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THE TAYLOR REVIEW 2017

The approach of the Taylor Review is based on a single overriding ambition, namely "All work in the United Kingdom economy should be fair and decent with realistic scope for development and fulfilment." Good work matters because (a) "fairness demands... that people, particularly those on low incomes, have routes to progress in work, have the opportunity to boost their earning power and are treated with respect and decency at work," (b) "the quality of people's work is...a major factor in helping people to stay healthy and happy which benefits them and serves a wider public interest," (c) "better designed work which gets the best out of people can make an important contribution to tackling our complex challenge of low productivity," (d) "we should as a matter of principle want the experience of work match the aspirations we have of modern citizenship; that people feel they are respected, trusted and enabled...to take responsibility" and (e) "the pace of change in the modern economy and particularly technology and the development of new business models, means we need a concerted approach to work which is both up to date... responsive and based on enduring principles of fairness."¹ Unfortunately there have been many UK cases of exploitation by employers towards vulnerable workers.

These are indeed high principles to which British industrial relations should strive towards! Parameters of space allow only for a *limited* discussion on *some* of the Taylor Review recommendations. What will be treated will include the employment status, the notion of dependent contractor, particulars of employment, flexibility in the UK labour market, continuity of employment and good corporate governance and social dialogue.

Employment Status

Employment status is "the gateway through which the individual must go to access statutory rights." The problems of employment status arise where individuals are neither "employees" nor "independent contractors" but have the status of "worker." The reality is that, resulting from technological and digital innovation, the world of work is changing rapidly and will continue to do so in the future. Although the Review found that the current legal framework works well and is flexible enough to deal with the innovative forms of employment, it nevertheless felt that there is a compelling case for greater clarity in determining employment status. The current approach taken by tribunals and courts is to determine in which one of the statuses, - namely employee, worker or independent contractor, - an individual falls into. They do so, in the absence of the key elements of the relationship between the parties being defined by legislation, in applying the general British contractual principles, the EU Directives and the plethora of common law cases and

1 "Good Work. The Taylor Review of Good Working Practices", July 2017.

the tests developed therein and heard in the courts dating back to over a hundred years.² The Review's opinion is that legislation should be updated to reflect the main characteristics of an employment status through primary legislation which would "respond dynamically to changing conditions and relevant case law, the detail that underpins these criteria should be specified in a way that can be updated quickly with greater use of secondary legislation and guidance."³ According to the Taylor Review, employment status should be distinct and not so complicated that only a court can understand fully the basic principles. Where individuals are under "significant control" by the employer in the way they work they should not be left unprotected by reason of the way their contract is drafted. Nor should it be as difficult for ordinary people and responsible employers to seek clarity on employment status.

The recommended concept of "dependent contractor"

The Taylor Review is of the opinion that the current three tier approach to status, namely that of employer, independent contractor and worker is confusing and the two categories of persons that are eligible for employment rights should be easier to distinguish from one another. The Review thus recommends that the government should introduce a new name to refer to the category of persons who are eligible for "worker" rights but who are not employees. The legislation should refer to such a group as "dependant contractors." Nevertheless the government should retain the three tier approach because it remains relevant to the modern labour market. Furthermore, in developing the test for this status, control by the employer should be of greater importance, with less emphasis being placed on the requirement to perform the work personally which is currently required under the statutory definition of the status of worker.

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- 2 For an analysis and evaluation of the tests created by the courts see Jo Carby-Hall "New Frontiers of Labour Law - Dependent and Autonomous Workers" in "Du Travail Salarié au Travail Indépendent: Permanences et Mutations" (Professors Bruno Veneziani and Umberto Carabelli (Eds)), European SOCRATES Programme (2003) Cacucci Editore. Italy at pp.163 - 287 and by the same author "Innovative Forms of Employment in the 21st Century Versus Employment Status" in "Sociedade de Permutas e Combinações: Problemas Jurídicos da Economia Colaborativa" scheduled for publication by Cambridge Scholars Publishing in mid- 2018. For a fuller analysis see Jo Carby-Hall "The Taylor Review 2017 - A Critical Appreciation on a Selection of its Legal Content" scheduled for publication in late 2018 as a chapter in a book entitled "Technological Innovation and the Future of Work: Emerging Aspects Worldwide"
 - 3 "Taylor Review" *op. cit.* at pp. 34 - 35.

Particulars of Employment

Under British law there is no requirement for the employer to provide the employee with a contract of employment. There is however a requirement to provide the employee with a written statement of the particulars of employment within two months of starting the employment. The Review suggests that the government makes it a statutory requirement for both employees and dependent contractors to be given the particulars of employment on the first day of obtaining employment. The information currently required by the written particulars of employment to employees includes the name of the employer, the place of work, wages, paid holidays, sick pay and pension rights. The Review seeks an extension to ensure that it is relevant to dependent contractors and include the statutory rights which workers are entitled to from the first day of employment, how wages are calculated, and how they will be paid. In addition the Review suggests that the laws specify the format of the written particulars of employment to enable information to be transparent using plain English and be accessible to prevent employers from attempting to bury information or use unintelligible language. Should the employer fail in that duty, the Review suggests that the employer pay compensation to the employee or the dependent contractor. So as to improve further clarity and understanding, the Review suggests that the government should create and develop a free to use on-line tool which provides individuals with information on employment status and other relevant matters, thus taking advantage of digitalisation and machine learning to spread information.

Flexibility in the UK labour market

The UK labour market is renowned for its flexible nature! Flexibility plays a key role in enabling employers to respond to rapid changing market conditions and also enable the maintenance of high employment rates. The Review was concerned by the manner in which employers use the concept of flexibility to their own advantage thus exploiting and controlling workers. Nowhere was this situation more visible than in the 2016 and 2017 cases of Uber, City Sprint and Pimlico Plumbers. The respective employers used that flexibility by unilaterally imposing upon their workers the status of independent contractor. They controlled this policy by making it a "take it or leave it" situation. No negotiation was thus allowed or suggested to the worker. This amounted to one-sided flexibility. The vulnerable individual on atypical work, as for example zero hours contracts, and the gig economy needs to be protected. Flexibility is important to the labour market for the reasons given above and thus needs to be retained, but flexibility should not be used by unscrupulous employers solely to their own advantage without taking into consideration their workforce. Employers must therefore be discouraged from exercising one-sided flexibility.

Continuity of employment

The Review did not recommend the abolition of the concept of continuity of employment. The problem with individuals working on zero hour contracts and others who work irregular hours is that they can find it difficult to prove eligibility to qualify for certain employment rights by reason of gaps in their continuity of employment. For example, in order for an employee to qualify for redundancy payments, or to bring an action in a tribunal for unfair dismissal the employee has to be continuously employed for two years. Those who are casual or intermittent individuals could thus find it difficult to establish continuity of employment to entitle them to qualify for a particular employment right. The Review suggests that more needs to be done to make the process of establishing continuity

of employment easier and suggests to increase that period to one month. This could mean that the casual individual who works for a week and then is laid off for up to a month when a job is offered, the continuity of employment would accrue during that month. In that manner casual and intermittent workers would be able to acquire employment rights in circumstances where qualifying periods apply.

Good corporate governance and the social dialogue.

“Well run companies recognise the importance of the people who work for them and invest time and effort in good management relationships between individuals and at a collective level” says the Taylor Review. For work to be fair and decent an effective social dialogue is imperative; workers need to be treated with respect and dignity, day-to-day business needs to be conducted in a civil manner and workers’ views on how the work is performed should be considered by management to be relevant and potentially useful, workers need to have a broad and general understanding on what policies the company is pursuing, what its aspirations and future plans are and the role of workers in contributing to company developments and finally workers need to be informed of important strategic decisions which may affect them. Employee involvement and social dialogue constitute the essence of a well -run and successful company. In addition, corporate governance and social dialogue include statutory and common law requirements to be met in certain fields of employment law. Many of those statutory requirements emanate from EU Directives transposed into national laws while others emanate from national laws. Examples of European laws being translated into British law is the Acquired Rights Directive or the Transfer of Undertakings Directive. There exist there in an obligation for the employer to inform and consult employee representatives on a variety of issues, similarly with the Collective Redundancy Directive. As for national laws individual redundancies are provided for by the Employment Rights Act 1996 where there exist provisions for negotiations with a view to concluding a collective agreement. There also exist elements of corporate governance and social dialogue in the British common law such a duty of respect towards the employee, and the common law employer’s duty of care. The Taylor Review wishes to generalise within the labour market both corporate governance as well as the social dialogue.

The primordial question is, given Brexit, will the political will of the government and parliamentary time exist to enact those, or some of those, proposals?