NO CONFIDENCE

The IWGB plea for a motion of no confidence in the Business Secretary

INDEPENDENT WORKERS UNION

IWGB

Address:
Independent Workers Union
of Great Britain,
First Floor Office,
12-20 Baron Street,
London, N1 9LL

Email:
office@iwgb.org.uk

Independent Workers Union of Great Britain

www.iwgb.org.uk

The Business Secretary has utterly failed to get to grips with exploitation in the so-called "gig economy". Many companies are depriving workers of legal rights right, left and centre and the Business Secretary has not brought forward a serious plan on enforcement. To add insult to injury he rejected recommendations to increase fines for companies who breach minimum wage. The IWGB's request for a motion of no confidence will curry much favour from Labour MPs.

– Rebecca Long Bailey, MP

Shadow Secretary of State for Business, Energy and Industrial Strategy

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Independent Workers Union
of Great Britain,
First Floor Office,
12-20 Baron Street,
London, N1 9LL

Email:
office@iwgb.org.uk

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21 December, 2018

Dear Honourable Members of the House of Commons,

I am writing, in my capacity as General Secretary of the Independent Workers' Union of Great Britain (IWGB)[1], to request that one of you, in line with recent fashionable trends in the House, tables the following motion of no confidence in Business Secretary Greg Clark:

> *This House has no confidence in the Business Secretary, due to his utter failure to get to grips with exploitation in the so-called "gig economy", his lack of understanding of the issues faced by precarious workers, his propensity to make grandiose and highly misleading press announcements, and his sanctioning of the notion held by some businesses that employment law is optional.*

Here's why:

BACKGROUND

1. Few aspects of the world of work have attracted more political, media, and academic interest than the so-called "gig economy". Although there is no universally accepted definition, the term "gig economy" is usually just shorthand for insecure and atypical work in which the individuals providing the labour are bogusly classed as independent contractors (more on which below) so that the entities for whom they work can avoid giving them basic workers' rights like paid holiday and minimum wage.
2. The IWGB has been at the forefront of unionisation efforts of these workers, waging and winning various court battles and campaigns against "gig economy" companies.
3. In recognition of the growing attention on the subject, Theresa May has made paying lip service to addressing the problem of exploitation in the so-called "gig economy" a central plank of her Government. This is why on 1 October, 2016 the Prime Minister commissioned the Independent Review of Employment Practices in the Modern Economy, to focus primarily on the "implications of new forms of work, driven by digital platforms, for employee rights and responsibilities, employer freedoms and

[1] https://iwgb.org.uk/

obligations, and our existing regulatory framework surrounding employment"[2], also known as the Taylor Review.

4. Shortly after this, on 1 January, 2017, the position of Director of Labour Market Enforcement (DLME)[3] was created[4] and filled by Sir David Metcalf[5]. The remit of the role was to "bring together a coherent assessment of the extent of labour market exploitation, identifying routes to tackle exploitation and harnessing the strength of the three main enforcement bodies"[6]: the Employment Agencies Standards Inspectorate[7], HMRC minimum wage enforcement division[8], and the Gangmasters and Labour Abuse Authority[9] (more on which below).
5. On 11 July, 2017, the Taylor Review was published[10]. To say it was a disappointment would be the understatement of the century. A few days after publication the IWGB responded with an open letter to Matthew Taylor, entitled *Dead on Arrival*, setting out the extensive problems with the review[11] (more on which below).
6. On 20 November, 2017 the Business, Energy and Industrial Strategy (BEIS) and Department of Work and Pensions (DWP) select committees jointly published a report and draft legislation in response to the Taylor Review[12]. The IWGB released a response on the same day[13].
7. On 7 February, 2018 the Government finally showed signs of life by issuing a press release announcing its "response" to the Taylor Review[14]. On the same day I wrote

[2] https://www.gov.uk/government/groups/employment-practices-in-the-modern-economy
[3] https://www.gov.uk/government/people/david-metcalf
[4] Following provision for this in the Immigration Act 2016.
[5] https://www.gov.uk/government/people/david-metcalf
[6] Metcalf, D. *United Kingdom Labour Market Enforcement Strategy 2018/19,* p8. May 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf
[7] https://www.gov.uk/government/organisations/employment-agency-standards-inspectorate
[8] https://www.gov.uk/government/publications/enforcing-national-minimum-wage-law
[9] http://www.gla.gov.uk/
[10] For details, see: https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices
[11]For *Dead on Arrival*, see here: https://iwgbunion.files.wordpress.com/2017/07/iwgb-response-to-taylor-review1.pdf. For a shorter synopsis of the Review's problems, see: https://www.theguardian.com/commentisfree/2017/jul/18/taylor-review-gig-economy-workers. To hear these issues debated, see the podcast debate between myself and Matthew Taylor: https://soundcloud.com/unworkable/unworkable-episode-3-reviewing-the-taylor-review.
[12] For more on which, see: https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/news-parliament-2017/future-of-work-report-17-19/
[13] See: https://iwgbunion.files.wordpress.com/2017/11/iwgb-response-to-dwp-beis-report.pdf
[14]https://www.gov.uk/government/news/millions-to-benefit-from-enhanced-rights-as-government-responds-to-taylor-review-of-modern-working-practices

the Business Secretary a letter expressing our disappointment with this response[15]. At the time the only information we had regarding the Government response was the press release. Later in the day however, after all the media outlets had written up stories based on the press release, the Government issued its actual response (and related material) in a massive document dump, consisting of:

a. *Good Work: A Response to the Taylor Review of Modern Working Practices*[16] (80 pages);
b. *The experiences of individuals in the gig economy*[17] (108 pages);
c. *THE CHARACTERISTICS OF THOSE IN THE GIG ECONOMY: BEIS Research Paper: 2018 no. 2*[18] (47 pages);
d. *GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES: Consultation on agency workers recommendations*[19] (33 pages);
e. *GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES: Consultation on enforcement of employment rights recommendations*[20] (40 pages);
f. *GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES: Consultation on measures to increase transparency in the UK labour market*[21] (48 pages);
g. *EMPLOYMENT STATUS CONSULTATION*[22] (55 pages); and

[15] To read the letter see: https://iwgbunion.files.wordpress.com/2018/02/iwgb-letter-to-greg-clarke.pdf
[16]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/679767/180206_BEIS_Good_Work_Report__Accessible_A4_.pdf
[17] This document contains the findings of research commissioned by the Department for Business, Energy and Industrial Strategy (BEIS), with funding from the Department for Education (DfE), and conducted by the Institute for Employment Studies (IES). The research was led by Andrea Broughton and the report authors were Andrea Broughton, Rosie Gloster, Rosa Marvell, Martha Green, Hamal Langley, and Alex Martin. The report can be found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/679987/171107_The_experiences_of_those_in_the_gig_economy.pdf
[18]This paper was authored by Katriina Lepanjuuri, Robert Wishart, and Peter Cornick and can be found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/679436/The_characteristics_of_those_in_the_gig_economy.pdf
[19]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/679831/2018-02-06_Agencyworkerconsultationdoc_Final.pdf
[20]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/679792/2018-01-17_Taylor_Employment_Tribunal_Enforcement_Condoc_v7.1_FINAL__1849_.pdf
[21]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/679849/Consultation_-_Increasing_Transparency_-_070218__3_.pdf
[22]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/679853/FINAL_-_Employment_Status_consultation_-_FOR_UPLOADING_and_PRINTING.pdf

h. *Good Work: Government response to the Matthew Taylor Review of Modern Working Practices: Communications Toolkit*[23] (11 pages).

8. After reviewing all 422 pages of the Government's response to the Taylor Review, on 23 February, 2018 I wrote an 81 page letter to the Business Secretary, entitled *Bad Job*[24], calling on him to resign for his utter failure to get to grips with the issue at hand (more on which below).
9. In May, 2018, Sir David Metcalf published his Labour Market Enforcement Strategy for 2018/19[25], which set out the abysmal or non-existent state of some parts of the UK's employment law enforcement regime, and made recommendations on how to improve it (more on which below).
10. Finally, on 17 December, 2018, the Government announced another response to the Taylor Review (this time entitled Good Work Plan[26]) as well as its response to Metcalf's recommendations[27].
11. Having commented extensively on the various phases of the slow-motion car crash outlined above[28], it is the most recent announcements that this document addresses.

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[23] This is Government guidance sent to "stakeholders" on helping them to reach "the people who the Government's response may impact, and creating a dialogue across the nation."

[24] Full letter here: https://iwgbunion.files.wordpress.com/2018/02/bad-job.pdf

[25] For the full report see here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf

[26] For full report see here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765128/good-work-plan.pdf

[27] For the full response see here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765124/dlme-strategy-government-response.pdf

[28] In addition to the numerous press comments and interviews, and social media postings, see: on my scepticism of the Taylor Review from the beginning see: https://www.theguardian.com/commentisfree/2017/feb/15/silicon-valley-spin-undermine-workers-rights-gig-economy-employment; on the problems with the Taylor Review before it was published: https://www.theguardian.com/commentisfree/2017/mar/22/rights-gig-economy-self-employed-worker; on why the Metcalf review was more important for the so-called "gig economy" than the Taylor Review: https://www.theguardian.com/commentisfree/2017/jul/05/gig-economy-workers-payslips-holiday-pay-law-metcalf-review; a comprehensive response to the Taylor Review: https://iwgbunion.files.wordpress.com/2017/07/iwgb-response-to-taylor-review1.pdf; a shorter response to the Taylor Review: https://www.theguardian.com/commentisfree/2017/jul/18/taylor-review-gig-economy-workers; a debate between me and Matthew Taylor on the Taylor Review: https://soundcloud.com/unworkable/unworkable-episode-3-reviewing-the-taylor-review; and on the need for enforcement of employment law in the so-called "gig economy": https://www.theguardian.com/commentisfree/2017/nov/13/uber-lost-appeal-workers-employment-rights; and on this week's announcements: https://www.theguardian.com/commentisfree/2018/dec/20/uber-breaking-law-state-intervene-gig-economy.

But before being able to understand why the Government's announcements are inadequate, one needs to fully understand what the issues are.

The Issues

12. For present purposes there are three main categories under which individuals can perform work: **employee**, **independent contractor who carries on a profession or business undertaking on their own account and contracts with clients or customers**, and **limb b worker**. It is important to be very clear on what the differences are as the delineation between these three categories goes to the heart of the debate around how to address the wide-scale deprivation of employment rights in the so-called "gig economy". Of particular importance:
    a. An **employee** is what it sounds like: someone who works under the control of an employer and who usually has an on-going understanding with that employer about when they are expected to work and what that work is supposed to look like. An **employee** is on PAYE; the employer makes tax deductions from their pay and pays national insurance contributions in respect of their employment. An **employee** has the maximum number of employment rights.
    b. An **independent contractor who is in business on their own account**, referred to here by the short-hand of **independent contractor**[29] is self-employed, has clients or customers, and is genuinely running their own affairs. They do their own taxes and for the most part do not have employment rights as they have no employer.

[29] Although technically a limb b worker could be considered an "independent contractor" in the sense that they provide work pursuant to a contract for services rather than a contract of service, for ease of reference we shall use the term "independent contractor" as a shorthand for those self-employed people who truly are independent providers of services and who are not limb b workers. We use this terminology in the same way as Sir Terrence Etherton MR in *Pimlico Plumbers Limited & Anor v Gary Smith* [2017] EWCA Civ 51:

> 3. The case puts a spotlight on a business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor rather than employer and employee or worker.

c. A **limb b worker**, usually referred to as simply a "**worker**"[30] for short, is also self-employed, however they are self-employed people who carry out their work as part of someone else's business rather than as part of their own business. For this reason they are entitled to some, but not all, of the employment rights that employees have. Importantly, **limb b workers** are covered by trade union rights, minimum wage, paid holidays, automatic employer pension contributions, and protection from discrimination. They do not however have a right to statutory sick pay, statutory maternity/paternity pay, or a right to claim unfair dismissal. As **limb b workers** are self-employed, they do their own taxes and the "employer"[31] does not make national insurance contributions on their behalf.

13. One can see that the above descriptions are somewhat different from the normal portrayal in the media of the three categories being "employee, worker, and self-employed". As "worker" is a sub-category of self-employment, it is patently incorrect to present "worker" and "self-employed" as two distinct and mutually exclusive categories. This is incredibly important not just because of the tax implications, but also because of how many who work in the so-called "gig economy" self-identify. They often (but not always) set their own hours, they have more flexibility and autonomy than the average employee, and they rightly benefit from more favourable tax arrangements which account for the fact that unlike an employee (who doesn't have to rent their desk), workers often have to invest in the tools of their trade, e.g. motorbikes, protective equipment, cars, etc.
14. One of the most striking features of the debate around workers' rights in the so-called "gig economy" is the degree to which the media, the Government, some employment lawyers, thinktanks and others consistently inaccurately characterise the current state of the law, in particular on the issue of whether limb b workers are a category of self-employment. This is all the more striking given the absolute clarity of the current position, as set out in paras [24], [25], and [31] of the judgment of the (then) Deputy President of the Supreme Court, Lady Hale, in one of the leading employment status

[30] The reference to "limb b" comes from the fact that employment rights statutes tend to define "worker" as encompassing two different sub-groups: limb a workers which are employees, and limb b workers which are the type described above.

[31] Although somewhat counterintuitive to refer to someone who engages a self-employed person as an "employer"- this is nevertheless the term often used to cover those businesses who engage limb b workers, in recognition of the fact that the limb b worker is carrying out their work as part of the "employer's" business and not their own. As such this letter will also refer to those who engage limb b workers as "employers".

cases before the Supreme Court: *Clyde & Co LLP & Anor v Bates van Winklehof* [2014] UKSC 32[32]:

> 24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.
>
> 25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005; [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act.
>
> ...
>
> 31. As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self- employed but do not fall within the second class[33].

[32] https://www.supremecourt.uk/cases/docs/uksc-2012-0229-judgment.pdf

[33] It is true that various of the key employment rights statutes have slightly different definitions of "worker" which is not particularly helpful. For example, whilst the Working Time Regulations 1998 and the National Minimum Wage Act 1998 have a virtually identical definition, the Trade Union and Labour Relations (Consolidation) Act 1992 has a slightly different definition. Similarly, the Equality Act 2010 has an extended definition of "employee" which in this case includes workers. The Transfer of Undertakings (Protection of

15. The *Bates* case was not some aberration or unintentional use of sloppy language, but rather outlined the general principles of law that anyone familiar with employment status issues should know. The fact that limb b workers are self-employed was further reiterated in Lord Wilson's account of the history of limb b worker status in the judgment of *Pimlico Plumbers Ltd. & Anor v Smith*[34] [2018] UKSC 29 at para [9]:

> From 1970 onwards Parliament has taken the view that, while only employees under a contract of service should have full statutory protection against various forms of abuse by employers of their stronger economic position in the relationship, there were self-employed people whose services were so largely encompassed within the business of others that they should also have limited protection, in particular against discrimination but also against certain forms of exploitation on the part of those others; and for that purpose Parliament has borrowed and developed the extended definition of a "workman" first adopted in 1875.

16. Much has been made of the fact that employment law recognises three tiers whilst tax law only recognises the two categories of "employee" and "self-employed". The suggestion by commentators, including Matthew Taylor and the Government (more on which below), is that this issue leads to confusion and is inherently problematic. That is because the underlying premise of this contention is that limb b workers are not self-employed but a distinct category which cannot be characterised as either employees or self-employed. If this premise were true then the situation would of course be confusing and the commentators would be correct to express concern.

Employment) Regulations 2006 also has an extended definition of employee which appears to include workers. The tediousness of the matter is further increased when one considers the terminology of EU law- upon which much of UK employment law is based- in which "worker" has an autonomous meaning (which would normally include the UK definition of worker) and in which the term "employment relationship" would normally encompass the connection between a UK worker and their "employer". Additionally, the European Convention of Human Rights, which is relevant to some aspects of UK employment law (in particular regarding discrimination and trade union rights), does not refer to workers or employees but rather to people with such terms as "everyone" or "no one". However, notwithstanding all of this tedious detail, it is widely accepted that UK employment law recognises three main categories, as succinctly summed up in the passages from Lady Hale cited above.

[34]See full judgment here: https://www.supremecourt.uk/cases/docs/uksc-2017-0053-judgment.pdf

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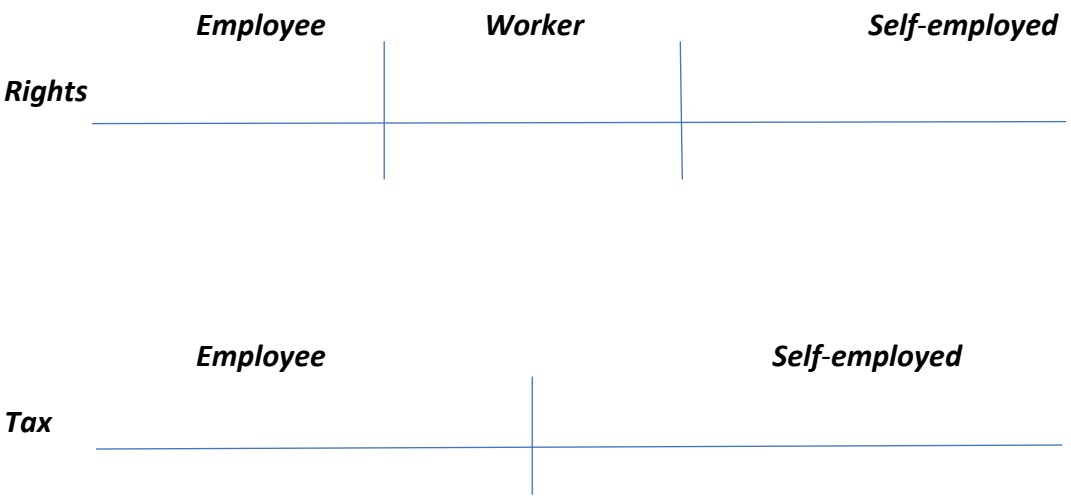
office@iwgb.org.uk

Indeed, a diagram of the commentators' understanding might look like Diagram 1, below.

Diagram 1



17. However, given that workers are self-employed, the commentators' understanding is incorrect. The definition of employee in both tax law and employment law has the same source: the common law on contracts of service[35]. Whilst tax law and

[35] For example, the Income Tax (Earnings and Pensions) Act 2003 sets out the definition of employment in s4:

4 "Employment" for the purposes of the employment income Parts
(1) In the employment income Parts "employment" includes in particular-
- **a. Any employment under a contract of service,**
- **b. Any employment under a contract of apprenticeship, and**
- **c. Any employment in the service of the Crown.**

(2) In those Parts "employed", "employee" and "employer" have corresponding meanings.

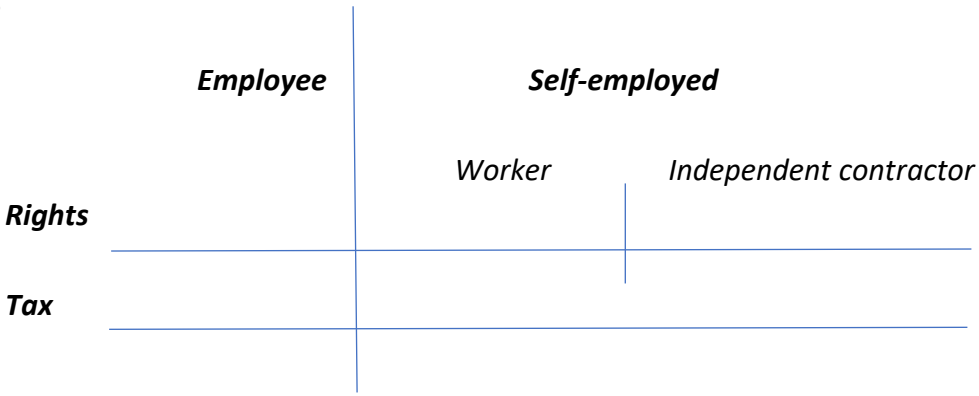
employment law might be applied slightly differently in some situations due to the fact that a body of case law for tax purposes builds up in the Upper Tribunal (Tax and Chancery Chamber) whilst a body of case law for employment law purposes builds up in the Employment Appeal Tribunal (EAT) before both tribunals eventually feed into the Court of Appeal in England and Wales, Court of Appeal in Northern Ireland, or Court of Session in Scotland[36], the general rule is that someone who works pursuant to a contract of service (i.e. an employee) will be entitled to the maximum suite of employment rights, have the tax liabilities of an employee, be put on PAYE, and have national insurance contributions made on their behalf by their employer[37]. Under both employment law and tax law, so far as the so-called "gig economy" is concerned[38], someone who does not work pursuant to a contract of service will be self-employed[39]. This means they will not be on PAYE and the entity for whom they work will not be liable for national insurance contributions on their behalf. Employment law then further divides this category of self-employed people into two sub-sets: independent contractors and limb b workers. Limb b workers will be entitled to some employment rights (as above). Therefore Diagram 2, below, would be more accurate.

Similarly, the Social Security Contributions and Benefits Act 1992 sets out the scope of the categories of earners at s2:

> **2 Categories of earners**
> **(1) In this Part of this Act and Parts II to V below-**
> **a. "employed earner" means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with […earnings]; and**
> b. **"self-employed earner" means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment).**

[36] All three of these courts then feed into the UK Supreme Court.
[37] Of course in tax law there are exceptions to the general rule, set out in both primary and secondary legislation. But as it is the general rule which the commentators imply is incompatible with employment law categorisation, it is to the general rule to which these comments are addressed.
[38] I.e. putting aside office holders, apprenticeships, etc.
[39] For employment law, see the passage of Lady Hale quoted above.

Diagram 2



18. The fact that limb b workers are a subset of the self-employed, and are therefore taxed as self-employed, is seen in Lord Wilson's comment on the Claimant's tax affairs in the *Pimlico Plumbers* case at para [42]:

> Mr Smith correctly presented himself as self-employed for the purposes of income tax and VAT. His accounts for the six years ending on 5 April 2011 were put in evidence. Mr Smith clearly took advantage of the facility to purchase materials himself for use on each assignment and to charge the customer, albeit funnelled through Pimlico, 20% more than he had paid for them. …

19. Couriers, food delivery workers, and private hire drivers do not usually claim to be employees. The issue tends to be whether they are independent contractors or limb b workers. The answer to the question does not affect their self-employed status, but it does of course have a major impact on their entitlement to employment rights. Unsurprisingly, the companies say these people are independent contractors and often compel the individuals to sign documents agreeing to that, and we say the individuals in question are limb b workers. In some even more absurd examples, the companies say the main contractual relationship is between the customer and the individual working, not between the company and said individual.

20. Following the landmark Supreme Court case of *Autoclenz Limited v Belcher & Ors* [2011] UKSC 41[40], the law is clear that tribunals and courts need to look at the actual working relationship between the parties; the signed "contract" will not necessarily be determinative. Because of the incredible extent of asymmetrical bargaining power between a putative employer and a putative worker or employee, the fact that an individual signs a document stating they are an independent contractor does not necessarily mean they are one. In this regard, every employment lawyer who has argued a case on employment status is familiar with the well-known passage from Elias J in the Employment Appeal Tribunal case of *Consistent Group Ltd v Kalwak* [2007] IRLR 560, cited at para 25 of the *Autoclenz* judgment:

> 57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.

21. "Gig economy" companies have lawyered up and riddled their contracts with bogus clauses. Luckily for the workers however, the tribunals have largely seen through this. In the *Uber* (Employment Tribunal, Employment Appeal Tribunal, and Court of Appeal)*, CitySprint, Excel, Addison Lee* (courier Employment Tribunal and Employment Appeal Tribunal; private hire Employment Tribunal and Employment Appeal Tribunal), *Hermes*, and other cases the judges have held that the individuals in question were limb b workers and not independent contractors. Despite the fantastical narrative of these employers that the law is so muddled and confused they couldn't possibly know where they stand, the scathing prose of some of these judgments leaves little doubt about the supposed lack of clarity in the law. For example, in the *Uber* employment tribunal, Employment Judge Snelson stated[41]:

> 87. In the first place, we have been struck by the remarkable lengths to which Uber has gone in order to compel agreement with its (perhaps we should say its lawyers') description of itself and with its analysis of

[40] https://www.supremecourt.uk/cases/docs/uksc-2009-0198-judgment.pdf
[41] https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf

the legal relationships between the two companies, the drivers and the passengers. Any organisation (a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator, but (c) requiring drivers and passengers to agree, *as a matter of contract*, that it does not provide transportation services (through UBV *or* ULL), and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of skepticism. Reflecting on the Respondents' general case, and on the grimly loyal evidence of Ms Bertram in particular, we cannot help being reminded of Queen Gertrude's most celebrated line:

The lady doth protest too much, methinks.

88. Second, our skepticism is not diminished when we are reminded of the many things said and written in the name of Uber in unguarded moments, which reinforce the Claimants' simple case that the organisation runs a transportation business and employs the drivers to that end. We have given some examples in our primary findings above. We are not at all persuaded by Ms Bertram's ambitious attempts to dismiss these as mere sloppiness of language.

89. Third, it is, in our opinion, unreal to deny that Uber is in business as a supplier of transportation services. Simple common sense argues to the contrary. The observations under our first point above are repeated. Moreover, the Respondents' case here is, we think, incompatible with the agreed fact that Uber markets a 'product range.' One might ask: Whose product range is it if not Uber's? The 'products' speak for themselves: they are a variety of driving services. Mr Aslam does not offer such a range. Nor does Mr Farrar, or any other solo driver. The marketing self-evidently is not done for the benefit of any individual driver. Equally self-evidently, it is done to promote Uber's name and 'sell' its transportation services. In recent proceedings under the title of *Douglas O'Connor-v-Uber Technologies Inc* the North California District Court resoundingly rejected the company's assertion that it was a technology company and not in the business of providing transportation services. The judgment included this:

> **Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs.**

We respectfully agree.

> 90. Fourth, it seems to us that the Respondents' general case and the written terms on which they rely do not correspond with the practical reality. 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. Ms Bertram spoke of Uber assisting the drivers to "grow" their businesses, but no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel. Nor can Uber's function sensibly be characterised as supplying drivers with "leads". That suggests that the driver is put into contact with a 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 a reduction of the fare set by Uber). They are offered and accept trips strictly on Uber's terms.

And this section of the judgment carries on for another six points.

22. Rather than tweak their arguments in light of the bruising employment tribunal decision, on appeal Uber doubled down on its "intermediary" argument, i.e. it persisted in arguing that Uber was nothing more than an agent, acting in the best interest of the drivers, by putting them in touch with customers, with whom the drivers entered into a direct contractual relationship for the supply of transportation services. Lest one be concerned that the tribunal judge got a little carried away, it's worth noting that Uber fared no better in the Employment Appeal Tribunal. HHJ Eady QC upheld the Employment Tribunal's decision in its entirety, saying at para 116[42]:

> … I am satisfied the ET did not err either in its approach or in its conclusions when rejecting the contention that the contract was

[42] *Uber B.V & Ors v Aslam & Ors* UKEAT/0056/17/DA. See: https://assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam_and_Others_UKEAT_0056_17_DA.pdf

between driver and passenger and that ULL was simply the agent in this relationship, providing its services as such to the drivers. Having rejected that characterisation of the relevant relationships, on its findings as to the factual reality of the situation, the ET was entitled to conclude there was a contract between ULL and the drivers whereby the drivers personally undertook work for ULL as part of its business of providing transportation services to passengers in the London area.

23. Third time was *not* the charm for Uber as they again lost their argument in the Court of Appeal[43], in somewhat stronger terms. For example, at para [71] the majority opinion stated: "In our view the ET were not only entitled, but correct, to find that each of the Claimant drivers was working for ULL[44] as a "limb (b) worker". The Court of Appeal's majority, similar to the ET, expressed its views on Uber's chicanery:
    a. From para [88]:

> … For ULL to be stating to its statutory regulator that it is operating a private hire vehicle service in London, and is a fit and proper person to do so, while at the same time arguing in this litigation that it is merely an affiliate of a Dutch registered company which licenses tens of thousands of proprietors of small businesses to use its software, contributes to the air of contrivance and artificiality which pervades Uber's case.

    b. From para [90]:

> There is a high degree of fiction in the wording (whether in the 2013 or the 2015 version) of the standard form agreement between UBV and each of the drivers

    c. From para [92]:

> The ET found at paragraph 20 that after each ride has been completed UBV "generates paperwork which has the appearance of being an invoice addressed to the passenger by the driver. The invoice document does not show the full name

[43] See: https://www.judiciary.uk/wp-content/uploads/2018/12/uber-bv-ors-v-aslam-ors-judgment-19.12.18.pdf

[44] Uber's London subsidiary (my footnote).

> or contact details of the passenger, just his or her first name. Nor is it sent to the passenger." The ET described this standard document (at paragraph 87) as a "fiction"; as it clearly was.

d. From para [94] on Uber's attempt in the Employment Tribunal to reconcile past public statements with their current legal arguments, in particular the statement by Uber's witness that "Uber drivers are commission-based. … Drivers are paid a commission of 80% for every journey they undertake.":

> This statement neatly encapsulates the Claimants' case that they are workers providing their services to ULL as employer. It is wholly at odds with Uber's case. The ET records at the end of paragraph 69 that Ms Bertram attempted before them to dismiss it as a typographical error. The ET's observation that this attempt was made by the witness "to our considerable surprise" is notably restrained.

e. And from para [105]:

> … We consider that the extended meaning of "sham" endorsed in *Autoclenz* provides the common law with ample flexibility to address the convoluted, complex and artificial contractual arrangements, no doubt formulated by a battery of lawyers, unilaterally drawn up and dictated by Uber to tens of thousands of drivers and passengers, not one of whom is in a position to correct or otherwise resist the contractual language. …

24. In a strong hint that other private hire companies may be denying statutory employment rights to thousands of other private hire drivers, the majority opinion emphasised that the private hire regulatory regime "strongly reinforces the correctness of the ET's conclusion that the drivers were providing services to Uber (specifically to ULL), not the other way round."[45] Similarly, in terms of whether the passenger is entering into a contract with Uber or the driver, the majority noted at para [89]:

> Consistently with what we have said about the reality being reinforced by the regulatory framework, it is of interest to note that section 56 of the Local Government (Miscellaneous Provisions) Act 1976 expressly

[45] Court of Appeal decision, para [87].

> provides for the hire of a licensed private hire vehicle to be deemed to be made with the operator who accepted the booking, whether or not he himself provided the vehicle. For this purpose, it is irrelevant that the Act only applies outside London.

25. With regard to Uber's ridiculous claim that it is the drivers and not Uber that sells transportation services it is not just the UK tribunals/courts but also the EU legal system that has assessed the matter. For example, in the case before the CJEU of *Associación Profesional Elite Taxi v Uber Systems Spain SL* (Case C-434/15)[46], Advocate General Szpunar said in his opinion[47]:

> 43. In its written observations, Uber claims that it simply matches supply (the supply of urban transport) to demand. I think, however, that this is an unduly narrow view of its role. Uber actually does much more than match supply to demand: It created the supply itself. It also lays down rules concerning the essential characteristics of the supply and organises how it works.
>
> …
>
> 51. Thus, Uber exerts control over all the relevant aspects of an urban transport service: over the price, obviously, but also over the minimum safety conditions by means of prior requirements concerning drivers and vehicles, over the accessibility of the transport supply by encouraging drivers to work when and where demand is high, over the conduct of drivers by means of the ratings system and, lastly, over possible exclusion from the platform. The other aspects are, in my opinion, of secondary importance from the perspective of an average user of urban transport services and do not influence his economic choices. Uber therefore controls the economically significant aspects of the transport service offered through its platform.
>
> 52. While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a

[46] http://curia.europa.eu/juris/document/document.jsf?text=&docid=190593&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1130645

[47] Endnotes have been omitted from the quote.

> scale effect, makes it possible to manage in a way that is just as – if not more – effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.
>
> 53. The foregoing leads me to conclude that Uber's activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, by Uber or on its behalf. The service is also presented to users, and perceived by them, in that way. When users decide to use Uber's services, they are looking for a transport service offering certain functions and a particular standard of quality. Such functions and transport quality are ensured by Uber.
>
> …
>
> 61. Uber is therefore not a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services. On the contrary, Uber is a genuine organiser and operator of urban transport services in the cities where it has a presence. While it is true, as Uber states in its observations in the case, that its concept is innovative, that innovation nonetheless pertains to the field of urban transport.

26. The decision of the CJEU (Grand Chamber) in that case[48] followed the opinion of the AG, going on to hold that Uber needed to be regulated as a service in the field of transport rather than as an information society service.
27. In the *CitySprint* tribunal[49], Employment Judge Wade also pulled no punches on CitySprint's attempt to get around the law, saying:

> 29.1 The substitution clause 3.5 in the Tender is contorted and self-destructive. It grapples with the conflict between the desire to have such a clause and the reality that the CitySprint brand cannot be put at risk by the use of arms-length substitutes. The effect is so prescriptive

[48] http://curia.europa.eu/juris/document/document.jsf?text=&docid=198047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1130645
[49] http://www.egos.co.uk/ir35_cases/Dewhurst_v_City_Sprint_2016.pdf

that only couriers who are already on circuit would in practice be able to substitute.

…

54. The respondent's opening outline says:

> *"The respondent operates courier services around the UK. Self-employed van drivers, motorcycle riders and cycle couriers all make their services available to CitySprint, on relevantly the same terms."*

By contrast, when Ms Dewhurst was questioned she said:

> *"I work hard for them so that they can maintain their relationship with their clients."*

55. Not only is the phrase "make their services available" as opposed to "work for" a mouthful, it is also window dressing and I find Ms Dewhurst's description to be more accurate. Her phrase expresses not only that she provided her services personally but that CitySprint was not her customer but her employer.

…

64. The very title of the document "Confirmation of Tender to supply Courier Services to CitySprint" arouses the suspicion that the contract may have been generated by the "army of lawyers" described by Mr Justice Elias in *Kalwak*.

…

78. I have no doubt that the claimant was working not for herself with CitySprint as her customer but on the respondent's behalf. Couriers out on the road on their own bicycle enjoy a certain amount of freedom (sometimes this is the freedom to get very cold and, at worst, have an accident for which they receive no sick pay) but the network of connections back to CitySprint is very sturdy. The claimant and her cycle courier colleagues are:

78.1 Expected the work when they say they will

78.2 Directed throughout the time that they are on circuit

78.3 Instructed to "smile with your greeting" and wear the uniform

78.4 Told what to do if the parcel cannot be delivered as instructed

78.5 Told when they will be paid and paid according to the respondent's formula after it has made deductions

78.6 Told that they are part of the "family" who the respondent describes as "our couriers" on many occasions.

28. The conclusion of EJ Pearl, in the employment tribunal case determining the employment status of the Addison Lee private hire drivers[50], was similarly strong:

> 53. … 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 business. The facts all point the other way and Mr Burns's submission, in our view, defies evidential gravity.[51]

29. Unfortunately for Addison Lee, the company did not do any better in the Employment Tribunal case over its couriers' employment status[52]. EJ Wade again made the point that the company knew exactly what it was doing:

> 44. The respondent's recruitment material on its website says:
>
> *"we are proud of our couriers – we'd love you to be part of that"*
>
> It does not say:

[50] Case numbers 2208029/2016, 2208030/2016, and 2208031/2016.
[51] As mentioned above, Addison Lee went on to lose their appeal of this decision in the Employment Appeal Tribunal.
[52] Case number 2200436/2016, which they also lost again on appeal in the Employment Appeal Tribunal.

> *"We want to find couriers who are independent and work on an ad hoc basis – if you do account work you to be a self-employed sub-contractor and for non-account work we will be your agent so you carry the risk."*

Not only is this confusing and wordy, it is not the way the business ran, or could run, as the respondent well knew. This is why it employed its "armies of lawyers" to do the best job possible to ensure that the claimant and his colleagues did not have "limb b" worker status. Sadly, they even resorted to clause 15.3.2, see paragraph 13 above, which was designed to frighten him off from litigating and suggests that they knew the risk of portraying the claimant as self-employed.

45. Website verbiage can be dismissed as advertising puff but when it differs so starkly from the contractual wording, alarm bells must ring. I find the true relationship to be closer to the wording of the website in that:

> a. The respondent and the claimant worked together in a team and under a contract whereby the claimant was expected to carry out work for the respondent, under its direction, when logged into the system.
>
> b. He performed the work personally, and not because Addison Lee was his client or customer.

Applying *Autoclenz,* I do not consider that the contract of October 2015 portrays the relationship correctly and it is just one source of many to be taken into account.

…

57. I therefore conclude that the claimant was a "limb b" worker. This was a working arrangement which did not lend itself to the interpretation which the armies of lawyers tried to promote. The claimant was part of a homogeneous fleet and a homogeneous operation which promoted Addison Lee to customers and looked after its own. There is nothing wrong or bad about that, it simply does not fit with the employment status for which the respondent contends.

30. And again in the Hermes tribunal case[53], the employment judge was highly sceptical of Hermes' lead witness, at para [3.1]:

> The main evidence for Hermes was given by Mr Ormsby. As Head of Courier he is a senior member of Hermes management. He reports to the Director of Delivery Experience who in turn reports to the CEO. He has been in the Hermes business 10 years. I found his evidence wholly unpersuasive and in respects implausible. He gave the very distinct impression that he was saying what needed to be said to support Hermes's case that its couriers are not limb (b) workers, regardless of whether what he said was accurate. In a number of respects it appeared that he was essentially improvising as he went along. …

31. The Hermes tribunal also thought the case was abundantly clear, at para [4.12]:

> Taking all these factors, and notwithstanding Mr Leiper's able submissions to the contrary, the terms of the contract and the way in which the parties operate in practice point overwhelmingly to the fact that these are contracts that fall within the field of dependent work relationships. The Hermes couriers undertake personally to perform work and Hermes is not a client of a business undertaking of theirs. They are properly regarded as limb (b) workers.

32. Sometimes the employers even find it difficult to maintain their farcical narrative among their own staff, who are supposed to promulgate that narrative with the couriers and drivers. EJ Wade recounts a cute little anecdote in her judgment in the *CitySprint* case:

> 50. There is a recording of a conversation between Mr Katona and a controller called Ian. Mr Katona had a problem with an item which he had collected but could not deliver at the end of the day because the premises were shut. As trained in the induction, he telephoned the controller for instructions. When he asked whether he could do what

[53] *Leyland & Ors v Hermes Parcelnet Ltd.* (2018), Leeds Employment Tribunal, Case Numbers 1800575/2017, 1800594-1800599/2017, 1801037-1801039/2017, 1801166-1801169/2017, and 1801320/2017. Full judgment can be seen here: https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Employment/1800575-17-Hermes-PH-Judgment.pdf

he wanted with the item the controller replied (and I quote from the respondent's recording):

> *"no, I'm afraid so, I'm afraid you can't really - I mean that's all bullshit- as we all know isn't it… That you self employs [sic] can do exactly what you want – I mean if that was the case we wouldn't have a business would we, really?"*

The controller subsequently tried to explain his comments away in an email but did not come here to give evidence.

33. Similarly, Kevin Valentine, the head of Addison Lee's courier department and only witness in the courier employment status employment tribunal, admitted on a secret recording of him blacklisting one of our members (Andrew Boxer)[54] that he knew Addison Lee was going to lose its appeal of the case:

> **Valentine**: *What I am saying is be careful, please be careful where you are going. Because your union is going to win. But what happens afterwards, where that goes, where the HMRC goes, where everything else goes. All your taxation, all your freedom, everything else goes, be very careful.*
>
> **Boxer**: *the point about being worker status…*
>
> **Valentine**: *you can be worker status, we are preparing for it*
>
> **Boxer**: *…is that it allows that freedom*
>
> **Valentine**: *yes of course it does*
>
> *…*
>
> **Valentine**: *I'll probably see you in a year's time when you come here as a worker*

34. So just to be clear about what's happening here, even the head of Addison Lee's courier department believes Addison Lee couriers are workers! And as mentioned above, he was right- we did win the appeal. So for pundits, policy makers, and some sections of the press to carry on as if the main problem is one of confusion around

[54] https://www.youtube.com/watch?v=ICqO2qi2Dfs&feature=youtu.be

employment status, either constitutes wilful obfuscation or alternatively betrays a deep misunderstanding of the problem at hand.

35. In addition to the emphatic judgments cited above, in other cases we have run, the companies admitted to their behaviour. For example, shortly before our case against eCourier was due to be heard at the employment tribunal the company agreed to a settlement including the wording:

> The Respondent admits that during the Claimant's engagement by the Respondent he was engaged as a worker, as defined in section 230(3)(b) of the Employment Rights Act 1996, which for the avoidance of doubt includes an entitlement to holiday pay as claimed by the Claimant. …

36. Similarly, in our case against The Doctors Laboratory (TDL) over the employment status of their couriers they initially responded to the claim by admitting the couriers were in fact limb b workers. Then, shortly before the preliminary employment tribunal was due to take place, they agreed to acknowledge that some of the claimants were in fact employees[55].
37. Undoubtedly the legal advice both of these companies received was that the law was clear: if the matters proceeded to tribunal on these points the companies would lose.
38. You'll have to forgive the extent to which we have quoted judgments above, however it is absolutely crucial that one understands what the problem is before being able to suggest a solution. Based on the Government's pronouncements to date, I am not sure they have properly understood the problem. So let's sum it up: the fundamental 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[56], the recent tribunal and court cases have demonstrated the exact opposite. The existence of the third category of "limb b 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

[55]For more detail, see: https://www.theguardian.com/law/2018/feb/07/couriers-carrying-blood-for-nhs-win-full-employment-rights

[56]For example see the ridiculous YouTube video in which Deliveroo CEO and Founder Will Shu says he is going to "campaign the government" to allow him to give sick pay to riders as currently employment law doesn't allow this: https://www.youtube.com/watch?feature=youtu.be&v=JRzC-JllvYA&app=desktop.

that the law did not have to be stretched or reconfigured to cover workers in the so-called "gig economy".

39. Indeed the only recent high profile "gig economy" decision to not come down on the side of the workers is the case of Deliveroo before the Central Arbitration Committee (CAC) and High Court. The case is currently being fought on European Convention of Human Rights grounds (the IWGB is applying to the Court of Appeal for permission to appeal the decision of the High Court[57]). Ironically, even though they held the riders were not limb b workers, the CAC in their decision went on to decide that a majority of the riders in the bargaining unit would nonetheless be likely to want a collective bargaining arrangement where the IWGB could negotiate their pay, hours, and holidays with Deliveroo.

The Root Cause of the Problem

40. Given that the fundamental problem is the failure of employers to obey the law, a proper diagnosis would ask why this occurs. The answer is not rocket science:
    a. There are almost no consequences whatsoever for employers unlawfully classifying their workers as independent contractors. The implication of the *CitySprint* judgment was that the company had been unlawfully depriving its couriers of employment rights to which they were legally entitled for years. The consequence? They had to pay two days' holiday to the claimant. No fine, no sanction, no incentive to obey the law.
    b. Employment tribunal fees, introduced in July 2013, resulted in a drop in tribunal claims of nearly 70% due to the strong deterrence effect of having to pay substantial sums to assert one's rights. These were not abolished until July 2017 when the Supreme Court ruled the fee regime to be unlawful[58].
    c. There is virtually no government enforcement of employment law, and what little enforcement there is tends to be incredibly half-hearted and ineffective.

[57] We were refused permission for judicial review on the grounds that the domestic statutes were misinterpreted and did not appeal against this refusal as the Convention grounds alone would suffice to win the case (as the case is about collective bargaining). This therefore leaves open the possibility of making further arguments on domestic law grounds as well as on EU law grounds in separate cases, both of which the IWGB intends to do. In any case, Deliveroo is rather the exception which proves the rule.

[58] See full judgment here: https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf

In sum, when there is virtually no government enforcement of existing law, virtually no consequences for unlawful behaviour, and when claimants find it almost impossible to assert their rights in tribunal, it is entirely unsurprising that there is such widespread unlawful behaviour.

41. The abysmal state of the UK's enforcement of employment law- or lack thereof- was confirmed repeatedly in Metcalf's 2018/19 strategy. The starting point however is that most aspects of employment law are not enforced badly; they are simply not enforced at all. The enforcement bodies that do exist focus on niche or heavily restricted aspects of employment law. For example the Health and Safety Executive[59] which, as the name implies, deals with health and safety, or the similarly self-explanatory remit of the Pensions Regulator[60]. The remaining enforcement bodies are those that fall under Metcalf's remit, who at the time of Metcalf's report, had a total staff of just 512[6162]:
    a. The Employment Agencies Standards Inspectorate, which deals with employment businesses and agencies, is part of the Department for Business, Energy, and Industrial Strategy (BEIS), and at the time of Metcalf's report had a total staff of 12;
    b. The National Minimum Wage (NMW) enforcement section of HMRC, which operates under a Services Level Agreement (SLA) with BEIS; and
    c. The Gangmasters and Labour Abuse Authority (GLAA), which licenses gangmasters in certain limited sectors such as horticulture and food processing, and which now has authority to enforce some more general breaches of labour law.
42. There is no department or agency generally tasked with ensuring companies are not misclassifying their workers, nor is there an agency or department ensuring workers obtain their rights to paid holidays[63], trade union protections, or other basic employment rights. So far as concerns the so-called "gig economy", the main enforcement body of interest is HMRC's minimum wage enforcement division as, in

[59] See: http://www.hse.gov.uk/
[60] See: https://www.thepensionsregulator.gov.uk/en
[61] Metcalf Strategy, p20.
[62] Indeed at p67 Metcalf points out that, including the Health and Safety Executive, the UK has one inspection officer for every 20,000 people in employment, which is only 50% of the International Labour Organisation's (ILO) recommended rate of one in 10,000.
[63] Despite an estimated £1.8 billion of unpaid holidays each year (Metcalf Strategy, p104). These figures actually underestimate the scale of the problem as the right to paid holidays is a health and safety measure (despite not being enforced by the Health and Safety Executive) originally introduced to give the necessary breaks for good health. The £1.8 billion does not capture the detrimental impacts of a lack of holidays on workers' health.

theory, this division would recognise that bogusly classed independent contractors are in reality limb b workers, therefore entitled to minimum wage, and would go after the companies who are depriving these workers of that minimum wage.

43. Minimum wage breaches can attract both civil fines from HMRC and criminal prosecutions in cases HMRC refers to the Crown Prosecution Service (CPS) in England and Wales. However the civil penalties are limited to 200% of the wages due (in addition to the wages paid to the worker), and if paid within 14 days are reduced by 50%[64]. The criminal cases could attract unlimited fines but criminal prosecutions for minimum wage violations are virtually unheard of; at the time of Metcalf's strategy document there had only ever been 14![65] Writing on the minimum wage criminal enforcement track record of the enforcement bodies, Metcalf wrote at p61 of his Strategy:

> By comparison we note that the HSE achieves in excess of 500 prosecutions leading to conviction each year. Even allowing for its greater size and funding, this is proportionately a much higher prosecution rate. This seems to me to be an underutilised intervention in the labour enforcement arena. I do of course recognise the lengthy and sometimes costly process involved. HMRC told us that even the less complex cases cost at least £50,000, with the more complex ones costing considerably more. If anything, this adds weight to my recommendations for higher financial penalties and the recycling of some of this money to help fund more prosecutions (see Section 3.2). Overall, if used more frequently and with wider publicity, greater use of prosecutions could act as a much more powerful deterrent.

44. Metcalf also made the broader point that companies are extremely unlikely to be the subject of any minimum wage inspection by HMRC:

> Consider first of all the deterrent effect of the risk of being inspected. Taking HMRC NMW/NLW enforcement as an example, in 2016/17 it completed nearly 2,700 investigations. With 1.3 million employers in the UK this suggests that the average employer can expect an inspection around once every 500 years (employers divided by closed cases in Table 5 below). When considering the range of low-paid

[64] Metcalf Strategy, p23.
[65] Metcalf Strategy, p24.

> sectors, the chances of being inspected vary from once every 200 years in accommodation and food services to once every 2,800 years in professional, scientific, and technical activities (Table 5 below).
>
> …
>
> In practice as all complaints are investigated and other investigations are intelligence based, the probability of a non-compliant firm being investigated will be higher than that of a compliant firm which would be rated low risk. We should also recognise that both HMRC NMW/NLW and GLAA have seen substantial increases in their resourcing in recent years and so the chances of being inspected should also increase accordingly.
>
> Nevertheless the once in 500 years figure, on average, illustrates the resources point and demonstrates that the likelihood of inspection is low enough to have only a weak deterrence effect.[66]

45. However, I'd suggest that if anything, the one in 500 figure *overrepresents* the risk of inspection. According to Metcalf's review, in 2016/17, 45% of closed cases originated from complaints, and 55% of cases from targeted (pro active) enforcement by HMRC[67]. Most low paid workers are highly unlikely to report their employer to HMRC for minimum wage enforcement. This is a problem which Metcalf recognised in his report:

> … The critical gap recognised across the labour market enforcement landscape is the chronic underreporting of breaches. As discussed elsewhere in this Strategy, there is a myriad of reasons for workers choosing not to report their employer's non-compliance, ranging from a lack of awareness, understanding, or regard for their own rights, to a fear of reprisal for action. …

46. My own experience, as General Secretary of a union which represents predominantly low-paid workers, and which has submitted multiple minimum wage claims through the employment tribunals, confirms that the vast majority of low-paid workers are highly unlikely to report their employers to the Government.

[66] Metcalf Strategy, p52
[67] Metcalf Strategy, p68

47. Returning to the likelihood of companies facing minimum wage inspection, if one excludes inspections provoked by worker complaints, the likelihood of unprovoked inspections is 1 in 1,080 years. So if an employer misinforms their workers about their rights, or keeps them in a perpetual state of fear about reporting breaches, such that their workers do not report anything to HMRC, the employer cuts their risk of inspection by more than half.
48. Metcalf's philosophy on deterrence is that the effectiveness is

> …essentially a trade-off between the level of enforcement resources (and the ensuing **likelihood of an inspection** for each employer) and the **size of the financial penalty** an employer might face if found to be non-compliant.

Therefore, given the paltry civil fines, the extremely small likelihood of inspection, and the virtually non-existent likelihood of criminal prosecutions, it is unsurprising there's a problem. Indeed Metcalf concluded that "the chances of being inspected and the size of any civil penalties are both far too low"[68]. This analysis is reflected in Metcalf's recommendation:

> that the NMW penalty multiplier is reviewed again and increased to a level that would ensure that there is an incentive to comply with the legislation.[69]

And Metcalf even floated the idea of basing penalties on turnover, like the massive potential fines of the General Data Protection Regulation (GDPR)[70]:

> For increasing penalties, there may well be a case for emulating the model used elsewhere in public policy, where enforcement plays a major role. This centres around the use of so-called 'turnover taxes', which link the value of the fine directly to the company's turnover (see Box 5 below). This model has the potential to generate substantial penalties – for instance the HSE can now fine large organisations in excess of £10 million on conviction for the most severe offences – and can provide an option for a more graded response to fines. A key point

[68] Metcalf Strategy, p55
[69] Metcalf Strategy, p57
[70] See: https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en

> to note is that such penalties are linked to turnover rather than profit, and that criminal fines cannot be insured or indemnified against, maximising the potential impact of the penalty on the non-compliant company. Financial penalties could also be adjusted by firm size too.[71]

49. Although Metcalf stopped short of calling for increased budget outlays for HMRC's minimum wage enforcement, he did in effect call for an increase in resources by other means:

> I recommend that revenue from higher penalties should be recycled into the enforcement system as additional resource.[72]
>
> I recommend that, where appropriate, employers found to be non-compliant should be charged a fee for intervention to allow the enforcement bodies to recover some of their enforcement costs.[73]

If some of Metcalf's ideas were implemented, one should not underestimate the potential impact on resources. For example, if one took the GDPR penalty approach of fines up to four percent of the previous year's global turnover, and applied it to Uber's breach of minimum wage, Uber would face a penalty of £300 million[74], which is over 11 times greater than the entire HMRC minimum wage enforcement budget for 2018/19 of £26.3 million. Something tells me that after being hit with a fine like that, Uber would be careful not to deprive its drivers of minimum wage again!

The Solution

50. In light of the above, and in recognition of the fact that a growing proportion of the workforce appear to be falling into the category of limb b worker rather than employee, the IWGB has consistently called for three simple proposals which we believe would go a long way to securing proper employment rights for people in the so-called "gig economy":

[71] Metcalf Strategy, p55
[72] Metcalf Strategy, p57
[73] Metcalf Strategy, p56
[74] Based on a 2017 turnover of £7.5 billion (https://www.statista.com/statistics/550635/uber-global-net-revenue/).

a. Introduce proper government enforcement of employment law. This means a government agency or department (or preferably Misnistry of Labour, as proposed by the Institute of Employment Rights[75] and adopted in the Labour Party manifesto[76]) which can inspect workplaces, build cases against employers, prosecute them, and fine them for unlawful behaviour.
b. Eliminate employment tribunal fees to make it easier for claimants to assert their rights, and introduce fines as a result of employers using bogus employment status.
c. Increase the employment rights associated with worker status so that workers enjoy rights which currently only accrue to employees.

51. Luckily, although no thanks to the Government, part of the above has been accomplished via the Supreme Court decision (in which the IWGB was an intervener), which ruled the tribunal fees to be unlawful[77].
52. The above three suggestions should not be interpreted as the total solution for employment rights in the so-called "gig economy", and much less so for the UK labour market overall. Obvious improvements above and beyond our three key proposals include equalising the minimum wage with the real living wage, increasing statutory sick pay, repealing the Trade Union Act 2016, and much more. For a comprehensive set of recommendations on how to improve employment rights and working lives see the Institute of Employment Rights' (IER) Manifesto for Labour Law[78][79], much of which was incorporated into the Labour Party manifesto in the last election.
53. Our suggestions are rather an extremely modest and reasonable starting point which we believe would dramatically improve things for workers in the so-called "gig economy".
54. As alluded to above, we have in the past commented extensively on the Taylor Review and the Government's response to it, and have come to the conclusion that not much at all was on offer for the "gig economy" workers we represent. Below we shall take a look at the Government's announcements this week by stacking them up against our modest policy proposals and asking the question: will workers be fundamentally better off as a result of these announcements?

[75] http://www.ier.org.uk/
[76] http://www.labour.org.uk/page/-/Images/manifesto-2017/Labour%20Manifesto%202017.pdf
[77] For the full judgment, see: https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf
[78] http://www.ier.org.uk/manifesto
[79] Also see IER's Rolling out the Manifesto for Labour Law (http://www.ier.org.uk/publications/rolling-out-manifesto-labour-law)

Address:
Independent Workers Union
of Great Britain,
First Floor Office,
12-20 Baron Street,
London, N1 9LL

Email:
office@iwgb.org.uk

GOOD WORK PLAN

55. This document contains the Government's second response to the Taylor Review, and consists of three substantive sections: *Fair and decent work, Clarity for employers and workers,* and *Fairer enforcement*.

Fair and decent work

56. In this section the Business Secretary announces he will bring forward the much talked about "right for all workers to request a more predictable and stable contract", although I have to say that calling that a "right" at all seems a bit of a misnomer. We further learn that the "right" would only accrue after someone's been on the job for six months, and the employer would then have three months to respond. So after nine months of insecure work, a worker can have a response from their employer about whether the employer wants to give them more stable work. The Business Secretary still does not appear to offer an answer to the question: what if the employer says no?
57. The Low Pay Commission was also sceptical, as expressed in a letter by its Chair to the Business Secretary[80]:

> Taylor's Review recommended a right to request a more stable and predictable contract. Government has since consulted on such a measure based on the right to request flexible working. However, Commissioners are of the view that a stronger framework is appropriate, as the issue is not about a worker requesting a change to the amount of work they do, but rather the proper recognition of their normal hours. Workers already worried about raising issues in the workplace, because of fears of employer retaliation, are less likely to raise a 'request' – so the right needs to be stronger than this. An employer would need to objectively justify any refusal according to

[80]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765052/Letter_from_the_LPC.pdf

conditions clearly defined in legislation. These would include the reference period for determining normal working hours, a qualifying period, and the specific circumstances in which an employer would not be required to offer a contract guaranteeing normal hours worked. We have given examples of these specific circumstances in our report but recommend that the Government consult widely on these qualifying conditions. This right should be enforced through Employment Tribunals, and Government should also consult on appropriate penalties for non-compliance.

58. The next announcement was that the Government would extend from one week to four weeks the length of a gap in work which would break an employee's continuous service accrual (relevant for certain rights that accrue over time). As we've said before this would do no harm but also won't achieve a whole lot.
59. The Government also confirms their intention to repeal the Swedish derogation, which allows agency workers to earn less than their directly employed colleagues under certain circumstances. This is undoubtedly a good thing, though not particularly relevant to the couriers and private hire drivers working in the so-called "gig economy".
60. In the interest of trying to save my readers from the pain of reading about endless waffle on "quality" of work, I will not comment on the Business Secretary's writings on this. Until we see in concrete terms how these proposals will improve the lot of our membership there really isn't much to comment on.
61. The Government proposes legislating to ban employers from making deductions from staff tips, which of course is a good thing. However, when it comes to the fundamental issue of obtaining basic employment rights in a world in which your employer denies them to you, keeping the tips you earn will be of little consolation. In any case, the right would presumably only apply to limb b workers and employees, so unless there is a plan to get around the deliberate misclassification, the right is meaningless for "gig economy" workers.
62. With regard to "voice and autonomy", the Government says it will make it easier for employees to set up information and consultation arrangements[81] by lowering the threshold from 10% of staff to 2% of staff required to trigger a request for these arrangements. Putting aside for the moment the fact that these regulations- which provide no official scope for trade unions and do not mandate collective bargaining-

[81] Pursuant to the Information and Consultation of Employees Regulations 2004.

are a poor substitute to trade union representation, the rules only apply to employees, and not limb b workers. So their ability to increase "voice" of "gig economy" workers with their employers is pretty much zero. The Government itself seems somewhat dubious about the modifications having any impact on anyone, as can be seen by the Explanatory Note accompanying the draft legislation introducing the change:

> In relation to the amendment reducing the threshold in relation to requests to negotiate information and consultation arrangements under the 2004 Regulations, an impact assessment has not been prepared as no significant impact on individuals or businesses is foreseen.

63. There's also a proposal on better stakeholder engagement, but in line with my policy on waffle above, I'll abstain from opining on it.

Clarity for employers and workers

64. This section betrays an astounding level of ignorance about the issue at hand. For example, on employment status the document states:

> The rise of new business models and employment practices have caused increasing numbers of disagreements around the employment status of individuals. This has raised concerns that some businesses may not currently be providing people with the rights they are entitled to…[82]

Seriously? Disagreements? May not be providing the rights? These comments make a mockery of our legal system. When a courier and a judge agree the courier is a limb b worker, and the company says the courier is an independent contractor, this is not a "disagreement"; it is the company attempting to evade its employment law obligations. When virtually every single high profile "gig economy" employment status case results in the individuals being declared limb b workers, this does not mean that these companies *may* not be providing people with rights, it is a definitive statement in law that they are not.

[82] Good Work Plan, p26

65. Further, the document states:

> … In the UK tax system there is a two-tier employment status framework of employed and self-employed.
>
> For employment rights there is a three-tier framework that consists of two statutory employment statuses of employee and worker, and a third category of self-employed, which is not defined in legislation.[83]

Wrong again. See the discussion on limb b workers being self-employed above. These are not minor errors but go to the heart of the issue, and, as seen below, contaminate the Government's approach to the matter. Not understanding basic issues around employment status, or around the current state of play for the multiple "gig economy" workers who have won their cases, when the Business Secretary is claiming to propose an overhaul of workers rights to protect these workers, should alone suffice for a motion of no confidence.

66. The document goes on to state:

> Matthew Taylor recommended that renewed effort should be made to align the employment status frameworks for the purposes of employment rights and tax to ensure that the differences between the two systems are reduced to an absolute minimum. The Government agrees that this is the right ambition and will bring forward detailed proposals on how the frameworks could be aligned.[84]

Whilst this may sound great to a lay person it is in reality problematic. Given our explanation of the frameworks above, aligning the tax and employment status frameworks- in the sense of having the same categories and subcategories in each- would mean either the tax framework adapts to the employment law one, resulting in limb b workers being taxed more, or it means the employment law framework adapts to the tax one, resulting in limb b workers disappearing as a category and those individuals losing their rights. Given that limb b workers take advantage of being taxed as self-employed because they often have much higher expenses on the job (as above), neither of these two options is particularly attractive, to say the least. This is

[83] Good Work Plan, p27
[84] Good Work Plan, p28

not to say that companies who engage limb b workers should not be made to make national insurance contributions on their behalf (they don't currently).

67. Of most concern however, is the following:

> He highlighted that the existing employment status tests have contributed to a lack of clarity faced by individuals and employers. Following consultation, we agree with his conclusion and we will legislate to improve the clarity of the employment status tests, reflecting the reality of modern working relationships.[85]

When virtually every single case is decided the same way, it's a bit absurd to suggest that lack of clarity is the root cause of the problem. And given that the concept of the third category of employment status has been around since the late 1800's, and in the form of its modern definition since 1970, the fact that it has served the likes of Uber drivers and other "gig economy" workers rather suggests it has done a remarkable job keeping up with the times. It's usually better not to fix something when it's not broken. Further, the minute the definitions are changed, every one of the companies we have already beaten in tribunal or court will want to relitigate, on the basis that the previous cases were won under the old definitions. The fact that this is even suggested rather demonstrates a deep misunderstanding of the problem at hand, or a sinister attempt to protect these companies through the back door.

68. Luckily for the workers who would likely loose out by opening the pandora's box of employment status definitions, it looks like the Government is going to take its normal glacial pace of implementation. After Taylor's 10 month review, and a further five month consultation on employment status, the Government has now

> …commissioned independent research to find out more about those with uncertain employment status, which will help us to understand how best to support them when bringing forward legislation.[86]

Wake me up when it's over.

69. The Government also announces in this section that it will modify the right to a statement of employment particulars so that it applies to limb b workers in addition to employees, contains more information, and is given on day one rather than within

[85] Good Work Plan, p28
[86] Good Work Plan, p29

the first two months of employment.[87] We are in favour of this, however it is important to realise that this is not a game changer. People whose employers class them as independent contractors will not receive a statement. A complaint in a tribunal about a company's failure to provide a statement does not result in any compensation for the worker unless the worker has another substantive claim along with it, and the right is not enforced by the state. Further, so far as limb b workers are concerned, the right will only apply to those *starting* a new job on or after 6 April, 2020. For whatever reason, the ability of people employed before then to get access to the upgraded statements is restricted to employees[88].

70. For agency workers the situation is moderately better in that the EAS will have power to enforce their entitlement to a "key facts page".[89]
71. On holidays the Government says they will run an awareness campaign and introduce new guidance.[90] However, for someone whose employer is denying them the right to paid holidays in the first place, additional guidance is little comfort.
72. The Government also states it will legislate to extend the holiday pay reference period from 12 to 52 weeks, designed to give people with unusual working patterns a more stable holiday allowance.[91] This is good but the impact I fear will be quite minimal. It is certainly not designed to cost companies more, for as the Explanatory Note accompanying the draft legislation states:

> A full regulatory impact assessment has not been produced for Part 3 as it has only marginal, if any, impact on the costs of business, charities or voluntary bodies.[92]

Fairer enforcement

73. This section also has some pretty outlandish statements. For example:

[87] Good Work Plan, p31
[88] See Regulations 8 and 9 of The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018: http://www.legislation.gov.uk/uksi/2018/1378/made/data.pdf
[89] Good Work Plan, p32
[90] Good Work Plan, p33
[91] Good Work Plan, p33
[92] http://www.legislation.gov.uk/uksi/2018/1378/made/data.pdf

> There are two tiers of how employment rights are enforced – by the Employment Tribunal system, and by the state. Matthew Taylor concluded that this two-tier enforcement framework works, but highlighted some concerns - including a sense that enforcement is not as easy as it should be for the worker.[93]

This passage demonstrates, better than any other, how badly Matthew Taylor failed to get to grips with the issues before him. When Taylor wrote his report the employment tribunal fees had not been abolished, and he did not call for them to be abolished in their entirety. And as we have seen above, the state does *not* enforce most aspects of employment law, and it does a poor job of enforcing some of the rights it is supposed to enforce, like minimum wage. Given that when it comes to employment status, enforcement is the main issue, the above statement couldn't be more ridiculous.

74. The Government states that it will increase the limit on aggravated breach penalties from £5,000 to £20,000.[94] These are fines that can be ordered by an employment tribunal for particularly bad employer behaviour. But if the fine accompanies an award of compensation for the worker because the worker wins a claim, the total fine is capped at no more than 50% of the financial award. It is then reduced by a further 50% if paid in fewer than 21 days. So we're still talking paltry sums. But of even more concern is the Government's propensity to focus on policies that have proved relatively useless in the past[95]. For example, between April, 2014 and January, 2017, only 18 aggravated breaches were ordered in the tribunals, 12 of which went unpaid[96]. Indeed the actual use of these penalties fell rather short of the predictions contained in BIS's impact assessment prior to introduction: that aggravated breaches would occur in 25% of cases, resulting in an additional £2.8 million cost for businesses per year.[97] The Government's predictions this time around, contained in the Explanatory Note to the draft legislation, are rather less sanguine:

> In relation to the amendments increasing the maximum level of penalty available for an aggravated breach under section 12A of the Employment Tribunals Act 1996, a full impact assessment has not been

[93] Good Work Plan, p35
[94] Good Work Plan, p38
[95] Use of the Information and Consultation of Employees Regulations 2004 being another example of this.
[96] See: https://www.lawgazette.co.uk/news/employment-tribunal-penalties-falling-short/5059394.article
[97] See: https://www.lawgazette.co.uk/news/employment-tribunal-penalties-falling-short/5059394.article

produced as no, or no significant, impact on the private, voluntary or public sector is foreseen.[98]

75. I have to say, when the Government's press release hails its new policies as the "largest upgrade in a generation to workplace rights"[99], yet we're repeatedly told that no impact assessment is needed as no real impact or cost to business is expected, there appears to be a slight tension, to put it mildly.
76. Further on employment tribunal enforcement, the Government says they will consult with interested parties to bring forward proposals on how tribunals can use sanctions for repeated breaches by employers.[100] I'm totally in favour of this, not least because if we and other unions are going to have to continue doing the Government's job of enforcing the law, we might as well have the tools necessary. But the need for this points to what a dismal job the Government has done with enforcement. The state should be catching employers who break the law and obviating the need for workers to take out tribunal claims. But it's even more embarrassing for the state to recognise that its enforcement regime is not even adequate to deal with employers who *repeatedly* breach the law.
77. The remaining pages deal with state enforcement, however as these overlap with the response to the Metcalf Strategy, I will deal with these below.

UNITED KINGDOM LABOUR MARKET ENFORCEMENT STRATEGY 2018/19: Government Response

78. Metcalf's review made 37 recommendations. Many of these focussed on compliance rather than deterrence, i.e. on how to encourage and facilitate companies obeying the law rather than on penalties for failure to do so. This is no criticism of Metcalf; he is right to focus on both compliance and deterrence. We deal with companies all the time, for example cleaning companies, who deduct wages from workers not because they are trying to steal from them but simply because they are so administratively incompetent that they do it by accident. The line between accidental behaviour and

[98] See: http://www.legislation.gov.uk/ukdsi/2019/9780111177457/pdfs/ukdsi_9780111177457_en.pdf
[99] https://www.gov.uk/government/news/largest-upgrade-in-a-generation-to-workplace-rights-getting-work-right-for-british-workers-and-businesses
[100] Good Work Plan, p38

wilful disobedience starts to blur when one considers the possibility that the reason these companies don't put sufficient resource and effort into compliance is because they have no fear of the penalty. The same administratively incompetent cleaning companies somehow manage to ensure that they complete the right to work checks and are not employing undocumented workers, for example, clearly a reflection of the much more severe consequences of immigration offences[101]. However, this is a discussion for another day. As there is no question that "gig economy" firms are wilfully depriving their workers of rights, my comments here will focus on deterrence measures, and in particular, those which might have the potential of addressing the problem of employment rights in the so-called "gig economy".

Intelligence and enforcement approaches

79. This section states that:

> The Government **accepts** the recommendation that state enforcement should continue to shift to more proactive enforcement methods. The Government is supportive of the three enforcement bodies using more proactive methods for enforcement to complement their existing enforcement approaches and we are pleased with the progress the bodies have already made in this area.[102]

A more proactive enforcement approach is definitely what's needed. But to state what is obvious to anyone familiar with basic arithmetic: if the bodies continue to respond to all complaints, then there will be a limit to how much additional proactive work they can do without more resource.

[101] Namely unlimited fines and a jail sentence: https://www.gov.uk/penalties-for-employing-illegal-workers
[102] Metcalf Response, p15

Reforming current enforcement tools

80. This section contains the most mind-boggling paragraph in the entirety of the Government's announcements this week:

> The Government **rejects** the recommendation that the NMW penalty multiplier is reviewed and increased again to a level that would ensure that there is an incentive to comply with the legislation. The current multiplier is 200% of the value of the National Minimum Wage arrears. This was increased from 100% for arrears prior to April 2016. Enforcement statistics for 2017-18 show that the value of penalties increased to **£14 million** compared with **£3.9 million** the previous year for a comparable number of penalties. The recent increase to 200% is therefore having a significant impact on the value of penalties and reflects HMRC's robust enforcement approach. The Government, therefore, does not believe there is sufficient evidence to justify a higher penalty, given the high penalty levels already now in operation.[103]

This paragraph is as clear an indication as any that this Government is simply not serious about enforcing the law. Following the advice of the expert they chose to advise them could have resulted in both a serious increase in incentives to obey the law as well as a massive boost to funding enforcement, all without any additional budget outlays from the Treasury.

81. The next paragraph is the classic sort of duplicitous language that makes people hate politicians:

> The Government **accepts** the recommendation that the revenue should be recycled into the enforcement system as additional resource. The budget for National Minimum Wage Enforcement activities has more than doubled over the past four years, producing record identification and repayments of arrears to workers. Meanwhile, the revenues collected from the higher penalty percentage charged to

[103] Metcalf Response, p19

> employers responsible for underpayment is returned to the Treasury who finance this budget.[104]

I'd be happy to be corrected, but it doesn't seem to me that the Government is here promising that revenues from penalties will be earmarked for increased budgets for enforcement; which is clearly what Metcalf meant by his recommendation.

82. The Government's proposals on the BEIS naming and shaming scheme are not particularly relevant to the "gig economy". These companies have received far more publicity of their unlawful behaviour than any BEIS scheme could possibly garner, and yet they continue to flout the law.
83. The Government says it agrees that there should be more use of criminal prosecutions and undertakings and orders (which can lead to criminal prosecutions) in England and Wales.[105] However, and bearing in mind the £50,000 cost of a minimum wage criminal prosecution alluded to above, it is unclear how the Government is going to go about increasing prosecutions without considerable additional resource.
84. The Government rejected Metcalf's recommendation that public procurement contracts should explicitly compel compliance with labour market regulations on the grounds that it could "unfairly promote [labour market regulation] compliance over other legislation when we expect compliance with all relevant legislation"[106]. That reasoning sounds like a little teeny porky pie.
85. The Government accepts Metcalf's recommendation that:

> …the three bodies should further develop and embed an evaluative approach to their own processes and systems, making best use of data and information to assess their performance and impact, ensuring they align with strategic enforcement principles, especially in terms of increasing the deterrence effect.[107]

Research and evaluation is a great thing, especially if it will enlighten us with regard to the design of a more effective deterrent. But given that Metcalf produced what is essentially a 140 page evaluation of the current enforcement regime, with evidence-based recommendations on how to improve the deterrence effect, the strongest of

[104] Metcalf Response, p19
[105] Metcalf Response, pp20-1; 23-4
[106] Metcalf Response, p22
[107] Metcalf Response, p23

which were ignored by Government, the acceptance of this particular recommendation does not fill me with hope.

86. The same can be said for the Government's acceptance of the further recommendation that

> …an independent evaluation should be undertaken, by independent academics or consultants, to investigate the overall impact of the three bodies on tackling labour market non-compliance.[108]

New labour market enforcement tools

87. Buried here is what appears to be the totality of new resources promised in this week's announcement: five new employees for the EAS.[109] If the near entirety of the upgrade in employment law enforcement is hinging on these five people, all I can say is that I hope the Government has the most effective recruitment process in the history of the world.
88. Also in this section is another disappointing rejection:

> The Government **will not be taking forward at this time** the recommendation that, where appropriate, employers found to be non-compliant should be charged a fee for intervention to allow the enforcement bodies to recover some of their enforcement costs but will keep this under review.[110]

It is difficult to understand the rationale for rejecting measures which not only increase the deterrence effect, but which also would contribute to funding enforcement efforts without any additional budget outlays from the Treasury. The Government's excuses; namely that this sort of regime might risk the "integrity" of the enforcement bodies, or create perverse incentives for the bodies to pursue companies on the basis of fee generation[111], simply don't add up. The whole point of the recommendation is that non-compliant firms fund the cost of enforcement against

[108] Metcalf Response, p23
[109] Metcalf Response, p25
[110] Metcalf Response, p25
[111] Metcalf Response, p26

them. It's hard to conceive of how an incentive to take enforcement action against non-compliant firms could be "perverse". Surely the aim should be that action is taken against all non-compliant firms?

89. The Government's response to Metcalf's proposal on supply chains perfectly illustrates the point that it's a tactical mistake to propose meek and mild reforms in the hope that this Government would be more likely to implement those reforms than the bolder ones necessary to achieve actual change. Metcalf stopped short of calling for joint and several liability as desired by the unions, and instead called for joint "responsibility"- essentially naming and shaming heads of supply chains when they don't take appropriate action regarding employment law breaches of their suppliers. The Government responded by watering it down even more, saying they envisage

> …an approach whereby the enforcement body could privately notify both the supplier and the head of the chain. This could enable the head of the chain to work with the supplier to take corrective action. The Government will consult on this and how to address non-compliance in supply chains, working with business, trade unions and the enforcement bodies before responding to this recommendation.[112]

Indeed, this approach typifies much of the Metcalf and Taylor reviews and the Government's responses to them.

90. The Government's response on holidays is the most interesting. The Government accepts that it should start enforcing the right to paid holidays for "vulnerable workers". However, it does not define what a "vulnerable worker" is. Further, with the exception of suggesting that EAS and GLAA should enforce holidays in the situations that fall within their respective remits, the Government does not identify which enforcement agency will be responsible for enforcing holidays for vulnerable workers across the board. Needless to say, neither is there any additional resource allocated for it.[113] Finally, there does not appear to be any plan for how the enforcement of paid holidays will be any less pathetic than the enforcement of minimum wage.

[112] Metcalf Response, p27
[113] Metcalf Response, p31

91. The decision to modestly expand the remit of the EAS to cover umbrella companies[114] is a baby step in the right direction (the destination of course being full state enforcement of all employment law).
92. However, we're immediately back to the Government's modus operandi with its refusal to enforce the Agency Worker Regulations (AWR) 2010. It's rationale is rather characteristic of its general approach to enforcing employment law:

> The Government is concerned that expanding EAS's remit to cover the Agency Worker Regulations 2010 (AWR) would represent an unreasonable expansion of its role. EAS are currently focused on employment businesses and agencies (and will have their role expanded to cover umbrella companies). They are able to take effective compliance and enforcement action in this sector. Expanding their remit to the AWR would bring every business in Great Britain that uses agency workers within their scope for investigation and require them to encompass a much broader set of employment rights. This would be a radical shift in their operating model which would risk their ability to take effective action. We will therefore not expand EAS's remit to include enforcement of the Agency Worker Regulations.[115]

Put another way:

> *We don't want too much employment law to be enforced. Some regulations are better left completely unenforced by the state lest it create too much hassle for business. Enforcing the law is a concept far too radical for the employment law enforcement agencies to handle. In any case, the EAS would probably be overwhelmed by such a big expansion of their scope and wouldn't be able to cope with the meagre resources we've given them. We won't give the EAS or the other agencies the resources or mandate necessary to effectively enforce employment law across the board because we simply don't care.*

[114] Metcalf Response, p 32
[115] Metcalf Response, p33

Address:
Independent Workers Union
of Great Britain,
First Floor Office,
12-20 Baron Street,
London, N1 9LL

Email:
office@iwgb.org.uk

CONCLUSION

93. Honourable Members, I trust that upon reading the above you will agree with me that the Business Secretary's failure to deal with exploitation in the so-called "gig economy" is of monumental proportions. He is basing his minimal employment law reforms upon the Taylor Review whose author was equally not up for the task at hand. Far from being a manifesto for necessary and effective change, it is wholly inadequate for the task at hand.
94. The Government did somewhat better with Metcalf, but the Business Secretary has chosen to reject the small number of recommendations that might have a real impact on exploitation in the so-called "gig economy". It is almost as if the Secretary doesn't want enforcement to actually be effective, he just wants a headline saying it is.
95. Either way, this week's announcements amount to little more than extra-parliamentary pantomime and will not effectively deal with the problem of employment rights in the so-called "gig economy". A problem the resolution of which was in the Tory Party manifesto and which this Government has promised on multiple occasions. The responsibility of resolving this problem falls under the brief of the Secretary. Although Brexit is all-consuming, it is important not to forget that Government ministers and secretaries have other responsibilities as well, and should be held to account when they do not perform. For this reason we ask that one of the 650 of you propose a motion of no confidence.

Yours sincerely,

Dr. Jason Moyer-Lee

General Secretary

Independent Workers' Union of Great Britain (IWGB)