



XpertHR Podcast

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- Laura Merrylees: Hello and welcome to this week's podcast with me, Laura Merrylees. Last week we saw the publication of the keenly awaited Taylor Review into modern employment practices, outlining seven key principles for good work for all. But what does the review mean for employers and what impact will it have on modern employment practices? Joining me on the phone today to discuss these questions is Fiona Rushforth, Senior Associate in the Employment Department of Wedlake Bell, who are one of our regular contributors for XpertHR. Hi, Fiona. [0:00:39.1]
- Fiona Rushforth: Hello.
- Laura Merrylees: So Fiona just kicking off, what are the key principles of the report? [0:00:42.2]
- Fiona Rushforth: Well the report sets out several general principles, one of which is that there should be fairness and opportunity for everyone in employment, especially for people on lower incomes and that everyone has the right to be treated with respect and dignity. It also recognises that there is exploitation, particularly of casual workers, and sets out a commitment to tackle that. Then it also says that we need to clarify the law and make enforcement easier and also make tax between different employment statuses more consistent.
- Laura Merrylees: So how are they proposing to achieve that? [0:01:13.5]
- Fiona Rushforth: Well one of the main ways is creating a new dependent contractor status. They have also said that they will achieve changes through improved corporate governance rather than through legislation and regulation and that companies must be encouraged to provide good work and opportunities. And it also says that the law should recognise new ways of working, particularly the platform models, like Uber.
- Laura Merrylees: And worker status is, I guess, is probably the area that has generated the most press attention over the past week since the report was published. One of the key recommendations in the report is the call for what we currently know as 'worker status' to be renamed 'dependent contractor status'. Does this mean that there will actually be a difference, then, between the current worker status and the proposed dependent contractor status? [0:01:57.6]
- Fiona Rushforth: There is very little difference in practice. Supposedly the difference is that the new category is broader and therefore will recognise these casual arrangements like the platform models. But as all the recent case law shows, when these casual arrangements are currently

challenged through the courts, they normally are found already to come within the worker category. Basically, it's the same as worker status and the rights a dependent contractor would have would be the same as worker rights.

Laura Merrylees: In terms of the current worker status test itself that's used by the courts, there is a suggestion that that test is reviewed and currently under that test there is a great emphasis on whether there is a requirement for the individual to perform the work personally. So what would any proposed change under the review mean to that test?
[0:02:42.4]

Fiona Rushforth: The legal difference is supposed to be that the right to substitute becomes less important and doesn't automatically mean that if there is no genuine right of substitution, the person can't establish dependent contractor status.

Laura Merrylees: Right. [0:02:54.6]

Fiona Rushforth: But in fact there is, again, little practical difference. The gig economy cases have almost never failed over the right to substitute, because it's so rare that there is a genuine right to substitute in these cases. So the gig economy cases in practice have been largely decided on the basis of how much control the employer has. However, there is a suggestion that the status should be more clearly set out in legislation rather than just relying on case law. And that could be helpful, although it would be very difficult to set this out in legislation when there are so many different factors in play and each case has specific working arrangements. The courts are still going to have to interpret and decide each separate legal challenge.

Laura Merrylees: Yes. It may be easier said than done. Let's just have a look at another aspect of the report which was pay in the gig economy and one of the other recommendations of the report is that dependent contractors would be paid by the task rather than the hour. How would that work?
[0:03:52.4]

Fiona Rushforth: Well this would be done by adapting the current piece rate legislation. So, pay would be based on the output of work rather than on an hourly rate, so basically supposing you are doing deliveries, you'd be paid per delivery. And companies would be expected to show how workers can realistically earn 1.2 times the living wage of £7.50 an hour for standard rate when they're doing an average amount of work at reasonably busy times. So workers would log onto a platform to see their real time earnings potential. However, it does make a proviso that if the employee chooses to work just at times of low demand, that's their responsibility, they can't expect to get 1.2 times the minimum wage if that's their decision.

Laura Merrylees: So what would the practical impact of that then be on employers if this goes through? [0:04:38.3]

Fiona Rushforth: Well some people do already work in this way. Deliveries, for example, did trial this and there were a lot of complaints about it, because people said that they weren't getting the minimum wage. So one reason why that might be happening currently is not because people choose to work at times of low demand, but instead because

there is overstaffing and too many people competing for the amount of work there is. So that may actually end a loophole for exploitation if these new regulations are brought into force and people using the outer pay model will either have to pay more or be using so many people so that people's work drops below that minimum rate. And that may make this pay per output model less attractive to those already using it.

Laura Merrylees: Well, absolutely, yes. And tying in with pay, there's also a recommendation that the Low Pay Commission considers introducing a higher National Minimum Wage for any of the non-guaranteed hours in a contract. What's that likely to mean in practice if it's adopted? [0:05:35.5]

Fiona Rushforth: Well the idea is to incentivise employers to guarantee minimum hours. So if they provide a certain number of minimum hours, let's say six, those are paid at the normal rate but anything more than that that the employee regularly works will be paid at the higher rate. So the effect of this is that for the employee it creates a trade-off between pay and certainty and for the employer they may have to think more about what their actual needs are and not just perhaps quite lazily put everyone on the minimum possible hours and then require them to work much more. They're either going to have to accurately forecast what hours they need, or they're going to have to pay more.

Laura Merrylees: But the report also sets out recommendations for agency workers and workers – and this obviously has attracted a lot of press attention recently and has been pretty controversial – zero hours contracts, doesn't it? [0:06:27.0]

Fiona Rushforth: Yes. So they suggest a right to request a direct contact with the employer agency workers who are with the same hirer for twelve months and the hirer would have an obligation to consider that request in a reasonable manner. Individuals on zero hours contracts could request guaranteed minimum hours after twelve months and the other suggestion is that pay reference periods would be increased to 52 weeks to take account of seasonal work in respect of holiday and also that employees or workers could take the choice of having rolled-up holiday pay, i.e. they can take an uplift in their pay to account for the holiday.

Laura Merrylees: Right. And in terms of agency workers, there's a suggestion in the report, isn't there, that the rule known as the Swedish Derogation Rule is abolished. Can you just remind the listeners, Fiona, of what that rule means? [0:07:19.3]

Fiona Rushforth: Yes. So the Swedish Derogation Rule is the legal loophole where temporary employees from agencies can be paid less than their direct comparators doing the same job provided that the employer pays the worker at least 50% for the four weeks in which they are not provided to work with work immediately after their period of employment has ceased. So basically they get some pay during the gaps between assignments.

- Laura Merrylees: And if that rule was abolished, what impact do you think this would have in practical terms? Is it going to make much of a change? [0:07:50.2]
- Fiona Rushforth: Well it does get rid of a potential avoidance loophole. The people who interviewed for the report, a lot of people said that actually this was being used as a loophole. So those people who are structuring agreements to take advantage of the loophole will now not be able to do so if this is implemented. I don't think it will be a huge impact, because the Swedish Derogation is rarely used in practice, but the report says that it's used in places like call centres where agency workers are regularly paid less than the direct hires. So for people who are doing that, it will make using agency workers less attractive because, of course, they have to pay the agency fee on top the hourly rate, but if people are using agency workers in the normal way, that would be completely unaffected by this.
- Laura Merrylees: Just turning to tribunal fees now. They've been with us for four years or so, hugely controversial when they were introduced and in a way have remained so and we have seen a significant drop in the number of claims being issued since they were introduced, the report does touch on fees and one of the recommendations is to allow an employee to bring a claim to the employment tribunal without a fee to determine employment status as a preliminary issue. What are your thoughts on that? [0:09:00.7]
- Fiona Rushforth: Well it does seem like a sensible solution, because currently people can sometimes pay up to £1,200 in tribunal fees and then fail on that preliminary point if it's not decided at the preliminary hearing stage. So it does seem sensible to bring that provision in and have that decided as a preliminary point and then if the employee is successful in establishing they have the status to continue with their claim, they then pay the fee at that point. And another suggestion is that the burden of proof would be reversed on this point, so it's up to the employer to show that the employee doesn't have the legal status to bring their claim, rather than the other way round. And, again, that seems like quite a positive development, because it could go quite a long way towards ending the situation where an employer just relies on the fact that it will be too difficult for the people working for them to establish that they actually do have the status to bring a claim.
- Laura Merrylees: And there's also a suggestion that the enforcement process, if an award is made at tribunal, is made simpler for claimants who've been successful. That's part of the report, isn't it? [0:10:08.5]
- Fiona Rushforth: Yes. Because at the moment a large number of tribunal awards actually aren't paid and it's quite a complex process to get it enforced and the Government doesn't play any part in that, so it's proposed that they take action against employers who don't pay their tribunal awards without the worker having to fill out a form and institute new court proceedings.
- Laura Merrylees: So we've got the report, I think many people are asking what are the next steps. What does it mean? What do we need to look out for? What are the next steps? [0:10:38.7]

Fiona Rushforth:

The Government is supposed to now start engaging with stakeholders across the country, including those who represent employees and those who represent employers, get their views on the report and then publish a full Government response later in the year. Some of the proposals, if they're accepted, are ready to go and others take a lot more consultation. They are basically mere suggestions for further input and research and will take a lot longer to bring to fruition.

Laura Merrylees:

Well thanks very much, Fiona, and as Fiona mentioned, some of the proposals may be fairly quick to bring to the table and others will take a lot longer, so we'll obviously be keeping the site updated as the Government's response becomes clear. But in the meantime, we have a commentary and analysis piece on the review and you can find that under the tools tab on the site.

So we're back next Friday, but until then thanks very much for listening.