Legalising the gig economy

Protecting Britain's vulnerable workforce

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Summary

Nearly three million people have found work in the courier, transportation, and food delivery services that make up the fast growing gig economy.[1] Almost all of these people are given the status of self-employed 'independent contractors'[2], rather than 'employees'[3] or 'workers'[4], and one in four of them earns less than the National Living Wage.[5]

In a series of reports on people's pay and conditions in the gig economy – based on the testimonies from hundreds of couriers, drivers, and riders at Hermes[6], Uber[7], DPD and Parcelforce[8], and Deliveroo[9] – we have demonstrated how companies are evading their responsibilities as employers by abusing the 'independent contractor' status. We have also shown how this bogus form of self-employment gives rise to a life of chronically low pay and exploitation for large swathes of the gig economy workforce.

Under these arrangements, people are told that if they wish to work freely and flexibly – choosing patterns of work that fit around other commitments, for example – they must sacrifice the basic rights and financial security to which the rest of the working population is entitled. While we have expressed doubt in our previous reports around the true levels of freedom and flexibility involved, we have also consistently made the point that this sacrifice cannot be acceptable in a society that has united around the principle of a National Living Wage for working people, and enshrined this principle in legislation.

The National Living Wage has taken on a hugely progressive role in the earnings distribution, by advancing the real wages of millions of people on low pay.[10] Yet those in the gig economy who have been misclassified as 'independent contractors' are not entitled

[1] The gig economy involves the exchange of labour for money between individuals or companies, mostly via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment by task basis.

[2] According to the Government, a person is a self-employed 'individual contractor' if they run their business for themselves and take responsibility for its success or failure. Self-employed people are not paid through the Pay As You Earn system and do not have the employment rights and responsibilities of 'employees' or 'workers'.

[3] An employee is someone who works under an employment contract. According to the Government, someone who works for a business is probably an employee if most of the following are true: they are required to work regularly unless they're on leave, for example holiday, sick leave or maternity leave; they are required to do a minimum number of hours and expect to be paid for time worked; a manager or supervisor is responsible for their workload, saying when a piece of work should be finished and how it should be done; they can't send someone else to do their work; the business deducts tax and National Insurance contributions from their wages; they get paid holiday; they're entitled to contractual or Statutory Sick Pay, and maternity or paternity pay; they can join the business's pension scheme; the business's disciplinary and grievance procedures apply to them; they work at the business's premises or at an address specified by the business; their contract sets out redundancy procedures; the business provides the materials, tools and equipment for their work; they only work for the business or if they do have another job, it's completely different from their work for the business; their contract, statement of terms and conditions or offer letter (which can be described as an 'employment contract') uses terms like 'employer' and 'employee'.

[4] A person is generally classified as a 'worker' if they have a contract or other arrangement to do work or services personally for a reward; they only have a limited right to send someone else to do the work; and they are not doing the work as part of their own limited company in an arrangement where the employer is actually a customer or client.

[5] Department for Business, Energy and Industrial Strategy, *The characteristics of those in the gig economy* (February 2018), pp. 5-6. The National Living Wage is the statutory minimum wage of £7.83 an hour for 'workers' and 'employees' aged 25 and over. The rate will increase to £8.21 in April 2019.

[6] Frank Field and Andrew Forsey, *Wild West Workplace: self-employment in Britain's gig economy* (September 2016)

[7] Frank Field and Andrew Forsey, *Sweated Labour: Uber and the gig economy* (December 2016)

[8] Frank Field and Andrew Forsey, *A new contract for the gig economy: Britain's new self-employed at BCA, DPD and Parcelforce* (July 2017)

[9] Frank Field and Andrew Forsey, *Delivering justice? A report on the pay and working conditions of Deliveroo riders* (July 2018)

[10] Conor D'Arcy, *Low Pay Britain 2018* (Resolution Foundation, May 2018)

to this protection. Hence the appalling scenarios we have encountered, where some couriers, drivers, and riders take home as little as £2 an hour.

If the Government really is serious about shoring up its cornerstone labour market policy, and improving working families' living standards, it will need to find new and innovative ways of preventing companies from wilfully disqualifying people from the National Living Wage.

But the policies that are decided upon by the executive and legislative branches of our democracy form just one piece of the regulatory jigsaw puzzle that determines people's pay and conditions in the gig economy. In fact, to date, it has been the rulings issued by the judicial branch which have formed the biggest piece.

In recent years, alongside our efforts to investigate and publicise the causes and consequences of rampant injustice in this segment of the labour market, individual workers and trade unions have begun directly challenging bogus self-employment in the courts. With one or two notable exceptions, every single challenge has been successful.[11]

As a result, a growing number of companies have been required to recognise people as 'workers' who are entitled to basic forms of statutory protection – including a guaranteed minimum wage and holiday pay – rather than 'independent contractors' with no such protection.

However, some of these companies have decided not to meet their legal requirements to recognise the rights that are held by their workforce. Rather, they are still largely free to continue exploiting those who they have wrongly classified as 'independent contractors'. Injustice has been allowed to persist throughout much of the gig economy.

That is why we have been gathering evidence from individual workers, legal and enforcement experts, trade unions, and companies, as well as the Government's Director of Labour Market Enforcement, Sir David Metcalf, on the question of how best to enforce justice in the gig economy.

This report summarises the evidence we have received, in three sections: the scope and consequences of the judicial process, the adequacy of employment law, and the effectiveness of its enforcement. In doing so, the report shines a bright light on the extent to which justice is being evaded in the gig economy, and how the roles of the state, companies, and trade unions need to evolve to meet the challenges we describe.

While the report seeks to recognise examples in which companies have managed successfully to honour their obligations, and in some cases significantly raise their labour standards, it also suggests a package of reforms that we believe are required, both to the law as well as its application and enforcement, to ensure no company is able to evade justice.

Our three key findings are:

1. The judicial process is prone to being strung out by companies and, even when it eventually delivers favourable outcomes for individual claimants, or some larger groups who challenge their employment status, there is no sure-fire way of extending justice to people in a company's wider workforce who are similarly misclassified and exploited.

2. The laws governing work in the gig economy are inadequate. Certain aspects of the law, such as the emphasis placed upon a notional 'substitution clause' when determining an individual's

[11] A summary of recent case law, as set out in the written submission from Paul Jennings and Rachel Mathieson, is included as an Appendix to this report.

employment status, enable companies far too easily to avoid their responsibilities as employers.

3. There is virtually no proactive enforcement mechanism to prevent workers being misclassified as 'independent contractors' and subjected to bogus forms of self-employment. The onus currently falls on individual workers to enforce the law.

What this boils down to is the entrenchment of gross inequality between companies and their workers, in which all too many people are having to work without the basic protection to which society has agreed they should be entitled. As one courier put it to us, 'companies are taking the mick out of people like myself'.

Companies are able to use the current weaknesses in the law and its enforcement to gain a competitive advantage over employers that accept the responsibilities they hold to their workforce. Indeed, one worker told us that, 'everybody's working on the same model. It's about exploiting us. When companies say they don't know the law and it's very confusing, they know exactly what they're doing. They've been getting away with it for so long now'.

A major challenge for reformers, therefore, must be to ensure it is no longer left to individual workers to pursue justice through a draining, expensive, and convoluted legal process which seems to be stacked in favour of the company. Going through an employment tribunal is often the last thing in the minds of people who are in precarious jobs.

The balance of power in the 'gig economy' has to change. If the country is to be set on a movement against exploitation, we need the Government to act quickly.

We recommend the following six reforms, to set a new agenda for the protection of individuals working in this fast growing segment of the labour market, which we ask the Government to incorporate within any forthcoming employment legislation:

1. A modern, streamlined judicial system, with new powers for employment tribunals to handle freestanding cases that deal exclusively with employment status. A fast-tracking process should be introduced for the handling of such cases – the objective should be to resolve them within a matter of weeks, rather than several years. Employment tribunals should also be given powers to make broader recommendations, at the conclusion of each case, which apply to similarly placed individuals across a company's entire workforce.

2. Clearer legal definitions and tests of 'worker' and 'independent contractor' status, which look beyond contractual terms and focus more closely on the factual substance of the relationship between an individual and a company. The tests should place less of an emphasis on the notional 'substitution clause' in companies' written contracts. They should instead primarily consider the extent to which companies mediate the transactions between their workforce and customers; the means used to determine the price, terms and conditions of the services provided by the workforce, as well as the means of payment; the monitoring, supervision, and treatment of the workforce's performance and the details of their work – particularly in the context of management decisions being taken by company algorithms; the amount of direction and discipline that is used by a company towards its workforce; and whether the work being performed by individuals forms part of their, or a company's, core or regular business.

3. A statutory presumption of 'worker' status, in which employment law begins from the basis that a company's workforce comprises 'workers', who are still able to choose their preferred work patterns without having to sacrifice basic rights and financial security. Having reversed the burden of proof in this way, it would be for companies to argue why individuals should be classified as 'independent contractors'.

4. A new single labour inspectorate, headed by a Commissioner for Labour Market Enforcement, with the remit and resources it needs regularly to conduct proactive checks on companies, to ensure they are not wrongly classifying members of their workforce as 'independent contractors', and to deliver justice on behalf of those individuals who it has found to be wrongly classified. Stiffer fines for non-compliance with the law, which are linked to a company's turnover, should be introduced as a means of resourcing the new labour inspectorate.

5. An enhanced role for trade unions in the gig economy, enabling collective organisation and the negotiation of pay and conditions for all individuals engaged in this form of work. Trade unions will have an important role in remedying the structural inequality we have identified by, for example, providing intelligence to the new labour inspectorate and negotiating more favourable settlements for each company's workforce.

6. A move towards the equalisation of employment rights, such as protection from unfair dismissal, between 'workers' and 'employees', and a review of the continuous service rule for this particular segment of the labour market.

We ask also for the Government to honour the commitment it gave for the Business, Energy & Industrial Strategy and Work & Pensions Select Committees to undertake pre-legislative scrutiny of any forthcoming legislation that covers these issues.

As an interim measure, we urge individual companies to bring their existing practices up to the standards which have been set by those that have decided to offer new and improved settlements to their entire workforce. Raising labour standards may result in initial adjustment costs for each company, but in our view they will ultimately lead to a more just and productive organisation of work, without impacting negatively on customer service.

We are grateful to Michael Newman and Professor Michael Ford QC, as well as representatives from the Trades Union Congress (TUC) and the Independent Workers Union of Great Britain (IWGB), and the Director of Labour Market Enforcement, for their contributions to a roundtable session that took place on 27th November 2018. We are also thankful for the written submissions we received from individual workers, Paul Jennings and Rachel Mathieson, Professor Simon Deakin, Michael Newman, Protect, and the TUC, as well as Addison Lee, Amazon, CitySprint, Deliveroo, DPD, eCourier, FedEx, Hermes, Pimlico Plumbers, and Uber.

Applying the law

Since 2012, there have been more than a dozen judicial rulings against companies' misclassification of their workers as 'independent contractors'. Some of these rulings have delivered justice for individual claimants, and others for larger groups, but their overall impact on the wider gig economy has, to date, been minimal. This is mainly because the judicial process is subject to delays and companies' dubious contractual gymnastics, while employment tribunals themselves possess only limited powers.

Delays

What we have picked up from our evidence is a general unwillingness amongst companies to respect an employment tribunal's initial ruling and implement the necessary structural changes. They choose instead to appeal repeatedly against the ruling, and often over several years, to the highest possible level. It was suggested to us that as the larger companies tend to have more financial and legal resources at their disposal, they can afford to adopt these tactics.

One courier who has been through an employment tribunal commented to us that, 'currently, gig companies can more or less ignore the implications of any court judgment against them, as they have the shining example of Pimlico Plumbers before them, and know that they can keep the ball in play for years, quite legally, by playing the legal system, and especially the appeals part of it.

'If I were asked to make one recommendation which might result in the conversion of the whole series of judgments critical of exploitative gig economy companies into concrete changes, it would be that the appeals system be subjected to a strict time scale, with a requirement that appeals, and the resultant judgments, take place within a number of weeks, rather than allowed to meander along over months (and, indeed, years) as happens at present.

'Without the ability to defer the effects of adverse judgments by effectively 'playing' the system, such companies might possibly be forced to accept the verdict of law, rather than seek to defer it for years.'

While we accept that it can take a considerable amount of time for both parties to compile evidence in the lead-up to an employment tribunal, we believe the delays that occur further along in the process, at the appeals stages, need to be eliminated so that justice can be delivered swiftly and effectively. As one expert put it to us, 'the results we do get are working for us. We're winning cases. It's about getting to judgments quicker'.

One example given to us, which illustrates how drawn out the process can be, involved an individual by the name of Gary Smith who worked for Pimlico Plumbers between 2005 and 2011. In 2011, he suffered a heart attack, and subsequently requested that he be permitted to reduce his hours of work. In response, Pimlico Plumbers withdrew his work.

In May 2011, Mr Smith brought a claim for unfair dismissal against Pimlico Plumbers. An employment tribunal heard the case in August 2011, and the judgment, handed down in April 2012, found in his favour. Pimlico Plumbers' appeal was heard in May and October 2013. The judgment, which dismissed the appeal, was handed down in November 2014. Pimlico Plumbers' further appeal was heard in January 2017 and the judgment, once again in favour of Mr Smith, was handed down a month later. Pimlico Plumbers' final appeal was heard by the Supreme Court in February 2018, with the judgment being handed down in favour of Mr Smith in June of the same year. The case was drawn out across seven years.

Limited scope

Moreover, even when companies are defeated by individual claimants, or larger groups, their misclassification of thousands of similarly placed workers outside the courtroom tends to remain untouched. It was suggested to us

that, 'a fundamental weakness is that a legal ruling may create precedent but still there is no obligation for it to be applied to other workers in the same situation who do not wish to risk their already precarious livelihoods, or to go through all the current hurdles associated with an employment tribunal claim'.

One notable exception was given to us by the IWGB, in which The Doctors Laboratory accepted, when it was challenged, that nobody in its workforce was an 'independent contractor'. The company made all the necessary structural changes without dragging the case through the judicial system.

The IWGB shared with us a second example, involving eCourier, in which the company, 'saw the writing on the wall. They knew they were going to lose, the law's relatively clear on this, and wanted to negotiate a settlement […] they then announced they were conducting a review to look at this whole situation'.

The company itself told us that, 'following the settled case, we elected to review all similar contracts. Where we decided that the work was the same, and met the same tests for 'worker' status, we offered this change of status. 24 colleagues voluntarily changed from self-employed to worker status. We did this promptly and without compulsion […] we would advocate simply that employment status should match the work on offer'.

Arguably the company that has responded most favourably to an employment tribunal ruling, which we helped to initiate with the GMB union, is Hermes. Following its defeat in June 2018, the company developed a new contract that provides guarantees on minimum earnings and holiday pay that are safeguarded by a recognition and partnership agreement with GMB. The new contract will operate on an opt-in basis, with couriers choosing whether to remain on their current contract or move to the new one. We strongly welcome this move and would encourage other companies to engage on similar terms with trade unions, in an attempt to negotiate a series of more satisfactory packages across the gig economy.

Similar reforms have been enacted by DPD, following the tragic death of one of its drivers, Don Lane[12]. The company recently committed 'to ensure that anyone who contracts directly with DPD receives the Real Living Wage. We also give everyone the opportunity to change the basis on which they contract with DPD – from employed to worker or self-employed, from worker to employed or self-employed and from self-employed to worker or employee […] New applicants see the [worker] contract as a halfway house so they can decide whether full self-employment is right for them'.

Elsewhere, according to the TUC, 'one major airline has recently indicated that in future it will offer all new joiners direct employment with the airline, or with an employment agency. This is in contrast to the airline's previous policy of mainly engaging pilots on the basis of self-employed status. In addition, this airline is now offering direct employment to all existing pilots who have previously been deemed to be self-employed'.

Yet it is the following extract from the TUC's submission that demonstrates why companies' own voluntary actions are no substitute for the statutory enforcement of basic rights: 'steps are still being taken by the airline to dissuade the pilots from taking up direct employment. For example, practical barriers are created delaying providing new contracts or pushing back commencement dates. These measures sometimes have the effect of pilots dropping their requests to be directly employed by the airline'.

Elsewhere, while drivers at Parcelforce are able to switch between employment and self-employment, we have documented in a

[12] Having been fined by DPD for attending a medical appointment to treat his diabetes, Don Lane missed subsequent appointments because he felt under pressure to continue working. He subsequently collapsed and died.

previous report how some of them feel they have been misled about the potential advantages of becoming self-employed: '[We] were heavily persuaded to leave long-term employment with all the benefits that go with it to be treated as an employee (in fact worse) but with no holiday or sick pay, no security and no pension'.[13] Moreover, while DPD's recent reforms will broaden the range of options that are available to drivers, it should not have taken the death of a driver to prompt such action. Basic rights and financial security that are set out in law should be enforced accordingly, and not be left to individual companies' discretion.

Another company that appears to have been prodded into action by an employment tribunal is Uber, which is being challenged by 106 drivers over their employment status.

The company informed us that since the drivers made their claim (more than three years ago), it had set up a partnership with AXA Insurance to 'provide a range of insurance coverage including sickness, injury and maternity & paternity payments for users across Europe when they are on and off the Uber app. This is free of charge and benefits approximately 150,000 to 200,000 self-employed people using the app'. The insurance package has been live since June 2018 and, in this country, includes medical cover, accidental death benefit and funeral expenses, permanent disability compensation, inconvenience compensation for hospitalisation or injuries, and jury service payments.

Uber also acknowledged in its submission that, 'the changing world of work means we need to build new solutions to meet the "21st century social contract" and our Partner Protection insurance programme with AXA is now helping drivers manage life's setbacks that may be caused by an on-trip accident or an off-trip life event'.

While this acknowledgement is welcome, and certain positive changes have been made to drivers' conditions since the initial claim was brought, the company is still failing to recognise its drivers as 'workers' and, as such, it does not guarantee them the basic rights and financial security the law requires. It appears to be picking and choosing certain improvements it wishes to enact to drivers' conditions, rather than adhere to the minimum protections set out in law. An employment tribunal ruled in favour of the individual claimants in October 2016, and two subsequent appeals ruled likewise in November 2017 and December 2018. Uber has said that it intends to take its appeal to the Supreme Court.

Indeed, within the present framework, companies are still able to wriggle free from their duty to provide basic rights and financial security for their workforce, even though employment tribunal claims tend to relate to major structural problems that stem from the misclassification of their workforce. Even if the 106 claims against Uber are ultimately successful, for example, the company is under no obligation to offer similar terms to the remainder of its 40,000 drivers.

The upshot of the current setup is that, while individual claimants may eventually gain the right to enhanced protection, by winning their own legal battles, the wider inequality that exists between the company and its workforce is left pretty much undisturbed. As Professor Veena Dubal has put it, workers win the litigation battle, but lose the larger war for economic justice.[14] We received several proposals for countering this injustice.

First, it was recommended to us that, 'what would be beneficial is a more robust mechanism for ensuring that results from one case are applied to the workforce'. The TUC proposed in evidence that, to even up the scales, employment tribunals should be given

[13] Frank Field and Andrew Forsey, *A new contract for the gig economy* (July 2017): p. 13

[14] V.B. Dubal, 'Winning the Battle, Losing the War? Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy', Wisconsin Law Review 2017 (4): pp. 739-802

the ability to make wider recommendations relating to a company's entire workforce. This could ensure that companies change their practices in relation to other workers, not just individual claimants. It was also suggested to us that, 'there is an inherent imbalance of power in status claims. Another route to addressing the imbalance of power is that HMRC or another governmental body could act as an intervener in significant status cases'. We return to this suggestion later.

Several submissions argued that additional penalties should be introduced, as a deterrent, specifically to deal with companies that have lost previous employment status cases on similar grounds. We welcome the Government's commitment to increase the size of maximum penalties that employment tribunals can impose in instances of aggravated breach, and to oblige employment tribunals to consider the use of sanctions where employers have lost a previous case on broadly comparable facts.

Finally, it was proposed that employment tribunals should be given the power to consider freestanding claims involving employment status. As one worker wrote in their submission, 'at present the process of taking a worker status concern to employment tribunal or other body is complicated further by the fact that the claim must be brought on the back of a specific issue such as National Minimum Wage, holiday entitlement, etc., rather than worker status itself. This causes added complexity in terms of ascertaining when triggering events took place and if they are "in time" in the eye of the employment tribunal', and, 'this also raises an issue with ACAS in that they are unable to effectively arbitrate on issues of worker status but only able to focus on specific issues – NMW, holiday leave entitlement, etc.'.

What also became increasingly clear in the evidence we received is the central role that trade unions are taking on, and which must be encouraged, in representing individuals who work in the gig economy.

Rewriting contracts

One mechanism being used by companies, to resist any movement away from the 'independent contractor' classification of their workforce, is to enact small changes of wording in their contracts that undermine or delay the claims being brought to an employment tribunal. One courier commented to us that, despite changes being made on paper, 'nothing actually changes for us. It's pretty poor from them. It also makes a mockery of the decisions from the judges'.

In oral evidence, this mechanism was described to us as, 'the second bite of the cherry – "there's a new contract so we have to look at it again". That fits into the delay point – companies are going to be allowed to change their model. I don't think you'll ever be able to say, "we've made a finding now and that's it forever". The answer is, "okay, you've got a new contract, let's go and find out what the answer is on that basis". It's currently in favour of the companies because it takes two years or more to find out. If you could find out very quickly, the incentive to roll something out on your workforce would diminish hugely'.

One such example was presented to us by Max Dewhurst, who said in oral evidence, '[After] we won fairly and squarely […] CitySprint appealed for a year and then three or four weeks before the appeal hearing they pushed through new contracts – or new written documents – more or less the same as previous ones, which forced us to relitigate. Then only a judge can say if this is a new relationship at all. They pushed them through on the basis that pushbike couriers had two weeks to look at the contracts and raise any issues, but if you didn't sign the contract you lost your job. So loads of people just signed it anyway.

'The day after the deadline they wrote to the appeal tribunal to say we'd all signed new contracts, so they considered it an historic issue. Basically they were just playing the system, clearly on the advice of their lawyers. The company aren't smart enough to pull that

off themselves. So it gave us a three month window to relitigate the new contract.'

CitySprint subsequently withdrew their appeal and the new contracts led to little meaningful change, if any, on the ground.

The company itself told us that, 'from November 2017 we invited all cycle couriers contracting with us to sign on to updated terms of services. These new terms were shorter and sought to simplify language where possible. They clarified the rights and flexibilities available to all self-employed cycle couriers who provide their services to CitySprint, and gave any cycle courier wishing to work for us the ability to query or challenge any of their provisions. Amongst other things, they reinforce in particular that there is no control over the couriers, that couriers have the freedom to accept or reject individual jobs, and that there are no fixed times or obligations to provide their services'.

However, faced with the choice of signing a new contract or losing their job, most people will naturally agree to the new terms. As one worker suggested to us, 'changes of agreement wording and updates may happen over time so that workers have no choice but to "agree" on paper to increasing levels of control or loss of basic rights and protections. This is often a race to the bottom amongst competitors in the same industry for fear of loss of competitiveness.

'Wording or terminology used may change, but practices remain the same; a company may become more careful about what it puts in writing but continue to assert control verbally or in other ways; change may be enacted in a small number of branches rather than across the business as a whole; local management may be used as a scapegoat for the actions of the business at corporate level; creative structures may be proposed for future implementation to give an appearance of compliance'.

It was also reported to us that one of the options open to workers, the Central Arbitration Committee, proceeds on the basis of the contract that applies at the time of the hearing, meaning that individuals are vulnerable to the contracts being changed at the last minute. While this was a main factor in Deliveroo riders' unsuccessful claim against the company, Deliveroo itself informed us that it, 'has already taken on risk to give riders more security within the current framework, for example with a free insurance package, covering accident and injury and third party liability'.

Reforming the law

Despite asking them to sacrifice basic rights and financial security, by signing up as 'independent contractors', the companies we have studied tend to treat people more like 'workers' who are largely under their control and supervision. Amongst other advantages that accrue to each company, this enables them to deliver (and advertise) a reasonably uniform service to their customers. The companies are quite happy to capitalise on these arrangements, knowing that it is individuals, rather than themselves, that bear all of the financial risk during quieter periods, for example, while still being on hand to deliver the service that is advertised to potential customers.

What the recent pattern of court rulings tells us is that the law, in its current form, should be sufficient to protect those workers from such exploitation. On almost every occasion that companies' use of 'independent contractors' has been put before the courts, they have been found to be in breach of the law. This could lead us to focus exclusively on the application and enforcement of the law.

Nonetheless, our evidence suggests that the law itself contains two key weaknesses which allow companies to get away with using the bogus forms of self-employment that submerge working families' living standards.

The first is that the burden of proof currently rests with individuals, who must spend several gruelling years going through the judicial system to prove they are a 'worker'. It is currently assumed that they are an 'independent contractor', unless they can prove otherwise.

The second is the weight given to a dubious and notional 'substitution clause' in contracts, which was described to us as a 'get out of jail free card' for companies. Such clauses state that, in law, if an individual has the contractual right to get somebody else to perform work on their behalf, they are self-employed as an 'independent contractor'. The fate of claims going through the judicial system, in particular recent ones involving Deliveroo and Hermes, tends to hinge on the existence and take-up of this clause.

One of the legal experts submitting evidence to us noted that, 'an issue at the outset is that organisations can afford to instruct lawyers to construct convoluted and carefully drafted terms and conditions in order to evade the statutory requirements'. Clearly this applies to the 'substitution clause' which tends to represent a major sticking point in the courts, with both sides trying to prove or disprove the existence in reality of such a right.

Indeed, one of the companies acknowledged in its submission that, 'in some of those cases, we recognise and agree that companies should not be able to avoid a worker/employee status finding simply by relying on a contractual clause that is never operated in practice, or by stating there is no obligation to work when in reality there is. We think some of those cases are a reflection of the current lack of clarity in what 'self-employment' means'.

This latter point brings us on to a debate that was played out in evidence, namely around whether the law itself needs to be updated to codify new definitions and tests of 'worker' and 'independent contractor' status.

Among those in favour of legislative reform, it was suggested that, 'there can clearly be a level of uncertainty both for the individual and the organisation as to the appropriate status in new and novel business models. One way to address this uncertainty would be to create primary legislation which sets out the minimum tests that need to be applied in each case'.

In contrast, it was argued by others that, 'if you look at a courier contract for any of the big companies, they are updated to reflect case law, so that "everything in a recent case that says this person is a 'worker', we do the opposite". So it's simply not true that they're confused about the law. The big companies know exactly what the law says'. Additionally,

it was noted that with any new legislation, there are, 'new chances to game the system […] whichever test you adopt, there will be an attempt to do that'.

Although so much depends on the enforcement and application of the law, we believe that a change in the law itself could enact a cultural change that rebalances the scales more evenly between companies and individual workers.

As a first move, which was put to us in oral evidence, 'you could enact a cultural change with a statutory presumption that all individuals qualify for employment rights unless an employer is able to demonstrate they are genuinely self-employed [as an independent contractor]'. It was proposed similarly in a written submission from one worker that, 'in general the burden of proof of status needs to shift from the self-employed 'worker' to the hiring business from the moment of contractual engagement to the point of arbitration or tribunal or relevant regulatory body scrutiny'.

Secondly, it was recommended to us that the law should be changed, 'to drop the link with the contract altogether, and focus the test entirely on the factual relationship. You decrease the opportunities for gaming the system. Break the link with contractual terms which allows the redrafting of clauses'.

This recommendation would open up the possibility of setting new tests that consider how much control a company exerts over its workforce, but also whether individual members of that workforce are carrying out a business undertaking on their own account, with the company being viewed as a client, or whether they are providing their labour as an integral part of the company's operations.

The Government has set out its intention to lend more weight to such tests, mainly at the expense of the 'substitution clause', and we recommend that when it considers the matter of control it bases the tests around factors such as:

- the extent to which companies mediate the transactions between their workforce and customers;
- the means used to determine the price, terms and conditions of the services provided by the workforce, as well as the means of payment;
- the monitoring, supervision, and treatment of the workforce's performance and the details of their work – particularly in the context of management decisions being taken by company algorithms;
- the amount of direction and discipline that is used by a company towards its workforce; and
- whether the work being performed by individuals forms part of their, or a company's, core or regular business.

Separate from such considerations is the level of flexibility that individuals have in setting their work patterns. This is a common feature in different kinds of employment relationship and should not be a decisive factor in determining an individual's employment status. Rather, the tests we have proposed here would apply during the time an individual is logged in and available for work. Given the nature of the services that are offered to customers in the gig economy, being logged in and awaiting the allocation of a job is a necessary part of the role and should therefore be included as working time for the purposes of these tests.

Enforcing the law

The single largest piece missing from the regulatory jigsaw puzzle in the gig economy, to make life better for people on very low pay, is an effective means of enforcing the law. That is the overriding message that shone through much of the evidence we received. Even the most robust legislation can be rendered meaningless, if it is not accompanied by an enforcement mechanism of equal measure.

Dr Jason Moyer-Lee, the General Secretary of the IWGB, presented a compelling case for a new enforcement regime:

'A lack of enforcement is the root cause of the problem in the cases we're dealing with. The Doctors Laboratory has an in-house courier department – over a hundred couriers. This is one of the cases we dealt with. We brought a test case, they recognised and admitted the couriers were workers. As soon as we lodged the claim, they responded to say they admitted they were workers.

'In practice, they were admitting to depriving unlawfully these people of basic rights for the past 20 years and then they implemented the change for everyone going forward. So they did the right thing, but they did nothing on the back pay and everything they deprived couriers of for so many years.

'Several months after that, they had an issue with immigration. Someone called me and said one of our guys had an issue with his Indefinite Leave to Remain and it was purely a technicality. He had the right to work, but his document wasn't in the right passport or something like that. The Doctors Laboratory solicitor called me with absolutely no sense of irony and said, "We can't take the risk. We've got to suspend him. We can't pay him. We can't have him working for us, because we just can't fall on the wrong side of the law on this".

If you breach immigration law, you risk unlimited fines and a jail sentence.

'If companies thought there was a real sanction, they wouldn't risk [breaching employment law]. It would be unimaginable for Uber to employ 40,000 undocumented workers in London, because of the consequences.

'Companies that knowingly exploit employment status are only likely to change behaviours if there are financial and reputational incentives for them to do so.'

It was made clear to us that the only ways of enlarging companies' incentive to comply with employment law are massively to increase their likelihood of inspection, to install a fully-resourced labour inspectorate which is tasked with being more proactive, to put the onus onto each company to prove their workforce comprises 'independent contractors', and to accompany these reforms with a major increase in the maximum level at which fines are set. Indeed, one of the conclusions reached during oral evidence was that while enforcement remains driven by claims from individuals, 'there is no incentive to comply', and that, 'until the Government decides to adequately resource enforcement of employment law, with fines and sanctions that are stiff enough to create a real deterrence effect, these companies will continue to act as though obeying the law is optional'.

The Government has indicated that it accepts the need for state enforcement to continue its shift to more proactive methods,[15] and that it will bring forward proposals for a new, single enforcement agency to 'ensure that vulnerable workers are more aware of their rights and have easier access to them and that businesses are supported to comply'.[16]

The Government has also restated its belief that, 'financial penalties play a crucial role in

[15] Department for Business, Energy and Industrial Strategy, and Home Office, *United Kingdom Labour Market Enforcement Strategy 2018-19: Government response* (December 2018): p. 15

[16] HM Government, *Good Work Plan* (December 2018): p. 10

punishing and deterring employers from breaching employment protections'.[17] In response to the recommendation made by the Director of Labour Market Enforcement, for monies raised by fines to be recycled into the enforcement system as additional resource, the Government has stated that such monies are returned to the Treasury, which in turn finances the budget for enforcement bodies. We note that the Director of Labour Market Enforcement's recommendation went further, stating that these monies should be recycled to fund enforcement efforts, in addition to the core budgets[18]. We endorse this recommendation and ask that the Government follows it in spirit as well as in letter.

The Government has rejected the Director's recommendation for the National Minimum Wage penalty multiplier to be reviewed and increased again to a level that would ensure that there is an incentive to comply with the legislation.

If the new labour inspectorate is to be effective and proactive in the pursuit of justice, and to redress the current imbalances we have documented, it is vital that it is given the appropriate remit and accompanying resources.

From the evidence we have received, a blueprint for any new agency must involve:

- becoming a first port of call for individuals who are concerned about their employment status and its consequences for their pay and conditions – enforcement has to be focused on rooting out the deliberate misleading of workers;

- being led by a Commissioner for Labour Market Enforcement, along similar lines to Australia's Fair Work Ombudsman, whose overriding objective is to protect all working people from exploitation;

- conducting regular inspections in companies and sectors that face a high risk of bogus self-employment and investigating concerns that stem from individuals' employment status;

- during these 'deep dive' investigations, looking beyond the contractual terms and considering more closely the reality of the employment relationship, i.e. whether individuals really are free from direct control or direction over their work, if the work is outside the usual course of the company's operations, and if individuals are engaging with the company as a business would engage with a client, for example;

- building cases against companies that it finds to have been misclassifying individuals using a bogus employment status, directing these companies to reclassify their workers and, if necessary, pursuing legal cases on behalf of those individuals;

- levying sufficiently steep fines against those companies that do not comply with employment law, at levels that are commensurate with company turnover, to deter companies from misclassifying an individual's employment status – as one worker put it to us, 'what will incentivise them from the beginning to change their business model?';

- constantly monitoring the effectiveness of employment law and recommending improvements;

The Government has given a commitment to introduce new employment legislation, to

[17] Department for Business, Energy and Industrial Strategy, and Home Office, *United Kingdom Labour Market Enforcement Strategy 2018-19: Government response* (December 2018): p. 19

[18] Director of Labour Market Enforcement, *United Kingdom Labour Market Enforcement Strategy 2018-19* (May 2018): p. 57

protect better the pay and conditions of workers in vulnerable positions. We hope the proposals in this report will help to shape this legislation, and that the undertaking for the Business, Energy & Industrial Strategy and Work & Pensions Select Committees to conduct pre-legislative scrutiny will be honoured.

The gig economy looks set to continue growing rapidly in the years ahead. Justice demands that the laws governing jobs in this segment of the labour market, as well as their application and enforcement, are brought up to scratch quickly so that it can be made to work for everyone in this country.

Appendix – Recent case law in the gig economy

Case	Summary/Principle	Stage	Resisted/appealed	Final outcome
Autoclenz Ltd v Belcher [2008] 6 WLUK 48 *Autoclenz Ltd v Belcher* [2009] EWCA Civ 1046 *Autoclenz Ltd v Belcher* [2011] UKSC 41	The Supreme Court found that the CoA had been correct to find that where a party to a contract disputed the genuineness of an express term, there was no need to show that there had been a common intention to mislead. The essential question was "what was the true agreement between the parties?"	Supreme Court	(1) Belcher appealed to EAT (2) Autoclenz appealed to CoA (3) Autoclenz appealed to SC	Appeal dismissed – The contractors were workers within reg.2(1) of the 1998 and 1999 Regulations.
Pimlico Plumbers Ltd v Smith [2014] 11 WLUK 646 *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51 *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29	Supreme Court affirmed the CoA and EAT decisions that, although the plumber had a limited right to substitute another company operative in his place, the dominant feature of the contract remained personal performance and he therefore fell within the definition of a "worker" in the Employment Rights Act 1996 s.230(3)(b).	Supreme Court	Appealed each time by Pimlico Plumbers Ltd	Appeal dismissed – Smith found to be worker
Windle v Secretary of State	The CoA restored the ET's decision that individuals providing	Court of Appeal	No further appeal	Appeal allowed – Windle held to

for Justice [2016] EWCA Civ 459	services to the Courts and Tribunals Service on an assignment-by-assignment basis were not "employees" within the meaning of the Equality Act 2010 s.83(2)(a) because there was no mutuality of obligation between assignments.			be an employee
Uber BV v Aslam UKEAT/0056/17 [2017] 11 WLUK 238	EAT confirmed ET's judgment that Uber London Ltd employed drivers as "workers", for the purposes of the Employment Rights Act 1996 s.230(3)(b). The ET had been entitled to reject the label of agency and the characterisation of the relationship between the drivers and Uber in the written documentation as not properly reflecting the reality	Court of Appeal	(1) Uber appealed to EAT (2) Uber appealed to CoA	Heard in October 2018, drivers found to be workers.
Independent Workers Union of Great Britain v Central Arbitration Committee [2018] EWHC 1939 (Admin)	Permission for JR - In determining whether someone was a "worker" for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992 s.296(1)(b), the contractual terms were the critical starting point and an obligation to perform the work personally was the sole test. A right to substitute in the contract might be inconsistent with personal performance but was not necessarily so. Where	High Court (Admin)	No appeal	Application granted in part - the riders were not obliged to provide personal service, and therefore they did not qualify as s.296(1)(b) workers and were not eligible to be the subject of a recognition claim.

	the right to substitute was significantly limited, it was unlikely to be inconsistent with the obligation of personal performance, but a general right of substitution in which the employer party was uninterested in the identity of the substitute provided, only that the work got done, would negate an obligation of personal service.			
Addison Lee Ltd v Gascoigne UKEAT/0289/17 [2018] 5 WLUK 202	The EAT found that the ET had not erred in finding that a cycle courier was a "worker" for the purposes of the Working Time Regulations 1998 reg.2, and not a self-employed independent contractor. The contract of employment did not reflect the reality of the parties' legal relationship, which included the necessary element of mutuality of obligation.	EAT	Appealed to Court of Appeal by Addison Lee Ltd	Appeal dismissed at Employment Appeal Tribunal - Gascoigne held to be a worker Appeal to the Court of Appeal has been stayed pending the outcome of the Uber case.
Dewhurst v Citysprint UK Ltd ET/220512/2016	ET held that a cycle courier for Citysprint was a worker under section 230(3)(b) of the Employment Rights Act 1996.	ET	Appeal to EAT (meant to be heard in Nov 2017) was withdrawn	Judgment for claimants - Dewhurst found to be a worker
Boxer v Excel Group Services Ltd (in liquidation) ET/3200365/2016	The ET held that Boxer was a “worker” for the purposes of the Working Time Regulations 1998 because (amongst	ET	Not appealed and respondent unrepresented	Judgment for claimants - Boxer found to be worker

	other reasons) he was not in a client/customer relationship with Excel, Excel required personal service (with a limited right to substitute), he had no power to agree terms with clients, he worked for fixed rates set by Excel and he did not bear the risk of cost of damage in transit.			
Lange and others v Addison Lee Ltd ET/2208029/2016	Drivers who contracted to provide driving services to a private hire company, using vehicles hired from an associated company, and who were expected to work as soon as they logged onto the company's computer system, were "workers" within the Employment Rights Act 1996 s.230(3)(b).	EAT	Appealed to the EAT	Appeal dismissed – Lange et al found to be workers
Independent Workers Union of Great Britain v RooFoods Ltd (t/a Deliveroo) TUR1/985(2016)	Delivery riders for the food delivery business, Deliveroo, were not "workers" within the statutory definition of either the Trade Union and Labour Relations (Consolidation) Act 1992 s.296 or the Employment Rights Act 1996 s.230(3)(b).	CAC	Not appealed	Application by IWGB to be recognised for collective bargaining refused (riders not workers)
IWGB & The Doctors Laboratory Limited	An out of court settlement acknowledged that some of the couriers were employees and the IWGB application to be recognised for the collective	CAC	Not appealed	Out of court settlement - IWGB application approved and some of the couriers were recognised as employees.

	bargaining purposes was accepted.			
RS Dhillon and GP Dhillon Partnership v HMRC [2017] UKFTT 17 (TC) [Tax case]	Drivers acting for a partnership providing haulage services to the construction industry were employees rather than self-employed for tax purposes.	First-tier tribunal, tax chamber	Not appealed	Judgment for the respondents (HMRC) – the drivers were employees.
Flanore v eCourier	eCourier settled a claim with former courier Demille Flanore on 12 May 2017, admitting that he was a worker	n/a	n/a	Settled – courier was a worker
Ms E Leyland and Others v Hermes Parcelnet Ltd: 1800575/2017 and Others[19]	The Claimants are or were workers of the Respondent within the meaning of s 230(2)(b) Employment Rights Act 1996, regulation 2(1) Working Time Regulations 1998 and s 54(3)(b) National Minimum Wage Act 1998.	ET	Not appealed	Settled – new contracts offered to all couriers

[19] This entry was included by the authors, and was not contained in the written submission that presented the original table, as the settlement was reached after we had received the written submission.

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