

CHASING STATUS

The three-tier employment status framework underpins our flexible and dynamic labour market and must be maintained

The CBI welcomes this opportunity to respond to the Government's Employment Status consultation and present the case for improving our existing status system by ensuring that the law is well understood and effectively enforced. This approach is central to ensuring that our flexible and dynamic labour market can thrive and continue to support sustainable growth.

The CBI is the UK's leading business organisation, speaking for some 190,000 businesses that together employ around a third of the UK's private sector workforce. Its mission is to help businesses create a more prosperous society.

The UK's flexible labour market is a key driver of economic growth and prosperity. Flexible labour markets tend to enjoy higher employment rates and lower unemployment than those with more rigid approaches. As CBI research from 2014 shows, they have also better protected the labour share and delivered more real terms wage growth.¹

Our employment status framework, and in particular the worker status, is the bedrock of this flexibility and must be retained. Sitting between employment and self-employment, the worker status importantly provides additional rights appropriate to the nature of the relationship between employer and worker. It often makes possible more flexible forms of work that are preferred by some individuals. This has been a key driver of UK labour market success that sees unemployment at record lows.² Further, the worker status provides businesses with access to fluid labour that can allow them to develop innovative working models and adapt to varying levels of demand, often at short notice.

CBI feels that the worker status is delivering as intended and so does not believe that there is a case for changing the worker category to 'dependent contractor'. We do not agree that this would be beneficial for the status framework and in fact businesses believe that its introduction would add unnecessary confusion rather than simplicity. Since the point of publication, Taylor has also made statements that seem to contradict the proposal made in the review and implying that 'dependent contractor' should be a new subsection of worker.³ No employment tribunal judge has yet felt unable to determine whether a claimant is a worker or self-employed and it is unclear how the creation of a 4th status, or a rebranding of the 'worker' status would benefit anybody.

- **RECOMMENDATION:** Government should not rename or change the worker category to 'dependent contractor'.

The worker status is integral to business confidence and flexibility in the UK labour market...

Nevertheless, it is important to highlight that full-time, permanent employee working relationships are still the norm in our labour market and will remain so because of the advantages to both businesses and to workers. For the fifth year running, CBI research indicates that UK businesses expect permanent job openings to

¹ *A Better off Britain*, CBI, 2014

² *UK Labour Market: May 2018*, ONS, 15th May 2018

³ *Oral evidence, Taylor Review of Modern Working Practices, HC 352*, Business, Energy and Industrial Strategy and Work and Pensions Committees, 11th October 2017

outstrip other forms of recruitment in the year ahead.⁴ The balance of firms expecting permanent hires to increase over those expecting less permanent recruitment in 2018 is +35% - nearly double the result of the previous year's survey. Business models based on the recruitment of employees and workers remain attractive to firms because they provide them with the labour force stability that they need to make long term plans and investments, whilst having access to more flexible working arrangements gives businesses and investors the confidence that they can adapt to future challenges and opportunities. Our three-tier employment status system facilitates this balance and strengthens our labour market as a result.

Clearly, it is positive that our labour market provides so many different working arrangements to suit the needs and preferences of businesses and individuals. However, it is important that the strength of the UK economy is not measured on its ability to offer any specific type of arrangement. Instead, the focus must be on whether our labour market is providing the opportunities that people want and whether it can respond quickly to changing attitudes and behaviours.

- **RECOMMENDATION:** We must retain the worker status as part of our existing three-tier employment status framework.

...and we must challenge myths about the drivers and experiences of flexible work and self-employment

It is right to consider the labour market context within which debates around employment status take place, particularly considering the rise of self-employment and flexible working. Self-employment in the UK stands at 15% of the total workforce – around 4.8million people⁵ - however there are a wide variety of 'types' of self-employed people who operate in many different ways.⁶ Within the self-employed cohort, it is estimated that 4.4% of the UK workforce has worked in the gig economy in the last 12 months.⁷ Importantly, very few of these gig workers rely solely on this work as less than one in ten (8%) see it as their main source of income, and nearly a third (32%) use gig platforms to bring in extra income on top of other regular income.⁸ The rise in people entering into more flexible working arrangements, including those self-employed individuals who are active in the gig economy, is a positive example of our labour market responding to the diverse needs of businesses and workers.

The decision to enter into a flexible working arrangement is, in the clear majority of cases, the result of an active and informed choice. Research has found that over four-fifths of self-employed individuals want to keep working in this way rather than looking for employed jobs⁹ and two-thirds of zero-hours contracts workers do not want fixed working hours.¹⁰ More than half (53%) of gig economy workers say that overall they are very or fairly satisfied with their work and only just over one in ten (12%) report that they are dissatisfied.¹¹ The UK also has the best record in Europe for temporary workers moving into permanent work where this is what they would prefer to do.¹²

Research into the experiences of those working in the gig economy indicates that the main perceived advantages of this type of work is flexibility on working hours and whether or not to accept jobs, as well as

⁴ *Working Together* – CBI/ Pertemps Network Group Employment Trends Survey 2018, CBI, 2017

⁵ *The True Diversity of Self-Employment: Uncovering the different segments of the UK's self-employed workforce*, Centre for Research of Self-Employment, November 2017

⁶ Ibid

⁷ *The characteristics of those in the gig economy*, HM Government, February 2018

⁸ Ibid

⁹ *Just the job – or a working compromise? The changing nature of self-employment in the UK*, D'Arcy, C. and Gardiner, L., Resolution Foundation, 2014

¹⁰ *Employee views on flexible contracts*, UK Commission for Employment and Skills (UKCES), 2013

¹¹ Ibid

¹² *Labour transitions from temporary to permanent contracts – 3-year average*, Eurostat, 2016

the possibility of fitting work around other commitments.¹³ Research also finds that this sentiment exists across the many different gig occupations and that individuals understand that this flexibility comes at the cost of predictability and certain protections.¹⁴

With this in mind, growth in flexible working should be seen as the labour market reacting both to changing preferences around working patterns and to evolving consumer behaviour. Government's role in this process should be to provide appropriate guidance to individuals and businesses to support transparency of information, as well as supporting effective, targeted enforcement, including a well-functioning tribunal system, to ensure that any uncertainty around status can be managed effectively. Instead of providing clarity, status legislation would introduce harmful rigidity into our system and shackle future governments to a perpetual cycle of chasing status.

Concerns around a lack of clarity in the UK's employment status framework stem from ineffective enforcement of the rules, rather than ineffective law

CBI recognises that there are instances where a lack of clarity in the employment status system has led to some individuals being unclear of their status, particularly where new business models are concerned. It is right that these cases are put before an employment tribunal judge so that the specific nature of the relationship between the business and the claimant can be determined. While genuinely new ways of working will require test cases to confirm how the law applies in new situations, businesses have a good record of complying with relevant case law rather than pursuing very similar cases. If an employer is found to be deliberately failing to comply with the law then they should be subject to enforcement activities. This is integral to sustainable growth and increasing productivity and the CBI supports increased Government efforts in this area, as detailed in the CBI's other submission to this set of consultations *Good Work is Flexible and Fair*.

However, CBI does not support Government proposals that undermine flexible working opportunities as this would deprive individuals currently working in these ways of the flexibility that they value so highly. Doing so would create unnecessary barriers to the labour market for many individuals at a time when three-quarters of businesses tell us that skills gaps are the most prominent threat to the competitiveness of the UK labour market over the next five years.¹⁵ The detrimental impact of these barriers would also be felt most keenly by those who are unable to enter more regular forms of work such as carers and students, thereby disproportionately affecting certain sections of society.

Rather than increasing clarity for businesses and individuals, codification of case law will only make it more difficult to adapt to new ways of working in the future...

It is a credit to the UK's existing employment status system that, despite the development of new business models, employment tribunals have felt able to continue to determine status. One of the most positive and natural functions of our common law system is to adapt to changing labour market landscapes. The process of case law being determined over time creates an evolving legal framework which continues to serve the UK labour market well. The recent emergence of the gig economy is the latest in a long line of shifts that our legal system has successfully responded to. Indeed, there are ongoing court cases which will soon set

¹³ *The experiences of individuals in the gig economy*, HM Government, February 2018

¹⁴ Ibid

¹⁵ *Working Together – CBI/Pertemps Network Group Employment Trends Survey*, December 2017

important precedents for the way in which employment status is determined at employment tribunals moving forward, for example the Pimlico Plumbers and Uber cases.

Codification of case law by passing new legislation with the intention of quickly providing clarity around status would in fact have the opposite effect. The ramifications of this in the short term would be increased uncertainty as legislation may take longer to be drafted, passed and implemented than new case law. Case law would then also need to determine the boundaries of this new test. If tests are changed, it may also lead to a reduction in the proportion of workers able to find work in the form in which they are looking for it.

In the longer term, this approach would prevent employment tribunals from evolving the test to take account of ways of working that do not yet exist. Passing legislation on status definitions or the principles used to determine status is highly likely to be ineffective and create harmful rigidity in our labour market. The business community expects that this would further prevent us from being able to quickly adapt to and determine the appropriate status of new forms of work in the future. As tribunals have demonstrated over time, the way in which the status principles are applied can change depending on the context of the case. This flexibility is a powerful tool that underpins the adaptability of the legal framework and enables it to react much more quickly to labour market changes than would be possible with legislation. Therefore, it is something that we must continue to equip tribunal judges with moving forward.

In our original submission to the Taylor Review of Modern Working Practices, CBI stated that the employment status tests were in a period of transition, adapting to emerging ways of working such as the gig economy. A year on, the status landscape is clearer and will become clearer still as more rulings are made. The impact of these decisions will take time to filter through the system but once cases are completed will result in clarity faster than if Government attempted to pass legislation.

- **RECOMMENDATION:** Government should not codify employment status case law, which would create new uncertainties and make the law less effective in the longer-term.

...and simplicity must not come at the price of accuracy

The status test continues to be successfully applied to employment status cases. It is clear that tribunal judges believe that the test, and the principles that underpin it, are still relevant – even while presiding over disputes involving new forms of work, such as those of the gig economy. There has been no case where the judge has indicated that they were prevented from applying the status that reflected the nature of the relationship between the business and the individual because of the structure or principles of the existing status test.

Businesses see the principles-based approach as central to the strength of our employment status test as it provides courts with the maximum flexibility to consider all the relevant facts and deliver a reasoned judgement. Proposals to simplify the employment status test underestimate the importance of nuance and context in these judgements. Businesses have voiced concerns that oversimplified tests could greatly undermine accuracy and would lead to individuals being inappropriately judged to be workers or self-employed. Simplification of the test would therefore increase uncertainty and complexity within the status system and so business could not support such an approach.

Simplification would also go against the practice in other countries, including the US and Germany, where simple status tests, such as the ones referenced in the consultation document, have been replaced, or are supplemented, by a more detailed consideration of the broader factors at play in each status dispute.

The balance of the principles in the irreducible minimum must also be maintained and the CBI could not support greater weighting being allocated to any one over the others. Employment tribunals must equally consider substitution, control, and mutuality of obligation to develop a holistic view of each case to arrive at

the right outcome. Further, it is important that tribunals continue to have the flexibility to look beyond the irreducible minimum to consider wider factors as this allows a clearer picture to be developed and more nuanced conclusions to be reached. Nevertheless, firms believe that the core principles are the right ones and that they should continue to be used across all cases.

- **RECOMMENDATION:** The status test in its current form should be maintained and the principles used to determine status should remain the same.

Business is clear that the reality of employment relationships must determine employment rights

Businesses believe it essential that employment rights continue to be conferred only from the reality of the employment relationship between a business and an individual. It is reasonably assumed by some individuals that their tax status follows their employment status, leaving a perception of unfairness when somebody is self-employed for employment rights but employed taxation is still levied. Minimising the frequency with which these situations occur requires a speedy and effective process for the determination of employment status, and for HMRC to be mindful of avoiding unnecessary misalignment wherever possible when exercising its discretion to determine tax status.

From a practical perspective, there is already some degree of alignment between tax and rights status. HMRC, for example, takes employment rights case law into account, as well as the supervision, direction and control criteria, for determining tax status. HMRC also has a degree of discretion on how to apply this. It is primarily this discretion that sometimes results in an individual having one status for tax and another for employment rights.

The question of alignment is therefore one of absolute alignment rather than the quasi-alignment that currently exists.

Businesses recognise that there are potential advantages to absolute alignment. It may help to simplify the system, providing a single set of rules in place of the two used currently. The existing rules are acknowledged to have significant overlap and their practical application can be somewhat confusing. The advantages of alignment would however, be significantly outweighed by the disadvantages if alignment results in HMRC's discretion having any influence on eligibility for employment rights which must continue to be conferred from the reality of employment relationships.

Businesses have practical concerns too. As noted in the consultation document, there is currently no concept of 'worker' status for tax purposes, as there is for employment rights. Alignment of the two sets of rules would mean either removing the definition for rights purposes – which as discussed previously is essential to the UK's labour market – or introducing it to tax legislation or some alternative, which would also not be desirable and the necessity of such significant rule changes would arguably reduce the noted advantage of simplicity.

- **RECOMMENDATION:** The tax and employment statuses should remain separate, but HMRC should develop policy and exercise its discretion in ways which minimise divergence from the employment status test applied at the Employment Tribunal.

A holistic approach to taxing self-employed people is needed

As set out in the CBI's submission to 'The Taylor Review of Modern Working Practices' business recognise that developments in the labour market (most notably the growth in the number of self-employed) have started a wider discussion about the balance of tax paid by different employment types.

The current tax system is complex, not easily understood and hasn't kept pace with modern ways of working. Therefore, the CBI believes that a holistic review of the tax system is needed rather than further piecemeal changes. The decision to treat issues such as off-payroll working in the private sector separately from the Taylor Review make this more challenging to achieve, as the two are inherently linked. Businesses believe this issue is better addressed as part of a holistic review to ensure that the tax incentive for entrepreneurial activity is enhanced rather than lost. This review should be informed by six principles:

- Simplicity to bring greater clarity to employment status for tax purposes;
 - Entrepreneurial in spirit to spur growth among start-ups;
 - Supportive of the flexibility of the labour market;
 - Innovative in the use of technology to ease the compliance burden;
 - Sustainable to fund the entitlements on offer; and
 - Efficient use of HMRC's and businesses' limited resources for enforcement activities.
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- **RECOMMENDATION:** Government must take a holistic approach to taxing self-employed people and avoid making piecemeal changes to the system.

Efforts should be focussed on reforming access to the tribunal system and transparency of information...

The principle behind calls to simplify the status test is right – it should be quick and easy for people to determine their status if there is any doubt. Businesses are clear that employment tribunal judges are the right people to carry out this task.

For many years CBI has called for structural reform of the tribunal system. Ideally, Government should seek to return tribunals to their original vision of an easily accessible, informal, speedy and inexpensive system for people to individually enforce their rights, where other avenues of resolution have failed.

In the CBI's submission to the Taylor Review, we made the case for a separate tribunal track that would deal with employment status-only cases and our members still believe that this would be a valuable addition to the system.¹⁶ While the CBI believes that proportionate fees have an important part to play in this system to prevent misguided, weak and occasionally vexatious claims, we believe that claims via this status-only track should be free.

- **RECOMMENDATION:** Government should introduce a new employment tribunal track for employment status-only cases.

...and CBI members believe that an advisory online employment status tool could provide useful guidance

CBI members also see some merit in proposals for an advisory online employment status tool. Such a tool could help to provide individuals with access to information and guidance around their status which could help to increase clarity on the subject. This could both help individuals understand their situation better and enable businesses to test innovative ways of working when considering different business models.

Importantly, however, CBI members are clear that such a test could only ever be advisory and we would not support proposals for a determinative tool. Businesses are unconvinced that a status-tool could be created

¹⁶ *Work that works for all*, CBI, May 2017

that would strike the right balance between being detailed enough to capture the full picture and also quick and accessible enough to be practically useful.

In contrast, an advisory tool could be useful if it gives individuals and businesses early guidance and a general idea of how their situation is likely to be interpreted. CBI also thinks that a tool could have a part to play in the status-only track recommended above as a way of quickly identifying whether the issue in dispute is factual or based on the interpretation of facts. The effectiveness of the tool would depend largely on meaningful engagement with the business community and other stakeholders during the development phase to make sure that it delivers consistent, accurate, and appropriate guidance.

It would also be important to ensure that such a tool is not viewed as a 'silver bullet' to the structural deficiencies in the tribunal system and is instead introduced as part of a holistic drive to increase transparency, accessibility, and efficiency.

- **RECOMMENDATION:** Government should work closely with the business community to develop an advisory online status tool that can provide guidance around status for businesses and individuals.

The definition of working time for the gig-economy must not stifle the flexibility that many individuals value

Businesses recognise that the National Minimum Wage is of fundamental importance to our labour market and it should be completely clear as to where it applies and where it does not. While tribunals have been able to determine status for new forms of work, determining how the NMW applies in these sorts of situations is much more difficult as it challenges conceptions of what is and what isn't working time. Judges in recent cases, such as *Uber vs Aslam*, have indicated that greater legal clarity is needed in this area, particularly because of the tension around whether being 'available' to work could any longer be considered working time given that individuals can be 'available' for multiple platforms at once.¹⁷

CBI was pleased to see in the Employment Status consultation that government recognises employers' concerns that a definition of working time that requires individuals to be paid just for having an app open would be entirely incompatible with the gig economy. Platforms would need to abandon the aspect of gig working that workers most frequently cite as their reason for working in this way – the flexibility to decide when to seek work and whether to accept work. Failing to introduce a new definition of working time would increase the mismatch between the working opportunities that people are looking for and those that are available.

CBI believes that a simpler definition of working time is needed to apply the NMW to this form of work. This simpler definition must exclude 'available' or 'stand-by' time or risk removing this way of working despite the demand from individual workers for it.

After a simpler definition of working time has been applied, businesses should retain the same flexibility as other businesses to pay the NMW on the basis of 'time work' and 'piece work'. This is important to reflect the diversity of situations in which gig work is carried out. Some gig work for example, requires tasks to be carried out promptly or immediately. This situation may most accurately measure working time from the point at which a task is accepted to the time that it is completed. Other gig work involves accepting tasks to be completed in the future, for which a fair piece rate would be more appropriate.

Businesses are committed to providing transparency around employment rights and entitlements, including around pay.¹⁸ Many CBI members that operate in the gig economy already use their data to provide

¹⁷ *Uber vs Aslam*, Employment Appeal Tribunal, 10th November 2017

¹⁸ *Good work is flexible and fair*, CBI, May 2018

guidance for individuals on the rates of pay they can expect when they log on. This helps individuals to make an active and informed decision about when and with who to work. However, in practice providing this estimate can be challenging as there is a balance to be struck between simplicity for the individual and the accuracy of the guidance. The complexity is driven by the fact that there are so many variables that can impact upon an example rate including level of demand, geographical factors, the reference period over which the average is calculated, to name a few.

This is clearly an area where legislation is required to provide clarity. However, we cannot apply traditional understandings of working time to these new working relationships. Gig platforms have access to the data and technical knowledge to help the government arrive at an appropriate method of ensuring that the NMW is paid when it should be. But this must be done with the objective of protecting the flexibility that makes working in the gig economy so attractive.

- **RECOMMENDATION:** Government must legislate to set out a definition of working time that is compatible with working relationships in the gig economy.
- **RECOMMENDATION:** Government must give platforms the flexibility to provide estimated earnings in a way that is easy to understand for their users.