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GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

Submission from the Employment Lawyers Association on the Consultation documents – Employment Status Consultation

EMPLOYMENT LAWYERS ASSOCIATION SUBMISSION

GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

EMPLOYMENT STATUS CONSULTATION

WORKING PARTY RESPONSE

Introduction

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

A sub-committee, co-chaired by David Widdowson and Catrina Smith was set up by the Legislative and Policy Committee of ELA to respond to the four consultation documents issued by the Department for Business, Energy and Industrial Strategy in respond to the Matthew Taylor Review of Modern Working Practices.

In each of the documents there are some questions which we have not answered mainly because they are directed at employers and/or employees or concern purely policy issues. We have concentrated our response on the areas of legal relevance.

CHAPTER 5: LEGISLATING THE CURRENT EMPLOYMENT STATUS TESTS

Q2. Would codification of the main principles – discussed in chapter 3 – strike the right balance between certainty and flexibility for individuals and businesses if they were put into legislation? Why / Why not?

The existing case law has developed over time and, whilst in some respects may be seen as contradictory, has shown an ability to respond to changing ways of working, perhaps more so than codified legislation might. The raft of recent cases has as much been caused by the rapid changes in available working options as any change in judicial views. They have mainly been, not as in the past over the distinction between employee and worker status but over whether a person truly is self employed.

Codified legislation would tend to provide greater certainty but would still be likely to result in some employers seeking to structure their relationships in such a way so as to minimise their obligations. This is likely to continue for as long as there are differential rights conferred.

The principle issue, if codification is to be adopted, is precisely how the dicta from cases are to be combined into a cohesive definition, as to which see question 5 below.

Q3. What level of codification do you think would best achieve greater clarity and transparency on employment status for i) individuals and ii) businesses – full codification of the case law, or an alternative way

We think that primary legislation with separate clear basic definitions for worker, self-employed and employee would be desirable, with then a power given to the Secretary of State to make regulations and/or guidance, whether statutory or non-statutory. This would produce the best way of providing workers with some indication of what is required to be shown in each category and at the same time retain the flexibility that the courts have shown in responding to changing social and working patterns.

Q4. Is codification relevant for both rights and/or tax?

The same definitions should apply to both employment rights and tax to define employment status. This would avoid both employers and employees/workers being required to deal with two different sets of proceedings with potentially different results. This creates unfairness and uncertainty. That said, it is likely that this will be met with resistance. HMRC adopt a restrictive approach to raise revenue for employee/employer tax and NI. There are however public policy arguments involved there. If the HMRC approach were to be adopted for the purposes of defining employment status it would mean that nearly everyone would be categorised as an employee and it would be difficult to reconcile the category of worker within that. One approach may be for employees and workers to be treated as one group in the same way with the employer withholding and accounting for tax, leaving the self-employed only to account for their own tax.

A possible issue here is that workers would be paying the same tax as employees but eligible for fewer benefits. Consideration would need to be given to that but there would appear not to be any reason in principle why a worker, taxed in the same way as an employee at source, ought not subsequently be able to claim back tax to reflect whatever additional allowances were thought appropriate to be available.

Q5. Should the key factors in the irreducible minimum be the main principles codified into primary legislation?

We think they are appropriate for determining employee status, although it will always be possible to find examples where a person is properly to be regarded as an employee but where one is missing or reduced.

Q6. What does mutuality of obligation mean in the modern labour market?

This is perhaps the area that has caused the most difficulty as app-based employment has developed. It is perhaps best viewed as whether the individual is required to attend for work or not. If there is no ability to choose then it may well be argued that this should be the starting point for determining employment status and then to consider if there is anything present in the other two factors which militates against that. Mutuality of obligation has consistently been stated to be the feature without which there cannot be employment status though not necessarily determinative even where it is present.

Q7. Should mutuality of obligation still be relevant to determine an employee's entitlement to full employment rights?

Yes. It would be possible to legislate so as to provide that, where there is no mutuality of obligation, there cannot be employment status. That would be to gloss over some aspects of certain judgments but there is of course no impediment to that if codification/legislation is the chosen route. Guidance and/or secondary legislation could expand on what is meant by "mutuality" – for example, does it mean equivalence of obligation or simply some obligation owed by each party, albeit imbalanced?

Q8. If so, how could the concept of mutuality of obligation be set out in legislation?

See above. We would also observe that, for all that may be set out in statute, or for that matter case law, if, as now, the substance of a working relationship does not match its form, then ultimately, in the absence of a labour inspectorate, it will be for the courts to adjudicate.

Q9. What does personal service mean in the modern labour market?

The absence of the right to substitute is an obvious indicator but appbased working systems produce difficulties in determining who is delivering services to whom. Generally our view is that a personal commitment by a natural person to perform services for another is a required feature for employment but is obviously not exclusive to that status as many workers will also meet this definition.

Q10. Should personal service still be relevant to determine an employee's entitlement to full employment rights?

Yes.

Q11. If so, how could the concept of personal service be set out in legislation?

See above.

Q12. What does control mean in the modern labour market?

Some degree of control is required in all working relationships. New ways of working, however, mean that the term as it might have been understood in the past is now rather different. Whilst workers may have greater autonomy in how a task is done, the organisation may well need to exercise greater control over other aspects of work in order to meet regulatory obligations –for example, under the Bribery Act 2010. Broadly, control over at least when and where work is to be done would be essential to employment and worker status and, again broadly, the greater the control, the more likely the person is to be an employee. The test should not be defining, however- it is perfectly possible for one person to carry out tasks for the duration of a normal 9-5 Monday to Friday working week (and so be regarded as obviously an employee) and work alongside another person doing exactly the same task and subject to exactly the same supervision but who attends work only at times of peak demand or to cover for sickness. A good example might be the way in which Nursing Banks are used in the NHS.

Q13. Should control still be relevant to determine an employee's entitlement to full employment rights?

See above. A working relationship with no or minimal control (as defined to fit modern working) should not be one of employment.

Q14. If so, how can the concept of control be set out in legislation?

The definition should cover the extent to which an employer stipulates when, where and how the work is done and the extent to which the worker is supervised and subject to the overall discipline, policies and other controls of the organisation.

Q15. Should financial risk be included in legislation when determining if someone is an employee?

Yes, normally as a contra-indicator. Also financial risk would need to be defined. It might be said that a sales person whose remuneration is heavily commission based to some extent takes the financial risk that the organisation's products are competitive. Similarly someone with a significant investment or other financial stake in a business – for example, many directors of small companies - may still be an employee.

Q16. Should 'part and parcel' or 'integral part' of the business be included in legislation when determining if someone is an employee?

No. We would see this as more part of control.

Q17. Should the provision of equipment be included in legislation when determining if someone is an employee?

Possibly for some. A worker who brings his own tools is less likely to be an employee but equally workers can and often will use company-provided equipment. Again it may be useful to include this as part of the "control" element, perhaps in guidance. It is only likely to be of central importance in cases where the equipment is a defining central part of the role without which that role cannot be performed.

Q18. Should 'intention' be included in legislation when determining if someone is an employee in uncertain cases?

If the term is meant to equate the intention of the parties with what is set out in the contract or other written document then this could be included as creating a rebuttable presumption that the label p[ut on the relationship is equivalent to its form. Anything higher would create the risk that the inequality of bargaining power inherent in many relationships would result in a distortion where the reality does not match the form. Recent cases have repeated the starting point as being the intention of the parties and, when what happens in practice deviates from the form of the relationship at the outset, that has been taken as evidencing a mutual change in intention. In our view intention (as we have understood it as above) should not be a factor as such but where it is clear that the individual had understood the nature of the relationship and there is no evidence that what happens in practice is materially different then it might be treated as being persuasive.

Q19. Are there any other factors that should be included in primary legislation when determining if someone is an employee? And what are the benefits or risks of doing so?

We see this as a matter of policy. We would however observe that, if the aim of codification is to bring more clarity and simplicity to the question of status, that is unlikely to be achieved if a multiplicity of factors are included. That might well be more easily achieved by using the three main factors identified and using guidance to supplement these as we have recommended for example with control and integration above.

Q20. If government decided to codify the main principles in primary legislation, would secondary legislation: i) be required to provide further detail on top of the main principles; and ii) provide sufficient flexibility to adapt to future changes in working practices?

We consider secondary legislation, whilst providing more certainty would be less fit for the purpose of clarity than guidance (which might be statutory or non-statutory) and would be more easily updated to reflect changing patterns of work. There may be an issue of publicity here but, as we have observed elsewhere, there is generally a need for all guidance to be centralised in one place, ACAS being the obvious option. A power reserved in the primary codifying statute to the Secretary of State would preserve the ability to bring in subordinate legislation should there be a perceived policy issue to be addressed, as, for example, zero hours contracts.

Q21. Would the benefits of this approach be outweighed by the risk of individuals and businesses potentially needing to familiarise themselves with frequent changes to legislation?

See our comments above as to the general need for concentration of information on employment law and guidance matters in one place.

CHAPTER 6: A BETTER EMPLOYMENT STATUS TEST?

Q22 Should a statutory employment status test use objective criteria rather than the existing tests? What objective criteria could be suitable for this type of test?

Most of the existing criteria, even those which look at first glance to be objective, include subjective elements - for example the degree of control – or at least are very case specific.

Truly objective criteria which might be suitable for a test and which could be universally applicable to provide the greatest degree of certainty would include hours worked, duration of the contract, length of service and levels of pay.

There is a risk that any objective criteria will simply encourage those entering into a contract to work around them. If, for example, a contract of over six months was deemed to be one of employment, then we would expect to see a rise in contracts for no more than 25 weeks. The working party understands this to be the case in jurisdictions such as the Netherlands.

- In the Netherlands until 2016, self-employed consultants applied for a Declaration of Independent Contractor Status from the Dutch Tax and Customs Administration, which provided that if the declaration was later found to have been wrongly issued, the contractor would pay the back taxes and penalties due at no cost to the client company. We understand that this gave rise to concerns about abuse of the system. It was replaced in 2016 under the Assessment of Employment Relationships (Deregulation) Act. Legislation introduced model agreements approved by the Dutch Tax and Customs Administration – both general and

individual, and for different sectors and professions, and if you worked based on those, you would be self-employed. Both the individual contractor and their client would be liable to pay payroll taxes if the contract was considered to be an employment contract. There has been reluctance to use this system and model agreements. Alternatively, parties could choose to let the tax authorities review their own agreement. An initial evaluation in July 2016 suggested that 92% of agreements sent for approval were rejected.

The model agreements legislation is still in place, but proposed new legislation to replace it (from 2020) is under discussion. Under the current proposals, the criteria used to decide if employee or self-employed would be:

- individual earns 125% of the average in that position, the individual can choose whether to be employed or self-employed
- duration – the longer the contract is, the more likely it is to be employment (six months is a possible cut-off but this is not confirmed)

If the company employs employees in a similar positions, the individual is more likely to be an employee.

- In Austria, workers also complete a declaration which consists of a series of questions to determine whether someone is employed or self-employed. While some of these are objective, such as whether the person has a uniform or a pass to the employer's building, other tests are more subjective and akin to the UK tests such as levels of control over the way in which the person works.

If objective criteria were chosen, the next query would be whether the relationship will be assessed against the objective criteria at the beginning of the relationship, or whether there would be scope for that status to change during the relationship. A fixed 'label' at the start of the contract would give certainty to both parties. However, it may not reflect the reality of the relationship as it evolves.

If earnings were used as an objective criteria to determine status, then for many individuals (especially those in the gig economy) it may not be possible to know expected earnings with any degree of accuracy at the beginning of the relationship, and levels of earnings will continue to vary throughout the contract.

In employment law, there are already circumstances in which a person's employment status may change, such as where a fixed-term employee's contract is renewed after four years and pursuant to the Fixed-Term Employees Regulations, it becomes a permanent one.

It might be preferable to identify objective criteria where their presence would mean that the relationship could *not* be one of employment. These might include:

- an unfettered and real right of substitution

- no direct contract between the individual and end user client
- a lack of obligation to offer or accept work

This is not a simple answer. Although in Pimlico Plumbers v Smith there was a right of substitution (allowing the plumber to ask a suitably qualified plumber previously approved by Pimlico Plumbers) to carry out a job in his place, many consultancy contracts do in fact rely heavily on the particular skills, experience and characteristics of the individual consultant.

There is no obligation to offer or accept work where an agency signs up suitably skilled individuals and clients offer short term assignments (although the individuals may be employees for the periods of time when they are actually working on an assignment, there is no umbrella relationship between them and the agency which could be deemed employment).

Q23 What is your experience of other tests, such as the SRT? What works well, and what are their drawbacks?

The SRT introduced for the first time a statutory test for individual tax residence. However, for decades there had been guidance from the Inland Revenue and, latterly, HMRC, called IR20 and subsequently HMRC6. Those booklets were based on and intended to be in accordance with the relevant case law on residence and identified the main factors that would be relevant in determining an individual's residence status. The guidance went further than the case law in one respect, in stating that if a taxpayer worked full time abroad under a contract of employment s/he would be treated as non-resident in the UK. That test raised questions of fact (in particular, was the employment full time), but gave certainty to taxpayers that if they fell within the guidance they would be afforded a certain tax treatment. There was already one bright-line statutory test - if someone was in the UK for more than 183 days they were resident.

When introducing the SRT, the government therefore had the advantage of being able to legislate for some of the automatic tests, which were already fairly well recognised: the 183 days test in statute, and full-time employment in the UK or full-time employment outside of the UK in the guidance. The other main advantage that the government had in introducing the SRT is that whilst presence in the UK was never treated as determinative of residence, it had always been considered as a significant factor. Physical presence is an objective, measurable factor (how many days are you in the UK) and it underpins the structure of the SRT. It is central to some of the automatic tests as well as the 'sufficient ties' test – the more ties you have with the UK the fewer days you are allowed to be here if claiming to be non-resident.

The SRT has undoubtedly created greater certainty for taxpayers as to their residence status. There remain areas of the SRT that are open to interpretation and uncertainty, which have yet to be resolved by the tribunals or courts (e.g. what is a home?), but by and large it will be clear to most people what their residence is.

However, along with greater certainty has come greater ease of planning to avoid being resident. Taxpayers know precisely what they must do to achieve non-residence status and can plan their lives accordingly. What the law has gained in certainty it has therefore lost in terms of subtlety and nuance.

It would be desirable to create a similar statutory employment test that creates certainty for the vast majority of workers even if that came with an acknowledgment that it will result in some employers

trying to avoid the consequences of the test by planning their contractual arrangements to avoid individuals being classed as employees. The difficulty of creating a similar statutory employment test is in identifying factors which are capable of objective measurement such that individuals and businesses have the desired certainty of outcome. There are factors that are capable of measurement (level of pay, length of engagement), but these have never been recognised in the UK common law as important factors in determining employment status. Those factors alone also do not link neatly with the question of whether an individual and employer should have the rights and responsibilities of an employment relationship, rather than worker status.

One difficulty with the implementation of the SRT is that the primary legislation has had to be supported by 103 pages of guidance from HMRC in order to try to explain some of the concepts used in the test (e.g. what does it mean to spend a day in the UK). Whilst having read the guidance, many of the concepts are clear, the guidance is not very accessible to the man in the street. For many people concerned with their residence status they might be engaging professional advice in any event. In contrast a statutory employment test will affect great swathes of the population – both companies and individuals – who do not have the money to spend on specialist advice. If the result of the statutory test is that government has to produce reams of guidance as to what it means to have 'control' or 'mutuality of obligation', the statutory test may not provide the desired certainty of outcome for the people who require it most and are at greatest risk of being exploited.

Q24 How could a new statutory employment test be structured?

A default system would mean that if the relationship fulfils a certain number of criteria, the individual would be an employee unless the hirer was able to prove that they were not.

There are advantages and disadvantages to a 'default unless' system. It may be necessary to structure the test to find a compromise between certainty for the parties, and flexibility. It would mean giving up some of the nuances and richness of the current law for some in favour of clarity for the majority of individuals who fall squarely into one category or another.

Experience has shown that, if not carefully controlled, a default system will work only until the exception becomes the rule. Guidance could be provided to avoid cases going to tribunal, but it would be very difficult to cater for all possibilities. Inevitably for as long as rights differ according to status, some employers will structure their working relationships with a view to minimising those rights, whether that be by reference to case law, statute or guidance.

Q25 What is your experience of tests, such as the Agency Legislation tests for tax, and how these have worked in practice? What works well about these tests in practice, and what are their drawbacks?

The agency legislation (s. 44 ITEPA 2003) uses as one of its key conditions whether "the manner in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person". This is a negative condition i.e. provided the other conditions are satisfied, the agency legislation applies unless this condition is fulfilled. It is therefore for the agency to prove that the condition is fulfilled.

Our experience of the agency legislation is that it achieves its objective of bringing into the tax net most agency relationships because: a) the test is so broad; and b) the burden is on the agency to show that the condition is satisfied. The breadth is shown by the fact that it is only the right of supervision, direction or control that needs to be satisfied; and because it can be supervision, direction or control by any person, which includes either the agency or the end client. The truly self-employed are generally able to satisfy the condition by showing that, although they may be directed as to the work that is required to be done and when and where it is required (e.g. build a wall of a certain length in a certain place at a certain time), the client will generally not supervise precisely how the work is achieved. It is the difference between agreeing to produce an outcome and agreeing to provide service.

The same test would not be suitable as a statutory test of employment, because it focusses only on one element of a relationship – control over the 'how' - which is too blunt a tool. The government has said that it wishes to retain the three-way split between employees, workers and the truly self-employed. Both employees and workers are generally subject to the right of control as to the manner in which work is performed and so it would not differentiate between those categories. It is also noticeable that control over 'how' work is performed is being seen in the case law as the least important of the control factors pointing towards employment in the more fragmented labour market – see *Various Claimants v Institute of the Brothers of the Christian Schools* [2013] 2 AC 1 at [36].

Q26 Should a new employment status test be a less complex version of the current framework?

The current framework is complex and not easily understood. In order to make it less complex, some of the current criteria could be removed. However, deciding which criteria to remove is likely to provide difficult and controversial and increases the risk of the position being "gamed". However, greater certainty for the majority of people may be an acceptable trade-off for these risks, particularly if both "employer" and "employee" were fully aware of the position.

Q27 Do you think a very simple objective or mechanical test would have perverse incentives for businesses and individuals? Could these concerns be mitigated? If so, how?

Experience in other countries shows that a simple test will increase the risk of action being taken to avoid it. If the government wishes to give clarity to the majority by simplifying the test, it is necessary to accept that there will be those who work around the rules at the edges.

Common law develops and is interpreted to prevent this kind of avoidance (see TUPE example where law developed to prevent employers from claiming TUPE did not apply where no employees were transferred).

Precisely how these perverse incentives could be mitigated will depend on the terms of the test, but:

- Duration – a form of automatic unfair dismissal (depending on the period of time) or other employment protection could be put in place for those whose contracts were terminated in order to avoid someone converting from worker/self-employed status to employee. This could be the case if, for example, it could be shown that the role which had been vacated had been taken on by someone else. However, the potentially perverse consequence of this is where a business is expanding and people are replaced, workers could establish employee status but if contracting e.g. in effect in a redundancy situation, the person could not.

- Levels of pay - if levels of pay were chosen to determine whether someone was or was not an employee, then again, the system could be "gamed" to prevent people being employees. However, as we would envisage that high pay would be an indicator of self-employed status (rather than the other way around) certain social and economic protections would be in-built into the system.

- Hours – we have seen some commentators suggest that full-time work or work over a certain number of hours per week would be a hall-mark of employment. The difficulty with this, of course, is that we would not want this to result in part-time employees becoming more vulnerable or for employers to artificially restrict access to work.

We have seen this at present where employers have (anecdotally) decided against e.g. offering certain benefits which would be of use to individuals in order to avoid increasing the risk of their being held to be workers or employees.

Q28 Are there alternative ways, rather than legislative change, that would better achieve greater clarity and certainty for the employment status regimes (for example, an online tool)?

HMRC has developed an online tool for intermediaries legislation (IR35) assessment purposes.

In our view, an online tool works best for those who fall clearly into one category or another. There will inevitably be tricky cases which do not fit. In our view, a reliable, easily available and well-publicised online tool could provide a default categorisation which would stand unless the hirer proved otherwise.

In order to avoid misunderstandings, any online tool should be completed by both parties, who agree that the information entered is accurate. This would encourage the parties to clarify their intentions and understanding at the beginning of the relationship.

Q29 Given the current differences in the way that the employed and the self-employed are taxed, should the boundary be based on something other than when an individual is an employee?

In *Good work: a review of modern working practices*, Matthew Taylor proposed that it would be sensible to require workers' employers to operate PAYE as they do for employees.

We believe that many of the concerns around the question of employment status would be resolved if employees and workers were taxed in the same way.

If employees and workers were subject to the same tax rules, workers would no doubt argue that they should be entitled to additional benefits just as employees are. However, this assumes that the tax deducted would be more than they would have had to pay in any event via self-assessment. If the amounts are the same, and it is simply that the employer is discharging the PAYE obligation on behalf of the worker, then the argument could be said to have been undermined. If the amount of tax and national insurance contributions made by or on behalf of workers is to increase, in our view, it might be helpful to differentiate between those benefits at the expense of the State, and those provided by

employers. For example, SMP might be extended to workers or at least, to Maternity Allowance on the same basis as employees, with the first six weeks also to be paid at 90% of average earnings rather than at the lower statutory rate – currently, £145.18 per week).

We recognise that some employment rights, such as the right to claim unfair dismissal, is a right against the employer. If reform results in workers paying higher taxes as though they were employees, they may also expect such rights. However, not extending these to workers could be explained as the 'price you pay' for flexibility, lack of mutuality of obligation and the other advantages to the individual of worker, rather than employment, status. Employers could use the same argument to deny workers other additional benefits, for example enhanced maternity pay.

The result of such changes might be to push more individuals back towards self-employment. A radical solution would be to require that anyone who wishes to be self-employed must be an employee of a personal services company (PSC) which contracts with clients. This would give PSCs the ability to structure their tax arrangements as they wish (and to, for example, set off business expenses against tax), while ensuring that tax and NICs are paid in respect of the individual. However, this would be a complex and relatively costly arrangement to set up for individuals who are, for whatever reason, at the lower end of the income scale.

Operating PAYE could be a considerable challenge for employers if they have little or no visibility on the other earnings of the worker and may have to rely on emergency tax codes issued by HMRC. While this is also a challenge for employers with part-time employees (who may also have more than one job) applying these arrangements to the gig economy would increase the scale of the issue considerably.

CHAPTER 7: THE WORKER EMPLOYMENT STATUS FOR EMPLOYMENT RIGHTS

Q30 Do you agree with the review's conclusion that an intermediate category providing those in less certain casual, independent relationships with a more limited set of key employment rights remains helpful?

While essentially a policy question, it is our view that a set of fundamental or basic employment rights be applied to all who cannot truly be said to be self-employed. In particular, the economic rights to minimum wage and pension provision would help to ensure that the cost of providing a minimum standard of living for work done falls on the user of their labour (on the assumption that the cost is passed on to the end user) rather than the general tax payer. Conversely we would assume that "regular" employees with obligations towards their employer may feel [resentful] of workers who enjoy a full set of employment rights without the corresponding obligations because they can e.g. choose when and if to work etc.

We would also note the following:

- technology and other social developments have enabled people to access work more flexibly and, in some cases created markets which previously did not exist or were underdeveloped, particularly in sectors where the service is provided in the end customer's home;
- while we would note that much of the discussion has focused on employment rights, employment status also carries with it responsibilities which may be unwelcome to gig economy workers leaving them just with the option of self employment which would have the effect of the having fewer rights than might be appropriate. While worker status has possibly replaced some of the roles which might previously have been classified as employment (indeed the consultation paper refers to it almost as a lesser form of employment) we submit that its biggest impact has been to replace roles which

would otherwise have been classified as self-employment, thereby giving valuable rights and protections to individuals who might otherwise have found themselves without them.

Q31 Do you agree with the review's conclusion that the statutory definition of worker is confusing because it includes both employees and Limb (b)workers?

Q32 If so, should the definition of worker be changed to encompass only Limb (b) workers?

We would agree that the current structure of the definition positions limb (b) workers almost as a lesser form of employee rather than a distinct category which is neither an employee or someone who is self-employed.

The category of worker emerged to give rights to those who would otherwise not have had them as they were not employees. The policy makers of the day recognised that there were a class of workers who did not have the traditional hallmarks of employees because there was flexibility and autonomy as to how and when to work, but could not truly be said to be in business on their own account. While we are neutral as to how people who are not, as the law currently stands, truly self-employed, we would note that any amendment to the definition would require amendments to legislation to ensure rights were given to employees and workers (or "dependant contractors").

Q33 If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?

As noted above amendments to legislation would be needed to ensure both employees and workers were covered.

Q34 Do you agree that the government should set a clearer boundary between the employee and workers statuses?

While the major battle ground in recent cases has been between self-employed and worker status, we believe it would be helpful to have a clearer distinction between employee and worker statuses. However, while legislation might lead to greater clarity for the majority, there will inevitably be areas of uncertainty particularly as new ways of working emerge.

Q35 If you agree that the boundary between the employee and worker statuses should be made clearer:

i. **Should the criteria to determine worker status be the same as the criteria to determine the employee status, but with a lower threshold or pass mark? If so, how could this be set out in legislation?**

ii. **Should the criteria to determine worker status be a selected number of the criteria that is used to determine employee status (i.e. a subset of the employee criteria)? If so, how could this be set out in legislation?**

iii. **Or, is there an alternative approach that could be considered? If so, how could this be set out in legislation?**

We believe that this would be difficult as the irreducible minimum of employment, principally the obligation to provide work and to work does not exist for workers. While employers might be obliged to offer work, requiring the worker to take it would fundamentally undermine the flexibility which many workers want and would run the risk of their being pushed into the self employed category with no employment rights. It would be odd to have one of the fundamental criteria of employment status be disapplied rather than putting in place a structure in which some of the less important hallmarks of employment were displayed.

Q36 What might the consequences of these approaches be?

As explained above, this approach would run the risk either of having to disapply some of the fundamental hallmarks of employment which would seem odd or removing one of the key advantages for many workers. As noted above, this may push workers who want to retain that freedom firmly into the self employed category.

Q37 What does mutuality of obligations mean in the modern labour market for a worker?

Mutuality of obligation is most important when work is not immediately available for the worker or when the worker does not wish to or is unable to work. In any of the three categories, once work is identified and the individual (or consultancy company) has agreed to do it, the legal obligation to do so has arisen and can only be terminated by breach or on notice. The employer enters into an on going contract to provide work and the employee enters into an on going obligation to do it - usually at a time and in the manner dictated by the employer. Those who engage workers, particularly through platforms, agree that work will be advertised to those workers it has on its books (usually having first proved that they fulfill a certain set of skills and experience) , but may in fact, never be offered as the work as the end user can choose someone else or decide not to go ahead. Critically, the worker has the choice whether or not to accept the work. However, acceptance by the worker has two stages, first of all, they declare themselves willing to work, e.g. by logging on to the app, but can then decline work by not accepting any of the roles on offer. However, there is some discussion of how, in fact, a worker is to decline the work as they may be penalised for not doing so. Someone who is truly self employed can accept or decline the offer of work with no consequences, aside from commercial and reputational ones.

Q38 Should mutuality of obligation still be relevant to determine worker status?

Mutuality of obligation is and should be relevant to determine worker status, particularly on the part of the worker.

Q39 If so, how can the concept of mutuality of obligation be set out in legsilation?

If it were to be set out in the legislation, it would need to have:

- ongoing obligation to offer and accept work – employee
- ongoing obligation to offer or advertise work on a basis of pre-qualification - but no obligation to accept or bid for work - hallmark of worker, but not determinative
- no obligation either to offer or accept work - hallmark of self employed status, but not determinative.

The question of between whom the mutuality exists is also important. Some platform based models are merely market places for trade people or professionals who, in some cases, fulfill certain criteria. This can be very minimal, or rigorous. For example, one platform rejects around 92 percent of those who apply to join the platform as their quality control (which is part of their offering to clients) is so high. However, in most cases (usually for administrative convenience) the client's obligation to pay is owed to the platform and not the person providing the service. The question is whether the platform is being paid by the customer for the service, or simply administering that payment on behalf of the worker. The former might suggest worker status and the latter, self-employed. This is a disctinction which appeared in the Uber case.

Q40 What does personal service mean in the modern labour market for a worker?

Q41 Should personal service still be a factor to determine worker status?

Q42 Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?

When a party agrees to perform some work, the distinction is between whether s/he personally will carry it out or whether he is responsible (contractually at least) for it being carried out. While the obligation to carry out the work in person has always been a hallmark of employment, even for those individuals whom the law would currently regard as self employed, it is often the case that the right of substitution, if it exists at all, is illusory, particularly where the individual has been hired for his or her particular expertise or skill e.g freelance performers or consultants who possess a skill not found in the employer's permanent workforce. In other cases, so long as the work is done to an acceptable standard, the employer is less concerned about who carries it out - this can apply to employment, particularly for low skilled jobs.

We therefore think that too much emphasis on personal service can, absent other factors, lead to counter-intuitive conclusions.

Q43 Should we consider clarifying in legislation what personal service encompasses?

While we think it might be helpful to clarify what is meant by personal service as a factor in deciding status, we do not think, for the reasons outlined above, that it should necessarily be determinative.

Q44 Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?

Such a fettered right might be consistent if the majority of the work were to be carried out by or under the supervision of the principal contractor.

Q45 Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?

Q46 What does control mean in the modern labour market for a worker?

One of the many of the aspects of control considered in the review is who has control of the relationship between the worker and the end user client - i.e. whether the platform operates as a market place connecting workers and end users or whether the relationship is between the end user and the platform rather than the worker or, a middle ground, where the relationship can properly be characterised as one between the client and the end user which is merely facilitated or administers by the platform on behalf of the end user client and the worker. In the more traditional sense, control is of the timing and manner in which the work is carried out. This still has meaning when looking at highly skilled workers where the employer does not have the expertise to direct the worker - but this is often the case for highly skilled employees when control is more about when and where the work is done rather than how.

Q47 Should control still be relevant to determine worker status?

Q48 If so, how can the concept of control be set out in legislation?

Control is still a useful test, but as illustrated above, control can take many forms and can apply to more than one relationship so any legislative provisions would need to acknowledge that.

Q49 Do you consider that any factors, other than those listed above, for 'in business in their own account' should be used for determining worker status?

Other factors which could be considered include who bears the cost or responsibility for insurance, who makes the initial approach, whether the worker advertises or markets their skills, whether they employ or engage others to work with or for them,

Q50 Do you consider that an individual being in business on their own account should be reflected in legislation to determine worker status? If so, how could this be defined?

This could be put into legislation, but we would suggest that factors to be taken into account would be best suited to guidance which can be relatively easily updated rather than legislation.

Q51 Are there any other factors (other than those set out above for all the different tests) that should be considered when determining if someone is a worker?

Other factors could include how the worker is paid and by whom – eg the client or the platform, and the extent to which the worker absorbs commercial risk for what s/he does.

Q52 The review has suggested there would be a benefit to renaming the Limb (b) worker category to 'dependent contractor'? Do you agree? Why / Why not?

The current situation has the disadvantage that the word "worker" is used both in its technical Limb (b) sense but also as a common term to simply denote people who work for someone else and so including both employees and Limb (b) workers. This may be helpful to make it a separate category rather than being regarded as quasi employment. The use of the word "dependent" may confuse particularly in app-based employment where, while there may be many who do depend on securing work through the system as their primary source of income, there will be others for whom it is supplemental and who are not, in the ordinary sense of the word, dependent on the system.

CHAPTER 8: DEFINING WORKING TIME

Q53 If the emerging case law on working time applied to all platform based workers, how might app-based employers adapt their business models as a consequence?

We anticipate that the major consequence of the existing case law being applied across a platform based service provider's business would be a significant restriction on the flexibility which both parties evidently value in the relationship. Although increased control it is not, strictly speaking, a necessary consequence of worker status, in practice it will be difficult to monitor and comply with the relevant working time provisions without increasing the level of control over the workforce that many platform based providers currently exert.

The reason for this is that working time laws are arguably outdated in some respects and cause practical difficulties for platform-based employers. For example, it is breach of working time laws if a worker exceeds certain limits on his/her working time across all jobs, and for obvious reasons it is difficult for platform-based service providers to ensure compliance with such laws because, in order to do so, platforms (including competitors) would have to share data about an individual's work performed on each platform.

Many platform-based service providers' models apply limited, if any, control over the hours any given individual chooses to do either for them or for other businesses, particularly because many of those individuals are not intended to be employees or workers and therefore the service provider recognises that it can only exercise limited control over their actions.

Similarly, the obligation to provide paid annual leave will prove difficult to administer where individuals are working atypically. We anticipate that platform based service providers' would seek to restrict workers from taking leave at certain times or the year, or during certain period, which would again reduce flexibility.

Put simply, in our view simply requiring platform based service providers to comply with the existing working time provisions (which are very much a reflection of the more "typical" workforce dynamic of their time), may, in our view, push those providers toward a more traditional workforce model. In our view this would be a poor outcome for consumers, workers and providers.

We also anticipate that providers would seek to minimise labour costs and employment law risks by, for example, arranging working time so as to limit the amount of unproductive working time (e.g. locking-out workers from the app at times of low demand) or agreeing with individuals that their normal rate of pay will include rolled-up holiday pay.

We note that there is some possibility that a platform based workforce provider may choose to change its model so as not to engage limb (b) workers. As the employment tribunal stated in *Aslem & Others v Uber BV and Others (2202550/2015 & Others)*: *"…none of our reasoning should be taken as doubting that the Respondents could have devised a business model not involving them employing drivers. We find only that the model which they chose fails to achieve that aim*".

Although a platform-based service provider may, in theory, have several options for changing its model so that it engages self-employed individuals rather than limb (b) workers, in practice the recent appellate decisions in a number of cases has demonstrated that it is difficult to arrange one's business in this way. We understand that for some platform based providers, there may be practical difficulties to arranging their business under a different model. For example, they could arrange themselves more as market places or "shop windows" for workers (with the "badge" of quality given by the platform) and require the worker to pay a fee to be on the platform/require the worker to pay them a percentage of their earnings with the fee paid by the end user being paid directly to the worker rather than via the

platform. However, this could have the effect of shrinking the market as consumers may prefer the convenience of an account with the platform and some workers, particularly at the lower ends of the income spectrum may not have the ability to effectively take payment (other than via cash in hand), although the number of cheap payment service providers is increasing. This would also have the effect of passing on the cost of the payment system to the worker.

Although, in *IWGB v RooFoods Ltd (t/a Deliveroo TUR1/985(2016)* the Central Arbitration Committee recently determined that certain Deliveroo bicycle couriers were self-employed persons and not workers because the cyclists had a genuine right to appoint a substitute, we note that that decision is under appeal.

Further, there may be good policy driven reasons why it is not desirable for a platform worker to have the ability to engage a substitute (such as, for example, the health and safety of the public where a worker is going to people's homes to make deliveries, or regulatory requirements).

It follows that it would not be desirable for all service providers to choose to engage all of its workforce on contracts which include such substitution clauses and which, therefore, (genuinely) do not require personal service, in order to defeat any claim that it engages limb (b) workers via its platform.

Another option would be for the platform-based service provider to require that individuals using its platform set up his/her own service company, with which the service provider then contracts directly, although again this would arguably not be satisfactory (or possible) from a policy perspective for the reasons given.

Q54. What would the impact be of this on (a) employers and (b) workers?

As explained above, in some cases we anticipate that there may be a move towards a self employment model, however, we anticipate the main impact will be a move towards a more traditional workforce model, with stricter control exercised over workers in relation to when they can and cannot work, and, once they have begun working on any given day, when that work ends. This could also lead to a reduction in the breadth of service for consumers if platform-based market places or service providers “switched off” their service during periods of low demand to avoid having to pay workers for periods during which the income from the customers was potentially insufficient to cover their costs.

There may also be limits on the amount of work an individual can do for a different employer, as we anticipate that platform based service providers will want to ensure a supply of labour for its own business.

Evidently platform-based limb (b) workers (as opposed to self-employed contractors) will benefit from statutory rights such as the NMW/NLW, auto-enrolment into a pension scheme, limits on their working time, protection from discrimination, etc. However, we would anticipate that providers would look to offset these costs against e.g. costs per delivery/job, and have a smaller pool of workers with more typical working patterns.

Further, if a service provider, for example, arranges working time so as to limit the amount of unproductive working time (e.g. locking-out workers from the app at times of low demand) or agreeing with individuals that their normal rate of pay will include rolled-up holiday pay, this would erode the benefit of some of that income security.

Q55 How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?

Under existing legislation, we anticipate that many providers will consider ways of minimising their liability for paying the NMW/NLW at times of low demand for their services by, for example:

- limiting the amount of limb (b) workers that can log-in to its platform at times of low demand; or

- operate a two-tier system comprised of (i) core operatives (who can log-on to the platform at all times) and (ii) other operatives (who can only log-on only when permitted by the platform, at times of high demand).

The NMW/NLW legislation appears to focus primarily on work which is controlled by the employer. In the case of platform-based workers, the worker has complete freedom to determine when to log on and log off of the app.

If all time spent logged on were working time, in our view it would naturally follow that a provider would seek to take more control as to when a worker could choose to log on/off.

In both cases flexibility will be lost, and potentially there would be fewer platform-based job opportunities as a result.

Q56 Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?

Yes. A matter for policy-makers to determine is whether it is fair that an individual could be logged-on to one or more platforms, not doing any work, but yet be entitled to the NMW/NLW.

A measure which could provide fairness to both platform-based service providers and the limb (b) workers that use their platforms would be for government to consider whether the piece rates legislation could be adapted so that service providers would be able to compensate limb (b) workers based on their output (e.g. the number of tasks performed) as was recommended in the Taylor Review.

One major problem with the existing piece rate legislation is that time spent travelling for the purpose of rated output work counts towards rated output working time, on an hourly basis. As many platform based business require, by their very nature, peripatetic workers, this means that all time spent travelling e.g. back from a delivery, whilst not on a job, would count. It is very difficult to monitor this in practice, and allows the worker to e.g. stay logged on whilst travelling for other purposes (e.g. to meet friends or go home). We anticipate that providers would be quick to mitigate against this by placing additional restrictions on workers, e.g. by requiring workers only to provide services within a particular area.

That all being said, a pre-condition for entitlement to the NMW/NLW is an individual being a limb (b) worker. As is well documented in the Taylor Review, the law on limb (b) worker status would benefit from more clarity.

Also, because each case turns on its own facts, an individual usually does not benefit directly from a judgment in favour of another person, even though that other person may be in the same or similar

circumstances to the individual. Accordingly, Parliament could prescribe a new clearer test for determining who is a limb (b) worker, which has bright-line rules which are easily understood and assessed and which takes into account modern working practices including app-based work.

Q57 What are the practical features and characteristics of app-based working that could determine the balance of fairness and flexibility, and help define what constitutes 'work' in an easily accessible way?

While we recognise that for many workers, their preference would be to be in regular employment, for many workers and providers the element of flexibility is key. While flexible employment is increasing, with employment comes a level of obligation on the part of the employee which, for many workers is undesirable. The existing legislative provisions, if applied to such workers and providers, would be likely to require both parties to forgo a degree of that flexibility.

If workers are to have complete discretion as to when to work, we believe that that should impact upon when they are said to be working for legislative purposes. The simple fact of logging on to an app should not be sufficient to render time "work" for either working time or NMW/NLW purposes. However, there is still a decision to be made as to when the clock starts ticking e.g. when the worker accepts the job (in which case travelling time to the job would be counted) or from when the worker starts their interaction with the product or client e.g. picks up the package or arrives at the client's home to provide their service. Further complications arise where the job is not "instant" i.e. pre-booked appointments rather than "on demand" services. Case law to date would suggest that travelling time between clients counts as working time and we would therefore expect that similar principles would be applied in these cases.

In our view, difficulties are created where travelling time between jobs (i.e. where one job has finished and another has not been accepted) is problematic. Time spent genuinely waiting for work can be compensated for through the piece work legislation (with providers using their existing data to identify the average hourly "piece" at different times of the day/week/year).

Providers can mitigate against the risk of workers "gaming" the system by forcing them to log off if they refuse to accept work within a reasonable period, or if demand is too low to meet supply at a given time.

We note that the case law has focused on features such as: (i) whether the individual is logged-on to an app; (ii) whether the individual is ready and willing to work; (iii) the consequences for an individual declining work; (iv) whether the individual is offering himself/herself to work for another provider; and (v) whether the individual has to provide personal service (i.e. can he/she appoint a substitute).

Whilst it is a matter of policy whether: (a) these remain relevant factors; (b) what other factors might be important; and (c) what weight should be attached to each factor, we note that some factors have been criticised for being unfair or arbitrary and/or that the weight attached to such factors is disproportionate. We note as follows:

- Availability to work and mutuality of obligation: An individual could be a limb (b) worker (and therefore entitled to the NMW/NLW, amongst other things) when he/she is logged-on to a platform, despite not being required to perform any actual work (and may indeed be logged-on to a number of other providers' platforms at the same time). Another aspect of mutuality of obligation is whether it should remain relevant that there is or is not any detriment for declining app-based work.

- Personal service: A genuine and unqualified substitution clause defeats a claim for limb (b) worker status. This factor is hard-baked into the current statutory definition of a limb (b) worker, but

has attracted criticism from some commentators, as the inclusion of a substitution clause in a contract for services may not be genuine (i.e. it may exist solely to defeat a limb (b) worker claim).

Q58 How relevant is the ability to pursue other activities while waiting to perform tasks, the ability of workers to refuse work offered without experiencing detriment, requirements for exclusivity, or the provision of tools or materials to carry out tasks?

Under the current law, whether an individual can pursue other activities while waiting to perform tasks and whether an individual must work exclusively for one platform are important factors in identifying a limb (b) worker, following the EAT's judgment in *Uber BV and others v Aslam and others, UKEAT/ 0056/17/DA*: "*If the reality is that Uber's market share in London is such that its drivers are, in practical terms, unable to hold themselves out as available to any other [private hire vehicle] operator, then, as a matter of fact, they are working at [Uber's] disposal as part of the pool of drivers it requires to be available within the territory at any one time… If, however, it is genuinely the case that drivers are able to also hold themselves out as at the disposal of other [private hire vehicle] operators when waiting for a trip, the same analysis would not apply*."

The ability of workers to refuse work offered to them without experiencing detriment is an important factor in determining limb (b) worker status (as discussed extensively in the EAT's judgment in the Uber litigation). However, there is a lack of clarity relating to this factor because it is a question of degree. For example, the employment tribunal in the Uber litigation found there was a requirement for drivers to accept 80% of offers of work, which was sufficient for that tribunal to find of an obligation to work (as a matter of law, it would be open to any other tribunal to reach a different view). We therefore ask: would (or should) the outcome have been different, if the requirement to accept work had only been 70%, or 50% or 49%? Whilst the substance of any new bright-line rules regarding this factor would be a matter for Parliament to decide, our view is that, for the sake of clarity and increased certainty for all stakeholders, statutory intervention could help.

The relevance of the provision of tools or materials to carry out tasks has not featured prevalently in the recent case law on platform-based work, which is perhaps surprising given that many platform-based services involve the provision of some tools and equipment by the individuals (e.g. vehicles, cycles, cleaning materials, beauty products).

It is a question for policy-makers to determine how relevant (and how much weight should be attached to) any of these factors should be for determining whether an individual is a limb (b) worker.

Another factor for the government to consider, which we have noted a number of times above, is whether an increase in the rights of individuals performing services via app-based platforms might result in corresponding higher/more onerous demands from the service providers that engage them. In our view it is likely that it will. Perhaps that is not desirable for some of the individuals that perform services via such platforms.

Q59 Do you consider there is potential to make use of the data collected by platforms to ensure that individuals can make informed choices about when to log on to the app and also to ensure fairness in the determination of work for the purposes of NMW/NLW?

Yes. We assume it is not difficult for a platform operator to send out notifications/emails/text messages telling individuals whether any given time of the day is (or is not) a time of high demand and, therefore,

a good time to log-on to an app to perform services. However, we are conscious that providers will also need workers to log in during times of low demand, and the solution may well lie in the adoption of a more flexible piece work approach.

We think that there is great potential in using data to determine working time, provided Parliament can lay down some bright-line rules to assist each platform operator in determining when limb (b) work is being performed.

If service providers respond to these consultation questions confirming that they can monitor workers' output via their platforms, an option for the government which may increase fairness for the purposes of the NMW/NLW would be to proceed with the Taylor Review's recommendation to adapt the existing piece rates legislation for platform work, so that service providers could compensate app-based workers on the basis of their output.

CHAPTER 9: DEFINING "SELF-EMPLOYED" AND "EMPLOYERS"

Q60 Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?

Yes, unless there is a move whereby if an individual is neither employed nor self employed (per a new statutory definition), they are automatically classed as a worker unless they fall into an exempt category, such as volunteer. However, this is probably unworkable, as any attempt to define self employment could create significant difficulty. Please also see the response to question 61 below.

Q61 Would it be beneficial for the government to consider the definition of employer in legislation?

Yes, perhaps.

A statutory definition of employer that goes beyond the current orthodoxy relating to the word's meaning may be a useful mechanism by which a number of issues (particularly relating to agency workers) could be addressed. However, we recognise that introducing radical concepts can lead to unintended consequences, and therefore the extent to which a new definition is required will depend in part on the way in which the issues relating to agency workers can be resolved through other means. It is also noted that the protections against discrimination and, to an extent, whistleblowing, extend beyond the paradigm employer / employee relationship. Therefore, there may only be limited circumstances where a wider definition is required. And it may also depend in large part as to whether the rights of a worker should be extended to rights relating to unfair dismissal or redundancy protection. We set out below a possible approach to enable the definition of 'employer' to be used as a tool to overcome some issues found in employment law. Whether it is adopted as a general definition may be overly ambitious, but such adoption could result in greater efficiency as liability would rest with the most appropriate party, responsible for causing the harm (thereby reducing the need for avoidance strategies as may sometimes be employed by businesses looking to mitigate any risk). In any event, though, it may offer a solution to discrete problems that have recently been considered mainly from the perspective of the status of the individual doing the work, rather than the entity providing that work.

A key issue in relation to worker status is the worker's relationship to the employer. While the status of worker, employee and self employed individuals has attracted much debate in recent years, the concept of the employer has remained remarkably unchanged for many years – in essence, it has not evolved from the days of the master and servant relationship. It is arguable that many of the difficulties in defining an individual's rights come from their relationship with the employer. However, for the modern workforce, in part at least, the drive to no longer be part of a master/servant

relationship has come from the new generation of workers who may no longer wish to have the obligations of an employee i.e. the duty of trust and confidence, not to compete, not to simultaneously work for other employers, obligation to work, to work in a particular way, to comply with policies and procedures, post-termination restrictions etc.

Much of the debate has focussed on the obligations of the employer to provide work, give rights etc., but a more fruitful path may be to look at the relationship through the lens of the individual. Do they feel "obliged" (beyond of course the fact that employees may, at any point resign and they cannot be compelled to provide their services under statute) to work for a particular employer or can they genuinely decide to work for someone else, or not at all?

There is a strong presumption that an employer is, and can only be, a single entity. The bilateral contractual relationship between individual and employer has meant that there is no room for an alternative explanation of how an individual may be related to a third party in an employment relationship. As a consequence, agency workers have been put at a considerable disadvantage: in some cases, agency workers have been unable to claim any protection against either the end user client or the agency engaging them.

However, the issue is more widespread than in agency relationships. In recent years, there has been a shift in the way in which business operates. More work is outsourced. This tendency to devolve responsibility (and liability) further down the supply chain has meant that the employing entity may be far removed from the end user. This creates a situation whereby the 'employer' may be simply a personal services company, engaging one person. That individual's only recourse may well be against their *own* business, even though they have been affected by a decision made by a completely different entity, one or more steps removed from their employer.

Even in group company situations, it is common to find workers employed by a shared services company but effectively seconded to different business units in other subsidiary entities. Similarly, private equity firms will often exert considerable control over their portfolio companies, such that decisions will be taken by them which directly affect employees working employed by and working in those entities.

It is very difficult to pierce the corporate veil that exists, in order to avoid the presumption that the person contracting with the individual is not their employer, or to imply a contract with a third party. This was found in *James v Greenwich Borough Council* [2008] EWCA Civ 35, where the test set out in *The Aramis* [1989] 1 Lloyd's Rep 213 (CA) of business necessity was held to be a high one: if there could be any other explanation for the relationship, there was no need to imply a contract with a third party.

The way in which the law has evolved has therefore meant that as soon as an employer is identified, other parties are disqualified from consideration as being potentially responsible under an employment relationship. This is the case even where the employer has had little involvement in the way in which the employee is hired, managed, or dismissed.

Conversely if a potential employer fails to meet one of the necessary criteria for employment (for instance, if it does not have mutuality of obligation with the individual, or the individual is not required to perform services personally for that entity), it is automatically exonerated from many responsibilities, even though it may meet many of the other criteria. For instance, consider the 'employer' who engages an individual to perform a menial task on a production line. The 'employer' provides the individual with constant work, 9am – 5pm, five days per week. However, as the task is so straightforward, the 'employer' makes it clear that it would not take issue if the individual sent a replacement to do the work, and also reserves the right to withhold work if it decides to shut the production line at any stage, or if it is overstaffed on any particular day (and it exercises this right from

time to time, albeit infrequently). The individual works for the 'employer' for five years, but after a short sickness absence is told that no further work is available. In these circumstances, the right of substitution could be seen as genuine. There would also be a lack of mutuality. [CAT – not sure I agree with this – the employee certainly seems to be "obliged" in this case – see my note above] Therefore, the individual may find it difficult to bring any employment claim against the employer, even though it would appear to the casual observer that this was a paradigm employment arrangement.

A solution to the issues that these situations create may be found in taking a different approach to the meaning of employer. Rather than defining the employer as a single entity with whom the employee has a contractual relationship, there are arguments to suggest that the approach to employer responsibilities should be based on the functions that an entity performs. As Jeremias Prassl points out in *The Concept of the Employer*, employers fulfil five functions:

- The inception and termination of contracts;

- Receiving labour and the fruits of that labour (such that the employee owes duties of fidelity, and obedience, and the employer is entitled to any intellectual property rights created by the employee, and can benefit from the goods and services produced by the employee);
- Providing work and pay;
- Managing the internal market (i.e. controlling what needs to be done within the business, when, and how the work should be performed); and
- Managing the external market (i.e. investing in the project (such as through the provision of tools), continuing to pay during downturns, benefitting from profits and suffering losses made through the enterprise).

There is more scope to apportion responsibility by reference to the different functions carried out by entities, as opposed to considering only one employer: the functions may well be carried out by one employer, but they could equally be apportioned between two or more, or each function could itself be shared between multiple entities. There is no 'lump of power' when it comes to managing employees: because one stakeholder is given power over employees, it does not mean that other stakeholders must therefore necessarily have less power.

Accordingly, if an employee on balance satisfies the test of being self employed, but a third party in reality is able to dictate the working conditions of that individual (the hours they work, the way in which they perform the task, and how much they should be paid for it), then the entity should be responsible for ensuring that the individual is paid the National Minimum Wage, and is able to take rest breaks and holiday.

This would allow the court to give protection to those who need it, by reaching around umbrella contracts, gig economy platform arrangements and complex corporate structures.

This concept is not completely alien to employment law. Section 41 of the Equality Act 2010, for instance, allows for third parties to be liable in agency situations for discrimination. In the *Albron* case in the Netherlands, an employee in a group company was held to be protected by the Acquired Rights Directive when the business of a subsidiary company in the same group was transferred to a third party. It should therefore be possible for an employee to have the ability to bring a claim against the entity that decides to dismiss them, or indeed for the entity that provided the training and facilities to an employee to take the benefit of the intellectual property rights produced by that employee during the course of their work.

Of course, the definition would need to be limited to cases where employment law currently could provide a remedy. The Employment Tribunal would need to be careful not to hold third parties responsible for decisions made in the course of business which would not normally have a bearing on an employment claim. So, if a supplier chose not to continue to supply a retail outlet and the shop therefore needed to make redundancies among its staff, the supplier should not be held responsible.

We recognise that the multifunctional approach is a considerable departure from existing law. However, it may be appropriate to limit its use to circumstances where an employee would otherwise

have no remedy. It may be that a statutory definition of employer should only be used in certain circumstances – as with the extended definition of worker used in whistleblowing legislation.

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