

# stuc

## Briefing:

# CURRENT EMPLOYMENT REVIEWS

### Britain's Atypical Workforce

It is often said that Britain's workforce is changing: away from large workplaces that employ hundreds of people, or public sector workers on permanent contracts and final salary pensions, to zero hours contracts, flexible work, and self-employment.

In this briefing, we take a look at how true this is and offer a critique of the current parliamentary and government ordered employment reviews on the changing nature of employment. Finally, we will look at what the trade union response has been in Scotland to date and where we go from here.

The female employment rate is at a record high but still remains around 9% below that of men<sup>1</sup>. Women disproportionately work part-time and part-time self-employment is growing, driven largely by an increase in self-employed women (9% over the year to 113,000 whilst male self-employment increased by 2.8% to 213,000)<sup>2</sup>. As the Taylor Review points out "together with occupational segregation, lower median hourly earnings for part-time workers are one of the root causes of the gender pay gap<sup>3</sup>". Women make up the majority of workers on a zero hours contracts and of temporary employees, although agency workers are more likely to be men<sup>4</sup>.

Self-employment is more prevalent amongst older people; around 40% of those aged 65 and over who work are self-employed<sup>5</sup> whilst over one third of people on zero hours are in the 16-24 age range and around one-fifth are in full-time education<sup>6</sup>. Agency workers are significantly over-represented among younger groups, with close to half aged under-35. The number of self-employed people with a disability has grown by 13% since Q1 2014, broadly in line with the increase in the numbers of disabled employees but considerably quicker than growth among non-disabled workers<sup>7</sup>.

According to research by CIPD<sup>8</sup>, a higher proportion of gig workers are aged 18–29, with nearly four in ten falling into this category, compared with just 21% of 'other workers' (workers that do not work in the gig economy). Gig economy workers are marginally more likely to be male.

Those respondents that work in the gig economy have a broader range of ethnic backgrounds than those in the other worker sample. Less than seven in ten gig economy respondents describe themselves as white British compared with 85% of the other worker sample. There are also a significantly higher proportion of gig workers who describe themselves as either Indian or black African compared with the sample of other workers.

### Employment Reviews

Precarious work, and the subsequent issues of exploitation which precarity of employment bring, continues to grow in almost every sector of the Scottish and British economy. As such, a number of reviews of have been undertaken which look at current employment law's fitness for purpose, Bills have been drafted and laid before Parliament, and governmental support has been put in place.

- The Taylor Review on Modern Working Practices was commissioned on 1st October 2016 and published in June 2017<sup>9</sup>. The report outlined a number of suggestions and proposals which Governments could take forward in addressing issues raised by 'modern' working practices.
- Sir David Metcalf named the first Director of Labour Market Enforcement to oversee 'a government crackdown on exploitation in the workplace' on 5th January 2017. His remit is to set the strategic priorities for the Gangmasters and Labour Abuse Authority, Employment Agency Standards Inspectorate, and the HMRC's National Minimum Wage enforcement team.
- The Scottish Affairs Committee heard evidence through their inquiry on working conditions in March 2017 from Amazon, Uber and Deliveroo to examine how employment in Scotland may change in the coming decades and how UK Government will support the creation of quality, secure jobs. The inquiry looked at how successful UK policy is in protecting people from unfair employment practices. The inquiry closed in early June 2017 due to a snap general election being called and no joint report has been produced.
- However, written evidence from the companies and workers is available<sup>10</sup>.
- Labour's Tom Watson convened a Future of Work Commission which published a report in 2017 on covering economic changes, technological advances and resulting labour market impacts<sup>11</sup>.
- The Framework for Modern Employment report<sup>12</sup> was published in November 2017 as a joint committee report from the Work and Pensions Committee and the Business, Energy and Industrial Strategy Committee which included a draft Bill to amend existing legislation.
- Chris Stephens MP laid the Workers' Definition and Rights Bill before Westminster in late 2017.
- Stewart McDonald MP has introduced the Unpaid Trial Work Periods (Prohibition) Bill to Westminster which will receive its second reading on 16th March 2018.

- In Scotland, a collaborative economy panel was set up from government, trade unions and employers to look at a variety of issues which the emergence of the collaborative economy raises, including worker rights<sup>13</sup>. Their report was published at the end of January 2018 and will be laid before Parliament in the coming months.
- The UK Government responded to the Taylor review and the Framework for Modern Employment on 7th February 2018<sup>14</sup>.

### Taylor Review

The Taylor Review on Modern Working Practices was commissioned by the Conservative Government in the wake of an increasing amount of bad publicity around the prolific use of zero hours contracts by large employers such as Sports Direct and the subsequent parliamentary enquiry into working practices there. The Taylor Report, published in June 2017, narrates a lot of facts and statistics about the current nature of work and workers in Britain, whilst exploring ways in which work can be 'good' for all, including the increasing number of precarious and gig workers, and self-employed. Much of the 116 page report discusses different ways to measure quality work, whilst there is not much emphasis placed on trade union organisation as part of this national strategy to ensure quality work out with agreeing that trade unions are 'helpful' in the workplace.

Jillian Merchant of Thompsons solicitors outlined the proposals from the Taylor Review, with analysis, as follows<sup>15</sup>:

- The report recommends a new category of employment status as the "dependent contractor". It is proposed that this will be a status given to a worker, in the gig economy, if they are under "control" and "supervision" of the employer. In these circumstances that worker should be given holiday pay, sick pay and, in most cases, receive the minimum wage. It is alleged that this would be a category, clearly different from the self-employed.
  - This is an entirely unnecessary addition to employment law in the UK. Cases have already been won demonstrating that many of those working in the gig economy are, in fact, workers under the current law and therefore should already have entitlement to holiday pay, sick pay and the minimum wage.<sup>16</sup> Many of those working in the gig economy should already have worker status. There is no need to make a new category of employment status. Instead employers should simply recognise them as the workers which they are.
  - One of the few benefits within the report which would assist with this issue, is the suggestion that "Government should ensure individuals are able to get an authoritative determination of their employment status without paying any fee and at an expedited preliminary hearing". This is something which, if implemented, would be of genuine assistance to those seeking clarification on their employment status.
- The report recommends that workers should be able to "request" fixed hours instead of zero hour contracts.
  - Unless this is backed up with a right to take the matter to the Employment Tribunal if the request is not granted this is a toothless and meaningless new "right".
- The report recommends that gig economy employers would not have to pay the minimum wage for every hour worked if they were hiring the services of genuine platform based self-employed people. The Taylor review recommends that if a worker chooses to work a shift, in the knowledge that they will not be paid the minimum wage, they will not be able to make a claim under the minimum wage regulations because "they choose" to work at that time.
  - This is far from the reality of working people's lives. Most workers in the gig economy require to fit work around child care, caring for elderly relatives and a myriad of other daily activities and responsibilities. Many do not "choose" when they work. They simply have to take the shifts that are on offer, to make ends meet. Those on zero hours contracts live in fear of turning down work in case they are never offered any shifts again. Having different rates for different times of work will simply result in those in the most need being exploited and continually being paid under the minimum wage. If there is a sign up option everyone will try to sign up to the higher paying shifts, meaning those are oversubscribed, with the lower paying shifts left for those desperate for money. No one "chooses" to work for less than the minimum wage.
- The report suggests that employers could 'roll up' workers holiday pay to the end of a fixed period.
  - "Rolled up" holiday pay is not currently permitted because the law, as it stands, states that there should be no "disincentive" to workers taking holidays. The suggestion in the report allows workers not to take holidays and be paid more for those days worked instead. It defeats the very purpose of holidays. Holidays are designed to allow workers a period of rest and recuperation from the workplace. Paying workers for holidays and workers not taking holidays is completely contrary to this. What this does mean, is that those struggling to make ends meet will not take holidays. They will take the extra money and take very little holidays – if any – each year. Time off work will, again, become a luxury for those who can afford it. There is nothing progressive or "flexible" about this.
- The report stated that the minimum wage raises the financial base line of low paid workers, but needs to be accompanied by sectoral strategies engaging employers, employees and stakeholders to ensure that people are not stuck on minimum wage.

- The report does not go far enough in encouraging, or indeed mandating, collective bargaining in historically low paid sectors. Collective bargaining units where the employers negotiate with democratic trade unions is the most effective way to drive up wages, terms and conditions.
- The report suggests a new, higher, minimum wage for ‘non-guaranteed’ hours - thereby requiring (some) employees doing overtime to be guaranteed a minimum pay premium above their regular wage.
  - This could help incentivise companies away from zero-hour contracts and benefit the almost one in seven workers who worked overtime last year typically comprising 12% of the weekly wages of those doing overtime. A third of paid overtime hours were in social care and retail.<sup>17</sup>
- The report proposes abolishing the ‘Swedish derogation’ that allows firms to get around the requirement to pay agency workers the same as directly employed workers doing the same job in some circumstances.
  - This is welcome, given the evidence that companies abuse this to undermine terms and conditions.
- The report argues that ‘responsible corporate governance’ is best placed to ensure a better working environment, not more regulation.
  - Whilst it is true that strong industrial relations are important within an organisation, it is not the case that this will happen simply by asking employers to “be nice” to workers. Legislation, with effective and enforceable rights, make a difference as a strong tool in the box of trade unionists and all workers who seek to challenge their employer. Without these tools, the power dynamic ensures that the employer will always be able to undermine the worker.

On self-employment, the report notes that current trade union legislation only extends to employees and workers but that self-employed people would benefit from collectivising their experiences. However, the proposal is that the Government should support technology which brings self-employed people together instead of changing trade union legislation to include any definition of a person who is paid for their labour or carrying out services.

The report does note that the scope of HMRC investigations is limited, that the cost and effort of going to Tribunal can be off putting, and that people have a genuine and real fear of losing their job if they challenge the employer. However, the report does not list trade unions as an effective enforcement mechanism nor does it call for a repeal, or even progressive reform, of anti-trade union legislation.

The report places emphasis on worker ‘voice’ and highlights that ensuring workforce participation and

engagement, in reality rather than as a tick-box exercise, is beneficial for the employer. The report suggests that Regulations around consultation should be broadened in scope to ensure more worker consultation takes place. However, the key thing which the report misses is Enforcement.

### Future of Work Commission

Tom Watson’s Future of Work Commission’s report recommends a new single status statutory definition of ‘worker’ which encompasses all existing definitions of ‘worker’ and is framed without reference to the contract. This means a single worker status is supported by the SNP (through Chris Stephens’ Bill) and Labour; as well as the Framework for Modern Employment proposing a clearer definition and presumption in favour of worker status.

The main focus of this report, which is slightly different from the other reviews, is that Government must work with employers and workforce, as well as academics and industry researchers, to ensure that workplace regulation, enforcement and rights are up to date with technological change and advancement. One particularly interesting example is that the Equality Act 2010 should be extended to allow a right to understand the basis for algorithmic decision-making and to prohibit discrimination by algorithms. The report goes further into exploring school curriculums, what is taught to who and how. Whilst recommending that innovative AI technology could be used in classrooms to promote individual learning styles, the report also suggests that modules like ethics training is part of this.

The proposal that financial and practical support for emerging models of organisation for freelance workers and the self-employed is provided via trade unions and co-operative models is echoed in the report of the Scottish expert advisory panel on the collaborative economy which goes further in specifying that this training should be provided by union-funded learning courses.

### Collaborative Economy Panel

In early 2017, a Scottish Expert Advisory Panel on the Collaborative Economy was convened to provide advice, expertise and experience to on-going policy development on the collaborative economy and to make recommendations to Scottish Ministers on how Scotland can position itself to take advantage of the many opportunities of the collaborative economy and overcome any regulatory, economic and social challenges.

The report, published at the end of January 2018, is clear that “principles of Fair Work must be the standard by which we assess employment and skills-based activities on collaboration platforms”.

The proposals include:

- Setting up an observatory into the collaborative economy to collect, aggregate, analyse and publish a variety of datasets that show the ongoing impact of collaborative economy platforms in Scotland.

- This observatory could give access to the information workers could use to understand the practices and policies that control their schedules and wages; instead of keeping these algorithms hidden. With a better picture of their sector, workers could arrange courses and skills-development relevant to their field of work. Workers could develop the skills and tools to keep a check on the company they work for (with systems like turkopticon, ‘a place for workers to help one another with information and their experiences about employers’). And workers could develop education that would allow them to create truly collaborative enterprises where workers are in control of their pay, schedules, and work.
- A workers’ observatory would also provide a tool to expose malpractice, through reverse surveillance of platforms that could bring to light instances of discrimination or breaches of employment law. With an observatory, workers could identify issues locally, and start to coordinate action together. This could be the basis of agitation and other activity to improve conditions and contracts.
- Finally, an observatory could allow workers to access the kind of information that will help with self-organisation to link up and form union branches to secure their rights and build power. Information such as pay-rates, the number of staff, the ratio of part-time to full-time reliance on systems, and other information form the basis of any organising strategy.<sup>18</sup>
- The report suggests that government should provide the resources to develop a secure, trusted place for people to access accurate information regarding their rights and responsibilities in the collaborative economy. This might be best delivered in partnership with an intermediary such as Citizens Advice Scotland, union or union-based organisations, and importantly, must be accessible from all collaborative economy platforms operating in Scotland.
  - This is another welcome finding. Trade unions are in a very good position to ensure that people know their rights, and also offer skills training in organising. A public campaign to ensure gig workers know how to access information on their rights, and on enforcement of their rights, would be very welcome.
- The report also urges the Scottish Government to support skills development to encourage pioneers of new platforms that meet Fair Work standards, including digital platforms owned and operated by workers themselves.
  - Similar to the Future of Work Commission’s report, this report acknowledges the challenges and opportunities which technology can bring to a workforce both in terms of easing their job role and in organising.
- Collaborative economy platforms should be assessed as to how they offer fair work, and be required to report publicly on their efforts to do so on an annual basis. The Scottish Government needs to give a tangible signal to collaborative platforms that are embodying best practice when it comes to offering fair work, or creating a different power relationship between workers and platforms – such as recognising trade unions, increased worker engagement and particularly co-operative models of ownership.
  - This proposal, linked with a fair work charter and the gig economy observatory proposal would enable workers, consumers, and worker representative bodies to highlight the ‘good’ and ‘bad’ platforms. Other initiatives could also be explored such as the fair work framework being incorporated in to procurement frameworks in order to ensure that there is some measure of enforcement action.
- The Scottish Government should provide support, through Scottish Union Learning, to ensure that workers are given the knowledge and capability to understand the platforms they work under, to analyse any data relating to their work that is held by the platform provider, and to increase their awareness of platforms supporting union organisations and collective bargaining.
  - This proposal goes one step further than that proposed in the Future of Work Commission’s report as it is funded knowledge building.

### Trade Union Responses

In early 2018 Chris Stephens MP proposed the Workers’ Definition and Rights Bill. Although this Bill did not advance it still offers an example of effective legislative change that would genuinely protect workers. The Bill called for the following changes to be made in legislation:

#### ‘Single Employment Status’

This flips the onus to prove worker / employee status on to the employer. At the moment, it’s for the alleged worker / employee to seek a ruling on their employment status prior to their case being heard at Employment Tribunal. In the case of the Deliveroo riders, the Central Arbitration Committee decided that they were not workers and therefore could not proceed to ET. If enacted, this legislation would mean that a case can be taken to Employment Tribunal based on the worker / employee’s interpretation of their status without reference to CAC. Through ET proceedings, it would now be for the alleged employer to prove that they are not in fact employing the claimant, rather than the other way around.

## Mutual Liability of Companies for Contractors

This states that someone is an employer if they engage another person to provide labour “whether directly or through another or others”. This section is very important as, if enacted, would mean that in the situation of outsourcing or, potentially, agency work, the end employer is the one with responsibilities and duties to the employee/worker. To take the example of the unpaid workers at the Greenday gig, they were employed by company A. However, company A was told to engage these workers for labour by company B. If this Bill were enacted, the unpaid workers could claim for wages directly from company B instead of waiting for company A to pay company B first.

## Notice for Zero Hours Workers

This states that an employer shall be required to give zero hours workers at least 7 days’ notice of any request or requirement to undertake a period of employment; and 7 days’ notice of any cancellation of a period of employment already agreed.

## Payment at Double Time

Where a worker does not receive the 7 days’ notice, then s/he will be paid double time for the work undertaken or which should have been undertaken. Where the work is cancelled, workers will also be any loss incurred as a result of the cancellation (including loss of wages caused by declining offers of employment elsewhere, child care arrangements, and advance travel costs) whether they are normally recoverable in work or not.

## Excess Hours

Where employers request workers to work more than their contractual hours, this excess will not exceed more than 10% in 12 months and the excess hours will be paid at double time. Furthermore, the request and agreement to work these additional hours must have been made in writing. The only other situation where an employer can ask a worker to work excess, or additional hours over and above the 10%, are where an agreement has been made in terms of a collective agreement between an employer and an independent trade union recognised by the employer for the purposes of collective bargaining.

These sections of the Bill serve to dis-incentivise the use of zero hours contracts with the starting point being that “every worker shall be entitled to fixed and regular weekly hours on commencing employment” which will be notified in writing.

## Unpaid Trial Shifts

Stewart McDonald MP has introduced the Unpaid Trial Work Periods (Prohibition) Bill to Westminster. The second reading is due on 16th March 2018.

The Bill aims to amend the National Minimum Wage legislation by ensuring that periods of time prior to a

worker being engaged, in order to determine whether they get an employment contract or not, are unlawful.

Whilst trade unions and the Better than Zero campaign will continue to campaign on the ground, in workplaces, universities, colleges and schools, to ensure the eradication of the zero hours, zero pay, zero rights, zero respect culture in precarious workplaces; we are heartened to see elected politicians also taking this campaign up in Parliament.

## Conclusion

In its response to the Taylor review and the framework for modern employment, the UK Government have now said they will introduce reforms such as the “right” to request a guaranteed hours’ contract. Agency workers will be entitled to a breakdown of who pays them and any costs deducted from their wages, while the Low Pay Commission has been asked to consider higher minimum wage rates for those on zero hour contracts. Laws allowing agencies to employ workers on cheaper rates could also be repealed, while some employment tribunal fines against employers will be quadrupled to £20,000. Whilst this response is a step in the right direction, it falls far short of the sort of transformative changes which the employment reviews have highlighted are needed.

It is clear that the issue of employment status and how it is used by employers to exploit workers is of growing concern across all sides of the political debate. The increasing casualisation of the labour market, the use of zero hours contracts, agency workers and bogus self-employment effects the quality of work and is negatively affecting living standards across the country. The need for change is clear and well recognised but tinkering around the edges is not enough. The rights set down in legislation form the basis of how workers will be treated. There is an opportunity to make a lasting change that truly supports better outcomes for workers, but this means a focus on real and meaningful rights that can be enforced.

The role of unions in this agenda, particularly around enforcement of rights, should not be underestimated and trade union organisation and collective bargaining remain the best way for workers to protect themselves from exploitation. Chris Stephens’ Private Members Bill had a strong focus on enforcement and made the link between trade union recognition and flexibility in the labour market. It is this sort of creative thinking that will allow the creation of modern work places which promote fair work, good quality jobs and decent living standards for all.

Trade unions believe that action is needed now; not further consultation. Every review has called for worker status to be clearly defined. Every review has noted the prevalence of low wages and the need to remedy this. In the immediate term, the STUC believes that the following points must be included in any legislation if it is to serve as a genuine campaigning basis which we can take action from.

- Clearly defined 'one worker status' with the presumption in favour of this status. Genuine self-employment must meet a statutory test and the onus is on any alleged employer to prove that a person is self-employed rather than a worker. Rights flowing from this one worker status would be enforceable from day one of employment.
- Tightened minimum wage legislation in order to send a clear signal to employers that they should not be using 'trial shifts' as a way to undercut the minimum wage or to staff their premises with free labour.
- A ban on zero hour contracts.
- The use of casual contracts is permissible but only when agreed through collective bargaining. In these instances, employers will require to pay a wage premium which has the aim of disincentivising the use of exploitative casual contracts. Employers will need to give notice of changes to hours with the employer facing sanction if they do not comply.

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