LawWorks Policy Consultation Response

Taylor Review of modern employment practices

Introduction

LawWorks is pleased to respond to this important review which may lay the groundwork for a new framework for employment rights in the next Parliament. With a rapidly changing labour market there is growing demand for greater transparency, clarity, information and advice about different work practices and the rights and obligations that they accrue. In addressing the questions posed by this review, we are limiting our response principally to issues concerning the legal and regulatory framework rather than broader labour market policy issues. We are therefore focussing this response on:-

- Security, pay and rights
- The balance of rights and responsibilities

About LawWorks

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

- University of Law Chester Employment Rights Advice Line (CHERAL)
- Plymouth University Law Clinic - South West Employment Rights Centre (SWERC)
- Toynbee Hall Free Legal Advice Centre (FLAC)

Following impact assessment on a sample of clients last year across the network of independent clinics that LawWorks supports, 93% felt that they had a better understanding of the legal matter on which they were helped and 81% felt less stressed after getting the advice. Advice on employment law now stands at 17.4% of casework undertaken by clinics, and in the previous year (April 2014 – March 2015) there was a 49.6% increase in employment advice taking place at clinics demonstrating growing demand in this area.

LawWork's overall view on employment rights

We welcome this consultation and review which demonstrates that Government are treating the issue of employment rights in the new economy seriously. Recent evidence from Citizens Advice shows that 4.5 million people in the UK are in insecure work including 800,000 with either zero hours or agency contacts, 1.1 million with temporary contracts and over 2.3 million working variable shift patterns. The briefing states that "despite record employment rates, the persistence of insecure work leaves many households at risk of economic shocks and unable to plan for the future."[1] This a major challenge and points to the need for strengthening the framework of protective rights and standards around different models employment.

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

Yet at the same time the self-employed are a large and growing part of the UK labour force. Five million people—15% of workers—are now self-employed, and the expansion of self-employment has played a significant part in achieving current record employment levels. With new technology facilitating the growth of the "gig economy," the nature of work in many sectors is changing which has led to both positive developments and opportunities with many of the benefits that go with flexible working, but often at the expense of security. There are now an estimated 1.1 million people in Britain's gig economy, which is nearly as many workers as in the National Health Service (NHS) England.

Employment rights therefore need to strike the right balance between security, flexibility and innovation. Above all though people need transparency, information and advice about what their rights and legal position may be in any particular context and relationship. With employment law issues having been virtually removed from the scope of legal aid (only cases involving human trafficking or a contravention of the Equality Act 2010 now qualify), such specialist advice is often in short supply. The information and support available through ACAS is often insufficient to address the complexity of modern employment relationships. We would also like to highlight the huge injustice and barriers presented by the high tribunal fee levels for wronged employees seeking redress. Since 2013 employees who may have been wronged by their employer—underpaid or dismissed unfairly, for instance—have had to pay up to £1,200 to go to an employment tribunal, which was previously free.

The critical issues that we would like to see the review address includes:-

- The complexity of supply-chains leading to greater complexity of legal relationships - who is the employer and what rights follow or accrue?
- The divergence of working practices leading towards exclusive suit of employment rights in the labour market for privileged professionals, in significant contrast to those working in the less formal economy
- The insufficient enforcement of existing rights and/or proactive action being taken against rogue employers and exploitative practices.
- The costs of redress and the challenge of access to justice.
- The strong case for better social protection for those with more precarious employment

In taking these issues forwards we believe that the review should be taking the following overall steps and approach

- Establishing a baseline of minimum standards to achieve more equalised treatment across the various working arrangements (this might involve reducing some standards overall and/or upgrading of standards for insecure work)
- Taking an overall view of the appropriate share in the labour market of protected work and more insecure work, and promote transition from insecure to secure work
- Reviewing statutory presumptions as to "worker" status
- Considering approaches to self-regulatory best practice and standards or 'kitemarks' for informal work, and look at different approaches and options for regulating zero hours contracts.
- Build on the new arrangements and opportunities offered by the new Directorate of Labour Market Enforcement so that early action can be taken and exploitative practices can be as they emerge.

The balance between security and flexibility, and rights and responsibilities will always be difficult one to get right. Above all though where there are rights there need to be remedies and the capacity and channels for the working population to be able to enforce those rights – this principle should be writ large in this review process.

Security, pay and rights

To what extent do emerging business practices put pressure on the trade-off between flexible labour and benefits such as higher pay or greater work availability, so that workers lose out on all dimensions?

To what extent does the growth in non-standard forms of employment undermine the reach of policies like the National Living Wage, maternity and paternity rights, pensions auto-enrolment, sick pay, and holiday pay?

The review is interested in what new, non-traditional, ways of working have on the rights and benefits of those involved with particular reference to security, pay and options for redress.

Security

It is difficult to separate the issues of 'security' from 'status', as the legal status of all work and labour related transactions (whether between individuals, legal entities or both) affect legal affects tax, redundancy rights, national minimum wage entitlement, benefits and credits, pensions auto-enrolment and other matters relating to security in the labour market. In 2014 the Government has commissioned the Office of Tax Simplification to examine the dividing line between employment and self-employment and whether the line drawn in the right place and in the right way. It concluded that given the myriad of new working arrangements it was no longer as simple as a binary divide (employed versus self-employed) and that there is a growing problems of lack of legal certainty. It also concluded that whilst there could be some better definitions of employment status, there were no easy or tidy solutions.[2] We address some of the issues about rights and status in the section on the balance of rights and responsibilities below.

'Security' also captures a range of issues faced by workers (whether agency workers, workers on zero-hours contracts or otherwise) including their awareness of existing rights, ability to identify and enforce accrued rights (including pay), family and pregnancy rights and certain rights not to suffer a detriment. Currently "workers" do not enjoy a whole raft of rights and entitlements as compared to employees. Evidence submitted to this review shows that the absence of such rights has given rise to unacceptable levels of insecurity for some workers. Some of the rights not currently enjoyed by "workers" include:

- Written particulars of employment
- Itemised pay statements
- Maternity, paternity, adoption and parental absence pay
- Statutory sick pay
- Time off in respect of partners, adoption, family and dependents
- Termination rights (except by analogy to the right of workers not to suffer a detriment in connection with the ban on exclusivity in zero-hours contracts)
- The right not to be refused employment because of membership or non-membership of a trade union and other rights connected with trade union activity and support
- Not to suffer detriment for exercising rights in respect of taking time off for study or training, health & safety or jury service

We believe that transparency is a key driver for greater security and predictability. There can and should be greater transparency for all workers as to the terms of their engagement and accrued rights, such as pay. Extending to "workers" similar rights of employees as regards particulars of engagement as well as itemised information regarding pay and other accrued entitlements could be the first step to

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537432/OTS_Employment_Status_report_March_2016_u.pdf

informing workers on the most basic level about their rights and obligations. Self-evidently, in the absence of a basic level of ready available and intelligible information workers' ability to understand their entitlements and to plan ahead is severely limited and the ability to enforce rights is curtailed. We believe that rights voices at work generate higher levels of security and should be enhanced. This could include enhancing trade union voices and collective bargaining regarding specific working conditions in industries where there is a high level of part-time or other atypical work. Indeed, often the very workforce that would benefit most from trade union representation, i.e. those working under precarious conditions, enjoys the weakest suite of rights in this regard.

Rights voices can also be enhanced by industry bodies and other forms of self-regulation, as such entities are often best placed to gather information about current practices among members or within the industry. Self-regulation, in whatever form, often works best alongside an implied threat of government to legislate in the absence of evidence of improved circumstances over time. Already there are examples of industry trade bodies which gather and analyse information about industry practice, some of which have contributed to this and other reviews. If employers and industries are clear about the mutual advantages of new forms of working then self-regulation represents an opportunity to respond to some of the more sceptical voices and to make the case against legislative intervention. In this way industries can start to gather evidence to demonstrate progression from precarious work towards less precarious work, training opportunities, as well as the prevalence of precarious work and other core industry specific data; indicators of a job market operating to the benefit of both workers and businesses. Membership criteria can help to highlight businesses adopting the more egregious practices within an industry. Self-regulation can work alongside legislative intervention.

We do recognise the many benefits arising out of new forms of working for both businesses and workers. Further, we recognise the prevalence of atypical working arrangements in some industries and acknowledge that any reform must strike a balance between innovation and job creation and greater security for workers. Indeed, bodies such as the Institute of Directors and the CBI have made this case persuasively. What is more social protections and safety nets such as welfare rights and in-work benefits can be utilised to enhance security in the workplace, but such protections should avoid unduly subsidising businesses and other organisations that take too many of the benefits and bear too few of the risks flowing from atypical working arrangements.

We believe that the case should be considered for greater equalisation of rights at the legislative level, such as sick pay and family rights, as between 'employees' and 'workers'. Issues around sickness and family can generate unmanageable risks for some workers, leading to high levels of insecurity. Government has already shown a willingness to intervene in some areas of the so called "gig economy", especially where egregious practices have been identified. The Exclusivity Terms in Zero Hours Regulations 2015 ("The 2015 Regulations") is an example of legislative intervention into the job market with the aim of protecting workers against some practices leading to very low levels of security; however we urge the review to go further towards more meaningful equalisation of rights rather than focusing on indefensible practices. For example, in respect of zero-hours contracts schedules of 'expected' work or guarantees as to minimum hours, whether negotiated through trade unions or otherwise, would go some way to meaningfully redressing an imbalance unduly favouring some employers and creating insecurity for workers.

Pay

One question that the review needs to probe is whether the growth of more flexible employment patterns may be encouraging employers to shirk on their responsibilities in managing effective payroll systems. In a report last year Citizens Advice also provided evidence that the number of issues they dealt with about unauthorised deductions at work (i.e. the non-payment of wages owed) had nearly doubled in a single year. For the quarter to march 2016, in the charity's Advice Trends publication, problems with unauthorised deductions increased by 84%, prompting concerns from Citizens Advice that there is an emerging trend of "wage theft" where people are not getting paid in full for the work they do. In some cases "employers are deliberately underpaying people including taking money from their wages without good reason; misrepresenting people's working hours; paying below the national minimum wage and not paying wages for a long period of time or at all."

Employees often have difficulty finding out from their employers exactly how many hours they have worked which can present a significant problem when trying to bring a claim. Often the amounts of money they are owed is modest compared to the fees involved which is another reason why redress not pursued, in addition to the transient nature of the work done by many employees.

Remedies open to workers who face this issue include using dispute resolution services through ACAS or, if that fails, taking an employer to an employment tribunal – however access employment tribunals has been significantly been curtailed by the high application fees. We have made generalised remarks in relation to the impact of the Fees Order 2013 elsewhere in the next section of this response, which we do not intend to repeat here. In respect of pay disputes, we believe that it is unrealistic to expect many potential claimants to pay up-front tribunal fees which exceed the value of the underlying claim even where employers would be ordered to pay successful claimants' fees, not least as some individuals will not be aware of the tribunal's approach. In this way we believe that the levels of tribunal fees have had a chilling effect on potential claims. Indeed, anecdotal evidence suggests that some workers, if not deterred from bringing claims for unlawful deduction from wages entirely, prefer to issue County Court claims over Employment Tribunal claims. Clearly the prospect of recovering the costs associated with bringing a claim in the courts is a relative advantage over tribunal claims, however it is difficult not to conclude other than that the introduction of tribunal fees is likely to have reduced the number of pay claims brought before the Employment Tribunal, including meritorious claims.

Pay and benefits can also be complicated by unusual or irregular working patterns, as well as other aspects of the "gig economy", including uncertainty as to status. So we refer the review to the various remarks we have made elsewhere in connection with workers' access to information about terms and conditions, pay and entitlements, including information as to how pay and benefits have been calculated by employers.

National minimum wage in the "gig economy"

Whilst innovation and job creation should be fostered and not put in jeopardy by government policy there is evidence to this review and elsewhere indicating that certain employment practices in the "gig economy" can in some cases undermine the operation of national minimum wage legislation.

In 2015 the government published its response following its consultation on the draft National Minimum Wage (Consolidation) Regulations. A subsequent and wider consultation was at that stage proposed by the government. We broadly welcome the government's drive in this area, as well as the government's proposal for a further review, in particular into practices affecting pay in the so-called "gig economy". Proposals arising out of the government's consultation include:

- Increasing enforcement of the NMW, including more proactive enforcement and increased fines in cases of prosecution and repeat offenders.
- Requiring employers to provide workers with a statement that clearly sets out how the NMW is calculated.
- Addressing issues relating to the fair piece rate option and "bogus self-employed" in the hotel sector.
- We urge the government to undertake further consultation in relation to the NMW, particularly as it affects the so-called "gig economy".

Underpayment of the NMW to "self-employed" workers or other "gig economy" workers is of concern, as highlighted by evidence to this review and elsewhere. We believe that the Low Pay Commission should proactively and with greater focus monitor the so-called "gig economy", in particular in relation to practices in certain industries, such as the hotel industry which has complex supply chains and a high prevalence of agency workers, potentially indicating active circumvention of the NMW. The LPC's role would be especially desirable in cases where it is unrealistic to expect individuals to assert rights so as to highlight unlawful industry-wide practices in the courts or tribunals, for example migrant or student workers.

The trade union, Unite, has reported that some employers have responded to an increase in the NMW by employing more workers under precarious working arrangements, such as zero contract hours and agency work, as a mechanism to, in effect, compensate for increases to the NMW. Sophisticated avoidance strategies can make impracticable or unrealistic Employment Tribunal disputes, hence we believe that the LPC is best placed to gather and analyse industry data, alongside other organisations such as trade unions, LawWorks', Citizens Advice and other stakeholders, with a view to informing government policy and legislation.

Rights and redress

The degree to which a right is effective is self-evidently linked with the ability to enforce it. We believe that following the introduction of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) ("Fees Order 2013") access to justice has been excessively curtailed.

We do recognise that in some respects the Employment Tribunal service was, prior to the introduction of the Fees Order 2013, not fit for purpose in too many cases, leading to frivolous or unmeritorious claims being brought, some of which ran a course through the system, sometimes reaching final hearings. Despite this we believe that a more effective balance can be struck between greater access to the Employment Tribunals on the one hand and greater case management powers to deal with unmeritorious claims on the other hand. The government's reasons for introducing the Fees Order 2013 were said to be to avoid "drawn out disputes" which are "very emotionally damaging for workers and employers, as well as being financially damaging for employers". Whilst we broadly support these aims we believe that tribunal fees should not deter meritorious claims and a greater focus should be placed upon reform of the Employment Tribunal case management powers to address many of the issues raised by the government, rather than an over reliance upon tribunal fees. In short, we believe that the Fees Order 2013 is in some respects operates as the proverbial hammer to a nut.

The reforms to the Employment Tribunal's case management powers following the review of Mr Justice Underhill in 2012 show that changes to the procedures have the ability to address many of the issues identified by the government. Further, the joint MoJ and BEIS review, *Reforming the Employment Tribunal System*, is another

opportunity to address the issues raised by the government.

Employment Tribunal fees

The fees payable under the Fees Order 2013 range from £390 to £1600. Official statistics show that the number of issued claims has fallen in the region of 80%. In January 2017 the Ministry of Justice belatedly published its review of the fees regime, concluding that the regime has broadly worked well, discouraging individuals from bringing claims rather than preventing them. Despite this the MoJ recognises that some action is necessary, including a consultation around fees remission with a view to increasing thresholds.

We believe that this review should go further than the recommendations in the MoJ's review. Indeed, the appeal pending in the Supreme Court arising out of a judicial review of the fees regime brought by Unison in 2014 paints an altogether different picture of the sorts of claims that are no longer brought following the introduction of the Fees Order 2013. Further, in June 2016 the House of Commons Justice Committee reported on, among other things, the Fees Order 2013 ("The Justice Committee Report"). The Justice Committee Report concluded that the introduction of tribunal fees had, contrary to the MoJ's findings, adversely impacted access to justice for meritorious claims.

The Justice Committee Report made a number of proposals, including:

- very substantially reducing the level of fees.
- introducing a more proportionate and sophisticated fee structure, replacing the current Type A and Type B claims.
- simplifying and increasing the financial thresholds for fee remission; and,
- adapting procedures to the special position of women who allege maternity or pregnancy discrimination.

We broadly support the Justice Committee Report's proposals. When re-setting the level of fees or reforming the operation of the remission scheme, we believe that any such reforms should err on the side of caution so as to avoid the unintended consequences identified by the Justice Committee Report of deterring meritorious claims. We believe that proper procedures should be in place once claims have been brought to disincentivise certain claims or claimants, including striking claims out and managing mutually damaging or drawn out claims better.

Information, advice and early redress

We would especially like to see the review take up the issue of the link between advice, rights and redress. LawWorks are involved in a number of Clinic projects aimed at targeted early advice and ensuring that there are easy referral routes between advice agencies and pro bono lawyers and know the value that that this joined up approach has. The following case study for example is taken from one of the referral projects that LawWorks has been involved in.

> Marco, an Italian who speaks no English. He worked in the UK as a self-employed construction worker for a building firm from whom he was seeking outstanding payments of £4,260. After he approached Lambeth Law Centre, he was referred to a volunteer solicitor from DLA Piper who advised him that he was more likely to be an employee than self-employed. The solicitor helped him enter the ACAS early conciliation process (not available to self-employed workers) and Marco subsequently received a payment of £1,300.

However Marco was lucky as many local Citizens Advice and Law Centres don't have the capacity they used to have to deal with employment law problems since the abolition of legal help for employment law issues in 2013. Whilst this was only a small amount of funding - approximately £3 million, it enabled a network of employment rights advisers to operate across the country embedded in the advice sector and local law firms to operate.

Under the Legal Help Scheme public funding for advice and assistance for the preparation of tribunal claims up to, but not including, representation at the Tribunal was available with some 179 legal and advice providers' offices franchised to provide this service, dealing with around 20,000 cases annually. At the same time that funding for employment was abolished many other rights based information and advisory services also faced cuts to specialist help - for example the Equality and Human Rights Commission's casework service and helpline.

Pro bono projects can help to plug some of these gaps, and there is a growing appetite for Law Schools to do more in the space. For example In response to a recent case involving the closure of a steelworks in Middlesborough, the Students at Teesside Law Clinic agreed to assist those employees who were not represented by a union and as such were not represented in Employment Tribunals. 340 employees had been informed they would not be entitled to a 'protective award' as a result of the closure in respect of a failure to consult on redundancies. A meeting was arranged by the clinic at short notice in which students worked all evening gathering information. Students continued to work from 8am-9pm 5 days a week for 2 weeks, in addition to their lectures and seminars. The clinic advanced claims on behalf of approximately 340 ex-employees, eventually submitting an application to the Employment Tribunal resulting in each client receiving £3,600 in respect of the protective award. In total the amount recovered was in excess of £1.2 million. Times were incredibly hard for those affected by the closure and these pay-outs went someway to assisting those affected in having funds to seek alternative employment, start businesses and look forward to a more positive future. The efforts of the students and Law School were recently recognised in pro bono award presented by the Attorney General.

However, we would emphasise that pro bono alone cannot take on the unmet need for employment advice and that there is a case for the restoration of some public funding in this area.

The balance of rights and responsibilities

Do current definitions of employment status need to be updated to reflect new forms of working created by emerging business models, such as on-demand platforms?

The review is interested in whether the current categories of employee, worker and self-employed, operate effectively for those in the gig economy. The problem of employment status is also exacerbated by the complexity of supply chains and almost unlimited tiers of sub-contracting which has become a particular feature of some sectors such as construction. As the BEIS Independent Review of self employment concluded with the self-employed being an incredibly diverse group, covering a wide range of occupations sectors, industries and trade occupations from construction, taxi and cab drivers, own businesses, freelancers and contractors "There is no clear understanding of the employment status within many of these groups."[3] However, Julie Deane who undertook the review did consider that "simplification and clarification of a single definition for tax and employment law is highly desirable," and also suggested in her report ways in which some rights could be aligned such as bringing Maternity Allowance in line with Statutory Maternity Pay.[4]

The Office of Tax simplification also concluded that there needed to be "third way" between employed and self employed status to better reflect the balance of rights and responsibilities for quasi employed freelancers and the people and organisations that they work with.[5] The OTS has

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/529702/ind-16-2-self-employment-review.pdf
[4] ibid
[5] ibid https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537432/OTS_Employment_Status_report_March_2016_u.pdf

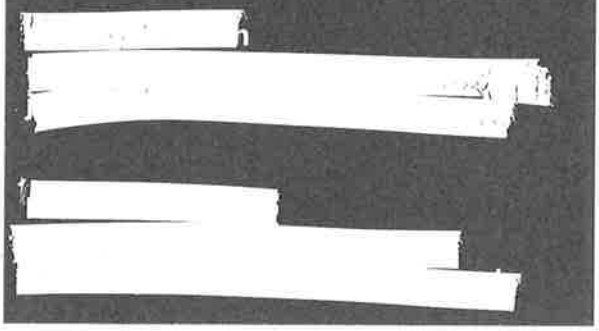
suggested various possible models drawing from other countries employment law regimes, and ways to make it easier for freelancers to be single person limited companies possibly with certain rights attached and a more seamless process for tax administration.

Models - how can government support a diverse ecology of business models

Government has an important role but it cannot do everything. We endorse the conclusions and recommendations of the Select Committee's inquiry which urged Government "to adopt an approach of 'shared regulation", which will require government to work in a more collaborative way and appeal to a range of stakeholders to help establish key tenets and principles of good work in the gig economy. Government may take the lead in distinguishing what good work looks like, but businesses and civil society are crucial in making good work a reality. In truth, government needs platforms, civil society, investors, legislators, and workers themselves to ensure that gig work is actually aligned with its vision of good work. Ultimately, collaboration will enable government to shape the gig economy in a more strategic way than has been achieved so far by taking either a heavy-handed or light-touch approach to regulation. We recommend that government collaborate on a 'Charter for Good Work in the Gig Economy'."[6]

The RSA has also presented ideas around 'shared regulation' as an option for shaping a "sharing economy". Shared regulation is similar to self-regulation in the sense that aims to redistribute regulatory responsibilities to parties other than government, but it goes beyond the inclusion of businesses as key actors in the regulatory framework.

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



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