Consultation on Employment Status

Acas Council Response

1. Acas (Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the government’s consultation on employment status.

2. Acas is a statutory, non-departmental public body with a duty to improve employment relations in Great Britain. Acas has considerable practical experience of the dynamics of the workplace and of the issues experienced by both individuals and employers in the wide range of working arrangements in the modern labour market. In 2016/17, Acas handled almost 900,000 calls from individuals and employers to its national helpline and dealt with over 500,000 queries online. It provided conciliation in 744 collective disputes, received 92,000 notifications to its early conciliation service, and its network of locally-based advisers trained nearly 37,000 individuals on a wide range of workplace-related topics.

3. This response draws on insights from Acas’ practical experience and policy research. In particular, it draws on evidence and analysis previously set out in Acas’ submission to the Taylor Review.¹

4. Acas does not seek to offer an opinion on those issues beyond its practical experience and research, therefore not all themes and questions within the scope of the consultation are addressed in this response.

Issues with the current employment status regimes (Question 1)

5. Acas agrees with the government’s observation in the consultation document that in the vast majority of employment relationships, determining employment status is relatively straightforward and causes little confusion or difficulty for employers or individuals. However, in Acas’ experience, in those cases where an individual’s employment status is ambiguous or is in dispute, the current tests for determining employment status can present a range of barriers to achieving clarity and satisfactory resolution.

6. Acas provides a range of guidance, on its website and via its telephone and online helpline services, on the various employment statuses and applicable rights and obligations. An analysis of calls to the Acas helpline, which informed Acas’ submission to the Taylor Review, revealed a wide variety of issues encountered by both individuals and employers in connection with employment status in non-standard working arrangements.

7. The main headings identified by the government in its consultation document - that in the current system employment status is ‘complex’, ‘open to

¹ http://www.acas.org.uk/media/pdf/h/s/Acas-submission-to-the-Taylor-Review.pdf
interpretation’ and leads to ‘difficulties resolving disputes’ – broadly reflect the main issues highlighted by Acas’ experience and research in this area. Acas refers to its submission to the Taylor Review for further details, while paragraphs 8-18 below highlight some of Acas’ key findings in this regard.

Complexity

8. Acas’ experience confirms the government’s view in the consultation document that for some, particularly those in atypical work, employment status can be a complex issue. Calls to the Acas helpline suggest that there is a great deal of confusion and uncertainty around employment status among both individuals and employers engaged in atypical working arrangements. In particular, in some cases there can be a lack of clarity around the boundary between ‘employee’ and ‘worker’ statuses, and between the ‘worker’ and ‘self-employed’ statuses. Examples of such issues from calls to the Acas helpline include:

- uncertainty around whether worker or employee status applies where individuals on zero hours contracts have been working for the same employer over prolonged periods of time with reasonably regular patterns of work;
- uncertainty whether individuals are genuinely self-employed where they have been working regular hours for a single employer over protracted periods of time, and/or where the employer appears to exercise a significant degree of control over when, where and how they perform their work;
- uncertainty among some agency workers engaged in multiple jobs via several agencies at any one time, about whether they had a single ‘overall status’ when treated as employed in some jobs but as self-employed in others doing the same type of work.

9. Acas’ experience further confirms the government’s view that in some cases employment status can be confusing due to the complexity of the various tests from case law precedents. Acas finds a general lack of knowledge about the detail of these tests among both individuals and employers, as well as difficulties encountered in interpreting how these tests apply in the circumstances of particular working arrangements. As discussed further below (see paragraphs 14-18), the complexity of these tests and uncertainty around their application to individual arrangements can frustrate efforts by employers and individuals to obtain a clear understanding about employment status in their particular situations, which in turn can affect negatively the ability for parties to reach early, effective resolution of concerns about rights and obligations.

Open to interpretation

10. Acas’ experience confirms that a further difficulty with the current employment status system is that it can be open to interpretation. As noted in Acas’ submission to the Taylor Review, such scope for interpretation can result in a range of difficulties which can impact negatively on employment relations as well as the reach of employment rights to some working arrangements.
11. For example, analysis of helpline calls suggests that many atypical workers have different interpretations of their employment status than that stated in their contracts. Some described their situation as being “kept on freelance” or “not really self-employed”, and told how they felt taken advantage of in respect of their status and unfairly excluded from employment rights.

12. In some cases, this difference of interpretation can be due to genuine confusion or lack of understanding among employers and individuals around how the tests for status apply to a particular working arrangement. In other cases, Acas’ evidence supports the government’s view, as expressed in the consultation document, that the ambiguity in the rules can be used by unscrupulous employers to justify miscategorising their employees or workers as self-employed. Accounts given by callers to the Acas helpline indicate that some employers may be choosing to do so directly as a means to reduce or avoid the costs of employment obligations. For instance, some callers related how their employer had told them that they would need to ‘become self-employed’, without any substantive change in the working relationship itself, explicitly to enable the employer to avoid the costs of sick pay, holiday pay, maternity pay or other obligations.

13. In Acas’ experience, where individuals are labelled as having ‘worker’ or ‘self-employed’ status other than by way of mutual agreement and a genuine and well-informed choice for such status – whether this is due to genuine ambiguity or deliberate miscategorisation – this can be detrimental to the ‘psychological contract’ between the organisation and the worker. That is, it can have a negative impact on the unwritten aspects of the relationship that underpin trust and commitment, wellbeing and productivity in a working arrangement.

Difficulties resolving disputes

14. Acas’ experience further confirms that the complexity and openness to interpretation of employment status can make it difficult for parties to resolve uncertainties or disputes which depend on employment status. As the government notes in its consultation document, only a court or employment tribunal can definitively decide someone’s employment status where a dispute arises. However, in Acas’ view, this is not necessarily a key barrier in itself, as it is equally true that in all disputes about employment law and rights only a court or employment tribunal can make a definitive decision about the law that applies in the facts and circumstances of a particular case.

15. Rather, in Acas’ experience, one of the key difficulties in resolving disagreements about status is that the complexity of the tests for status, and the need to consider the relevance of numerous specific aspects of a working arrangement, many of which can be open to interpretation, means that it can be very difficult for employers and individuals to obtain clear guidance about status in their particular situation. This presents a significant difficulty when it comes to enabling parties to know where they stand when it comes to their rights and obligations, to assess their positions objectively, and to make informed decisions towards
resolving their disagreements in an early and satisfactory manner. In contrast, those in employment relationships where status is not unclear or in dispute can usually be advised with much more certainty about the rights and obligations that apply to their situation.

16. A second barrier to resolving such disputes early and effectively is that confusion about the different statuses for employment rights and tax purposes can create uncertainty for some individuals and employers on where to seek appropriate guidance. As noted in Acas’ submission to the Taylor Review, many callers to the Acas helpline with concerns about employment status appeared to be experiencing a frustrating and somewhat circuitous journey in trying to establish a sufficiently certain understanding to inform their options. Some had apparently been moving to and fro between Acas, HMRC and other resources in an attempt to find the answers they needed.

17. A third significant difficulty here is that, where employment status remains unclear even after guidance has been sought, parties can face a more complex and uncertain array of potential routes for addressing their concerns. As tribunal and/or civil court options may potentially be appropriate depending on employment status, even after seeking guidance on their position such individuals can remain uncertain about which route may be the appropriate one to deal with their potential complaint.

18. Acas’ analysis of helpline calls suggests that such uncertainty and confusion can cause a great deal of anxiety for those concerned – especially where rights, entitlements and security of income are at stake. Acas has found that this can hamper individuals’ confidence even to discuss their concerns or to raise a grievance with their employer, for fear of being seen to assert rights that they may not have and looked on less favourably thereafter. Other callers expressed the view that making a tribunal claim to establish their status seemed too arduous a prospect, and/or too risky in terms of their income security, without being able to make a better advance assessment of their likely status, although this was a course of action some callers were considering.

19. In view of the range of difficulties that can be encountered in some cases when it comes to achieving clarity about employment status and the rights and obligations that depend on it, Acas suggests there would be merit in introducing a streamlined employment tribunal process which might enable individuals to determine their employment status by way of a standalone claim that does not require the assertion of a breach of a right. Such status claims should be decided by a suitably expert employment tribunal following a full hearing.

Non-legislative approaches (Question 28)

20. Acas welcomes the government’s agreement with the Taylor Review’s conclusion that there is “a compelling case for greater clarity in this area”, including a role for better guidance. Acas Council suggests that there may be value in exploring the idea of a statutory Acas code of practice to provide clear
guidance on existing employment status rules for employers, workers and their representatives, and Acas would be willing to discuss this further with the government.

21. Acas agrees with the government’s suggestion that an online interactive tool is one option that has potential to provide more clarity to individuals and employers in this area, and that the development of such a tool merits further consideration. Acas emphasises however that, as with other forms of guidance, any such tool cannot be expected to provide a ‘determination’ or ‘certainty’ regarding employment status. It will always remain that courts and tribunals will have an important role to play in interpreting elements of the law in view of particular factual circumstances and in providing judgments where a dispute about status cannot otherwise be resolved.

22. Moreover, while an interactive tool that tailors advice according to information input by users has potential to provide more effectively individualised advice on status in a given situation, it remains that such advice will always be dependent on the accuracy of the information that users input to it. As that information could vary between individuals and employers in the same employment relationship, potentially rendering different results from the tool, placing too much emphasis on the value of such a tool could be misleading.

23. In Acas’ view, any promotional messaging or guidance around the use of such a tool should make such limitations clear. In particular, Acas emphasises that a tool should not be viewed or promoted as a potential substitute for individuals seeking a determination of status through the courts and tribunals. However, within such limitations, Acas agrees that a tool could potentially help individuals and employers to make informed decisions about their options, including whether to raise (and how to respond to) an informal or formal grievance in the workplace, and whether to pursue (or respond to) a claim through the courts and tribunals system, including seeking resolution through the conciliation services provide by Acas.

24. Acas further notes that clearer guidance, such as through an online tool, does not provide a complete answer to the problem noted at paragraph 18 above, i.e. that of ensuring that individuals have the confidence to challenge their status if they have concerns about it. Similarly, guidance is not necessarily persuasive in helping to resolve concerns once these are raised – in this regard, Acas’ submission to the Taylor Review noted evidence from helpline calls which suggested that indications of status from HMRC’s online employment status tool can sometimes be simply disregarded by employers when individuals seek to use this as evidence in challenging their status and entitlements. In Acas’ view, this points to a need to complement efforts to improve guidance with measures aimed at a simpler system for clarifying employment status, possibly through the Employment Tribunal, as well as boosting worker confidence to use the routes for redress that are available to them. Acas refers further in this regard to its response to the government’s recent consultation on Enforcement of Employment Rights.
25. Acas anticipates that there would likely be significant practical challenges in developing such an online tool. Not least, it would be important to strike the right balance between the aim of providing an accurate indication of status that would be practically helpful in informing choices and resolving disagreements, and the aim of creating a tool that is easy-to-use and which does not require a complex input of information that might be off-putting to users in practice.

26. Acas would be willing to work with the government to explore how such a tool might be developed, and to explore the broader question of how Acas, the government and others might engage better with service users to enable them to access the information they need in clear, accessible, helpful ways. Acas has an existing range of online, telephone and face-to-face guidance available on employment status, and will continue to review and develop its guidance in this area in response to emerging evidence of user needs and any relevant policy developments.

**The worker employment status for employment rights (Questions 30-52) and defining working time in the platform economy (Questions 53-59)**

27. On the question of re-naming Limb(b) ‘workers’ as ‘dependent contractors’, in Acas’ view this measure could risk creating greater confusion. The term ‘worker’ is one that is well-established in EU law. Moreover, the terminology of ‘worker’ may be preferable with regard to improving transparency and understanding of employment obligations – where an individual ‘works’ for an employer this terminology might more clearly suggest a greater level of employment obligations and responsibilities than the terminology of a ‘contractor’.

28. Acas would also have reservations around the introduction of a ‘dependent contractor’ status to name a sub-category of workers/employees who work in the platform economy. While Acas recognises the importance of clarifying the lines between ‘worker’, ‘employee’ and genuine self-employment in this area of the economy, Acas does not believe that it would be appropriate to create a distinct sub-category of status for this group.

**Defining ‘self-employed’ and ‘employers’ (Questions 60-61)**

29. On the question of whether it would be beneficial for the government to consider the definition of ‘employer’ in legislation, Acas’ experience and research does suggest that there is a need for greater transparency in the employment relationship in some cases, including greater clarity regarding the identity of the employer. For instance, Acas’ submission to the Taylor Review noted evidence of confusion among some agency workers as to the identity of their employer.

30. However, in Acas’ view it is not clear that a revised statutory definition of ‘employer’ would improve this situation. Acas notes that there are other options
for improving transparency in the employment relationship, including extending the right to a written statement of terms and conditions to all workers, on which Acas has commented in its responses to the government’s recent consultations on Agency Workers and Increasing Transparency in the Labour Market.