

SUBMISSION TO THE MODERN EMPLOYMENT REVIEW BY PROFESSOR PATRICIA LEIGHTON

1 Introduction

My submission is based on a large number of empirical research projects, undertaken over the last 40 years which have led to a range of publications. It is hoped they have some relevance for the Review. My background is as an employment lawyer, though I have primarily been an academic. More recently I have moved into consultancy and policy work. I have also worked as a freelancer for many years and currently run a small business.

My interest in the topic of changing work relationships dates mainly from the early 1980s when I undertook projects on employment contracts, employment status and related topics for then Department of Employment, the ILO, the European Commission, various governmental bodies and private sector/not for profit and other bodies. The topics I have covered have included various forms of flexible working, such as job sharing, homeworking/teleworking, agency working and intermediation more generally and more recently the rise in professional self-employment/IPro working. Recently I undertook what is thought to be the first analysis of Ipro working in nine EU states. I have applied both qualitative and quantitative methods, though have tended to focus on organisational and individual issues, rather than mass surveys. A constant theme of my work has been the issue of employment status: Unsurprisingly, my current work is on the implications of the so-called 'gig' and digital economy for employment relationships, especially issues of regulation and accountability.

I work with colleagues in other parts of Europe and with researchers and writers in Australia. I attach a brief overview of my work but am happy to supply more detailed information, perhaps especially on current activities and writings. I do not intend to respond to all the issues raised in the Review as some of them I have little direct knowledge of. I will focus on Qs 1,2 and 3.

However, I would like to state that the whole topic of changing work relationships has for long been a fraught one, not least because it raises some many diverse issue, including those of fiscal policy and practice, employment and labour market and business organisation and, indeed many ethical considerations.. Indeed, it is interesting to observe the controversies stirred by some of the recent changes, such that some operators in the gig economy are facing litigation across the globe and on a wide range regulatory and other issues. What is happening is by no means confined to the UK, the EU or to developed economies, and that is why it is so important.

The second point I would like to make is linked to the first. This is that a lot of discussions, policy-making and law making has taken against a backdrop of limited robust research data, anecdotal evidence at best and sometimes mis information. There is, of course, research data but it has tended to focus a limited range of topics(the 'sham employment' discourse being perhaps the most obvious where we simply do *not* have adequate data on the extent of it and whether people allegedly in a sham are there voluntarily or on an involuntary basis). The paucity of research, coupled with the strength of lobbying and other organisations has meant that assumptions can easily become the orthodoxy. For example, my research, especially interview-based research clearly reveals how the growing numbers of IPros feel adversely affected by assumptions, often voiced by officials, politicians and others that they work as self-employed to avoid tax, and other responsibilities and are driven by unsocial objectives. Where is the evidence for this, beyond anecdotes, and, in any event, lpros, freelancers and others can only within a work environment often dictated by others? Freelancers etc, when interviewed are very clear and consistent about their reasons for being self-employed. It comes down to autonomy, choice, professional commitment and work satisfaction.

2 Question 1 Security, pay and rights

This is a hugely complex area covering income, working conditions more generally, security or lack of it, what happens to people who are ill, pregnant and of, course, the big question of pensions. These are no longer theoretical questions and there are many indicators that there are some major challenges already with us. We have seen the income gaps widen-often between those in high paid, employee jobs, and those in insecure, gig-type jobs. The income of the self-employed generally has reduced and many new imbalances seem to be emerging.

But many employees, too, have long faced reduced protections, especially in terms of pensions. The rise of some forms of HRM has also placed huge pressures on them in terms of working hours and outputs. The incidence of occupational stress, often leading to very high levels of labour turnover in the UK, along with declining productivity has produced further pressures. It is thought that in the gig/digital/robotic economy such matters can only get worse, with growing insecurity, isolation and only the very highly ITC literate gaining in income, possibly along with those working the 'non-robotic areas' like personal care.

The nature and pace of change requires urgent decision-making but this will be very hard. This is not least because the forces of change are global not national and there are many complexities and tensions Although there will still be many, especially young people, who will welcome change and see new opportunities and new careers, other will be alarmed at the replacement of one type of control through demanding HRM policies by control via digital platforms and the like. We can already see this from the UBER literature, including case-law. Of course, the new opportunities will exist, including for self-employment, and we have already

seen some of them, but the issues of pay, security and declining benefits will likely counteract most of that.

What can be done? The UK faces some particular challenges. I partly live and work outside the UK and work regularly with other EU nationals and whereas there job security, continuity and social benefits tend to be given a very high priority we have promoted our 'flexible labour market' which has already impacted on notions of security etc. My thoughts are in no way suggesting we need to try to put the clock back but rather that we need to make some radical changes.

It seems to me that the state has to take a bigger role and we need to stop seeing all regulation as 'red tape'. (Of course some regulation is bad or counter-productive but if the aims are clear, it is clearly drafted, sensibly enforced and not undermined, legislation can be positive). We need to understand the nature and role of regulation and learn from some good examples. (It is possible to argue that the strategy of safety management at the core of H&S legislation is coherent and consistent and understood). Some of our legislation is too detailed, complex and appears to suffer from too many internal compromises (I am struggling with the Equal Pay Reporting Regulations at the moment!). Although social partners are beginning to respond to the changes, their responses tend to be traditional and reactive. As I have said earlier, we cannot put the clock back. But, clearly, they can play a bigger role, find new and effective ways to support workers, especially perhaps in social protections and training. These organisations need encouragement, as they have a role to play.

More generally, it seems to me that a status quo approach is unhelpful. My research into relatively simple changes from the 1980s, such as the growth in part-time work, homeworking and flexi hours was not responded to very well. The 'new' ways of working were simply seen as 'derogations' from normality, which is standard full time work. Management systems remained largely unchanged and legal protections, designed to help, have been only weakly enforced. The changes today are more radical and many have fragmented the labour market but also detached people from one employing organisation. Many today have several jobs, change their patterns of work over time and have had to become more self-reliant. However, they still have some basic needs.

At the heart of the challenges is the fiscal system. It collects revenue (Which is dramatically falling due to some of the work changes) and provides financial protections, eg during sickness, redundancy, maternity etc. Of course, access to these protections has not been universal, with the self-employed being able to access only a few rights and protections. Given the fluidity and unpredictability of the labour market, it seems we need a universal scheme of contributions on the one hand and a more flexible access to benefits on the other. A scheme has to fit a lifetime, a lifetime that is only rarely today as an employee with one employer.

A universal scheme , open to both employees and the self-employed. with, broadly, flat contributions and, possibly, the opportunity to build up credits could provide flexibility in terms of the benefits and protections. Contributions could be topped up, there could be partnerships as is often the case elsewhere ,with private providers. People are realistic and only resent systems if they are thought to be grossly unfair or rip them off. It would be hard to get government departments to work together, but the alternative of letting things drift where more and more have declining and unstable incomes and are unable to access benefits is not an option.

The universality of the scheme would mean the de-coupling of social protections from employment laws with both systems free standing and not interdependent. Employment status could be retained for employment rights-the self-employed do not seem at first sight appropriate for job security rights, but this might be a good matter for debate.

It seems to me the choice facing policy-makers is a stark one. In a situation where more and more appear to be in less stable work and facing declining work conditions due to the business models and practices of companies often based outside the UK, either we regulate them so as to curb some of the practices, or the UK state through a reformed employment, and social protection regime takes on a larger role. A growing number of academics and others are coming, often reluctantly, to this view. The important thing would be to find a way of responding that does not curb/inhibit innovation, creativity and other vital characteristics of a competitive workforce.

3 Question 2 Progression and training.

If the first question is challenging this one is even more so. Clearly, the ways people work are increasingly influenced by technological advances, themselves dependent for effectiveness on the skills of workers. At the same time, if work is becoming more unstable and fragmented, the processes of training and development become more difficult. We learn from the research on self-employment that for them sustaining and enhancing their skills is a major issue. Where the individual belongs to some liberal professions, they receive training and support via their professional body. Indeed, it is often a legal requirement in order to practice. However, where this facility is missing-just how do self-employed people get training? And who funds it? Where the individual rather than a social or professional group becomes the norm, all of these issues become that bit more difficult.

Some have enthused about the possibilities of MOOC, and the opportunities of on-line information and training. Will this be adequate for high skill and creative roles-both of which will be greatly needed? If not, who will fill the gap? In the UK, through direct government policy, universities and colleges impose very high fees. Affording them is hard out of already

taxed income. Can they, therefore, provide the training that will be required? However, we are not just talking about the highly skilled, including the self-employed but what of nurses, engineers and technicians, and others, especially those providing their skills through a digital platform. The challenge is to find sources for not only sustaining skills but developing new ones. There are various estimates of the percentage of the workforce that will need to up- or re-skill by even 2025. We also know from research that intermittent or unreliable work means that people are reluctant to give up work (and money) to undertake training. Recent governments have, indeed, seen the need for investment in training, including through employer levies. If people are separated from individual employers through the gig economy, how can this work?

Of course, some organisations, including professional bodies, umbrella companies, agencies and others, such as co-operatives, co-working bodies are developing support and training structures, but will this be enough in a fragmented labour market?

4 Question 3 Balance of rights and responsibilities

Again, this is a very challenging area, especially at a time when traditional norms relating to ways of working are changing. The first thing to consider is 'rights and responsibilities 'for and to whom'? It has been interesting in the debates over the gig economy that the focus has been on the provider of work and the undertaker of it. But, for example, in the case of driving, other parties are involved, not least other road users and members of the public. This raises the legal ideas of vicarious liability, ie taking responsibility for the conduct of others and it needs legal certainty, not least so that insurance protection can be accessed.

The ideas of vicarious liability evolved during the nineteenth century in the UK. It can be speculated that the motivation of judges and courts was to see imposing liability as one way of ensuring improved safety standards at the workplace and its practices. It seems to me that this approach is relevant for the changing ways of working today. The alternative is to leave potential victims unprotected and no incentive for work providers to improve work standards- and, indeed, invest in training and development. It has to be said, that the law has struggled to respond to new work arrangements, such as secondments and outsourcing when accidents have occurred so the law would need to make major strides to deal with current complexities.

Most of the debates have concerned the rights and responsibilities of the parties to the work relationship. This, in the UK, is dependent on the common law of contract, which many researchers and analysts accept has struggled to find a convincing framework for employment relationships. The law is derived from commercial contexts and the now- developed notions of 'trust and confidence' and 'interdependency' of the employer/employee contract seem often to sit uneasily within traditional contract law rules. Contract law provides only limited

recognition of third parties-hence the problems we have had responding to some of challenges of agency working, umbrella working and other supply chains for work.

It is possible that contract law could be reformed, but unlikely, so that to achieve greater clarity we need to look to regulation. This will need to look at some of the 'ought' questions in terms of risk and responsibility. Is it right, for example, that a person employed through a platform operated from outside the UK, is covered by law drawn from that country or elsewhere and has to resolve any disputes in those national courts?

The potential for disputes in the modern economy is major, but in the UK we have, through the changes to Employment Tribunals and the use of phrases like a 'litigation culture', downplayed the importance of dispute resolution. I know, from my own work, that the incidence of low level disputes, grievances and discontent more generally, runs high in current UK employment. If it is combined with problems in identifying who/what is your employer or client it is likely that matters can get worse, not least in terms of alienation and its impact on productivity.

So; the questions are, where should the responsibilities lie? And what, if anything, should be the role of contracts, which have, it has to be said, been used very effectively to protect work providers in the past. Traditionally, we have seen that we have two employment categories. They are mutually exclusive are defined by contract law. The employee contract requires duties on the part of the work provider towards an employee, for example, to pay, provide a safe work environment, and the employee is required to obey lawful orders, act competently and act in accordance with faithful and honest service. The content of the self-employee contract is not defined by law and is usually the product of ad hoc negotiation. Which category you are in defines you access to employment as well as social rights.

Judges and lawyers have laboured hard for over one hundred and fifty years to find the key to what differentiates the employee from the self-employed. Currently, in the UK we have at least four potential 'tests'. The tests focus on totally different aspects of the relationship-economic risk, Integration, control, so called 'mutuality of obligation'. The last test is the one which has, generally, left gig workers and those is 'casual', 'on call' zero-hours' and similar work arrangements as non-employees, and therefore unable to access core employment law rights. More recently, judges have sometimes taken a more interventionist approach and have stated that their duty is to define the 'employment realities' of the relationships, rather than be bound by complex written and generally binding contracts that enable employers to deny responsibilities by declaring people to be self-employed.

One has to ask, in a context of increasingly complex work relationships and the decline in traditional workplace structures whether the time and effort to differentiate the employee from the self-employed (Or vice versa) is worth the effort. It seems to me that the real divide is

between those who provide work and those who do it. We already have since 1986 the useful statutory category of 'worker' in the UK, ie those who are strictly self-employed but who 'personally execute' work. It is significant that the gig cases that we have had in the UK have focussed on this group-though there may be many reasons for this. The question then is whether the 'worker' protections are adequate, especially for higher earners. If the distinction between employment rights and tax etc is retained, then those who want to keep their autonomy, choice etc are able to do so, at least in terms of how they contribute to the economy in both practical and financial ways. We know that the current self-employed value very much opportunity and appreciate that autonomy also carries with it risks.

What we might be really looking for are 'transportable rights' that will take workers through the various and inevitable changes to their working lives. We have seen EU portable health cards, now the debates over e.cards covering qualifications and experience. We have the technology now to have work cards that can record tax etc contributions, work and other relevant information. Moving in and out of work; working on different bases, reporting qualifications etc could be relatively easily dealt with.

It seems to me that the key question and the one likely to be the most controversial and difficult is the responsibility of the work provider. We have seen how problematic it is to enforce accountability, especially where the work provider, operating directly or indirectly, is a multi-national company or internet platform. This basic issue is both highly topical but urgent. If ways are not found to provide a proper balance between the work provider and the work doer, it is likely that there will be increased social tension and practical problems, leaving people holding governments responsible. Maybe we can see some parallels with EU debates over CETA and other treaty proposals? While the technology advances, the core political, economic, philosophical and legal issues remain and some, at least, need to be urgently addressed, especially, in my view the issues around the balance between the work provider and doer. In this process it will be vital to ensure that innovation and creativity thrive-indeed, they will be needed more than ever. Those who tolerate risk, or, at least some levels of risk need encouragement but also appropriate support.

