13th October 2017

CWU Response to ‘Informing Labour Market Enforcement Strategy, 2018/19’, Director of Labour Market Enforcement

Introduction

1. The Communication Workers Union (CWU) is the largest union in the communications sector in the UK, representing approximately 192,000 members in the postal, telecoms, financial services and related industries.

2. We welcome the Director of Labour Market Enforcement’s introductory strategy and the opportunity to submit evidence to inform his Strategy for 2018/19. There is clear and mounting evidence that exploitation of workers is a substantial problem across the UK that requires urgent corrective action.

3. The CWU is concerned about all forms of mistreatment in the workplace, from the withholding of wages to extremes of abuse such as trafficking and slavery. One issue that affects many of our members is the use of ‘Swedish Derogation’ contracts to avoid equal pay for agency workers, which is unlawful as Matthew Taylor’s review recently highlighted.\(^1\) Another serious problem faced by CWU members is false self-employment, which is a particular concern in the unregulated parcel delivery sector. Whilst the introductory strategy identifies false self-employment as an area of labour market non-compliance, we are disappointed that it offers no clear solutions to address this problem.

4. The CWU believes the main enforcement bodies should have more powers and resources to carry out their role. We also think that stronger employment protection legislation is needed if we are to genuinely end the scourge of labour market exploitation in Britain today.

Q1: What information is available from your sector or organisation that might usefully be fed into the intelligence hub?

False self-employment and exploitation in the parcel sector

5. The CWU is particularly concerned about the problem of false self-employment in the unregulated parcel delivery sector, which has witnessed rapid growth in recent years. There is no official data available on the scale of this problem, but reports suggest there are nearly 20,000 self-employed ‘owner drivers’ in Hermes and Yodel alone, with thousands more working for companies that operate the same low cost employment model.

6. Unlike Royal Mail, these unregulated parcel operators are not accountable to minimum quality of service standards. They typically rely on self-employed so-called ‘lifestyle couriers’ to reduce their costs, but these workers have all the characteristics of direct employees, doing long and regular hours for the same company with little or no control over their affairs at work. Whilst enjoying none of the benefits of self-employment, lifestyle couriers are being asked to take on all the risk including responsibility for National Insurance, tax, van hire, fuel, travel time, vehicle maintenance and insurance.

7. An investigation by the Guardian\(^2\) last year and a subsequent report by Frank Field MP\(^3\) revealed highly exploitative employment practices in Hermes and in the gig economy more generally. This includes drivers being paid below the National Minimum Wage; pressure to work shifts of upwards of 12 hours; charges of £150 and over when shifts are missed due to sickness; and the widespread practice of being ‘stood down’ at short notice when work is unavailable. The Guardian revealed that drivers for Hermes have been taking home as little as £3.50 an hour.

8. The Independent found a similar situation at Amazon Logistics, where an undercover reporter gained employment and earned, after deductions for van hire and insurance, £2.59 per hour for a three day week in his first week and £4.76 per hour for the four days he worked in his second week. He revealed that “several other drivers said they took home less per hour than the National Minimum Wage because they had to work such long hours to deliver all the packages they were assigned. Some agency staff said the system did not allow for traffic jams, let alone factor in time for breaks. For this reason, some workers said they sometimes had to defecate in bags and urinate in bottles rather than stopping to find a toilet.”

9. Drivers for DPD have reported to the CWU that they may be “stood down” from future shifts should they refuse to take on a delivery; though they are compensated for fuel they must pay VAT costs; and drivers are charged every four weeks to lease their vehicles. Importantly, many drivers report that they are paid less than the National Minimum Wage and that stringent limits are placed on the delivery routes taken by drivers – illustrating that they are very much self-employed in name only.

10. The growth of false self-employment in the unregulated parcels market poses a threat to jobs and labour standards in the regulated postal sector. Precarious jobs on poverty pay and potentially illegitimate terms are now becoming the benchmark for employers and the postal regulator when measuring cost efficiency. Companies are presenting themselves as good employers if they offer slightly better terms and conditions than the disrupter businesses, thereby undermining secure jobs with a living wage and pension security. This has brought the CWU into a major industrial dispute with Royal Mail,

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\(^3\) Wild West Workplace, Self-employment in Britain’s ‘gig economy’, Frank Field and Andrew Forsey, September 2016

which is justifying its proposals to reduce terms and conditions on the basis that it will still be a better employer than its low cost parcel competitors.

11. We are witnessing a similar race to the bottom on pay and job security across many other sectors and this poses major risks to the UK economy, including greater levels of inequality and in-work poverty, weaker consumer spending, higher levels of debt, and lost tax revenue for the exchequer. In early 2015 the Office of Tax Simplification estimated lost tax from bogus self-employment would have been £314m if 10% of those classed as self-employed, were categorised wrongly.\(^5\)

12. Last October the Government instructed the HMRC to investigate the employment status and treatment of workers at Hermes following Frank Field’s investigation. We believe that similar assessments should be made across the gig economy to ensure that minimum standards are maintained and a floor against exploitation created. Where employers and intermediaries deliberately push workers towards false self-employment we believe that HMRC should be able to take strong action to reflect the reality of the relationship between worker and employee.

13. We also believe that all workers should qualify for the same statutory employment protections. Where workers have made the pro-active choice to become genuinely self-employed then we recognise that these protections cannot be guaranteed by the Government. As such, we believe that the most immediate task is differentiating between the genuinely and falsely self-employed so that protections can be implemented where appropriate.

14. We support the view presented by the Institute of Employment Rights (IER), that the current definitions of both an ‘employee’ and a ‘worker’ give rise to serious problems of scope, with many increasingly common but non-standard forms of employment being excluded from receiving full employment rights.\(^6\) We believe these definitions need amending to ensure a decent floor of rights for all workers, including those in atypical employment such as online platform work and bogus self-employment, which have grown rapidly in recent years.\(^7\)

15. We note that the introductory strategy says Matthew Taylor’s Review of Modern Working Practices will comprise a vital input into the revised strategy scheduled for spring 2018. However, we do not believe that Matthew Taylor’s proposals on employment status go anywhere near what is needed to genuinely address the problem of UK labour market exploitation. We oppose Taylor’s proposal to rename ‘Worker’ as ‘Dependent Contractor’ as it will allow employers to continue undercutting employees by hiring workers with fewer rights. The IER has labelled this rebranding exercise a ‘gift

\(^7\)The number of people employed on a zero hours contract in their main job has risen from 143,000 in 2008 to 883,000 in June 2017 (ONS Labour Force Survey, Sept 2017) and there are now 865,000 agency workers, up by 30% since 2011 (Resolution Foundation, Secret Agents, Dec 2016). Nearly 5 million crowd workers in the UK are estimated to have found work through online platforms such as Uber and Upwork (UNI Europa, University of Hertfordshire, Feb 2016).
to gig economy companies that hope to avoid the minimum wage’, as it will become the worker’s responsibility only to accept work that pays highly enough to make up any shortfall.

**Systematic exploitation of agency workers through ‘Pay Between Assignment’ contracts**

16. There is clear evidence from the CWU’s experience that agency workers are being systematically denied equal pay with their permanent colleagues as a result of a loophole in the Agency Workers Regulations (AWR). The CWU represents over 1,400 agency members in Manpower, most of whom work on a contract for BT and are paid up to £500 less per month than direct employees doing the same job. This is the result of abuse of the ‘Swedish Derogation’, which exempts agencies from offering the same rate of pay to an agency worker, provided that they have a permanent contract of employment and are paid at 50% of pay between assignments or the National Minimum Wage (NMW) for the hours worked on the last job, whichever is greater. The vast majority of our Manpower members in BT are on such a contract, commonly known as a pay between assignment (PBA) contract. Due to the low pay rates that our Manpower members earn and with many on the statutory minimum, most would only be paid the NMW between assignments.

17. As Matthew Taylor’s review noted, the use of PBA contracts to avoid equal pay is unlawful (the AWR specifically prohibits the structuring of assignments to avoid equal pay), but it is clearly happening. We welcome Taylor’s proposal that the Government should repeal the Swedish Derogation so that agency workers can no longer be paid a lower rate for the job. The CWU has campaigned over more than a decade for equal treatment for agency workers. Our ‘Close the Gap!’ campaign aims to ensure that our members in Manpower are paid the Real Living Wage at the very minimum and to eradicate the use of PBA contracts in the business. It also aims to close the legal loopholes that allow hirers and agencies to use PBA contracts, which is essential if we are to secure fairness and equality for agency workers.

**Q2: How can we more effectively promote awareness of rights and responsibilities – of both workers and employers? Should reporting non-compliance (especially of one’s own employer) be made easier?**

18. Trade unions have a vital role to play in promoting awareness of rights and responsibilities at work and ensuring that these are properly enforced. The collective voice of trade unions in the workplace also provides an essential avenue for reporting non-compliance and ensuring that workers receive protection should they raise concerns.

19. However, trade union rights in the UK are among the most restrictive in the world and have come under attack most recently through the 2016 Trade Union Act. We believe legislative changes are required to enable unions to more actively organise, particularly in those workplaces where the risk of exploitation is greatest, and enhance collective bargaining protections for vulnerable workers.

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9 Close the Gap!, CWU, accessible at: https://www.cwu.org/campaign/close-the-gap/
20. We believe there should be a clear and well publicised process for reporting labour market non-compliance, which ensures the protection and anonymity of those who take steps to report these abuses. This should be through a dedicated, properly funded and resourced unit that feeds intelligence directly to the Director of Labour Market Enforcement and the various enforcement bodies.

**Q4: Effective use of the spectrum of enforcement tools: the enforcement bodies have a variety of tools that they can use, from fines and repayment of wages owed, to public naming of organisations caught being non-compliant, to the new Labour Market Enforcement Orders and Undertakings, potentially leading to up to two year prison sentences.**

- *a.* What evidence is there on the effectiveness of different penalties at achieving redress for workers and changing the behaviour of employers?
- *b.* How can the enforcement bodies target their different enforcement tools to greatest impact, both addressing non-compliant behaviour and supporting compliant businesses?
- *c.* Are there additional tools or powers that enforcement bodies could use to change employer behaviour?

21. While there is clear evidence of widespread breach of labour standards, such as failure to pay the National Minimum Wage, there is also mounting evidence that the current system of workers' rights enforcement is failing to hold those who break the law to account.

22. As the consultation notes, the weakest HMRC lever in enforcement of the statutory minimum wage is getting any arrears paid to the worker in the non compliant firm. It is estimated that non-compliance “could affect somewhere around 100,000 people plus an unknown number in the informal economy”. The number of workers covered and total minimum wage arrears more than doubled from 2014/15 to 2015/16. This suggests clearly that the HMRC’s enforcement powers are simply not sufficient to deter employers from non-compliance with the law.

23. We wish to see changes introduced so that firms take the threat of penalties and prosecution seriously. The naming of non-compliant firms is unlikely to have the desired impact if it is not backed up with the real prospect of a fine or prosecution. It was reported earlier this year that not one of the 700 employers ‘named and shamed’ for paying below the minimum wage since 2013 has been prosecuted.10 We support the view of the Low Pay Commission, that criminal investigation for non-compliance is an under used tool, which could potentially have a high impact on those considering deliberately flouting the law.11 The fact there have been just 13 prosecutions since 1999 for breaching minimum wage law is a signal to employers that they are free to break the law with almost guaranteed impunity.

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10 Not one firm ‘named and shamed’ for paying below minimum wage has been prosecuted, Tory minister says, Mirror, 5th January 2017, accessed at: [http://www.mirror.co.uk/news/uk-news/not-one-firm-named-shamed-9558344](http://www.mirror.co.uk/news/uk-news/not-one-firm-named-shamed-9558344)

24. We are also concerned that no enforcement agency currently has a remit or the resources to systematically identify and prosecute cases of false self-employment. This means workers are forced to seek justice through an employment tribunal. A number of recent tribunal cases regarding employment status including in Citysprint, Excel and Uber, have found against the companies and proved that workers were being deliberately and incorrectly classified as self-employed so that employers could evade their employment responsibilities. However, a long drawn out appeals process means it could be some considerable time before any action is taken. We believe that the HMRC or another labour market enforcement agency should be given the responsibility and powers to police this issue and eradicate the problem of false self-employment which is blighting the lives of so many workers in Britain today.

25. In May 2017 it was widely reported that HMRC had stepped up its investigation into whether Hermes drivers should be classified as self-employed. This involved the carrying out of one-hour interviews with Hermes drivers alongside the collection of payslips, contracts and other materials. Given the resources needed to carry out such an investigation and how widespread these issues are we believe that HMRC should reconsider its public commitment to reducing staff levels to 50,000 by 2021. Similarly, the decision to close up to 150 premises should be reconsidered. Instead, we believe that new funds should be made available with the specific goal of tackling false self-employment and recouping all relevant tax receipts.

Q14: Should EAS remit be extended to cover:
   a. regulation of umbrella companies and other intermediaries in the supply chain;
   b. compliance under the Agency Workers Regulations (requiring employers to treat agency workers and permanent staff equally on certain contract terms)?

26. Yes, we strongly believe that the remit of the Employment Agency Standards (EAS) Inspectorate should be extended as suggested to cover umbrella companies, other intermediaries and compliance under the Agency Workers Regulations. Whilst the EAS does not have the power to enforce the AWR, agency workers are left to take their cases through the tribunal system. We note that Matthew Taylor identified this as a problem and recommended an extension of the EAS remit to include compliance with the AWR.

27. However, we are concerned that while expanding EAS’ remit would be a positive step, the inspectorate is failing in its current role and requires substantial investment and restructuring. It is notable that EAS suffered a cut to its budget from £1.1m in 2009-10 to £500,000 in 2015-16 and that staff numbers at the agency fell 70% from 30 to nine in the same period. Despite complaints rising by a fifth between 2011 and 2016, the number of inspections carried out by the EAS has fallen by more than half and the agency failed to bring a single prosecution forward or seek any prohibitions on unscrupulous employers in the past year.

28. Similarly, we are concerned that EAS does not currently have the staffing capacity required to investigate and tackle non-compliance whether on a general or industry-
specific basis in sectors such as post, warehousing, logistics and construction. For example, EAS conducted a targeted inspection exercise in the construction sector between 2010 and 2012, but inspected just 59 employment agencies and businesses. With each EAS FTE member of staff covering an average 1,636 agencies there are few signs of this situation abating.

Q15: Should employment agencies be required to provide greater clarity on the information they provide workers, for example explaining all deductions and setting out the full amount workers will get paid in people’s contracts?

29. We believe that workers should be given – as standard when receiving their contract – a full break down of any deductions they will/may face from their employer. Concurrently we believe that a new regulatory framework is required to inform workers of their rights at work. This should include, for example, their entitlement to breaks, to join a trade union and to receive representation in any discussions with management.

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