HOUSE OF LORDS Library Briefing

Gig Economy: Legal Status of Gig Economy Workers and Working Practices

Summary

It has been argued by some lawyers, politicians, researchers, companies and workplace-relations organisations, that the gig economy has created difficulties in defining the employment status of those who work within it under current law. Many companies in this area have been the subject of legal challenges from individuals working in the gig economy regarding their employment status. Furthermore, the issue of gig economy employment status has been addressed by multiple governmental organisations, government-commissioned reviews, and parliamentary reviews.

This Briefing provides information on current employment law, and what it means to be 'self-employed', a 'worker', or an 'employee'. It provides information on all current and previous legal challenges brought against companies operating in the taxi driving, food delivery, goods couriers and skilled manual labour sectors of the gig economy, and their meaning for the employment status of individuals working in these sectors. Information on the various government and parliamentary reviews to have focused on gig economy employment status is included. It concludes with information on potential wider legal implications of how the legal status of workers in the gig economy is to be defined.

This Briefing is part two of a two-part series on the gig economy. *Gig Economy: Introduction*, part one, provides a general introduction to the gig economy, including sectors, demographic information, and potential impact on the wider economy.

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1. Introduction

It has been argued by organisations involved in workplace relations that the gig economy has created difficulties in defining the employment status of those who work within it. For example, the Head of Guidance at the Advisory, Conciliation and Arbitration Service (Acas) stated that the organisation had recently updated its guidance on an individual's employment status because:

> We have seen changes in the way many people are working over recent years, with a heightened focus on gig economy working. Many businesses and their staff may not realise that a working person's employment rights very much depends on their status. A person who is self-employed or defined as a worker is likely to have different legal rights to someone else who is considered an employee.[1]

Furthermore, the employment status of individuals working in the gig economy has recently been a focus of numerous legal proceedings, government-commissioned reviews, parliamentary inquiries and considerable contentious commentary, as detailed below.

2. Current Employment Law

Under UK employment law, there are three main classifications of employment status: self-employed and contractor; worker; and employee, all of which have different employment rights.[2] Under the Employment Rights Act 1996, the classifications of worker and employee are defined as follows:

1) "Employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
2) "Contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
3) "Worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
    a. a contract of employment, or
    b. any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or

[1] Advisory, Conciliation and Arbitration Service, 'Acas Publishes New Guidance to Help Understand Gig Economy Working and Employment Status Rights', accessed 26 July 2017.
[2] HM Government, 'Employment Status: Overview', accessed 26 July 2017. There are other employment classifications, including employee-shareholder, director, and office holder, yet far fewer individuals fall under these. Agency workers are covered by the Agency Workers Regulations 2010 (SI 2010/93).

> services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.[3]

In short, whilst all employees are workers, not all workers are employees. Both confusion and contention has often arisen around the classification of what are usually referred to in employment law cases as limb (b) workers, from clause 3(b) of section 230 above. Limb (b) workers work under contracts for services but are not in business on their own account (ie not truly self-employed), and as such are individuals who exhibit some characteristics of self-employment and some of employment, but do not quite satisfy the requirements for acquiring employee status.[4] Defining whether an individual is a limb (b) worker or self-employed has been the subject of considerable case law, as individuals have been treated as self-employed, with minimal employment rights, by companies when on further legal analysis they were found to be workers, and awarded certain entitlements and protections.[5]

In the context of the gig economy, as the Royal Society for the Encouragement of Arts, Manufactures and Commerce (RSA) stated in its report, "the crux of this debate is a question about how much control companies exercise over their workers".[6] An individual is generally classified as a worker if:

- They have a contract or other arrangement to do work or services personally for a reward.
- Their reward is for money or a benefit in kind.
- They only have a limited right to send someone else to do the work (subcontract).
- They have to turn up for work even if they do not want to.
- Their employer has to have work for them to do as long as the contract or arrangement lasts.
- 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.[7]

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[3] Employment Rights Act 1996, section 230.

[4] House of Commons Library, *Employment Status*, 10 November 2017, p 8.

[5] For further information on the history of employment status, see House of Commons Library, *Employment Status*, 10 November 2017, pp 7–15.

[6] Royal Society for the Encouragement of Arts, Manufactures and Commerce, *Good Gigs: A Fairer Future for the UK's Gig Economy*, April 2017, p 35.

[7] HM Government, 'Employment Status: Worker', accessed 26 July 2017.

Where casual or irregular work is concerned, someone is likely to be classified as a worker if most of the following apply:

- They occasionally do work for a specific business.
- The business doesn't have to offer them work and they don't have to accept it—they only work when they want to.
- Their contract with the business uses terms like 'casual', 'freelance', 'zero hours', 'as required' or something similar.
- They had to agree with the business's terms and conditions to get work—either verbally or in writing.
- They are under the supervision or control of a manager or director.
- They can't send someone else to do their work.
- The business deducts tax and National Insurance contributions from their wages.
- The business provides materials, tools or equipment they need to do the work.[8]

Case law has generally defined a 'contract of service', as specified for limb (b) workers, as one where:

- The individual agrees to work personally for pay.
- There is a mutuality of obligation between the parties.
- The employer exerts a sufficient degree of control over the work.
- The provisions of the contract are consistent with it being a contract of service.[9]

An individual is considered to be self-employed if most of the following are true:

- They are in business for themselves, are responsible for the success or failure of their business and can make a loss or a profit.
- They can decide what work they do and when, where or how to do it.
- They can hire someone else to do the work.
- They are responsible for fixing any unsatisfactory work in their own time.
- Their employer agrees a fixed price for their work—it does not depend on how long the job takes to finish.

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[8] HM Government, 'Employment Status: Worker', accessed 26 July 2017.

[9] House of Commons Library, *Employment Status*, 10 November 2017, p 9.

- They use their own money to buy business assets, cover running costs, and provide tools and equipment for their work.
- They can work for more than one client.[10]

Self-employed individuals have minimal employment rights, except for health and safety protections, and protections against discrimination. Workers are entitled to certain employment rights, including (as are often contended in gig economy employment tribunal cases) the national minimum wage and statutory holiday pay. Employees have all the statutory entitlements of workers and, in addition, further entitlements, including for sick pay and for protection against unfair dismissal.[11]

3. Legal Cases by Gig Economy Sector

3.1 Taxi Driving

Uber currently describes those who drive for it as 'partner-drivers';[12] ie classifying them as self-employed contractors. The issue of whether Uber drivers are formally workers for Uber, or are employed by Uber (and thus entitled to workers' or employees' rights) or indeed self-employed has recently been addressed in the legal system. On 20 July 2016, a case was brought to the Central London Employment Tribunal by law firm Leigh Day and the GMB union on behalf of two Uber drivers, Yaseen Aslam and James Farrar. The case argued that the drivers were working for Uber, and as such should receive workers' rights, including holiday pay and an entitlement to the national minimum wage.[13]

Prior to the case, Justin Bowden, National Secretary of the GMB union, stated that "the issue here is not about taking away the flexibility […] but the high degree of control that Uber exercises over their drivers" and that "you either have employment laws that people have to follow or you do not".[14] Annie Powell, an employment lawyer at Leigh Day, argued that "we are seeing a creeping erosion of employment rights as companies misclassify their workers as self-employed so as to avoid paying them holiday pay and the national minimum wage".[15] In contrast, Jo Bertram, then Regional General Manager at Uber UK, stated:

> More than 30,000 people in London drive with our app and this case only involves a very small number. The main reason people choose to

[10] HM Government, 'Employment Status: Self-Employed and Contractor', accessed 26 July 2017.
[11] ibid.
[12] Uber website, 'Partner-driver Requirements', accessed 16 August 2016.
[13] BBC News, 'Drivers Battle Uber over Employment Rights', 20 July 2016.
[14] ibid.
[15] ibid.

> partner with Uber is so they can become their own boss, pick their own hours and work completely flexibly. Many partner-drivers have left other lines of work and chosen to partner with Uber for this very reason. In fact two thirds of new partner-drivers joining the Uber platform have been referred by another partner.[16]

In a witness statement, Mr Farrar stated that Uber claimed it paid him £13.77 on an average hourly basis, based upon the hours he was logged on to its app for drivers; however he stated his net earnings in August 2015 after expenses amounted to just £5.03 an hour.[17]

During the Tribunal, Uber's QC contended that its drivers are self-employed, as they can choose when they work, and argued that there was a "direct connection" between Mr Farrar taking jobs that he then cancelled, and his earnings level.[18] Mr Farrar stated in response that Uber drivers felt that they had to accept jobs, and that Uber would log drivers out of its app if they did not accept two or three trips in a row.[19] Mr Farrar also stated that "I don't believe I have a free choice" and that "I consider Uber work as my job".[20]

On 28 October 2016, the Tribunal ruled in *Aslam, Farrar and Others* v *Uber* that regarding the employment status of Uber drivers:

> We have reached the conclusion that any driver who (a) has the App switched on, (b) is within the territory in which he is authorised to work, and (c) is able and willing to accept assignments, is, for long as these conditions are satisfied, working for Uber under a 'worker' contract […].[21]

In writing that Uber's general case and their written terms "do not correspond with practical reality", the Tribunal found that "it is not real to regard Uber as working 'for' the drivers and that the only sensible interpretation is that the relationship is the other way around".[22] The Tribunal found that drivers for Uber are indeed 'workers' for the following reasons:

1) The contradiction in the Rider Terms between the fact that [Uber] purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings.

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[16] BBC News, 'Drivers Battle Uber over Employment Rights', 20 July 2016.
[17] *Financial Times (£)*, 'Uber Challenged on UK Drivers' Status', 20 July 2016.
[18] ibid.
[19] ibid.
[20] BBC News, 'Drivers Battle Uber over Employment Rights', 20 July 2016.
[21] *Aslam, Farrar and Others* v *Uber* [2016] ET/2202551/2015, p 26.
[22] ibid, pp 28–9.

2) The fact that Uber interviews and recruits drivers.
3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.
4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces this requirement by logging off drivers who breach those requirements.
5) The fact that Uber sets the (default) route and the driver departs from it at his peril
6) The fact that [Uber] fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory.)
7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties.
8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.
9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.
10) The guaranteed earning schemes (albeit now discontinued).
11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.
12) The fact that Uber handles complaints by passengers, including complaints about the drivers.
13) The fact that Uber reserves the power to amend the drivers' terms unilaterally.[23]

The ruling further stated that Uber's case in general merited "a degree of scepticism", partly due to it "resorting in its documentation to fictions, twisted language and even brand new terminology".[24] In particular, on the nature of Uber's business and its role in relation to its drivers, the Tribunal found that:

> It is, in our opinion, unreal to deny that Uber is in business as a supplier of transportation services […]. The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous. In each case, the business consists of a man with a car seeking to make a living by driving it. […] Nor can Uber's function be sensibly characterised as supplying drivers with 'leads'. That suggests that the driver is put into contact with a

[23] *Aslam, Farrar and Others v Uber* [2016] ET/2202551/2015, p 29.
[24] ibid, p 27.

> possible passenger with whom he has the opportunity to negotiate and strike a bargain. But drivers do not and cannot negotiate with passengers (except to agree to a reduction of the fare set by Uber). They are offered and accept trips strictly on Uber's terms […] we are satisfied that the supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties.[25]

Uber was granted the right of appeal, and according to the statement of appeal, Uber's QC intended to argue that the original tribunal made "inconsistent and perverse findings" and "erred in law".[26] At the appeal tribunal in September 2017, Uber's QC argued that it was not in fact a gig economy firm, and that its business model was similar to that of a local taxi firm.[27] Furthermore, the QC argued that "the agency model has been operated for many years. It's in no way novel. It's been recognised by case law".[28] An Uber spokesperson stated that:

> Almost all taxi and private hire drivers have been self-employed for decades before our app existed. With Uber, drivers have more control and are totally free to choose if, when and where they drive with no shifts or minimum hours. The overwhelming majority of drivers say they want to keep the freedom of being their own boss.[29]

Uber also argued that 80 percent of its drivers would rather be classified as self-employed than as a worker.[30]

In November 2017, this appeal was rejected, although Uber stated it would continue with its appeals against the original judgment.[31] Tom Elvidge, Acting Head of Uber UK, argued that the original decision relied on an assertion that drivers were required to take 80 percent of trips sent to them when logged into the app, but "as drivers who use Uber know, this has never been the case in the UK", although the GMB union argued that "Uber must now face up to its responsibilities and give its workers the rights to which they are entitled".[32]

In a similar case, taxi and courier firm Addison Lee was adjudged in September 2017 to have classified some of its drivers incorrectly as

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[25] *Aslam, Farrar and Others* v *Uber* [2016] ET/2202551/2015, pp 27–9.

[26] *Guardian*, 'Uber Granted Right to Appeal Against Ruling on UK Drivers' Rights', 19 April 2017.

[27] BBC News, 'Uber is not Part of the Gig Economy, Firm Argues', 27 September 2017.

[28] *Guardian*, 'Uber Says its Business is Similar to a Minicab Firm', 27 September 2017.

[29] ibid.

[30] BBC News, 'Uber is not Part of the Gig Economy, Firm Argues', 27 September 2017.

[31] BBC News, 'Uber Loses Court Appeal Against Drivers' Rights', 10 November 2017.

[32] ibid. The appeal was supported by the Independent Workers Union of Great Britain (IWGB).

self-employed when in fact, they should have been treated as workers, and as such were entitled to holiday pay and the minimum wage.[33] It was reported that the firm had 3,800 such self-employed drivers in London.[34] At the hearing, Addison Lee argued that its drivers were independent contractors who could log-on whenever they wished. However, the judges stated in their findings that the firm exerted certain controls, including that the vast majority of drivers leased their company-liveried cars from an associated firm of Addison Lee, that they had to follow a dress code, and received 'driver guidance', including "please do not engage in conversations about sex, politics, religion or anything controversial".[35]

The judgment stated that with regard to whether the limb (b) definition of worker had been satisfied, that:

> The statutory wording is that there must be a contract "whereby the individual undertakes to do or perform personally any work or services" for the other party. This was clearly the case here whenever each driver logged on. The test is an objective one and we need to ask what a reasonable observer, in possession of the material facts, would say the parties had agreed. Ignoring the period between 'log ons', the drivers, when they logged on, were undertaking to accept the driving jobs allocated to them. They were undertaking to perform driving services personally. No other conclusion is possible.
> […]
> We consider that the drivers were not in any realistic sense contracting with Addison Lee so that the status of the latter was as clients or customers of a business. The contractual documents demonstrate, as much as anything else, the inequality of bargaining power between the respective parties. The drivers were in a subordinate position, which is not surprising, but they cannot sensibly be viewed as contracting with a client of their driving.[36]

In response to the verdict, Addison Lee stated that:

> We note the tribunal's verdict, which we will carefully review. Addison Lee is disappointed with the ruling as we have always had, and are committed to maintaining, a flexible and fair relationship which generates work for 3,800 drivers.[37]

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[33] *Guardian*, 'Addison Lee Wrongly Classed Drivers as Self-Employed, Tribunal Rules', 25 September 2017.
[34] ibid.
[35] *Financial Times (£)*, 'Uber Rival's Drivers are 'Workers', Employment Tribunal Rules', 25 September 2015.
[36] *Mr M Lange and Others v Addison Lee Ltd* [2017] ET/2208029/2016, pp 14–16.
[37] *Financial Times (£)*, 'Uber Rival's Drivers are 'Workers', Employment Tribunal Rules', 25 September 2015.

In December, the European Court of Justice (ECJ) ruled that Uber is a transport services company, and not a technology services company.[38] The case was brought by a taxi drivers' association in Barcelona, the Asociacion Profesional Elite Taxi, against Uber's service UberPOP, which operates to connect passengers to drivers without commercial licenses in Poland, the Czech Republic, Slovakia, and Romania.[39] The judgment, which cannot be appealed in the European Union, found that Uber was more than a "mere intermediary" for customers trying to hail a cab; and that Uber "must be classified as 'a service in the field of transport' within the meaning of EU law", which means "Member States can therefore regulate the conditions for providing that service".[40] The judgment also found that Uber was "indispensable for both the drivers and the persons who wish to make an urban journey", and that it "exercises decisive influence over the conditions under which the drivers provide their service".[41] Responding to the judgment, an Uber spokesperson stated:

> This ruling will not change things in most EU countries where we already operate under transportation law. However, millions of Europeans are still prevented from using apps like ours. It is appropriate to regulate services such as Uber and so we will continue the dialogue with cities across Europe.[42]

Following this decision, Jo Stevens (Labour MP for Cardiff Central) asked the Secretary of State for Transport whether he would introduce regulations in response to the ruling.[43] In response, the then Minister of State for Transport, John Hayes, stated:

> Uber has always been regulated as a private hire vehicle operator in England and Wales, therefore no additional or revised regulation is required as a consequence of the European Court of Justice ruling.
> I announced in a Westminster Hall debate that I would be setting up a working group to consider current issues concerning taxi and PHV licensing. That group has now been formed and will report its findings to me early this year.[44]

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[38] *Guardian*, 'Uber to Face Stricter EU Regulation after ECJ Rules it is Transport Firm', 20 December 2017.
[39] *Financial Times (£)*, 'Uber Faces Tougher Regulation after ECJ Rules it is a Transport Service', 20 December 2017.
[40] ibid.
[41] ibid.
[42] ibid.
[43] House of Commons, 'Written Question: Uber', 20 December 2017, 120771.
[44] ibid.

3.2 Food Delivery

In November 2016, a group of deliverers for Deliveroo began legal action to gain union recognition with collective bargaining rights (which can only apply to those classified as workers or employees) under the auspices of the Independent Workers Union of Great Britain (IWGB).[45] At the subsequent hearing at the Central Arbitration Committee (CAC—the tribunal which oversees collective bargaining law) in May 2017, Deliveroo argued that the IWGB "does not represent Deliveroo riders who tell us the reason they want to work with us is because of the flexibility we offer", and that its riders prefer the freedoms available to independent contractors as "they can fit their work around their life, rather than their life around their work".[46] In contrast, the IWGB argued that the "vast majority" of Deliveroo riders in Camden and Kentish Town, the area focused on by the Tribunal, wanted it to represent them. Dr Jason Moyer-Lee, Secretary-General of the IWGB, said Deliveroo wanted to avoid a tribunal decision saying its riders are workers, as "they'd have to start giving them employment rights like holiday and sick pay".[47] Deliveroo stated that fewer than 50 of the 213 deliverers it had in the area were union members, although the IWGB disputed those figures and contended that deliverers had been put off joining by a "campaign of misinformation" from Deliveroo, and had also been "fogging" the definition of worker status to "intimidate riders from joining the IWGB".[48] Before the verdict of the CAC, it was reported that Deliveroo had pledged to offer its deliverers sick pay and injury insurance.[49]

In November 2017, the CAC found in favour of Deliveroo, finding that its deliverers were not workers but self-employed due to their freedom to 'substitute'—to have another deliverer take their place on a particular job—and thus not entitled to collective bargaining.[50] As the CAC judgment stated:

> The central and insuperable difficulty for the Union is that we find that the substitution right to be genuine, in the sense that Deliveroo have decided in the New Contract that Riders have a right to substitute themselves both before and after they have accepted a particular job; and we have also heard evidence, that we accepted, of it being operated in practice.
> […]
> In light of our central finding on substitution, it cannot be said that the Riders undertake to do personally any work or services for another party. It is fatal to the Union's claim. If a Rider accepts a particular

[45] BBC News, 'Deliveroo Riders Seek to Unionise and Gain Workers' Rights', 8 November 2016.
[46] *Telegraph*, 'Deliveroo Denies Riders are Workers as Gig Economy Tribunal Begins', 23 May 2017.
[47] ibid.
[48] *Guardian*, 'Deliveroo Accused of 'Painting a False Picture' at Work Tribunal', 25 May 2017.
[49] *Times*, 'Deliveroo Breaks Ranks by Offering Riders Sick Pay', 7 July 2017.
[50] BBC News, 'Deliveroo Claims Victory in Self-Employment Case', 14 November 2017.

> delivery, their undertaking is to either do it themselves in accordance with the contractual standard, or get someone else to do it. They can even abandon the job part way having only to telephone Rider Support to let them know. A Rider will not be penalised by Deliveroo for not personally doing the delivery her or himself, provided the substitute complies with the contractual terms that apply to the Rider.[51]

However, the CAC judgment did recognise the IWGB's argument concerning the desire for collective bargaining as valid. As it stated:

> The Union has been able to demonstrate considerable and consistent levels of support over the unfortunately long period of this case, notwithstanding Deliveroo's opposition to the Union's claim, and notwithstanding the difficulties of organising and contacting other Riders and the individual nature of the work—being a one person cycle delivery rider is, by definition, a solitary activity. There are clearly concerns about the precarious nature of the work and the wider debate around the gig economy. From all the information before us, if the Riders had been workers within the meaning of s.296 of the Act,[52] we would have found that a majority of the Riders in the proposed bargaining unit would support the Union's bid for collective bargaining on pay, hours and holiday.[53]

Dan Warne, the Managing Director of Deliveroo in the UK and Ireland, said that the decision represented a "victory for all riders who have continuously told us that flexibility is what they value most about working with Deliveroo".[54] In contrast, Dr Jason Moyer-Lee argued "despite the CAC's finding that a majority of the riders in the bargaining unit would likely support union recognition for the IWGB", that "finally a so-called gig economy company has found a way to game the system".[55]

Also in November 2017, a separate legal challenge was launched by 45 Deliveroo riders with the Employment Tribunal under the auspices of law firm Leigh Day, directly challenging their status as self-employed and claiming they are entitled to the rights and status of employees.[56] No date for the hearing on this case has yet been set.

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[51] *Independent Workers' Union of Great Britain* and *Roofoods Ltd T/A Deliveroo*, [2017] TUR1/985(2016), pp 27–28.
[52] In this case, s.296 of the Trade Union and Labour Relations (Consolidation) Act 1992.
[53] *Independent Workers' Union of Great Britain* and *Roofoods Ltd T/A Deliveroo*, [2017] TUR1/985(2016), p 36.
[54] *Financial Times (£)*, 'Deliveroo Fends Off Couriers' Demands for Union Recognition', 14 November 2017.
[55] ibid.
[56] Leigh Day website, 'Deliveroo Riders take First Step in Legal Challenge for Employment Rights', 1 November 2017.

3.3 Goods Couriers

In January 2017, a case was brought to the Central London Employment Tribunal by the IWGB and law firm Bells Waite Braithwaite, on behalf of Maggie Dewhurst, a cycle courier for the firm CitySprint. Ms Dewhurst was classified as self-employed by the firm, however, she argued that she did not enjoy sufficient freedom to be classified as self-employed, as she was subject to the control of managers with no control over rates of pay, had to wear a CitySprint uniform, and was tracked during the performance of her duties by GPS.[57] Ms Dewhurst further argued on couriers' relationship with City Sprint that:

> We spend all day being told what to do, when to do it and how to do it. We're under their control. We're not a mosaic of small businesses and that's why we deserve basic employment rights like the national minimum wage.[58]

The Tribunal found that Ms Dewhurst was a worker for CitySprint, and therefore it had unlawfully not paid her for two days' holiday. The ruling criticised CitySprint's depiction of its couriers as self-employed individuals who "make their services available to the company", as "not only is the phrase 'make their services available' as opposed to 'work for' a mouthful, it is also window dressing",[59] and also described the general contractual arrangements as "contorted" and "indecipherable".[60] The ruling further stated that:

> Ms Dewhurst is in a simple binary relationship with the respondent; one courier working personally for one organisation at any one time and any concept of her operating a business is a sham. Another way of putting it is that the claimant is both economically and organisationally dependent upon CitySprint not only for her livelihood but also for how it is earned.[61]

CitySprint stated that the case had "demonstrated that there is still widespread confusion regarding this area of law", and called on the Government to "provide better support and help for businesses across the UK who could be similarly affected". It also stated it was "disappointed" with the ruling and that "this applies to a single individual and was not a test

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[57] *Financial Times (£)*, 'London Bike Courier Wins 'Gig Economy' Legal Battle', 6 January 2017.
[58] BBC News, 'Bike Courier Wins 'Gig' Economy Employment Rights Case', 7 January 2017.
[59] *Financial Times (£)*, 'London Bike Courier Wins 'Gig Economy' Legal Battle', 6 January 2017.
[60] BBC News, 'Bike Courier Wins 'Gig' Economy Employment Rights Case', 7 January 2017.
[61] *Dewhurst v CitySprint UK Ltd*, ET/2202512/2016, 5 January 2017, pp 12–13.

case".[62] It further stated that "evidence presented at the tribunal confirmed that the vast majority of our couriers enjoy the freedom and flexibility of their current role".[63]

In March 2017, Andrew Boxer, a cycle courier who had worked for firm Excel (which had been taken over by CitySprint in 2016 and was in liquidation), won an employment tribunal case against the firm (who did not contest it) for holiday pay.[64] The firm had classified him as self-employed, and in the performance of his duties he provided his own bike, phone and protective clothing.[65] Nonetheless, the tribunal found he should have been classed as a worker as he was under the direction of another, and not running his own business, because:

a) He signed a contract because he had no choice, there was no negotiation or tendering involved. The inequality of bargaining power at this point was very notable.
b) The business model required him to work five days a week under the control of a controller.
c) Whilst he enjoyed some flexibility this had to be by arrangement and with notice.
d) He was paid a fixed rate for his work which was non-negotiable and he played no part in computing the rate.
e) He did not have to bear the cost of any damage in transit or pay insurance.
f) The only contractor in the business was the respondent who contracted with companies to supply to them and the claimant was "staff".
g) Not only was he expected to work and in return was entitled to expect a steady stream of jobs, he was also expected to stand by in between jobs waiting for the next one. Furthermore, if he wanted to move location he had to get permission from a controller. Even if he is not expected to wait around for the next job, this is what he does because he does not have his own client base or other means of earning an income in between jobs provided by the respondent.
h) He was also expected not to take a break when another job would come in and he was needed.[66]

In May 2017, the firm eCourier (a subsidiary of the Royal Mail) admitted it had incorrectly classified one of its cycle couriers, Demille Flanore, rather

[62] *Guardian*, 'Courier Wins Holiday Pay in Key Tribunal Ruling on Gig Economy', 6 January 2017.
[63] ibid.
[64] *Telegraph*, 'Blow for 'Gig Economy' as Tribunal Rules Excel Must Pay Courier Holiday', 24 March 2017.
[65] *Boxer v Excel Group Services Ltd* [2017] ET/3200365/2016, p 3.
[66] ibid, p 6.

than face an employment tribunal.[67] Mr Flanore was classified as an independent contractor, yet the firm's agreement with him stated "he was engaged as a worker […] which for the avoidance of doubt includes an entitlement to holiday pay", and paid £545 to settle the case.[68] Prior to this settlement, the IWGB had argued Mr Flanore was a worker as he was instructed on what to do by a "controller", he was required to work exclusively for eCourier, all jobs were booked and allocated to him by eCourier, and eCourier set the prices to customers and what it would pay him.[69] The Chief Executive of eCourier, Ian Oliver, stated he was launching an internal review to determine how best to implement the same worker status "for colleagues where it reflects their actual working arrangements with us".[70]

In a similar case, courier firm The Doctor's Laboratory (which provides pathology services to the NHS), conceded in June 2017 that a number of its couriers were in fact workers and not self-employed, without the intervention of an employment tribunal. However, the IWGB is pursuing the matter further, and intends to argue before an employment tribunal that these workers are in fact full-time employees.[71]

In a further case, taxi and courier firm Addison Lee was adjudged in August 2017 at the central London employment tribunal to have unlawfully failed to pay holiday pay to one of its cycle couriers, Chris Gascoigne.[72]
Mr Gascoigne's contract included a clause that stated he should "indemnify Addison Lee against any liability for any employment-related claim or any claim based on worker status brought by you".[73] The judge stated that this "suggests they knew the risk of portraying the claimant as self-employed", and described the clause as "designed to frighten him from litigating".[74]
Commenting on the verdict, Addison Lee stated that it was "disappointed with the ruling as we have always had, and are committed to maintaining a flexible and fair relationship with cycle couriers".[75]

At a fringe event at the Conservative Party conference in October 2017, the Chief of Hermes in the UK, Carole Woodhead, stated that "we know that most of our couriers do not want to be employed".[76] She further argued

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[67] *Guardian*, 'Royal Mail Firm Launches Review after Admitting it Denied Courier Benefits', 12 May 2017.
[68] ibid.
[69] ibid.
[70] ibid.
[71] *Guardian*, 'Cyclists Delivering Emergency Blood to NHS Gain Employment Rights', 30 June 2017.
[72] *Guardian*, 'Addison Lee Suffers Latest Defeat in Legal Row over Gig Economy Rights', 2 August 2017.
[73] ibid.
[74] ibid.
[75] ibid.
[76] BBC News, 'Gig Economy Workers 'Like the Flexibility'', 5 October 2017.

that the firm's couriers "like the flexibility of being self-employed" and that "they like the ability to choose—the number of rounds they do, the number of hours they work".[77] At the same event, the Chief of CitySprint, Patrick Gallagher, stated that the "vast majority" of the firm's couriers wanted "things to remain as they are", and that due to competition from other courier and food delivery firms, CitySprint had to ensure its deliverers were treated fairly and paid well.[78]

3.4 Skilled Manual Labour

In 2012, it was adjudged at an employment tribunal that Gary Smith, a plumber working under the auspices of Pimlico Plumbers, was in fact a worker, and not self-employed, as the firm (and previously Mr Smith himself) had defined his working classification; a decision later upheld at the employment appeal tribunal in 2014.[79] This was subsequently appealed to the Court of Appeal, which dismissed the case and upheld the previous judgments in February 2017.[80] The Court of Appeal in particular stated the 'Manual for Self-Employed Operatives' which applied to Mr Smith included "the provision for a normal working week of 5 days and a minimum of 40 hours" and as such the employment tribunal was correct to originally state that "Mr Smith was obliged to work a normal 40 hour week, even if that was not enforced".[81] The judgment further stated that:

> The relationship between PP [Pimlico Plumbers] and its operatives would only work if the operative was given and undertook a minimum number of hours' work. Mr Smith, like the other operatives, was required to use the PP logo'ed van for work assignments and also a mobile phone issued to him by PP. The Manual provided that the van was to be rented to the operative at a standard rate of £120 per month in advance plus VAT.[82]

As such, the judgment concluded that "the degree of control exercised by PP over Mr Smith […] was also inconsistent with PP being a customer or client of a business run by Mr Smith",[83] and his employment status was accordingly that of a worker. In August 2017, Pimlico Plumbers was granted the right to appeal this judgment to the Supreme Court.[84]

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[77] BBC News, 'Gig Economy Workers 'Like the Flexibility'', 5 October 2017.
[78] ibid.
[79] *Pimlico Plumbers Ltd and Anor v Smith* [2014] UKEAT/0495/12/DM.
[80] *Pimlico Plumbers v Smith* [2017] EWCA Civ 51.
[81] ibid, para 109.
[82] ibid, para 112.
[83] ibid, para 115.
[84] Supreme Court website, 'Permission to Appeal Decision', 9 August 2017.

4. Reviews and Inquiries Concerning the Gig Economy

4.1 Taylor Review

In 2016, the Department of Business, Energy and Industrial Strategy commissioned Matthew Taylor, the Chief Executive of the RSA and former policy director in the Blair Government, to review UK employment practices. The report of the review, published in 2017, made a number of recommendations on current employment legislation with regard to developments in the gig economy.[85] The report of the review stated that the current three classifications of employment status should be retained, yet "the current three-tier approach is confusing" and that "the two categories of people that are eligible for "worker" rights should be easier to distinguish from one another".[86] As such, the report recommended the worker classification should be revised into a status of 'dependent contractor', emphasising the control of a company over such individuals, as opposed to an emphasis on the requirement to perform work personally:

> Government should retain the current three-tier approach to employment status as it remains relevant in the modern labour market, but rename as 'dependent contractors' the category of people who are eligible for worker rights but who are not employees […]. In developing the test for the new 'dependent contractor' status, control should be of greater importance, with less emphasis placed on the requirement to perform work personally […].[87]

The report argued that under current employment law, there was too great an emphasis on the classification of self-employment being determined by the absence of a requirement for an individual to perform work personally and the ability for 'substitution' of another worker in that individual's place. In contrast, the report argued that an emphasis should fall on whether an individual is controlled and/or supervised by another, which would mean they were not genuinely self-employed:

> Currently, an individual can have almost every aspect of their work controlled by a business, from rates of pay to disciplinary action and still not be considered a worker if a genuine right to substitution exists. We do not think this is fair, or reflects many of the opportunities presented in the modern world of work. The key employment protections which are available to 'workers' are there to support anyone who is not genuinely self-employed and it should not be that easy for employers to avoid any responsibilities in this way. We

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[85] For further information on the Taylor Review as a whole, see House of Lords Library, *Taylor Review of Modern Working Practices*, 17 July 2017.
[86] Department for Business, Energy and Industrial Strategy, *Good Work: The Taylor Review of Modern Working Practices*, 11 July 2017, p 35.
[87] ibid, pp 35–6.

> therefore think that it is important for Government to ensure that the absence of a requirement to perform work personally is no longer an automatic barrier to accessing basic employment rights.
>
> Ultimately, if it looks and feels like employment, it should have the status and protection of employment.[88]

The report stated this revised classification would assist workers in the gig economy by clarifying their status, and the entitlements that should go with it, whilst preserving the flexibility offered by the gig economy itself:

> For those who find themselves 'dependent contractors' now, rather than self-employed, the situation is more complicated. Many of those participating through the gig economy are already workers under today's framework—as is being established by the courts on a case by case basis. However […] if a change of this type were to result in a loss of the flexibility so many platform workers desire, this would represent failure. As such, these changes must be accompanied by a new approach that supports genuine two-way flexibility enabled by digital platform.
>
> In re-defining 'dependent contractor' status, Government should adapt the piece rates legislation to ensure those working in the gig economy are still able to enjoy maximum flexibility whilst also being able to earn the NMW [national minimum wage].[89]

Under these proposals, a gig economy company would have to demonstrate through the data available on its platform, that an average individual, working averagely hard, could earn 20 percent more than the national minimum wage in an hour at times of normal demand.[90] However, the Review also stated that if an individual chose to 'log in' to work at a time when demand was low, "he or she should take some responsibility for this decision", and they might not earn the minimum wage; although the company would have to use its data to provide notice of this.[91]

The report noted the difficulties of ensuring that those working in the gig economy would receive their entitlement under national minimum wage legislation. Alongside reforms to piece rates legislation, the report argued that the nature of the digital platforms through which the gig economy is

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[88] Department for Business, Energy and Industrial Strategy, *Good Work: The Taylor Review of Modern Working Practices*, 11 July 2017, p 35.
[89] ibid, pp 36–7.
[90] ibid, p 38.
[91] ibid.

conducted could be harnessed to ensure the minimum wage is paid to individuals:

> If the national minimum wage were to apply to individuals such as many platform workers, it is important that working time is sensibly calculated. Platforms do not place limits on when individuals can log onto the app but no individual should be expecting to be paid for all the time that he or she has the app open (regardless of whether or not they are seeking work). For instance, it would clearly be unreasonable if someone could log onto an app when they know there is no work and expect to be paid.
> […]
> Recent case law has attempted to tackle this, drawing a distinction between simply logging on to an app, and being available and genuinely looking for work. Individuals and companies working in the gig economy have also repeatedly said to us that they value the ability to 'sign on' for work as and when they please. Platforms present individuals with greater freedom over when to work, and what jobs to accept or decline, than most other business models. It is essential we do not lose this.
> […]
> The richness of data available to online platforms is a tremendous asset in developing solutions that can work for both organisations and workers. Such data can, for example, provide individuals with an accurate guide to their potential earnings if they sign on to an online platform at any given time. We believe it could also be used to ensure a fair application of the national minimum wage.[92]

The report also addressed the issue of recent legal cases on the employment status of workers, and made recommendations on the legal processes for defining this:

> 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.
> […]
> The burden of proof in employment tribunal hearings where status is in dispute should be reversed so that the employer has to prove that the individual is not entitled to the relevant employment rights, not the other way round subject to certain safeguards to discourage vexatious claims.[93]

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[92] Department for Business, Energy and Industrial Strategy, *Good Work: The Taylor Review of Modern Working Practices*, 11 July 2017, p 37.
[93] ibid, p 62.

Under the Taylor Review's recommendations, this would be supported by an employment test regime set out in primary legislation, as it argued:

> Government should replace the minimalistic approach to legislation with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail.[94]

In an interview given to the BBC, Mr Taylor argued that many individuals who work for gig economy companies on a self-employed basis were in fact workers of those companies. As he argued:

> If you are being controlled and supervised you are probably a worker and you should get workers' rights and also the employer that employs you should be paying national insurance.[95]

Mr Taylor stated that individual gig economy companies were not mentioned by name in his report, yet he argued that when their arrangements with those who provide services via their platforms are examined, they would appear to be workers rather than self-employed:

> We do not mention individual companies in our report, but I think that if you look at some of the big gig work platforms, at the present time you would say their business models look as though it may be that the people who work for them would be classified as workers rather than as self-employed.
>
> If you look at the judgments that the judges have been making, it looks as though the courts are saying that it looks as though somebody is subject to control and supervision, they should be described as a worker and not self-employed.
>
> Which, interestingly, is the same criterion used by the tax authority when they determine whether somebody is self-employed or an employee. We think that principle is right.[96]

In her speech to launch the published report of the Taylor Review, the Prime Minister, Theresa May, stated that "the Government will act to ensure that the interests of employees on traditional contracts, the self-employed and those people working in the 'gig' economy are all properly protected".[97]

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[94] Department for Business, Energy and Industrial Strategy, *Good Work: The Taylor Review of Modern Working Practices*, 11 July 2017, p 35.
[95] BBC News, 'National Insurance Tax Hit for Gig Economy Firms', 11 July 2017.
[96] ibid.
[97] Prime Minister's Office, "'We Have to Invest in Good Work",—Theresa May's Speech at Taylor Review Launch', 11 July 2017.

Responses from both business and union representatives to the Taylor Review has been mixed. The Institute of Directors (IoD) was positive on its recommendations, with its Director General, Stephen Martin, stating that:

> Despite the often one-sided narrative that surrounds the gig economy, it is welcome to see the review recognises the value of flexible labour to the UK economy and to individuals themselves. We are pleased Taylor has taken on board a number of recommendations made by the IoD, including further legal definitions of employment status, which 75 percent of our of members support. This would enable businesses to reap the benefits of flexible work without concerns about the ambiguous legal language that exists at the boundary between self-employment and non-employee work.
> […]
> The proposal to ask gig platforms to provide real-time information on the earning potential of individuals at any given point is a good one. Advances in data analytics have enormous potential to help those in self-employment understand how much they can earn and when to choose to work to best suit their lifestyle. The IoD has also proposed giving gig workers more control over their own data by allowing them to carry their work histories and ratings across with them, to increase competition on the growing number of platforms.[98]

The Confederation of British Industry, in its response, stated it welcomed certain parts of the review, yet had concerns about others, as:

> The Taylor Review rightly recognises that labour market flexibility is a key strength of the UK economy, driving better outcomes for everyone. Businesses agree that flexibility must be matched with fairness, but building on our current approach, as the report concludes, is the right way forwards.
> […]
> A number of proposals in the report will be of significant concern to businesses, however. Changes to the application of the minimum wage, rewriting employment status tests and altering agency worker rules could have unintended consequences that are negative for individuals, as well as affecting firms' ability to create new jobs.[99]

The IWGB was less positive about the review's recommendations concerning the gig economy, stating in response that:

> Based on the Review's proposals we are not sure the Review has properly understood the problem. So let's sum it up: the fundamental

[98] Institute of Directors, 'Taylor Review Strikes the Right Balance on Flexible Work', 11 July 2017.
[99] Confederation of British Industry, 'Labour Market Flexibility is a Key Strength of the UK Economy, Driving Better Outcomes for Everyone', 11 July 2017.

> problem of employment rights in the so-called "gig economy" is the lack of enforcement of existing employment law. Despite the oft-repeated cliché that UK employment law is archaic and has failed to keep up with the times, the recent tribunal and court cases have demonstrated the exact opposite. The existence of the third category of "worker", the ability and willingness of the tribunals and courts to look beyond the written terms of the purported contract, and the emphatic nature with which the judges have declared their findings all lead to the conclusion that the law did not have to be stretched or reconfigured to cover workers in the so-called "gig economy".[100]

The IWGB further stated that "even if every single one of the Review's recommendations was implemented, we believe very little would change for workers in the so-called "gig economy"".[101]

The IWGB also criticised the fact that one member of the Taylor Review, Greg Marsh, was an investor in Deliveroo, and did not divest himself of his shareholding in the company until four months after the Review had commenced.[102] On this issue, Deliveroo stated that it had "engaged transparently with the Taylor Review", and a government representative stated it was appropriate for Mr Marsh's involvement "given the importance of considering the business aspect of any proposals", and that "prior to his appointment he disclosed his interest to the Cabinet Office and agreed to divest himself of his shares".[103]

The Taylor Review is currently the subject of an inquiry in Parliament under the House of Commons Work and Pensions Committee. Full details of this inquiry can be found on the Parliament website.[104]

Government Response to the Taylor Review

On 7 February 2018, the Government published its response to the Taylor Review, in which it accepted some recommendations made in the Review. It stated it would consult on the best way to proceed on others.[105] Regarding the gig economy the Government stated:

> Platform-based working offers welcome opportunities for genuine two-way flexibility and can provide opportunities for those who may

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[100] Independent Workers Union of Great Britain, *Dead on Arrival: The IWGB's Reply to the Taylor Review on Modern Employment Practices*, accessed 28 July 2017, p 11.
[101] ibid, p 50.
[102] *Financial Times (£)*, 'Taylor Review Member was Early Deliveroo Backer', 10 July 2017.
[103] ibid.
[104] Parliament website, 'Taylor Review of Modern Working Practices Inquiry', accessed 17 October 2017.
[105] HM Government, *Good Work: A Response to the Taylor Review of Modern Working Practices*, February 2018, p 5.

> not be able to work in more conventional ways. These should be protected while ensuring fairness for those who work through these platforms and those who compete with them. Worker (or 'dependent contractor' as the review suggested renaming it) status should be maintained but we should make it easier for individuals and businesses to distinguish workers from those who are legitimately self-employed.[106]

Responding to recommendation four of the Taylor Review, which argued that the Government should adapt the piece rates legislation to ensure those working in the gig economy are still able to enjoy maximum flexibility whilst also being able to earn the minimum wage, the Government said:

> The National Minimum Wage (NMW) and National Living Wage (NLW) are essential baseline protections for all workers, and the Government remains absolutely committed to ensuring that all those who are due the NMW receive it […] We recognise that modern business models are changing employment practices and that innovations which lead to work being offered in small, discrete packages through digital platforms can raise questions about how the NMW and NLW apply. It is important that those in the gig economy who are workers are protected by the NMW and NLW, while we preserve the flexibility and benefits—for both workers and consumers—that these platforms offer. We will therefore consult to gather further information and input on how definitions of working time can and should apply to platform working.[107]

Speaking on the launch of the response, Theresa May stated that the Government recognised "the world of work is changing and we have to make sure we have the right structures in place to reflect those changes", and that "we are proud to have record levels of employment in this country but we must also ensure that workers' rights are always upheld".[108] In the press release, the Government also stated it intended to go beyond the recommendations of the Taylor Review, by enforcing holiday and sick pay entitlements for vulnerable workers, giving all workers the right to demand a payslip, and allowing all workers to demand more stable contracts.[109]

Reaction to the government response was mixed. Matthew Taylor described it as "substantive and comprehensive" and in particular he "welcome[d] the direction" on "employment status and representation of workers".[110]

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[106] HM Government, *Good Work: A Response to the Taylor Review of Modern Working Practices*, February 2018, p 12.
[107] ibid, p 33.
[108] HM Government, 'Millions to Benefit from Enhanced Rights as Government Responds to Taylor Review of Modern Working Practices', 7 February 2018.
[109] ibid.
[110] BBC News, 'Gig Economy: Workers' Rights to be Strictly Enforced', 7 February 2018.

Stephen Martin, Director General of the Institute of Directors, stated that as this "could be the biggest shake-up of employment law in generations", it was right that the "Government proceeds cautiously by consulting widely", yet he described the "lack of action on tax reform" as a "wasted opportunity".[111] Dr Jason Moyer-Lee stated that "like the Taylor Review", the response "appears big on grandiose claims, light on substance", and that "the most important single thing government could do is introduce effective government enforcement of employment law. They say they will do this but give no indication of how".[112]

The response was subject to an urgent question from Shadow Secretary of State for Business, Energy and Industrial Strategy, Rebecca Long-Bailey, who referred in her supplementary question to the death on 4 January 2018 of Don Lane, a DPD goods courier.[113] Mr Lane was reported to have previously worked for DPD in a gig economy format, where it was alleged he had faced fines from the company by attending a medical appointment to treat his diabetes; it was further reported this condition was responsible for his death.[114] Concerning the response, Ms Long-Bailey argued that:

> The tragic case of Don Lane, a DPD gig worker, epitomises the precarious and unstable working life many people face and the failure of the Government to protect workers. […] Launching four consultations, merely considering proposals, and tweaking the law here and there is not good enough. How would any of this have actually helped Don Lane? It simply would not—that is the fact of the matter.
> […]
> Why have the Government not brought forward any meaningful proposals to protect gig workers? Defining working time misses the point. We needed clarity on workers being paid when they are logged into apps waiting to receive jobs, as well as clear and urgent direction on the legal status of gig workers.
> […]
> What we needed today was radical new architecture of the law at work to protect workers, in which the genuinely self-employed are offered key protections and the involvement of workers through their trade unions is crucial. We saw none of that […].[115]

In response, Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy, Andrew Griffiths, stated that:

> As a result of the actions set out in our response to this review,

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[111] BBC News, 'Gig Economy: Workers' Rights to be Strictly Enforced', 7 February 2018.
[112] ibid.
[113] HC *Hansard*, 7 February 2018, col 1497.
[114] *Guardian*, 'DPD Courier who was Fined for Day Off to See Doctor Dies from Diabetes', 5 February 2018.
[115] HC *Hansard*, 7 February 2018, cols 1497–8.

> millions of workers will have greater rights and access to more protection.
> […]
> The hon Lady seems to argue that it is wrong to be consulting on these issues. I hope the House will understand that in addressing the issues she raises—such as employment status in the gig economy, the rights of agency workers and better transparency in the workplace—we are modernising employment law to make it fit for the future world of work. […] Matthew Taylor himself has said that these issues are complex and we must take time to get them right, but the House should be clear that we are consulting on them in order to act. Rather than rolling back employment legislation, which we are sometimes accused of, we are improving the rights of workers and the enforcement of those rights.
> […]
> The hon Lady mentions the very regrettable case that has been in the newspapers over the past few days. I extend my sympathies to the family of the individual concerned. I cannot speak about individual cases, but I direct her to page 15 of our response. It clearly sets out what we are going to do to ensure we have the correct definition of workers' status, so they can have access to the kind of things she is talking about—sick pay, days off and the ability to attend doctor appointments if necessary.[116]

4.2 Business, Innovation and Skills Review

As part of the evidence for the Taylor Review, the May Government decided to release a report in February 2017 on employment status in the UK, written in 2015 by the then Department for Business, Innovation and Skills. The report argued that whilst current UK employment law is both generally authoritative and flexible enough to address most employment types, the growth of 'atypical working' had led to a lack of clarity for some employment protections:

> The framework to determine employment status in the UK is highly flexible and has responded well to changes in employment relationships over the past few decades. The current framework provides most individuals and employers with everything they need to determine status, abide by their responsibilities and claim their rights. What is more, the flexible framework as it stands should be able to adapt to what it is presented with in the years to come. However, one side effect of this flexibility is that, for those who make use of it (either out of choice of because those are the only jobs on offer), there can be a lack of clarity up front about what employment protections they have. This lack of clarity is likely to affect more people as the growth of atypical working continues. In the most extreme cases, this lack of

[116] HC *Hansard*, 7 February 2018, col 1498.

> clarity and transparency can lead to a feeling of insecurity and vulnerability and can see some unscrupulous employers take advantage, even exploiting low skilled, low paid workforces.[117]

4.3 Office for Tax Simplification Review

In 2015, the Cameron Government commissioned the Office of Tax Simplification (OTS) "to examine the dividing line between employment and self-employment and whether it is drawn in the right place and in the right way".[118] The report of the OTS acknowledged that employment status is a "complex and wide-ranging subject that many have said has no real solution".[119] Yet it concluded that "there is undoubtedly a problem" in defining employment status, that "it is a growing one (though perhaps not as fast as it has been)", and that "a key issue for those affected (businesses and individuals) is the lack of certainty".[120] The OTS stated that "it is clear that the drivers for the uncertainty and for employment status being a problem are varied", yet they included the following:

- Changing work patterns.
- A desire for flexibility—both from businesses (for their workforce; also simply managing numbers) and from individuals (as a way of working).
- For business, managing the risks involved, both tax exposure and (probably more significantly) exposure to claims for employment rights.
- The lower tax cost of self-employment (mainly NICs [national insurance contributions], but also expenses).
- Administrative burdens of employing people.[121]

The report recommended that there should be joint review between HM Revenue and Customs (HMRC), HM Treasury, the Department for Work and Pensions and the then Department for Business, Innovation and Skills to look at the "possibility of developing an agreed code of principles on employment status".[122] Further recommendations of the report included (but were not limited to):

- All of the Government's guidance material on employment status should be brought together in some form of 'employment status portal', covering both tax and employment rights.

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[117] Department for Business, Innovation and Skills and Department for Business, Energy and Industrial Strategy, *Employment Status Review*, December 2015, p 50.
[118] Office of Tax Simplification, *Employment Status Report*, March 2015, p 5.
[119] ibid, p 1.
[120] ibid, p 5.
[121] ibid, p 6.
[122] ibid, p 11.

- The case law underpinning HMRC's Employment Status Indicator tool (ESI) needs to be reviewed and updated, ideally in an open and transparent way, perhaps by establishing a working group.
- The concept of a wider withholding tax for payments to the non-employed should be explored. This would not be a simple expansion of the Construction Industry Scheme;[123] instead it would be a new system that took advantage of digitization to establish a simple and responsive deduction system that translated easily into payments on account.[124]

The OTS also stated that it "believes that the statutory employment test is an idea that needs to be taken further". The Government accepted most of the OTS's recommendations, including setting up a Cross-Government Working Group on employment status, and stated it would consider both a statutory employment test and extending the withholding of tax on payments to the non-employed.[125]

4.4 Parliamentary Reviews

In early 2017, the House of Commons Work and Pensions Committee conducted an inquiry into the status of self-employed workers in the gig economy, including hearing evidence from gig economy workers and representatives of gig economy companies. In the report of the inquiry, the Committee argued that the common standpoint of gig economy companies that 'flexibility' for workers was contingent on being self-employed was incorrect, and the motivations for doing so were not in the interest of the workers themselves:

> Companies relying on self-employed workforces frequently promote the idea that flexible employment is contingent on self-employed status. But this is a fiction. Self-employment is genuinely flexible and rewarding for many, but people on employment contracts can and do work flexibly; flexibility is not the preserve of poorly paid, unstable contractors. Profit, not flexibility, is the motive for using self-employed labour in these cases […]. It is incumbent on government to close loopholes that incentivise exploitative behaviour by a minority of companies, not least because bogus self-employment passes the burden of safety net support to the welfare state at the same time as reducing tax revenue.[126]

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[123] For more information on the Construction Industry Scheme, see HM Government, 'Construction Industry Scheme (CIS)', accessed 28 July 2017.
[124] Office of Tax Simplification, *Employment Status Report*, March 2015, pp 11–14.
[125] David Gauke MP, *Letter from the Financial Secretary to the Treasury to OTS on Autumn Statement 2015*, 25 November 2015.
[126] House of Commons Work and Pensions Select Committee, *Self-Employment and the Gig Economy*, 1 May 2017, HC 847 of session 2016–17, p 14 and p 19.

The report of the Committee made further recommendations to clarify the legal status of gig economy workers, arguing these would protect workers' rights and public revenues:

> Designating workers as self-employed because their contract offers none of the benefits of employment puts cart before horse. It is clear, though, that this logic has taken hold, enabling companies to propagate a myth of self-employment […]. The apparent freedom companies enjoy to deny workers the rights that come with employee or worker status fails to protect workers from exploitation and poor working conditions. It also leads to substantial tax losses to the public purse, and potentially increases the strain on the welfare state. *An assumption of the employment status of "worker" by default, rather than "self-employed" by default, would protect both those workers and the public purse and would put the onus on companies to provide basic safety net standards of rights and benefits to their workers. This assumption would entitle workers to employment rights commensurate with "worker" status. As there is no "worker" status in tax law, tax status would be unaffected. Companies wishing to deviate from this model would need to present the case for doing so, in effect placing the burden of proof of employment status on the company* [italics in original].[127]

On the release of the report, the chair of the Committee, Frank Field (Labour MP for Birkenhead), stated that:

> Companies in the gig economy are free-riding on the welfare state, avoiding all their responsibilities to profit from this bogus "self-employed" designation while ordinary tax-payers pick up the tab. This inquiry has convinced me of the need to offer "worker" status to the drivers who work with those companies as the default option. This status would be a much fairer reflection of the work they undertake which seems to fall between what most of us would think of as "self-employed" or "employed".[128]

Mr Field led a Westminster Hall debate in July 2017 on 'Working Conditions in the Private Hire Industry', where working practices in the taxi driving sector of the gig economy were examined.[129] Mr Field and his senior researcher Andrew Forsey have also produced three individual reports examining working practices in the taxi driving and goods courier sectors of the gig economy.[130]

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[127] House of Commons Work and Pensions Select Committee, *Self-Employment and the Gig Economy*, 1 May 2017, HC 847 of session 2016–17, p 14.

[128] Parliament website, "'Gig Economy" Companies Free-riding on the Welfare State', 1 May 2017.

[129] HC *Hansard*, 5 July 2017, cols 147–54WH.

[130] Frank Field and Andrew Forsey, *Wild West Workplace: Self-Employment in Britain's 'Gig Economy'*, September 2016; *Sweated Labour: Uber and the 'Gig Economy'*, December 2016; *A New Contract for the 'Gig Economy': Britain's New Self-Employed at BCA, DPD and Parcelforce*,

In 2016, the House of Commons Business, Energy and Industrial Strategy Committee began an inquiry into the future world of work and the rights of workers. Due to the dissolution of Parliament in May 2017, the inquiry was cut short and did not publish a report, yet a considerable amount of evidence was received that concerned the employment status of workers in the gig economy. Submitted evidence can be viewed on the Parliament website.[131]

In November 2017, the House of Commons Work and Pensions Committee and the Business, Energy and Industrial Strategy Committee released a joint report entitled *A Framework for Modern Employment*, which stated:

> The expansion of self-employment and business models built around flexible work on digital platforms promise positive opportunities for entrepreneurs, workers and consumers alike. But these changes also create confusion about the rights and entitlements of workers, and add to the potential for exploitation. Evidence tells us this exploitation is already occurring. This raises the important question of what changes to legal and regulatory frameworks are required to protect workers in the modern labour market. It is this question that the Government asked Matthew Taylor to address in his Review of Modern Employment Practices.[132]

The report also contained a draft Bill, through which the committees proposed to legislatively address the recommendations of the Taylor Review.[133] The committees' report discussed the gig economy with particular reference to employment classification and enforcement of the national minimum wage, hearing evidence from some working in the gig economy, representatives of gig economy companies, and Matthew Taylor himself.[134] Recommendation one of the report, under the 'Clearer Statutory Definitions of Employment Status' section, stated:

> Questions of employment status are often not clear-cut, and legislative reform would not entirely eliminate the need for the courts. But it is evident that clearer legislation on employment status could be valuable in preventing confusion and promoting fair competition between businesses. This would lessen the need to go to court, and most importantly, protects vulnerable workers. *We recommend the Government legislates to introduce greater clarity on definitions of employment status. This legislation should emphasise the importance of*

July 2017.

[131] Parliament website, 'The Future World of Work and Rights of Workers Inquiry—Publications', accessed 19 September 2017.

[132] House of Commons Work and Pensions Committee and House of Commons Business, Energy and Industrial Strategy Committee, *A Framework for Modern Employment*, 20 November 2017, HC 352 of session 2017–19, p 3.

[133] ibid, pp 28–32.

[134] See in particular ibid, pp 10–11 and pp 15–17.

> *control and supervision of workers by a company, rather than a narrow focus on substitution, in distinguishing between workers and the genuine self-employed.*[135] [italics in original]

Recommendation two of the report, under the 'Worker by Default' section, stated:

> Relying on individual tribunals as a corrective to companies' systematic use of questionable self-employment models places an unacceptable burden on workers to address poor practice, while the companies themselves operate with relative impunity. *We recommend the Government legislate to implement a worker by default model, as set out in Part 2 of our draft Bill. This would apply to companies who have a self-employed workforce above a certain size defined in secondary legislation.*[136] [italics in original]

Recommendation six, under the 'Flexibility and the National Minimum Wage' section, stated:

> A flexible labour force can provide benefits to workers, consumers and businesses. What we do not accept is that the gig economy should burden workers with all the risks of this flexibility. They should not be faced with a choice between not working and working for below the minimum wage. *We recommend the Government rules out introducing any legislation that would undermine the National Minimum Wage/National Living Wage.*[137] [italics in original]

On the report's release, the Chair of the Business, Energy and Industrial Strategy Committee, Rachel Reeves (Labour MP for Leeds West), argued that:

> Uber, Deliveroo and others like to bang the drum for the benefits of flexibility for their workforce but currently all the burden of this flexibility is picked up by taxpayers and workers. This must change.
>
> We say that companies should pay higher wages when they are asking people to work extra hours or on zero-hours contracts.
>
> Recent cases demonstrate a need for greater clarity in the law to protect workers. Responsible businesses deserve a level-playing field to compete, not a system which rewards unscrupulous businesses.

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[135] House of Commons Work and Pensions Committee and House of Commons Business, Energy and Industrial Strategy Committee, *A Framework for Modern Employment*, 20 November 2017, HC 352 of session 2017–19, pp 9–10.
[136] ibid, p 11.
[137] ibid, p 17.

> We need new laws but also much tougher enforcement, to weed out those businesses seeking to exploit complex labour laws, and workers, for their competitive advantage.[138]

The General Secretary of the GMB union, Tim Roache, argued that whilst the report "may make small difference", nonetheless:

> The fact remains that without real investment in HMRC and a political will to get tough on rogue employers who are cheating the British taxpayer out of millions and reaping profits out of worker exploitation, then there will be no significant change.[139]

However, a statement from the CBI argued that:

> Based on a very limited review of the evidence, the committees have brought forward proposals that close off flexibility for firms to grow and create jobs, when the issues that have been raised can be addressed by more effective enforcement action and more targeted changes to the law.[140]

The Government responded to the recommendations of the joint report in its response to the Taylor Review. Responding to recommendation one above, the Government stated that it "will take forward further work on how best to clarify definitions of employment status".[141] Responding to recommendation two, the Government stated that it "believes clarifying status and rights along with actions to make redress easier and faster should help address the concerns underlying this recommendation".[142] In response to recommendation six, the Government stated that it "has no plans to legislate to undermine the minimum wage".[143]

In November 2017, the All-Party Parliamentary Group (APPG) on Responsible Tax heard evidence regarding the legal definition of workers, employees and employers within the gig economy.[144] The Chair of the APPG, Margaret Hodge (Labour MP for Barking), said it would soon draw up recommendations on how to deal with the challenges posed by the gig economy to the tax system.[145] Uber, which was a particular focus at the

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[138] Parliament website, 'Committees Publish Bill to End Exploitation in the Gig Economy', 20 November 2017.
[139] *Guardian*, 'Change Law to Protect Gig Economy Workers', 20 November 2017.
[140] ibid.
[141] HM Government, *Good Work: A Response to the Taylor Review of Modern Working Practices*, February 2018, p 76.
[142] ibid.
[143] ibid.
[144] *Financial Times (£)*, 'Call for Employment Law Reform to Prevent 'Uberisation'', 20 November 2017.
[145] ibid.

APPG hearing, stated "drivers who use our app provide transportation services to passengers and will be registered for VAT if they meet the threshold set by government", and that this "has been the case across the taxi and private hire industry for decades. Black cab drivers, and apps they use, operate in exactly the same way".[146]

4.5 Parliamentary Questions and Debates

The release of the Taylor Review prompted debate in both Houses in which the nature of work in the gig economy was discussed extensively.[147]

On the same day as the release of the Taylor Review, Bill Esterson (Labour MP for Sefton Central) asked the Secretary of State for Business, Energy and Industrial Strategy "what estimate he has made of the number of workers being paid less than the national minimum wage in the gig economy".[148] In response, Minister for Small Business, Consumers and Corporate Responsibility, Margot James, stated that "there are no official estimates of workers paid below minimum wage rates in the 'gig economy'", yet "the Government is committed to cracking down on employers who break the National Minimum Wage law". Ms James further stated "that is why we have increased HMRC's 2017–18 enforcement budget to £25.3m".[149] Previously in November 2016, Margaret Ritchie (then Social Democratic and Labour Party MP for South Down) asked the Secretary of State for Business, Energy and Industrial Strategy "what assessment he has made of the adequacy of the legal protections in place for workers engaged with online platforms in the gig economy".[150] Responding for the then Government, Margot James stated that:

> This Government believes everyone deserves to be treated fairly at work and is clear that employers must take their employment law responsibilities seriously and cannot simply opt out of them.[151]

5. Wider Legal Implications

5.1 "False" Self-Employment

In recent years, concern and commentary has arisen over 'false' self-employment, where employers seek to ensure that workers are treated as self-employed (thereby reducing PAYE and NICs commitments) through

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[146] *Financial Times (£)*, 'Call for Employment Law Reform to Prevent 'Uberisation'', 20 November 2017.
[147] HC *Hansard*, 11 July 2017, cols 157–72; HL *Hansard*, 11 July 2017, cols 1164–74.
[148] House of Commons, 'Written Question: Low Pay: Sharing Economy', 11 July 2017, 4211.
[149] ibid.
[150] House of Commons, 'Written Question: Sharing Economy: Internet', 1 November 2016, 51367.
[151] ibid.

disguising their actual working practices; this is considered to be particularly prominent in the construction industry.[152] HMRC stated in 2016 that it was "concerned by increasing pressure on haulage operators to treat workers wrongly as self-employed, or to hire workers through their own companies in ways that are not compliant with tax laws".[153] More generally, HMRC has seen increasing evidence of employment intermediaries helping to create false self-employment "to reduce employment taxes and avoid having to fulfil their legal employment rights and obligations", and has taken action to reduce this under the Income Tax (Pay As You Earn) (Amendment No 2) Regulations 2015.[154] In 2015, the OTS used HMRC data to make the following estimations of underpaid tax due to false self-employment:

OTS Calculations of Tax Gap for Employment Status in Different Scenarios[155]

Estimated % of self-employed taxpayers who should be categorised as employed	10%	5%	3%	1%
Estimate of total tax/NICs underpaid	£314m	£157m	£94m	£31m

In 2017, Justin Madders (Labour MP for Ellesmere Port and Neston) asked the Chancellor what estimates he had made "of the cost to the public purse of lost revenue resulting from incorrect classification of individuals as self-employed in each of the last three years".[156] In response, Financial Secretary to the Treasury, Melvyn Stride, stated that:

> The Government has not produced an estimate of the cost to the Exchequer of lost revenue as a result of false self-employment.
>
> The Chancellor, in a response to a question from the Shadow Chancellor during the Budget debate on 15 March 2017, said he recognised "that there is a problem of bogus self-employment. There is a problem of employers who are refusing to employ people, requiring them to be "self-employed". There is a problem of individuals being advised by high street accountants that they can save tax by restructuring the way they work. We do believe that people should have choices, and we do believe that there should be a diversity of ways of working in the economy—we just do not believe that that should be driven by unfair tax advantages".

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[152] For further information, see House of Commons Library, *Self-employment in the Construction Industry*, 20 July 2017, pp 8–12.
[153] *Times*, 'Plumber's Victory Will Affect 'Gig Economy'', 11 February 2017.
[154] HM Revenue and Customs, 'Why the New Legislation was Introduced', 12 June 2017.
[155] Office of Tax Simplification, *Employment Status Report*, March 2015 [updated March 2016], p 29.
[156] House of Commons, 'Written Question: Taxation: Self-employed', 23 June 2017, 934.

> HM Revenue and Customs is aware that false self-employment presents a risk and is deploying compliance resources to address that risk. It will take appropriate action where false self-employment is identified.[157]

Similar concerns have been raised for workers in the gig economy. In 2016, Chi Onwurah (Labour MP for Newcastle upon Tyne Central) asked the Chancellor with reference to the ruling in the Uber case, if he would estimate "the effect on national insurance tax receipts of the misclassification of workers in the gig economy".[158] In response, Jane Ellison, then Financial Secretary to the Treasury, stated that the Government had "not currently made an assessment of the effect on National Insurance receipts of the misclassification of workers in the gig economy".[159] She also stated that:

> HM Revenue and Customs (HMRC) created the Employment Status and Intermediaries Team to focus on employment status and employment intermediary risks. HMRC's risk-based approach to compliance, the outcome of Employment Tribunal cases, third-party data and other data will help inform the Government's assessment of the number of people whose employment status has been incorrectly classified.[160]

It was reported in May 2017 that HMRC was conducting an investigation into the employment status of couriers for the firm Hermes, including requesting that they disclose information such as their written contract and payslips, and agree to a one-hour interview.[161]

5.2 Enforcement of the National Minimum Wage

In January 2017, the Government appointed Sir David Metcalf as Director of Labour Market Enforcement, with a remit to set the strategic priorities for employment enforcement bodies.[162] In his introductory report on labour market enforcement, Sir David Metcalf stated that "our data and information sources suggest a number of vulnerable groups at risk of noncompliance and exploitation [of labour market laws]", of which the first group was the self-employed.[163] The report addressed the gig economy within this group, stating:

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[157] ibid.
[158] House of Commons, 'Written Question: Sharing Economy', 6 December 2016, 56427.
[159] ibid.
[160] ibid.
[161] *Guardian*, 'HMRC Steps Up Inquiry into Employment Status of Hermes Couriers', 3 May 2017.
[162] HM Government, 'Sir David Metcalf Named as the First Director of Labour Market Enforcement', 5 January 2017.
[163] HM Government, *United Kingdom Labour Market Enforcement Strategy—Introductory Report*, July 2017, p 49.

> The tax Self-Assessment population is rising—explained mainly by an increase in the numbers classed as self-employed—and average income levels declared have fallen. Certain sectors considered part of the growing 'gig' economy are where low-skilled, low paid employment is found. We have seen intelligence which suggests that employment status is manipulated by the employer resulting in restrictions on hours, deductions and deficiencies in sick pay and holiday pay.[164]

The report also stated that the results of the Taylor Review would be a "key input" for a strategy document on enforcement to be published in spring 2018.[165]

The Low Pay Commission (LPC—of which Sir David Metcalf was a founder and member from 1997–2007), noted in its 2017 report on non-compliance and enforcement of the national minimum wage that recent gig economy legal cases had placed worker status, a key determinant of eligibility for the minimum wage, under considerable scrutiny.[166] The LPC argued that whilst the "core issue" of the "grey area around workers status" was not new, the prevalence of technology was a new phenomenon, and that the "increased awareness of the gig economy has refocused attention on some older issues around worker status and its potential ambiguity".[167] Commenting on the release of the Taylor Review, the LPC stated that it would "welcome any clarity that the outcome can bring to worker status as this is key to enforcing the minimum wage".[168]

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[164] HM Government, *United Kingdom Labour Market Enforcement Strategy—Introductory Report*, July 2017, p 49.
[165] ibid.
[166] Low Pay Commission, *Non-compliance and Enforcement of the National Minimum Wage*, September 2017, p 32.
[167] ibid.
[168] ibid.