

**Department for Business, Energy and Industrial
Strategy, Her Majesty's Treasury and Her
Majesty's Revenue and Customs Employment
Status Consultation**

The NASUWT's submission sets out the Union's views on the key issues identified by the Department for Business, Energy and Industrial Strategy, Her Majesty's Treasury and Her Majesty's Revenue and Customs consultation on employment status.

The NASUWT represents teachers and headteachers.

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Executive summary

- The NASUWT is clear that all those employed, irrespective of their employment status, should be able to access the same basic rights and protections.
- The NASUWT believes that the current definitions used in respect of employment status are far from clear and promote a system which is weighted in favour of the employer and open to manipulation and abuse by unscrupulous employers.
- The NASUWT maintains that everyone should be entitled to the same rights and entitlements as those currently accessed by employees. There should therefore be a single 'worker' status to determine access to all statutory employment rights.
- Whilst it is recognised that the current legal framework no longer fits the reality of modern work, the problem is not easily solved through codification or the application of a simple test, as employment relationships are often complex.
- Codification would enable unscrupulous employers to game the system by devising contracts which deliberately fall outside the scope of any codification or statutory definition.
- Codifying employment status on the basis of personal service, mutuality of obligation and control is problematic and there is no guarantee they would capture all forms of employment relationship (i.e. supply teachers as agency workers).
- The NASUWT believes that the move to rename limb b workers as dependent contractors is a distraction and ignores the more pressing need to extend employment rights to agency workers and other forms of atypical works.
- Any definition of working time should ensure that an individual undertaking work is fully paid for all of the work undertaken to complete the assignment. Work is work and should be paid accordingly.
- The definitions of employment for the purposes of tax and employment status are different and should therefore not currently be aligned.
- Trade unions have a vital role to play in ensuring that workers are better informed and empowered in respect of their employment rights. The right to trade union representation and the right to withdraw labour, free from

victimisation, is a vital and fundamental principle and right that should apply to all workers.

- Changes to employment status must go hand in hand with greater Government regulation and enforcement.

1. GENERAL COMMENTS

- 1.1 The issues highlighted by the Department for Business, Energy and Industrial Strategy (BEIS), Her Majesty's Treasury (HMT) and Her Majesty's Revenue and Customs (HMRC) consultation on employment status as part of the Government's response to the *Taylor Review of Modern Working Practices*.
- 1.2 The recommendations in the consultation are significant and wide-ranging and cover a number of significant areas associated with the labour market and clarity over employment status. The NASUWT submission seeks to address these issues.
- 1.3 There have been significant changes in the UK labour market over recent years which have impacted upon pay, job security and conditions of employment.
- 1.4 The world of work is now removed from the traditional standard employment relationship comprising of full-time, direct permanent employment. For example, the Office for National Statistics (ONS) reports that 15% of Britain's 31 million workers are categorised as self-employed and another 3 million are engaged as agency and zero-hours workers.¹
- 1.5 Although most self-employed people work full time, it is part-time self-employment that has been growing faster in recent years. Part time self-employment grew by 88% between 2001 and 2015, compared to 25% for full-time people.²
- 1.6 Recent research by the McKinsey Global Institute has suggested that the true number of people working part-time in the 'gig economy' is much higher than the official employment statistics suggest.³

¹ <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2001to2015>

² Ibid.

³ <http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>

- 1.7 Figures published by the Trade Union Congress (TUC) show that over 3 million people – one in ten of the UK workforce – now face uncertainty about their working hours and their rights and protections. Of these, 730,000 are agency workers.⁴
- 1.8 The Labour Force Survey (LFS) puts the estimate at 865,000 agency workers in the UK today, made up of those in temporary and permanent agency work, as well as those classed as self-employed but paid by an agency, and those who undertake agency work as a second job.⁵
- 1.9 The Union acknowledges that there has been a lot of public interest regarding the gig economy following the GMB case against UBER,⁶ and the more recent case involving drivers working for Addison Lee.⁷ However, the NASUWT is concerned that the Government has failed to recognise and address the issue of workers' rights and the level of protection and support agency workers should be afforded irrespective of whether or not they work in the gig economy.
- 1.10 The case against UBER brought by the GMB showed that there is a compelling case for greater clarity in employment status as companies misclassify workers as self-employed so as to avoid paying them holiday pay and the National Minimum Wage.⁸
- 1.11 The Union also notes that the rise in insecure work is having a disproportionate impact upon groups who already suffer a labour market disadvantage, such as women and black and minority ethnic (BME) workers.⁹ The TUC estimates that BME workers are over a third more likely than white workers to be in temporary or zero-hours work.¹⁰
- 1.12 One of the sectors the TUC has identified as having the fastest growth in insecure work is the education sector, which has risen by 42% since

⁴ <https://www.tuc.org.uk/sites/default/files/the-gig-is-up.pdf>

⁵ <http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf>

⁶ <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>

⁷ <https://www.leighday.co.uk/News/News-2017/September-2017/Victory-for-AddisonLee-drivers-as-Tribunal-finds>

⁸ <http://researchbriefings.files.parliament.uk/documents/LLN-2018-0026/LLN-2018-0026.pdf>

⁹ <http://www.resolutionfoundation.org/app/uploads/2016/12/Secret-Agents.pdf>

¹⁰ <https://www.tuc.org.uk/sites/default/files/the-gig-is-up.pdf>

2011.¹¹ The NASUWT is concerned about the growing trend towards the casualisation of work, precarious employment and the use of zero-hours contracts, and the negative impact of these practices upon teaching standards, teacher morale and the entitlement of children and young people to a high-quality education.

1.13 The NASUWT maintains that everyone should be entitled to the same rights and entitlements as those currently accessed by employees. There should therefore be a single ‘worker’ status to determine access to all statutory employment rights.

1.14 The Union is, therefore, committed to an education system that is fair to all teachers regardless of employment status.

1.15 The Union believes that the Government must act in order to ensure that the rights and entitlements are extended to all other categories of worker.

2. SPECIFIC COMMENTS

Issues with the current employment status regimes and attempts to develop a better employment test

2.1 Establishing employment status is fundamental both for employment law and the tax system. The NASUWT recognises that the BEIS, HMT and HMRC employment status consultation has highlighted a range of issues associated with the labour market and the need for increased clarity in the employment status framework.

2.2 It was right that the *Taylor Review of Modern Working Practices* investigated and made recommendations about the current system for the determination of employment status in the UK, including how these statuses are defined.¹²

¹¹ Ibid.

¹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

- 2.3 This submission seeks to address considerations around the rules that determine who gets which rights, and how labour market practices are best placed to address new models of work, regulation, innovation and the broader role of work.
- 2.4 The establishment of the employment status of an individual is fundamental to determining their eligibility for certain statutory rights. Currently within the UK, there are considered to be three main employment statuses: employee, worker and self-employed.¹³
- 2.5 The definition of an 'employee' as set out in section 230 of the Employment Rights Act (ERA) 1996¹⁴ is far from clear and it has been left to the courts and tribunals to determine what amounts to a 'contract of service' in respect of the specific circumstances of the employment relationship.
- 2.6 Coming up with a single test 'has proved to be a most elusive question',¹⁵ therefore tribunals are required to carry out an objective assessment of a number of factors, such as whether there is a commitment to personal service, is there a mutuality of obligation and is there a degree of control over the individual from the employer.¹⁶
- 2.7 More recently, the courts have been more likely to take into account the inequality in bargaining power and the limited ability of an individual to refuse to accept terms over which they have no control. A number of Employment Tribunal cases, such as UBER, Addison Lee, City Sprint and Pimlico Plumbers, have demonstrated that workers have to accept terms and conditions which cannot be negotiated.¹⁷
- 2.8 In regards to UBER, the European Court of Justice (ECJ) ruled in December 2017 that the company 'exercises decisive influence over the conditions under which the drivers provide their service.'¹⁸

¹³ <http://researchbriefings.files.parliament.uk/documents/CBP-8045/CBP-8045.pdf>

¹⁴ <http://www.legislation.gov.uk/ukpga/1996/18/contents>

¹⁵ http://www.bailii.org/uk/cases/UKPC/1990/1990_9a.html

¹⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/585383/employment-status-review-2015.pdf

¹⁷ <http://researchbriefings.files.parliament.uk/documents/LLN-2018-0026/LLN-2018-0026.pdf>

¹⁸ Ibid.

- 2.9 However, section 230 of the ERA 1996 is not the only definition of ‘employee’ or ‘contract of employment’. Section 2 of the Transfer of Undertakings and Protection of Employment Regulations (TUPE) 2006¹⁹ provides a much broader definition which is not limited to those with a contract of employment, as defined, save that it does not apply to an independent contractor.
- 2.10 The term ‘worker’ as defined in section 230 of the ERA 1996²⁰ has become the standard for defining someone who is not an ‘employee’ but is also not genuinely self-employed.
- 2.11 This definition has been used to afford a range of protections beyond simply ‘employees’, including the National Minimum Wage and whistleblowing provisions.
- 2.12 This definition of ‘worker’ is, however, not the only one to apply in law. For the purposes of implementing European Directives, the Court of Justice of the European Union uses a definition which is more aligned to the definition of an ‘employee’ in UK legislation.²¹
- 2.13 This has resulted in the highly unsatisfactory situation where individuals for the purposes of European Union law are ‘workers’, but not for the purposes of the ERA 1996.
- 2.14 This is further complicated when considering the definition of ‘employee’ outlined in the Equality Act 2010.²² Under section 83 of Equality Act, in order to be protected from discrimination, an individual must be an ‘employee’. However the definition is broader than the definition of an employee under section 230 of the ERA and includes those who work under a contract of employment, those who work under an apprenticeship contract and those who work under a personal contract to do work.

¹⁹ http://www.legislation.gov.uk/uksi/2006/246/pdfs/ukxi_20060246_en.pdf

²⁰ <http://www.legislation.gov.uk/ukpga/1996/18/contents>

²¹ <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30dd5c098f6d860743298445af6c09b2acb8.e34KaxiLc3qMb40Rch0SaxuNbx50?text=&docid=61926&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=82188>

²² <http://www.legislation.gov.uk/ukpga/2010/15/contents>

- 2.15 The definitions outlined above illustrate the problem with the current definitions of ‘employee’ and ‘worker’. It is difficult to understand how the Equality Act 2010 and the ERA 1996 both use the term ‘employee’ but then define it differently. For example, the Equality Act concept of ‘employee’ is broad enough to encompass freelance workers who would otherwise be seen as self-employed.
- 2.16 The Agency Workers Regulations 2010²³ (AWR) make it clear that workers are not defined as either employees or workers. Critical in this regard is that individuals have a contract to undertake temporary work with the agency, or to perform work or services personally.²⁴
- 2.17 The main difficulty the Union sees in establishing ‘employment status’ as between the agency and the temporary work agency (TWA) is the fact that the TWA is not generally found to have control over what the agency worker does.
- 2.18 There is no definition of a ‘casual worker’. Typically ‘casual’ describes the situation where an individual supplies their labour or provides services to another for a temporary period.
- 2.19 The increase in insecure, non-permanent employment, typically on hourly paid zero-hours contracts, falls into this category.
- 2.20 The same tests as apply to workers outlined above will apply to determine the employment relationship of these casuals.
- 2.21 Whilst there is no statutory definition of ‘self-employed’ status, it is generally taken to involve an individual who is engaged in business on their own account.²⁵
- 2.22 The NASUWT believes that the current system is weighted too much in favour of the employer and this has manifested itself in abuses of the

²³ <http://www.legislation.gov.uk/uksi/2010/93/contents/made>

²⁴ Ibid.

²⁵ <http://swarb.co.uk/market-investigations-v-minister-of-social-security-1969/>

system. For example, individuals have been coerced into engaging on a self-employed basis, when in reality the relationship was more permanent.

- 2.23 The Union is concerned that the current system is therefore too open to manipulation by unscrupulous employers, specifically in regards to the use of agency workers and zero-hours contracts, when it would be more appropriate to appoint permanent staff.
- 2.24 In such situations, there is a concern that individuals are unsure of their rights and lack the confidence to assert them, especially where the balance of power is slanted in favour of the employer.
- 2.25 This is a view confirmed by the Low Income Tax Reform Group, who argue that the nature of the rules and the complexity involved results in many individuals often being unaware of their employment status.²⁶
- 2.26 The NASUWT believes that many businesses are using the complexity around employment status as a means to deny individuals their core rights, either through sham contracts or by designing them in such a way as to make it difficult for individuals to understand and enforce their rights.
- 2.27 This is particularly true for atypical working arrangements (e.g. supply teachers as agency workers) where the Union believes it can be challenging for individuals to determine 'continuous employment', which means that they may not be able to be sure that they qualify for the rights they wish assert.
- 2.28 Indeed, many supply teachers report that they are treated as 'second-class citizens' who are not always able to access and enforce their employment rights.
- 2.29 Furthermore, the ability of the employer to restrict work opportunities for atypical workers (i.e. agency workers or those on zero-hours contracts) who challenge the employer, means that individuals are unable to assert

²⁶ <https://www.litrq.org.uk/sites/default/files/files/170517-LITRG-response-Independent-review-employment-practices-modern-economy-FINAL.pdf>

their rights for fear of retribution and loss of earnings. This is in addition to the insecurity of income that atypical working brings.

Legislating for the current employment status tests

2.30 It was right that the *Taylor Review of Modern Working Practices* conducted by Matthew Taylor investigated and made recommendations about employment status, including that the burden of proof should be reversed so that it falls on the employer to prove that someone is not entitled to employment rights.²⁷ The Taylor Review went so far as to state: 'Ultimately, if it looks and feels like employment, it should have the status and protection of employment.'²⁸

2.31 Indeed, the Taylor Review recommended that clearer tests for employment status should be developed by the Government to replace the minimalistic approach to legislation.²⁹ This would provide clarity and greater certainty to individuals and could be achieved through 'codification'.³⁰

2.32 Whilst it is recognised that the current legal framework which underpins employment protection no longer fits the reality of modern work or has led to any degree of consistency or predictability, the problem is not easily solved through codification or the application of a simple test.

2.33 Employment relationships are often complex, circumstantial and subject to continuous development in line with economic demand. The complexity of the employment relationship is reflected in the evolving case law and status tests which are modified to incorporate new and complex relationships.

2.34 Additionally, an unintended consequence of codification would enable unscrupulous employers to game the system by devising contracts which deliberately fall outside the scope of any codification or statutory definition.

²⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

²⁸ Ibid.

²⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

³⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679853/FINAL_-_Employment_Status_consultation_-_FOR_UPLOADING_and_PRINTING.pdf

- 2.35 Codification could also act as a disincentive to those employers who do not take on permanent employees and result in an increase in those working atypically, such as agency workers or those on zero-hours contracts.
- 2.36 Furthermore, codification could reduce tests for employment status to a simple box-ticking exercise, and, as such, significantly reduce the scope of the courts to adjust and show flexibility when dealing with situations that do not fit neatly into a box ticking exercise.
- 2.37 Any proposals must also be adaptable enough to recognise the importance of 'intention' and the reality of the situation 'on the ground' for the parties involved. This permits the law to be fluid and flexible to changes in the employment market.
- 2.38 The consultation response makes references to mutuality of obligation, personal service and control as examples of principles for codification into primary legislation.³¹
- 2.39 However, codifying employment status on the basis of these definitions is problematic and there is no guarantee that it would capture all forms of employment relationship. For example, there is an issue regarding control for agency workers (i.e. supply teachers) who are often directly controlled by the end user rather than the agency.
- 2.40 As a consequence, agency workers currently claim their (albeit limited) employment rights from agencies or umbrella companies. While agencies and umbrella companies are technically deemed to be employers, they rarely supervise, direct or control work done by the agency workers. A control-led test could mean that many agency workers could lose out on their already limited employment rights.
- 2.41 Furthermore, the use of mutuality of obligation is problematic as it impacts disproportionately on atypical workers. Under the Employment Rights Act

³¹ [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679853/FINAL - Employment Status consultation - FOR UPLOADING and PRINTING.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679853/FINAL_-_Employment_Status_consultation_-_FOR_UPLOADING_and_PRINTING.pdf)

(1996),³² the current rules on continuous service only apply to employees. Individuals who work atypically and intermittently may be workers or employees, but any break in service in-between periods of work can have a detrimental impact on an individual's ability to demonstrate periods of continuous service in order to qualify for employment rights.

- 2.42 The rules as they stand are therefore weighted in favour of the employer and allow them to game the system, specifically for those who are in atypical work, such as supply teachers as agency workers.
- 2.43 Supply teachers are specifically disadvantaged by the current rules on continuous service as they are only eligible to work for 195 days of the year. This results in successive breaks where they are unable to demonstrate the requisite period of continuous service for the purpose of accessing employment rights.
- 2.44 Supply teachers are also less likely to be able to argue that the statutory rules on continuity of employment, which allow for gaps in continuous service to be discounted, apply particularly those pertaining to a 'temporary cessation of work'.³³
- 2.45 The vagaries of insecure and precarious employment for supply teachers working on a casual 'as and when required basis', at the behest of the client as the end user, means that supply teachers are much more likely to have gaps between assignments in excess of a week.
- 2.46 This could be resolved if all workers, including supply teachers as agency workers, were able to access the full suite of employment rights once they have been employed with an agency for two years.
- 2.47 Additionally, the test for continuous service could be reformed so that the reasons for absence from work that do not break continuous service are expanded to include all forms of statutory leave, including family-related leave and statutory holidays.

³² <https://www.legislation.gov.uk/ukpga/1996/18/contents>

³³ <https://www.legislation.gov.uk/ukpga/1996/18/contents>

- 2.48 This should also apply in regards to the rules on temporary cessation of work. They should be revised to reflect the changing UK labour market so that if work is not provided by the employer, this would not constitute a break for the purposes of calculating the period of continuous service.
- 2.49 This would mean that absences from work would not break continuity of service or return the clock to zero. Instead, the clock would be paused, much in the same way that the clock is paused for certain circumstances under the Agency Workers Regulations (AWR) for the calculation of the 12 weeks' qualification period for equal pay.³⁴
- 2.50 In this situation, any work undertaken by an individual would count towards continuous service. Therefore, agency workers on atypical working arrangements, such as supply teachers, would see all work contribute to the accrual of continuous service. As a consequence, agency workers would be able to access the full range of employment rights quicker.
- 2.51 The recommendation to look at the intention of the parties involved would introduce a subjective element to any test of employment status and would enable employers to argue that they never intended that workers should accrue any rights in the workplace. This test would also undermine the Supreme Court decision in *Autoclenz Ltd v Belcher & Ors* (2011) which confirmed that courts should consider the reality of an individual's employment relationship, rather than focusing on the terms of the contract, when determining an individual's status.³⁵

A better employment status test

- 2.52 The NASUWT believes that it is for workers to know whether they are protected by statutory rights. Increased certainty can reduce the number of disputes and tensions in the workplace and prevent unscrupulous

³⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf

³⁵ <https://www.supremecourt.uk/cases/docs/uksc-2009-0198-judgment.pdf>

employers from gaining competitive advantage by misleading workers about their rights and entitlements.

- 2.53 The Union believes that a single worker test to determine access to all statutory employment rights, based on the presumption that everyone has access to such rights by default, will provide the transparency which individuals desire regarding their employment status, as they will all benefit from the same level of statutory protections.
- 2.54 A single coherent definition of ‘worker’, which is understood by both worker and employer, will overcome the confusing, and often conflicting, definitions which have created inconsistencies and uncertainties.
- 2.55 ‘Worker’ is generally understood as a broader term which would capture more forms of employment currently operating in the UK labour market and would help courts avoid courts interpreting the test of employment status narrowly so that only current employees have rights, including the right to trade union recognition.
- 2.56 The current three-tiered system (e.g. employee, worker and self-employed) means that those in atypical work are missing out on statutory rights and key employment protections because they fail to qualify as employees. As a result, they can be hired and fired at will and often have no guaranteed hours at work.
- 2.57 Non-legislative approaches, such as an online tool, must be fit for purpose and provide accurate estimates based on a range of scenarios. The Union would have serious concerns over the ability of such a tool to produce a definitive/determinative judgement on employment status and would suggest that employment status should be enforced and determined by the employment tribunals and the courts.
- 2.58 This will provide a safety net and a set of guarantees to demonstrate that the Prime Minister ensures that the ‘interests of employees on traditional

contracts, the self-employed and those people working in the gig economy are all properly protected'.³⁶

Tax liabilities and employment status

2.59 The NASUWT recognises that the existence of different statuses for the purposes of tax and employment can cause confusion and uncertainty for individuals. The consultation raises questions in regard to this, which require further consideration.

2.60 The different tests which are used for the purposes of tax and employment status serve different purposes. The tests employed in tax law are relatively crude and do not reflect the nuances found in employment case law. Extending the existing tax status tests to employment law could therefore see workers losing out on their rights.

2.61 It certainly cannot be the case that workers are denied access to basic employment rights through no fault of their own because they have been forced into bogus self-employment.

2.62 For example, the rise of online booking platforms specifically developed for supply teachers have highlighted legitimate concerns about their use in education, specifically around the employment status of the supply teacher and guarantees around their rights and entitlements.

2.63 Many online platforms do not clearly define the contractual relationship to the supply teacher when seeking work. The danger is that all of the 'risk' is passed on to the supply teacher as they are assumed to be 'self-employed'. This is further compounded by the fact that the supply teacher may be asked to set up an umbrella company.

³⁶ <https://www.gov.uk/government/speeches/we-have-to-invest-in-good-work-theresa-mays-speech-at-taylor-review-launch>

- 2.64 The implications would see a trend towards more supply teachers being considered self-employed and working in the gig economy, with little choice but to accept work on this basis, as well as the associated tax liabilities.
- 2.65 The Union believes that the development of the gig economy will only serve to reinforce the inequality that currently exists in the worker/employer relationship, with the potential to create greater insecurity for supply teachers, especially if they are denied the basic protections afforded others due to being forced into self-employment against their knowledge.
- 2.66 In addition, some employment intermediaries are promoting products that encourage supply teachers to set up as a limited company. The NASUWT has serious concerns about such products and the implications for supply teachers in regards to their tax liabilities, specifically in setting up a new limited company where the supply teacher is the 'sole owner', director and employee.

The worker employment status for employment rights

- 2.67 As outlined above, many supply teachers working as agency workers report that they are treated as 'second class' citizens who are not always able to access their employment rights.
- 2.68 The NASUWT maintains that the statutory presumption should be that there is a single worker test to determine access to all statutory employment rights, based on the presumption that everyone has access to such rights by default.
- 2.69 Currently, the experience of many supply teachers is far from clear, with agency contracts failing to explicitly distinguish between employee status, worker status and self-employed status, and whether a supply teacher is working for the employment agency, an umbrella organisation, or whether they are self-employed.

- 2.70 Many businesses are using the complexity around status to deprive individuals of their core rights either through sham contacts or by making them so long and opaque (sometimes 27 pages long) that individuals do not necessarily understand what they are signing and the rights that they are entitled to, especially in waiving their rights to equal pay, in order to gain regular work.
- 2.71 The Union asserts that at the root of this problem is a lack of clarity and transparency, as well a lack of monitoring and scrutiny. This has encouraged the growth of employment businesses and umbrella companies that deny workers access to even basic employment rights.
- 2.72 Furthermore, the NASUWT has received testimony that where supply teachers have raised concerns about their treatment, they have then found that they are subject to blacklisting practices by these agencies/companies. The process is that they are led to believe there is no longer any work for them. In essence, their experience is that the work just 'dries up'.
- 2.73 The Union is extremely worried about such practice and the way in which it effectively denies supply teachers and other agency workers access to work. When this occurs, there is no recourse or action that can be taken, a failure which significantly disadvantages agency workers in comparison to permanent employees.
- 2.74 However, ensuring fair practices by these agencies and umbrella companies, and seeking to close loopholes, should not be reliant upon individual teachers being prepared to challenge their practices.
- 2.75 In a context where supply teachers are already subject to intermittent and insecure work, being registered with these agencies is of critical concern, as otherwise it could deny an individual the opportunity for work.
- 2.76 The evidence demonstrates that the current balance of benefits between agency worker (i.e. supply teacher) and employer is skewed significantly in favour of the employer (i.e. the agency).

- 2.77 Issues of non-compliance demonstrate that swathes of agency workers are unaware of their rights and are unsure about how to report unfair practices. Where supply teachers do complain about poor practice, work often dries up. Therefore, supply teachers are often unwilling to complain due to the potential impact upon their income and financial security.
- 2.78 Currently, the distinction between employee, worker and self-employed status is poorly understood by those upon whom it impacts most.
- 2.79 The reversal of the burden of proof recommended by the Taylor Review³⁷ could further assist those in atypical and precarious employment when challenging the decision of employers.
- 2.80 The recommendation of the Taylor Review to rename limb b workers as dependent contractors is a distraction and could add further confusion to the current UK labour market.
- 2.81 It is also misleading in so far that it is not just independent contractors who rely on the limb b test. Agency workers and those on zero-hours contracts also depend on this test to secure basic worker rights.
- 2.82 The NASUWT therefore believes that the move to rename limb b workers as dependent contractors is a distraction and ignores the more pressing need to extend employment rights to agency workers and other forms of atypical works.

Defining working time

- 2.83 The NASUWT is aware that the increased use of online platforms, focusing on an on-demand, remote relationship between the operator who allocates the work and the individual who carries out the work, has raised questions in respect of 'working time' which the consultation seeks to address.

³⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

2.84 The Union is clear that any definition of working time should ensure that an individual undertaking work is paid fully for all of the work undertaken to complete the assignment. Work is work, irrespective of how it is undertaken, and should be paid accordingly. The Government should ensure that all employers, irrespective of their business model, should therefore adapt their practice to accommodate this.

Defining self-employed and employers

2.85 The NASUWT recognises that there is a desire to define self-employment into a statutory employment status in order to enable better decision making on who should fall into that category.

2.86 However, the Union has concerns that any attempt to define self-employment could enable unscrupulous employers to game the system and force individuals into self-employment even though they have all the characteristics of employees.

2.87 In addition, there is also a risk that some individuals would fail to meet the statutory tests for either self-employment or workers, meaning they would find themselves in a form of 'no man's land'.

Alignment between tax and rights

2.88 The NASUWT recognises that it might be beneficial to align employment status for tax with employment status for employment rights in order to avoid the confusion caused to individuals and businesses.

2.89 The Union acknowledges the confusion which this causes, but is aware that the respective definitions for the purposes of tax and employment status necessitates further discussion, particularly as the tests for tax purposes are often 'blunter' than tests for employment status and are seeking to achieve different aims.

3. ADDITIONAL COMMENTS

- 3.1 Trade unions have a vital role to play in ensuring that workers are better informed and empowered in respect of their employment rights. The right to representation is a key concern for the NASUWT. The right to trade union representation and the right to withdraw labour, free from victimisation, is a vital and fundamental principle and right that should apply to all workers.

- 3.2 Changes to employment status must go hand in hand with greater Government regulation and enforcement, including enhanced penalties for non-compliant employers. Without the requisite enforcement, any such changes could be seen as tokenism or window-dressing.