Redressing the imbalance of power in the gig economy: The Taylor Review, the Good Work Plan, and the future of UK labour law

Abstract

Working practices have changed rapidly in the past few years, creating challenges for the current labour law framework and prompting the UK Government to identify a path of law reform. This paper analyses the path chosen by the Government by discussing the two main policy documents published to date, the so-called 'Taylor Review' and the subsequent 'Good Work Plan'. Noting the Taylor Review's premise that all the major problems in the UK labour market stem from the imbalance of power between employers and workers, the paper discusses the reform proposals contained in the two documents with a view to assessing how these might impact on imbalances of power in the UK labour market. In doing so, it focuses on one of the new forms of employment to have emerged in the past few years, namely gig work, which, on the one hand, epitomises modern working practices and, on the other hand, is characterised by one of the starkest inequalities of power in the current labour market. The paper argues that, despite some minor improvements, the path taken by the Government does little to redress imbalances of power between gig workers and 'employer' platforms.

1-Introduction

The UK labour market has undergone significant changes since the global financial crisis of 2008. The so-called 4th Industrial Revolution, fostered by rapid technological development, is

creating new occupations and professions whilst at the same time rendering others obsolete.[1] Within this broader revolution, the spread of digital platforms mediating the meeting of supply and demand for labour in the so-called gig economy has changed the way people work and find employment.[2] These changes have been accompanied by the spread of other atypical forms of employment which, although already existing before the Global Financial Crisis, have become much more common in recent years. Self-employment, which in the 1990s involved about 12% of the labour force, has been on the rise since 2001 and has experienced a significant increase in the past ten years, reaching 15.1% of the workforce in 2017.[3] The use of zero-hour contracts (ZHC) has dramatically increased in recent years, now comprising 2.8% of total employment.[4] Finally, temporary agency work is also at a historical high, having increased more than 40% since 2008 and likely to reach 1 million by 2020.[5] All these changes have resulted in the percentage of people employed in so-called standard employment (full-time, permanent) decreasing to 63.0% of the working population. [6]

These changes represent a significant challenge for the current labour law framework. Several commentators have characterised the current legislative framework, still centred around the so-called standard employment relationship, as increasingly outdated and have

[1] Ursula Huws, *Labor in the Global Digital Economy: The Cybertariat Comes of Age* (1st Edition, Monthly Review Press, 2014).
[2] Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (1st Edition, Oxford University Press, 2018).
[3] Office of National Statistics, Trends in self-employment in the UK (7 February 2018). https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/trendsinselfemploymentintheuk/2018-02-07 (date last accessed 3 May 2019).

[4] Office of National Statistics, People in employment on a zero-hours contract: Mar 2017 (15 March 2017) https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/mar2017#summary (date last accessed 3 May 2019).

[5] Joe Sommerlad, 'UK economy sees 40% rise in number of agency workers over last 10 years' *Independent* (London, 10 February 2018).
[6] Matthew Taylor, Good Work: The Taylor Review on Modern Working Practices (Gov.uk, 2017). Available at https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices (date last accessed 15 May 2019) (The Taylor Review).

called for a thorough-going reform of labour law to adapt it to these labour market changes, to provide workers in new forms of employment with adequate rights and protection and to improve work quality.[7] In the light of this increased need for reform, and conscious of the lack of fit between the existing labour law framework and current labour market conditions, the Government has identified a path to reform UK labour law.

This paper analyses the path the Government has taken in reforming labour law by critically analysing two key policy documents, the so-called Taylor Review (2017) and the Good Work Plan (2018). The Taylor Review identifies the imbalance of power in the labour market as the key factor in explaining poor work quality.[8] Therefore, this paper discusses the reform path taken by the Government from the perspective of the imbalance of power, analysing what the proposals and recommendations contained in the two documents do to redress it and whether they can be regarded as sufficient to deal with modern working practices. Gig economy work is taken as an example to illustrate the limited impact the proposed reforms will have in redressing the imbalance of power entailed in modern working practices.

2-Setting the Context

Since its inception, one of the core functions of labour law has been to redress the imbalance of power between employers and workers inherent in the employment relationship, by shaping the rights and obligations of both employers and workers, and by affording a certain bargaining power in the negotiation over employment and working conditions to each party to the

[7] See for instance, Deepa Da Acevedo 'Regulating Employment Relationships in the Gig Economy' [2016] 20(1) *Employee Rights and Employment Policy Journal* or Jeremias Prassl 'Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?' [2017] 25 *Oxford Legal Studies Research Paper.*

[8] The Taylor Review, at 26.

employment relationship. In that respect, the inherent inequality of power between employers and workers can be, at least partly, rebalanced, by granting workers' rights, entitlements and resources in the establishment, duration and end of the employment relationship. Although some scholars have questioned the redress of the imbalance of power as a central purpose of labour law in contemporary labour markets,[9] others have argued that the redress of the inequality of power between employers and workers remains one of the core purposes of labour law, despite the dramatic changes in the labour market in the past few decades. [10] In understanding the evolution of labour law, it remains of paramount importance to pay attention to the dynamic role labour law plays in shaping power relations in the labour market, and in affording rights and obligations to workers and employers.

During the so-called *trente gloriouses*, following World War II, labour law, mostly by granting higher employment protection to workers in full-time, permanent positions (so-called 'standard employment') and by promoting collective bargaining between employers and trade unions, served to rebalance power relations in the labour market in favour of workers.[11] At the same time, the development of the welfare state granted workers different forms of social protection, by protecting them from a number of social risks, including unemployment, injury, sickness and old age, further improving the bargaining power of workers vis-à-vis their employers, by providing them with alternative sources of income to employment.[12]

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[9] See, for instance, Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds*.), An Idea of Labour Law* (1st Edition, Oxford University Press, 2011). See also Paul Davies and Mark Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford Monographs on Labour Law, 2007), chapter 5.

[10] E.g. Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (1st edition, Oxford Monographs on Labour Law, 2014).

[11] Ibidem.

[12] Giuliano Bonoli, 'The Politics of the New Social Policies. Providing Coverage against New Social Risks in Mature Welfare States' [2005] 33(3) *Policy and Politics* 431.

This has changed in the past few decades, where labour market liberalisation reforms have tended to lower employment protections and to hamper union power which, together with structural economic changes reducing union coverage and density, have dramatically altered the balance of power in favour of employers. Furthermore, since the 1970s, the spread of atypical forms of employment has further tilted the balance of power against workers, as an increasing share of the labour force has been granted weaker employment and welfare protection compared to standard workers and has found more difficult to be collectively represented.[13] Early researchers had already noted how the use of atypical employment can strengthen employers' position in employment relationships at the expense of workers.[14] In particular, atypical workers, given the often temporary nature of the employment relationship, may be reluctant to exercise their labour rights for fear of not seeing their employment contract renewed at its expiry.[15] Furthermore, welfare cuts and a turn to 'workfare' in the UK welfare system, have further weakened workers' power by significantly reducing the ability of workers to refuse work of very low quality.

Although primarily concerned with Brexit, Theresa May's Government seemed initially to signal a change compared to previous Governments in labour market regulations, appearing more sympathetic to workers' issues and putting the quality of work as a priority on the policy agenda. Prompted by a number of scandals regarding cases of severe labour exploitation, the Government has gone some way towards acknowledging the detrimental effects of the labour law reforms enacted in the past few decades and has initiated a process of

[13] Rebecca Gumbrell-McCormick, 'European Trade Unions and 'Atypical' Workers' [2011] 42(3) *Industrial Relations Journal* 293.
[14] Michael Reich, David M. Gordon and Richard C. Edwards, 'A Theory of Labor Market Segmentation' [1973] 63(2) *The American Economic Review* 359.
[15] Antonio Aloisi, 'Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of on-Demand/Gig Economy Platforms' [2016] 37 *Comparative Labour Law & Policy Journal* 653 and Marcello Pedaci, 'The Flexibility Trap: Temporary Jobs and Precarity as a Disciplinary Mechanism' [2010] 13(2) *WorkingUSA: The Journal of Labor and Society* 245.

revision of UK labour law.[16] In October 2016, it commissioned a review of work practices from Matthew Taylor, Chief Executive of the Royal Society for the Encouragement of Arts, Manufactures and Commerce (RSA), which was published in July 2017 under the name *Good Work. The Taylor Review of Modern Work Practice* (from now on, simply the 'Taylor Review').[17] After an initial response in February 2018,[18] the Government initiated four different consultations (on transparency in the labour market, on employment rights enforcement, on employment status, and on extending the right to a written statement). Following some of the key points highlighted in the Taylor Review, the consultations were intended to gather more evidence and, especially, stakeholders' views on specific issues before developing a reform plan. Finally, in December 2018, the Government published *The Good Work Plan*,[19] which represents the Government's vision regarding labour law reform. Despite the current political uncertainties in relation to Brexit, the path taken by the current Government is likely to define the direction labour law will take in the next few years.

As I will argue in this paper, despite a partial acknowledgement of the excessive imbalance of power present in the UK labour market, and of the need to redress this, neither the Taylor Review, nor the Good Work Plan propose reform solutions likely to achieve that aim, especially when it comes to workers employed in new forms of employment, who may be in positions of particular weakness in respect of their employers.

[16] Kendra Briken and Phil Taylor, 'Fulfilling the 'British way': beyond constrained choice—Amazon workers' lived experiences of workfare' [2018] 49(5) *Industrial Relations Journal* 438.
[17] The Taylor Review.
[18] HM Government, *Good Work: A Government Response to the Taylor Review of Modern Working Practices* (Gov.uk, 2018). Available at https://www.gov.uk/government/publications/government-response-to-the-taylor-review-of-modern-working-practices (date last accessed 15 May 2019).
[19] HM Government, *The Good Work Plan* (Gov.uk, 2018). Available at: https://www.gov.uk/government/publications/good-work-plan (date last accessed 15 May 2019) (The Good Work Plan).

3-Gig economy and inequality of power

In this paper, I use gig work as an example drawn from the broader realm of new forms of employment to show how little both the Taylor and the Good Work Plan do to redress the imbalance of power these workers face in the UK labour market. There are several definitions of gig work,[20] and here we use the term to identify all forms of work that are performed off-line but mediated by a digital platform. It has been estimated that there were roughly 1.1 million gig workers in the UK in 2017, and this number is rapidly increasing.[21]

Gig work can be regarded as an extreme example among new forms of employment when it comes to imbalances of power between workers and platforms. First of all, the majority of gig workers[22] are self-employed.[23] This means that the platforms are not formally their employers and are therefore exempted from the usual obligations employers have. As self-employed, gig workers do not have access to any form of employment protection and the contract[24] with the platform can be terminated unilaterally at any time.[25] On the one hand, the lack of employment protection diminishes the power of gig workers as they do not want to challenge or cross the platform for fear of losing employment. On the other hand, lack of employment protection reinforces the platforms' power as they are freer to unilaterally impose working conditions and easily get rid of ('deactivate') workers who do not comply. Furthermore, the self-employed do not have the right to be collectively represented by a union,

[20] See for instance, Valerio De Stefano, 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy' [2016] 37 *Comparative Labour Law & Policy Journal* 471 or Arne L. Kalleberg and Michael Dunn, 'Good Jobs, Bad Jobs in the Gig Economy' [2016] *Perspectives on Work* 10.

[21] Brhmie Balaram, Josie Warden and Fabian Wallace-Stephens, *Good Gigs: A Fairer Future for the UK's Gig Economy* (RSA Action and Research Centre, 2017).

[22] The term 'worker' is here used in a general sense and does not correspond to 'worker' as an employment status as defined in UK labour law.

[23] Balaram, Warden and Wallace-Stephens (n 21).

[24] Which is not an employment contract, as the person is self-employed.

[25] Aloisi (n 15).

as was recently confirmed by the case involving Deliveroo.[26] This, together with the fragmented nature of the workplace, the often isolated nature of the work and the lack of a direct relationship with the company, makes it very difficult for gig workers to collectively organise.[27]

By relying on a self-employed workforce, gig economy companies are able to unilaterally transfer risks associated with the economic activity in question to the workers. The self-employed are not covered by minimum wage legislation and gig economy companies generally pay workers piece-rates, meaning that the risk associated with ebbs and flows in demand is borne entirely by the workers and not by the company. Moreover, by relying on a self-employed workforce, platforms do not have to provide any insurance against accidents or injuries, while at the same time, workers are subjected to limited health and safety regulations and little protection against discrimination.[28] Furthermore, as workers are 'hired' to carry out specific tasks or assignments, the company is able to relinquish any employment obligation in between different assignments.[29] At the same time, the availability of a large pool of workers competing with each other over 'tasks' or 'gigs', reduces the company's reliance on any specific worker while undermining the potential collective power of the workers acting together.[30]

Moreover, self-employed people do not have access to most in-work benefits, such as sick pay and are not entitled to the same parental allowances. Despite several attempts to reduce

[26] *IWGB v Roo Foods T/A Deliveroo* [2018] EWHC 3342 (Admin).
[27] Hannah Johnston, Chris Land-Kazlauskas, 'Organizing on-demand: Representation, Voice, and Collective Bargaining in the Gig Economy' Conditions of Work and Employment Series No. 94 (ILO, 2018).
[28] House of Commons, Self-employment and the Gig Economy: Thirteenth Report of Session 2016-17 (April 2017).
[29] De Stefano (n 20).
[30] Willem Pieter De Groen and Ilaria Maselli, 'The Impact of the Collaborative Economy on the Labour Market' [2016] 38 *CEPS Special Report.*

the gap in social security provisions compared to employees, for instance through the introduction of the New State Pension, self-employed individuals continue to be at a disadvantage, by being excluded from contribution-based Jobseeker's Allowance, whilst facing limitations in accessing Universal Credit.[31] This translates into fewer resources to rely on other than employment, further reducing their bargaining power by obliging individuals to accept the employment and working conditions offered in order to have an income. If we add the emphasis on 'workfare' characterising the UK welfare system, recently enhanced by welfare reforms, many individuals are obliged to accept any work in order not to be subjected to cuts to their benefits or to be sanctioned.[32]

Whether gig economy companies should be considered 'employers' and individuals working for them should be regarded as 'employees' or 'workers' rather than self-employed under the law, is a matter discussed at length in the literature.[33] The recent decisions involving UBER and the couriers CitySprint and Hermes[34] have found these companies to be employers and the individuals their 'workers' under UK law, meaning these workers are entitled to several employment rights they were previously denied, including national living wage, sick pay, holiday pay, working time regulations and union representation. Although other cases[35] have found gig workers to be genuinely self-employed, it appears that several platforms are using bogus self-employment to avoid employment regulations, which would restrain their power over the workers. As has also been found in the courts, many of these companies exercise a lot

[31] Balaram, Warden and Wallace-Stephens (n 21).
[32] Briken and Taylor (n 16).
[33] See, for instance, Prassl (n 2) and Miriam A. Cherry and Antonio Aloisi, 'A Critical Examination of a Third Employment Category for On-Demand Work (in Comparative Perspective)' in Nestor M. Davidson, Michele Finck & John J. Infranca, (Eds.) Cambridge Handbook on the Law of the Sharing Economy (1st Edition, Cambridge University Press, 2018).

[34] *Uber BV v Aslam* [2018] EWCA Civ 2748; *Dewhurst v Citysprint UK Ltd* [2016] ET 220512; *Ms E Leyland and Others v Hermes Parcelnet Ltd* [2018] UKET 1800575/2017.

[35] See for instance *IWGB* (n 26).

of control over the workers, ranging from setting prices, the route to be followed in carrying out tasks, the behaviour the worker should have in interacting with costumers, to the dress code.[36] At the same time, some of these companies, despite advertising the flexibility of working for them, actually set some strict requirements regarding availability to work, suspending workers if they do not abide.[37] Thus, it appears that many of these companies are purposely misrepresenting their actual relations with gig workers and creating one-sided flexibility in which the companies reap the benefits whilst workers are left in a weak position, being burdened with all the risks.[38] Even when the courts[39] have rectified the misrepresentation, by finding some gig workers to be 'workers' rather than self-employed, the decision only applied to the claimants and not to all the gig workers working for the company involved in the case, thus reducing the possibility of redressing employment status misclassification.[40]

Besides their self-employed status, gig workers face specific disadvantages which foster an inequality of power vis-à-vis the platforms. As already highlighted by tribunal judge Snelson, their contract with the platform is written by the company without any input from the gig worker, and the company is free to unilaterally change the contract conditions, without consulting the workers.[41] Companies are therefore able to frame the contracts in order to disempower the workers to their own advantage. In the court case involving UBER, judge Snelson quotes the previous court case *Consistent Group Ltd-v-Kalwak* (2007) IRLR 560 to

[36] Aloisi (n 15) and Jeremias Prassl and Martin Risak, 'Uber, Taskrabbit, and Co.: Platforms as Employers - Rethinking the Legal Analysis of Crowdwork' [2016] 37 *Comparative Labour Law & Policy Journal* 619.
[37] De Groen and Maselli (n 30).
[38] Orly Lobel, 'The Gig Economy & the Future of Employment and Labor Law' [2017]51 University of San Francisco Law Review 51.

[39] E.g. *UBER BV (n 34); Dewhurst* (n 34); *Leyland* (n 34); *Boxer v Excel Group Services Ltd* [2017] ET/3200365/2016; *Addison Lee Ltd v Mr C Gascoigne* [2018] UKEAT/0289/17/LA.

[40] The Taylor Review.
[41] *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET).

advise that 'armies of lawyers will simply place substitution clauses, or clauses denying any obligation to provide or accept work […] even where such terms do not begin to reflect the real relationship' in order to reduce the platforms' obligations towards the workers.[42]

Furthermore, some platforms have been found to insert clauses in the contract prohibiting workers from taking legal action against the companies in a number of instances, including, for instance, in relation to their employment status. Even though courts rely on the true nature of the agreement rather than what is written in the contract in determining the employment status of an individual, thus making these clauses unenforceable, the insertion of these clauses has clearly a deterring effect as it discourages workers from making a legal claim.[43] All these practices further reinforce the power of the platforms vis-à-vis the workers, as most workers feel unable to challenge the companies on a legal basis. When this is associated with the fact that gig workers are not entitled to a written statement as they are either 'self-employed' or 'workers', this makes it very difficult for them to even know what rights and obligations their contract with the company entails, as the oral evidence provided by a Hermes courier to a joint Parliamentary Committee aptly testifies.[44]

In addition, the system of ratings, which many platforms use, allows companies to monitor the quality of the service provided by workers remotely, while at the same time establishing a severe disciplinary mechanism which the workers have little power to counteract.[45] For example, UBER has been found to deduct money from its drivers when one of the customers complained about the service and asked for a refund, without the drivers being able to explain the situation or question the customer's position.[46] At the same time, workers

[42] *Aslam & Ors* (n 41) citing *Consistent Group Ltd-v-Kalwak* [2007] IRLR 560 78.
[43] Balaram, Warden and Wallace-Stephens (n 21).
[44] House of Commons (n 44).
[45] Prassl and Risak (n 36) and Aloisi (n 15).
[46] *Aslam & Ors* (n 41).

can be easily 'de-activated' without explanation and with limited possibilities to challenge the decision, giving companies the power to get rid of workers with extreme ease.[47]

Finally, platforms also have access to a large amount of data about their workers, whilst workers not only have limited data about the platforms, but they have very limited knowledge of how the platforms use their data. Besides this raising important issues with data protection[48] which go beyond the scope of this article, the platforms can use these data to create an 'indirect managerial control and create power asymmetries between the platform and the worker'[49]. Through complex algorithms, gig economy companies can use these data to control different aspects of their economic activities and to manage their workforce in an automated or semi-automated manner. For example, through its algorithms, UBER can assign rides, fix prices, decide the route drivers are recommended to follow and monitor the workers' performance, without workers' having any knowledge on how the algorithms work or how their data have been used.[50] This has led several authors[51] to talk about 'algocracy' with monitoring and supervisory activities carried out by algorithms in a non-transparent manner, and workers kept ignorant of how decisions are made and powerless to challenge them.

Following these features, it can be argued that gig work constitutes an extreme case within modern working practices in terms of imbalances of power. On that basis, it is used in what follows as an example to assess the extent to which the path of labour law reform undertaken by the Government can be said to redress imbalances of power and to provide a fairer balance between rights and obligations in modern working practices.

[47] Prassl and Risak (n 36) and Aloisi (n 15).
[48] Vassilis Hatzoupoulous, *The Collaborative Economy and EU Law* (1st Edition, Hart Publishing, 2018)
[49] Ibidem, at 154.
[50] Miriam A. Cherry, 'Beyond Misclassification: The Digital Transformation of Work' [2016] 2 *Saint Louis U. Legal Studies Research Paper.*
[51] E.g. Hatzoupoulous (n 48) and Cherry (n 50).

4-The Taylor Review and the Good Work Plan

The Taylor Review was commissioned in October 2016 to make recommendations for updating UK labour law, in order, as its full title suggests, to make it more suitable for modern working practices. Academic analyses of the Taylor Review have hitherto focused on its shortcomings in addressing modern employment strategies[52], work intensification[53], employment status issues[54], workforce management[55], labour exploitation[56], workfare[57]and choice[58]. Although some of these analyses[59] mention the imbalance of power in the employment relationship, none systematically analyses the Review in relation to redressing the imbalance of power between employers and workers. Furthermore, at the moment of writing, no academic analysis of the Good Work Plan has been published, discussing in depth its strengths and weaknesses. In this paper, I will analyse the proposals contained in these two documents in order to assess how they might redress the imbalance of power in the labour market. The analysis is structured along six key dimensions: employment status, transparency, employment rights, social protection, workers' voice and law enforcement. These dimensions are meant to cover all the work and employment dimensions covered in both the Taylor Review and the Good Work

[52] Paul Thompson, 'The Taylor Review: a platform for progress?' [2019] Early View *New Technology, Work and Employment.*
[53] Phil Taylor, 'A Band Aid on a Gaping Wound: Taylor and Modern Working Practices' [2019] Early View *New Technology, Work and Employment.*
[54] Alexander Wood, 'The Taylor Review: Understanding the Gig Economy, Dependency and the Complexities of Control' [2019] Early View *New Technology, Work and Employment* and Ewan McGaughey, 'Uber, the Taylor Review, Mutuality and the Duty Not to Misrepresent Employment Status' [2018] Early View *Industrial Law Journal.*
[55] Sian Moore and others, ''Fits and Fancies': The Taylor Review, the Construction of Preference and Labour Market Segmentation' [2018] 49(5-6) *Industrial Relations Journal.*
[56] Deirdre McCann and Judy Fudge, 'A Strategic Approach to Regulating Unacceptable Forms of Work' [2019] Early View *Journal of Law and Society.*
[57] Briken and Taylor (n 16).
[58] Katie Bales, Alan Bogg And Tonia Novitz, ''Voice' and 'Choice' in Modern Working Practices: Problems With the Taylor Review' [2018] 47(1) *Industrial Law Journal 46.*
[59] E.g. Briken and Taylor (n 16) and Thompson (52).

Plan, with the exclusion of progression, training and taxation which, while certainly important, fall outside the focus of this paper on the imbalance of power.

4.1 Employment Status

A central issue identified in both documents is the lack of clarity of employment status. The current labour law framework, based on the distinction between 'employees', 'workers' and 'self-employed', is recognised in both documents to be ill-adapted to new forms of employment enabled by technological developments. This can create ambiguity and uncertainty in the employment status of individuals, which can be used by some companies to mislabel its 'employees' or 'workers' as either 'workers' or 'self-employed', thus reducing their obligations and denying the workers' labour rights. Both documents seem to take a tough stance against bogus self-employment, with unscrupulous employers being able to misclassify their workers and transfer to them all the risks without bearing any obligation, as some recent cases involving gig work have aptly demonstrated.[60] The Taylor Review further highlights the desirability of expanding the currently minimalistic legislation on employment status, thereby addressing the consequent excessive reliance on case law to solve employment status disputes.

On the one hand, the Review recommends that employment status be clarified in legislation in order to make the determination of status 'simpler, clearer, and give individuals and employers more information, a greater level of certainty and an understanding of which rights and responsibilities apply'[61]. Despite this laudable preamble, the Review goes on to identify the creation of a 'dependent contractor' status in substitution of the current 'worker' status as the main solution. Without making the case for the utility of redefining workers as

[60] *Aslam & Ors* (n 41); *Dewhurst* (n 34); *Leyland* (n 34).
[61] The Taylor Review, at 35.

dependent contractors, as has already been discussed elsewhere, the Taylor Review remains very vague on how the definition of 'dependent contractor' will differ from the current definition of 'worker' and it is silent on which features should be included in the definition to improve the clarity of employment status and avoid companies misclassifying its workers, an issue which, as we have seen, is particularly relevant in the gig economy.[62]

On the other hand, the Taylor Review advises a change in current employment status tests to put increased emphasis on 'control'. Nowadays, courts rely primarily on three characteristics to determine whether an individual is a worker or self-employed: mutuality of obligation, control, and personal service.[63] By putting more emphasis on control, the Review aims to avoid situations in which, although a company exercises a lot of oversight over the way a worker performs a task, but there is no obligation to accept work or there is a right of substitution, the company might not be considered the 'employer' and the individual, not a 'worker'. This is exactly what happened in the recent case involving Deliveroo, in which the judge found riders to be self-employed as the contract with the company entailed a genuine right of substitution.[64] Although the recommended emphasis on control is supposed to avoid cases like the one just mentioned, it presents some important pitfalls. As already highlighted by the Trades Union Congress,[65] placing more emphasis on control risks excluding from the 'worker' category individuals who, although working with some autonomy, might still be dependent on a company. At the same time, by focusing mostly on one characteristic, it might invite companies to engineer contracts and employment relationships that mask the real control the company has on workers, thereby making it easier to avoid being classified as employers.

[62] See, for instance, Bales, Bogg and Novitz (n 58).
[63] BEIS, HMT and HMRC, *Employment Status Consultation* (Gov.uk 2018). Available at https://www.gov.uk/government/consultations/employment-status (date last accessed 15 May 2019).
[64] *IWGB* (n 26).
[65] TUC, *Taylor Review: Employment Status. TUC response to the BEIS/HMT/HMRC Consultation* (2018).

In redesigning common law tests on employment status, in other words, an emphasis on control might solve some problems while creating others.

Following the Taylor Review and recognising the lack of clarity in employment status as an important challenge, the Government launched a consultation dealing specifically with employment status.[66] However, the Good Work Plan, which was supposed to draw from the results of the consultation to design a reform of the relevant provisions, does not contain any substantial proposals in this regard: neither as to amending the legislation nor as to the changing employment status tests used by courts. The Plan only vaguely states that the Government will 'bring forward legislation to improve clarity on employment status, reflecting modern working practices'[67], without specifying how this will be done, which principles will be followed or any time frame for reform. At the same time, it mentions that the Government has commissioned independent research to investigate more about 'those with uncertain employment status'[68] despite the already widely available empirical evidence on the consequences of the uncertainty of employment status. Thus, the Good Work Plan does even less than the Taylor Review to address the issue of bogus self-employment, which reinforces the 'one-sided flexibility', which the Government claims to want to fight.[69] It is therefore unlikely that many gig workers, who currently find themselves in an employment limbo, will see their employment status clarified in the incoming years, leaving to individual legal claims and to lengthy court trials, the onus to prove they are not self-employed and are therefore entitled to many core labour rights.

4.2 Transparency

Lack of clarity does not only concern employment status. In fact, both documents rightly identify a lack of transparency in the rights and obligation employers and workers have and

[66] BEIS, HMT and HMRC (n 63).
[67] The Good Work Plan, at 44.
[68] The Good Work Plan, at 29.
[69] The Good Work Plan, at 12.

acknowledge that this puts many workers in a position of weakness vis-à-vis their employers. It must be borne in mind that the current law obliging employers to provide a written statement of employment particulars within two months of the start of employment applies only to employees, leaving newly started employees and 'workers' without any written statement or other record specifying key features of the employment relationship, including their labour rights. The self-employed, including those in the gig economy, have no such right. Taking into account the suggestions provided by several submissions, the Taylor Review proposes to provide a written statement from day 1 of employment and to extend this right also to 'workers' or 'dependent contractors' as they are to be renamed according to Taylor.[70] Following the Review, the Government published a consultation on the extension of the right to a written statement to 'dependent contractors'[71]. As a result of the consultation, the Good Work Plan endorses Taylor's recommendation and proposed, too, that the right to a written statement be extended to all 'workers' from day 1. This is definitely a positive outcome as it will allow clarifying workers' rights and employers' obligations for a number of atypical workers, who are nowadays excluded from any right in this regard, providing them with important information to challenge eventual employers' abuses.

That said, the proposals overlook two important points. On the one hand, they do not extend any rights to the self-employed, who will continue working without having a written statement specifying their rights. As we have seen in the previous section, many of those working in the gig economy might continue to be considered self-employed even if reforms relating to employment status are implemented, meaning that they will still not have a right to any written statement. On the other hand, there is no mention in either the Taylor Review or

[70] E.g. TUC, *Living on the Edge: TUC submission to the Taylor Review of Employment Practices in the Modern Economy* (2017); GMB, *GMB Evidence to Matthew Taylor Review on Modern Working Practices* (2017); CBI, *Work That Works for All: Building a Fair and Flexible Labour Market That Works for All* (2017).
[71] BEIS, *Extending the Right to a Written Statement to 'Dependent Contractors' (Non-employee Workers)* (Gov.uk, 2018).

the Good Work Plan of any reform to challenge some employers' bad practices, such as those of inserting unenforceable clauses with the sole purpose of intimidating workers from claiming their rights. Similarly, the reform does not do anything to reduce the power of employers to unilaterally amend contracts, a practice that appears very common in the gig economy, as highlighted in the Deliveroo[72] and UBER decisions.[73] By not addressing these issues, the reform does little to change the imbalance of power entailed in a written statement, relying instead on the goodwill of employers to correctly write down their obligations and workers' rights, without providing workers with the legal tools necessary to counteract employers' bad practices.

Both documents also conceive of transparency in an overly narrow way, focusing mostly on the written statement of employment particulars. As we have seen, gig economy companies gather a large amount of data from the workers and use them to carry out forms of automatic or semi-automatic management through complex algorithms. There are currently important issues related to the opaque use of these data by these companies and the non-transparent functioning of these algorithms, which can be used by companies to exercise power over the workforce.[74] Thus, by completely omitting transparency reforms in this context, both documents overlook how the lack of transparency in data gathering and use can contribute to an imbalance of power in the employment relationship, giving platforms a lot of control and information about their workforce, but leaving workers powerless in respect of the use of this information by the company.

[72] *IWGB* (n 26).
[73] *Aslam & Ors* (n 41).
[74] Cherry (n 50).

4.3 Employment Rights

Besides issues of clarity and transparency, the two documents discuss at length a number of employment rights. However, both the Taylor Review and the Good Work Plan propose only limited improvements in this regard. Continuity of service is an important feature of the current law in that it constitutes a condition of some important employment rights, such as the rights to claim unfair dismissal and to receive redundancy pay. In accepting a recommendation from the Taylor Review, the Good Work Plan proposes a relevant change to the definition of continuity of service, extending the relevant break-period from one week to one month. At the same time, again following a recommendation of the Review, the Plan also proposes an increase in the pay reference period to calculate holiday pay from 12 to 52 weeks. Although some workers can undoubtedly benefit from these changes in the qualifying period, some of the most precarious workers, with the most irregular working patterns, will continue to lose out. As most gig workers are not regarded as 'employees' according to the law, and are unlikely to be considered so in the future given the limited changes to employment status (see Section 4.1), they will not benefit from rights related to unfair dismissal and redundancy pay, regardless of the length and continuity of the contractual relationship.

As regards the national minimum wage/national living wage (NMW/NLW), the Taylor Review suggests important but problematic changes directed specifically at gig work, where many workers are paid piece-rate. The calculation of working time, which is key in determining how the NMW/NLW legislation applies, has already been discussed by the courts and, as the recent UBER decision has shown, is not at all straightforward.[75] The main problem, which Taylor acknowledges, is that gig workers can 'log in' to an app without actually looking for work, or they might be logged in to multiple apps at the same time, or they might be free to

[75] Ibidem.

refuse work when logged in. This makes it very complicated to define when the workers are in fact working for a specific platform and, as such, entitled to the NMW/NLW. Taylor also recognises that there might be times of oversupply of labour, 'flooding the market'[76] and reducing the hourly rate to below the NMW/NLW, as the number of 'gigs' the workers will carry out will not result in a piece-rate pay above or equal the NMW/NLW.

The Review recommends two partly contradictory solutions. On the one hand, it urges the Government to amend piece-rate legislation to make sure gig workers are paid the NMW/NLW whilst continuing to enjoy their flexibility. It further proposes the use of 'fair piece-rates', which can be calculated using the data the platforms already gather, in order to make sure gig workers are paid NMW/NLW.[77] On the other hand, it puts a lot of emphasis on 'choice' arguing that 'if an individual knowingly chooses to work through a platform at times of low demand, then he or she should take some responsibility for this decision'[78]. Rather than aiming to ensure a guaranteed NMW/NLW for all, in other words, the Review seems to suggest that the only role for platforms should be to clarify the rough amount workers would be paid over a certain time, leaving to the workers the choice of whether to accept to work for less than the minimum wage. This seems to disregard the possibility that some workers may not be free to make this choice; that they may feel compelled to work in order to accrue enough income, even if that means working below NMW/NLW. The Review thus seems to completely ignore the asymmetry of power in wage bargaining in the labour market, purporting a freedom of 'choice' which does not reflect the reality of many workers.

In the consultation on employment status, the Government further considered the same issues.[79] In the end, in the Good Work Plan, the Government decided not to bring these changes

[76] The Taylor Review, at 37.
[77] The Taylor Review, at 38.
[78] Ibidem.
[79] BEIS, HMT and HMRC (n 63).

forward, citing in the decision that this follows the recommendations of the Joint Parliamentary Committee in response to the Taylor Review.[80] Indeed, the Joint Parliamentary Committee rightly argued that 'the proposal is overly complex, and risks undermining the NMW/NLW by inviting worker to choose to work for a lower rate of pay'.[81] Nevertheless, the Good Work Plan does not introduce any alternative reform to piece-rate pay which, as it currently stands, leaves many gig workers working below the NMW/NLW, as companies continue to transfer the risk of ebbs and flow in demand to their workers. By leaving piece-rate pay legislation untouched and at the same time not proposing any significant reform in clarifying employment status (see Section 4.1), the Government is leaving most gig workers without any protection against extreme low pay, as many gig workers may continue to feel compelled to work even when the pay rate falls significantly below the NMW/NLW.[82]

4.4 Social Protection

Conscious that employment rights have to expand into the realm of social protection in order to fully protect workers, both documents discuss important changes to the social protection framework. The Taylor Review recommends considering statutory sick pay as a basic employment right, like the NMW/NLW, thus making it available to all 'workers' from day 1 of employment. At the same time, it recommends extending the right to return to work after a prolonged illness to all 'workers', as it applies nowadays to parental leave. This is undoubtedly an important improvement, as many workers nowadays are not entitled to sick pay and have to struggle to work in order not to lose income, or can be dismissed by the employer because they

[80] House of Commons, *A Framework for Modern Employment: Second Report of the Work and Pensions Committee and First Report of the Business, Energy and Industrial Strategy Committee of Session 2017–19* (November 2017).
[81] Ibidem.
[82] See, for instance, Frank Field and Andrew Forsey, *Wild West Workplace: Self-employment in Britain's 'Gig Economy'* (2016); Frank Field and Andrew Forsey, *Sweated Labour: Uber and the 'Gig Economy'* (2016).

have been sick for long periods. These recommendations can, therefore, help rebalance the imbalance of power in the employment relationship, giving many previously excluded workers income and employment security when sick. However, the Government reaction to these recommendations appear quite timid, to say the least, as the Good Work Plan seems to leave to employers the responsibility to improve protection during sickness and stating that it will consult on measures to improve sick pay, without specifying the scope of the consultation and whether it will also consult on Taylor's recommendations. Therefore, despite Taylor's proposals to improve the imbalance of power in case of sickness, the Government appears to refrain from any relevant reform in this regard, once again leaving many workers without any protection in case they fall sick.

Furthermore, the Taylor Review discusses at length a number of measures to improve social protection amongst the self-employed. First of all, it advises the Government to improve pension provision for the self-employed, for instance by extending auto-enrolment rules into pension schemes. It also suggests the use of portable benefit platforms, which would allow the self-employed, including those working in the gig economy, to move freely between jobs and platforms whilst continuing accruing benefits, which can include sick pay, holiday pay, protection against injuries, pensions and training. Moreover, it hypothesises a 'link' between these private vehicles and state-based social protection rights, thus creating integrated social protection for the self-employed, though it does not specify how this would work in practice. Finally, it encourages the Government to create a 'WorkTech Catalyst' to find creative solutions to better support the self-employed.[83] In the Good Work Plan, the Government accepts these recommendations[84] and presents several Government initiatives to improve social protection among the self-employed. However, with the partial exclusion of pension

[83] The Taylor Review, at 77.

[84] Although it will not directly extend the auto-enrolment scheme currently available to other workers, instead providing a more targeted solution to take into account the heterogeneity of the self-employed workforce.

provisions, the Government approach to increasing social protection among the self-employed entail very limited state involvement, preferring market-based solutions. Thus, although aware of the numerous gaps in social protection suffered by gig workers, who are working mostly as self-employed, it does little to de-commodify them, leaving improvements to private initiatives.

Finally, neither of the two documents proposes any relevant change for the most vulnerable workers as regards their ability to go without an employment income for any period of time. In fact, neither the Taylor Review nor the Good Work Plan discusses the 'workfare' model characterising the UK social protection system at all, nor the most recent social protection reforms, which toughened conditions to access benefits for workers and reinforced a punitive sanctioning regime, compelling workers to tolerate employers' abuses and mistreatments, in order not to lose income.[85] Therefore, neither document addresses one of the core issues of the current UK social protection system, which instead of enabling workers to refuse exploitative working practices, actually obliges them to suffer employers' abuses in order not to lose access to welfare.

4.5 Workers' Voice

As the imbalance of power between employers and workers appears to be Taylor's central concern, it seems of utter importance not to focus only on individual employment rights but also to discuss workers' collective representation rights. The UK currently suffers from one of the highest representation deficits in Europe, coming last but one in the European Participation Index, which measures workers' representation in the workplace.[86] Unlike some Continental European countries, workers' representatives do not sit on company boards. Union density was

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[86] ETUI, Employment Participation Index (EPI) https://www.worker-participation.eu/About-WP/European-Participation-Index-EPI (date last accessed 5 May 2019).

23.5% in 2016, and in the private sector, only 13.5% of employees are unionised.[87] At the same time, collective bargaining coverage is only 26.3%, among the lowest in Western Europe.[88] An abundance of studies shows how trade union presence and strength at a workplace can help redress the imbalance of power in favour of workers, ensuring better health and safety standards[89], providing more generous contractual benefits[90] and improving work-life balance[91]. Unsurprisingly, this was also recommended by several trade unions' submissions to the Review.[92]

If a core aim was to redress the imbalance of power in the labour market, strengthening collective representation and bargaining would have been an obvious route to take. Nevertheless, only very limited space is dedicated in either document to employment relations, with the Taylor Review devoting to the topic only three pages out of 116 and the Good Work Plan one page out of 64. Although Taylor does not completely ignore the importance trade unions play in redressing the imbalance of power in the workplace, stating that 'we heard many positive examples of the roles trade unions can play in good employment relations'[93], there is no role for unions in any of his recommendations. Given this, the neglect of a role for trade unions seems to be driven by ideological reasons rather than empirical ones, something which seems at odds with the purported independence of the Review. The Government in the Good

[87] BEIS, *Trade Union Membership 2017: Statistical Bulletin* (March 2018).
[88] OECD, Collective Bargaining Coverage (2016) https://stats.oecd.org/Index.aspx?DataSetCode=CBC (date last accessed 5 May 2019).

[89]Theo Nichols, David Walters and Ali C. Tarisan,'Trade Unions, Institutional Mediation and Industrial Safety: Evidence from the UK' [2007] 49(2) Journal of Industrial Relations 211 and David Walters, 'Trade Unions and the Effectiveness of Worker Representation in Health and Safety in Britain' [1996] 26(4) *British Journal of Health Services* 625.

[90] John W. Budd, 'The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly Power, Collective Voice, and Facilitation' (2005) University of Minnesota, *Industrial Relations Centre Working Paper*.
[91] Abigail Gregory and Susan Milner, 'Trade Unions and Work-life Balance: Changing Times in France and the UK?' [2009] 47(1) *British Journal of Industrial Relations* 122.
[92] TUC (n 70); UNITE, *Unite Submission to Taylor Review of Employment Practices in the Modern Economy* (2017); GMB, *GMB Evidence to Matthew Taylor Review on Modern Working Practices* (2017).
[93] The Taylor Review, at 52.

Work Plan goes one step further, not considering there to be any space for workers' representation in the improvement of workers' voice and not mentioning 'employment relations' even once.

Most importantly, neither the Taylor Review nor the Good Work Plan proposes any change to the *Trade Union Act 2016*, which has made it more difficult for unions to organise industrial action and, more generally, has introduced several barriers to collective representation.[94] Also, they do not recommend any reform to collective bargaining or to increase union presence at the workplace. Finally, as will be mentioned in the next Section, unions are not considered at all in the context of improving law enforcement and reporting cases of breaches of the law. The only mention of unions in the two documents is that they should work with ACAS and Investors in People to promote 'better employee engagement and workforce relations'[95], without specifying how this would be done in practice and without acknowledging the important legal and other obstacles unions face today in the collective representation of workers.

Instead, the two documents focus on the need to reform the Information and Consultation of Employees (ICE) Regulations, which have been in place since 2005, and which allow employees in firms with at least 50 employees, under certain conditions, to request the employers to inform and consult them about workplace issues.[96] Conscious of the limited impact these regulations have had in the UK labour market, the Taylor Review advises to include not just employees but also 'workers' in their scope of application, and to lower the threshold to trigger the application from 10% of workers in a workplace to 2%.[97] This is a

[94] Michael Ford and Tonia Novitz, 'Legislating for Control: The Trade Union Act 2016' [2016] 45(3) *Industrial Law Journal* 277.
[95] The Taylor Review, at 53.
[96] ACAS, Information and Consultation of Employees (ICE) http://www.acas.org.uk/index.aspx?articleid=1598 (date last accessed 5 May 2019).
[97] The Taylor Review, at 53.

welcome proposal which was also suggested by the TUC in its submission to the Review.[98] Although in the Good Work Plan, the Government accepted Taylor's recommendation of lowering the threshold for implementation from 10% to 2%, it does not appear that it will extend the right also to all 'workers' rather than only employees, once again leaving those participants in the labour market suffering from more disempowerment, without any improvement in their power to request information or be consulted in workplace decisions concerning them. Therefore, even hypothesising that in the future many gig workers will be re-labelled 'workers' rather than self-employed, this reform does little to improve their ability to be informed and consulted by their employer, given that the isolated activity of most gig workers and the fragmentation of the workplace will make it very difficult for these workers to even reach this lower threshold.[99]

Moreover, these reforms are unlikely to improve information and consultation among the most disempowered workers. As highlighted years ago by Ewing and Truter, the ICE Regulations embody not mandatory rules but rather a 'voluntarist' approach, whereby workers have to trigger a process of negotiation.[100] This means that, unless a certain number of workers is able and willing to request information or consultation, the employer can completely disregard involving workers in any decision concerning them. If workers know they can be dismissed any time or they fear that their working hours may be reduced, they are unlikely to go against their employer or to start a formal procedure of information or consultation. Furthermore, many modern working practices, such as in the gig economy, entail isolated conditions of working, whereby workers might not even know who other workers are or how to contact them. For instance, people working for platforms specialised in domestic tasks, such

[98] TUC (n 70).
[99] Johnston Land-Kazlauskas (n 27).
[100] Keith D. Ewing and G. M. Truter, 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' [2005]68(4) *The Modern Law Review* 626.

as TaskRabbit or Airtasker, might never meet with any of their peer workers. It becomes very difficult for these workers, even supposing they are considered employees, to reach even the lower threshold to trigger the implementation of ICE Regulations, thus leaving them completely disempowered over employers' decisions.

Furthermore, the emphasis given to questions of employment status does not consider the lack of collective representation suffered by many self-employed people, such as many in the gig economy, who are excluded from any form of collective representation, as was recently reiterated in the Deliveroo decision.[101] Thus, the individuals suffering from the highest imbalance of power are the ones least likely to benefit from these reforms. In respect of the collective representation of the self-employed, the Taylor Review only timidly suggests supporting technology which can help the self-employed to share problems and to make sure this is encouraged by employers, once again relying on a voluntarist approach instead of advising an improvement of statutory rights to strengthen workers' voice. The proposal was accepted by the Government, although the Good Work Plan contains only a vague mention to the involvement of stakeholders in the development of ideas to use WorkTech models to help the self-employed.

4.6 Enforcement

No changes in labour law can be effective if labour law is not fully enforced. Law enforcement is recognised in both documents to be important in order to guarantee that rights and obligations entailed in an employment relationship are respected. The Taylor Review acknowledges that the current enforcement system mostly relies on individual rather than statutory enforcement. As regards employment status, the Review cites the solicitors Leigh Day's submission, which

[101] *IWGB* (n 26).

states that 'the present system provides few incentives for an unscrupulous employer not to mislabel staff as self-employed and deny them workers' rights. Until a worker challenges that classification at the tribunal, the employer has little to lose'.[102] Or, as concerns the power of employers to exploit their workers, the Review cites Nick Denys, Head of Policy of Conservative Workers and Tarde Unionists, remarking that 'the current system puts too much onus on the individual to assert that they are being exploited, which for obvious reasons many find difficult to do so'[103]. Therefore, the Taylor Review fully recognises that the current system of enforcement further tilts the balance of power in favour of employers and it advises important reforms. The Good Work Plan also acknowledges some of the issues with enforcement and recognises the need for modernisation albeit using a more sympathetic tone towards the current system.

As regards individual legal claims, Taylor advises reversing the burden of proof in tribunal hearings concerning employment status, so that it is the employer who has to prove that the individual is not entitled to employment rights. By reversing the burden of proof, the workers' position is strengthened as it is now the employer (or alleged employer) who must prove that it does not bear any employment obligations and does not have to grant employment rights. Furthermore, the Review proposes the creation of an expedited preliminary hearing and the abolition of tribunal fees[104] as the financial burden of accessing justice was also considered a barrier towards enforcement of workers' rights, disproportionally strengthening employers' power. Finally, Taylor advises the introduction of aggravated breach penalties and uplifts in compensation for those employers who had already been involved in a similar court case or have failed to reconsider the employment position of workers in similar material arrangements.

[102] Leigh Day, cited in the Taylor Review, at 57.
[103] Nick Deny, cited in the Taylor Review, at 61.
[104] Tribunal fees have subsequently been abolished through a Supreme Court decision (R v Lord Chancellor, [2017] UKSC51, Supreme Court (SC)).

Thus, the Taylor Review proposes important legal changes aimed at rebalancing the power in favour of workers, by giving to the employer the onus to prove that workers are not entitled to certain labour rights, by advising the reduction of barriers to legal claims against employers and by increasing penalties for recidivist employers.

In response to the recommendations highlighted in the Review, the Government launched a consultation on the enforcement of employment rights.[105] The Good Work Plan, however, falls short of the recommendations suggested by Taylor. It states that the Government will *not* change the burden of proof, but will instead introduce an online tool to help to clarify employment status. Only after the implementation of this tool, will it again consider the burden of proof issue. The Good Work Plan also proposes a reform of the employment tribunals system, intended to make tribunal process more streamlined, and to provide clearer guidance and information at each stage of the process so that claimants are guaranteed justice 'with the minimum of effort'[106]. Though these reforms are welcome, once again, the Government considers improved clarity and information sufficient to solve enforcement deficiencies, not recognising how difficult it is for many workers to have their rights enforced, even when they possess all the necessary information, as the many decisions involving gig economy companies have shown.[107] The only recommendation accepted relates to the introduction of aggravated breach penalties and uplifts in compensation for employers who had already been involved in a similar court case. Although this can certainly be considered an improvement in law enforcement, empowering workers in similar material situations to act against a recidivist employer, it still relies on individual initiatives, leaving workers with the burden of bringing

[105] BEIS and MoJ, Good Work: The Taylor Review of Modern Working Practices. Consultation on Enforcement of Employment Rights Recommendations (February, 2018).
[106] The Good Work Plan, at 37.

[107] E.g. *IWGB* (n 26); *Aslam & Ors* (n 41); *Dewhurst* (n 34).

their case to court, rather than obliging employers to automatically update their obligations towards comparable workers.

Finally, neither the Taylor Review nor the Good Work Plan considers the role of unions in enforcing labour rights. Several union submissions to the Taylor Review and to the Government consultation on enforcement have insisted to strengthen union power in law enforcement, so that they can monitor workplace practices, report abuses and irregularities, provide workers with information about their rights, offer support in case of issues with employers and help workers in individual tribunal claims.[108] However, neither of the two documents contains any reference to unions in law enforcement, conceiving of the employment relationship exclusively in individual terms and overlooking all forms of collective action as offering potential solutions or partial solutions to the challenges identified.

As regards reforms to state enforcement, the Taylor Review recommends transferring the responsibility of enforcement of sick pay and holiday pay for the lowest paid workers from individuals to Her Majesty's Revenue and Customs (HMRC), as is nowadays the case for NMW/NLW. This would provide vulnerable workers with a statutory tool to have their holiday and sick pay rights enforced, without having to rely on individual claims, which puts already disempowered workers at the risk of being unable to enforce these basic labour rights. In the Good Work Plan, the Government partially accepted these recommendations stating that it will introduce a new enforcement system for holiday pay, reserving the right to decide the most appropriate body to do so. As regards sick pay, the Government plans to consider changes to the enforcement system as part of an overall reform of Statutory Sick Pay, though, it remains

[108] GMB, *Response to Consultation Good Work: The Taylor Review of Modern Working Practices Consultation on Enforcement of Employment Rights Recommendations* (2018); TUC, *Enforcement of Employment Rights: TUC Response to the Consultation on Enforcement of Rights Recommendations* (2018).

very vague on the principles it will follow, what exactly will be changed and there is no mention of any specific time frame.

Although these reforms will allow some disempowered workers to enforce their holiday and possibly sick pay rights, they do not address some core weaknesses related to the current state enforcement system. As has been highlighted by Metcalf,[109] and by several submissions to the Taylor Review,[110] the enforcement system is chronically understaffed and underfunded. As a consequence, the UK has only 0.9 labour market inspectors per 100.000 workers, against 4.6 in Ireland, 12.5 in Belgium, and 18.9 in France.[111] Using NMW/NLW as an example, Metcalf[112] calculates that an average employer can expect an inspection once every 500 years. Despite an increase in funding since 2014, some enforcement bodies still do not have the necessary resources to carry out effective monitoring and enforcement in the labour market. Nonetheless, none of the two documents contains any recommendation as regards funding. In order to justify this apparent oversight in the Review, Taylor himself has declared in an oral evidence session to a Joint Parliamentary Committee that, 'the general thrust of the review it would be fiscally positive for the Government'[113], though this was not specified in his mandate, nor mentioned at any point in the Review.

Furthermore, none of the two documents considers the current fragmentation of the enforcement system as an issue. Unlike many other European countries, the UK lacks a unified Labour Inspectorate responsible for the monitoring and enforcement of all labour rights, with this responsibility shared between four different institutions. At present, HRMC is responsible for the enforcement of NMW/NLW; the Gangmasters and Labour Abuse Authority (GLAA)

[109] David Metcalf, *United Kingdom Labour Market Enforcement Strategy 2018/19* (HM Government, 2018).
[110] See, for instance TUC (n 70); UNITE (n 92).
[111] GMB (n 109) citing FLEX, *FLEX Policy Blueprint: Combatting Labour Exploitation through Labour Inspection* (2015).
[112] Metcalf (n 106).
[113] House of Commons (n 44).

investigates modern slavery and other forms of labour abuses, whilst also operating a licensing system for agencies in high-risk sectors; the Employment Agency Standards Inspectorate (EAS) monitors employment agencies; and the Health and Safety Executive (HSE) enforces health and safety regulations as well as working time regulations.[114] In 2016, in order to counteract this fragmentation, the Government created the role of Director of Labour Market Enforcement, since held by David Metcalf, with the purpose of improving coordination and effectiveness of enforcement activities in the labour market. Although Metcalf[115] himself has highlighted the several issues of coordination enforcement bodies are facing, the problems of coordination and cooperation among enforcement bodies are not mentioned in either of the two documents. Improvement in coordination would instead help make enforcement more efficient and effective, making sure that employers respect their obligations towards workers and workers see their labour rights properly enforced.

5- Conclusion

In the years following the global financial crisis, the UK labour market has undergone important changes. The creation of new working practices thanks to technological developments, as well as the spread of previously uncommon employment arrangements, have increasingly challenged the current labour law framework, still centred on the so-called standard employment relationship. In order to adapt UK labour law to these changes in working practices, the Government has identified a path of reform, aimed ostensibly at improving the quality of work and in making the labour market fairer for all. This paper has analysed the path chosen, focusing on the two key policy documents published to date, which constitute the basis for the labour law reforms which will be implemented in the incoming years, should the Conservatives remain in government. Particularly, the analysis has considered how the

[114] The Taylor Review.
[115] Metcalf (n 106).

proposals and recommendations contained in these documents will help redress the current imbalance of power between employers and workers which, as the Taylor Review rightly identifies, constitutes the root of the core issues in the UK labour market. The analysis has used examples from gig work to critically discuss the proposed reforms, as gig work can be argued to epitomise new working practices and which involves some of the workers experiencing the highest imbalance of power in the current labour market.

The Taylor Review starts from the stance that the current labour law framework, dubbed 'the British way' works relatively well and does not need to be thoroughly reformed. This idea is reiterated in the Good Work Plan, which emphasises the success and competitiveness of the UK labour market. Starting from these premises, it is not surprising that neither of the two documents proposes deep and structural changes to the labour law framework. Thus, both documents fail to address many of the core issues of the UK labour market, limiting themselves to cosmetic changes in the current legislative framework and in mostly minor improvements in the imbalance of power between employers and workers. As we have seen in reference to gig work, they do not fundamentally address the current employment misclassification of many gig workers, which deprives them of labour rights and allows gig economy companies to reap all the benefits whilst transferring all risks to workers. At the same time, none of the two documents considers the lack of collective representation and the weakness of unions in the UK context as a fundamental issue, nor unions are seen as a key tool in redressing the imbalance of power in the labour market. By failing to address these core issues, none of the documents proposes any structural alteration in the imbalance of power, nor provides workers with long-lasting tools to improve their power vis-à-vis employers.

Rather than addressing the structural issues in relation to the imbalance of power, both documents start from the doubtful premise that most of the issues associated with the current labour law framework are due to a lack of transparency and information and the limited

knowledge workers and employers alike have of their rights and obligation. Therefore, most proposals are related to improvements in transparency and in the clarification of rights and obligations. Although this will certainly contribute to workers having a better knowledge of their rights, improvements in transparency do not *per se* reduce the imbalance of power, as already highlighted by the TUC[116]. If workers have limited rights and employers limited obligations, as is nowadays the case for many atypical workers, including those in the gig economy, better knowledge will not necessarily improve the workers' position vis-à-vis their employer. Furthermore, both documents suffer from a naïve conception of transparency, which seems to assume that rights and obligations in an employment relationship are jointly agreed by employers and workers. In reality, as we have seen in the case of gig work, many contracts are written by the platforms, without consulting the workers, and companies are free to unilaterally amend the contract or to insert 'bogus' clauses with the sole purpose of discouraging legal action against them. If these issues are not addressed, increasing 'transparency' will mean little for many workers.

Moreover, both documents strongly rely on a voluntary approach, which is clearly deficient in addressing situations of extreme inequality of power. If many rights continue to be enforceable only through individual tribunal claims, if workers have the right to 'request' but not to 'receive', or if they can 'choose' to work below NMW/NLW, then very little will change in the overall imbalance of power. On the one hand, many of the most precarious workers will not dare to go against their employer for fear of losing their job or, as in the case of gig workers, to be 'de-activated'. On the other hand, even in the case where workers are able or willing to do so, the employer will know that it does not have to accept the worker's request, knowing

[116] TUC, *Taylor Review: Measures to improve transparency in the UK labour market. TUC response to the BEIS consultation* (2018).

that a certain right can only be enforced through court, or that there is no right attached to a worker's request.

Finally, despite the emphasis placed in both documents on the need to adapt the current labour law framework to the changes in working practices, they both seem to be deeply anchored to a traditional conception of employment, without deeply engaging with the new issues created by labour market changes. For instance, both documents rely on a conception of continuity of service which is ill-adapted to many work practices, including ZHC and gig work, where workers might work very irregularly. Similarly, they do not adequately address issues associated with piece-rate pay, which allows many gig workers to be paid lower than the NMW/NLW. In addition, the fissurisation of many contemporary workplaces means that many of the proposals contained in the two documents, such as the reduction of the threshold for triggering ICE Regulations, will likely have a limited impact for workers who do not work in 'one' workplace and who might not know who their co-workers are, as is the case of most gig workers. Also, neither of the two documents addresses one of the most important issues associated with gig work, that is the use of algorithms and the collection of personal data by companies to exercise power over their workforce. By not fulling engaging with the issues associated with modern working practices, and by not fulling understanding how the imbalance of power is structured in contemporary labour markets, both documents fall short of their initial goal.