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NUJ response to the business, energy and industrial strategy committee inquiry into the future world of work and rights of workers

The National Union of Journalists is the voice for journalism and media professionals across the UK and Ireland. It represents staff, freelances and students in the broadcast media, newspapers, news agencies, magazines, books, public relations, communications, online media and photography.

Introduction

The immediate task when beginning a conversation about self-employment is to find a way to discuss a term that covers an almost infinite variety of working relationships

There are freelance journalists who work from home without ever meeting their clients, but who enjoy a harmonious and mutually rewarding arrangement. There are freelances who work on the client's premises but who, within the course of a year, can work for many clients.

There are freelances who work for only one client, doing the same job, in the same office, at the same desk, day after day, week after week, year after year. We know of freelances who have worked at the same desk, doing the same job for 20 years. To an onlooker they would appear to be employees, just like the colleague sitting at the next desk. However, unlike the colleague, they do not have a contract of employment and are never offered one.

The TUC cites more than 760,000 people in non-standard forms of temporary work, including agency and casual work, with 1.7m people in low paid self-employment, where the rewards from this type of work are unlikely to compensate for the reduction in rights and security involved in self-employment.

Close to a third of journalists class themselves as freelance and casualisation of the profession is growing. Many newspapers, including the national press, no longer have staff photographers, the BBC is moving towards rapidly to outsourcing of TV and radio

production and a pay survey of members carried out in 2015 found 60 per cent of freelances said they had suffered financial hardship, with 15 per cent being asked to work for no pay.

Our starting point in arguing for increased rights for freelance workers is that they have been left behind in gains made under the National Minimum Wage Act (1998) and the Fairness at Work legislation (1999 Employment Relations Act).

There is no doubt that self-employment has increased in the intervening years, with a corresponding decrease in the percentage of workers protected by legislation.

As the economy of the 21st century becomes increasingly dependent on atypical workers, these people find themselves increasingly trapped in working conditions that should have died out in 1918.

A large and growing sector of the workforce has no right to be covered by collective bargaining agreements. The media sector, notorious for the anti-union hostility of employers, is well-documented is certainly not the only industry where this is a crucial issue.

The 1999 Act gave employees two important rights: a statutory right to union recognition, and the right to strike without fear of dismissal for a prescribed period. Freelances cannot force any employer to bargain with them collectively, nor have they any protection in the event that they collectively withdraw their labour.

The exception to this point would be those self-employed people who meet the definition of 'worker', but this is a very difficult status to prove.

An employment tribunal has ruled that Uber cab drivers meet the definition of 'worker', which entitles them to the national minimum wage, paid leave and rest breaks. But protection at work should not depend on an arcane legal argument about employment status; it is much too important for that.

When members contact their unions for advice, they do not ask if they are employees or 'workers' in fact: they simply ask what rights or and protection they might have.

Freelances are excluded from the basic rights enjoyed by employees: a written contract; a notice period; a severance payment; paid holiday; paid sick leave; maternity/paternity allowance. There is no reason why any dependent worker in a civilised society should be denied these rights.

We argue that all dependent workers should have the same statutory rights: the right to form a bargaining unit and to seek recognition through the statutory process; and the underpinning of that right with the right to withdraw labour as a last resort, following the current statutory procedure.

They should have the right to a written contract, family friendly rights, including rights to time off for antenatal appointments, maternity and paternity leave and the right to request

flexible working practices. They should have job security rights, such as the right to paid notice periods, protection from unfair dismissal and redundancy pay

In Austria, the law provides standards for “permanent freelances” (Ständig Freie Mitarbeiter). Not only does it define the term “permanent freelance”, but it also allows for the negotiation of collective agreements. This has enabled the Austrian union to negotiate national collective agreements that cover freelances: one for daily and weekly newspapers and their online platforms, the other for magazines and their online platforms. The agreements define minimum standards for fees, expenses, authors’ rights and the possibility for work councils to protect freelances.

There is no reason why the UK government could not introduce such legislation.

In the UK, the law now draws a distinction between two different kinds of self-employed people. For our purposes, the second category summarises what we mean by ‘dependent workers’: “self-employed people who provide their services as part of a profession or business undertaking carried on by someone else (*Supreme Court: Bates van Winkelhof v Clyde & Co LLP and another [2014] 1 WLR 2047*).

It is on this basis that the ET found that two GMB members driving for Uber are ‘workers’.

CASE STUDIES (Q5)

- ‘Louise’ worked as the Editor of two trade magazines. She worked five days a week in the office, sometimes working late and weekends, used the company’s equipment and reported directly to the publisher. She was so integrated into the company that she was trusted with keys to close the office. However under her written “freelance” contract she was not entitled to any employment rights, including paid holiday.
- ‘Nick’ worked one day a week as a “regular casual” at a national newspaper for 9 years. He worked as a sub-editor, reporting to the chief sub-editor, using the company’s equipment, and being paid via PAYE. However, in comparison to workers, he had no entitlement to notice pay or sick pay, or access to the pension scheme, and was provided with less paid holiday.
- ‘Tim’ worked full time as a presenter for a broadcaster for over 20 years. During this time, he was forced to form a limited liability company. Although Tim worked in such a way to effectively make him an employee in all but name, he was not entitled to any employment rights. Later on, he was then told that he had to change to a contract of employment but was offered lesser terms and had lost years of employment rights.
- ‘Desdemona’ wrote a weekly column for a national newspaper for 10 years. The fee comprised 90 per cent of her earnings. When the editor decided that the column had

run its course, Desdemona was stunned to be advised that she was not entitled to a redundancy payment.

Terms of reference

1. Is the term 'worker' defined sufficiently clearly in law at present? If not, how should it be defined? What should be the status and rights of agency workers, casual workers, and the self-employed (including those working in the 'gig economy'), for the purposes of tax, benefits and employment law?

A person is generally classed as a 'worker' if:

- they have a contract or other arrangement to do work or services personally for a reward (your contract doesn't have to be written);
- their reward is for money or a benefit in kind, e.g. the promise of a contract or future work;
- they only have a limited right to send someone else to do the work (subcontract);
- they have to turn up for work even if they don't want to;
- their employer has to have work for them to do as long as the contract or arrangement lasts;
- they aren't doing the work as part of their own limited company in an arrangement where the 'employer' is actually a customer or client.

As the Uber and Deliveroo cases have illustrated, the real issue is whether the nominal arrangement is a sham i.e. false/fake freelancing. Is the 'arrangement' simply an attempt to avoid 'worker' status or even employee status? The NUJ is not convinced the definition is the problem: more that companies use it as a prescription to wriggle out of 'worker' status. Maybe there should be penalties for companies which try to avoid their responsibilities as employers.

2. For those casual and agency workers working in the 'gig economy', is the balance of benefits between worker and employer appropriate?

The use of the word 'casual' is fraught with difficulty. Some people are 'regular' casuals, 'long-term' casuals or even 'resident' casuals. A 'casual' arrangement is often an employee/employer relationship in disguise. The 'casual' has all of the disadvantages of self-employment and none of the advantages. The employer has all the advantages of being an employer and none of the disadvantages. What is required is a definition of 'dependent' worker, and whether that person is a 'worker', a 'casual', or an agency worker there should be some basic rights on a pro rata basis with an employee doing the same work.

3. What specific provision should there be for the protection and support of agency workers and those who are not employees? Who should be responsible for such

provision – the Government, the beneficiary of the work, a mutual, the individual themselves?

“Protection” and “support” are vague: what exactly is meant by this? For dependent workers of all categories, the beneficiary of the work should have a duty of care.

- 4. What differences should there be between levels of Government support for the self-employed and for employees, for example over statutory sick pay, holiday pay, employee pensions, maternity pay? How should those rights be changed, to ensure fair protection for workers at work? What help should be offered in preparing those people who become self-employed (with, for example, financial, educational and legal advice), and who should be offering such help?**

The genuinely self-employed – those operating a business on their own account – should take full responsibility. But dependent workers of all categories should receive statutory sick pay etc. from the provider of the work on a pro rata basis. Help in preparing people who become self-employed should be provided by trades unions and trade associations.

- 5. Is there evidence that businesses are treating agency workers unfairly, compared with employees? See case studies above.**

- 6. Should there be steps taken to constrain the use by businesses of agency workers?**

A quota system? A business could only use x number of agency workers provided it has y number of employees.

- 7. What are the issues surrounding terms and conditions of employees, including the use of zero-hour contracts, definitions of flexible contracts, the role of the Low Pay Commission, and minimum wage enforcement?**

The main issue is the use of such arrangements to avoid the obligations owed by an employer under a standard contract of employment. From the point of view of the worker, this makes for a precarious existence on low pay and a reluctance to try to challenge terms and conditions. Minimum wage enforcement can require an individual to stand up to an employer alone and face the possibility of dismissal. The fact that two years’ continuous service is now required before acquiring protection makes this even more hazardous.

- 8. What is the role of trade unions in representing the self-employed and those not working in traditional employee roles?**

The NUJ and other trades unions have long tried to organise and represent the self-employed, and will continue to do so. However, the law allows union recognition for collective bargaining purposes only to employees and workers, which excludes many

self-employed people who are dependent upon a particular employer. We need the law to be expanded, allowing union recognition for all dependent workers.