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The Business, Energy and Industrial Strategy Committee Inquiry into the Future World of Work and Rights of Workers

Response from the Employment Lawyers Association

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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 David Widdowson and Catrina Smith was set up by the Legislative and Policy Committee of ELA to consider and comment on the Inquiry launched by the Department for Business, Energy, Innovation and Skills (BEIS) into the future world of work and rights of workers. This document responds to that inquiry and offers some comparative views of the status and rights or workers in other jurisdictions as models for consideration in any proposal to reform. A list of the sub-committee can be found at the end of this paper.

This response broadly follows the eight questions posed by BEIS. To an extent these overlap but their overall scope is very wide, involving examination of areas where, at least at present, EU law interacts with domestic law and also common law originating in the old law of master and servant which continues to define boundaries between workers who have protections and owe obligations and those who do not. The present uncertainties over our relationship with the EU mean that any radical reform of employment status and the rights and obligations that attach to that may be premature. The impact of technology on commerce and of globalization has increased the perceived need by employers for greater flexibility in the workforce and the challenge is to achieve a system which does not restrict that flexibility but which at the same time offers a level of support and protection to those who provide their services to it that is appropriate, effective and, at least for the moment, compliant with our international obligations. Our comments which follow are made against that background

QUESTION 1

Is the term 'worker' defined sufficiently clearly in law at present? If not, how should it be defined?

What should be the status and rights of agency workers, casual workers, and the self-employed (including those working in the 'gig economy'), for the purposes of tax, benefits and employment law?

Summary

Employment law typically defines three broad tiers of individuals providing work in the UK: (i) 'employees', (ii) 'workers' and (iii) 'self-employed'. However, the 'worker' tier is not widely understood by the public. Determining the line between employees, workers and the self-employed can be difficult and distinguishing

between the worker tier and the two other tiers can be very challenging as is illustrated by the regular referring of disputes on status to the appellate courts for rulings. Distinctions within the various tiers – for example "zero hours contract workers" - also complicate matters further.

Having a worker tier may have advantages including arguably better reflecting economic trends in work such as the gig economy where a traditional "employment" model may suit neither the individual nor the hirer of their labour but the law (i) could be simplified to make it easier to determine the status of any individual, particularly those in non-standard employment; and (ii) strengthened to ensure that the non-employment model works for the benefit of both the individual and the hirer.

As an alternative the law should provide a "floor" of rights for all those engaging in work of any kind and we would suggest that as rights for those who work are increased commensurate with their status, so do their responsibilities.

Classifications of working status

In order to answer question 1, we feel it would benefit the Inquiry to explain the legal distinctions relating to any individual who provides work in the UK and how an individual's status is defined ("**Working Status**").

There are broadly three tiers of Working Status in the UK: (i) 'employee', (ii) 'worker' and (iii) 'self-employed'. However, for the purposes of employment law these broad categories cover at least 15 distinct classifications of individual (the **Classifications**):

1. 'Employee'.[1]
2. 'Employee shareholder'.[2]
3. 'Employee', for the purposes of protection from discrimination.[3]
4. 'Non-executive director'.[4]
5. 'Worker'.[5]
6. 'Fixed-term worker'.[6]
7. 'Part-time worker'.[7]
8. 'Agency worker'. [8]
9. 'Worker',[9] for the purposes of whistleblowing protection (including Limited Liability Partnership members, who may otherwise be regarded as a self-employed contractor).[10]

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1 Section 230, Employment Rights Act 1996 (the "**ERA**").

2 Section 205A, ERA though now abolished.

3 Section 83(2), Equality Act 2010 (the "**EqA"**).

4 No statutory definition.

5 Section 230(3), ERA.)

6 Regulation 1(2), Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 can be employees and workers.

7 Regulation 2(2), The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 can be employees and workers.

8 Regulation 3(1), Agency Workers Regulations 2010.

9 Section 43K, ERA.

10 *Clyde & Co LLP v Bates van Winkelhof [2014] UKSC 32*

10. ‘Contract worker’, for the purposes of discrimination protection.[11]
11. ‘Self-employed contractor’.[12]
12. ‘Self-employed contractor’, operating via a limited company.[13]
13. ‘Self-employed contractor’, operating via an umbrella company.[14]
14. ‘Office holders’.[15]
15. ‘Volunteer’.[16]

This list is not necessarily exhaustive and, indeed there have been cases where the arrangement was described as *sui generis e.g Construction Industry Training Board v Labour Force Limited [1970] 3 All ER 220)*. It is possible to categorise the Classifications in other ways.

Are the definitions of the Classifications clear?

The following issues arise regarding the definitions of each Classification:

- Definitions can be unclear or lacking specificity. For example:
    - An ‘employee’ is self-referentially defined in the ERA as “an individual who has entered into or works under… a contract of employment”.[17] The brevity in the statutory definition has generated a significant amount of case law.
    - Statutory definitions of a worker vary slightly but the most often relied on is the following definition in the ERA "an individual who has entered into or works under…any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contact 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…"[18] While this definition is more specific than the statutory definition of an employee, it can be very difficult to draw a line between the two definitions.
- Definitions can overlap. For example:
    - An ‘employee’ is also a ‘worker’.[19]
    - An ‘agency worker’ must be an ‘employee’ or ‘worker’ of the temporary work agency.

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11 Section 41(5), EqA.
12 No statutory definition.
13 No statutory definition.
14 No statutory definition.
15 The Supreme Court has defined an office as "a position of a public nature, filled by successive incumbents, whose duties were defined not by agreement but by law or by the rules of the institution”. See *President of the Methodist Conference v Preston [2013] UKSC 29.*
16 No statutory definition.
17 Section 230, ERA.
18 Section 230(3)(b) ERA
19 Section 230, ERA.

- A 'worker' under legislation relating to whistleblowing[20] can be 'self-employed'.

- Determining Working Status is a fact sensitive matter which often involves a multi-factorial test. For example, the courts have set out guidance (which has changed over the years) for determining if an individual is an 'employee', but have been unable to identify any single factor that determines the issue.[21]

- Definitions can vary across the statues. For example, an 'employee' for the purposes of maternity pay[22] is more widely defined than 'employee' for other employment rights,[23] meaning that an individual who is a 'worker' may also be an 'employee' for certain purposes.

- Whilst there are three tiers of Working Status for employment law purposes, there are only two tiers for tax purposes. Tier 2 'workers' could be employed or self employed for tax purposes. Employment law and tax law are also not always aligned with regards to the Classifications. Although the principles applied are broadly the same, an individual can be classified as one thing under employment law and another under tax law.[24]

- Individuals can have different employers for different purposes in relation to, for example, vicarious liability. As a result, employers can be held vicariously liable for the acts of not just their employees, but in some cases people who are employed by or work for another.[25]

It is, we think, useful to understand that some of the complexities in Working Status arise from the fact that the European Court of Justice has held in various cases that EU employment rights must be extended to include those who are not necessarily regarded as employees under the laws of their member state. Brexit will not necessarily result in the UK Parliament being able to (or wishing to) revoke the concept of worker from UK law. But there may be more legislative freedom to reform Working Status and employment rights, after Brexit occurs.

Classifying standard and non-standard employment

In practice, difficulties in classification arise most commonly when an individual does not have standard employment. By 'standard employment' we mean a job which the employer and the individual agree that they are in an employment relationship. Non-standard employment is increasingly common particularly given emerging economic trends such as the gig economy.

The courts, employment/tax tribunals and HMRC are the only bodies with the power to determine any individual's Working Status and, as noted above, these bodies may classify an individual's Working Status differently.

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20 Section 43K, ERA.

21 A leading authority being *Ready-Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497.*

22 Section 171(1), Social Security Contributions and Benefits Act 1992.

23 For example, section 230, ERA.

24 We do not go into detail in this response on this issue given that the Office of Tax Simplification has addressed this issue: https://www.gov.uk/government/news/proposals-to-simplify-tax-complexities-of-employment-status-published

25 For example: *Hawley v Luminar Leisure Ltd and others [2006] IRLR 817*.

Non-standard employment is an evolving concept. This may reflect attempts by employers to structure working relationships differently to avoid regulation or may reflect changing generational aspirations and requirements to life and work or both. At this time, we can broadly squeeze most working arrangements into one of the above categories but as new types of non standard work evolve this may become more challenging.

Why is this important?

The purpose of the above is to demonstrate to this Inquiry that the legal definition of an individual's Working Status can be difficult to determine. Lawyers struggle to apply these definitions with certainty. It is surely beyond doubt that most businesses and individuals struggle to define Working Status, especially with regards to non-standard work.

The first part of our answer to this question is that Working Status could be simplified and made easier to understand. However, while it is easy to see why such simplification would be beneficial in providing greater certainty for individuals and businesses, it may not be easy to achieve given the vast array of (constantly evolving) work situations that need to be covered by Working Status definitions. For as long as differing rights apply to each category it is to be expected that some employers will seek to structure relationships so that those who work for them enjoy the fewest rights possible.

The rights of individuals not in standard employment

There is a distinction between the Classifications of those (i) near the top of the list above, who are entitled to common law and statutory rights and (ii) near the bottom of the list, who are, in some cases not afforded any such rights. The flip side to this is that those towards the bottom of the list may owe fewer obligations to their 'employer' and may benefit from the ability to lower their tax obligations by taking advantage of allowances and concessions. This Inquiry asks what status and rights should be afforded to individuals who are broadly 'workers' or 'self-employed' – ie Classifications 5 to 13 above.

For simplicity, we shall refer from here onwards to only the three broad tiers of Working Status ('employee', 'worker' and 'self-employed') (the "**Tiers**").

In very high level terms, the rights attributed to each Tier can be understood as follows:

- "**Tier 1**" is 'Employees'. They have the same rights as workers (below) plus rights relating to: unfair dismissal, redundancy pay, statutory notice and family-friendly leave and to collective consultation either on a general level or with respect to particular topics e.g. collective redundancy. They also have a variety of implied obligations to their employer established through common law – for example the duties of loyalty and to obey lawful and reasonable orders,

- "**Tier 2**" is 'workers'. They have the same rights as self-employed individuals (below) plus working time rights (rest breaks, holidays), the National Minimum/Living Wage, protection from unauthorised deductions from wages, certain pensions rights, protection from detriments relating to discrimination and whistleblowing and the right to statutory trade union recognition.

- "**Tier 3**" is 'self-employed' contractors. They have no rights from their 'employer' other than regarding health and safety in the workplace, data protection, limited discrimination and whistleblowing protection and any specific rights arising in their personal contract with the employer.

Conclusions

Our views are as follows:

- The position might be taken that there is an argument for essentially preserving the current position that individuals in different Tiers should have different employment rights. It is our experience that some self-employed individuals in the Tier 3 actively desire that status and do not wish to have the same obligations, as Tier 1 employees or Tier 2 workers have, towards their 'employer'. An example would be someone who is a genuine free-lancer who does not want to have the obligation to work set hours – he or she simply wants to get the job done. As part of such an arrangement, a number of items such as specialist clothing, travel to work etc can be set off against tax as part of that individual's cost of doing business – items which an employee would pay for out of taxed income. In a properly enforced model of employment law, it could be argued that individuals who have better employment rights should owe more obligations to their employer and have a different tax regime, when compared to those individuals that have fewer employment rights but reduced obligations to their 'employer' and a tax arrangements which reflects their status. We stress the point that this model is only justified where an individual can easily, cheaply and quickly enforce his/her rights and also where the State will intervene to prevent tax evasion.

- Under this model the Tiers reflect the different types of Working Status that exist in the working world: (i) those that are in an employment relationship with mutual obligations to each other and aligned commercial interests, (ii) those that are neither employed nor self-employed, but require some minimum standard protections and rights to prevent exploitation and (iii) those that are self-employed, in business for themselves.

- It may be well argued that the reality of the working world is that there should be a Tier 2, whatever it is labelled, which sits between the Tier 1 and Tier 3 as a 'middle' type of work between (i) a relationship of employment and (ii) a relationship of self-employed contractor and client and that a worker in such a position receives minimum protections in relation to working time and unlawful deductions from wages, minimum pay, minimum pension rights and freedom from unlawful treatment related to discrimination and/or whistleblowing together with rights derived from the four ILO principles set out below and a safe place of work

- Legal distinctions within a Tier can create complexity. If the law could be simplified so that there were three amended, easier to understand, and clearly delineated Tiers, this could be an effective model of law for all stakeholders. However, given the constantly evolving nature of work achieving such simplification could be very challenging.

- We do not think the policy grounds are clear as to why some self-employed contractors or office holders should not benefit from protection from detriments relating to discrimination and/or whistleblowing, in the same way that workers (and employees) benefit from such protection. One could argue the law denies individuals important rights due to legal technicalities, which undermines the public policy behind these rights. If the Tier model is perceived to be the correct policy direction then we recommend that each Tier has a unified set of rights relating to anti-discrimination and protection regarding whistleblowing. Ideally, all Tiers would bestow the same protection on individuals. In terms of what could be regarded as a benchmark or "floor" of rights for those agreeing to carry out work for others, the International Labour Organisation's four Fundamental Principles and Rights at Work are:

- businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining. As noted above, the statutory trade union recognition process covers "workers" but the works council/consultation legislation is aimed just at employees e.g. the Information and Consultation of Employee Regulations 2004;

- the elimination of all forms of forced and compulsory labour

- abolition of child labour

- elimination of discrimination in respect of employment and occupation.

Again, as an irreducible minimum, a safe system and place of work should also be key. The Health and Safety at Work Act 1974, despite its age, is generally regarded as doing a good job in this area as section 4 of that Act refers not just to "employees" but also covers anyone who uses premises "as a place of work".

- As we have explained above, it is our experience that most members of the public are not aware of the distinctions between 'employee', 'worker' and 'self-employed'. We think more could be done to "brand" the Tiers in such a way that it was more obvious what they mean. Most people understand the concept of employee and self-employment, but we wonder if re-labelling 'worker' as, say, a 'limited employee' or a 'protected contractor' might make it more clear to the public.

- These proposals depend on individuals within each of the three Tiers being able to enforce their rights. Subject to limited exceptions, an individual currently has to pursue their rights in a court or tribunal, involving an often disproportionate cost compared to the benefits a change in status might bring. It is not the place of this working party to re-open the debate about court/tribunal fees and access to justice. However, our view is that a decision about a change to workers' rights will only be fully informed if that decision is taken in cognizance of the cost to any individual in enforcing rights derived from their Working Status.

- A second option could be to simplify Working Status by conflating Tiers 1 and 2. The result would be that there was a broadly binary distinction in the labour market between a new super-Tier of 'employed' individuals, on the one hand, and the remaining Tier 3 of 'self-employed' individuals, on the other. We expect that workers' rights and obligations (Tier 2) would have to be extended (rather than employees' rights in Tier 1 being lowered), to bring these categories together as one, because of the prospect of reducing employees' rights being challenged as a breach of EU law and/or the political ramifications of removing decades worth of accumulated employees' rights. Overall, we see the force in the argument that there could and should be a better balance between the rights and obligations of employers and those who provide their labour as some workers can find themselves in a situation in which they are not really in a position to take advantage of worker status as the benefits of it e.g. flexibility work almost entirely in favour of the employer rather than it being a feature of the engagement which genuinely suits both parties.

  If workers' rights (Tier 2) are raised to that of employees (Tier 1), workers would gain a number of new benefits including:

  - Unfair dismissal protection (after two years' continuous service).

  - Redundancy pay (after two years' continuous service).

- Statutory minimum notice periods.
- Family rights such as maternity leave.

However, when considering any increase to worker's statutory rights, one should balance (i) the flexibility in working patterns which a current 'worker' would lose (ii) the potential that a current 'worker' would thereby owe their 'employer' new obligations such as the duty of fidelity (the duty not to compete), trust and confidence and the requirement to be available for work, (iii) the potential increase in taxation for current 'workers' and (iv) the adverse cost to business.

This is something of a radical solution and would probably need primary codifying legislation, not only to bring the existing category of "worker" within the statutory rights available to employees, but also to make clear the extent to which existing implied rights in contracts of employment (both in favour of employer and employee) will be part of this merged status. That would also be an opportunity to end the undesirable differing approach of HMRC to the issue of status. Whether this is a wise course of action at a time when the future relationship between the UK and the EU is so uncertain must be open to serious question.

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International comparison

The UK is one of only a few jurisdictions that recognise a tier of Working Status in between "employee" and "self-employed". Other examples of jurisdictions that do so include:

- **Austria**, which has a category of 'economically dependent workers'. These are individuals who (i) perform work or provide services on another party's behalf without having entered into an employment contract, and (ii) are economically dependent on the arrangement in place. 'Economically dependent workers' benefit from a limited number of labour law provisions, such as work place health and safety and protection from discrimination. However, unlike 'workers' in the UK, 'economically dependent workers' are not entitled to receive paid holidays or sickness benefits.

- **Germany**, which has a category of 'employee-like persons'. These are individuals who are economically dependent on another party, but who are not personally dependent or subordinated. 'Employee-like persons' receive limited employment rights and legal protection, including annual leave and protection from discrimination.

- **Australia,** which has three different tiers of Working Status: (i) 'national system employee', (ii) 'employee', and (iii) 'self-employed'. Whilst 'national system employees' are entitled to the full range of employment rights and legal protections, 'employees' benefit from a limited number of these provisions, such as holiday entitlement, sickness benefits, minimum wage and pension benefits.

For those jurisdictions who do not have a middle tier of Working Status (including, for example, **Singapore** and **South Africa**), various practices apply in determining whether or not an individual is truly 'self-employed', or whether they are in fact an 'employee'. In some countries like the **Netherlands** and **Spain** there is a statutory presumption in favour of an employment relationship existing and an employer is required to produce evidence to rebut the presumption. In **Ireland**, a Code of Practice ("the Code") for determining employment or self-employment status was introduced. Where there is uncertainty about whether an individual is 'self-employed' or an 'employee', the individual can contact the Local Tax Office or

SCOPE (Section of the Department of Social and Family Affairs) who will determine the individual's status. However, the Code is not binding and the courts and tribunals in Ireland still frequently have to determine an individual's status as they have ultimate authority on the matter. In the **United States of America** individuals can bring a claim before the courts or alternatively make a complaint to the Department of Labor (or relevant state body such as the Division of Labor Standards Enforcement in California) if they believe that they have been misclassified by their 'employer'. The Department of Labor can perform audits and issue fines where it discovers organisations have been misclassifying individuals.

It is clear that disputes about Working Status arise in jurisdictions regardless of whether they have a two tier ('employee' and 'self employed') system or a three tier system like the UK. Where there is a middle tier of Worker Status between 'employee' and 'self employed' it arguably better reflects economic trends in work such as the gig economy. In this regard it is telling that there is a growing movement in the **United States of America** (which as noted above currently only has two tiers of Working Status: 'employee' and 'self employed') of lobbying the legislatures to create a new category of worker with limited employment benefits and rights, referred to as "gig workers".

QUESTION 2.

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

Workers generally

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..

The responses to the last government's consultation on zero hours contracts reveals a polarized approach to this issue. On the one hand, trade unions report widespread exploitation of workers where employers have excessive ability to arrange hours of work with short notice changes.

On the other hand there is a body of such workers who positively seek a working relationship of this nature and who desire the ability to work when they wish without any subsisting obligation to an employer. Those expressed strong opposition to, for example, the suggestion that zero hours contracts should be outlawed.

The principal difficulty in responding to this question is as illustrated above the enormous breadth and variety of agencies/casual/zero-hours and self-employment arrangements in use in the UK economy. Comment in relation to the lower paid or "bottom end" of that bracket may therefore have limited or no application to higher paid people at the top of it, and vice versa. Similarly, some self-employed people work regular hours for only one client for extended periods and yet their legal position is not necessarily different from someone who provides expert services to a whole portfolio of clients as demand his/her whim or need to work allows. These are at the extremes, obviously very different factual scenarios, potentially suggesting very different answers to this question. In this answer and 4 below, "employer" is used as denoting the beneficiary of the services and not in the sense of legal employer.

At the bottom end of the gig economy market - where the worker is spending his/her time working exclusively for one employer over an extended period - there may well be an imbalance in favour of the employer. Employers have what might in some cases be excessive flexibility to re-arrange hours of work at short notice, even where there is predictable demand for services, minimum staff levels for regulatory purposes, etc. Such workers usually have the theoretical right (by contract at least) to refuse work should

it not suit them and to take leave when they want. However, there are, in our experience, often tensions between what the contract says and what the reality is.

Responses to the Government consultation on zero hours contract workers showed a fear amongst a number of zero hours contract workers that if they do not accept work pattern changes or “rock the boat” in other ways they will be penalised in the hours allocated the following week or month. Anecdotally at least the same may be true in the agency worker world. No doubt by contrast there are many businesses where worker rights are fully respected and holidays can be requested or complaints made without that fear. This is clearly an area where exploitation may arise but, save in respect of exclusivity clauses, the Government has so far chosen not to provide any wider rights to redress where workers are penalised in these circumstances. This may be an area which it might choose to review.

This feeling extends to a fear about commenting on or complaining about other aspects of their job. For example, Citizens Advice Bureaux apparently report that agency and zero hours contract workers struggle to get paid holidays and fear raising it or going to an Employment Tribunal, with or without fees. Protections for whistle-blowers already exist, which would cover agency workers, casuals and zero-hours employees. Those fears are not limited to those works but afflict regular employees also. This is not therefore a factor which separates "gig economy" workers as a discrete group from regular employees at similar levels in the business to any material extent. That does not make it right that such fears may exist, but it would be wrong to use them as part of any case for change in the law here.

Other areas where there is arguably an imbalance of power is cost shifting to the worker of various regulatory requirements. Agency or zero hours workers they may have to pay their own registration fees to statutory bodies and pay for Disclosure and Barring Service (DBS) referrals plus their own training (continuous professional development) to retain competency for professional registration. This may be a valid point, at least morally, where the worker is expecting to be with the same employer for the duration of the certificate/qualification/registration. But if he is not, or if the benefit of the expenditure is spread over his work for several different employers, it seems unfair to make any one of them pay for something which is either partly or entirely not for its benefit.

At certain levels, therefore, within the gig economy population, the employer seems to enjoy all the advantages and the worker bears the risk, without any commensurate premium pay or allowance as compensation. However, it cannot be argued that this is true across the board. Some workers work on this basis specifically because it suits them to do so e.g. to balance with other interests or careers or as part of a “wind-down” to retirement. They may gain tax/NI advantages, make use of the time and work flexibility of genuine self-employment, work at a rate which suits them, have the ability to send a stand-in in some cases and have greater latitude as to exactly how they provide their services. Not everyone wants the controls and restrictions which come with being an employee or worker. So it is not possible to form an objective view of the rightness of the "balance" because it will be in different places for different people, at different times.

The solution to this is not easy to formulate both because of the differing views outlined above and that of definition. One step that has been taken is render unenforceable exclusivity clauses in zero hours contracts. While perhaps a reasonable and appropriate step for many such relationships it does little to address the trade unions’ wider concerns and, in terms of definition, easily avoided by an employer by committing to a very small number of guaranteed hours. If the perception is that further protective action is necessary, one approach could be for there to be a floor of rights available to certain defined categories of worker with the possibility of an opt out for those who are not concerned about their terms and are happy to negotiate these individually. A further variation on this might be for employers to be obliged to make an end of service payment to those who do opt-out – a system used in some US states and also in Saudi Arabia.

<u>Agency Workers</u>

Agency workers, perhaps with more justification than other atypical workers such as those on annualised or zero hours contracts, can arguably be regarded as having agreed to be available at relatively short notice to meet the fluctuations in demand typical of gig economy work, accepting that there may not be the security of permanent employment. Individuals may use agency work as a source of income while looking for permanent employment or may prefer the flexibility of short-term assignments for personal reasons (e.g. students working between terms). As such, while they have little or no recourse if an end-user chooses to cease using them (save for the protection afforded to contract workers under the Equality Act 2010), this could be said to be inherent in the nature of the working arrangement and not inappropriate in itself. Likewise, if they choose to leave, neither the end-user nor the agency is likely to have legal recourse against them. It should be noted, however, that this flexibility also leaves agency workers vulnerable to income fluctuation, as it is relatively unusual for them to be paid by the employment business between temporary work assignments (e.g. see research conducted by BIS in 2014 among Recruitment Employment Confederation Members https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/386340/bis-14-1257-agency-workers-research.pdf). According to the Resolution Foundation's report "Secret Agents: agency workers in the new world of work" (December 2016) a full-time agency worker earns roughly £430 a year less than their full time permanent employee counterpart.

The Agency Worker Regulations 2010 (AWR) were intended to provide some limited additional legal protection for agency workers (particularly as regards pay parity with permanent employees after 12 weeks). There are few reported cases concerning the AWR, although it is unclear whether this is due to a high level of compliance, low awareness of rights or the impact of the introduction of Employment Tribunal fees on what are likely to be low-value claims. However, the EAT's decision in Moran and others v Ideal Cleaning Services Ltd and another (UKEAT/0274/13) leaves a significant gap in protection in that long-term agency workers (particularly those without a definite end-date) may not be covered by the AWR at all. As a result, an end-user may enjoy the commercial and organisational benefit of having a long-serving worker without that individual having protection against unfair dismissal unless they can establish employee status (which in most cases is unlikely, following the judgment of the Court of Appeal in James v London Borough of Greenwich [2008] EWCA Civ 35*)* or enjoying the more limited protection offered by the AWR. In such cases, the balance of benefits is obviously more uneven. It may therefore be worth considering how this balance could be redressed for longer-term agency workers. One option for reform is to revisit the drafting of the AWR to address the specific issue raised in Moran. Alternatively, a more interventionist approach would be to introduce restrictions on the use of agency workers over extended periods or guarantee them enhanced rights after a certain period of working for one end-user (e.g. a minimum period of notice of termination of an assignment/the right to a payment similar to a statutory redundancy payment) after an assignment has lasted a certain length of time, similar to the 4-year rule under the Fixed Term Employees Regulations 2002).

QUESTION 3.

What specific provision should there be for the protection and support of agency workers and those who are not employees? Who should be responsible for such provision – the Government, the beneficiary of the work, a mutual, the individual themselves?

The status of agency workers and the protections available to them has been a difficult issue for a considerable period of time. For instance, the case of Construction Industry Training Board v Labour Force [1970] 3 All ER 220, which considered whether or not agency workers were employees, is a case from 1970. As such, agency workers have generated some of the most useful case law relating to worker status and it is instructive to examine that case law in order properly to understand the challenges facing workers in the gig economy. Agency workers have long been seen to be the epitome of the flexible

workforce. The colloquial term for them, 'temps', illustrates that they are generally workers who fulfil a specific, short term, need and move on. It is often argued that this suits the agency worker, who is reluctant to commit to a long term relationship with an employer due to their personal circumstances; it also benefits the employer who has no need to recruit a permanent (or fixed term) employee. However, as Elias P (speaking as the then President of the Employment Appeals Tribunal in James v Greenwich Council [2007] IRLR 168) said:

> *"many agency workers are highly vulnerable and need to be protected from the abuse of economic power by the end users. The common law can only tinker with the problem on the margins. That is not to say that all agency relationships simply have as their objective to defeat the rights of the workers. There are obvious benefits in flexibility for employers in hiring agency staff, and many employees, particularly those with specialist skills, may also benefit from the flexibility as well as giving tax and fiscal advantages. A careful analysis of both the problems and the solutions, with legislative protection where necessary, is urgently required."*

He made this comment in 2006. We therefore welcome the opportunity to contribute to this debate.

Agency workers differ from other categories of workers in that their working relationship inevitably involves a tripartite relationship. Much of the litigation relating to them concerns whether the worker is employed (either strictly under a contract of service, or more loosely under a contract for services) by either the employment agency (or recruitment business, in the language of the Conduct of Employment Agencies and Employment Business Regulations 2003) and/or the end user (the hirer), or neither. Case law has shown that riding two horses does not double the chances of an agency worker finding legal protection, rather it appears to halve them. The agency worker is often left without a remedy.

Current protections

The Agency Workers Directive sought to provide agency workers with a degree of protection. However, the effectiveness of the Agency Worker Regulations 2010 is questionable, not least for the reasons set out in our response to question 2. We are aware that the Regulations are unpopular with the recruitment industry, hirers and some agency workers, who consider that their flexibility has been curtailed.

We further note the protections afforded by the Gangmasters (Licensing) Act 2004.

We consider that the more significant root causes of vulnerability in relation to agency workers lie in their fundamental status within the existing legislative and common law employment framework. The main areas in which agency workers are not provided with the same rights as others performing the same tasks are as follows:

Rights as employee

Certain rights, such as unfair dismissal, are only afforded to employees (i.e. those working under a contract of service). Case law has demonstrated that it is very difficult for an agency worker to establish employment status with the hirer, even if they have worked for that hirer for a considerable period of time. This is mainly because no contract usually exists between the worker and the hirer. Their contract is usually with the agency, and the agency will contract with the hirer. Whether a contract of service can be implied with the hirer depends on whether the agency relationship is somehow defective and also whether it is *necessary* to imply a contractual relationship. This is a high test, and is rarely met. It is not

sufficient merely to demonstrate that an employment relationship would be consistent with the way in which the agency worker works for the hirer.

It is also often difficult for agency workers to establish an employment relationship with the agency in the absence of an express contract of service. The agency tends not to exert sufficient control over the worker, and it is also difficult to demonstrate that there is any mutuality of obligation in circumstances where no guarantee of work is given. Both of these are elements which the courts consistently view as required for there to be an employment relationship.

While this has perhaps changed in recent years, due to the introduction of the so-called Swedish derogation in the Agency Worker Regulations 2010, the rights of the agency worker are still limited. For example, in the recent case of Sandle v Adecco UK Ltd UKEAT/0028/16/JOJ, the worker's two year assignment with the hirer was terminated, and the worker was not offered any other work by the agency. However, the worker's claim for unfair dismissal failed, as it was held that in the absence of an express dismissal by the agency, the worker was unable to show that they had been dismissed at all. While they could have technically claimed constructive unfair dismissal, they failed to do so.

We are not convinced that an agency worker should be given employment status purely on the length of time they work for a hirer. However, we consider that it may be appropriate for the test of whether a contract of service to be relaxed in circumstances where the worker has provided services under the effective control of the hirer for an extended period (say, two years), the worker is integrated into the business of the hirer and is presented as an employee by the hirer, and the agency acts merely as a payroll agent.

Discrimination

Agency workers are protected from discrimination in relation to the agency, either as employees of the agency, or under section 55 of the Equality Act 2010. They can also claim against an end user as a contract worker, providing they are 'employed' by the agency (either as an employee or as a worker). However, if they cannot show that they were employed by the agency, they will be unprotected, as happened in the case of Muschett v HM Prison Service [2010] EWCA Civ 25. In that case, Mr Muschett was found by the Employment Tribunal not to have been employed by the agency, as the relationship lacked mutuality of obligation. While this may have been incorrectly decided (some doubt on the analysis of the Tribunal was expressed by the Employment Appeal Tribunal and the Court of Appeal, but the point does not appear to have been expressly appealed), agency workers who provide their services through a personal service company will also not be protected, as there would be no obligation to perform services personally to the agency (Marston v Robert Half Limited & anor (unreported, case number 2700532/2015)). We consider that this represents a lacuna in the law, and suggest a solution in the section relating to whistleblowing below.

Statutory sick pay, maternity pay, paternity pay and shared parental pay

Agency workers will be entitled to the above categories of statutory pay, providing they are an employed earner for NIC purposes (and they satisfy the relevant qualifying criteria, unrelated to their status as agency workers).

National Minimum Wage & Working Time

Agency workers are specifically protected by the legislation relating to minimum wage and working time. The legislation ignores the contractual relationship, and instead focusses on the person responsible for paying the worker. If the worker provides his or her services through a personal services company, therefore, they may lose the protections. We would anticipate, however, that those workers sufficiently sophisticated to have set up their own company may be earning more than the minimum wage in any event (but may face difficulties in relation to enforcing rights under working time legislation).

Pensions auto enrolment

Agency workers count as jobholders, so the person responsible for paying the agency worker must automatically enrol them in a pension scheme.

Whistleblowing

The provisions relating to whistleblowing protection specifically extend to agency workers. They are wider than the equivalent provisions under the Equality Act 2010, as they do not require the worker to establish worker status under the normal rules with either the agency or the hirer. This is a departure from normal principles, under which the Equality Act 2010 and the whistleblowing provisions of the Employment Rights Act 1996 are usually seen as being aligned (see, for example, Virgo Fidelis Senior School v Boyle (2004) IRLR 268). Nor do the whistleblowing provisions determine the protection by reference to the person responsible for paying the worker. Instead, section 43K(1)(a) of the Employment Rights Act 1996 focuses on the person or persons responsible for determining the *'terms on which [the worker] is or was engaged to do the work'*. This allowed an agency worker who provided services through their personal services company to claim protection in Croke v Hydro Aluminium Worcester Ltd UKEAT/0238/05/ZT. The principle was tested in the recent case of McTigue v University Hospital Bristol NHS Foundation Trust [2016] UKEAT/0354/15, where the respondent sought to argue that, as it had not been substantially responsible for determining the terms of work, it should not be liable. However, the Employment Appeal Tribunal gave some very helpful guidance to establish whether liability should attach to a party. We set out the guidance here in full, as it could be of real significance when considering how, if at all, the protections to agency workers and other workers in the gig economy may be extended: it suggests another way of approaching the issue of whether someone is self employed or a worker and resolves the difficulties presented in the wording of the Equality Act 2010:

> *"(a) For whom does or did the individual work?*
>
> *(b) Is the individual a worker as defined by s.230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on s.43K in relation to that person. However, the fact that the individual is a s.230(3) worker in relation to one person does not prevent the individual from relying on s.43K in relation to another person, the respondent, for whom the individual also works.*
>
> *(c) If the individual is not a s.230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?*
>
> *(d) If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within s.43K(1)(a).*

(e) If not, were the terms substantially determined (i) by the person for whom the individual works or (ii) by a third person or (iii) by both of them? If any of these is satisfied, the individual does fall within the subsection.

(f) In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.

(g) There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered.

(h) In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

(i) If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within s.43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under s. 43K(2)(a) ERA 1996."

We consider that this formulation, based to an extent on control and benefit, may be the appropriate way of determining rights for agency workers in most situations where they would otherwise fail the 'worker' test due to their unique contractual position in the tripartite relationship with hirer and agency.

QUESTION 4.

What differences should there be between levels of Government support for the self-employed and for employees, for example over statutory sick pay, holiday pay, employee pensions, maternity pay? Should those rights be changed, to ensure fair protection for workers at work? What help should be offered in preparing those people who become self-employed (with, for example, financial, educational and legal advice), and who should be offering such help?

The category of "self-employed" workers is, as noted above, divided broadly into those who are happy with and actively choose this status and then those for whom it is not a freely made choice but one that is imposed by an employer as a condition of engagement and where no alternative is available or offered. As a result there may be workers, particularly at the lower end of the pay scale who would like, for example, their employer to pay more National Insurance for greater access to state benefits. Our members report some rogue employers who are encouraging bogus self- employment amongst workers who are on their premises working and under their direction for long periods of time. Equally, we see evidence of individuals who would otherwise be workers/employees asserting that they are self-employed and refusing engagement other than on the basis of self-employment. This is common, for example, in the oil and gas industry. This lowers the National Insurance outlay for both parties and reduces worker employment rights although it is fair to say that it increases their disposable income in return. The Government needs to decide how far it seeks to be responsible for workers' own retirement planning above the State basic provision, even if that responsibility means it is denying workers the benefit of an informed choice to take cash and flexibility (at least for a period) instead of pension rights and some level of security. The law ought to allow for both.

The Employment Tribunal and HMRC's systems already allow people who consider themselves misclassified to apply for re-assessment of their relationship with their employer. It may however be that the priority should be not broadening the scope of worker, but clarifying it - at present, an employer can have no certainty as to the number, nature or extent of the factors which may tip an individual from self-

employed into worker, and bring with it corresponding obligations by way of holiday pay, minimum wage, etc.

There are strong arguments that self-employment should only be for those who have positively chosen it. Anyone who signs up to an agency or consultancy or zero-hours working arrangement has positively consented to do so under ordinary contract principles. It would be impracticable to procure advice each time, and that would imply in any case that there was some other option available if the worker declined to agree. Lack of viable career option does not equal a lack of freely-given consent, since we cannot get to a test based on the absence of reluctance or reservations about signing a contract, whether it is zero-hours or regular employment. Access to State benefits and employment rights is available online already. It could be simplified but that does not get around the basic issue that some lower-end gig economy workers are in those roles because they have not been able to find anything better. Telling them more about the benefits position does not resolve that issue. Merely because they would be in more secure and better-pensioned employment if they could is not a reason for changing the law to put them there.

The TUC takes the view that there should be one single package of employment rights for both workers and employees from day one of employment. As noted under Question 1 above, this is a possible route to follow There may, however, be rather too many variations in working patterns to make this a viable solution. Where a person dictates their own hours and activities the employer will not often have the degree of control or visibility over hours worked to administer sick pay, holiday pay, maternity pay or minimum wage if appropriate.

An alternative could be to consider additional protection for workers who earn less than a set amount per hour. While this would be a blunt instrument to a certain extent, it would at least make some attempt to distinguish between low-paid “gig” economy workers for whom this type of work is only a Hobson’s choice and well-paid professionals who are better able to sell their services to clients on a flexible basis at a well-remunerated level.

QUESTION 5.

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

As noted above, there are very few reported cases of agency workers being treated unfairly, which may be due to a number of factors, and we are reluctant to rely on anecdotal data to conclude why this may be. However, given the legislative framework described in our response to question 3 above, we recognise that there is considerable scope for unfair treatment. The Resolution Foundation report referred to above '*Secret agents: Agency workers in the new world of work*' indicates that there is evidence to suggest that agency workers are paid an average of 22p less per hour than their non-agency counterparts. This is equivalent to a loss of £430 per year for those working full time through agencies. While it would appear that temporary agency work is comparatively well paid, permanent agency workers appear to be paid 45p less than their equivalent permanent counterparts. We note there are cases relating to the Gangmasters (Licensing) Act 2004, but consider these to be generally outside the scope of this note, as they often relate to workers who are vulnerable for reasons other than simply their employment status.

We also are aware that agency workers may expect (and, indeed, be entitled to) less in the way of equal treatment, given the nature of their role. 'Unfairness' may not be an appropriate description of the way in which agency workers are treated in certain circumstances, given the fundamental nature of their role in a business. We note, for example, in some cases, the law appears to require preferential treatment of employees as opposed to agency workers. For example, a redundancy situation: the Trade Union and Labour Relations (Consolidation) Act 1992 requires employee representatives to be informed of the

employer's use of agency workers so their use can be factored in to any discussions around workforce reductions. Case law also suggests that where an employee is made redundant and an agency worker in the same or similar role kept on, such a redundancy is likely to be unfair.

QUESTION 6.

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

It is unclear whether such constraints would improve the position or treatment of agency workers or workers more generally. The trend across the EU appears to be for loosening of restrictions on the use of temporary workers, an example being the ruling of the CJEU in **Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry & Shell Aviation Finland Oy** (Case C-533/13).

It is worth bearing in mind that, in our experience, there is not a clear division between individuals "on the books" of employment businesses and individuals who take on zero hours/annualised hours contracts and other forms of work characteristic of the gig economy; many do both. Constraints on the use of agency workers are likely to result in an increase in the use other forms of temporary, casual work, or flexible work, some of which may entail less protection in practice or inferior terms and may therefore disadvantage the very individuals such constraints would be intended to protect. In our view, any concerns about perceived or actual unfair treatment of agency workers would be better addressed by examining the current gaps in legal protection for such individuals, rather than constraining use by businesses of such workers. We have sought, in our responses to questions 2 and 3 above, to suggest potential avenues for reform.

The key constraint at present is on the use of agency workers to carry out work which would otherwise be done by employees participating in industrial action. A response to the consultation on removing this restriction (which closed in 2015) has not yet been published. This is, for obvious reasons, a politically-sensitive aspect of the regulatory regime.

QUESTION 7.

What are the issues surrounding terms and conditions of employees, including the use of zero-hour contracts, definitions of flexible contracts, the role of the Low Pay Commission, and minimum wage enforcement?

General comments

Key employment issues for ‘atypical’ workers seem to be uncertainty as to the number of hours they are offered to work, the pay they receive for those hours and any terms which limit what other work (if any) they can do. The right to claim unfair dismissal may be of secondary importance to such workers compared to securing the correct pay and ensuring that they are not penalised for taking on other work (where their contract allows them to do so / when a particular hirer is not providing enough work to keep them occupied).

Uncertainty as to hours and times of work creates particular difficulty for workers who need to plan and book childcare in order to be able to work. Similarly, ‘atypical’ workers are particularly vulnerable because they lack employees’ pregnancy and maternity entitlements; even employees’ pregnancy and maternity entitlements are often breached. Atypical workers with other caring responsibilities also face difficulties.

The welfare system and the automatic enrolment system for pension contributions are poorly adapted at dealing with the fluctuating income which is common to many casual and atypical workers. Therefore, it

is complicated for atypical workers to work out whether they are entitled to certain benefits (and when) and whether they have received the correct level of benefits.

We understand that CAB advisers are seeing particular problems with arbitrary deductions from wages, failures to provide payment for travel between jobs, and a requirement to return to headquarters or base in order to clock off.

It is worth noting that not all atypical workers may be unhappy with this status. Some like the flexibility and have specifically chosen this model over employment. But for others, atypical working arrangements are all that they are able to secure, and they would prefer greater certainty, stability and protection in their working arrangements. There are sections of workers who seem to be being forced into self-employment when that is not a suitable arrangement for them.

The increased use of outsourcing for many key services such as catering and cleaning (which were previously undertaken in-house by large employers such as local authorities) also causes fragmentation in the workforce, which means it is harder for those workers to know and enforce their rights, and they are less likely to benefit from access to union services, from overarching policies that commit to giving them certain rights, and from training programmes and other initiatives for personal and professional development. In this environment, it seems many employers (particularly smaller businesses) have insufficient incentive to make reasonable adjustments for disabled atypical workers, and similarly may not invest helping migrant workers with immigration issues. More research is needed as to whether particular groups, already likely to be over-represented in the lower-paid areas of the labour market, such as working mothers, recent immigrants, the youngest workers, and particular racial groups, are disproportionately and negatively impacted by their status as 'atypical' workers.

Zero-hour contracts

As noted above, the response to Government consultation on zero hours contracts shows that a proportion of workers on such contracts like the arrangement and that the flexibility suits them. For this category an outright ban on zero hours contracts would not therefore be supported.

Equally, the same consultation contained many responses complaining of erratic hours allocation, victimisation where work was offered but refused or where complaints over, for example, remuneration for travelling time and over late notification of withdrawal of hours are met with victimisation in the form of reducing future allocations of hours. Although one of the most significant issues – exclusivity clauses - has now been dealt with, it may be argued that more protections could be considered though a complete ban on such contracts would be likely to unfairly affect those who actively seek them out.

Definitions of flexible contracts

There is a lot of terminology used to describe 'atypical' working arrangements, and most of these terms have no legal definition including zero hours, casual labour, intern, freelancer, gig economy and bank staff, to give some common examples.

Some of these arrangements can, rightly we think, fall within any of employee, worker or self-employed status depending on the facts of the case. We do not consider that there is necessarily a need to codify the terms above if the concepts of employee, worker and self-employed can be clarified so that it is easier to determine what category any particular individual falls into and therefore what their employment rights are. Clarification of these terms will ensure that workers understand the advantages and disadvantages of the type of work they are agreeing to do, and can object if unlawful arrangements are being proposed.

Free, reliable, easily accessible and understandable sources of information for both employers and workers about the relevant tests has an important role to play. Once this information has been collated, we would recommend a public interest campaign (for example adverts on public transport) to raise awareness of these source(s) of information targeted at those who are vulnerable workers or labelled (against their wishes) as self-employed.

It is, however, worth being aware of certain loopholes that may exist because of the lack of such definitions. For example, with 'zero hours', the ban on exclusivity clauses and protection from detriment for breach of such clauses may be circumvented by offering workers a guaranteed hours contract, even if the number of guaranteed hours is very small and therefore tantamount to a zero hours contract. (See also our comments below regarding internships and national minimum wage).

Role of the Low Pay Commission

We consider that there is room for the Low Pay Commission to be more active and to use its valuable research functions (the products of which should be more widely shared) to further bolster its advisory functions not just on the rate of the minimum wage but the position on a sector-by-sector basis including areas for specific focus in terms of enforcement.

Minimum Wage enforcement

Our members' view is that, despite the political focus on the national minimum/living wage, more could be done to raise the profile of enforcement in order to further publicise the right and encourage employers to comply.

Individual workers have the right to bring certain claims (unlawful deductions from wages / breach of contract) to enforce payment of the minimum wage. But the number of such claims has fallen significantly since employment tribunal fees were introduced. These fees appear to present a significant barrier to justice. Low paid workers are especially negatively affected – it is simply not cost effective to pay the fees to claim a few hundred pounds in unpaid wages. Further, the remission arrangements are incredibly complex and difficult to navigate (even for professional advisers), meaning that this does not alleviate the hardship. In our experience, very few litigants – of those who still choose to bring claims – even investigate the remission arrangements due to their complexity.

In light of employment tribunal fees, the burden of enforcement should pass to HMRC which is now better placed to enforce minimum wages claims than individuals. However, our recent experience is that HMRC is slow to get involved in minimum wage enforcement (even with employment tribunal claims pending) in cases where the employer is a small business or an individual (such as in domestic servitude cases), choosing instead to focus on big name employers. This is regrettable, as it is the most vulnerable workers that would benefit most from HMRC enforcement in this area.

Further, we note that HMRC can recover up to six years' back-pay, while individual claimants, following the introduction of The Deduction from Wages (Limitation) Regulations 2014, can only recover up to two years' worth of unlawful deductions. These Regulations were introduced to deal with claims for holiday back pay following the judgement in the case of **Lock v British Gas** but appear inadvertently (it is assumed) to have limited back pay claims for breaches of the National Minimum Wage Regulations. We note that HMRC's enforcement strategy recognises that some employers/companies will be more responsive to preventing reputational damage than to avoiding financial penalties and we agree with this. We would call for HMRC to be more active in enforcement action against non-compliant individual employers, for example professionals employing nannies and domestic workers, against whom this

strategy could be particularly effective. We hope that the new role of Director of Labour Market Enforcement will assist with this. We also note that the tougher sanctions introduced in 2015 for non-compliance send the right message about the importance of the national minimum wage but do not assist with identifying cases of non-compliance in the first place.

We note that a recent bill to ensure longer-term internships are paid did not pass in the House of Commons earlier this Autumn. While it is true to say that interns who are workers are entitled to the minimum wage (and we do not disagree that interns who are purely within a business to learn and gain work experience should not have a right to pay as they are not workers), this does not mean that the law currently deals satisfactorily with long term internships. This is an area that is open to abuse (sometimes unintentionally). There are two main issues: at the edges, it is difficult to determine whether these individuals meet the 'worker' criteria or not and, secondly, even if they are workers (and the hirer knows this), there is little effective enforcement of their rights to prevent exploitation. In a climate where businesses have identified a significant 'skills gap', we do not want to discourage initiatives that enable people to get valuable work experience that could help them into more regular paid employment yet this should not allow for exploitation or discrimination. There is an issue with social mobility, in that interns without dependents and who have existing assets/family money to depend on can afford to work for nothing while others do not have this luxury. We also consider that some research is needed to see which, if any, junior workers are benefiting from unpaid internships. It may be that there is disadvantage for one sex, or that particular races are more likely to be exploited. We also tend to assume that unpaid internships are mostly undertaken by the youngest workers without dependents but this is not necessarily the case.

QUESTION 8.

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

Although the self-employed are not prevented from being members of a trade union, historically they and others who do not fit into the standard contract of employment have not been at the centre of trade union attention and have proved difficult to recruit organise and represent as they have not traditionally fitted into the scope of collective bargaining.

History suggests, however, that, in circumstances where workers have few rights – such as, for example, where employers in the gig economy classify some parts of their workforce as independent contractors to avoid the rights that go with worker or employee status - trade unions have prospered in terms of membership as individual workers find greater bargaining power advancing claims for improved terms and treatment together rather than individually. The knowledge, resources and experience of trade unions offers an effective means by which such workers may unite and can provide legal advice, representation and bargaining support.

Evidence for this can be seen in the recent claim by the Independent Workers Union of Great Britain for recognition as representing Deliveroo delivery workers in the London Borough of Camden, with the aim of persuading the company to agree their status as workers rather than independent contractors. Trade unions have also been particularly active in campaigning on behalf of care workers in respect of payment for travel time in between appointments. UNISON has also offered these workers professional indemnity insurance as part of membership and access to training through a partnership with the Open University. The welfare and benefits aspect of union membership, so much a part of the trade union movements early development may be a key element in its offering to this section of the workforce.

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