert much pressure.

Change needs to come via enforceable legislation.

END OF REPORT

