The gig economy – a UK perspective

Paul Callaghan

TaylorWessing

The gig economy in the UK

One of the vaunted benefits of the gig, sharing or collaborative economy business models, is their supposed flexibility for those working for them. You can work for a delivery company part time while studying or while your kids are at school; you can choose the hours you work; and you are independent. If you are genuinely self-employed, you do not have the rights which are associated with being an employee, like sick pay, holiday pay and a minimum wage. Some people who work in the gig economy believe they have been wrongly classified as self-employed by businesses wanting to avoid the regulation that comes with having employees, or the intermediate category of “workers”

The legal and political issues around the future of work have dominated the thinking of business. Litigation in the UK around Uber and worker status it formed the 'case of the year' in the UK in 2017. Discussions about employment status, which are really about the rights people have in relation to work, have dominated in many developed economies

Why so, when gig economy or online platform work involves only 6% of independent workers, by some estimates?

1. Independent work is growing - no one knows by how much, and there is limited research on why. But all sources agree that it is, and in many cases it is positively chosen.

2. Where it is growing is patchy – it seems to be declining in Germany, and across the EU there are inconsistent levels. So forming common policy on an international basis is difficult.

3. Across most countries, the tax and social security 'take' for this work is less, and so are the social and legal rights that people have.

4. The combination of technology and demographic change - "Daddy, a robot ate my job" - heightens the generational insecurity that has plagued Western consumer and worker considerations since the financial crisis.

Small but growing as it is, the platform economy is the 'Godzilla' that represents general anxiety about work and rights in the 21st century. It is a metaphor for disruption, change and insecurity, and "insecurity at work is becoming the new normal for too many workers. It's happening across new and old industries, with workers forced onto shady contracts whether they are ... drivers, bar staff or teaching assistants"[1].

Around the world, businesses are thinking how to adapt, differentiate themselves and grow in a radically altering environment. In the UK, Brexit is challenging …

"The huge opportunity offered by Brexit is to allow our national government to ... rethink the basic questions of employment, taxation and the role of government in the 21st century". [2]

[1] TUC: quote accompanying report: The Impact of increased self-employment and insecure work on the public finances 2017
[2] Source: Janet Daley, The Daily Telegraph March 2017

Platform working

His masters' voices? Bumps in the road to platform working and selective tasking

What counts as working time is important, as it goes to the calculation of the selected economic rights to which all workers are entitled. For example, in the Uber case, does the National Minimum Wage (or the recently introduced National Living Wage) just cover time actually driving a customer on a trip?

In the UK Uber driver case, it was determined that "working time starts as soon as he is within his territory, has the App switched on and is ready and willing to accept trips and ends as soon as one or more of those conditions ceases to apply."

A question of status

'Worker' is an intermediate category of person who is not an employee with full rights not to be dismissed but is not an independent contractor either. More significantly, from a legal perspective, they have rights to some potentially expensive benefits.

There are a number of overlapping tests to determine whether an individual should be considered a worker rather than being engaged on a genuinely self-employed basis. The recent UK Court of Appeal judgment involving a tradesman working via a traditional plumbing business, Pimlico Plumbers which has recently been heard in the Supreme Court, (i.e. not a gig economy type app) is the latest high profile case to consider a number of these tests. The Court focussed in particular on whether the individual is required to provide work personally, or has a genuine and unfettered ability to provide a substitute. Where the agreement between company and individual contains restrictions on the individual for carrying out work for third parties during or after the services being provided to the business in question, this is likely to be suggestive of a worker relationships.

Other tests that the courts will consider include assessing the level of integration of the individual into the business of the company (do they work from a company office, using tools and materials provided by the business?) and the level of 'mutuality' (is there a requirement for the individual to be offered a minimum amount of work? When offered work, is the individual under an obligation to do it, rather than having a free rein to pick and choose assignments as he sees fit?).

Drivers start to earn this right as soon as they are available to accept any trip, even if this means they are sat in their vehicle, stationary, for a potentially significant period of time. Circumstantial evidence suggests that, with the increase in people choosing to work via Uber's app, an insufficient respective increase in service users has made competition for fares fiercer, particularly in recent months. So workers have more incentive to bring claims than the 19 who originally sued Uber.

Workers are also entitled to accrue paid time off whilst working – the ability to take holiday and still receive payment as if they were actually working at such time: something employees in more traditional workplaces take for granted, at least in Europe, whereas it is not something which is universally expected or offered in the online economy. In the UK a full-time worker is entitled to a minimum of 28 days paid vacation. Pro-rating to gig economy workers and working out how much they actually should be paid each time they take vacation is a challenge. The law currently provides only a small amount of guidance.

Juggling is an illusion

In the Uber case, evidence was heard that a high number of drivers relied on the platform as their main source of income. But economic models change with market forces, and all the more so if new policy is passed – whether by the EU or after the Taylor Review which was set up by the UK government to introduce new ways of working. What if a person is not only an Uber driver but also, for example, works on Gett, Uber Eats or is a Deliveroo rider? (Deliveroo is a popular app across Europe similar to Uber Eats delivering meals from signed up restaurants.) They may have two different apps running at the same time to see which offers them an assignment first. After all, it is consistently an argument run by gig economy businesses that workers have no duty to accept any particular assignment, an indication of self-employment rather than worker or employment status. This is extremely common in the US, where drivers often work for both Uber, Lyft or Juno in New York at the same time. With the increasing number of industries being disrupted by this kind of business model, the options available for a "gigger" are limited only by time and geography. They could be a Taskrabbit tasker, ten minutes later a Lyft driver and delivering meals via Uber Eats an hour after this.

Two main questions therefore arise where someone is multi-apping is this way; questions which no court or tribunal has yet had to answer:

1. is the individual really entitled to be treated as carrying out work for such business for all the time they "have the App switched on and… ready and willing" to accept assignments?
2. which businesses should at any particular time be responsible for the rights thereby accruing?

This highlights a defect of the common law model for dealing with new technologies and practice: evolutionary case law takes time, has an uncertainty cost, and grafts sometimes uncomfortably into EU-derived universal values.

If the answer to the first question is 'yes', and for example the individual logs into five apps at any one time and makes themselves available to take on gigs through each, then that individual would be entitled to receive from each of those app businesses the minimum wage for all such periods; it would be a practice open to abuse. Similarly, they would accrue the right to take paid holiday for all periods worked in this way and be able to require each app to provide such holiday pay. That would be an unintended consequence arising from an isolated factor in the Uber worker status case.

This is something which Uber themselves have referred to when responding to the call for input into a parliamentary enquiry into the future world of work and rights of workers. They observe that "When using Uber, drivers are … entirely free to work elsewhere at the same time, for example delivering parcels for Amazon, or to use Uber while also working for a mini-cab firm". They refer to a case study of one Uber driver who "logged onto the app for 91 hours over one week last year, but took only 18% of the trips that were sent to him. What he did during the other time, Uber cannot know ...". They go on to point out that "if this same driver were classified as a worker, Uber would be required to compensate him on an hourly basis for his time ..." and that this would "raise questions as to which 'employer' should be responsible for paying this hourly wage if the worker used Uber while also working for another company at the same time. For example someone driving with Uber may also have parcels in their car that they are delivering throughout the day. It would be an odd result for both to be required to pay the minimum wage".

Assuming that in time there should be no ability to accrue multiplied rights, yet to be resolved is exactly how such rights can and should be enforced following such a finding.

The responsible employer

If someone is working for a variety of businesses from hour to hour, how are such businesses to be responsible for ensuring the payment of minimum wage and holiday? Even if an individual does not open a wallet of apps at one time but rather works for different businesses on different days, the issue still arises; when that individual decides to take a week's holiday, how should responsibility for funding it be determined? What is to stop someone taking paid 'holiday' for a week when they are not working as an Uber driver only to continue to be paid during that week while carrying out Deliveroo assignments? And how to reduce scope for workers to game the system by working long hours to boost holiday pay (e.g. under the UK's 13-week averaging system)?

In the EU, the right to take paid holiday is at least in part a health and safety measure to avoid burn out and there is considered a duty of care on all employers to ensure people are taking holiday to which they are entitled. How does this transpose to the economic valuation of rights and peripatetic nature of a gig economy worker over whom one app cannot reasonably be expected to have control as to what they do when not carrying out their assignments?

A further example is the EU cap on maximum weekly working hours. Whether this is maintained after Brexit, we need to wait and see. It is a controversial subject to many, and rights to opt out could be weakened, or even made inapplicable to online workers. Where someone is not opted out from this, to what extent should a platform be required to ensure their workers are not carrying out work for other companies so that their total working hours are not in breach of the law and potentially dangerous from a health and safety point of view? A similar point can be made for the enforcement of daily and weekly rest breaks, further rules set down by European legislation for the protection of the workforce, and which may be ripe for review after Brexit.

The UK Prime Minister promised to 'grandfather' these EU rights but, with that taking the form of secondary legislation, it would be possible for them to be eroded quickly through Parliamentary action in the short term - if the political will is there and UK policy review cannot find a way to a fair solution.

The way ahead

Where the rights accompanying worker status are monetary in nature, in particular minimum wage and paid holiday rules, it seems difficult to reconcile a system where the worker receives what they are legally entitled to without the risk of double (or treble or quadruple) benefit. It will be interesting to see to what extent this issue can be dealt with in the Taylor Review instead of legal decisions. Perhaps in a world of multi-app working, the most viable solution would be an arrangement whereby each platform in an industry pays a set rate towards a fund from which gig economy workers can be paid in respect of holiday they are entitled to take.

There are examples of industry-based benefit plans derived from teaching, healthcare and local government. It would be a strange echo indeed if 'public-sector' style solutions like this were evolved for the highly privatised platform economy. And it would not answer the cross-category 'problem' of multi-industry workers, unless the technology itself was taxed in this way, or the UK moved closer to a universal benefits system.

These thoughts rely on the belief that the tide continues to flow in favour of those engaged in the gig economy being deemed workers. Many of the important decisions have been made only at first instance. But if (as we assume) this happens, rather than focusing on whether individuals should be considered workers and therefore be entitled to certain employment rights, the courts

will need to turn their minds to costing these rights and deciding who should be responsible for them and how. Without this clarity, enforcement of those rights will be riddled with difficulties.

Of course, the tide could turn. Higher courts may accept that independent contractor models apply on the facts. Equally, platforms may adapt some of their practices to increase the likelihood that their people are self-employed.

Having taken three years to get to the general recognition of the issues of control and integration for platforms in determining worker status, it is unthinkable that it could take three more years to work out the cost. And it is as troubling for businesses to think that EU and UK methods may diverge sharply.

The UK case law

Questions about employment status are arising across new and old industries – while the platform economy is small (but growing), it embodies wider anxieties about work and rights in the 21st century. Last year Uber became the most famous name so far to fall foul of the rules, when two supposedly self-employed drivers were held to be workers entitled to paid holiday, sick pay and more.

1. **UK appeal tribunal confirms decision that Uber drivers are "workers" and not self-employed**

Employment Tribunal decision in 2016:

A first instance Employment Tribunal in London has found that Uber drivers have “worker” status and are not self-employed as claimed by Uber.

The decision is likely to be appealed and at this stage does not create a legal precedent. However, it is potentially very significant as a matter of UK law. Workers status does not give full employee rights to shared or gig economy service providers.

However, “worker” status does give individuals the right to 5.6 weeks of paid vacation per year and to the national minimum wage which is currently set at £7.20 per hour for people aged 25 and over. It may also result in a right to pension contributions. The cost to shared or gig economy companies is potentially great.

The key issues revolve around the control that Uber allegedly has of its drivers in order to ensure quality of service. It was held that Uber controls key information, in particular regarding the passengers’ destination and potentially takes disciplinary action against its drivers who cancel trips, take poor routes or who receive poor ratings from passengers. The fact that Uber decides on the fare charged is also relevant. It has also found to be an important fact that payment of the fare does not go directly from the passenger to the driver but via Uber.

For all companies in the shared or gig economy this reinforces the need to give self-employed contractors as much freedom as possible as to how they perform their services so that the company can show that it is simply providing a technology platform for users and service providers.

Employment Appeal Tribunal upheld the decision on 10 November 2017:

It has been confirmed that Uber have failed in their attempt to overturn a judgment that their drivers should be deemed “workers” rather than self-employed contractors and that they are therefore entitled to certain minimum employment rights including minimum wage and the right to at least 5.6 weeks’ paid time off on a pro-rated basis for time worked.

The UK employment appeal tribunal has upheld the findings of the Employment Tribunal in 2016.

Workers are not entitled to the full suite of UK employment rights and do not, for example, benefit from the right not to be unfairly dismissed after two years’ service.

Despite Uber clearly categorising the relationship as that of self-employment in relevant paperwork, it was considered correct to look behind this to the “reality of the situation” and the practical arrangements actually in place, which were more consistent with that of a worker relationship. The Uber drivers were deemed to be incorporated into Uber’s business of providing transportation services, rather than working in business on their own account.

It was deemed important to the issue of control that there were obligations on drivers to accept trips offered by Uber – an 80% acceptance rate was expected - and that they should not cancel trips once confirmed.

It was found that Uber drivers should be considered to be engaged on "working time" (and therefore entitled to minimum wage, for example) whenever they have the Uber app switched on and were available and willing to accept rides. This appears to be the case even if a driver is also logged into one or more other apps through which they could equally accept an assignment at any given time. This raises issues around whether it is correct that an individual could technically claim minimum wage from each gig economy platform they happen to log into at any one time (even when they are not actually carrying out any work on any or all of them). It was made clear that this would be highly fact- and context-specific but that the scale of Uber's business was a factor suggestive of this being the correct analysis in this instance. The same approach may not be taken for other platforms which perhaps do not have such a high market share, where users of the various platforms are more clearly advertising themselves as being available to work not just for one app, or where it is less likely that assignments on that app would be preferred over others which may be available.

This is almost certainly not the end of the matter, the case is due to be heard in the Court of Appeal but no date has been set yet. This case is expected to be allowed to be pursued on appeal to the UK's Supreme Court, the decision of which will be most telling for the gig economy industry in the UK.

For all companies operating their business as simply a technology platform accessed by contractors running their own enterprise, this ruling reinforces the importance of self-employed contractors being fully in control of how and when they perform their services, there being no penalties for failing to carry out any assignments offered and having no restrictions on being able to carry out services for any third parties.

2. Deliveroo CAC decision:

On 14 November, Deliveroo won a ruling by the CAC (an authority dealing with union recognition) that its riders are not workers. This was a surprise.

In contract to the Uber case, Deliveroo succeeded in showing self-employment because its 'roos' have a right to substitute others for the job they have already accepted, or are yet to accept. This finding has been argued to rely on new contract terms only recently introduced by… yes, whole "armies of lawyers" … And the IWGB union in that case has said it's a rare success for a business which is trying to "game the system".

3. Pimlico Plumbers – the first Supreme Court case on the gig economy

Earlier this year, the company lost its appeal against a finding that Gary Smith, who had worked for the plumbing business for about five and a half years as a supposedly self-employed contractor, was in fact a worker all the time. It was an arrangement that suited both parties – the company was not obliged to offer him work if none was available and passed the risk of non-paying customers to him; as self-employed for tax purposes, he had the benefit of reduced National Insurance contributions and was able to declare deductions for employing his wife and using a room at home as his office. All that changed when his health meant he wanted to reduce his hours: Pimlico Plumbers stopped giving him work and demanded their van back.

After the decision Charlie Mullins (the founder of Pimlico Plumbers) said, “It looks like the courts are happy for [workers] to have their cake and eat it,” and that he was considering an appeal. Pimlico Plumbers have now made an application that, if granted, will give the company the opportunity to put its side to the Supreme Court.

For a start, Uber is (currently) only an employment tribunal decision, although the EAT will hear the company’s appeal in September. When it does so, one of the cases to which it will no doubt be referred will be Pimlico. It’s already been in the Court of Appeal, and was decided there by three highly respected judges, including Lord Justice Underhill (former President of the Employment Appeal Tribunal) and the Master of the Rolls.

The judgment is clear that this is a case of importance not just to the platform economy, but to the broader grounds on which people can be found to be workers. Gary Smith was a highly skilled, well-paid professional – not a stereotypical gig economy worker doing simple tasks for payment that could even be less than the national minimum wage.

Any contract has to be interpreted in the light of the facts which form its background, said the Master of the Rolls. Context makes it more likely that a contract will be taken to show an employer-worker relationship.

The contract included a restrictive covenant preventing him from working as a plumber in Greater London for three months after termination. The Court of Appeal found that the EAT was correct to consider such restrictions an important feature of worker status. Many companies which use contractors include post-termination clauses.

These issues are crucial to work in the 21st century. Matthew Taylor’s Review into modern employment practices is due after the election; meanwhile, Uber is offering sick pay and other benefits (at a cost to workers) and Hermes (which denies it is part of the gig economy) has plans to establish a ‘Courier Co-op’ for consultation with its self-employed couriers. Yet both are facing claims from those who work for them.

In other words, a business like Pimlico cannot have its cake and eat it: if it wants to say someone is self-employed, their economic freedom and ability to compete are an important feature of that status. But will the Supreme Court agree?

The Supreme Court heard the case last month and we are still awaiting the judgement on the case.

The Taylor Review and the UK government's response

In February 2018, the UK government published its response to Good Work, the Taylor Review's independent report into modern working practices. That report, published in July, made numerous proposals with the aim of securing fair and decent work for all. It covers many kinds of modern work – agencies, zero hours, contractors and the online gig economy.

The government response has been hailed as "the employment law shake up of a generation" by business leaders at the Institute of Directors and "big on grandiose claims, light on substance" by union leaders. Matthew Taylor himself, the man who captured the ideas, says that he welcomes "the direction indicated…, but there is more work to be done." But what does the response actually say, and how soon can we expect change?

A reminder of the background

The UK has one of the most flexible labour markets in the world, with less regulation of temporary work than in other jurisdictions. After a number of highly publicised cases and concerns about new ways of working, the July 2017 *Good work: the Taylor review of modern working practices* acknowledged the strong performance of the UK labour market, and argued that all work in the UK economy should be fair and decent, with realistic scope for development and fulfilment. The report set out seven steps to be taken, acknowledging the importance of good work for all, fairer flexibility, the importance of good management, the importance of progression at work and health in the workplace, and of clarity in the gig economy.

Building on the Taylor Review's recommendations, the Work and Pensions and Business, Energy and Industrial Strategy House of Commons Select Committees produced a joint report at the end of 2017, together with draft legislation to take their proposals forward.

A direction of travel: the government's response

The government says it is committed to reform that makes modern work fit for the 21st century. There's a lot in the response, and the four consultations which accompanied its publications – but not yet all the detail.

In summary, the government says that it is "taking forward" all but one of the recommendations in the Taylor Review – but that doesn't always mean they have accepted them, or that we can expect immediate action to implement them.

For instance, the government has considered but decided not to pursue the Review's recommendation that 'rolled up' holiday pay (paying an additional 12.07% of wages to workers in lieu of holiday) be made lawful, since it is contrary to EU law. This is an area where policy will maintain current EU rules, rather than there being a Brexit bonfire of regulation.

Employment status

The UK's present ***three-tier approach to employment status*** (employees, workers, and self-employed independent contractors) will remain; workers who are not employees are likely to be renamed ***'dependent contractors'***. This is simply intended to make their status clearer, and will not itself bring new rights or obligations.

People who currently fall into a particular category are unlikely to move to another. Rather, the response acknowledges it should be easier to identify a person's status, and clear to both business and the individual into which category they fall – and therefore, what their rights are.

The consultation asks how best to provide clarity without the need to go to an employment tribunal, and proposes that, once the test is clarified (and perhaps, codified in statute), an ***online test*** is developed.

HMRC has developed a similar tool for IR35 determinations, which is believed to have reduced instances of bogus self-employment. However, as anyone who has followed the history of that tool will remember, this is a highly complex task, in an area subject to change (the cases of Pimlico Plumbers in the Supreme Court and Uber in the Court of Appeal later this year will impact the current test).

The differences between tax and employment law are a source of confusion for many. The consultation considers the review's recommendation for ***greater alignment between tax and employment status***, and asks whether those deemed employees for tax purposes should therefore get employment rights, and if so, which ones. It would be surprising if much comes out of this.

Working time, pay, and the gig economy

Usefully, the government plans to consult on the definition of ***working time for platform workers***, and to be clearer ***how the minimum wage applies*** to gig economy workers. Many platforms do not at present accept the view that merely being logged onto an app and waiting for a job is 'working', but the judges in the Uber and other tribunal cases have disagreed.

Many apps allow those working through them to be logged on to more than one app at once, and argue it cannot be right that individuals can earn the minimum wage more than once for the same waiting period. This ***'multi-apping'*** has been acknowledged but to date, no solution has been found. They will want to contribute to the consultations. It is not clear yet how the minimum wage rules might be changed to deal with this, perhaps to active work (but how would this then impact those who earn the minimum wage in traditional 'on call' arrangements?) or by excluding the possibility of working for more than one employer at once. Clarity would certainly be welcome - although how exactly it will clear up that issue when platforms and apps can be so variable remains to be seen.

The government has accepted the Taylor Review's recommendation to ask the Low Pay Commission to explore the impact of a ***higher National Living Wage/National Minimum Wage rate for non-guaranteed hours***. The LPC will report back to ministers in October 2018, but it met with some criticism in parliamentary committee evidence and may not find favour.

Rolled-up holiday pay is unlawful, but the government will consult on increasing the reference period for calculation of holiday and ***holiday pay*** from 12 to 52 weeks, to better ensure all workers, but especially seasonal ones, receive their full holiday entitlement and businesses can smooth out fluctuations.

The government will analyse whether ***statutory sick pay*** should be made a basic right from day one, but which increases with length of service as holiday does at present, and whether a right to return to a job following sickness absence should be introduced.

Finally, the response includes support for the Taylor Review's recommendation that those on gig economy platforms should be able to carry their good ratings from one platform to another, as investment managers try to when they move jobs. However, the government intends only to monitor GDPR implementation (which will make it easier for individuals to access their personal data) to see if further government action is required to support the transferability of ratings.

Agency workers

This is a political hotspot. It is bound up with attitudes to the EU.

While some people choose to be agency workers for the flexibility it gives them, the more vulnerable need protection. ***Pay transparency for agency workers*** should be improved, with rights to key fact information about who is responsible for paying them, and what the rates of pay will be.

The consultation seeks evidence on the extent of abuse of the ***'Swedish derogation'*** (pay between assignments contracts) in the Agency Workers Regulations, and asks for opinions on options for its repeal or improving enforcement. (Evidence provided to the Taylor Review has already suggested that less reputable agencies use these contracts inappropriately.) If widespread, the derogation may be abolished.

The government is considering if the Employment Agency Standards Inspectorate should have its remit extended to ***umbrella companies and supply chain intermediaries*** and enforcement of the Agency Workers Regulations.

Right to request a more stable contract

The Taylor Review recommended that agency workers who have been placed with the same hirer for more than 12 months would have a right to request a direct contract, and the hirer must consider the request in a reasonable manner. Those who have been on a zero hours contract for more than 12 months should be entitled to request a contract that guarantees hours better reflecting the actual hours worked.

The government response goes further than the Taylor Review, and commits to creating ***a new right to request a more predictable contract for all workers***, including zero hours and agency workers. The government will consult on how best to effectively implement this right. This could be more significant than it looks – over time, the right to request flexible working that was introduced in 2003, has meant more variety in work patterns.

Transparency

A number of the Taylor Review's recommendations intended to improve transparency are being taken forward:

- All workers should ***receive information about the terms of the working relationship*** from the very beginning (a 'Day 1 statement'), but precisely what information and in what format remains open to consultation.

- All workers should be entitled to an ***itemised pay slip*** (stating the hours worked for time-paid workers) from 6 April 2019.

- The government proposes changing the law to extend the period for a ***break in continuity of service*** from one week. (Many employment rights are dependent on length of service, such as unfair dismissal and the right to maternity pay.) The consultation asks whether it should be two weeks or higher, and asks whether the criteria and exemptions for breaks in service need to be amended. There will be new guidance to clarify the rules.

- While pointing to the Acas guidance published in November 2017, the government has committed to updating and consolidating the ***pregnancy and maternity*** pages on its website GOV.UK by Summer 2018. It will also review the legislation relating to protection against redundancy and keep existing protections under review.

- The government will also explore publicity campaign options to better communicate entitlements to all workers.

Reporting and accountability

This government has an appetite for requiring business to disclose its practices online.

The Taylor Review said companies beyond a certain size should report certain information on their workforce structure and the number of requests from agency workers for direct contracts and zero hours workers for contracts better reflecting hours worked.

The government does not propose immediate change, but will monitor the impact of planned ***corporate governance reforms*** (which include plans to require large private companies to account for their business conduct) and will take further action if these reforms do not change behaviour. Guidance for companies on the content of annual reports will be revised to encourage companies to provide a fuller explanation of workforce models and practices.

Workforce relations

The government is consulting on how to ***enhance employee engagement***, which includes changes to the Information and Consultation Regulations 2004 (ICE Regulations). What are the benefits of making it easier for workers to trigger formal consultation with their employer?

The government has accepted the Taylor Review's recommendation that the government work with bodies such as Acas, trade unions and Investors in People to identify and develop ways of promoting better employee engagement, and ministers and officials will hold meetings with experts in the coming months.

The ICE Regulations appear (based on old data) to have had limited impact. The government say they are committed to employees having a voice at work, but will consult further on the recommendation to reduce the threshold for implementation of the ICE Regulations from 10% to 2% of the workforce. This is more radical than it looks. There are a number of union recognition battles that are hard for workers to win. The proposal would go some way to reverse that pattern.

Enforcement of employment rights

The present ***two tier approach to enforcement*** works, says the government – some basic rights (such as to the National Minimum Wage) are enforced by the state (HMRC), while others are the subject of employment tribunal claims.

The government is consulting on extending state enforcement to other basic employment rights, such as sickness and holiday pay, for the lowest paid workers, so long as enforcement can be targeted at those most likely to be in breach while minimising burdens on compliant businesses and ensuring that all activity is cost-effective.

The government plans to ***simplify the enforcement process*** for employment tribunal awards, and to introduce a new naming scheme for unpaid employment tribunal awards. The

consultation published with this response will consider specifically how reforms across the courts and tribunal service to the process for dealing with unpaid awards should work in employment tribunals.

Employment tribunal fines may increase to ***£20,000*** for employers showing malice, spite or gross oversight, while tribunal judges will also be required to consider stronger punishments for employers who ignore previous tribunal judgments, as the government agrees that fair and transparent framework will act as a deterrent. The consultation asks detailed questions around how these recommendations can be implemented – for example, what precisely a "repeat offence" would be.

Apprenticeships and internships

The law is clear that ***if interns are workers, they should receive the appropriate pay***. There will be new guidance and targeted enforcement activity by HMRC to stamp out illegal and exploitative unpaid internships, while engaging with sectors where good practice is already common.

Apprenticeships should be "real, paid jobs". There are already steps in place to ensure the ***quality of apprenticeships***: they must be of at least 12 months' duration, involve sustained training and clear skills gain, and must include English and maths for those who have not achieved good GCSEs in those subjects. There should be a unified framework of employability skills, also open to employers and schools, as part of the reform of technical education.

The government will continue to assess the impact of the ***apprenticeship levy*** and apprenticeship reforms, and will work with employers on how the levy works so that it works effectively and flexibly for industry and supports productivity.

Support for the self-employed

'Workertech' solutions support individuals in sharing information, calculating benefits and bringing workers together as a collective voice.

The government, working with partners, wants to stimulate further development of models and platforms to support the self-employed and to improve their pension provision – and, of course, to ensure that they pay the right tax.

And what's been dropped

As well as rolled up holiday pay mentioned above:

- unsurprisingly, the government has no plans to increase ***self-employed National Insurance contributions***. While the government agrees with the Taylor Review that the small differences between employed and self-employed benefits no longer justify the scale of difference between the National Insurance contributions paid, the attempt to change this in the Spring 2017 Budget ended in a government climb-down.

- the government has ruled out the presumption of "***worker by default***" in the Select Committees' draft legislation (so that the employer was required to show the individual was self-employed, and not the other way round), at least until the tests for employment status are certain and an online test has been developed

- ***non-compete clauses*** will remain. In 2015, the government issued a Call for Evidence on whether such clauses prevent individuals moving between jobs, and whether the UK should follow other jurisdictions (notably California) in banning them. The government noted that respondents found such restrictions to be necessary and valuable, and no action will be taken.

So what now?

Companies using app-based workers will especially need to watch developments in case law closely, particularly around the questions of employment status and working time.

Several of the proposals, particularly around the national minimum wage and agency workers, have a clear cost to employers and end-users if implemented. Those using agency workers currently engaged under Swedish derogation contracts and those who use zero-hours workers should model the costs of increased hourly rates to their business operations.

While the will to develop a framework fit for the British labour market in the 21st century may be there, so long as detail is sparse, it will be hard to assess the impact or timing.

The government has issued four consultation papers with closing dates between 9 May and 1 June. It seems the government is trying to build consensus behind an important domestic policy change, and also to avoid taking a position that cannot be delivered: all while Brexit looms, and takes up government time.

For example, employment status is a huge issue and, for all of the questions around what the test should be, the government has not laid out its own proposal, and simply thrown open the door to suggestions. An online test which produces accurate results will take even longer to achieve.

The disadvantage to this approach is that the Taylor Review itself took months to listen to the views of and evidence provided by lawyers, employers, gig economy platforms, trade unions, think tanks and other interested parties before reaching its recommendations. It seems unlikely that the responses to the government's own consultations will vary much from those already shared with Matthew Taylor and his colleagues.

How long the government will take to respond will no doubt depend on the number and content of the responses, but are likely to be a minimum of three months, probably six, and perhaps even longer. The consultations will run parallel to cases which are continuing to develop the law in this area and to the Brexit timescale.

Paul Callaghan

March 2018