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Summary

As our society cautiously emerges from the grip of the Covid-19 pandemic, the employment status of those engaged in the dynamic world of the gig economy continues to prove a source of great tension in UK employment relations. Of particular concern amongst many labour law theorists is the question of whether the rights of these individuals are sufficiently protected under our existing system of workforce categorisation.

The statutory framework which currently governs our approach to this issue provides for three distinct categories of working arrangement – employees, workers, and the self-employed. Despite each of these concepts conferring differing levels of rights and protections, none benefit from any meaningful exposition under the various legislative provisions.

To that end, a significant body of jurisprudence serves to add contextual definition to these otherwise abstract statutory concepts by stipulating the three basic elements necessary to found a contract of employment – mutuality of obligation, control, and a requirement for personal service. Absent any of these key factors, an individual cannot be an employee. The test for worker status requires analogous considerations, with the courts recognising that although not formally included within the wording of the statute, the degree of subordination and dependence will, in almost all circumstances, act as a reliable indicator of the commercial reality of the contractual relationship that exists between the parties. The tests are effectively the same, but with one operating to a justifiably lower threshold. The extent to which any individual meets these definitions will always be a matter of fact and degree, with no one factor proving decisive in any given case. Those who fail to meet these criteria are automatically classified as self-employed, and do not benefit from any legislative protections.

The decisions of the Supreme Court in *Autoclenz and Belcher* [2011] UKSC 41 and more recently in *Uber BV and Other v Aslam & Others* [2021] UKSC 5 provide for an important development in this area, each complementing the existing regime by diminishing the significance of the written terms of agreement, choosing instead to emphasise the importance of determining an individual's employment status by reference to a factually specific assessment of all the circumstances in any given case.

At first blush then, this system presents as one burdened by opaque statutory provisions and a dizzying accumulation of technically complex case law; a system seemingly inapt to address the challenges presented by the gig economy. Accordingly, in their 2018 response to the Taylor Report, the government concluded that legislative reform was clearly necessary to provide greater clarity on this issue. Though noble in its ambition, this attempt ultimately fails to appreciate that the dynamic, agile, and constantly evolving labour market will likely outpace the relatively static slow-moving machinery of any legislative reform almost immediately. Inevitably, this would lead only to more legislation as the statute struggles to adjust, more case law, and fundamentally greater obfuscation of individual rights. Ironically, the originating critique of the current system – its imprecision – also holds the key to its salvation. Complimented by wide and opaque statutory definitions, and bolstered by the decisions in *Autoclenz* and *Uber*, the fluidity with which these concepts continue to operate in practice is matched only by that of the labour market it seeks so effectively to regulate.

Greater clarity is achieved then, not through legislative overhaul, but through a more sustainable funding model for governmental and third party advisory bodies, providing individuals with a better understanding of their necessarily complex legal rights. Against this backdrop, the recommendation for legislative reform represents something of a historic misstep, and is one which the government would be unwise to resurrect.

Introduction

The recent spate of well-publicised appellate court judgements surrounding the employment status of those in the so-called 'gig economy'[1] has generated much debate throughout the scholastic and professional legal communities, re-affirming once again its status as one of the most complex and litigious areas at the avant-garde of domestic labour law.[2][3] To those familiar with the historical development of the jurisprudence in this area, this debate is certainly nothing new.[4] The judicial and

1 See: *Uber BV and Others v Aslam & Others* [2021] UKSC 5, [2021] ICR 657; *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] IRLR 872; and *The Independent Workers Union of Great Britain v The Central Arbitration Committee* [2021] EWCA Civ 952, [2021] WLR(D) 357.
2 *Tolley's Compnay Secretary Handbook,* (30th edn, 2020 – 2021) chapter 14.3.
3 *Tolley's Employment and Personnel Procedures Manual,* para T.6004 (December 2015).
4 Jan Miller, 'Brexit proves all-consuming' (2019) 169 NLJ 7867, 5 (3).

legislative strains that such new ways of working bring to a traditionally binary distinction between those employed under a contract of employment, and those working as independent contractors are well documented.[5]

As long ago as 1991, the recitals to the European Union's Employment Contracts Directive foreshadowed this challenge, citing an increase in the *'number of types of employment relationship'*, and emphasising the need to provide employees with *'improved protection'* and *'greater transparency'* about their rights.[6] For this reason, much of the contemporary discourse centres around how these individuals, who engage in the labour market in various non-traditional ways, can be adequately protected – and their putative employers regulated – under the current system of labour classification.[7] Through the medium of the gig economy, this essay seeks to critically analyse the degree to which this method of determining employment status remains relevant to the socio-economic needs of our contemporary labour market, before evaluating the feasibility and desirability of parliamentary / governmental legislative intervention.

The Statutory Framework

In order to understand and critically analyse the adequacy of the protections afforded to those working in gig economy, it is first necessary to understand the three categories of labour under the auspices of employment legislation. In short, provision is made for three distinct individual groupings; employees, workers, and independent contractors. The employment status of any given individual is determined by which of these groupings their working circumstances fall within, which in turn dictates the differing levels of statutory rights and protections afforded to them under the various legislations.

Employee

Notwithstanding the undeniable advances made by alternative, more flexible ways of working in recent years (agency, part-time, temporary, zero-hour-contract, and gig economy), employees remain by far the largest individual labour grouping in our collective workforce.[8] Benefitting from the highest degree of legal protections, employees enjoy substantial rights (such as, among others, the right not to be unfairly dismissed,[9] the rights to a minimum notice period,[10] to flexible

5 Sandra Fredman & Darcy Du Toit, 'One Small Step Towards Decent Work: Uber v Aslam in the Court of Appeal' (2019) 48(2) ILJ 260, 261.
6 Charles Pigott, 'One-sided flexibility: redressing the balance' (2019) 169 NLJ 7858, p19, 20.
7 Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69(1) CLP 67, 108.
8 Andrea Oates, 'The "gig economy" and health and safety' (2017) 41 CSR 97.
9 Employment Rights Act 1996, s.94(1).
10 ERA 96, s.86(1).

working,[11] to a statutory redundancy payment,[12] and to parental leave[13]) that can only be vested in *employees*.[14]

An employee is defined under s.230(1) of the Employment Rights Act 1996 ('ERA 96') (and it's statutory predecessors[15]) as: '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*.'[16] A contract of employment is similarly defined as: '*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*.'[17] Rather unhelpfully, a '*contract of service*' is not further defined.[18] Analogous provisions are also contained within other statutes.[19]

Worker

First recognised in 1875,[20] the concept of a *worker* is somewhat of an intermediary category of labour. Bridging the gap between an employee and a self-employed individual, worker status confers some, more limited employment rights in common with employees, such as; the right to protection against discrimination,[21] the right to a minimum wage,[22] to holiday pay,[23] to collective (union) representation[24], and, following the recommendation of the Taylor report, as of April 2020, the right to a statement of written particulars.[25][26]

The current definition under s.230(3) ERA 96 draws its lineage from the 1971 Industrial Relations Act (the statutory predecessor to the ERA 96),[27] and, whilst slightly more well-defined than its sister provision above, is equally inelegant in its wording.[28] It defines a *worker* as:

11 The Flexible Working Regulations 2014, Regulation 3.
12 ERA 96, s.135(1).
13 ERA 96, s.71, & The Maternity and Parental Leave etc Regulations 1999, Regulations 4 & 13.
14 *Tolley's Employment Law Service*, para E.5001 (Issue 156, August 2021).
15 Contracts of Employment Act 1963.
16 ERA 96, s.230(1).
17 ibid, s.230(2).
18 *Halsbury's Laws* (4th edn, 2014) vol 39, para 149.
19 See: Trade Union and Labour Relations (Consolidation) Act 1992, s.295(1) & National Minimum Wage Act, s.54(1).
20 Employer and Workmen Act 1875, s.10.
21 Equality Act 2010, s.41.
22 NMWA 98, s.1.
23 Working Time Regulations 1988, s.13(1).
24 See: *IWGB v CAC* (n.1) [5] – [8].
25 Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (*Department for Business, Energy & Industrial Strategy*, July 2017) [p.40].
26 ERA 96, s.1.
27 Industrial Relations Act 1971.
28 *Byrne Brothers (Formwork) Ltd v Baird & Others* [2002] IRLR 96 (EAT) [16].

> *"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 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;"*[29]

The same definition is contained within The NMWA 98,[30] and The Working Time Regulations 1998[31] (implementing the Working Time Directive in which *workers* are referenced, but not defined),[32] with similar provisions also being contained within TULRCA 92[33] and The Equality Act 2010.[34] It should be noted that although the latter refers to '*employment*', this has been consistently interpreted (purposively) as being analogous to the definition under s.230(3) ERA 96. These slight differences are likely brought about by the incremental and piecemeal development of the various legislations, and, although interesting academically, are of little consequence in practice where they have routinely been held to amount to a '*distinction without a difference.'35* S.43K ERA 96 also extends the definition of a worker in whistleblowing claims to various other niche groups.[36]

Thus, the statutes allow us to understand the rights and protections conferred under each status (employees are automatically also workers),[37] but does not elucidate these concepts further.[38] In order to do so, we must first place them in their proper historical context by examining how they have been interpreted, applied, and arguably bolstered, by the courts in practice.

The Tests

Much as parliament has struggled to assign a precise definition to these nebulous concepts, so too have the courts recognised – both historically and more recently – the difficulties caused in distinguishing between these differing categories of labour. In the case of *Stevenson v MacDonald,* Denning LJ (as he then was) commented that: '*It is almost impossible to give a precise definition*',

29 ERA 96, s.230(3).
30 NMWA 98, s.54(3).
31 The Working Time Regulations 1998, Regulation 2(1).
32 The Working Time Directive 2003/88/EC.
33 TULCRA 92, s.296(1).
34 EA 2010, s.83(2)(a).
35 *Bates van Winkelhof v Clyde & co LLP* [2014] UKSC 32, [2014] 1 WLR 2047 [31] – [32].
36 See: ss.43K(1)(a), 43K(1)(b), 43K(1)(ba)(c), 43K(1)(cb) & 43K(1)(d).
37 ERA 96, s.230(3)(a).
38 Mark Butler, 'What's your employment status?' (2014) 19 ELN 86.

concluding that *'It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies.'39* Illustrative of this broad difficulty is the fact that despite numerous attempts, the courts have yet to agree upon a single unifying test that conclusively determines employment status.[40]

Historically, various formulations such as; '*the control test*', first theorised by Bramwell LJ in *Yemens v Noakes*;[41] '*the business integration test*', first championed by Denning LJ in *Stevenson*;[42] and the '*business of your own account*' test, posited by the High Court in *Market Investigations Ltd v Ministry of Social Security*,[43] (and subsequently approved by the Court of Appeal and the Privy Council)[44] have all enjoyed periods of historical pre-eminence. For employees at least, the test around which the majority of academic and judicial opinion has coalesced however – and which is generally endorsed as representing the most authoritative statement of the law in this area – can be found in Mackenna J's classical exposition of the ingredients of a contractual relationship in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*, where it was held:

> *'a contract of employment exists if these conditions are fulfilled:*
> *The servant agrees that, in consideration of wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.*
> *He agrees, express or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.*
> *The other provisions of the contract are consistent with its being a contract of service.'*[45]

A subsequent deluge of appellate court decisions have further refined these principles into three distinct requirements: mutuality of obligation between the parties, i.e. an obligation on the employer to provide, and on the employee to accept, some minimum amount of work; a sufficient degree of control, exercised by the employer over the employee; and the requirement for the employee to provide the service personally.[46] When taken together, these principles provide the foundations of the test from which employee (and to a significant extent also worker) status is then gleaned.[47]

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39 [1952] 1 TLR 101 (CA) 104.
40 Nigel Baker, 'Legal Status of Employees' (2004) 27 CSR 25, 198.
41 *Yemens v Noakes* [1880] 6 QBD 530 (CA) 532 – 533.
42 *Stevenson* v *MacDonald* (n.43) 111.
43 [1969] 2 QB 173 (QB) 185.
44 See: Y*oung & Woods Ltd v West* [1980] IRLR 201 (CA) [27]; *O'Kelly & others v Trusthouse Forte plc* [1983] IRLR 369 (CA) 382 [21]; and *Lee v (1) Chung and (2) Shun Shing Construction Engineering Co Ltd* [1990] IRLR 236 (PC) [6].
45 [1968] 2 QB 497 (QB) 515.
46 Robert Lassey, '*Service Contracts: Just Another Hair-Brained Scheme?*' (2021).
47 *Nethermere (St Neots) Ltd v Taverna and Gardner* [1984] IRLR 240 (CA) [60]; *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] IRLR 269 [19]; *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367 (CA) [31]; and *Carmichael v National Power plc* [1999] UKHL 34, [2000] IRLR 43 [29].

Whilst these factors do not, of themselves, guarantee a finding of employee status, they must each nonetheless be present in order to found a contract of employment.

For workers that are not employees (so called limb (b) workers), the position is not dissimilar. As recently summarised by Lord Leggatt in the seminal case of *Uber v Aslam,* the statutory test has three elements: (1) a contractual obligation to work / perform a service; (2) a requirement for personal performance / service; and (3) a requirement that the other party to the contract is not a client or customer of the individual.[48] Additionally, although notably absent from the wording of s.230(3), both domestic and EU jurisprudence have long since acknowledged that the degree to which the putative worker is subordinate to, and dependent upon, the other party in performing their obligations under the contract, is usually too a reliable indicator of worker status.[49] Similarly, although a more ambiguous definition of a worker is provided under EU law as; *'a person that performs services in an employment relationship,'50* an examination of the authorities from both Strasbourg and Brussels reveals an analogous approach to this issue.[51]

Clearly then, there is a significant degree of overlap between these two concepts; a fact which prompted Mr Recorder Underhill QC (as he then was) to declare in the now infamous passage of *Bryne Brothers* that: '*the test involves all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour.*'[52] The test then is ostensibly the same; in the case of a limb (b) worker, it simply operates to a substantially "*lower pass-mark.*"[53]

Using these metrics, an individual whom is deemed to be neither an employee nor a worker is classified as an independent contractor under employment law (although the position is different under tax law).[54] More commonly referred to as self-employed, Parliament does not afford this labour grouping any employment rights or legislative protections in their business dealings. Its rationale is obvious. Both employees and workers are in a position of subordination and unequal bargaining power vis-à-vis their employers;[55] whereas the self-employed: '*have a sufficiently arm's-*

48 *Uber v Aslam* (n.1) [126].
49 ibid [87], [90] – [102].
50 *B v Yodel Delivery Network Ltd* [2020] CJEU C-692/19, [2020] IRLR 550 [29].
51 See also: *Allonby v Accrington and Rossendale College* [2004] ECR I-873, [2004] ICR 1328 [67] – [68]; *Union Syndicale Solidaires Isere v Premier Ministre* [2010] C-428/09, [2010] ECR I-9961 [28]; *Fenoll Centre d'Aide par le Travail "La Jouvene"* [2016] C-316/13, [2016] IRLR [29]; and *Sindicatul Familia Constanța and others v Direcția Generală de Asistență Socială* **și** *Protecția Copilului Constanța* [2014] 58 EHRR 10, [2014] IRLR 49 [59].
52 *Bryne Brothers v Baird* (n.32) [17(5)].
53 ibid.
54 Michael Ford, 'The Fissured Worker: Personal Service Companies and Employment Rights' (2020) 49(1) ILJ 35, 37.
55 Ewan McGaughey, 'Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status' (2019) 48(2) ILJ 180, 187.

length and independent position to be treated as being able to look after themselves in the relevant respects.'[56]

The importance ascribed to each of the constituent element of these test(s), will always be a matter of fact and degree; each case enjoying its own unique blend of these competing factors, but with no single one proving determinative in any given case.[57] The application of these principles then is less '*a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation*'[58] and more a careful accumulation of factually specific detail from which an overall portrait of an individual's employment status can then be fashioned. As Maurice Kay LJ put it in *Hospital Medical Group Ltd v Westwood,* there is no '*single key with which to unlock the words of the statute in every case.*'*59* It was to the precise nature of this evaluative exercise that the landmark decision of the Supreme Court in the now infamous case of *Autoclenz v Belcher*[60] was concerned; and it is to this important decision that this article now turns.

The Autoclenz Principle

Widely regarded as one of the most influential developments in domestic labour law since the enactment of the ERA 96, the landmark decision in *Autoclenz v Belcher*, and more recently the '*varnish*' that has been applied to its principles by Lord Leggatt in *Uber,*[61] represents something of a revolution in the understanding and interpretation of the employment relationship in our legal system.[62] Reconciling a conflicting line EAT and Court of Appeal authorities,[63] the decision in *Autoclenz* concerned the difficulties caused by so called; '*independent contractor agreements*' in which employers would seek to draft contractual terms specifically with the aim of avoiding their liabilities under the employment status framework.

Recognising the clear and unsatisfactory power imbalance in this dynamic, the Supreme Court determined that, whilst ordinarily a clear and unimpeachable record of the terms of (commercial) agreement between the parties, the nature of the contractual relationship in an employment context was somewhat unique, requiring what Lord Clarke described as a '*purposive approach to the problem,*'[64] where the true nature of the agreement would '*often have to be gleaned from all the*

56 *Bryne Brothers* (n.32) [17(4)].
57 *Hall (Inspector of Taxes) v Lorimer* [1994] ICR 218 (CA), 226.
58 ibid.
59 [2012] EWCA Civ 1005, [2013] ICR 415 [20].
60 [2011] UKSC 41, [2011] IRLR 820.
61 See: *IWGB v CAC* (n.1) [84].
62 Alan Bogg 'Sham Self-Employment in the Supreme Court' (2012) 41 ILJ 328, 333.
63 See: *Protectacoat Firthglow Ltd v Miklos Szilagyi* [2009] EWCA Civ 98, [2009] IRLR 365; and *Kalwak and another v Consistent Group Ltd* [2008] EWCA Civ 430, [2008] All ER (D) 394.
64 *Autoclenz* v *Belcher* (n.65) [35].

circumstances of the case, of which the written agreement is only a part.'[65] Following this decision, and until as recently as March this year, it was generally established wisdom that the written agreement, although no longer conclusive in its own right, remained a key touchstone from which any subsequent analysis could then be based. Put simply, it was understood that the courts should only depart from the terms of the written agreement where the behaviour of the parties in practice made it clear that it did not reflect the commercial reality of their agreement.

Following the decision of the Supreme Court in *Uber* however, that interpretation of the provisions of *Autoclenz* has been comprehensively rejected.[66] In Lord Leggatt's view, attaching any degree of significance to the written contractual agreement '*would in effect be to accord [an employer] the power to determine for itself whether or not the legislation designed to protect workers will apply.*'67 Providing a stinging rebuke of such practices, the court ultimately concluded that any contractual clause that attempted to have the effect of vitiating an individuals' rights under section 230 ERA 96, would inevitably fall foul of the wording of section 203(1) ERA 96, thus rendering them automatically null-and-void, leaving some commentators to speculate as to the continued relevance of the written terms of agreement at all.[68]

Thus, the decision in *Uber* operates to bolster the ratio in *Autoclenz*, further solidifying an approach to the determination of employment status that requires a broad and factually specific enquiry into *all* the circumstances of any given case. Only then can a true appreciation of an individual's employment status be realised. Nowhere has this assessment proved more challenging, with these boundaries more controversially drawn, than in the multifaceted labour dynamics of the gig economy.

The Gig Economy

The gig economy is a term used to describe a relatively new form of working arrangement in which an individual contracts to sell their labour through a digital services platform (usually a mobile app), to work on demand, for a short-term engagement.[69] Typically involving the performance of services such as; driving, and/or delivering items, the flexibility that this method of labour provision allows for is consistently regarded as one of the key advantages of our labour market for both commercial entitles and individuals alike.[7071] At the time of writing, the Taylor report estimated that there

65 ibid [34] – [35].
66 *Uber* (n.1) [76].
67 ibid [77].
68 Jason Galbraith-Marten QC & Akash Nawbatt QC, *The Implications of Uber and What Comes Next?* (*ELA & ELBA Joint Webinar*, April 2021).
69 *Tolley's Employment and Personnel Procedures Manual,* para T.6003 (December 2015).
70 Taylor, '*Good Work Review'* (n.29) [p.26].
71 *Tolley's Employment Law Service*, para E5001 (Issue 156, August 2021).

were close to 1.3 million people engaged in this form of labour nationally.[72] Today, as the country continues to experiment with new ways of working in the wake of the Covid-19 pandemic, that number is closer to 7.5 million, with commercial giants such as Uber, Deliveroo, and Amazon all reliant upon this flexible labour arrangement to support their business models.[73]

For all its undoubted benefits however, this shift towards a more flexible workforce presents new challenges in categorising employment status, exposing a system whose principles could not reasonably have envisaged the transformative effect that such technologically advanced labour models would have on the status of employment relations. Can it really be said, for example, that Uber control their drivers in the manner envisaged in *Ready Mixed?* Or that Deliveroo riders are obliged to accept some irreductable minimum amount of work when they log onto the app? As demonstrated in the judgements of successive appellate courts in these, and other recent decisions in this area,[74] the answers to these questions are far from straightforward. Add to this a near-constant stream of complicated and expensive litigation involving confusing and factually specific criterion (invariably acting to prevent individuals from deciphering their rights, often to the benefit of unscrupulous employers), and one can readily understand why the Taylor report concludes that; '*more people [are] missing out on key rights*'[75] under a system presented as inelegant at best, and dangerously outdated at worst. The case for reform appears to be overwhelming.

Reform

The government's inter-departmental response to the Taylor report – The Good Work Plan – was published in December 2018. No doubt influenced in part by some of the issues highlighted above, it accepted the principal recommendations of the Taylor report to; '(1) *replace its minimalist approach to legislation, with a clearer outline of the tests for employment status, setting out the key principles in primary legislation* and *'(3) in developing the new test…control should be of greater importance, with less emphasis placed on the requirement to perform work personally*'[76] boldly promising to; '*bring forward legislation to improve clarity on employment status, reflecting modern working practices*.'[77] However, save for a reference to a proposed Employment Rights Bill in the December 2019 Queen's Speech, the details of which are yet to be formally announced in Parliament (likely delayed due to

72 *Good Work Review* (n.29) [p.26].
73 'UK's Gig Economy has workforce has doubled since 2016' (Trades Union Congress, 28 June 2019) <https://www.tuc.org.uk/news/uks-gig-economy-workforce-has-doubled-2016-tuc-and-feps-backed-research-shows.> accessed on 18 June 2021.
74 See: *Uber v Aslam, IWGB v CAC* (n.1); and *Addison Lee Ltd v Gascoigne* [2018] UKEAT 0289/17, [2018] ICR 1826.
75 *Good Work Review* (n.29) [p.26].
76 ibid [p.35].
77 Her Majesty's Government, *The Good Work Plan (The Department for Business, Energy and Industrial Strategy,* December 2018*)* [p.44].

the Covid-19 pandemic, but which is widely anticipated to provide for some legislative reform in this area), the government has yet to act upon this clear statement of intent.[78]

More broadly, various measures have been adopted to tackle this issue internationally, all to fairly minimal success, including, but not limited to; additional enforcement powers for statutory bodies (Australia), extra statutory protections for workers in '*high risk*' industries (Belgium), and placing restrictions upon the use of independent contractors to provide services considered '*core*' to a company's business model (France).[79] Fundamentally though, all of these intended protective endeavours are faced with the same basic shortcoming; that notwithstanding their modest short-term regulatory effects, they will quickly be rendered obsolete, outpaced by an increasingly technologically advanced and inter-connected global workforce that has already proven to be so chameleonic in its operations.[80] The alarming regularity with which such legislation would have to be enacted to achieve this regulatory effect, is perhaps illustrative of just how unworkable this approach is in practice.

The UK government's intended statutory resolution to this issue is no exception, and will almost certainly be met with similar challenges; the inescapable result of applying static and inflexible legislation to such a fluid concept. Even the Taylor report itself acknowledges that: '*the risk with this approach is that a more rigid legal framework is less able to adapt to new business models creating additional issues for some groups.'81* Ironically then, the effects of such legislative provisions are likely to be counterproductive, delivering a solution that will find itself obligated to introduce a mountain of increasingly unnecessary and restrictive primary & secondary legislation to a system already burdened by the weight of its own jurisprudential framework.[82] A codification of the test in the manner envisaged by the Taylor Report with a greater emphasis on control then, whilst superficial in its attraction, would ultimately prove to be a calamitous misadventure, leading only to a vicious circle of increasingly obscure legislative provisions and case law, further clouding the issues for those seeking to understand and enforce their (evermore narrowly defined) rights, whilst simultaneously allowing for unscrupulous employers to exploit these deficiencies to their own advantage.

78 'Queen's Speech 2019' (*Prime Minister's Office, 10 Downing Street*, 14 October 2019 <https://www.gov.uk/government/speeches/queens-speech-2019> accessed 4 June 2021.

79 Sophie Berg, Aurelien Louvet & David Woodman, *Employment Status and the Gig Economy: International Perspectives* (*ELA Webinar*, 6 July 2021).

80 Katie Bales, Alan Bogg and Tonia Novitz, 'Voice' and 'Choice' in Modern Working Practices: Problems With the Taylor Review (2018) ILJ 47(1) 46, 58.

81 *Good Work Review* (n.29) [p.107].

82 Bales, Bogg, and Novitz, Voice' and Choice (n.87), 59.

So too does the recommendation of the Taylor Report to create *'an online tool that determines employment status in the majority of cases'*[83] amount to little more than the sort of mechanical box-ticking exercise that was specifically cautioned against in *Latimer.84* The result is obvious; more people missing out on key protections – precisely the situation it strove to avoid.[85] Even if these recommendations were initially viable when first proposed however, the Covid-19 pandemic has ensured that the current industrial landscape is unrecognisable from that of 2017 / 2018. Accordingly, both the Taylor Report's recommendations, and the government's subsequent pledge to transform the employment status statutory framework have clearly been superseded by events, rendering them largely obsolete in this post-pandemic age.

But perhaps the most illustrative example of the broad coalition of judicial, scholastic and parliamentary opinion against this approach can be observed in the repeated reluctance of successive parliaments to reduce the *Ready Mixed* formula into the various pieces of legislation cited above; a clear warning which both the Taylor Report and Good Work Plan appear determined to overlook. Indeed, it is from this very same statutory imprecision, and aversion to codification as championed by successive cases such as *Autoclenz*, and *Uber*, that the current system derives its greatest benefit – its flexibility. Recognised by both the Taylor Report and the Good Work Plan,[86] the fluidity with which these inherently malleable concepts operate under the current framework allows them to effortlessly bend and flex to meet the demands of an equally dynamic labour market in a way that narrow, restrictive parliamentary legislation could never hope to achieve.

It is exactly this flexibility for example, that allows the courts to acknowledge that a limited right of substitution and/or delegation is not necessarily inconsistent with an undertaking of personal performance,[87] but that a genuine and unfettered right to do so is, even if such an arrangement is rarely (if ever) used in practice.[88] Similarly, whilst a lack of mutual obligations on the parties between individual labour engagements may denote an absence of the irreductable minimum of obligation and control necessary to found a contract of employment,[89] it may yet still provide for a sufficient measure of each to sustain a finding of worker status.[9091] Thus, whilst at first blush the recent litany of gig economy jurisprudence appears symptomatic of a system struggling to

83 ibid [p.39].
84 *Hall v Lorimer* (n.63) 226.
85 *Good Work Review* (n.29) [p.26].
86 *Good Work Review* (n.29) [p.14]; and *The Good Work Plan* (n.84) [p.25].
87 See: *Pimlico Plumbers* [20] – [34]; and *MacFarlane v Glasgow City Council* [2000] UKEAT 23, [2001] IRLR 7 [13] – [14].
88 IWGB v CAC (n.1) [78] – [80]; and *Tanton* (n.51) [25].
89 *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (CA) [41]; and *Carmichael v National Power plc* (n.51) [18].
90 *Uber* (n.1) [125] – [131].
91 Although see: *Somerville v Medical Practitioners Tribunal Service* [2021] UKEAT 0257/20 (EAT).

reconcile these new ways of working with its increasingly complex legal framework, they are in fact demonstrative of an approach whose deliberate ambiguity continues to afford the courts the latitude necessary to guarantee the rights of those most requiring its protections.[92]

The solution to the confusion and subterfuge highlighted in the Taylor Report[93] then is less about legislative endeavours, and more about granting people the means to effectively understand and determine their own rights under the existing framework through more sustainable investment in governmental and third-party advisory bodies such as the CAB, and perhaps even by re-enfranchisement of employment law under the legal aid regime. These measures are infinitely more likely to represent a judicious use of public funds, not to mention a significant boost to workers' rights more generally.[94] Similarly, whilst the recommendation of the Taylor report to change the title of worker to '*independent contractor'),95* would undoubtedly assist in providing this clarity, as would some modest statutory alignment of the various definitions of a '*worker*', such technical semantic revisions risk prioritising form over substance, and are unlikely to have any meaningful impact.

Conclusion

In summary, by effortlessly blending a masterstroke of parliamentary draftmanship with some of the most courageous examples of purposive legislative interpretation, our current system of labour categorisation embodies one of the finest traditions of our unwritten constitution – an unspoken yet decisively firm tripartite commitment between parliament, the courts, and the public to a system of labour rights that consistently affords the broadest degree of legal protections to its citizens. However inelegant, expensive, or politically inconvenient it may be, its continued relevance as the dominant system of labour categorisation in our country is beyond question.

However, with the emergence of complex issues such as multi-apping (where an individual is simultaneously logged onto multiple different service applications),[96] and with large number of cases currently on appeal (each involving atypical ways of working),[97] this debate is unlikely to be settled anytime soon. The more pressing question is surely then, not whether the current system remains relevant, but whether or not the government recognises the inadequacies of its predecessors, quietly consigning these ill-advised and dangerously misconceived proposals to the annals of history where

92 Janet Barlow, 'A poor fit' (2015) 165 NLJ 8.
93 *Good Work Review* (n.29) [p.26].
94 Bales, Bogg, and Novitz, 'Voice' and Choice' (n.87), 59.
95 *Good Work Review* (n.29) [p.62].
96 Galbraith-Marten & Nawbatt, 'The implications of Uber' (n.75).
97 See: *Stuart Delivery Ltd v Augustine* [2019] UKEAT 0219/18 (EAT); *CitySprint (UK) Limited v O'Eachtiarna and others* [2020] UKET 2301176/2018 (ET); *HMRC v Professional Game Match Officials Ltd* [2020] UKUT 0147 (TCC); HMRC v *Atholl House Productions Limited* [2021] UKUT 0037 (TCC); and *HMRC v Kickabout Productions Limited* [2020] UKUT 0216 (TCC).

they belong, or chooses instead to forge ahead with its legislative agenda, and risk upsetting the delicate balance that *Autoclenz*, and more recently *Uber,* have both sought so carefully to maintain.

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