Response from ICAS

Department for Business, Energy & Industrial Strategy

Good Work: The Taylor Review of Modern Working Practices – Employment Status

4 June 2018

About ICAS

1. The following submission has been prepared by the ICAS Tax Board. The ICAS Tax Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 board and committee members.

2. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General Comments

3. ICAS welcomes the opportunity to respond to the consultation paper 'Good Work: The Taylor Review of Modern Working Practices – Employment Status' issued by BEIS, HMT and HMRC on 7 February 2018.

4. We acknowledge that the main objectives of the call for evidence are to understand:

    a) Whether the options proposed in the 'Taylor Review of Modern Work Practices' could achieve more certainty and clarity for businesses when determining employment status, particularly in relation to the realities of the modern labour market, and the potential impacts and implications of those proposals, and

    b) That consideration is also being given to whether there are alternative approaches that could better achieve these aims. For tax, this consultation considers the tests that define the boundary between those currently taxed as employees and those who are taxed on a self-employed basis.

5. We have not responded to the 64 questions in the consultation. Instead we have grouped the main themes arising from the consultation document and discussed these, whilst also discussing some issues that may fall outside the consultation remit, but which we nevertheless consider to be essential components of the overall question.

6. The classification of employment status is relatively simple and obvious for the majority of individuals, as is evidenced by the high proportion who pay their income tax and NICs through PAYE and by those who correctly account for their self-employed income under self-assessment. The problem lies on the dividing line where it is not immediately obvious whether someone is employed or self-employed; therefore, a mechanism to address this which is too heavy-handed is likely to impose the wrong decisions. This would lead to mis-categorisation, avoidance of responsibilities by unscrupulous employers, and barriers to rights, pay, benefits in kind and in some cases, pension rights for individuals.

7. Employment status decision-making should rest on employment law. HMRC should not be in control of, or make decisions on, employment status – this should be a matter for employers and their legal advisers, and in the event of a dispute, the employment tribunal. The tax consequences should always follow the employment law decision. This entire space should therefore be governed and overseen by BEIS, rather than HMRC, with certain elements of the work assigned to HMRC by BEIS, as currently happens with National Minimum Wage protocols.

Specific Comments

The overall aim and purpose of the consultation

8. Achieving "certainty and clarity" in a concept such as employment status, as it currently stands, is difficult. What one employer claims is unequivocal and clear, another employer will claim is vague and opaque. The issue of employment status is not opaque, nor is it vague – the current tests by which employment status is determined are clear enough. However, it is the tests themselves which are potentially out of date in the modern-day

working environment. They no longer appear to align with ever-more common and popular working arrangements.

9. What is required is a clear articulation of the overall aim; tests can then be adapted to ensure they lead to this. The Government needs to consider both the importance of the flexibility of the labour market combined with encouragement of entrepreneurism when establishing its ultimate aim, which we suggest should be concerned with maximising: (i) employment rights for the employed, to make work fairer in line with the Taylor report recommendations; and (ii) receiving Income Tax and National Insurance receipts from the employed.

10. Some sectors have more difficulties in categorising individuals than others, for example in the social care, transport, construction and hospitality sectors. This is probably due to the itinerant, peripatetic and demand-led nature of these businesses. This factor alone highlights why certainty and clarity may currently be achievable in some sectors and not in others, combined with the amount of time it currently takes to (properly) determine someone's employment status.

11. We are disappointed that this consultation did not take place prior to undertaking the review of IR35 in the Public Sector. This consultation is the most obvious place to begin. If employment status determination is fundamentally changed and executed correctly, everything else that follows should fall into place naturally with no loss of flexibility or tax revenues.

Alignment of Income Tax and NICs

12. We note that changes to the rates of NICs in relation to employment and self-employment have been ruled out. This is unfortunate, because the tax base may now suffer erosion resulting from changing working patterns in the UK, especially where NICs are concerned.

13. Differentials in NIC are one of the main drivers behind status issues. If a person paid the same level of income tax and NICs irrespective of whether they are employed or self-employed, this would remove the need to be concerned about the tax base.

14. It is questionable whether Class 2 NICs should be abolished in view of the ongoing misalignment of Classes 1 and 4 NICs. Removing Class 2 NICs would only serve to increase the misalignment further as things currently stand. Due consideration should be given to this anomaly.

Alignment of employment rights legislation with taxation legislation

15. Tax revenues, and determination of employment status for tax purposes, whilst important, should come second to the primary driver of employment rights. Taxation of an individual should follow the employment status; therefore, the government should ensure that the employment rights side is positioned correctly before carrying out work to remedy the tax treatment.

16. This positioning would be greatly aided by remedying the current and future positions around some or all the following issues:

    - Carrying out employment rights audits in the same way as employer compliance reviews and NMW/NLW reviews are carried out currently. This would encompass a review of all employed, interns, self-employed and intermediary arrangements in a business. This should be the starting point for any employment status review and should examine whether employers are abusing workers' rights by engaging them on a self-employed basis. Any tax consequences should only follow on from an employment rights audit. If an employer compliance officer comes across a situation whereby he/she considers incorrect employment status has been applied by the engager, this should be referred to BEIS to investigate first, purely from an employment rights point of view. If it transpires incorrect employment status has been applied, the tax consequences flowing from this can be referred to HMRC to pursue.

- Introducing guidance and, if necessary, legislation to protect unpaid workers to enhance existing employment rights legislation (ERA 1996) and guidance as well as suitable up-to-the-minute guidance for interns and volunteers.

- BEIS should then also be equipped with the necessary authority to impose fines and sanctions on employers depending on the level of failure or offence, including naming and shaming. This could be complimented by the existing NMW sanctions remit, which HMRC carries out on behalf of BEIS.

- The abolition of the Swedish derogation rules for agency workers should be brought about which would bring an end to agencies applying two sets of payment rates.

- Ensuring that ACAS and GOV.UK guidance is clear on exactly what employment rights people have so that all unrepresented individuals, in whatever field or sector are easily able to understand what they are entitled to.

- In line with the execution of an employment rights audit, the Government, via the Ministry of Justice, could consider re-aligning the current levels of employment tribunal awards within the annual Employment Rights (Increase of Limits) Order to discourage unscrupulous employers.

- Elements of the work outlined in this section could be assigned to HMRC to perform in a similar way to that which is currently performed on NMW related matters, with BEIS retaining overall control.

Definitions: employee, employer and self-employed

17. Currently, the legislation does not define the terms employee, employer or self-employed. The best place to start with this is to define in statute what an employee is and what an employer is, and what the rights and obligations of both are. At the same time, consideration should be given as to whether the principles established in the Ready Mixed Concrete case are still valid today. Our further discussion of this matter at section 24 below refers in relation to the "irreducible minimum" of an employment contract.

18. If someone is not 'employed' as a result of the employment categorisation process, they should be self-employed by default. Our response in respect of workers is in sections 19-23 below.

Workers – the elephant in the room

19. At present, there is a clear difference between employment legislation and employment taxes legislation in terms of categorising employment status – with three status categories in employment law and two in tax.

20. Many employment lawyers, HR and tax professionals agree that the concept of "worker" status is at best confusing and unnecessary and should be abolished.

21. At present, the definition of a worker is currently set out as someone who is "not in business on their own account" and someone who is "personally" providing a service. For the vast majority of ordinary people, this description means someone who is not self-employed – in other words, an employee. The introduction in around 1996 of the worker status has confused people ever since and, due to the limited employment rights afforded to workers when compared to employees, this has also opened up an opportunity for unscrupulous employers to exploit some workers by not categorising them as employees. It also seems to be some vague notion of a halfway house between someone who is neither employed nor self-employed. The concept of employment status should, as a result of this consultation, be revisited from first principles.

22. The Taylor report refers to the possible re-naming of "worker" to "dependent contractor". What is a 'dependent contractor', if not a contradiction in terms? Surely under employment legislation, if someone is clearly not self-employed after asking some determining questions, they are by default employed, and vice versa? It is difficult to

conceive of a reason why this cannot be the case. Many recent employment tribunal decisions (e.g. Uber BV, Uber London Limited and Uber Britannia v Mr Y Aslam and Ors. UKEAT/0056/17/DA; Mr M Lange and Others v Addison Lee Ltd 2208029-2016) have resulted in 'worker' classification as an outcome. This is almost an appeasement to both sides – both sides being HMRC and the employer – because the individuals receive only a restricted set of employment rights and the engager has to pay them under PAYE, securing exchequer funding. But what of the individuals? Why should they not be entitled to receive a full set of employment rights?

23. What is the future aim of the middle category (worker)? The major differences between workers and employees are linked to continuity of service, unfair dismissal, etc. Should the opportunity now be taken to simply dissolve worker status into employee status to make things simpler for all. The worker category is not serving the flexibility of the labour market, nor achieving certainty and clarity, but instead, merely creating opportunities to exploit vulnerable, unrepresented and low paid people.

Codification of employment legislation

24. If the Government legislates for case law-derived tests of mutuality of obligation, personal service and control (collectively known as the "irreducible minimum" as established in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968)), it is likely these tests are no longer relevant in the modern working world. Equally, are these tests even relevant in a taxation context? If tax law mirrors employment law, the tax consequence will simply follow the determination made under employment law. There will simply be no requirement to carry out a determination of status for tax purposes.

25. A definition of employment and an employer should be set down in legislation. This should enable an individual and an engager to determine whether a person is an employee. If they do not meet the requirements for employed status, the individual is automatically treated as self-employed.

The employment status test

26. The employment status test should be a test which is controlled by BEIS to determine entitlement to employment rights. Any tax consequences arising from this should mirror the outcome of the employment test.

27. A test of employment should be brief and uncomplicated, and perhaps done by way of an interactive flow chart mechanism. At present, employers complain that the current test is too unwieldy, takes far too much time to complete and it is not used unless someone considers they can achieve the right outcome. If a test was to be created which determined a person's entitlement to employment rights, there would be no need to have any other test if the tax outcome followed the employment law one.

28. A simplified statutory test may be the answer which takes account of issues other than control and mutuality of obligation (which most employers have difficulty understanding anyway). In any event the notion of 'control' has clearly changed radically since 1968, especially in the case of highly skilled or experienced individuals who work at their own discretion even though, overall, their work is the eventual responsibility of the engager. Perhaps, therefore, the concept of 'which party to the contract retains overall responsibility for the work carried out by an individual' should be tested instead. In a similar way, supervision, and direction fall at the same hurdles and merely represent barriers to the true clarity of a contractual situation.

29. Substitution tends to be present in most contracts for services but is rarely used. The courts have been inconsistent in their application of its importance to the contractual relationship. Its importance should be diminished – which may also mean that the notion of providing a service personally is also diminished in importance – as a business could employ several people on a part time basis to carry out one full time equivalent role, or equally, a self-employed worker could send numerous other individuals who are all equally well qualified to carry out a similar piece of work if he is personally unable to

make it to the site. The important point is not *who carries out* the work but *who is ultimately responsible* for the work carried out by that individual.

30. Other factors such as: provision of equipment, and how, when and where the job is done are also blurred in today's working world when people can work from anywhere in certain roles and often need minimal equipment. An independent cheese quality control tester only needs a cheese trier tool costing £50 to do his job whereas a self-employed builder usually has a van full of tools. An employed lawyer may only need a lap top and printer to be provided to carry out their work but a care worker in a care home requires a uniform, medical equipment, lifting aids etc. Some self-employed people agree that the equipment they use will be available on site whereas others prefer to bring their own. Some employed people bear their own expenses for clothing, uniforms, training and equipment whereas others have it all provided. How, when and where the job is done are also vague and can easily be misrepresented – so their importance should be diminished.

31. Furthermore, considering the current labour market environment, who in an organisation actually assumes responsibility for determining employment status? It is not procurement – they merely recruit a person to do a job. It is not HR - unless the person is being onboarded as an employee – HR does not concern itself with looking through purchase ledger records to see if any "off payroll" employees or workers have potentially slipped through the net. HR may even be an off-site outsourced consultancy and not interacting with day to day decisions taken within the business. It is not payroll – they are paid to process payroll, and again, may well be a bureau with no knowledge of internal processes. It is not Finance – they are concentrating on the business's 'bottom line'. It is not purchase ledger- which may also be based elsewhere, or even overseas.

32. Government should provide a clearer outline of the tests for employment status, setting out the key principles in primary legislation; using secondary legislation and guidance to provide more detail. If the key to establishing whether each and every engagement was eligible for employment rights, HR would have to take this responsibility on board. Qualified HR professionals are best placed to do this work, in conjunction with legal advisers where more complicated situations arise.

33. By continuing down the HMRC route of determining and pursuing employment status, these gaps between departmental responsibilities and other anomalies will continue to live on.

34. We understand from our stakeholder discussions with BEIS, HMT and HMRC, as well as this consultation document that the overall intention of the Government is to maintain three employment statuses. We consider that this would be a mistake as this should be revisited from first principles. However, if the status quo is to remain, ICAS recommends that BEIS should still retain overall control and that employment law should take precedence over employment tax as set out in this response. Crucially, the points around the rights of employees and workers must be clarified (and consideration given as to whether they should be equalised) as well as the subsequent tax liabilities flowing from each of these statuses.

Platform/app-based workers and interaction with NMW/NLW

35. The questions around platform-based workers and their interaction with the NMW are not relevant to this employment status consultation. The issue of whether platform-based workers should be paid NMW/NLW for work undertaken at times of low demand seems clear enough – if they are working at all, they should be paid NMW/NLW. If they are not deemed to be working, they should not. The issue of whether they are working, waiting for work, or not working at all is a matter for the courts.

36. All individuals should be capable of being categorised into a form of working status whatever they do and whichever sector they work in. Platform-based workers are no exception to this although the numerous recent decisions made in the Employment Tribunal which have categorised many so-called "gig economy" workers as "workers" for employment law purposes seems to be a legal way of sitting on the fence.