EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

Taylor Review on Modern Working Practices

Submission from the Employment Lawyers Association

16 May 2017

435094_1

EMPLOYMENT LAWYERS ASSOCIATION SUBMISSION

TAYLOR REVIEW ON MODERN EMPLOYMENT PRACTICES

WORKING PARTY RESPONSE

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, co-chaired by [illegible] was set up by the Legislative and Policy Committee of ELA to contribute a submission to the Review on Modern Employment Practices being conducted by Matthew Taylor.

This submission is in addition and supplementary to our previous response to the Inquiry launched by the Department for Business, Energy, Innovation and Skills (BEIS) into the future world of work and rights of workers which described in some detail the categories of workers and their respective rights under employment law. We do not propose to rehearse that detail again in this submission but rather have highlighted below some key issues arising out of the Review's areas of focus, as communicated during the roundtable sessions attended by members of the Working Party.

A. General Observations

1. One of the central issues to the Review is the issue of status, there being essentially three groupings – employees, workers and self-employed. The perception, perhaps understandably, is that the recent profusion of litigation over the category into which a particular person falls is undesirable and, more generally, there should be a simpler means of dealing with resolution of disputes on status than is presently available.

2. It is of course true that, for as long as each category has differing levels of rights and regulation, there will be a tendency amongst some employers to seek to structure arrangements so that those who they engage have the fewest rights. The documentation that then is generated is designed to support that decision. The point at which disputes arise, however, is when the reality of the relationship does not correspond to the form or label applied to it.

3. There are a number of ways in which that might be approached on a regulatory basis:

   (i) Retain the present system by which the courts and employment tribunals are asked to decide, either in the context of seeking the benefit of a particular right or in the form of declaratory relief.

   (ii) Retain the principle of court/tribunal based dispute resolution but provide for a fast track process for declarations as to status.

   (iii) Establish an inspectorate that could determine these issues.

   (iv) Provide for a presumption as to status capable of being overturned on application, perhaps by reference to an online tool such as that recently introduced by HMRC.

(v) Remove the distinction between the categories or between employee and worker and apply the same rights to all.

(vi) Draft extensive guidance to summarise existing case law and setting out best practice.

4. Option (v) is examined in our previous paper and is not repeated here. Option (iv) is the least costly but is open to manipulation and may in any event be unworkable with the current mix of sub-tests. Even if the sub-tests were better defined and made more prescriptive it would be challenging to create an online test which catered for the full range of factual scenarios. Good guidance would be helpful for both companies and individuals, but cannot make up for underlying lack of certainty in the law. Option (vi) would not of course require legislation and could deal to some extent at least with the perceived problem that many people do not know their rights and have little recourse to the advice necessary to enable them to understand these.

5. There are some underlying issues which will need to be reviewed in deciding on which route to follow.

B. Freedom of contract or exploitation

6. It is a basic principle of English law that a contract signed by a person will generally bind him. There are some limited exceptions in the employment world to procure minimum protections by way of notice, minimum wage, non-discrimination, health and safety, etc., and some public policy provisos around criminality, penalty clauses, restraint of trade, etc., but in broad terms the law relies on the ability of "consenting adults" to decide on what terms they are and are not prepared to contract upon with others, however reluctantly.

7. What this gives rise to is the issue of whether, and if so to what extent, the law should be concerned by the respective degrees of contentment with that bargain of either party to a contract. One may be forced to pay more than he wants because he cannot find the service he needs if he does not, and one may agree to be paid less than he wants because he is under pressure financially and would sooner have something than nothing. Of course, this is not a question limited to money – the area of tension could equally be the hours agreed, the degree of flexibility required by either party, place of work, time off entitlements, and so on. That either party may feel taken advantage of by the other or that he had no practical choice but to accept the other's terms, however, has little or no bearing on the enforcement of the resulting bargain in the general law of contract.

8. It is equally true that as a matter of general principle, somebody who signs or otherwise enters a contract without reading or understanding it is nonetheless bound by its terms.

9. In daily commercial life, therefore, as a statement of broad principle, a contract may be enforced regardless of whether the individual

(i) first read all or any of the terms;

(ii) did not properly understand those terms by their length, complexity and/or language;

(iii) had any real chance to negotiate those terms;

(iv) had any practical option but to agree to them;

(vi) would not have agreed if there had been any more favourable alternatives; or

(vii) felt "exploited" by its terms.

10. Therefore the question becomes the point at which the law relating to employment should intervene into that bargain by providing that, notwithstanding the contract has been voluntarily entered into without legal duress, it can nonetheless not be allowed to operate in line with the terms agreed.

11. For many years the law of England and Wales adopted a laissez faire approach to the workplace, allowing masters and their servants to agree their own terms. That continued when the servants began to organise themselves and use the increased power given to them by collectivity to negotiate better terms. Since the 1960s, however, that policy has decisively changed and a very large amount of legislation has been applied to the workplace some of it interfering with the freedom to contract by providing minimum standards and anti-avoidance methods.

12. "Protecting the exploited" is a key theme of the Taylor Review, but that possibly requires first some fairly clear idea of what identifies someone who is "exploited". It cannot be by reference to any particular status or broad category of worker since surveys show that, for example, while some zero-hours contracts holders speak compellingly about the adverse treatment they experience, others regard them as ideal for their personal circumstances and value the personal flexibility they give.

13. We should also consider here what is meant by an absence of choice, since that is usually a pre-condition of exploitation. Do gig workers really have "no choice" to a greater degree than, say, minimum wage employees? Can it be said that an individual faced with a variety of perhaps similarly unattractive options (minimum wage employment, variable income self-employment, zero hours contract, State benefits, etc.) genuinely has no choice but to agree to "gig economy" status? It might also be observed that inequality of bargaining power is not a feature only of employer–worker relationships. An individual consumer who, for example, seeks to purchase a mobile phone has very little ability to negotiate the terms and conditions applicable to the contract attached to it. It is, however, a matter of social policy as to the extent to which the state wishes to intervene to rebalance that inequality and to comment on that goes beyond our remit.

14. Related to this is the question of economic dependency and how far the law should intervene to protect one party when he is economically dependent on another. Again, this might be said to require some understanding of when one party <u>does</u> become economically dependent on another – if a "gig worker" supplies his services exclusively to one end-user, then clearly he is economically very beholden to that end user. However, if the intention were to seek to differentiate between those who are "dependent workers" and those who are not by applying a more regulated regime to the former then the question arises as to how that distinction is to be made and who by?

15. One might say that employees have the minimum protections of the living wage, minimum notice rights, possible unfair dismissal protections etc. by way of compensation for this dependency. Against that, relative to some gig economy workers, they have much reduced flexibility about where, when and how they work, holidays and other time off, potential substitution, etc. Perhaps the flexibility is genuinely a big draw for the individual by reason of his other commitments (work or family) such that he is unable to provide an employer with reliable attendance as might be required for a better-protected but more regular role. So long as he makes a decision which is as considered and informed as he sees fit, at what point and

in what way should the law intervene to impose mandatory terms on the relationship, particularly if the consequence of it doing so is that the employer decides to cease to offer the arrangement?

16. Similarly, it is human nature for both workers (in the broadest sense) and employers to seek to make the best out of the contracts they sign, just as it is in the world of commercial contracting. For every courier who says he fears loss of future work if he takes a break or app-based taxi driver who feels he cannot refuse a customer lest he then be offered fewer fares, there will be an employee who takes time off sick without very good reason because his employer's sick pay scheme does not prevent it. That is not at all to applaud either position, but to recognise that there are limits to any legislator's ability in any arena to "level the playing field" not only because both parties to almost any contract will be doing their best to tilt it in their own favour but also because not everyone approaches work with the same set of needs or values.

17. The question must also arise as to why, if certain minimum protections are felt appropriate by the State for employees, they are not also appropriate for self-employed people, especially the "economically dependent". If this is taken as a morality argument then the distinction admittedly becomes more difficult, but from the legal perspective, the question is not whether those protections could be extended to cover self-employed people, but whether they need to be. Where an individual has entered a contract which makes clear what he is and is not agreeing to do and what he is and is not entitled to by way of compensation and benefits in return, the answer could readily be no.

18. We raise these points to illustrate the difficulties we see in finding commonalities of interest amongst the workforce generally such as would result in legislation meeting the aims of those whose interests it is designed to support without at the same unfairly damaging others. Whilst the principle of limiting freedom of contract by legislating to impose basic standards in the workplace is unlikely to be the focus of much challenge, its specific application is much less so. These difficulties, it may be argued, militate in favour of assigning to the courts and tribunals the role of policing legislation and acting to remedy abuse in cases where they consider it justified. This will not be a universal panacea as, if there are areas of exploitation which are not covered by legislation, even the most creative approach to statutory interpretation will not provide a remedy.

19. Having said that, it might be argued that, if it is right that most examples of unfair exploitation arise at the lower end of the income spectrum, if prescriptive legislation is thought to be the best means of remedying that, then it could be confined to those below a particular income level, perhaps on the same theme of "blue collar" and "white collar" workers which are features of some European jurisdictions. There are a number of detailed issues which would need to be addressed as part of such an approach but it could achieve the aim of helping those at the more disadvantaged end of the spectrum leaving those at the higher end to use their greater means and negotiating leverage to assert their rights and wishes.

C. The Gig Economy

20. For these purposes we understand the term "gig economy" to mean an environment where, instead of a salary, workers are paid for the sessions of work they carry out and where

temporary positions and short term engagements are common, neither worker nor employer owing any duty to the other outside those engagements.

21. In terms of current issues, the patterns of work offered by the gig economy are coming to the forefront and recent cases concerning status have received much attention, provoking comment from those who see such arrangements as exploitative and those who see them as containing the necessary flexibility for employer and worker alike to be competitive. Anecdotally at least there are many for whom the ability to find paid work through a number of locations as and when they want it is highly desirable. They (still less the organisations for which the availability of gig economy workers is a key part of their business model) would not want those opportunities to reduce or even disappear because of a perceived need for regulation..

22. As noted above, the CIPD survey "To Gig or not to Gig" suggests that around 4% of the total UK workforce is engaged in the gig economy in some way. Of those, only 20% of those responding said that they were self-employed, the remainder having varying types of arrangement, 69% being employees, either permanent or temporary. By comparison, around 10% of the remaining working population is self-employed. 46% of those working in the gig economy are satisfied with the arrangements they have including a satisfaction level of 68% of those for whom gig economy work is their main or sole source of income. We may, therefore, be talking about a relatively small part of the working population who are unhappy with their gig economy work and whose status provides them with very little in the way of rights.

23. One suggestion from members of the working party as to an approach that might be taken could be to provide for a presumption of at least worker status for all gig economy arrangements (or perhaps for all working arrangements) with those that wish to truly have self-employment status to do so by means of an arrangement similar to settlement agreements whereby an independent legal adviser certifies that the nature and effect of the agreement has been explained to the individual. That would of course add an extra layer to the contracting process and some cost too, as the adviser will presumably require payment for the advice. It would not completely prevent abuse either – unscrupulous employers would still be able to describe a relationship in a document which on the face of it describes self-employed status but which in practice has all the features of at least worker status if not employment but it would at least deal with the issue that the individual will have been provided with advice on his position and will understand the rights that are being excluded.

24. Much has been written about the complexity and formality of some gig economy engagement contracts. The general thrust of such comments is that their language makes it hard for a less sophisticated party to understand what his rights and liabilities are, and hence contributes to an inequality of bargaining power. The CIPD survey suggests that the levels of those who do not know what their terms and conditions of employment/engagement and their rights are is quite high. Another suggestion from members of the working party is that that might be addressed by legislation to provide for a common written statement of terms similar to that provided for under s1 of the Employment Rights Act 1996 for employees to be extended to all those who provide services, whether as independent contractor, freelance, self-employed or providing services through a personal service company where at least the essential terms of the relationship are set out in clear and easily understood language. There may be an issue related to fees in this respect; this might be dealt with by making applications of this nature exempt.

25. A further possible route for investigation may be a form of compulsory insurance scheme to be provided by gig economy companies (or indeed all those who seek to contract on the basis of self-employed status. Recently it has been reported that Uber has decided to offer a

subsidised insurance scheme to its drivers which would provide some degree of protection against sickness, etc. https://www.theguardian.com/technology/2017/apr/27/uber-to-offer-uk-drivers-sickness-cover-in-return-for-2-a-week-fee Workers could retain self-employed status but would be provided with some protection against inability to work for extended periods of time (and perhaps this could, in time, include for example some sort of maternity leave insurance). Clearly this is not a straightforward issue as Uber is in a particularly strong purchasing position and this would effectively be creating a new insurance product and market. Consideration would also have to be given to the interaction with state benefits and what minimum coverage would be required to ensure that individuals would not be worse off overall but it could offer a way of shifting some costs from the state to the business without eliding the legal distinctions between employee, worker and self-employed. Perhaps its scope could be limited to businesses over a certain turnover threshold which have in excess of (say) 250 self-employed workers. We do not seek to recommend this as an option as there are many feasibility issues to explore and one would need to take evidence from the insurance industry to understand how this could work. It is, however, we think worthy of further analysis.

D. Social Context

26. The status of employee, worker or self-employed contractor carries with it certain rights but also entails certain responsibilities. Generally speaking, as far as the bargain between the employer and the individual is concerned, the more extensive the rights granted to the individual, the more extensive the obligations. For example, an employee has obligations of good faith and fidelity towards their employer, must work the hours their employer dictates and is not free to accept or decline work at will.

27. In addition to the rights as between employer and individual, individuals also have a different social contract with the state as regards taxation and benefits. For example, generally speaking the income tax and national insurance contributions made by and on behalf of the self-employed (which, for tax purposes, generally includes workers) are more advantageous than for employees. Workers and the self-employed can also take advantage of the ability to deduct a greater range of costs and expenses from the remuneration they receive as a cost of providing their labour, in calculating the net amount which is taxable. This could cover, for example, travel to and from work, the cost of equipment they need for work etc. The rules on deductible expenses are more restrictive for employees. However, as a quid pro quo for that, as far as the state is concerned, workers and the self-employed receive fewer state-provided benefits. For example they are not entitled to claim statutory maternity or paternity pay.

28. This review is an opportunity to review not only the rights and responsibilities as between employer and worker but also the social contract between workers and the state. We would suggest that these elements are as important in ensuring fairness as between the different categories of workers in terms of what they contribute on a financial basis to the public purse along with what they receive from it. The recent discussion on the Budget proposals to bring the rates of national insurance contributions for the self-employed into closer alignment with those for the employed (albeit not for the present being pursued) highlight the fact that this is a sensitive issue, but also the fact that it is a topic which requires balanced consideration as evidenced by the controversy arising from the proposal. An added complication is that the self-employed and workers are – if VAT registered - potentially required to charge VAT in respect of their services, which can be an additional cost for certain sectors (e.g. certain

finance and property businesses), but have the potential to recover the VAT element of their own costs/expenses.

29. As part of the Government reviewing the social contract between workers and the state, the Government may wish to consider the extent to which the self-employed should be required to make provision for their own welfare, e.g. through compulsory insurance schemes or via payments into a private social fund that they can draw on for the typical aspects of the social safety net such as injury/ illness cover, pensions, healthcare etc. This would have the advantage that the state would not need to meet the full burden. It would also give such workers more control of their own benefits, consistent with their more autonomous status.

30. While they do not appear to be particularly prevalent in this country, the Government may also want to consider measures to encourage the development of "mutuals" to help the self-employed access benefits.

31. If the category of "worker" is to be retained, we believe that there is some work that needs to be done to recognise the fact that the rights and responsibilities of this category of individual do not sit easily with the current employment rights framework. The current framework is predicated on the basis that although an individual may have several part-time roles, s/he can essentially be regarded as being dedicated to one employer at any one particular point in time. As a result, many of the employment rights which are granted to workers proceed on the basis that for a particular unit of time (typically an hour or part thereof) the individual is dedicated to providing his or her labour to a single recipient. However this fails to recognise the fact that in the modern gig economy a worker may be working for two or three employers at the same time. An obvious example of this is someone who has a number of apps activated on their personal device at any one time and is available to work for a food delivery company and a courier business at the same time. It is currently common for workers in the 'gig economy' to work for multiple employers simultaneously. For instance, a driver could make deliveries from restaurant X to customers for the restaurant itself, for Deliveroo and for Just Eat all on the same trip. While s/he could be said to be dedicated to one or other of those employers while handing over the meal to the customer, when riding around with all three meals on her bike – who is s/he working for and who has the responsibility to pay her the minimum wage, holiday pay, pension contributions? On the face of it, all three have that responsibility. While this is clearly an advantage for the worker, we suggest that this should be a clear policy decision and not an accident of the development of the law given the social policy concerns behind these employment rights. However, while double or triple counting can work to the worker's advantage, for other calculations - such as working time – it is arguably to their disadvantage and is an unnecessary restraint on business. Using our delivery rider again, if she maximises her efficiency and works for two or more employers at the same time for much of her week, doubling or tripling her "hours" restricts her working week to 24 or 16 hours. As a group we did explore whether it would be possible to use the concepts which have already been developed in employment law and which cover piecework to be developed in order to meet the challenge of multiple simultaneous employers. However the rules regarding piecework do not easily lend themselves to a simple solution to this issue as, again, the legislation is drafted on the basis of one employer at a time.

32. One possible idea which may be worth exploring is the idea of 'co-operatives', particularly for workers in the gig economy. This could potentially be a way of overcoming the difficulties of resolving which of multiple (simultaneous) employers has to provide benefits by substituting the simpler idea that these individuals have no employer, but are part of a co-operative that provides support for handling accounts, paying for and obtaining benefits etc.

33. Finally in this context, there is a view frequently expressed that the UK ought not to regulate in the employment sphere lest it deter foreign investment. In the present context of an imminent withdrawal from the EU those views may well be more forcibly expressed. Again this is essentially a policy issue but it should be borne in mind that, according to the OECD Indicators on Employment Protection, the UK is 30th out of the 33 OECD countries. Although this primarily measures protection against dismissal it does suggest that it is unlikely to be a perception of heavy employment regulation which will influence decisions to invest in the UK.

E. Legislative Reform

34. It is clear that, in a fast changing world, whilst conventional employment status and arrangements continue to form the vast majority of working relationships, there are widely varying new types of working arrangements. In the gig economy there appear to be some relationships which look very much like employment but others which bear no relation to that at all. To legislate prescriptively for all of these may not only be difficult but runs the risk of being obsolete almost before it starts. For as long as differing rights apply to differing types of working arrangement, a proportion of employers at least are likely to continue to devise ways of structuring working relationships so that the perceived burden of those rights is minimised.

35. Given the relatively small percentage of the workforce to whom these arrangements apply it may be thought that prescriptive legislation is not the answer and that the most efficient way of resolving the issues of abuse of status and availability of employment/worker rights is to leave it as at present to the courts and tribunals.

36. That is not to say that a worker seeking to resolve the sole issue of status would be bound to do so by bringing a claim in the normal way, either seeking to assert a right or (much more rarely in our experience) a declaration as to status and having to pay a fee and engage in the usual adversarial process in which context, it might be said, the odds are stacked rather too heavily in the employer's favour. One suggestion is that a fast track arrangement could be established whereby the sole issue of status is referred to an Employment Judge with a reduced (or perhaps even no) fee. A Practice Direction might be devised to set out the procedure to be followed and this might go further, for example, to provide for an inquisitorial approach rather than the usual adversarial system which might reduce cost and time and perhaps even the need for a formal hearing. To preserve access to potential rights under the Human Rights Act 1998 an appeal might lie to the Employment Appeal Tribunal which would include the existing sifting process.

F. Workers and employees

37. Much of the litigation historically has been over the distinction between employees – those working under a contract of service – and independent contractors working under various types of contract for services. Historically the latter had virtually no rights beyond those contained in the contract (with no obligation for that to be set out in writing) but that has substantially changed over the past thirty or so years with many rights originating in the EU extending to all those who contract personally to provide services. As noted above, the result of that in some sectors of the economy has been to attempt to structure working relationships so that those rights are avoided altogether.

38. Over the years courts have applied a number of tests and outcomes have tended to reflect changing patterns of work and social attitudes. In roundtable sessions it was said that there was a perception that the same set of facts on employment status could be put before two courts and a different result reached. That would not be our general experience as practitioners. What can be said, however, is that a set of facts could be put before a court today and a result achieved which would have been different had that been before a court twenty years ago. That as we would see it, is one of the advantages of issues of status being for courts to decide rather than prescribed by legislation – it enables decisions to be made which reflect changing circumstances.

39. The distinctions between different types of working status can be unclear, and it is difficult to draw bright line distinctions. They rely on a mix of sub-tests. Some of the sub-tests which are currently used to determine working status lack specificity – e.g. control, integration, subordination. Others are arguably outdated in a modern economy – e.g. the sub-test of whether there is a power of substitution.

40. Any new, modernised sub-tests would need careful consideration and consultation to ensure that they are effective, especially if the same sub-tests are to apply at all levels, not just at the low-skill/income level. The more prescriptive the sub-tests, the more frequently they will need to be updated to keep pace with evolving ways of working.

G. Workers as a category - rights

41. We have dealt in detail in our previous paper on the Future World of Work with the various differences between employees and workers and the tests that have been applied in deciding on issues of status and do not propose to repeat those here.

42. It is worth bearing in mind, however, that the "worker" category is broad and covers a number of distinct legal relationships, of varying degrees of permanence and integration into the relevant business. We reviewed this in detail in our previous submission to BEIS on "The Future World of Work" but, by way of example, it includes:

    - Casual/bank workers, who may be offered shifts or assignments with a particular business (and will generally be subject to the business' control when carrying out such shifts) but are neither entitled to be offered such shifts nor obliged to accept them;

    - Agency workers, who, if not employees of the employment business, are likely to be workers of the employment business. However, their relationship with the employment business is likely to be limited in practice to the employment business seeking to find them work, arranging work for them (which they will generally be under no obligation to accept) and dealing with their pay when they are carrying out assignments on behalf of the employment business.

    - LLP members, who are likely to be fully integrated into the relevant business and, depending on the terms of the LLP deed, may have varying voting rights and input into the management of the business, as well as taking on varying degrees of financial risk (in some cases, the degree of financial risk they assume is significantly lower than a traditional self-employed contractor).

    Any extension of rights to the "worker" category as a whole must therefore bear in mind the wide range of legal relationships which would thereby be affected.

43. An alternative would be for any legislation resulting from the Review to address different sub-categories of worker separately. This approach does have the disadvantage, however, that the sub-categories are not always mutually exclusive and the boundaries between them are difficult to define. For example, the difference between a freelancer and a casual worker who participates in several businesses or through "banks" of staff may be very difficult to define. There is also the risk that any attempt to carve out a particular status (e.g. LLP member) from any enhancement of workers' rights would encourage avoidance measures by businesses (although that risk is arguably inherent in any reform in the arena of employment status).

H. Workers' rights and areas for possible extension

44. There remain, however, some significant rights which are the preserve of employees alone. We review below the possible issues which may arise if it were thought desirable to extend some or all of these rights to the wider category of "worker".

45. Information and consultation agreements

As was noted in the roundtable discussions, this right of employees is little-used in practice at present despite the regulations being employee-friendly (in the sense that, once a valid request[1] has been made, a default standard agreement will apply if the parties cannot reach agreement within 6 months if this period is not extended). While it may be possible to encourage greater take-up of this right in non-unionised workforces by publicising the right, doing so may not, in practice, achieve a great deal for many workers. Workers who work only sporadic shifts via a bank system or similar may not have each other's contact details (the business would be unlikely to share these for data protection reasons) and may spend little time working for the business or work night-shifts or other unsocial hours. There would therefore be significant practical hurdles preventing them from organising a valid request for an information and consultation agreement, and/or participating in such consultation if it were established. If extending this right to workers were thought to be desirable, therefore, considerable thought would need to be given to overcoming these practical hurdles. For example, it may be that businesses would need to have some obligation to take steps to facilitate such a request, e.g. providing a means of communication between workers for this purpose or even be placed under a positive obligation to initiate such an agreement. See below under "Representation" for an overview of the current arrangements for collective rights for workers.

46. Right to raise a grievance and protection against retaliation

Extending the right to raise a grievance to workers appears to the Working Party to have some merit in offering a structured way of addressing complaints by workers who otherwise have few avenues of redress. Although this would impose additional procedural obligations upon businesses, in practice many businesses at least respond to written complaints by workers as a matter of prudence (particularly where these raise issues of discrimination or other potential legal claims), even if they do not carry out a full grievance hearing. One counter-argument is that as a worker's relationship with a business tends to be less permanent, and the worker less integrated into the business, than an employee, there is less need to have a formal mechanism for resolving complaints and seeking to preserve/improve the relationship.

[1] i.e. one made by at least 10% of the employees or at least 15 employees, whichever is greater, subject to a 2,500 employee cap

However, it is by no means always the case that the worker-business relationship is more short-lived than the employment relationship, and there is a value to both businesses and workers in encouraging workers to raise issues of poor treatment or poor business practice.

47. At present, employees are expressly protected against retaliation only under whistleblowing and discrimination (i.e. victimisation) law, both of which extend to workers. An employee subject to retaliation for raising a grievance concerning, for example, their pay will have little legal protection unless the retaliation enabled them to claim constructive unfair dismissal (after 2 years' service) or they could bring the complaint within the ambit of the whistleblowing legislation (the "public interest" test introduced in 2013 was intended to make this more difficult but some cases may still meet this test as interpreted in case law).

48. If workers (who are arguably more vulnerable than employees given the lack of protection against dismissal) are to be encouraged to raise grievances, consideration should be given to general anti-retaliation provisions (although this should arguably be considered in relation to employees as well). Any such provisions would need to have appropriate carve-outs for grievances raised in bad faith.

49. TUPE

There is currently some debate as to whether TUPE as currently worded includes workers. This point remains undecided and the implications (e.g. in relation to LLP members) remain unclear. General business practice is to treat it as applying to employees only.

If it were thought appropriate to clarify the point and provide for extension of TUPE rights to workers these could include:

- Information and consultation
- Automatic transfer of contracts
- Protection against dismissal for certain transfer-related reasons
- Protection against changes to contractual terms

50. The right to participate in pre-transfer consultation is sometimes perceived as having little substantial value for employees, particularly given that: i) in some cases, such consultation commences only shortly before the transfer date, particularly where commercial considerations of confidentiality etc. override the risks of employee claims; and ii) the employees' ability to influence commercial decisions about the transfer is often very limited. It is doubtful whether extending this procedural right only, without any of the additional protections enjoyed by employees, would be perceived as having much value for workers in terms of influencing decisions although the availability and financial value of the protective award would represent a potentially valuable right. However, extending any of the other key TUPE rights to workers would represent a substantial elision of the distinction between workers and employees, particularly in relation to automatic transfer of contracts and protection against dismissal. If the Review considers that the distinction between employees and workers remains a useful one (which is, overall, the view of the Working Party), TUPE is arguably an appropriate area for employees to receive enhanced legal protection in return for their more extensive implied duties to employers.

51. Family Friendly Rights

Some employee rights in this category essentially consist of protection against dismissal during an extended period of absence, requiring the employer to keep the employee's job open until their return from maternity/paternity/shared parental/adoption/parental leave. If a distinction is to remain between employees and workers, this, like TUPE and unfair dismissal rights, may be a sensible line to draw between the two categories. However, one area which could usefully be considered for extension to workers is the right to reasonable unpaid time off to deal with emergencies affecting dependants (and the right not to be subjected to a detriment for taking such time off), which arguably would not impose undue burdens on businesses but would recognise the fact that individuals with less formalised working arrangements are no less likely than employees to have dependants with urgent needs.

52. However, the extension of the right to request flexible working hours to workers as a category appears unnecessary, given that many individuals in this category (in principle) generally have the right to accept or decline shifts/assignments as they wish and thus a degree of flexibility is already built into the legal framework.

53. There may be significant value in clarifying that the provision of benefits by 'employers' will no longer necessarily be an indicator of employment status. This may encourage some 'employers' to offer benefits to all those carrying out work for them even if they do not accord them employment status in terms of employment rights for other reasons. At the moment, it may be the case that "employers" are put off offering certain benefits because of the fact that doing so may increase the likelihood of the individual being held to be an employee. A particular benefit in issue may be pensions. There would appear to be no barrier in principle to including workers in such schemes and if the intention is to place more of the burden of welfare and providing a 'safety net' on employees/employers rather than the state then there would appear no logical reason why this should be limited to employees only. If the clarification referred to above were in place then employers could include workers in those arrangements without that alone influencing matters of status.

I. Worker Voice

54. We have identified above a number of rights that could be extended to workers as part of this review. The principle that there should be effective means of providing the workforce with effective channels of communication and enabling their comments and representations to be heard seems uncontroversial and a necessary component of effective employee engagement. While industry may say that it does not wish to have templates thrust upon it but would rather have the flexibility for each business to formulate its own structures, a default system which is mandatory in the absence of any other arrangement may be a means of promoting better worker voice. Those that there are at present cover only employees and, as noted above, there would seem little logic in excluding other types of worker from these rights if the overall objective is to be achieved.

55. We consider that there is a lack of coherent consistency across the various strands of legislation which may hinder the ability of workers to protect their interests via collective rather than individual action. Workers are counted as far as the right to statutory trade union recognition is concerned. Some but not all workers are potentially covered by the collective information and consultation rights under the Transfer of Undertakings (Protection of Employment) Regulations 2006. However, the collective consultation rights in respect of a collective redundancy (which can often take place at the same time as a transfer of employees

under TUPE) only cover employees. Similarly, the rights in relation to National and European Works Councils apply only to employees. If collective representation (by either trade unions, works councils or other employee representative bodies) is seen as an important measure to protect workers and their interests and tackle possible exploitation, we suggest that the current framework of collective rights does not support this.

56. A general review of the effectiveness of these various provisions is beyond the scope of this paper but, if better worker voice is perceived to be a desirable objective, increasing the scope of the existing rights to workers would seem a significant step in that direction.

J. Taxation

57. We understand that taxation of workers is not within the scope of the Review so we will not comment on this in detail. We observe, however, that HMRC recognises only two types of worker – employed and self-employed – and the division it applies does not on occasions sit easily with employment law. For example, some workers may not be regarded as self-employed while others may.

58. There would appear to be no good reason why this should continue to be the case. A decision would need to be taken whether the existing PAYE regime applied to employees is to be extended to all workers, leaving only the genuine self-employed accounting for their tax directly. While no doubt unpopular amongst some categories of worker it need not ultimately affect their tax position adversely, simply the method by which it is collected and there might be a positive impact on tax avoidance.

Members of the Working Party

Baker & McKenzie

UNISON

11 KBW

Howard Kennedy

Allen & Overy

Lewis Silkin

Norton Rose Fulbright (co-Chair)

Squire Patton Boggs

Abbiss Cadres (co-Chair)

Mishcon de Reya