



Bar Council response to the Employment Status consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business, Energy & Industrial Strategy's consultation paper entitled "Employment status".¹
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Consultation questions

Question 1 - Do you agree that the points discussed in this chapter are the main issues with the current employment status system? Are there other issues that should be taken into account?

The broad themes that are relevant to this consultation are as follows:

- a) At present, the position in law is more straightforward than others claim it to be. In respect of each high profile appellate decision, it is entirely possible to see why the Court arrived at the result that it did.

¹ Department for Business, Energy & Industrial Strategy (2018), "Employment status".

- b) In any event, there is merit in the current position. The starting point is the Judgment of the Supreme Court in Autoclenz v Belcher & Others [2011] ICR 1157. This allows the Tribunal to look at the 'reality of the situation'. It makes a distinction between a commercial contract and an employment contract and does so on a rational basis.
- c) The reason why a problem has been identified is that parties have been drafting agreements which do not reflect the reality of the situation. There is a desire by the more powerful body to identify individuals as self-employed or as workers when this does not reflect the reality of the situation.
- d) A connected problem has been the relative weaknesses of the party with the reduced bargaining power to challenge their status through the Employment Tribunal system. That is distinct from the issue of the substantive law and codification is unlikely to assist. Any reform should be focused on providing a range of effective methods of challenge and enforcement.
- e) Some tinkering around the edges may be necessary, but this is best achieved through the incremental development of case law.
- f) We do not consider that a wholesale codification of the law in this area is either necessary or desirable.

Question 2 - 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?

No. Codification is unlikely to produce clarity.

At present, Employment Tribunals are able to take into account a wide range of factors and evidence in order to determine status. With codification and a more rigid structure it would inevitably be easier for employers and those who draft contracts to create terms or structures which would get around a more rigid structure. The greater the clarity, the easier it is to get around basic rights.

The key point should be the 'reality of the situation'. This has been established by case law and reflects the range of factors that exist in the modern workplace. Those with even access to basic legal advice will be able to discover the definition set out in section 230 of the Employment Rights Act 1996 ('ERA') and the tripartite threshold test of (1) mutuality of obligation; (2) control and (3) personal service.

In the short/medium term, codification would be likely to increase the number of disputes regarding employment status and engender satellite litigation.

Question 3 - 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?

As noted above, it is suggested that codification is not the way forward. It is likely to overcomplicate matters and provide routes through which the party with the greater power is able to exploit their position.

Question 4 - Is codification relevant for both rights and/or tax?

Yes. As noted below in the tax section, it is sensible to have as much convergence between employment law and the tax system, though this should not be as a result of creating complicated or less effective laws.

Question 5 - Should the key factors in the irreducible minimum be the main principles codified into primary legislation?

We do not agree with codification for the reasons set out above. If there is to be codification, we would agree that these are the main principles.

Question 6 - What does mutuality of obligation mean in the modern labour market?

It means the employer being obliged to offer work and the employee being obliged to accept it.

The absence of mutuality needs to reflect a genuine ability on the part of the individual to refuse work and to do so without consequence. It is the trade-off for not having the guarantee of being offered work. However, there is a paradox. If you refuse to undertake a shift when offered it and as a result do not get offered future work then there has been a consequence to your refusal and the question has to be asked how that is genuinely an absence of mutuality. At the same time, given the absence of mutuality, the engager is under no obligation to offer future work as that is the whole point of the absence of mutuality.

As noted below at Q7, the issue of two years continuous service is a more pressing issue in terms of offering protection to those with employment status.

Question 7 - Should mutuality of obligation still be relevant to determine an employee's entitlement to full employment rights?

Yes. Mutuality of obligation is easy to understand as a concept and is directly related to the nature of employment.

Tribunals are able to recognise mutuality when they see it. E.g. emails requiring someone to come into work, a consistent work pattern etc.

The most contentious issue is the need for two years of continuous service in order to claim unfair dismissal. It is this issue rather than mutuality which is the most significant factor in distinguishing those who claim unfair dismissal and those who don't. For example, someone who is ostensibly a worker is more likely to be an employee and establish mutuality after a clear working pattern over a two year period in which the employer offered work and they were obliged to accept it.

Those without two years continuous service, whether ostensibly workers or employees are in the same position with regard to the right which affords the most significant protection. So, whether it is the employee or the worker who refuses to come in on their day off, and when they refuse gets told, 'don't bother coming in next week', the most significant protection would be whether or not they had two years of service. Genuine reform would have to look at reducing the length of service required to claim unfair dismissal.

Question 8 - If so, how could the concept of mutuality of obligation be set out in legislation?

If it is to be set out in legislation, then it should simply be a definition, namely the genuine obligation to offer work and the genuine obligation to accept that work.

Question 9 - What does personal service mean in the modern labour market?

Personal service means undertaking the work personally. Those who undertake work personally, but do not have mutuality of obligation are workers and not employees. Autoclenz v Belcher [2011] ICR 1157 highlighted the trend of including substitution clauses within contracts when there was no intention of the clause ever being utilised. However, even if there is a genuine substitution clause, worker status should still be possible, that is to say that in respect of the specific engagement where work is being undertaken personally, that individual should still have basic rights such as the right to be paid the NMW. It is only those who are genuinely self-employed who should not have that right.

Question 10 - Should personal service still be relevant to determine an employee's entitlement to full employment rights?

Yes. Personal service should be a relevant factor. The alternative is that it is not relevant which means that an employee would be able to delegate but still maintain their employment status. That is inconsistent with employment.

Question 11 - If so, how could the concept of personal service be set out in legislation?

If set out in legislation, it should be done as straightforwardly as possible. Namely, work undertaken personally other than as a genuine independent contractor.

Question 12 - What does control mean in the modern labour market?

Control extends beyond the ability to give lawful orders and the requirement to obey lawful orders. Where the individual uses individual skill and judgment in their role, it does not mean the absence of control: White v Troutbeck SA [2013] IRLR 949. Control also allows the employer to direct what type of annual leave is taken to the financial benefit of the employer: Bear Scotland v Fulton [2015] ICR 221.

In short, most individuals performing work personally are subject to control in the modern labour market. The genuine absence of control would be a factor indicative of self-employment.

Question 13 - Should control still be relevant to determine an employee's entitlement to full employment rights?

Yes. Control is a relevant factor in determining employment status and stems from the old concept of a 'master' and 'servant' relationship from which modern day labour law derives. However, where there is mutuality of obligation and personal service, control is highly likely to follow.

Question 14 - If so, how can the concept of control be set out in legislation?

It should be stated broadly, e.g. A is subject to the control of B. No single definition is apt to cover the myriad of factual scenarios in which it can be said that the necessary control is being exercised. This is best left to the wisdom and industrial sense of Employment Tribunals as informed by case law.

Question 15 - Should financial risk be included in legislation when determining if someone is an employee?

It is a relevant factor, but is secondary to mutuality, control and personal service. The interesting point is whether the element of financial risk is linked to increased profit on the part of the individual. If it is linked, is this central to the contract or is it ancillary? Take, for example a golf professional working at a golf club. He/she purchases stock and sells it in the club shop with the club taking a percentage of the profits. Some would say this individual should not be an employee because they are making profit from the sale of stock. Yet, there appears to be mutuality in that this

person must open the shop each day, provide golf lessons and if they were not to undertake the work personally, the arrangement would likely come to an end.

Question 16 - Should 'part and parcel' or 'integral part' of the business be included in legislation when determining if someone is an employee?

This is of limited use in determining employment status. Mutuality, personal service and control are better indicators of employment status.

In so far as anyone still talks of an 'integration' test, it is not practically used in Tribunals on a day to day basis.

If someone is 'part and parcel' of the business it is difficult to see how the relevant employment factors would not be present. Genuine integration would need those factors to be present in almost all cases.

Question 17 - Should the provision of equipment be included in legislation when determining if someone is an employee?

The provision of equipment is relevant, but minor. Our experience is that whether equipment is provided or not is often due to historical factors within a particular industry rather than any purpose relating to employment status.

Question 18 - Should 'intention' be included in legislation when determining if someone is an employee in uncertain cases?

No. In the majority of cases, the parties will not be in an equal bargaining position. The case law has built up precisely because of this as has been recognised at the highest level (c.f. Autoclenz v Belcher & Others [2011] ICR 1157 at para 35).

Autoclenz arose precisely because low paid workers had unrealistic and irrelevant substitution clauses in their contracts that did not reflect the reality of the situation.

Indeed, the position at para 35 of Autoclenz is sensible. It allows the Tribunal to look at the agreement between the parties but requires the Tribunal to look at wider facts.

Where the parties are in a more equal bargaining position, the Tribunal will take this into account when looking at all of the surrounding facts. This is different from the more isolated point of 'intention'.

Question 19 - 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?

No.

Question 20 - 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?

No. For the reasons already stated, there is a risk of complicating the law unnecessarily when the real issue to be resolved is one of effective and meaningful enforcement.

Question 21 - 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?

Yes.

Question 22 - 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?

For the reasons already stated above, the current tests, brought together with the requirement to look at the reality of the situation are preferable.

Question 23 - What is your experience of other tests, such as the SRT? What works well, and what are their drawbacks?

A points-based test would be too radical a change from the present position. It would be difficult to see how it would reflect the variety of different arrangements that can exist in the modern workplace. There is nothing to say that the interpretation of a points test would not result in greater difficulty.

Question 24 - How could a new statutory employment status test be structured?

It is difficult to see how the incremental case law that has been built up can be fully or accurately reflected in legislation without significant upheaval.

Question 25 - 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?

N/A

Question 26 - Should a new employment status test be a less complex version of the current framework?

This is likely to lead to the problems identified already and below. The less complex the test, the easier it will be to place individuals in categories with reduced rights.

Question 27 - 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?

Yes. For the reasons described above, it would be easier to circumvent a mechanical test and to deprive individuals of rights that they would otherwise have.

Question 28 - 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)?

As a broad brush, albeit not entirely accurate starting point, an online tool may be a good way of encouraging businesses and individuals to give thought to the issue of employment status and then take the next steps correctly to understand the position. If a rogue employer is seeking purposefully to misuse employment status, then the most likely motivational factor for change will be money or regulatory intervention. Consideration should be given to director's duties and whether someone who purposefully misuses employment status (particularly *en masse*) should be disqualified as a director.

Question 29 - 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?

No. This would create far more confusion.

Question 30 - 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?

Yes. It is important to have the more flexible status of worker coupled with some basic protections which can benefit both parties by creating a minimum level of protection allied to the wellbeing of workers and allowing for flexible arrangements within entrepreneurial and other business models.

Question 31 - 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?

No. It is simply a hierarchy of employment rights with increasing protections the higher up you go.

Question 32 - If so, should the definition of worker be changed to encompass only Limb (b) workers?

No.

Question 33 - If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?

A range of primary and secondary legislation would need to be amended.

Question 34 - Do you agree that the government should set a clearer boundary between the employee and worker statuses?

Possibly. Essentially, worker status should include all those who do not have mutuality of obligation and who are not genuinely self-employed in business on their own account.

Question 35 - 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?

This demonstrates the difficulties with a points system. It is too inflexible to deal with the actual relationship between the parties. Rather than looking at the merits of the position, it is forced to utilise tick boxes when that process cannot take into account all of the relevant surrounding evidence.

Question 36 - What might the consequences of these approaches be?

Less clarity. It would be unlikely to reduce disputes.

Question 37 - What does mutuality of obligation mean in the modern labour market for a worker?

This is problematic. For clarity, mutuality should relate to employment status. Its inclusion in worker status is an unnecessary complication. As noted above, this can

be a fact or situation specific issue and does not lend itself to one answer. The modern labour market encompasses many different types of arrangement.

Question 38 - Should mutuality of obligation still be relevant to determine worker status?

No. It is debatable as to whether mutuality is relevant to worker status as the question recognises. Attempts to make it relevant to worker status are unhelpful.

Whether there is mutuality of obligation or not should be the main distinguishing factor between worker status and employee status.

Question 39 - If so, how can the concept of mutuality of obligation be set out in legislation?

Not in respect of worker status.

Question 40 - What does personal service mean in the modern labour market for a worker?

All those defined as workers will be performing work personally. It is difficult to conceive facts whereby someone is a worker and not providing personal service.

Question 41 - Should personal service still be a factor to determine worker status?

Yes. Personal service remains relevant.

At the same time, if a substitute is sent, that does not prevent the substitute from also being a worker for the purposes of that particular engagement, e.g. the substitute is entitled to the NMW.

Question 42 - Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?

Yes, in the context of there being a historical over-reliance on substitution clauses which are not intended to be used or used restrictively.

Question 43 - Should we consider clarifying in legislation what personal service encompasses?

No. The terminology of 'personal service' should be used. Tribunals can draw on case law to understand its meaning.

If there is a specific issue relating to substitution clauses, this can be dealt with separately in legislation to the definition of personal service.

Question 44 - Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?

There is scope for misunderstanding on this subject. Whoever is undertaking the work, provided they are not self-employed, is a worker and entitled to the protections of a worker.

If a worker undertaking a shift is able to send a substitute, then whoever does that shift is capable of being a worker for the purposes of that shift. It would be clearly wrong if that individual were denied the NMW or statutory rest breaks unless they were genuinely self-employed.

These individuals are not employees if there is no mutuality of obligation.

Question 45 - Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?

Yes. A genuine independent contractor is less likely to be subject to control.

Question 46 - What does control mean in the modern labour market for a worker?

In most cases, it is the same as for employment, only without the existence of mutuality of obligation.

Question 47 - Should control still be relevant to determine worker status?

Yes. The greater the level of control, the greater the likelihood of worker status.

Question 48 - If so, how can the concept of control be set out in legislation?

It needs to be reflected as per the current case law e.g. White v Troutbeck SA [2013] IRLR 949 and Wright v Aegis (BVI) Ltd (2018) EAT

It would be wrong to define it restrictively with sole reference to the need to obey lawful orders.

Question 49 - Do you consider that any factors, other than those listed above, for 'in business on their own account' should be used for determining worker status?

How work is obtained is relevant, including whether and how their services are advertised. For example, a tradesperson (e.g. cleaner, painter & decorator, plasterer) working for themselves as opposed to being under the instruction of a company can obtain work by putting adverts up, leafletting through doors and word of mouth. This is consistent with being in business on your own account.

Question 50 - 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?

Additional legislation is unlikely to be necessary. The Tribunal will take into account the kind of factors listed at 7.26 already.

An important factor is whether someone is working for different clients, e.g. a cleaner advertising for people to contact him/her regarding cleaning their houses. This is distinct from someone working via an app for different clients as there is a larger, overarching engager with control.

The level of risk, ability to grow, lack of personal service, control, mutuality and the ability to make key decisions as to how capital is deployed are all indicative of self-employment.

Question 51 - 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?

No.

Question 52 - 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?

No. This is entirely unnecessary. It is a stylistic change with no appreciable value. The term 'worker' is as understood as the term 'dependent contractor' ever will be.

Question 53 - 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?

As noted below (Q 55), the apps are likely to restrict access to the platform at times of low demand.

Question 54 - What would the impact be of this on a) employers and b) workers?

Workers will most likely make their services available via more than one platform. As to whether this is valuable depends on your perspective. Some will view this increased flexibility and competition as favourable to workers and the economy and some will view it as placing too great a burden on individuals who are simply trying to secure paid work and lack the protections of employment.

Question 55 - How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?

If there is low demand, it follows that it would be open to the platform to shut individuals out from the platform at times of low demand and thus reduce their exposure to paying the NMW. In the absence of mutuality, there is no obligation to offer work. It is only the hope of having work for these individuals to undertake that causes the platform to be open to the worker.

Question 56 - Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?

The main concern is that the worker will be seeking work from more than one source at the same time. This could lead to a) the worker double recovering pay for the same time period or b) a lack of clarity over who is responsible for pay if the NMW is held to apply.

If an employer/engager is remunerating a period when work is being sought, it should be permissible for the employer/engager to include a term and condition that if the individual is to be remunerated that the individual is not seeking work from a different party. There would be some difficulty in enforcing this, but it is suspected that the answer to this most likely lies with the technology itself and a technological solution.

Question 57 - 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?

An important, though not determinative element is the usefulness of the activity to the engager. For example, if someone is available and ready to take on work, there is a benefit to the engager if the engager wishes to show potential customers that there are sufficient people available to do the work should it be required. If the engager is benefiting, then there is a logical link with the worker receiving remuneration.

Question 58 - 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?

The ability to refuse work is important, because it means that there is an absence of mutuality. For the reasons given at Q 6 (above), there is a paradox in respect of whether someone who refuses such work should be entitled not to suffer a detriment. Requirements for exclusivity are a modified form of restraint of trade and should be classified as such. There may be legitimate reasons for such exclusivity, but in many cases the legitimate interest would be more appropriately protected through a contract of employment. For the remaining cases where an employment contract is genuinely not appropriate, exclusivity clauses are likely to have a deterrent effect. The difficulty is that if a worker were to breach such an exclusivity clause and assuming that legislation prohibited such clauses, that worker would still need a meaningful and enforceable right given that the engager would be under no obligation to offer future work in the absence of mutuality.

Question 59 - 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. Consideration should be given to whether there is sufficient protection for the reader of such data and that there is an obligation for such data to be accurate. One risk would be that the reader to their detriment were manipulated by inaccurate data into working or not working or some other effect. In those circumstances there would need to be a meaningful, practical and enforceable right. Whilst it may not fall under the exact remit of data protection (depending on the nature of the information) the point would be akin to the need for data covered by the GDPR to be accurate.

Question 60 - Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?

It follows that anyone who is not an employee or worker, is self-employed. It is a simple concept because it catches all situations other than worker or self-employed. Legislation is not necessary.

Question 61 - Would it be beneficial for the government to consider the definition of employer in legislation?

No. Tribunals should be free to identify the correct employer as they currently do. Additional legislation is not required for employment purposes.

In addition, different legislation has different routes through which liability can be established. It is right in principle that more groups are treated as being liable under the Equality Act than the Employment Rights Act.

Question 62 - If the terms employee and self-employed continue to play a part in both the tax and rights systems, should the definitions be aligned? What consequences could this have?

It would be sensible for the terms to be aligned. If it can be done, the tax system should align with the employment definitions. This should not be at the expense of maintaining the current rights framework and sensible definitions in employment.

Question 63 - Do you agree with commentators who propose that employment rights legislation be amended so that those who are deemed to be employees for tax also receive some employment rights? Why / why not?

The current approach to the taxation of those working through companies is problematic and subject to ongoing litigation.

There is no need for a genuine employee under the control of their employer to use a service company. The only historical reason to do so is the tax system. Whilst reform can look at the deeming system, the issue must be raised as to why such companies are required in the first place if employment status is sought or is the reality.

Question 64 - If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?

If someone is an employee, then the appropriate rights are employment rights.

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