

# REFORMING EMPLOYMENT STATUS

Building a stronger  
foundation for  
employment rights

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# Reforming employment status: building a stronger foundation for employment rights

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## Acknowledgements

This report was written by Duncan Brown and Jenny Holmes of the Institute for Employment Studies (IES) for the CIPD.

IES is an independent, apolitical, international centre of research and consultancy in public employment policy and HR management. It works closely with employers in all sectors, government departments, agencies, professional bodies and associations. IES is a focus of knowledge and practical experience in employment and training policy, the operation of labour markets, and HR planning and development. IES is a not-for-profit organisation.

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## Executive summary

How to clarify and simplify employment status was one of the key areas of focus for *Good Work: The Taylor Review of Modern Working Practices*.<sup>1</sup> But it is the issue amidst more than fifty recommended actions where least progress has been made since 2017.

Nobody disputes that the current situation, with three main categories of status for employment purposes and two for taxation, is confusing. But beyond the need for simplification, there is no obvious agreement on the best means of achieving this.

The Good Work Plan<sup>2</sup> published in late 2018 did promise that '*the Government will bring forward detailed proposals*' on status. But over a year and a half later, we still await them.

Of course, COVID-19 has dominated the Government's attention since March this year, but the pandemic has also underlined the precarious situation of many in low-paid work, of whatever status, as well as the risks of losing employment rights through deliberate or mistaken misclassification.

The Government's ambition, set out in the Queen's Speech in December 2019, to '*build on existing employment law with measures to protect those in low-paid work and the gig economy*' also suggests that employment status is likely to return as an issue of interest to policy-makers once the immediate crisis has passed.

Against this backdrop, the purpose of this CIPD discussion paper is to:

- further investigate and detail the various issues and problems evident in the current situation regarding employment status
- consider evidence as to what would be the most effective and viable methods of simplification and reform, including the abolition of 'worker' status
- make recommendations to Government on employment status simplification and inform and influence the debate on this challenging issue.

## Stakeholder views

This discussion paper has been informed by a series of interviews and group discussions with key stakeholders. These have included HR directors from both digital platform and traditional companies, employment policy experts, employment lawyers and HR advisers.

- Our interviewees unanimously regard addressing employment and worker status as an important and unresolved aspect of the Taylor reforms that should be progressed urgently.
- Most see no strong rationale for employers to use worker status, nor for employees to want to be on it, other than as a route from self-employment to employment.
- Interviewees all supported aligning employment law and tax aspects of status.
- The majority favour doing this on the basis of the two category definitions of employed and self-employed, although some favoured three categories for the advantages of a flexible 'middle ground', and some are neutral.

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<sup>1</sup> Taylor, M. (2017) *Good Work: The Taylor Review of Modern Working Practices*. London: Department for Business, Energy and Industrial Strategy.

<sup>2</sup> BEIS. (2018) *Good Work Plan*. London: Department for Business, Energy and Industrial Strategy.

- The improved definition and tool for determining IR35 tax status was generally seen as providing further support for moving to the aligned, binary definition for employment purposes (perhaps supported by a similar tool on employment status).
- Most supported other actions to better protect the self-employed and increase flexibilities for employees, as well as reducing the incentive to misclassify employees by more closely aligning tax/NI rates. The need for a wider review of taxation and benefits was also referenced.
- Interviewees all emphasised that there would need to be a major and sustained communications campaign to spread awareness of the new, simpler categorisation.

### Literature review

This paper has also involved a rapid evidence review on employment status, incorporating both academic research studies and 'grey' management literature. This review also draws on learning from comparative research internationally.

The review highlights a number of issues under the current UK system:

- the major mismatch between having two statuses within tax law but three within employment law, creating risks and negative effects for all parties – legal risks for employers, loss of rights for people, loss of tax revenues and additional welfare costs for government
- negative consequences for job quality, affecting individuals' health and wellbeing, employer and national productivity
- difficulties in legal enforcement.

The review of the literature shows all countries examined have experienced the issues of growing flexibility of employment models and the challenges this poses in categorising people for employment and tax purposes.

Generally, in the other jurisdictions there is a binary split between employment and self-employment, with an alignment of tax and employment status on this basis. There are also good examples of the use of non-court status verification mechanisms, including online checkers internationally.

Governments are now generally moving to provide greater working flexibility to employees, while improving the rights of those in precarious work, producing more of a 'level playing field' between the employed and self-employed.

The research suggests that the UK could produce an improved approach by learning from overseas practice and addressing the current categories.

### Policy recommendations

The CIPD's [research](#) indicates that the current employment rights framework in the UK supports a labour market that strikes a decent balance between flexibility for employers, and job opportunities and employment security for individuals.

However, this review suggests that the three categories of employment status undermine people's employment rights and cause confusion for both individuals and employers.

It is an overly complex framework, with an excessive reliance on the individual to navigate the confusion, and to try to seek redress if necessary through an overworked tribunals system.

The evidence presented here demonstrates that the negative impact of this dysfunctional situation now outweighs the risks of change. Up to 15% of self-employed are wrongly categorised at the moment, with the most vulnerable being most likely to be misclassified

and denied their rights. The loss of rights from employment status confusion has become even more acute in recent months.

Therefore, the CIPD believes this situation has to be urgently addressed. Based on this evidence, the specific reforms recommended by the CIPD are as follows.

### Summary of proposed policy changes

Change proposed
1. Abolish worker status.
2. Form an expert stakeholder commission to define employed and self-employed categories.
3. The commission should develop a statutory definition of the binary categories.
4. Development of non-statutory guidance and indicative tools on status, informed by the commission and produced by Acas and other relevant bodies.
5. Make control the main determinant of status, with other relevant criteria in non-statutory guidance.
6. Move existing workers to employed status, unless proved otherwise.
7. Switch the legal presumption to being an employee, unless proved otherwise by the employer.
8. Move to greater alignment of taxation and benefits between the self-employed and the employed.
9. Give the new Single Labour Market Enforcement Body the role of resolving disputes in status, with tribunals used only for appeals against their decisions.
10. Increase Acas's budget to enhance its information, guidance and support on employment status – with enhanced powers of mediation in status disputes. Acas could also provide small firms with a free annual HR audit (MOT) that could help protect against financial liability regarding employment status at any tribunal claim. This would need to be consulted on and developed.
11. The Government should run a 'Know your rights' information campaign to support the abolition of worker status, in conjunction with employer and professional bodies, Acas, trade unions and the Citizens Advice service, with ongoing communications thereafter.

## Introduction: why employment status?

### Context

#### Taylor Review and the Good Work Plan

How to clarify and simplify employment status was one of the key areas of focus for [The Taylor Review of Modern Working Practices](#). But it is the issue where least progress has been made since its publication in 2017. Employment status was one of the four government consultations launched following Taylor's review, but this did not lead to any proposals for reform in the Government's subsequent [Good Work Plan](#) published in December 2018.

This issue of employment status is tucked away amidst the 50-plus reforms proposed there, with but a brief reference acknowledging the issue:

*In order to address recent disagreements around the employment status of individuals, particularly those in new and emerging work arrangements, the law needs to be more transparent. ... Having a separate framework for determining employment status for the purposes of employment rights and tax adds to the confusion.*

The Good Work Plan did promise that 'Government will bring forward detailed proposals on how the frameworks could be aligned.' However, over a year and a half later, we still await them. Of course, there has since been a change in Government with different priorities;

however, the impact of the pandemic on employment security and the renewed debate over tax, employment status and associated benefits mean the issue is more important than ever.

Taylor's original report considered how to define more clearly who is covered by the three main types of employment status – self-employed, worker and employee – and the associated employment rights and benefits. His review heard evidence that the current employment status framework and the rights of individuals under each status are difficult to understand, especially for people working in atypical ways and for smaller employers.

A key issue is the difficulty in defining who falls under which category, with a 'grey area' over how to distinguish between self-employed and worker status in particular. The only method of recourse in the event of disagreement currently is for the individual to make a claim for wrongful status and denial of employment rights into an already overburdened employment tribunals system. A [CIPD survey](#) found a majority of gig economy workers don't know what their rights are, and 40% don't know where to go to register a complaint.<sup>3</sup>

Taylor himself was of the view that while simplifying and improving the communication of employment rights and benefits is essential, the intermediate 'worker' status between the full employment and self-employed provides an additional flexibility that could benefit employers and those people wanting a more flexible form of working (but see below). Providing both parties fully understand the status and the mutual commitments and employment rights involved, this could be helpful. But that level of mutual understanding is a big assumption in many situations.

Others, including the CIPD, who [responded to the consultation](#) in June 2018, favour the removal of the worker status and alignment of the resulting two categories for both employment and tax purposes.

### COVID-19 pandemic and its impact

The Good Work Plan, and the Government's Employment Bill enshrining many of the Good Work reforms have not progressed as they might have done because of the COVID-19 pandemic. Once this crisis recedes, attention will hopefully return rapidly to implementing the Government's plans, outlined in the 2019 Queen's Speech, to '*build on existing employment law with measures to protect those in low-paid work and the gig economy*'.

Therefore employment status is almost certain to re-emerge as a key public policy issue.

COVID-19 and the Government's response to it, including the [Coronavirus Job Retention Scheme](#) to help protect employees from redundancy, as well as similar protection to cover the earnings of the [self-employed](#), have further highlighted the inconsistencies and confusion in the definitions of the different types of paid work. This is particularly evident at the lower-skilled and lower-paid end of the labour market as well as in the associated taxation arrangements.

In announcing the Self-Employment Income Support Scheme, the Chancellor made it clear that he plans to tax labour more consistently, saying '*it is now much harder to justify the inconsistent contributions between people of different employment statuses. If we all want to benefit equally from state support, we must all pay in equally in future.*'<sup>4</sup> This could hopefully

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<sup>3</sup> CIPD. (2017) [To gig or not to gig? Stories from the modern economy](#), London: Chartered Institute of Personnel and Development.

<sup>4</sup> Sheridan, D. (2020) [Rishi Sunak unveils bailout for self-employed, but admits it will not be available until June](#). *The Telegraph*, 26 March.

reduce the incentives for employers and individuals to deliberately misclassify status to lower their tax burden.

The crisis has also highlighted the lack of general protection and welfare provisions available to the self-employed. The number of self-employed and so-called 'gig workers' in the UK has grown by over 50% in the past 20 years to around 5 million, with some employers possibly pushing workers into (and misclassifying them as) this form of work.

The Independent Workers Union of Great Britain (IWGB) in May 2020 launched legal action against the Government to secure health and safety protections for gig workers. The union argued that the Government has failed in its obligation to transpose health and safety directives from EU law into UK law. UK health and safety law only protects employees, but EU law extends these protections to all those classified as workers. A 'worker' in EU law is defined as someone who does work under the direction of another in exchange for remuneration. In UK law, this is usually covered by applying rights to 'limb (b) workers', that is, the third intermediate UK status who are entitled to basic rights, such as minimum wage and holiday pay (see **Literature review and findings: what does the research tell us?**).

A series of tribunal and court rulings in the UK against 'gig economy' companies such as Uber, City Sprint and Hermes have found that their self-employed drivers in fact fall under this worker category. Losing this claim would force the Government to extend health and safety protections to all 'workers', mandating these employers to provide them with the associated rights and benefits.

Here again, we have the dichotomy of this confusing third 'worker' category in the UK. On the one hand it is a complex category to define, risking the loss of employment rights and entitlements if people are wrongly classified as such. On the other hand, there have been advantages to various trade unions of using it to secure at least some protections and benefits for those mistakenly or maliciously classified as self-employed by their employers.

The pandemic has also highlighted the economic insecurity and poverty of millions of low-paid people, irrespective of their legal status. Over 5 million employees and workers earning the minimum National Living Wage (NLW) have only statutory sick pay (SSP) at £96.85 per week to fall back on if they are sick or need to self-isolate (with the Chancellor's welcome, if temporary, employer rebate introduced in his package of COVID-19 measures). Many female, part-time workers don't even qualify for SSP as their earnings fall below the minimum earnings limit. A [recent House of Commons paper](#) notes that *'there are concerns over what will happen to the estimated two million low-paid and casual workers who do not qualify for SSP'*.

[Data from the ONS](#) shows that low-skilled, low-paid workers, many performing key roles during the crisis, have suffered disproportionately, both health- and job/income-wise, from the pandemic and associated lockdown. Thus, the loss of any rights and benefits from employment status confusion has become even more acute in recent months.

Consequently, the crisis has further increased the pressure for necessary reforms in employment status and to better protect those in low-paid and insecure employment. CIPD CEO Peter Cheese told *People Management* optimistically that he believes this will *'force us to confront inconvenient truths about the insecurity of work'*.<sup>5</sup>

Mathew Taylor similarly told the magazine that he is hopeful COVID-19 will add impetus to his agenda: *'The crisis has led us to recognise the importance of jobs that might previously*

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<sup>5</sup> Jacobs, K. (2020) [Has coronavirus brought a new normal?](#) *People Management*, 23 April.

*have been seen as low status as well as low paid. ... These jobs have proved enormously significant to maintaining our day-to-day lives.'*

He called on the Government's forthcoming Employment Bill 'to be bold' in areas such as employment status and protections for casual workers. He confirmed he wants the self-employed to be taxed at the same rate as PAYE, with the additional revenue used to provide them with sickness insurance and incentives to train or save for retirement. This could even include a minimum basic income: *'Security – and dignity – would be significantly enhanced if every citizen had the means to basic subsistence as a right.'*

Employment status is therefore far from a minor legal detail in the creation of a better world of work for all in the post-COVID future. It is a critical piece in the job-quality jigsaw that will enable it.

According to former Uber driver Yaseen Aslam, who jointly brought the original employment tribunal case against Uber, *'[t]he stakes could not be higher for everyone'*. Aslam claimed he and other drivers classified as self-employed were in fact workers. [With Uber's final appeal](#) against that judgment currently before the UK Supreme Court, he argues overturning the original verdict would see *'an unseemly rush by greedy employers to collapse employment as we know it and Uber-ise the entire economy'*.<sup>6</sup>

IWGB President Henry Chango Lopez said: *'With this case we will start to reclaim some of the basic rights that are being routinely denied to these workers.'*

## Stakeholder roundtable and interview findings: what do people think?

### Introduction

The purpose of this stage of the research was to explore and develop with a group of key stakeholders:

- the rationale for employment status reform and simplification stemming from the issues and problems currently evident.
- the pros and cons, benefits and costs, of simplification by removing the intermediate 'worker' status category.
- recommendations on change for government, while taking account of any changes during the pandemic.

The stakeholders included HR directors from both platform and traditional companies operating in the gig economy, as well as more traditional employers of low-paid workers; employment policy experts from employer, small business and employee representative bodies; employment lawyers and HR advisers; and also Mathew Taylor himself. Details of the steps taken in this stakeholder research can be found in the **Methodology** section of this report.

A very wide range of perspectives, roles and experiences was evident, with a rich and varied narrative of views, information and ideas obtained.

In this section we summarise the most commonly held views and highlight key areas of difference. There was a perhaps surprising level of agreement on many of the key issues

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<sup>6</sup> Booth, R. (2020) [Uber drivers' fight for workers' rights reaches UK Supreme Court](#). *The Guardian*, 21 July.

and best ways forward to address them, even if there were differences evident on using two or three employment status categories as the best approach in future.

The views described here are those of interviewees, not necessarily those of the CIPD or IES.

### Roundtable findings

The contributors to the stakeholder roundtable produced a well-balanced set of arguments, both in favour of and against the abolition of worker status.

James Davies from Lewis Silkin led consideration of the arguments of those who favoured abolition of the worker status, on the grounds of:

- Simplicity of the straight employee and self-employed definitions in order to clarify the distinction between them and reduce the confusion.
- Aligning the employment and tax definitions.
- Small business in particular doesn't understand the three-way categorisation, increasing their chances of unwittingly breaching employment or tax regulations.
- Few other countries having the three categories.

Marc Maryon from Eversheds led the arguments of those in favour of retaining three categories, but better defining, communicating and applying them, on the rationale that:

- It gives an element of additional protection and benefits to people who would otherwise be self-employed (although they might be employed, too, of course).
- Some people like this intermediate status and, as Taylor said, it does afford a grey/flexible category where minimum employment rights are upheld, like his Saturday staff for weddings at the RSA.
- 'Simple is hard' – two categories might only increase the incentive for employers to deliberately 'game' the system, even if the number of cases caused by confusion and error would decrease.
- The hybrid solution implemented at Hermes, with certain benefits like holidays provided for their self-employed drivers, both illustrates the fast-evolving nature of this situation and suggests that this intermediate status might come about 'naturally' if the third employment category wasn't there for it (even though the Inland Revenue's apparent acceptance of this as not putting their contractors in an employed situation is surprising and could of course be challenged in the future).
- Changes to section 1 of the Employment Rights Act 1996 (which came into force in April 2020) mean that workers as well as employees now have the right to a written statement of their working terms and conditions on day one of employment. In addition, [voluntary good employment and work charters](#) developed in various locations, including London and Manchester, can help boost awareness and understanding of employment rights and status.
- More of the proposed new [Single Labour Market Enforcement Body](#)'s resources could also then be better focused on enforcing the current three-way situation
- Taylor mentioned that one of the advantages of the three categories is that you would keep having Inland Revenue resources focused on at least some aspects of enforcement [in relation to status](#) (although there are only two definitions for tax purposes).

Taylor indicated at the March roundtable that he was now reasonably indifferent on whether there were two or three categories going forward, as long as definitions for tax and employment purposes were aligned and the boundaries completely clear. He also argued for more of a 'level playing field' across the categories in terms of employer and employee/worker/contractor contributions and benefits, with the coronavirus situation again highlighting the current confusion, differences and difficulties (although [Chancellor Philip Hammond's attempts](#) to do this in 2017 backfired badly and were dropped).

Whatever people's starting positions, there was perhaps also a surprising level of agreement evident at the end of this roundtable meeting on what is required going forward:

- There needs to be alignment of the tax and employment categories and definitions (which is perhaps a strong argument to move to the simple two-fold classification).
- There does need to be greater alignment of taxes and benefits for the employed and self-employed, to reduce incentives for employers to put employees off-payroll.
- Clearer definitions and tests are needed – the IR35 online test we heard is improving and will be further honed in the 12-month delay period due to the pandemic.
- Better communications, guidance and education for employees, workers and employers on the categories and associated rights and benefits, has to occur.
- Employers should provide more genuine flexible working arrangements for employees, supported by the likely legislative move to make [flexible working the default](#) option unless employers can prove otherwise.

But there was not agreement, ultimately, on the 'two or three categories' question; and there was not time to give greater consideration of the detail as to how this 'solution' might be implemented. The follow-up interviews were designed to provide more detailed insights and address some of the key issues that were generated by the roundtable discussion.

### Interview findings

The roundtable was followed by in-depth one-to-one interviews during the lockdown period with roundtable participants, plus other experts not involved in the original discussion.

The feeling across all interviewees was that the issue of employment status has become even more important given the experience of the pandemic, both because of the evident need to better protect those at the bottom end of the labour market hardest hit by COVID-19, and also because other aspects of the Good Work agenda may become more challenging to implement in the recessionary months ahead.

Interviewees generally knew the area well (nine participated in the roundtable) and so they tended to focus on the subjects where they had most experience and felt most strongly.

The key areas covered were as follows.

#### Current situation: what's the issue?

- *'The problem is complexity and confusion resulting from the different categories and rules for employment and tax purposes.'*
- *'Many people may not be fully aware of the rights they are entitled to claim; and in some cases they may be deliberately being denied them.'*
- *'Nobody understands it outside of HR departments and employment lawyers.'*
- *'There is lots of misunderstanding.'*

- *'It's a mess at the moment and needs sorting out.'*
- *'We need to stop employers using the current categories and confusion to misclassify people so that they lose their employment rights and protections.'*
- *'Too much uncertainty and the only recourse available is to an already-overloaded tribunals system.'*

The most significant problem resulting from worker status is the confusion and misunderstandings it creates as to people's employment status, according to interviewees, particularly the way in which it clouds the differentiation between employed and self-employed status, which itself has proved not to be straightforward for tax purposes in the past. It also, as everyone pointed out, fails to align with the two tax categories on this basis.

In fact, irrespective of their preference for two or three categories in future, aligning tax and employment categories was seen as more critical than the number of them by most interviewees:

- *'The key issue is addressing the definitions and confusion, rather than whether you have two or three categories.'*
- *'It's confusing and leads to unintentional law breaking, as well as providing an incentive for avoidance through public service companies and bogus self-employment.'*

Interviewees struggled to understand the motivation and rationale for why employers would want to use, or individuals would want to be employed, on worker status. Their perception generally was that it was only large employers who were using it, and that even then, many of the flexibilities and cost-effectiveness of using workers could be better obtained from the flexible use of employees, for example on zero-hours contracts, or contracting the work out to self-employed people or freelancers:

- *'It's only used by big companies with HR departments.'*
- *'I never met anyone asking to be a worker.'*
- *'It doesn't have a long history – get rid of it and continue to make employment more flexible.'*

The general perception was that the main attraction (and risk) of worker status for employers is that it offers a way to employ staff on a more flexible and lower-cost basis (in some cases genuinely, in some cases not). Now, with the tribunals and courts called on to clarify the situation in a sequence of recent cases, it was a route for self-employed workers to achieve more security and certain employment rights and benefits by claiming this employment status, as we have seen in the recent run of cases against Uber, Hermes, and so on:

- *'Small business owners have never heard of it and never use it. That represents a huge legal risk given recent tribunal judgments.'*
- *'There are too many grey areas left to the tribunals to define.'*
- *'You are afraid of getting caught out.'*

However, some interviewees did see the **advantages of an intermediate 'middle ground' of flexibility and security** for employers and workers, especially working women, providing it is defined clearly and aligned with the structure and appropriate level of taxation. This would be particularly relevant if the rights and protections of gig self-employed workers are not improved in the aftermath of the pandemic:

- *'It was driven partly by the inflexibility of employment rights, such as the Working Time Directive.'*
- *'We have to recognise the trade-off between employment rights and costs and our international competitiveness, especially with Brexit approaching.'*
- *'People need security – but they also value more flexibility.'*

The majority of interviewees felt the desired improvement in job quality, earnings and security for low earners would be better addressed by improving protection and providing some benefits for gig workers (by state and/or employer programmes). In tandem, this could be supported by increasing the flexibilities and by extending and better applying the rights already available within employed status, to maintain and enhance the UK's labour market flexibility and competitiveness.

As such, 'worker' is seen as an employment status category and choice with **almost no upside** according to the majority of interviewees. The consensus was that there was neither a clear rationale nor definition for 'worker' status; furthermore, it was associated with significant risks and disadvantages.

One employer interviewee mentioned that their organisation would have considered using it if the status was clearer: *'If you search for material on worker status, what it is, why it is there, what it covers, you find remarkably little compared with the volume on employment and self-employment. Yet it's the category that people understand the least.'*

Only a few interviewees mentioned the problems of worker status for workers themselves. However, research has shown significant levels of illegal under-provision/claiming of rights such as holiday pay. However, all described the risks to employers, particularly to SMEs, an area highlighted by those interviewees with experience of working with small businesses and their owners. While all interviewees favoured improved definition and communications to address this challenge, there was still no consensus on moving to two categories in the future.

Generally, the interviewees held that **small business owners are not aware of and don't use worker status**. But due to lack of in-house HR and employment law knowledge, they can be particularly **at risk of claims for worker status**, for example by a self-employed stylist against a hairdressing business (cited by one interviewee).

In terms of individuals being wrongly categorised and potentially being denied their employment rights and benefits (as well as the Inland Revenue being deprived of employers' NI contributions), interviewees held this occurs for two main reasons: first, due to deliberate manipulation and law-breaking by some employers; and second, because of confusion and misunderstanding of worker status by other, particularly smaller, employers.

Some interviewees cited examples of unscrupulous employers, for example inserting a right of substitution into contracts to defeat arguments over worker status, and all were interested in finding out more about the Hermes changes in offering benefits to self-employed workers. But platform companies were seen, as with any other category of employer, as a mixture of 'good' and 'bad'.

A number of interviewees pointed out that working people could be exploited, underpaid and insecure in all three employment categories, for example by being employed on a poorly managed zero-hours contract. But most felt that improvement of rights and protections across all categories of individual providing work for an employer would be easier to achieve if there were just two categories: 'employed' and 'self-employed'.

*We need to better protect the low paid on insecure contracts, whatever their status. But this simplification and clarification of the situation (by moving to two categories) has got to be worthwhile in contributing to that.*

The poorly understood positioning of worker status, combined with the lack of alignment with taxation, was seen as **a major contributor to the current problems**. The confusion and errors on the part of some employers also enabled unscrupulous employers to manipulate this ‘fog of confusion’ to their financial advantage.

Interviewees didn’t see addressing employment status as a crucial means of improving pay and conditions for people working for low pay and with poor security. Other aspects of the Good Work proposals were seen as more important levers to achieve this aim. Nonetheless, interviewees felt the issue was a key source of confusion as well as a cause of deliberate and mistaken law breaches. Therefore, it’s important for Government to address employment status (and for the CIPD to lobby for the change required). Further, most felt reform of employment status would not be particularly difficult to achieve compared with some of the other Taylor proposals.

**IR35** was seen by the majority as further justification to support the removal of worker status and alignment of tax and employment definitions as ‘employed’ and ‘self-employed’. IR35 was described as initially problematic, causing an over-hasty shift to only using employed workers and ending work for contractors in some big companies.

However, the combination of an improved online testing tool for IR35 and the year’s delay on implementation because of COVID-19, led most to feel that this was now a justification for the move to two employment categories, rather than a barrier to doing so:

- *‘IR35 is a step in the right direction.’*
- *‘What we need is an IR35-type tool for differentiating between the three employment categories and aligning that with the tax treatment.’*
- *‘Defining and enforcing employment rights is key; we don’t want taxation to drive it.’*

#### **Impact of proposed Good Work reforms**

- *‘Addressing worker status is important because of its negative effects at the moment.’*
- *‘Bizarrely, Taylor was told not to look at tax.’*

The interviewees were universally fully supportive of the Taylor Review proposals and the resulting Good Work Plan.

Some interviewees would have preferred Taylor to go further on worker status and recommend the abolition of this third category, rather than ‘sitting on the fence’, as one interviewee commented. However, a number saw some of his other proposals, for example on job quality and flexible working, as potentially making a more significant contribution to ‘good work’ and good pay and conditions. Nonetheless, all supported his proposals and agreed that:

- The definition of ‘worker’ needs to be clearer and more consistent.
- Those working with SMEs, in particular, supported Taylor’s proposal for more emphasis on control and mutuality, rather than on substitution as is currently the case in defining the relationship between an employer and a worker (or ‘dependent contractor’ as Taylor proposed renaming the category).

- Government should legislate to improve the clarity of the employment status tests, as is being achieved with taxation through IR35.
- Work is needed to reduce to 'an absolute minimum' the differences between tests for employment status in the tax and employment law systems.

Our interviewees were supportive of the other proposed Good Work Plan reforms, with the proposals on flexible working, right to a stable contract and the single labour market enforcement agency mentioned most often by them.

There was support for both greater protection and security for the self-employed (for example, through enhanced statutory sick pay protection and even unfair dismissal rights), as well as better terms for employees on zero-hours contracts, continuing the moves to a higher NLW, rights to stable work and flexible working. Some said that the pandemic had highlighted the need for these reforms to go further, with a right to flexible working, rather than to request it; and to meaningful representation rather than the perceived to be relatively weak method of a nominated director, required now:

- *'There is clear logic, enhanced by the pandemic, of giving the self-employed more security and providing more flexibility in employment.'*
- *'Improved employee involvement and bargaining rights will be key to enforcement.'*

#### Impact of changing worker status

- *'Move to a simple approach: you are employed or you are self-employed. Easy!'*
- *'Put it this way, it wouldn't be missed if it wasn't there!'*
- *'Why make life complex – on the continent it may be less flexible at times but it's clear and consistent for all parties.'*
- *'It's ironic that Government has promoted a "removing red tape" agenda but not taken action on this.'*
- *'HR can spend less time on employment law and disputes and more on HR strategy and partnering with the business.'*

While not unanimous, the **majority of our interviewees favoured removing worker status** and aligning employment definitions with an extended version of the existing two-fold categorisation for tax purposes of 'employed' and 'self-employed' people. This was seen as the simplest way of achieving consistency and clarity in the definitions.

Across the eleven interviewees, seven were in favour of moving to two categories, two favoured retaining worker status on a clearly differentiated basis, and two described themselves as 'fence-sitters'.

The two interviewees favouring the retention of three employment status categories nonetheless felt that the taxation categories needed to be changed to align with this and reflect the levels of investment made by the employer in each of these categories, that is with a different level of tax on organisations for employing workers: *'I can see the worth of an intermediate position, but it needs to be much clearer and well-defined.'*

For some of our practitioner interviewees **this was not seen as a major, nor a particularly difficult, change to make**. The rationale for it, as well as the confusion and lack of alignment between employment and tax categories, are all relatively obvious and accepted. Further, given there are existing definitions for taxation, the actual task of achieving it was not seen as onerous. For others, however, particularly those with a good knowledge of employment law, the task of defining the two categories and boundaries between them was

regarded as a complex one, probably requiring some type of expert group or commission to work together on it, and possibly supported by an Acas code of practice.

For example, while Taylor and the government proposals mention shifting the burden of proof on self-employed status away from substitution and more towards considerations of control, others felt that reliance on any single factor risked manipulation and abuse by unscrupulous employers. Some felt that the burden of proof should fall on employers, with an assumption of full employment status unless it could be proved otherwise.

However, this change was regarded as **one of the most straightforward and beneficial of the Taylor reforms to implement** from a cost–benefit analysis perspective. Some of the other proposals have the potential for a much greater impact on improving people’s living standards and security, but many of these were also seen as being more difficult and expensive to implement, especially given what is likely to be a recessionary and severely cash-constrained context, for employers and in the country generally:

- *‘BEIS and HMRC are not working together, and never have done which is disappointing and lies at the root of the problem, whether you argue for two or three categories in future.’*
- *‘Get BEIS and the Inland Revenue together in a room with some legal experts and they should be able to work out the two categories and aligned definitions.’*
- *‘By itself it’s not earth shattering, but with a better-funded enforcement body able to determine the simpler status categorisation it can have a major beneficial impact for an over-stretched system of justice.’*

The main advantage of reform would, according to the interviewees, be a much clearer understanding by employers of the basis on which they were contracting people and their associated rights and costs. For individuals, it should also result in a much clearer understanding of the rights and benefits associated with their status. The simplification to two categories and alignment of the tax and employment regimes were also seen as significantly reducing the scope for illegally manipulating status definitions to reduce costs and taxation through bogus self-employment: *‘We need to break the myth that employment is always an expensive option.’*

Some commentators contend the main disadvantages of removing worker status would be the risks it could reduce the flexibility of work for both employers and individuals (particularly working mothers), as well as potentially resulting in more workers becoming self-employed with the consequent loss of worker rights, such as holiday pay.

However, the interviewees were generally optimistic that employers have made significant progress in extending flexible working in recent years, and that other Good Work proposals would rightly extend flexible working rights. Further, the pandemic had produced an *‘irreversible shift’* towards greater home and flexible working among many employers, as one interviewee commented.

The interviewees were generally supportive of the provision of improved security and protection for gig workers and the self-employed, for example through more employers following the lead of Hermes and their ‘self-employed plus benefits’ package, and/or by government schemes for enhanced sick pay, as well as either voluntary or compulsory insurances and pensions for the self-employed. A number mentioned positively the improvements in state-funded protection made by the Chancellor for self-employed people during the pandemic; they also supported his reference to continuing with improved

protection benefits post-pandemic, which would be funded by higher rates of national insurance likely to be levied on the self-employed subsequently.

### **Additional changes required**

- *'The pandemic has highlighted the need to improve gig worker terms and security.'*
- *'There's a huge education piece whichever way you go on this.'*

Few of the interviewees had considered in detail how the existing workers would be reclassified under a new dual categorisation. One interviewee proposed a categorisation based largely on the level of skill, power and control of the individual, with:

- skilled professionals providing their personal service (such as musicians) clearly self-employed, and
- lower-skilled, often non-unionised and female workers, such as cleaners and carers, to be defined in the default position as employed.

Another interviewee favoured employment becoming the default category for all workers, with the burden of proof on the employer to show that someone working for them is self-employed in a new binary categorisation.

Nor had most of the interviewees considered in any detail any funding implications of the change from three to two categories from a tax perspective. Indeed, most felt that this would be a cost-neutral change for government to make in terms of the total tax take and implementation costs, and cost-neutral for individuals, given that workers are already taxed like employees for tax purposes, which the majority of them would now become.

However, most favoured **establishing a 'level playing field'**, or perhaps a 'leveller' playing field, for tax purposes by increasing National Insurance for self-employment in return for improved security and protection. This would reduce the incentive for employers to deliberately misclassify employees as self-employed to avoid the employers' NI costs.

One interviewee favoured moving to a totally level playing field in cost terms across employed and self-employed categories by removing employers' NI altogether, which they also felt would have the benefit of improving the UK's economic competitiveness and rate of domestic job growth in a post-Brexit scenario. However, this would incur a significant loss of tax revenues to the Treasury. On balance they felt it would need to be replaced by some type of wealth tax on higher earners and those with higher asset wealth, such as a 'mansion tax' or a higher capital gains tax rate, perhaps aligned with rates of income tax.

Another interviewee wanted to see a wholesale review of the tax and benefits system as an outcome of the pandemic, considering factors such as the lower earnings limit below which people do not qualify for SSP: *'All of the current incentives for employers to use worker and self-employed status and insecure, fragmented working to minimise their costs need to be removed.'*

Enforcement received surprisingly little comment in the interviews, largely because the need to improve it through the creation of the single enforcement body with enhanced powers and resourcing was almost taken as a 'given' by most interviewees. One stakeholder claimed that the day one statement of terms that became law in April is, in their experience, not being implemented by all SMEs, who are still waiting to test out a new recruit before confirming their status and terms.

One interviewee favoured the adoption of the approach used in Germany, where the enforcement body has the power to rule on employment status in cases of dispute, with the courts only available to use for appeals.

Almost all of the interviewees recognised and mentioned that the simpler, clearer and better-defined categorisation of status would not of itself create improved understanding and less confusion amongst individuals and remove all deliberate manipulation by employers. This would require an **extensive communications campaign** led by Government and its agencies including Acas and the labour enforcement body, and supported by employment organisations such as the CIPD, CBI, TUC and FSB, in partnership with employers. Some favoured extending employee involvement and rights to collective bargaining to help ensure the appropriate status, terms and conditions and their enforcement:

*Government needs to fund a major communications effort which the CIPD, employer bodies, the TUC and so on can then take on to build awareness quickly and support effective implementation of the change.*

A number of interviewees mentioned the need to **take advantage of regular communications with Government**, for example when a new company is registered at Companies House, and in the contacts associated with tax returns, to communicate the new two-fold employment categories and to build awareness and understanding amongst the employer and individual communities.

#### **Impact of the pandemic**

- *'The COVID-19 experience drives home the need to simplify.'*
- *'[The] CIPD should push for an immediate and radical change to two categories given the current climate – the recession justifies radical simplification, while the political situation makes it feasible to achieve.'*

The majority of interviewees were quite pessimistic as to the economic damage wrought in the short to medium term by the pandemic, and the barriers this would present to funding improvements to the improved working rights and securities proposed in the Good Work Plan, both by the Government and by employers. Indeed, some felt that it might create irresistible pressure for further worsening of earnings and terms, particularly for the self-employed.

Nonetheless, there was consensus that the case for clarity on employment status and alignment with the tax categories has been strengthened by the experiences of recent months, given the complexity of trying to apply the new government schemes, such as furlough, to the three categories. The impact of being wrongly classified and thereby losing out to important rights and benefits makes the case even more acute.

Because the simplification of employment status was also regarded as an easier and cheaper change to make, some felt this would hopefully increase its prioritisation for implementation within the Good Work Plan proposals. A number also mentioned that the experiences of the pandemic would, despite the resulting economic pressures, increase the case for better protection for the low paid, especially keyworkers, as well as build the business case for enhanced flexible working rights and practices, such as homeworking.

Some stakeholders believe that the parallel move out of the EU at year end could also increase the pressure to retain the UK's relatively flexible labour market and, some argued, retain worker status – but only on the basis that it is better defined and aligned with the tax system.

## Summary and conclusions

Our interviewees unanimously regarded addressing employment status as an important aspect of the Taylor reforms that should be progressed as soon as possible. They are extremely supportive of the CIPD continuing to push the case for this change with renewed force and supporting its implementation.

While the pandemic may make other aspects of the Good Work Plan – such as improved work quality – increasingly important, the huge resulting government deficit and economic recession also make them harder to fund and implement.

In contrast, most interviewees saw employment status simplification as an attractive area for reform in the short term, being a relatively straightforward change to make, with significant benefits resulting in terms of employer and individual understanding and people securing their legal entitlements and rights. Those with the deepest employment law knowledge, however, saw the reclassification into two categories and allocation of the existing workers between them as a complex task to achieve; integration with the tax categories would not be straightforward with the risk that tax, rather than employment, considerations would continue to drive classification. A commission or expert group would be needed to implement the reform, and transitional arrangements might be required.

The interviewees were unanimously supportive of aligning the employment law and tax aspects of employment status to address the current confusion, which help to explain both mistaken and deliberate failure by employers, particularly SMEs, to provide workers with their legal entitlements, such as holiday pay. However, some emphasised that the tax ‘cart’ should not be allowed to drive the employment rights ‘horse’, given that avoiding tax and NI costs is one of the factors encouraging deliberate misclassification where it occurs.

The majority favoured achieving reform on the basis of the two category definitions of ‘employed’ and ‘self-employed’, although some favoured three categories for the advantages of a flexible ‘middle ground’; some were neutral. Most would tolerate three categories if they were aligned across taxation and employment and definitions clarified.

Most saw no strong rationale for employers to use worker status, nor for employees to want to be on it, other than as a route from self-employment to employment. A risk of legal claims to achieve this following *Uber*, *Hermes* and similar cases meant some saw this as a significant risk for employers that should be removed.

The improved definition and tool for determining IR35, along with the year’s delay in implementation, was generally seen now as providing further support for moving to the aligned and simpler, two-category definition for employment purposes, perhaps supported by a similar definitional tool on the employment aspects.

Interviewees had not yet had the opportunity to devote a great deal of thought into how this alignment would be achieved and delivered. Forcing HMRC and BEIS to ‘sit down together’ and extend and harmonise the existing tax-related definitions was seen as being relatively straightforward by most. However, others recognised the technical and legal complexity and supported a dedicated commission or group of experts being required.

Most favoured parallel actions, largely covered in the Good Work Plan, to better protect the self-employed and increase the flexibilities for employed staff, as well as reducing the incentive to misclassify employees as self-employed by more closely aligning tax/NI rates. A number favoured going further than Taylor proposed, possibly by extending rights such as unfair dismissal beyond workers to the self-employed and even removing employers’ NI altogether. The need for a wider review of taxation and benefits was also referenced.

Interviewees also universally emphasised that there would need to be a major and sustained communications campaign to spread awareness and understanding of the new, simpler categorisation. As well as a launch campaign, interviewees stressed the importance of using regular employer communications from Companies House, Inland Revenue and so on, to constantly drive home the definitions. Some also emphasised the need for enhanced rights to employee voice and representation, in order to address the power imbalance that underpins some of the exploitation of the current confusing situation.

## Literature review findings: what does the research tell us?

### Introduction

To investigate relevant research on employment status and the role that the ‘worker’ category plays within this, a rapid evidence review was carried out, incorporating both academic research studies and ‘grey’ management literature published since 2015.

The information retrieved has been organised into four parts, reviewed in turn in this section and summarised, comprising:

- a history of the evolution of employment status
- the current situation for workers
- the consequences to individuals, organisations and government of worker status
- learning from international comparisons.

### History of employment and worker status

Employment status in the UK is derived from an ongoing interaction of statute and case laws that has evolved over many years, leading to the complexity that employers and HR professionals are having to deal with today. This includes the lack of a clear definition of an ‘employee’ and of the boundaries between true employment and self-employment, with the worker category itself a comparatively recent addition.

For employment status purposes, the most relevant piece of statute is the [Employment Rights Act 1996](#) (ERA 1996). This updated much previous employment law, including the Master and Servant Act 1823, Contracts of Employment Act 1963, the Redundancy Payments Act 1965, the Employment Protection Act 1975, and the Wages Act 1986.

Under the Employment Rights Act, there is a definition of employee and worker as follows:

#### [230 Employees, workers etc.](#)

- (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
  - (a) a contract of employment, or
  - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or

perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual...

By these definitions, employees are in fact a subset of the broader 'worker' grouping, although the term 'worker' is usually used to mean only those who are not also employees, sometimes referred to as 'limb (b) workers' (in reference to section 230(3)(b) above). This is the sense in which we use it in this report. The Supreme Court justices in the case of *Clyde and Co.* in 2014 observed that:

*There are two definitions of worker for the purpose of that Act. Limb (a) covers an individual who has entered into, works under, or has worked under 'a contract of employment' and Limb (b) of section 230(3) covers an individual who has entered into or works under or worked under 'any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer...'*

These definitions themselves rely on a number of undefined terms, such as 'contract of service,' that have required case law to develop a series of tests for definition and identification. The main question used to decide who should have employee status and the accompanying employment rights is based on an assessment of the level of dependence an individual has on their employer. Broadly speaking, people who are dependent are employees and work under a 'contract of service'; whilst those who are independent and 'in business on their own account', working under a 'contract for services', are not employees but self-employed.<sup>7</sup>

The evolution of case law, including the series of recent cases concerning gig economy companies, has resulted in a number of tests that can determine whether a contract is of service and therefore an employee. These are:

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

This has created the current situation where there are three main categories: employee, worker and self-employed (although this last is not in fact a statutory employment status and those who are genuinely running their own businesses are not expected 'to need legal protection to ensure they treat themselves fairly').<sup>8</sup> There is a 'grey area' for contractors and freelancers who, depending on the nature of the relationship with their client, could be considered to be self-employed, a limb (b) worker or an employee.

However, there are also variations in definition in the different parts of statute law, most relevant in relation to tax law, which only recognises two statuses for tax purposes: employed and self-employed. It does not differentiate between employees and workers. Unhelpfully, it is therefore possible for tax law and employment law to come to different conclusions on which is appropriate for any particular individual:

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<sup>7</sup> Pyper, D. (2018) *Briefing Paper: Employment status*. London: House of Commons Library.

<sup>8</sup> BEIS. (2018) *Employment Status Consultation*, London: Department for Business, Energy and Industrial Strategy.

*HM Revenue and Customs (HMRC) may regard someone as self-employed for tax purposes. An employment tribunal or court may still make a decision that they are a worker or employee for employment rights purposes.*

This may mean they do not have the benefit of the rights that come with employment while still paying the higher level of tax.

The term 'worker' in the sense of limb worker is relatively new in employment law and was first seen in UK law in trade union legislation – this definition is found in section 296 of the Trade Union and Labour Relations (Consolidation) Act 1992. The definition outlined above from section 230(3)(b) of ERA 1996 has since become the standard for defining someone who is not an 'employee', but is also not genuinely self-employed, and the limited employment rights associated with this worker status.<sup>9</sup>

As well as the UK legislation in this area, much of the UK's current employment legislation has been influenced by obligations under EU membership. It should be noted that '*the EU law concept of "worker" has also had a significant influence*'.<sup>10</sup> The EU has '*taken an active role in recent years in seeking to achieve minimum levels of employment protection*'<sup>11</sup> through the implementation of a number of directives, such as in relation to working time, which have included the wider group of workers rather than just employees.

This picture is further challenged by the rapidly evolving new organisational structures such as [platform work](#), where individuals are connected to work through a loose relationship with a company through an app, in companies such as Hermes, Uber and Deliveroo. This has created relationships that do not fit comfortably within the previously outlined categories. The latest stage of the *Uber* case to establish whether their drivers are workers went to the Supreme Court in July 2020. The final judgment is [still awaited](#).

As noted in section 230, all of this is compounded by the common-English usage of the term 'worker' in a number of contexts, such as shop worker, social worker, garment worker or agency worker, that does not equate to the legal limb (b) worker definition and may well describe people who are employees.

In summary, and as also related by our stakeholder interviewees, employers, finance and HR professionals as well as individuals face a considerable lack of clarity about employment status in the UK: '*Employment status is an incredibly complex issue*'.<sup>12</sup>

Individuals also face problems in trying to access guidelines and information, even just to correctly establish their employment status, never mind to enforce their rights:

*Different businesses have different capabilities in handling this issue. ... However, irrespective of the level of specialist tax resource and experience in dealing with employment status issues, this remains a difficult area for businesses of all sizes to manage.*<sup>13</sup>

### **Current situation: how many workers?**

Given the variety and complexity of definitions, it is difficult to be certain about the size of the worker group. In fact, the Department for Business, Innovation and Skills noted:

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<sup>9</sup> BIS. (2015) [Employment status review](#). London: Department for Business, Innovation and Skills, p15.

<sup>10</sup> OTS. (2015) [Employment Status report](#), London: Office of Tax Simplification, p2.

<sup>11</sup> BIS. (2015), p11.

<sup>12</sup> Jacobs, K. (2020).

<sup>13</sup> OTS. (2015), p65.

*[G]iven the way in which employment status is determined it is not possible to say for certain whether people working under these arrangements are ‘workers’ and therefore it is not possible to establish how many ‘workers’ there are in the UK.<sup>14</sup>*

It also said that it was ‘generally looking at nonstandard working arrangements, [and] it is likely that an individual’s status will change over time, making it even more difficult to estimate a number.’

The Office for National Statistics’ Labour Force Survey, generally a good source of any employment data, only distinguishes between employed and self-employed, so cannot be referred to for information on workers.

While ‘the majority of people are ordinary employees with no need to consider the employment status tests’,<sup>15</sup> there has undoubtedly been a significant growth over the past two decades in the numbers of self-employed, ‘gig’ workers and people on more flexible working arrangements, such as zero-hours contracts. So it is likely that the numbers in the worker status category has similarly increased over that period.

Other sources of possible estimates looking at particular subsets of people that may include workers are:

- The TUC estimates at least 1.8 million workers are at risk of losing out on key employment protections because they fail to qualify as employees.<sup>16</sup>
- Citizens Advice estimates there could be [460,000 bogus self-employed people](#) in the UK, of which some will be limb workers.
- Acas’s estimate for gig work is that between 1.1 million and 1.9 million workers across all categories find work through digital platforms on a regular basis.
- ONS estimates there are 4.8 million self-employed people, as well as 905,000 people on a zero-hours contract in their main job in the UK.
- Resolution Foundation estimates there are 865,000 agency workers in the UK today.<sup>17</sup>
- Williams et al, analysing the self-employed workforce in 2017, estimated that 1.4 million people (36% of the total self-employed) work with low levels of autonomy, in categories including drivers, cleaners, building operatives and carers. More independent self-employed individuals included builders, IT professionals, financial advisers and tutors This lack of autonomy could suggest that they should be in worker or employee status. Fifteen per cent, or 720,000, were found to have an uncertain employment status with very limited independence, and therefore more likely to be in false self-employment and should be classified as limb workers.<sup>18</sup>

The CIPD’s [Labour Market Outlook \(LMO\): Summer 2019 survey](#) gives some more detail, having asked 2,104 employers from a range of sectors and sizes about their experience of using worker status:

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<sup>14</sup> BIS. (2015), p15.

<sup>15</sup> BEIS. (2018) [Employment Status Consultation](#), p9.

<sup>16</sup> TUC. (2018) [Taylor Review: Employment Status](#). London: The Trades Union Congress, p5.

<sup>17</sup> Taylor, D. (2017) [Ain’t that typical? Everyday challenges for an atypical workforce](#). London: Acas, p4.

<sup>18</sup> Williams, M., Broughton, A., Meager, N., Spiegelhalter, K., Johal, S. and Jenkins, K. (2017) [The True Diversity of Self-Employment](#), Centre for Research on Self-Employment.

- Overall, 35% of participating employers employ anyone on worker status, with 32% of private sector organisations (506 employers) and 45% of public sector (169 employers) doing so.
- Workers are most common in larger organisations (around 46% in those with 500 or more employees). Only 21% of small firms (10–49 employees) and 11% of micro firms (2–9 employees) use the category at all, probably because they are not aware of worker status and/or are worried about misclassifying people within it.
- When asked what proportion of their workforce was made up of workers, 53% of employers, the biggest single group, said between 1% and 25%. Therefore, even for employers using the worker status, the number of workers as a proportion of the total workforce appears to be relatively small.

The lack of clarity both about the definition of worker status and about the size of the group adds to the difficulty in predicting the impact of any changes to this status.

### Consequences for employers, individuals and Government

While definitional arguments around employment status might seem somewhat dry and obscure, the allocation to one or other category has enormous consequences for individuals, employers and the government, which have been underlined by the current COVID-19 pandemic. While the Coronavirus Job Retention Scheme explicitly includes [limb \(b\) workers](#), and there has also been an equivalent government support package for the self-employed, the different levels of support through each scheme have made this distinction critical for [people who could be either](#). The virus has also exposed the generally poor levels of security and protection for low-paid people in whatever category.

#### Employers: why do they use worker status?

The CIPD LMO summer 2019 survey data also gives us an insight into the reasons employers give for their use of worker status:

- Their main rationale is work flexibility (to employ temporary or agency workers), cited by 47%. The second most frequently mentioned reason is the need to fill gaps while permanent employees are appointed (40%), while a quarter (24%) use worker status because it suits some people to work flexibly; almost a fifth (17%) use the status to trial someone before making a permanent arrangement as an employee.
- Significantly, lower numbers of employers also say they use worker status because there are fewer obligations, that is, workers are eligible for fewer employment rights (8%), because workers are easier to dismiss than employees (7%) and employment costs are lower (7%).
- Of the 35% of employers that use worker status, nearly half (49%) reported it would cause them difficulties if the status is removed, although a third (34%) wouldn't mind. This means that overall, only about 17% of employers report any concerns over the abolishment of worker status.
- Among organisations concerned about the removal of worker status, the main reasons for this are that the absence of worker status would reduce workforce flexibility (63%), make it harder to recruit casual or temporary staff (59%) and increase their employment costs (37%).

Improving workforce flexibility is given as the main reason for use of worker status by employers across the private, public and non-profit sectors. But its use was also reported more frequently by those employers who anticipated not hiring in the next three months than by those who are, by those making redundancies in the next three months than those who are not, and by those predicting a fall in employee numbers than those who are not. This

suggests that it may be financial constraints, a negative financial outlook and the lower employment costs that are driving the usage of limb workers, particularly as it is possible to build in-work flexibility through a range of flexible but permanent employee contracts, such as part-time, zero-hours, and annualised hours.

The Office of Tax Simplification also found that **the main drivers for decisions behind worker status** were to provide greater work flexibility and to reduce employment costs, listing the following factors in order of importance:<sup>19</sup>

- Headcount reduction – a desire to maintain a smaller permanent headcount to achieve greater profit per head, even at the relative expense of using self-employed or agency workers.
- Flexibility – to be able to increase or reduce the number of workers more quickly.
- Employment rights – an employee necessitates not only PAYE/NICs obligations for the employer but also the potential liability for other statutory payments (such as holiday pay, statutory sick pay and statutory maternity/paternity pay), to pay redundancy as well as other obligations, including pensions auto-enrolment.
- Employment tax and NICs cost – this cost will be secondary class 1 NICs (employers' NICs) charged at 13.8% on employees (and those workers who HMRC has decided are employed for tax purposes). They note that agency fees and the rates charged by self-employed individuals will often mean that the amounts paid for these individuals' services will usually be higher than an equivalent employee's base salary, so the difference in cost is not necessarily 13.8%.
- Tax risk – the risk of HMRC seeking to reclassify individuals as employees (if they've previously been considered self-employed) is a significant concern for businesses given possible requirement to pay PAYE/NICs for previous tax years as well as interest and penalties.
- Reputational risk – associated with an HMRC employment status review.<sup>20</sup>

The lack of alignment between tax and employment status may, the research literature suggests, be creating an artificial incentive for organisations to class individuals as self-employed, encouraging so-called false self-employment, deliberately or by mistake, where individuals are subject to the dependency of employment, but without the protections and benefits of worker or employment status.<sup>21</sup>

There have been recent actions by some platform companies to offer additional benefits while maintaining the self-employed status of the individual. For example, Hermes offers a 'self-employed plus' package that includes a [paid holiday entitlement](#). Although agreed with the GMB trade union, this move has been controversial amidst claims it muddies the situation of employment status further, deprives the Inland Revenue of NICs, and potentially deprives individuals of further rights (if they could be considered entitled to [worker rights](#)). There has been similar discussion on Deliveroo setting up a [hardship fund](#) for self-employed riders who were unwell during the pandemic.

### **Individuals: what do they get from worker status?**

For an individual, the highest level of employment rights is reserved for those with clear 'employee' status. Workers, however, do also have some employment rights. The self-

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<sup>19</sup> OTS. (2015), p65.

<sup>20</sup> Ibid, pp66–7.

<sup>21</sup> IES. (2018) [Summary of response to Employment Status Consultation](#). Brighton: Institute for Employment Studies, p5.

employed, as explained before, are not covered by employment legislation and would be expected to make their own provision with the exception of maternity allowance, which they are entitled to if they have [paid sufficient NICs](#).

The following table<sup>22</sup> from the House of Commons briefing paper on employment status outlines the key rights by status (note that since this table was produced, workers now also have had the ‘day one’ right to a written statement of particulars since April 2020).

**Table 1: Comparative employment rights for employees and workers**

	Employees	Workers
Annual leave	✓	✓
National minimum wage	✓	✓
Protection from wage deductions	✓	✓
Whistleblowing rights	✓	✓
Working time rights	✓	✓
Part-time workers rights	✓	✓
Written particulars of employment	✓	
Maternity/paternity/adoption leave	✓	
Unfair dismissal rights	✓	
Redundancy rights	✓	
Right to request flexible working	✓	
Notice periods	✓	
Protection from dismissal on the transfer of a business	✓	
Unpaid parental leave	✓	
Fixed-term employee rights	✓	

Workers have fewer rights than employees and less employment security as they have no right to a notice period or to redundancy entitlement, nor to protection from unfair dismissal after two years in employment. There is also the potential for women to be disproportionately affected from having worker rather than employee status. Many of the rights that workers are not entitled to are more commonly required or more regularly used by women, such as the right to maternity leave, right to request flexible working and to unpaid parental leave. A worker may be eligible for maternity allowance.

The TUC states that:

*[E]mployment status should not be a barrier to parents accessing their parental rights but increased casualisation of the workforce, lack of day one paternity rights and the challenges faced by the genuinely self-employed pose particular problems for new mums and dads [and that] unlike self-employed mums who may be eligible for maternity allowance, dads who work for themselves don't get a similar paternity allowance.*

The [TUC suggests that](#) ‘bogus self-employed’ may be ‘a tactic used by some employers to deny staff basic rights at work’.

The [Government's employment status webpage](#) states that workers may also be entitled to SSP; however, in contradiction, the [statutory sick pay page](#) makes clear that eligibility depends on being classed as an employee.

<sup>22</sup> Pyper, D. (2018), p4.

A limb (b) worker who is classed by HMRC as self-employed, benefits from the basic threshold of employment rights outlined above while paying lower tax. They may also welcome the possible greater flexibility in accepting work. On the other hand, a worker can be classified as employed by HMRC and would, in that situation, pay NI and income tax at the same rate as a standard employee without the additional employment benefits. Those who are in 'bogus self-employment' would pay the lower tax rates but have no employment rights and may not in fact have any additional flexibility.

Aside from the issues of employment rights and tax liability, there is also some evidence that job quality is poorer for those in worker status. Given the challenges of pinpointing the particular group of 'workers' in this research however, this evidence is largely based on the impact on insecure employment more generally that may include limb workers.

The International Labour Organization (ILO) stated that temporary and part-time employment frequently offers lower wages and worse prospects for career development than full-time permanent contracts.<sup>23</sup> Short-duration temporary contracts, such as those used for agency workers, can exacerbate the sense of insecurity felt by workers, both by increasing income volatility and thwarting their career development. Involuntary part-time employment was said to be due to a lack of full-time job opportunities, but is also more commonly accepted by women because of family-related responsibilities. It is therefore particularly problematic that the UK worker status does not offer rights in many aspects relevant to family life.

In its 2018 report on job quality, Eurofound stated that '*the development of more flexible forms of employment has sometimes had negative consequences for employees' working conditions and labour rights*',<sup>24</sup> with temporary, short-term employees having poorer career prospects and less scope to exercise their skills and discretion in the workplace. Various studies have highlighted associations between insecure contracts, lower productivity and worse health outcomes, although [CIPD research](#) shows that workers on more flexible and part-time contracts are as satisfied as permanent employees.

However, part-time workers, and especially involuntary part-timers in the Eurofound research, also experience lower job quality regarding, for example, access to training. Job quality is also lower for the solo self-employed than the average amongst employees. While they have more autonomy at work, they also work in poorer social environments, their working time quality suffers, and they are less likely to take up training.

The Government's Good Work Plan stated that it has '*taken the ground-breaking step of placing equal importance on the quality and quantity of work*' and that they wish to '*focus attention on creating higher quality jobs. We want to lead the way internationally in offering [high quality work](#) for all.*' The evidence might suggest that removing worker status could be one way to do this.

Research indicates that individual workers generally have very limited voice and means of altering this situation of poorer quality and more precarious work for themselves, as well as raising any potential denial of their rights by an employer. The Government's employment status webpage recommends contacting Acas for advice about employment status, employee rights or employer responsibilities. But the Acas website states that it can only '*explain how the law relates to your situation, but cannot give an opinion on your*

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<sup>23</sup> ILO. (2019) [World Employment and Social Outlook – Trends 2019](#). Geneva: International Labour Organization, p50.

<sup>24</sup> Eurofound. (2018) [Does employment status matter for job quality?](#) Luxembourg: Publications Office of the European Union, p2.

*employment status*'. Further, the CIPD's [survey](#) in 2017 found low awareness of Acas and uncertainty about who to contact amongst gig workers.

For the purposes of tax law, there is an online [employment status checker](#) that employers or individuals can use and will provide 'a *determination that HMRC will stand by*'. The only testing and enforcement mechanism open to workers on employment status is through a legal claim to and action by a tribunal.

### **Government consequences: tax revenue, litigation and welfare support**

For the Government, there are a number of consequences of the decisions employers and individuals make about work status and the complexity and confusion surrounding this.

#### **Tax revenue**

As has been outlined above, there are differences in the tax regime for individuals according to whether they are employed or self-employed for tax purposes that lead to different levels of revenue for the Government. An [IFS report](#) in 2016 illustrates how tax revenue would change based on status with the following worked example:

For a person generating £40,000 of income per annum, the total tax liability, taking into account both employer and employee NICs as well as the individual's income tax, would be:

- £12,146 if that person worked as an employee.
- £8,713 if this income was earned through self-employment, and
- £7,358 if someone provided their services through a company, and paid themselves dividends rather than wages.

As has been discussed previously, a worker could be in either the employee or the self-employed group, with the resulting difference to tax income for the Government. Citizens Advice in 2015 [estimated that the loss](#) to the Government of people in bogus self-employment was £314 million a year in lost tax and employer NICs.

#### **Volume of litigation**

The confusion that exists about employment status and the liabilities and benefits to employers and individuals has led to a great deal of litigation in both the employment and tax courts, which is associated with a high level of cost to the Government.

The split between employment and tax law for status is also replicated for any disputes with separate courts: for employment rights, a dispute is first heard at the Employment Tribunal, then, if there's an appeal, by the Employment Appeal Tribunal. The first stage for tax is an HMRC assessment, which can be appealed to the First-Tier Tribunal and then to the Upper Tribunal. In both pathways, a decision can be appealed to the Court of Appeal or Court of Session in Scotland and ultimately to the Supreme Court<sup>25</sup> (as is the situation currently with the *Uber v Aslam* case).

The cost of the employment tribunal system (for all types of cases) in 2016/17 was £59.3 million according to the HM Courts and Tribunals Service.<sup>26</sup> There are increasing concerns about the [backlog of cases](#), now said to be over 40,000, with many cases waiting

<sup>25</sup> BEIS. (2018) [Employment Status Consultation](#), p15.

<sup>26</sup> Pyper, D., Feargal, M. and Brown, J. (2017) [Employment tribunal fees](#). London: House of Commons, p21.

over a year to be heard and over 18 months for more complex cases. The pandemic will only have exacerbated these delays.

A simplification of employment status and fewer disputes would certainly help to reduce the burden on a heavily overloaded tribunals system.

### Good work and welfare support

As already explained, the evidence around quality of work and insecure employment suggests that the ongoing use of worker status could also impede the Government's ability to achieve the Good Work Plan reforms or its objective set out in the 2019 Queen's Speech to '*build on existing employment law with measures to protect those in low-paid work and the gig economy*'. On a wider, cross-European front, Eurofound also questioned whether:

*[E]xisting labour law and social protection systems are still fit for purpose; or whether fundamental amendments are required to ensure that non-standard workers and dependent self-employed people are better protected and do not become reliant on the margins of the welfare system, with increased risk of poverty and social exclusion in the longer term.<sup>27</sup>*

It suggests that '*continued tolerance of insecure work only leads to a greater welfare bill for government.*'

### International comparisons

All countries appear to have experienced the issues around the growing flexibility of employment models and the challenges this poses to categorising people for employment and tax purposes. This has grown in particular in relation to so-called 'platform work' where a platform company manages the distribution of work, such as Uber and Deliveroo. According to Eurofound, '*none of the EU Member States has clear regulations specifying the employment status of platform workers.*<sup>28</sup>

Generally in the other jurisdictions we have considered, there is a simpler binary split between employment and self-employment, with usually an alignment of tax and employment status on this common basis. This is the case, for example, in Ireland, where either the Revenue or Department of Employment Affairs and Social Protection can rule on employment status and their decisions will be accepted by the other.

Even in the majority of countries where there is only the option of employed or self-employed statuses, there are still sometimes quite detailed tests to be applied to determine which status an individual is in, and individual cases testing, for example, the same platform companies operating in the UK subject there to these test cases. Many of these tests have similarities to the UK tests, although the lack of an intermediate category would appear to make this a simpler determination.

Below we provide a few representative examples of how employment status is defined and tested in other countries, as well as three examples of countries with some equivalent to the UK's third worker category.

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<sup>27</sup> Eurofound. (2020) [\*Labour market change: Trends and policy approaches towards flexibilisation\*](#). Luxembourg: Publications Office of the European Union, p61.

<sup>28</sup> Eurofound. (2018) [\*Platform work: Employment status, employment rights and social protection\*](#). Luxembourg: Publications Office of the European Union.

## USA

In the USA, employed status is ascertained by following the 'ABC' test. There are some variations to this by state, but California is a typical example. Here the AB5 Bill (September 2019) requires application of the [ABC test](#) to determine whether an individual is an employee or independent contractor. The default position is that the person is considered to be an employee unless all of the following conditions are met:

- the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact
- the worker performs work that is outside the usual course of the hiring entity's business, and
- the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Being defined as an employee following this test grants the individual access to protection under California's wage and hour laws (such as minimum wage, overtime, meal periods and rest breaks), workplace safety laws, and retaliation laws. It also entitles the employee to go to state agencies such as the Labor Commissioner's Office to seek enforcement.

## Ireland

As in the UK, there is no statutory definition of an employee in Irish law; instead the [Code of Practice for Determining Employment or Self-Employment Status of Individuals](#) provides a long list of criteria that can be used to determine the employment status of an individual.

These include that someone:

- is under the control of another person who directs as to how, when and where the work is to be carried out.
- supplies labour only
- receives a fixed hourly/weekly/monthly wage
- cannot subcontract the work – if the work can be subcontracted and paid on by the person subcontracting the work, the employer/employee relationship may simply be transferred on
- does not supply materials for the job
- does not provide equipment other than the small tools of the trade – the provision of tools or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate having regard to all the circumstances of a particular case
- is not exposed to personal financial risk in carrying out the work
- does not assume any responsibility for investment and management in the business
- does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements
- works set hours or a given number of hours per week or month.

The majority of statutory employment rights apply only to employees, including part-time and fixed-term employees.

Both the Revenue and Department of Employment Affairs and Social Protection can assist in determining the [correct status](#) if required, so the tax and employment tests are completely aligned. They will examine the facts, apply the criteria and provide a written decision of status. A decision by one department will generally be accepted by the other, provided:

- all relevant facts were given at the time
- the circumstances remain the same
- it is accepted that the correct legal principles have been applied to the facts established.

## Australia

Australia uses six factors to determine employment status. An individual is an employee rather than self-employed if they fit the statements under each of these six headings:

- [Ability to subcontract/delegate](#) – the worker can't subcontract/delegate the work – they can't pay someone else to do the work.
- [Basis of payment](#) – the worker is paid either:
  - for the time worked;
  - a price per item or activity;
  - a commission.
- [Equipment, tools and other assets](#) –
  - your business provides all or most of the equipment, tools and other assets required to complete the work, or
  - the worker provides all or most of the equipment, tools and other assets required to complete the work, but the business provides them with an allowance or reimburses them for the cost of the equipment, tools, other assets.
- [Commercial risks](#) – the worker takes no commercial risks. Your business is legally responsible for the work done by the worker and liable for the cost of rectifying any defect in the work.
- [Control over the work](#) – your business has the right to direct the way in which the worker does their work.
- [Independence](#) – the worker is not operating independently of your business. They work within and are considered part of your business.

The Australian Taxation Office provides an [online decision tool](#) that the employer completes, generating a report that can be kept for their records and can be relied on.

While these three examples show that there can be differences in precise definitions and test questions, they also demonstrate the simplicity of a dual system and, in particular, one where the employment and tax rules match up. California also benefits from a clear default position of assuming employment unless all three parts of the test are met.

They each include clear and reliable mechanisms for determining status, without having to resort to the courts, which supports clarity for both individuals and employers.

## A third option?

Like the UK, some countries do have an intermediate status or additional sub-categories: we briefly describe three of them here.

## The Netherlands

As well as self-employed people, the [Dutch employment systems](#) divides individuals into permanent employees, payroll employees (agency workers and others whose employment involves a payroll company) and on-call employees (those who do not have a fixed number of hours and work when called upon by their employer). In an attempt to reduce the gap in rights and working conditions and remove incentives to use cheaper self-employed people, the Dutch Government introduced the [WAB \(Balanced Labour Act\)](#) on 1 January 2020.

This has created an incentive for employers to create more permanent employment roles by reducing the unemployment benefit they pay per permanent employee and has also increased the rights for payroll workers to the same level as an equivalent permanent employee. The Act also introduced minimum notice periods for on-call work, compensation for cancelled work and an obligation to offer a fixed number of hours after 12 months of on-call work. This mirrors some of the UK Good Work Plan proposals.

## Italy

Italy has a system including the categories of employees and self-employed. But since November 2019, it has had specific legislation for 'semi-autonomous workers', a category created in response to the growth of platform [delivery workers](#). This status ensures that they are covered by the same rules as employees and gives them protection in terms of a minimum wage, sick pay, maternity and paternity pay. It also creates safeguards in relation to sanctions for not accepting work. [The law](#) on platform work is being implemented gradually and the minimum wage aspect will not be in place until November 2020.

While this is a third category that could be an example for UK legislation in terms of the protection it provides, it is very narrowly defined as it only covers [delivery drivers](#).

## Austria

Austria has a multi-level system of categories, with employees, self-employed and semi-dependent workers, of which 'employee-like working persons' is a sub-category. Different approaches cover the employment rights of each of these groups. Employment law since the statutes of 1811 or 1859 specified the categories of employee or not. The third category starts to appear in case law from 1956 onwards. It's not defined in statute but on a case-by-case basis. The vast majority (95%) of employees in Austria are covered by collective bargaining agreements and these govern most of their terms of employment, for instance ensuring minimum wages. But these agreements apply to employees only and do not apply to these employee-like people, although they are covered by social security protections.

Some individual labour law statutes do apply to employee-like working persons, ensuring, for instance, notice periods for termination of work and protection for new mothers. Enforcement is managed through the Employment and Social Security Courts, which can decide in legal disputes between employee-like working persons and their contractual partners.<sup>29</sup>

These examples of three (or more) frameworks show that the UK is not the only country with complexity in categorisation; the growth of platform organisations and their workforces has challenged all of these jurisdictions, irrespective of their categories. The recent change to Dutch law in creating greater incentives to employment and increased protection for non-traditional employment reflects similar moves in the UK arising from the Taylor Review and now from exposure of the poor levels of protection for individuals during the pandemic. This

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<sup>29</sup> Brameshuber, E. (2019) [The 'personal work relationship' in Austria](#). *European Labour Law Journal*. Vol 10, No 3, pp187–97.

may indicate that a move back to a simpler, two-status system, with its valuable rights and protections for individuals from employers and the state, is starting to occur, alongside of a move post-pandemic to enhanced protection and rights for low-paid workers in all employment categories.

### Section summary

We have reviewed the literature on employment status and its consequences in the UK and selected international comparators. Research highlights that there are a number of issues with the current UK system:

- The major mismatch between having two statuses within tax law but three within employment law, resulting in confusion and possible misallocation for workers and employers, creating risks for all parties – prosecution and fines for employers, loss of rights and protection for individuals, and loss of tax revenue and increased legislative costs for government.
- A differential tax regime creating an incentive to employers and some categories of workers for bogus self-employment, with consequences for tax revenues from bogus self-employment, and additional welfare costs to support those in precarious employment whose status has meant they do not have entitlement to support from their employer.
- Negative consequences for job quality, affecting for example, individuals' health and wellbeing and employer and national productivity, arising from insecure employment and lack of employment rights and protections.
- Difficulties in enforcement caused by a variety of factors, including lack of resourcing, multiple agencies and heavy reliance on a tribunal-only route driven by individuals.

Aligning the employment and tax categories, as seen almost universally in international examples, would reduce the opportunities and incentives for bogus self-employment and address at least some of the current complexity and confusion.

Extending true employment with its accompanying rights would ensure that employees have a basic level of security in their employment, while the flexibility of workforce that employers want can in many cases be achieved within permanent contracts by offering part-time work or other flexible arrangements. UK and other government actions appear now to be moving in the direction of both providing greater working flexibility to individuals in employment, while improving the rights and conditions of those in precarious work and producing more of a 'level playing field' of costs and protections between the employed and self-employed and any intermediate categories.

We have also internationally seen good use made of non-court status verification mechanisms, including on-line checkers. This already partially exists in the UK with the IR35 scheme and could be extended into the employment sphere.

The research suggests that with learning from overseas practice and addressing the identified difficulties with the current categories, the UK could produce a better working environment for more 'good work' for more people, in a context of clearer understanding and less deliberate and mistaken abuse of employment status categories.

The Good Work Plan is already progressing some of this agenda, including the simplification of worker status through as yet unidentified means. In the final section of the report we outline the implications of our findings and the CIPD's recommendations for government and employers in future.

## Policy recommendations: what should the UK do on employment status?

Employment status is an incredibly complex issue and any reforms will be challenging. What is more, it will be necessary to ensure that in trying to correct perceived issues in the current framework, we do not simply create new ones in a different framework.

Employment status is a vitally important but also a complex area of employment law, as well as HR policy and practice. It lies at the foundation of determining the employment rights of people, as well as the taxation that both employers and employees pay.

The recent BEIS consultation on how best to implement the Taylor Review proposals for the simplification and clarification of employment status consisted of 64 questions. Yet these excluded any consideration of moving from three to two status categories, and taxation was also excluded from Taylor's brief. More recently, the Government's 'levelling up' agenda and the impact of the pandemic have highlighted the problems resulting from the lack of security and protection for low earners of whatever employment status.

Our evidence review, including international comparisons, has highlighted that all countries have been challenged to varying degrees by the global shift in employment markets towards more flexible employment relationships and atypical working. The CIPD's research underpins the view that the current UK regulations generally support a labour market that broadly strikes a decent balance between flexibility for employers, and job opportunities and security for individuals.

However, on employment status this review suggests that the UK is not effectively supporting a flexible, effective and efficient labour market, for either the employer or the individual. The UK's legislative framework has evolved haphazardly and retrospectively through history, largely based on loose general principles contained in overarching statutes. Determining status definition typically relies on individual case law, operating through an overworked tribunals system. There is an excessive reliance on the individual to navigate this complexity, raise possible breaches and pursue their own redress. Uniquely in the UK, according to PwC's [recent research](#),<sup>30</sup> the tax and employment status categories are not aligned.

Changing anything in this complex tapestry risks unintended consequences and disruption. Yet evidence has been presented in this paper demonstrating that the risks and negative effects of the current increasingly dysfunctional situation now outweigh the risks of change. Up to 15% of self-employed people are wrongly categorised at the moment, and it is the lowest paid and most vulnerable amongst these who are most likely to be misclassified and denied their employment rights. This situation and its damaging consequences will only intensify given the pandemic and recession the UK faces.

The pandemic has highlighted the economic insecurity and poverty of millions of low-paid people in the UK, irrespective of their legal status. These people, many performing key roles during the crisis, have suffered disproportionately from the pandemic and lockdown. Thus the loss of any rights and benefits from employment status confusion has become even more acute in recent months.

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<sup>30</sup> PwC Legal. (2019) [Gig economy Employment status](#). Brussels: PwC Legal.

The CIPD believes this situation has to be urgently addressed, as a key component of the Government's essential Good Work Plan reforms.

In this section the specific reforms the CIPD believes are required on employment status are outlined, along with the related changes and initiatives that are designed to help to guarantee their success.

### Abolish worker status

While recognising that this is not a simple and straightforward change to define and implement, the CIPD recommends **abolishing worker status and moving from three categories to two for employment status purposes – employed and self-employed**.

This move should:

- Help to make it easier for individuals and employers to understand employment status and the associated rights for each category.
- Reduce the 'grey area' between employment and self-employment, where mistakes and abuses are much more likely, thereby reducing the number of lower-paid and more vulnerable people who are denied their rights.
- Reinforce the other measures in the Good Work Plan to improve awareness, understanding and enforcement of employment rights.
- Facilitate better alignment with the tax system, thereby reducing the incentive for organisations to class individuals as self-employed to cut employment costs.

Simply changing the terminology from 'worker' status to 'dependent contractor' and attempting to improve awareness and understanding of the three existing categories, as the Taylor Review recommends, will not be sufficient to achieve the level of simplification and improvement now required, with the economic pressures for greater flexibility expected to intensify even further post-pandemic.

Legislating on employment status in relation to rights, without taking full account of the implications for tax and NI, would risk confusing employers further. The existing confusion about employment status could be significantly reduced, the CIPD believes, by bringing into line the definition for employment and rights purposes with that used for taxation.

There are of course criticisms and risks with the abolition of worker status, such as potentially reducing the range of flexible options that employers can use to staff up cost-effectively, and for individuals to combine their work with the other important aspects of their lives. Flexibility is a positive feature of the UK labour market that offers benefits for both employers and employees, when the terms are clear and the balance of power reasonably equal.

However, employers can continue to achieve this flexibility in a wide range of ways: for example, by engaging individuals as self-employed contractors, on fixed-term contracts, and/or on an agency basis. Although there are no specific statistics available, it seems likely that most employers who currently make use of 'worker' status do so on the specific recommendation of employment law firms, rather than through any strong adherence to this status and any unique flexibility it provides.

Similarly, helped by the strengthening of flexible working rights proposed in the Good Work Plan, individuals will still have access in most workplaces to flexible working, which should not be unduly affected by the removal of worker status. The pandemic seems to have

increased the range of flexible working options available to many people and sped up employer acceptance of them.

Indeed, like many small employers, most people are probably unaware of what worker status means and are primarily concerned about their remuneration and rights at work.

The simplification proposed, combined with improved definitions and distinction between the remaining two categories, should help to address some of the current uncertainty that contributes to precarious, rather than just flexible, working arrangements and their abuse through misclassification.

### **Form an expert group or commission to define the binary categorisation**

To develop the best possible understanding and application of employment status with a new, simplified binary categorisation will require both statutory and non-statutory action. This can best be achieved by forming an expert stakeholder group to develop statutory definitions, and non-statutory tests and guidance, which in combination will differentiate effectively between employees and the self-employed from an employment rights perspective, aligned with the current definitions for tax purposes. Establishing this formally as a commission might help to provide additional importance and independence to the group and provide added weight to its proposals in what is still a controversial area.

The expert group would ideally include employment lawyers, tax and payroll specialists, government representatives from BEIS and HMRC, the new, labour market single enforcement body and Acas, as well as key stakeholder groups including the TUC, CBI, FSB, the CIPD and those consulted as part of this project.

The role of the group would include:

- Working up the statutory definitions and associated rights of employed and self-employed status.
- Coordinating the drafting of non-statutory guidance and differentiating factors/tests, similar to the 'ABC test' in the US and the recently updated Check Employment Status for Tax (CEST) test and IR35 online tool used for tax purposes.
- Aligning the employment definitions with the existing binary definitions and tests for tax purposes, but ensuring the tax definitions do not drive the employment status, which has been a key cause of existing abuse and deliberate mis-classification.

### **Factors and tests of status**

The CIPD would support providing this group with as much freedom as possible to develop the appropriate definitions and tests, and the 2018 BEIS consultation focused heavily on this issue of differentiating factors and criteria. Our comparison of practice internationally indicates a significant degree of commonality in the criteria used to define, describe and differentiate between the two modes.

The CIPD agrees with Taylor's conclusion that 'control' should be the key determining factor, and this is consistent with the recent cases on worker status. It will, however, be difficult to define status in legislation. So non-statutory guidance can elaborate on the full range of factors relevant to decisions on employment status. The principles incorporated into the primary legislation should therefore focus on control. These would be supplemented by a fuller outline of how they have been applied, and how they might be interpreted in the light of business and labour market change, in the non-statutory guidance.

Control should remain the single most meaningful test of employment status and should be influenced by: where the work is done, when the work is done and how regular the arrangement is, how it's done, how much supervision and instruction the individual is given, whose equipment is used, and/or what clothing is required. However, no single criteria or 'objective' measures can substitute for a range of tests directed at establishing the nature of the relationship as a whole. The control test will need to be reinforced by reference to a number of supporting tests, including: whether the individual bears any significant financial risk; whether the individual is part of the organisation (integration); and whether the individual works exclusively for one employer, or has a wider client base.

'Mutuality of obligation' is an unhelpful, confusing term that rarely seems to help in differentiating employment status. The degree of continuity, that is, whether the relationship has been continuous, is also relevant, but variations in employment patterns suggest any arithmetical test on this basis for distinguishing between employee and self-employed is unlikely to be effective.

We comment in more detail below about the non-statutory information and guidance needed to accompany the change in definitions. In the view of the CIPD, employers should welcome non-statutory guidance and support, which will be more adaptable to reflect the changing labour market, rather than relying totally on primary legislation and its application by an already overstretched employment tribunal system.

Acas should be asked to adapt and extend its existing guidance on status on its website, which currently outlines the rights of employees and workers but does not attempt to describe the tests distinguishing the categories.

It would be useful to offer general guidance, based on case law, that would help employers and others make clearer choices about the kind of employment status they intend. The idea of a simple employment status test and tool, on the lines of the US's ABC test or Germany's '3 out of 5 test', is attractive. It could be seen as a form of alternative dispute resolution, which would be cheaper and easier to apply than a detailed consideration of the full legal tests. The 'ABC test' for self-employment in US legislation could not be adopted directly in the UK, but offers the kind of guidance that might be helpful to employers and others. Similarly, the German social security employment status test – 'depends on one employer for a long time' – underlines the significance of the time dimension in deciding whether there is an employment relationship.

However, if a simplified test is to be useful, employers and employees would need to accept that the outcomes might be still less predictable than now and, as with the CEST, it would be more indicative than wholly definitive.

As with IR35, a tool or algorithm could be developed and used to produce a prima facie answer on status. This could be done on a pilot basis, with the explicit aim of seeing what can be achieved, and progressively improved and adapted. If an online tool was produced, such an indicative assessment would be helpful in correcting misguided approaches, and preventing employers from incurring unnecessary legal costs.

Employment status for the purposes of tax and employment rights should be fully aligned as a result of the group's work. The tax status of individuals should not, however, drive decisions about employment rights: alignment of tax and rights should start from decisions about employment status. Legislation might be needed in order to reconcile the sometimes conflicting case law on tax and employment. However, the principles on which the courts have approached the issue of status from the standpoint of employment and tax are basically the same. A Treasury Green Paper would be essential to unlock this.

These proposals are not new. Moving to two categories was considered in the BIS review of employment status in 2015. Representative bodies for the self-employed have already recommended that self-employment should be defined as a formal employment status with minimum rights.<sup>31</sup> This would help to provide a clear message of support for the genuinely self-employed, while making it easier to identify and crack down on false self-employment.

In the context of the simplification of worker status and the wider Good Work Plan reforms, now is an appropriate time to implement these changes in conjunction with the rest of the Good Work proposals.

The work of this expert group should not be underestimated: simple is hard. The Government will need to ensure their work is properly resourced in terms of financial resources and the timescales required to complete and test their work.

### **Move all existing workers to employed status, unless proved otherwise**

As this review has highlighted, we do not even currently know how many people there are in the intermediate 'limb (b) worker' category between employed and self-employed status, never mind the detailed characteristics and occupations of those in this category.

Given this uncertainty, the CIPD recommends that all of those currently contracted in the worker status category when it is abolished automatically become employees of the relevant employer, unless the employer can demonstrate that they are truly self-employed. While recognising that this could add to employers' costs in funding the additional rights and benefits involved, the available evidence suggests that these costs should in most cases not be significant. There are a range of other flexible working options in employment that should be able to be utilised successfully and cost-effectively by the majority of employers for these workers.

The risks of assuming the opposite – that the default position for all workers on the abolition of worker status should be self-employed status – would in the CIPD's view, be far greater. This could involve a potentially significant loss of employment rights for these workers and presents the risk of further increasing the population of already misclassified people amongst the self-employed.

One possible criticism of the binary categorisation itself is that it raises the bar in cases where a claimant is trying to prove that an employer has misclassified them into self-employment and denied them their rights as a worker. However, the fact that cases such as *Uber* have been repeated in overseas jurisdictions such as California with two categories suggests that this need not be a barrier. The aims of the reforms being proposed are to reduce misclassifications and legal cases for redress, rather than potentially increasing them.

The diversity of the existing worker population means that some type of division amongst them into employed and self-employed could in theory be attempted, potentially on the basis of skills, occupation, earnings or some combination of these factors. Such a divide is being proposed for determining migration status based on an earnings cut-off, and the CIPD's interviewees on this project included some proposals along these lines.

However, this risks making an already complex situation worse in practice, potentially increasing rather than decreasing the already unacceptably high number of mis-classifications and disputes over someone's status. Developing a simple, straightforward division would not in fact be likely to be simple and straightforward. The exercise also risks

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<sup>31</sup> Williams, M. et al. (2017).

diverting attention away from the main task involved, which should be to determine the division between, and supporting tests and criteria for, the much larger populations of the employed and the self-employed.

### **Move the burden of proof and enforcement onto the state and employers**

The Good Work Plan reforms are intended to support individuals accessing their employment rights in full through greater clarity and awareness, but also through stronger state support and enforcement, whilst retaining the UK labour market's flexibility. The planned formation of the [Single Labour Market Enforcement Body](#) (SLMEB) is one of the key proposals to deliver this overall objective given the current weaknesses, and the CIPD is strongly supportive of it. But the SLMEB is also essential to the change proposed here in employment status definition. The pressures on the employment tribunals process also have to be borne in mind when recommending policy proposals on status.

If primary legislation is required to make the change to two categories, then an associated change that might be considered is to strengthen the individual's power to access their rights by reversing the current legal presumption that no contract exists to one where employment is assumed unless disproved by the employer. In other words, the default position for workers of all types would be that they are an employee, unless proved otherwise.

As well as better protecting the position particularly of vulnerable, low-paid workers, this would ensure that employers are fully aware of their responsibilities to engage people to work for them on the most appropriate basis and to match the rights that they provide with that status. It should be much clearer to them which of the binary categories to use, to agree this with the individual and much harder for them to argue that any misclassification was accidental.

Again this is not a wholly new idea. A [report](#) by the Work and Pensions Committee published in April 2017,<sup>32</sup> recommended making worker/employed status the default position, so that employers would have to prove a worker did not have employee rights where self-employed status was questioned.

### **Role of the SLMEB in disputes**

In any disputes about status and rights, the CIPD recommends that, as in Germany and other international jurisdictions, the SLMEB's inspectors would have the role of making the initial status determinations, with the employment tribunal only involved to hear appeals against their decisions.

Improving awareness, as well as enforcement, of employment status and rights, should follow from the establishment of the single, more progressive enforcement body. As well as improved resources and powers, we recommend that this body would place a much stronger emphasis on supporting employers – particularly small firms – to comply, rather than on naming and shaming and fining (see below).

This should act to considerably reduce the burden of dealing with employment status disputes from the employment tribunals, although it will depend on the SLMEB being adequately resourced to perform this function.

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<sup>32</sup> Work and Pensions Committee. (2017) [Self-employment and the gig economy](#). London: House of Commons.

## Move to alignment of tax and benefits between self-employed and employed

Although focused on the employment aspects of status, this review has necessarily considered aspects of taxation. This is because of the UK's apparently unique misalignment between tax and employment status categories at the moment – a key source of confusion – and because the very different levels of taxation and support between the current categories is a key driver of deliberate misclassification and bogus self-employment. Citizens Advice in 2015 estimated that the loss to the Government in tax and employer NICs from bogus self-employment was £314 million a year. Decisions about amending the framework of employment status therefore need to take full account of the implications for tax and NI.

The CIPD supports those proposing moves towards a greater alignment of taxes and benefits for the employed and self-employed, so as to reduce the incentives for employers to put employees off-payroll, and creating more of a 'level playing field' between employment and self-employment. In announcing his Self-employed Income Support Scheme during the pandemic, the Chancellor made clear that the level of security for the self-employed needs to be improved, but also that *'if we all want to benefit equally from state support, we must all pay in equally in future.'*<sup>33</sup>

Whether this means closer or complete alignment of tax and NI rates needs to be determined based on more detailed financial analysis. The CIPD recognises that the Government has said there are no plans to make any changes to Class 4 NICs. In the CIPD's view, however, it needs to set out its future model of NI before making changes to employment status. Equalising NICs for employees and the self-employed would remove the incentive to misclassify, possibly with state benefit protections provided for the self-employed.

The CIPD are also sympathetic on this basis to those who argue in favour of a more fundamental review of taxation and benefits. The pandemic has highlighted the risks of the current low level of SSP payments, as well as the need to review the lower earnings limit which in effects prevents up to 2 million mostly female and part-time workers from qualifying for it at all.

## Deliver a step-change in information, advice and guidance

In the CIPD's view a step-change is required in the level and quality of information, guidance and support available to employers, employees and the self-employed, going way beyond the typical government website 'Q&As' and online toolkits that typically accompany any employment law change. Changing the employment status definitions makes this especially urgent and important.

The Government needs to lead and fund a joined-up national, sectoral, and local approach, with key players involved including Acas, the SLMEB, sector employer associations, trade unions, Citizens Advice, management and professional bodies, and so on. Employment status reform should be communicated as a part of a much stronger business support network, advising not just on status and employment legislation, but also on the wider benefits and means of implementing good people management and employment practice, in support of higher productivity and performance.

As this research on employment status has shown, it is vital that increased resourcing is made available for supporting good practice, as well as enforcement, particularly at the local

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<sup>33</sup> Chancellor Rishi Sunak's [statement on coronavirus \(COVID-19\)](#) delivered on 26 March 2020.

level, where first line managers and SMEs can best be reached. Earlier CIPD research<sup>34</sup> found that over a third of HR professionals were not confident that their local line management were able to operate in full alignment with the requirements of employment law and communicate employment rights.

Acas's range of advisory booklets is an accessible and high-quality resource for employers and workers alike, and it needs to continue to play a vital role to support this change in employment status. However, awareness of Acas as a support service is currently low in some sectors and amongst SMEs. More must be done to raise its public profile through digital awareness-raising campaigns, a recommendation we believe Government has accepted. This applies to both individuals and employers. Acas itself, in its [response](#) to the 2018 consultation on employment rights, reported evidence from its helpline that where individuals are uncertain about the nature or extent of their rights, this contributes to a lack of confidence to raise concerns with their employer.

Acas could help to coordinate this vital information provision and guidance service at the local level. The CIPD's research supports the need for widespread availability of quality business support on good employment practice and people management, particularly to reach and engage with the hardest to reach, mostly small firms that currently have no contact with Acas and are not members of any form of business network or membership body. The CIPD pilot work on HR support for SMEs also found that awareness of Acas and its services in smaller firms and non-unionised workforces is currently low.

The CIPD believes that Acas's budget should be at least doubled to enable it to play a stronger role in providing not only core information on the new status categories and definitions to employers and individuals, but also to give professional advice where employment status is unclear or disputed and on people management more widely. Acas could, for example, provide a free annual employment contracts and status checking service to small firms, which could then help protect them from financial liability if they were taken to an employment tribunal. This could possibly be as part of a wider HR audit service that they and/or contracted professional qualified experts could provide. Acas could also offer its mediation services in cases of status disputes. Any changes to the role of Acas would need to be subject to consultation, particularly in relation to the proposal to reduce financial liability on a firm that has taken part in an annual 'HR MOT' .

The strong consensus among our stakeholder experts supported the view that improved information provision and employer support was seen as at least as, if not more, important in improving employment practices and achieving more 'good work' as the precise status categories and definitions.

These reforms cannot rely solely on state-sponsored activity or responsibility, or be a one-off exercise when the new binary status is enacted. Existing as well as new communication channels would need to be used, particularly to reach those operating in 'high-risk' sectors of the labour market, where evidence highlights that employers are most likely to abuse employment rights. Contact details for sources of information, including Acas, could be included in the new 'Day one' statement of terms and conditions that was introduced in April 2020, for example. Another supporting action could be for Companies House and HMRC to send out clear guidance on core employment rights and status to any new business that

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<sup>34</sup> IES/CIPD. (2019) *UK Labour market enforcement: current state, alternatives, the way forward: final report* [unpublished], p35.

registers, with the tax office repeating this in its annual communications in conjunction with tax returns.

### **‘Know your rights’**

The CIPD has regularly advised Government, based on previous research and consultation with stakeholders, to work more closely with Acas, Citizens Advice, trade unions and professional management, accounting and HR bodies, to run an integrated (and therefore impactful and cost-efficient), high-profile ‘know your rights’ campaign. A change in employment status categories would be the perfect opportunity to launch this.

This campaign could mirror the successful one run previously by the Pensions Regulator to promote pensions auto-enrolment. Since 2015, the effective communications and education campaign for employers and employees has resulted in high levels of awareness and over £90 billion being saved in pensions by more than 10 million people who previously had no personal pension savings.

This wider campaign could set out the information people should expect in relation to basic employment rights, as well as where to go if they have concerns or want to make a complaint.

The CIPD’s pilot programme on building HR capability in small firms,<sup>35</sup> run in three UK locations, highlighted the typically very poor level of knowledge of the most basic aspects of UK employment law among many owner-managers. The value in practice of the new requirement for all employers to provide the ‘Day one’ statement of employment rights to all of their workers, for example, might be open to serious question, given that some employers still seem unaware of the need to provide employees with an employment contract and what it should contain in the first place.

That CIPD programme also highlighted the rapid improvement in awareness and compliance that can be achieved among owner-managers of small firms through the provision of good-quality information, advice and guidance on HR and people management. Improved access to this type of support would equip more employers, particularly micro and small firms, with the knowledge to set out clearly in employment contracts the employment status of atypical workers, and to regularly review (at least once a year) the working arrangements in practice, to ensure that the reality of the employment relationship reflects what is set out in the contract.

## **Methodology**

The main **work stages** involved in producing this policy paper have been as follows:

- A series of discussions collectively and individually with a broad group of relevant experts and stakeholders, summarised in **Stakeholder roundtable and interview findings: what do people think?**
- Gathering, reviewing and summation of existing research and literature on the issue from the CIPD and other relevant and reputable sources, summarised in **Literature review and findings: what does the research tell us?**
- Development of CIPD policy recommendations.

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<sup>35</sup> CIPD/J.P. Morgan. (2016) *Building ambition and HR capability in small UK firms*. London: Chartered Institute of Personnel and Development.

With the stakeholder research, the method involved the following steps:

- A two-hour facilitated roundtable meeting was held in mid-March, organised by the CIPD and hosted by Lewis Silkin. This followed a structured debate-style format, reviewing the CIPD’s relevant *Labour Market Outlook* survey findings on worker status, followed by consideration and open discussion of the case for and then against the removal of this status.
- This was followed by 11 follow-up individual interviews, held to detail the views expressed, to speak to experts on employment status who had missed the initial meeting, and to gather additional material and research. These were completed by video or phone to a structured agenda, in late June and early July.
- Finally, a video conference was held in mid-August with as many as possible of those from the original roundtable that could take part, to review a draft of this report, focusing on the final policy recommendations section.

The participants involved in these discussions included:

- Sandra Roberts, HR Director, EMEA, NetBrain Technologies
- Andrew Walker, freelance HR and parliamentary professional
- Sarah-Jane Butler, Founder and CEO, Parental Choice
- Andy Chamberlain, Director of Policy, IPSE
- Hugo Martin, Director of Legal and Public Affairs, Hermes
- Jill Bottomley, Director, The HR Dept
- Francisca Burtenshaw, Senior Director of HR, PRA Health Sciences
- James Davies, Partner, Lewis Silkin
- Martin Kirke, non-executive director, coach, former Group HRD, The Post Office
- David Widdowson, Partner, Abbiss Cadres LLP
- Elliot Mason, Senior Policy Adviser, CBI
- Duncan Brown, Head of HR Consultancy, IES
- Karen Elliott, People Relations UK & Ireland, McDonalds
- Marc Meryon, Partner, Eversheds
- David Frost, Group OD Director, Total Produce

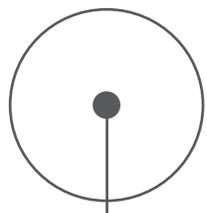
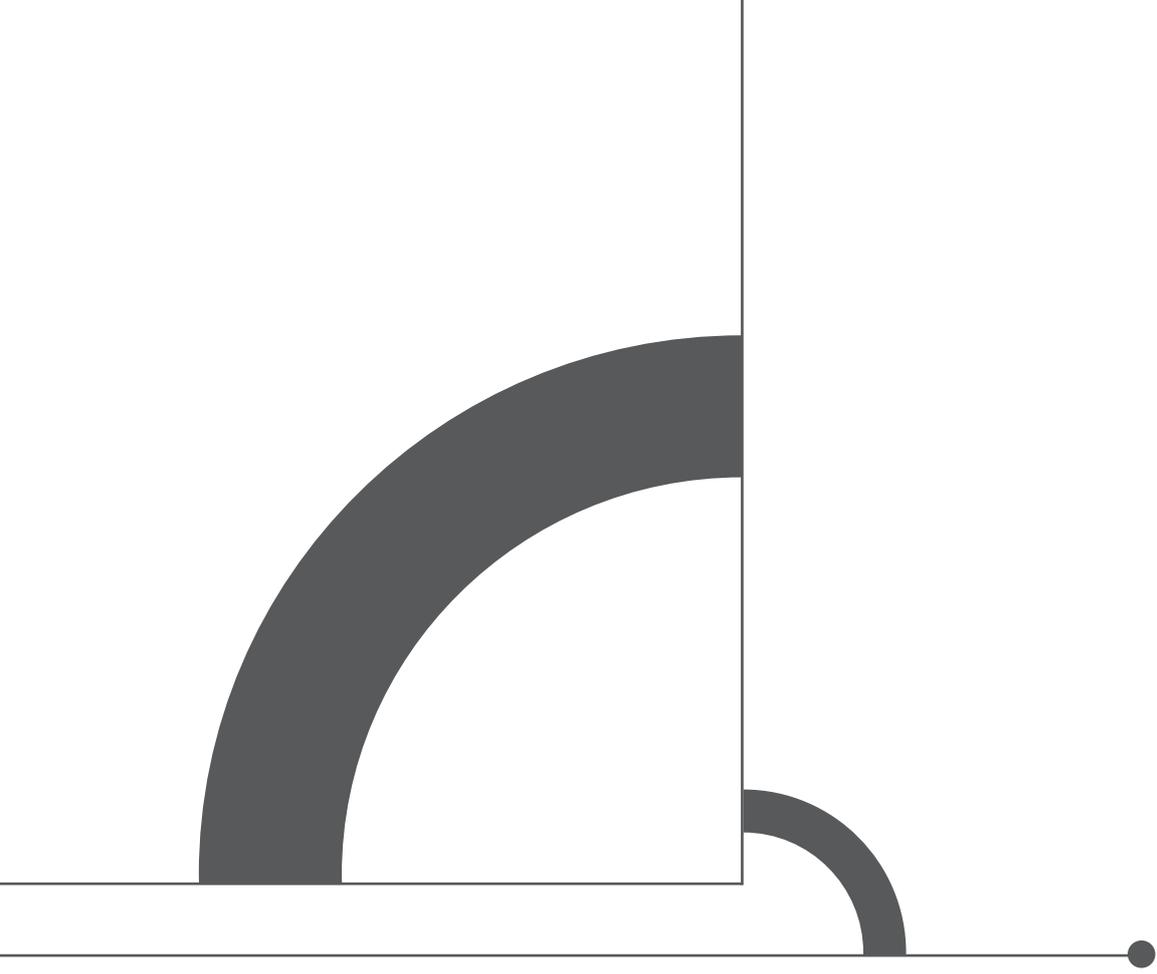
We are extremely grateful to them for their time, expertise and invaluable input.

The literature review stage looked at relevant research on employment status and the role that the ‘worker’ category plays within this. The search terms incorporated key words and phrases such as ‘worker’ and ‘employment status’; and the focus has been on employment law, HR and taxation-related journals and websites. The full search protocol is listed in Table 2.

**Table 2: Literature review search protocol**

Category	Sources/criteria/approach	Additional notes
<b>Academic literature</b>	Business Source Premier; British Education Index; Wiley; Scopus; Google Scholar	
<b>Grey literature</b>	Government websites and parliamentary publications; Employment Tribunal findings; HR trade publications e.g. e-reward, employee benefits, <i>Personnel Today</i> , <i>People Management</i> ; tax journals (e.g. <i>Taxation</i> ). CIPD data such as the <i>Labour Market Outlook</i> survey	
<b>Main search terms</b>	Employment status – self employed vs employed Worker status	

	<p>History/evolution of employment status</p> <p>Worker demographics/sector/role type</p> <p>Consequences/implications of worker status + individual/employer/government</p> <p>Job quality + employment status</p> <p>Compliance/enforcement</p> <p>HMRC consequences</p>	
<b>Exclusion criteria</b>	<p>Non-English language</p> <p>Partial text</p> <p>Book chapters not available online due to practicalities of obtaining them in timescales</p> <p>Pre-dating 2015 (except for history material)</p>	
<b>Inclusion criteria</b>	<p>Worker demographics</p> <p>Worker sectors and roles</p> <p>Implications of worker status</p> <p>Best practice</p> <p>International examples</p>	
<b>Quality assessment</b>	<p><b>Considerations:</b></p> <p>Type of source</p> <p>Level of discussion/strength of evidence</p> <p>Approach</p> <p>Type(s) of evidence provided to support conclusions</p> <p>Any concerns or limitations of the sample, analysis, or findings?</p>	<p>Grey literature, web document</p> <p>Subjective judgement</p> <p>Quantitative, qualitative, literature review, Other, e.g. surveys; consultations; case studies; data analysis; primary source; secondary source</p>



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