Submission to Review of Employment Practices in the Modern Economy

1. Introduction

Leigh Day is a law firm that acts for claimants who have been treated unlawfully by others. Our clients include individuals seeking to assert their employment rights.

We are currently representing the claimants in employment tribunal claims for workers' rights in almost all of the most important "gig economy" cases, including:

- Uber drivers (with the GMB trade union);
- Deliveroo riders;
- Addison Lee drivers (with GMB);
- DX couriers (with GMB);
- Hermes Couriers (with GMB); and
- UK Express couriers, who deliver parcels for Amazon (with GMB).

We also act for the IWGB trade union in its union recognition claim against Deliveroo.

Given our uniquely comprehensive experience in this area, we believe that we can offer valuable insight to the Review.

We consider that it is crucial for the Review not simply to ask whether the law needs changing but also why companies continue to treat their staff as self-employed when individuals keep winning claims that they are workers or employees, even under the current law. It is clear that there are few incentives to comply with the law, even as it currently stands.

We believe that this is an opportunity to introduce radical change to protect workers in the gig economy whilst maintaining entrepreneurship and competitiveness. New start-ups can continue to flourish without jeopardising worker protections. It is important to remember that Uber, Deliveroo, Hermes and Amazon all told the Work and Pensions Select Committee in February 2017 that they would still be viable businesses even without using "self-employed" staff.

As well as this, there is no conflict between ensuring that gig economy workers are protected, whilst retaining flexibility for workers and employers. In particular, if individuals can work in a genuinely casual way, without fixed hours, they should still be entitled to worker protections whilst they work. There is no reason why having flexibility of working hours, even if genuinely desired by both parties, should exclude individuals from having workers' rights.

2. Summary of proposals

In summary, our proposals for the Review are that:

- the requirement for personal service is removed from the definition of worker;
- the rest of the current definition of worker remains in place and new hurdles are not introduced;
- a presumption of worker status is introduced;
- all employment rights are provided to all workers, rather than limiting certain rights to "employees" only;
- penalties are introduced to discourage employers from breaching the rules.

We set out these proposals in detail below.

3. Personal service

The first question to ask is whether the law ensures that the right people benefit from workers' rights.

Under the current definition, a worker is an individual who:

- works under a contract to do or perform personally any work or services for another party;
- 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.

A particular area of concern in the first part of the definition is the requirement of personal service. Currently, if an individual has an unfettered right to use a substitute to carry out the work, they will not fall within the definition of worker, even if that right is never exercised (*Premier Groundworks*[1]).

The problem with this is that companies often insert sham clauses into the written documents stating that an individual can use a substitute, when in reality the company has no intention of allowing them to do so.

The individual then has to show that the clause does not reflect the true agreement between the parties, which can be difficult. For example, if you have never asked to use a substitute because you know that this would never be permitted, you will never have any evidence of refusal.

Further, even if an individual does have the genuine right to use a substitute, it is difficult to understand why they should automatically fail in a workers' rights claim.

---

[1] *Premier Groundworks: Premier Groundworks Ltd v Jozsa UKEAT/0494/08/DM*

Consider, for example, a cleaner who can send a suitably qualified substitute in her place but who never exercises this right because she needs the money. She (or a substitute) is required to work five days per week and when she works she is subject to the company's policies and disciplinary procedures; she has no say over her level of pay, her hours or what tasks she is assigned. Under the law as it stands, she can be paid £3 an hour, or be dismissed because she is pregnant, and she has no remedy. This is difficult to justify.

We believe that the requirement for personal service should be removed. Instead it should just be one relevant factor when considering the second part of the worker test: whether a person is working as part of their own professional or business undertaking.

4. Own professional or business undertaking?

So far as this element of the worker test is concerned, we consider that the law as it stands has it about right. There is a strong argument that anyone who is not providing their labour as part of their own business but who works for and as part of another's business should be protected by employment law.

This distinction favours low-paid workers who most need protection. Often, it will be obvious where individuals are not running their own businesses of which the putative employer is a customer.

Where it is not, a multi-factor test is applied. A criticism of such a test is that it is complicated and therefore could make it easier for employers to wrongly characterise their staff as self-employed, where such staff are unaware of the various relevant factors. However, we believe that the temptation to introduce a new single-factor test, such as subordination or control, should be avoided. This would simply add an additional hurdle for workers, whilst leaving no flexibility to deal with new ways of working.

Instead, we consider that any difficulties caused by having a multi-factor test can be overcome by introducing a presumption of worker status, as proposed by the House of Commons Work and Pensions Committee.

5. Presumption of worker status

As stated above, some argue that the current test for worker status is complex and that it can be difficult for an individual to be certain of what his or her status is, without testing this in an employment tribunal. In order to bring such a claim, that individual would probably have to pay fees and the tribunal process can be complex and challenging.

Workers in precarious employment are particularly unlikely to be able to pursue such claims.

A presumption of worker status by default, rather than of self-employment, would protect such workers. In accordance with this presumption, employers would be expected to provide entitlements to staff, irrespective of whether they labelled staff as self-employed. If an employer wished to deviate from this model, it would need to present the case for doing so, in effect placing the burden of proof of employment status on the employer.

6. All employment rights to be provided to all workers

Once it is clear who is a worker, the question is then what rights they should have.

We consider that there is little justification for certain workers to be entitled to more basic rights only, such as minimum wage and holiday pay, whilst "employees" have the "privilege" of redundancy pay, maternity rights and protection from unfair dismissal.

We believe that all workers should be entitled to the full suite of employment rights. There are two principal reasons for this. First, under the current law, it is already difficult to distinguish between a worker and an employee and, second, it is often casual workers in precarious roles who are most vulnerable to exploitation. The law should offer them greater protection, not less.

(a) How do you distinguish between a worker and an employee?

The starting point for employee status remains *Ready Mixed Concrete*[2], as developed by subsequent authorities. As the law currently stands, you need to show (i) a mutuality of obligations exists between the parties sufficient to create a contract to work (ii) the contract is to work personally; (iii) control by the employer; and (iv) that the other provisions of the contract are not inconsistent with its being a contract of employment.

However, these are all potentially relevant factors when considering worker status as well. As Underhill J put it in *Byrne Brothers*[3], the test for a worker "*will involve all or most of the same considerations 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.*"

---

[2] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497*

[3] *Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667*

If that is right, where do you draw the line? And how do we expect a gig economy worker to know where they stand? How much control do they need, how much flexibility?

Some regard a mutuality of obligations between assignments as key. In *Prater*[4], however, Mummery LJ stated that the fact that after the end of each engagement the employer was under no obligation to offer further work did not prevent the claimant from being an employee when she did work. That does not mean that mutuality of obligations between assignments is not a relevant consideration, only that it is not determinative. But, similarly, it might (but won't always) be relevant when considering worker status during assignments (*Pimlico Plumbers*[5]) and employment under the Equality Act 2010 (*Windle*[6]).

As things currently stand, for cases close to the boundary, presumably any single factor could get an individual over the employee threshold. For example, in a borderline case, if an individual had, say, had to wear a uniform, that might have been the factor that meant they were entitled to maternity rights or if they had only had a prohibition on competition in their contract (irrespective of whether they did compete in practice), they might have been able to claim unfair dismissal.

This lack of clarity would be eliminated if the distinction between employees and workers is effectively removed and full employment rights are provided to all workers.

(b) Precarious workers need protection

The merger of employee and worker status would also ensure that those in low-paid precarious work are not entitled to fewer rights, when in fact they are in most need of protection.

One justification for the current system appears to be that if you enjoy greater "control" and "flexibility", you should expect fewer rights.

The issue with this is that for many "casual" workers, control and flexibility are illusory. Through algorithms, customer review systems, automated incentives and tracking devices, so-called technology platforms are able to exert far more control over their workers than a human manager over his or her staff, yet those staff enjoy employment rights but the gig economy worker may not.

Even for workers who can genuinely choose when they work, if that "casual" role is their main or only source of income, they will not have a real choice about when they

[4] *Cornwall County Council v Prater [2006] EWCA Civ 102*
[5] *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51
[6] *Windle v Secretary of State for Justice [2016] EWCA Civ 459*

do and don't work if they are to make ends meet. For them, abstract concepts such as flexibility are meaningless where they have to pay for rent and food.

For others, even the illusion of flexibility is absent. Some courier companies, for example, are reported as requiring workers to confirm availability in advance and to agree to work certain shifts. If workers are unable to work a pre-arranged shift, they are fined a day's pay, even if they are sick. It would be wrong that those individuals were denied the right to raise a grievance or to claim unfair dismissal simply if, for example, they provide their own van.

What would be the downside in providing all workers with full employment rights? Unfair dismissal claims would be limited by the service requirement, which would prevent many genuinely "casual" workers from bringing claims. But, rightly, those who have worked consistently for the same employer for over two years will have protection from being dismissed at the employer's whim.

Further, what is the policy objective in denying maternity rights to women working in the gig economy? This simply makes it much harder for women to work in certain industries if they wish to have children. It is wrong for legislation to encourage such barriers.

If the issue is one of the cost of the tax burden of employing people, then the government should address the tax system rather than denying a certain group of people employment rights to help companies increase profits.

7. Discouraging bad behaviour

Finally, whatever modifications are made to the current rules, one point is clear. The present system provides few incentives for an unscrupulous employer not to mislabel staff as self-employed and deny them workers' rights.

Until a worker challenges that classification at the tribunal, the employer has little to lose. Even if they succeed, the employer will generally only have to make up the shortfall of what they should have paid in the first place and they know that most workers probably won't bring claims. Whilst employers can be prosecuted and fined for failure to pay the minimum wage, this is rarely used, and there is no similar regime for holiday rights.

If there is no automatic presumption of worker status, as argued above, in order to ensure employers comply with the law we suggest, at the very least, that additional penalties should be introduced for wrongly treating workers as self-employed and thus avoiding liability.

Also, following a decision that any individual in the workforce is a worker, the employer should be required immediately to ensure that all similar staff members are provided with workers' rights or face further penalties.

Leigh Day
17 May 2017