



EMPLOYMENT STATUS REVIEW

SUMMARY OF RESPONSES

MARCH 2006

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Introduction

1. The Government has carried out a review of employment status in relation to statutory employment rights. The review has considered the scope of certain statutory employment rights and sought views on the effects of and justification for extending their coverage. A discussion document was issued as part of the review¹ and the following is a summary of the responses received.

Summary of the responses

2. We received a large number of representations from a wide range of interested parties including working individuals, employer and worker/employee representatives and legal experts over the course of the Employment Status Review. The views expressed were wide ranging - from those who felt there was no need to change the present arrangements to those who suggested radical reform of the legal framework was necessary.

3. In total there were over 400 responses –

- 69 were from employers in the private sector or their representatives
- 20 from employers in the public sector or their representatives
- small businesses' views were represented in several written responses from individual businesses, trade associations and representatives and at a round table meeting hosted by the Small Business Service
- 15 written responses were from trade unions which were also represented at the round table meeting
- there was also interest from voluntary organisations, lawyers, interest and policy groups and academics
- 343 responses were specifically about the position of officeholders, primarily the clergy.

4. **Employers and their representatives in the private sector** consider the present arrangements generally work well and enable them to offer a wide range of work opportunities, which is mutually beneficial to organisations and workers. They often viewed their relationship with atypical workers as informal and thought that atypical arrangements were also flexible for workers, requiring fewer obligations to an

¹ Discussion Document on Employment Status in relation to Statutory Employment Rights July 2002 URN 02/1058.

organisation. For example, many atypical workers are not obliged to accept work if offered, can work for more than one organisation and are not required to provide statutory notice if they wish to leave a job. Some people also enjoy benefits specifically relating to their atypical employment arrangements (e.g. premium pay). Generally it was felt that the present legal framework works appropriately in attaching the most rights to the employment relationships requiring higher levels of obligation from individuals.

5. It was clear from the responses that UK businesses greatly value atypical employment arrangements which help them to respond to a range of situations, for example fluctuations in demand for products or services, requirements for specialised workers to undertake a specific project or provide a service for the organisation, employee absences or unfilled vacancies. Businesses consider atypical work to be an important element of a flexible labour market. Freedom to vary workforce numbers was one of the key flexibilities associated with atypical work.
6. Although there is clearly widespread use of different atypical arrangements according to practices and traditions in different sectors, agency work was the most commonly mentioned form of atypical work in the responses from businesses, who considered that agency workers' primary employment relationship was with the employment business and thought that a major advantage of agency work was that the agency deals with personnel issues.
7. Businesses did not want to change the present coverage of rights. Some argued that many cases of bad practice towards workers may relate to companies failing to comply with their existing obligations (e.g. minimum wage) or contractual issues, rather than workers' lack of access to statutory rights applying only to employees.
8. Businesses suggested that any regulatory extension of many or all employment rights to workers would mean additional costs and administrative burdens for them, especially individual businesses making extensive use of atypical arrangements and those industries where there are established traditions of atypical work. They also highlighted significant practical difficulties in extending certain rights to atypical workers, particularly those involving time off and the right to return when work is not guaranteed and indeed a particular contract may have already ended before a period of eg. maternity leave expires.
9. Businesses, trade associations and representative bodies suggested that the effect of extending rights would impact on their behaviour and work relationships in a number of ways:

- fewer atypical jobs being offered by businesses, which would not necessarily be replaced by more jobs for permanent employees;
- more workers having rights so greater potential for dispute and more applications to employment tribunals;
- businesses may expect greater commitment from atypical workers and change the terms of their contract to make it more restrictive; and
- businesses may redesign their recruitment procedures to be more cautious in selection. This could work against those who are disadvantaged in the labour market.

10. However businesses reported that it could sometimes be difficult to obtain clear information about employment status and that the different rules on status in employment and tax law² in particular created confusion. This could sometimes cause practical problems, for example difficulty in determining the status of individual workers for the purpose of access to statutory employment rights. Many businesses indicated that they would welcome additional guidance in these areas.
11. In terms of the labour market and economy, businesses asserted that an important reason for the continued success of the UK in world markets is the comparative flexibility of the labour market and that any changes that restricted this flexibility would risk undermining this. Increased costs and decreased flexibility to vary hours or terminate employment of atypical workers may make it more difficult for businesses to be competitive, particularly in industries operating on low margins.
12. Employers and their representatives in the public sector and private providers of public services valued atypical workers but most were against the extension of employment rights to atypical workers. Their responses emphasised that atypical employment arrangements, particularly agency and “casual” work are used extensively by some public sector organisations for a number of reasons, for example providing cover when it is difficult to recruit a permanent employee. Employers reported that atypical workers in the public sector, in some areas or professions, may often earn a higher hourly rate than permanent employees, although some workers, usually those with fewer skills, can have less favourable terms.

² HMRC have subsequently launched a tool called the Employment Status Indicator (ESI) on the 19 December 2005. The ESI is a computer based interactive tool which helps determine the employment status of workers for the purposes of Tax, National Insurance Contributions and VAT. It is available at www.hmrc.gov.uk/calcs/esi.htm

13. Several public sector employers stated that they were in favour of fairness for workers, particularly those in long-term atypical positions. However, they shared businesses' concerns regarding the administration and practicalities involved if more employment rights were extended to workers and were very concerned about any potential increase in costs in engaging atypical workers. Some thought that they might engage fewer atypical workers if costs increased.
14. Public sector employers were unclear about the responsibilities they and agencies had in relation to agency workers and would welcome guidance on this. Most would prefer responsibilities to lie with agencies. They also requested a consolidated approach in relation to any change in regulation on agency work.
15. Employment agencies emphasised their key role in the UK labour market and the need for them to be able to respond effectively to the requirements of organisations and to be competitive as businesses. Most agencies argued that agency workers are appropriately protected by employment rights applying to workers and the then existing regulations (which were completely overhauled and revised in 2004) on the conduct of employment agencies and businesses. Agencies suggested that many people pro-actively choose agency work rather than becoming a permanent employee.
16. Agencies asserted that the extension of many employment rights to agency workers would lead to increased costs and administration for agencies, which would need to be passed on to clients. They were also concerned that any extension of rights to agency workers would increase the cost of engaging them. Like businesses, agencies could, as a result of any changes:
 - redesign their recruitment procedures to be more cautious in selecting workers to post to user undertakings, competing to engage the best workers. This could work against those who are disadvantaged in the labour-market and the less experienced; and
 - seek greater commitment from workers, for example exclusivity clauses in contracts tying workers to one agency for the duration of the contract or making it more difficult for agency workers to become employees of a user undertaking where they have worked on an assignment.
17. There were several responses and representations in meetings from **workers, independent contractors and their representatives**. Some workers wanted additional rights or were confused about their existing rights, others said that they enjoyed particular freedoms and rewards from working atypically and pro-actively choose not to be employed. Some set up their own limited companies and see

themselves as small businesses trading on their knowledge and skills, even though they may be economically dependent on a single organization at particular times. For these people, the present arrangements work well and they wish to continue to operate in this way.

18. A large number of **churches, faith based organisations and individual clergy** expressed views about the position of the clergy who may not have access to employment law remedies as the courts do not recognise a contractual relationship between the clergy and church authorities. Some respondents argued that the clergy are appropriately protected by frameworks that already exist within their organisations and that there is no need for government intervention. Many responses from churches and individual clergy expressed the view that working for a church is a way of life or vocation and not an employment relationship in the same way as other occupations or jobs. There was also concern that an extension of employment rights to the clergy could result in the potential for secular courts to adjudicate over theological disputes. However, others highlighted instances where clergy, had in their view, been treated unfairly, saying that internal mechanisms are inadequate and that there is a need for the clergy to have a statutory right of recourse to an external body, such as an employment tribunal.
19. Eastern churches and some of the free churches typically appear to have less formal internal regulations, with responsibility for the clergy usually devolved to the local church. Respondents said that the rules and regulations that guide churches in their relationship with the clergy are seen as less explicit. It was argued by several people that Government intervention could undermine the bond between the clergy and congregation. It was also argued that for some small churches a successful tribunal claim requiring compensation could be very expensive and threaten the existence of some small churches.
20. On the other hand, some respondents argued that the lack of formal regulation makes the position of clergy more vulnerable in certain circumstances.
21. In relation to **registration officers**, the Society of Registration Officers pointed out that they are appointed to their posts by local authorities which also have responsibility for pay and accommodation but, in performance terms, have to answer to the Registrar General who has sole power of dismissal. It argued for the right of unfair dismissal to be conferred on registration officers through legislation with the Registrar General named as the employer.
22. **Unions** acknowledged that the Government has proactively extended the coverage of employment protection in a number of core areas

which has been welcomed but said that the approach has not always been consistent and that the law on employment status is in need of modernisation. They do not support the view that the extension of employment rights would lead to fewer jobs and a rise in unemployment.

23. Unions would like all employment rights to be extended to all working people except the genuinely self-employed through a new, broad statutory definition of "employee" which would cover agency workers, homeworkers, "casual" workers, officeholders, freelancers and the nominally "self-employed" who are economically dependent. They also proposed a legal presumption of employment with the burden of proof on employers to demonstrate that an individual is not employed.
24. Unions highlighted the present definitions of "employee" and "worker" and the associated common-law tests which they argued can exclude unfairly certain groups of workers from employment rights and make it more difficult for workers to access rights. They also suggested that it could be difficult for atypical workers to build up the necessary continuity of service for rights with qualifying periods.
25. Some unions also suggested that the present definitions "incentivise" employers to set up employment relationships deliberately to preclude workers from qualifying for the legal status of employee or to deny responsibility. Several unions, in particular Equity, the Broadcasting, Entertainment, Cinematograph and Theatre Union (BECTU) and the National Union of Journalists had particular concerns about a number of individuals who may be economically dependent on one or a limited number of work providers but who have sometimes been found to be self-employed, for example because they may be able to substitute labour or because they work for other organisations as well as their main provider.
26. In terms of the coverage of rights, unions pointed out certain inconsistencies, for example workers can join trade unions and be represented as part of a bargaining unit, but do not have statutory entitlements to protections relating to union membership or activities (this has been addressed by the Employment Relations Act 2004). Many workers are entitled to statutory maternity or paternity pay, but not the right to return after maternity or paternity leave. This has been highlighted by the TUC as a particular area of concern.
27. Unions also said that atypical employment arrangements are prevalent among ethnic minorities, female workers and the lower paid, many of who are not members of unions. They argued that some workers may not be able to find permanent work but may

instead move between insecure and low paid atypical jobs, which has implications for their social inclusion. Unions also suggested that many atypical workers are employed under less favourable pay and other terms and conditions than similar employees and are less likely to be offered training or be integrated into organisations, which, they felt, could have an impact on productivity.

28. The response of the **Equal Opportunities Commission (EOC)** also pointed out the important role of atypical work for the participation of people, especially women, in the labour market and argued that problems with the application of maternity and parental rights can deter labour market participation and progression. To address this, the EOC suggested that the definition of worker in the Part Time Regulations should be applied to a wider range of statutory employment rights.
29. There were also some detailed responses to the consultation from **interested experts** including law firms, often with a role in advising businesses, workers or trade unions about employment status and rights or with experience of litigating in this area, law committees and professional associations and organisations with an interest in employment policy.
30. Many legal experts felt that it would be helpful to have greater legal certainty and clarity about employment status and thought that the present legal definitions of “employee” and “worker” and the associated common law tests were sometimes interpreted unpredictably by tribunals and higher courts.
31. Several **organisations concerned with low pay and / or advising workers**, for example low pay units and the National Association of Citizens Advice Bureaux responded to the discussion document to report receiving many enquiries from atypical workers regarding employment rights and to argue in favour of the extension of rights to workers and greater clarity. They argued that many workers might not be aware of the legal implications that their work arrangements have for their employment status and rights (for example the freedom to turn down work and use of this freedom, irregular patterns of work, ability to send a substitute to perform their work). They said it can also sometimes be difficult for businesses, particularly those without dedicated HR managers, to understand employment status and their responsibilities towards atypical workers.