



Written evidence to the Collaborative Economy Expert Panel Workers' Rights

About the STUC

The STUC is Scotland's trade union centre. Its purpose is to co-ordinate, develop and articulate the views and policies of the trade union movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens.

The STUC represents over 570,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy and our representative structures are constructed to take account of the specific views of women members, young members, Black members, LGBT+ members, and members with a disability, as well as retired and unemployed workers

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Introduction

There has been much discussion around the changing nature of the labour market and the rise of insecure work. In many quarters the development of the so called 'gig economy' has been championed for its flexibility due primarily to the perceived benefits for employers and consumers. From a worker's rights perspective, however, many of the features of the gig economy and the questionable employment practices used are not new and have been the subject of trade union campaigns and legal challenges for a number of years.

The change, as seen from this perspective, is simply one of scale. The use of new technologies that reach a greater number of people, combined with competitive pressures resulting from the increasing use of contracts that push down labour costs, mean that a greater number of people are now negatively affected by these practices. The effect on the individuals concerned is great, but the distortion on the wider economy is now also observable.

The issue here is not around the use of new technologies per se, but rather how old fashioned exploitation, is dressed up as innovation through the clever framing of 'collaborative economy' services. It cannot be acceptable that certain companies are handed a trading advantage or are allowed to consider themselves exempt from employment rules simply by talking in terms of 'sharing labour' or 'facilitating trade' rather than offering goods and services in the traditional manner. Flexibility can be a useful feature of the labour market for both employers and workers and when used properly can support a greater degree of work-life balance but exploitation dressed up as flexibility is incompatible with fair work principles and cannot continue to be championed.

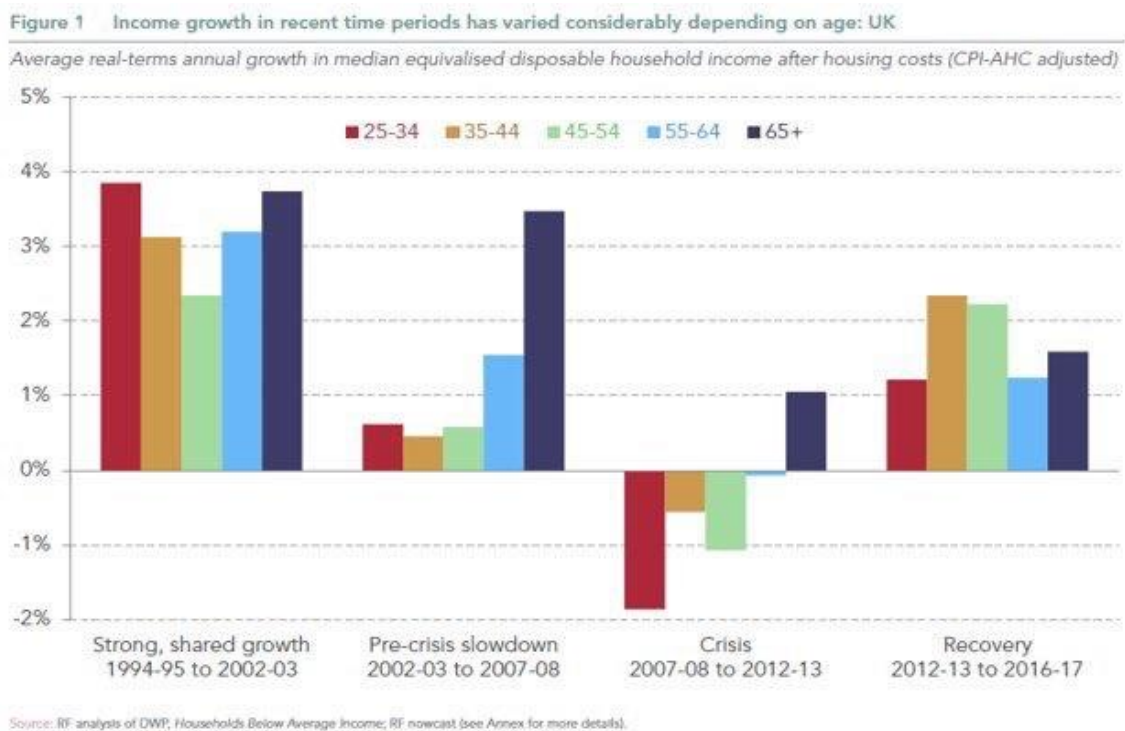
Impact of the Gig Economy on the Wider Labour Market

The unemployment rate in Scotland is now under 4%, and in the last quarter dropped to the lowest rate ever recorded. While some of this drop is attributable to a rise in inactivity, in recent quarters there has also been a discernible rise in employment. In the normal run of things when unemployment is low, wages should rise, however real wages in Scotland and across the UK continue to fall.

The reasons for this are complex with the continued austerity and enforced pay restraint within the public sector certainly playing a role. Equally the spectre of brexit increases uncertainty and is contributing to

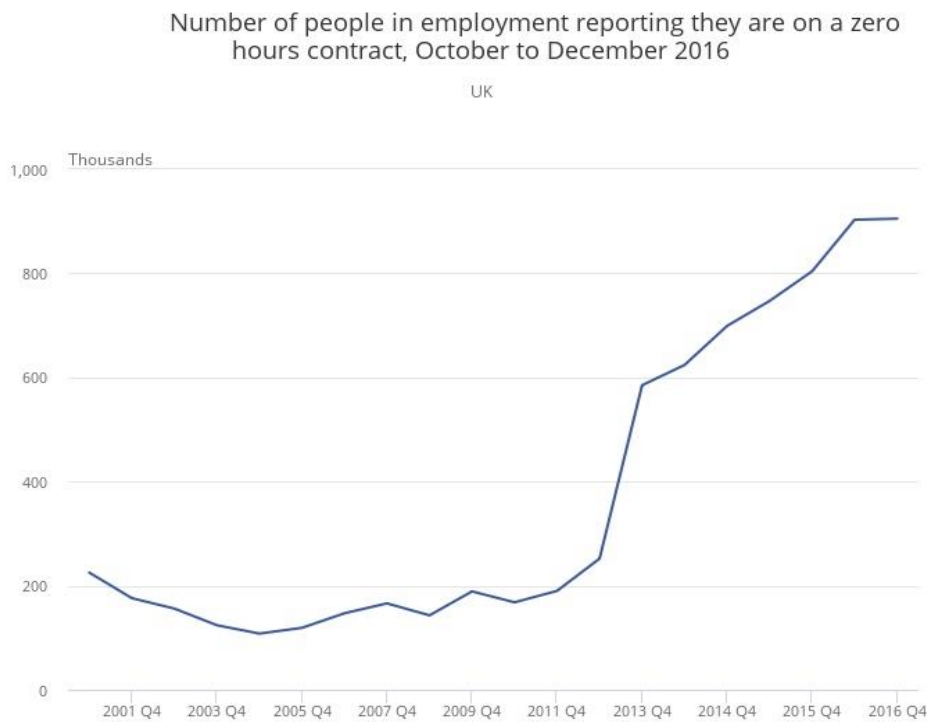
low pay offers in the private sector. Despite this, however, the Bank of England still had a clear expectation that wages would begin to rise once unemployment dropped below 4.5%. The contribution that precarious work makes to holding down pay should not be underestimated. Workers on precarious contracts are simply unable to bargain for pay increases, as they are primarily focused on maintaining their work. While the 'gig economy' is only one element of the growth in precarious work it does appear to be contributing to the growth of low wage, low quality work in Scotland.

As the graph below highlights, the incomes of young workers, who are more likely to be in precarious forms of work, have been the slowest to recover since the recession despite significant rises in the minimum wage. This could in part be due to the role of precarious work.



Zero hours contracts are now prevalent in a whole range of sectors in the economy from university lecturers to bar staff. It is clear that as businesses adapt their working practices competitive pressure is placed on other employers to do the same. This explains the relatively sudden rise in zero hours contracts in the hospitality sector, for example, which had previously operated successfully on a traditional employed status model (often flexible in nature and offering short hour contracts). By changing to zero hours the employers actually gain greater control over their workforce, gaining the ability to withhold and offer shifts as they see fit. This means that workers can effectively lose their jobs for turning

down a shift, asking for time off (including for medical appointments) or raising concerns about the workplace or about the behaviour of customers (including harassment). The employer also gains the ability to change shift patterns at a moment's notice, which includes sending workers home without pay if there isn't enough work. The Better than Zero campaign run by young workers but housed at the STUC has received countless examples of abuse, including clear breaches in employment law, stemming from the power differentials and the vulnerability of workers as a result of this type of contract.



Source: Office for National Statistics

It should also be noted that recent rises in employment in Scotland have primarily been a result of self-employment. As the graph below shows, the number of people in Scotland in self-employment is now at a record high. Research from the TUC has estimated that the Treasury is now losing £4bn a year in tax due to an increase in self-employment with the rise in low paid self-employment accounting for just over half of this lost revenue (£2.1bn).¹ The effect, therefore, of the rise of the gig economy and the increase in self-employment on the Treasury's coffers is already becoming problematic, hence the Chancellor's ill-fated effort to harmonize tax rules for the self-employed earlier in the year.

¹ <https://www.tuc.org.uk/sites/default/files/insecureworkonpublicfinances.pdf>



The use of self-employment and often bogus self-employment is a clear feature of the gig economy. It is however, also a feature of other industries like construction and the construction unions have been supporting workers and campaigning on this issue for over two decades. In employment law terms there is little difference between the practices in construction and the gig economy with an Appeal Court ruling against Pimlico Plumbers Ltd which supports workers rights held up by employment lawyers as an important ruling for the gig economy.

It is clear that a number of delivery companies have now adopted gig economy practices. Some of these like Deliveroo stem from the use of an app, while others like DPD, use similar 'self-employed' working practices but without an app element. This form of working is putting pressure on other delivery companies, for example Yodel, which still uses direct employment but which has recently had to slash the terms and conditions of its workers, and is still facing pressure due to undercutting from other companies using cheaper business models.

The reality of market forces suggest that the more these practices are used, the more they will be used unless their growth is prevented either through regulation or collective bargaining or a mixture of the two.

Classifications of Workers

The classification of workers continues to be confusing at best. New 'innovations' in the workplace like the use of zero hours contracts, the use of umbrella contracts or the growth in bogus self-employment simply highlights the absurdity of the 'classification' approach to workers rights. It is worth stating at this point that the STUC holds a longstanding

position that all categories of worker should be afforded all employment rights from day one, thus creating a level playing field and reducing incentives to game the system. Despite this the classification of workers continues to drive much of the effort to circumvent employment rights and consequently lower labour costs.

Ultimately employment status is determined by an employment tribunal. It is important to understand that the naming of a position by an employer as for example 'a self-employed contractor' is irrelevant to the determination of the worker's status and a tribunal will seek to establish the true employment relationship based on actual practices that exist in the workplace.

The classification of the worker is important with self-employed workers being effectively carved out of employment protections. Those classed as workers have a degree of protection while employees have the greatest number of protections. In this way all employees are workers but not all workers are employees.

Rights Covering All Workers

- Information about pay, notice and holiday entitlement
- National Minimum Wage (except statutory exceptions)
- Protection against unlawful pay deductions
- Equal Pay
- Working hours and breaks
- Holidays
- Rights not to be refused work because of union membership
- Rights to be accompanied to a disciplinary or grievance hearing
- Protection against discrimination on all unlawful grounds
- Protection against detriment for whistleblowing
- Protection against detriment due to a blacklist
- Pension auto-enrolment

Rights Covering Employees Only

- Written statement of particulars
- Statutory minimum notice
- Protection from unfair dismissal
- Implied contract terms
- Time off for union duties and training
- Time off for safety reps
- Time off for public duties
- Time off for antenatal care

- Statutory maternity pay and leave
- Statutory paternity pay and leave
- Statutory adoption pay and leave
- Parental and dependency leave
- Right to request flexible working
- Right to request time off for study or training
- Protection in business transfers (TUPE)
- Redundancy pay and rights
- Guarantee pay on layoffs
- Medical suspension pay

While the difference between employees and workers is significant, the difference between workers and self-employment is also substantial and when considering that bogus self-employment can often replace directly employed work², the attractiveness of defining workers as self-employed for the employer is clear.

When determining if a worker is self-employed the key tests an employment tribunal will apply tend to focus around control (ie, how, when and where the work is done) and whether the worker is personally responsible for doing the work. As noted by the Taylor review, many gig economy employers insert a clause around the ability of the worker to send a substitute, as a way of claiming self-employment in an otherwise employed environment. Case law is clear, however, that an express written right under a contract to substitute another person to do the work will only negate the personal service requirement, and hence stop someone acquiring worker status, if the right is a genuine reflection of the true agreement between the parties.

There is equally a clause in the Employment Rights Act that states that to be a worker: *'the person for whom the work is done must not be a client or customer of a business being run by the individual'* It is often this clause that 'collaborative economy' companies rely on to define their workers as 'self-employed'. In this way the app becomes a service to the self-employed business rather than a business that has staff which then provides a service to customers. In the high-profile litigation involving the taxi-app Uber, the employment tribunal found that there were a large number of factors which showed that Uber was not a customer or client

² For example PCL a bar chain and promotions company based in Glasgow now employs self-employed bar staff, considered free-lancers, alongside directly employed workers. The justification for this approach is unclear.

of any business or profession carried on by each of the drivers, including:

- Uber recruited and interviewed drivers
- Uber had a performance management process for drivers based on the ratings system whereby customers rated drivers—for example, drivers with a low average rating were required to carry out mandatory training and if their ratings still didn't improve their contracts were terminated (or 'deactivated', as Uber called it)
- Uber had a disciplinary process which it calls the 'Driver Offence Process', and
- Uber, rather than the drivers, set the fare to be paid by the customer

In the judgement the employment tribunal stated that

- Uber had resorted in its documentation to 'fictions, twisted language and brand new terminology'
- the written terms on which Uber relied did not 'correspond with the practical reality'

It should be emphasised, however, that taking employment tribunals is neither straight forward or easy for workers. Employment tribunals now come with costs in excess of £1200 and require a worker to challenge their employer and their source of income. Workers in the gig economy are often young, un-unionised and unaware of their rights. Even those who do wish to challenge their employer can find the penalties for speaking out too great.

This is evidenced by the difficulty that the STUC encountered even bringing a worker to give evidence to this session, despite supporting many workers in this area of the economy. Workers were simply afraid of reprisals from their employer and/or subject to severe financial penalties for missing even one day's work, with no rights to take holiday.

The Effect of the Gig Economy on Workers

The gig economy is often held up as a form of flexible working that allows workers to determine their own hours. While on paper this appears to be the case the evidence provided to the STUC on the issue of flexibility suggests that this is seldom the true picture. On balance the evidence collected by Better than Zero or given to the STUC through affiliated unions suggests that the gig economy tends to favour workers who are prepared to work longer working hours rather than truly flexible arrangements.

Where apps are involved there is some evidence to suggest that algorithms are at work which rewards workers who work longer shifts. In this way workers for both Deliveroo and Uber Eats suggest that the number of deliveries they are allocated depends on the number of hours they have worked in the previous week. Workers report that they often feel pressured to keep their hours up in order to maintain their income. In this way the workers are subjected to a form of performance management, however, the rules of that system or the expectations that the employer has are not transparent and workers often feel compelled to work in order to maintain their future earnings.

Far from being a flexible and a responsive place to work, the degree of control seen in the gig economy can often be greater than that applied to directly employed workers. In DPD for example, workers are on paper self-employed but face a variety of stringent requirements. They come to the depot each morning and are provided with a number of parcels to deliver. The worker in theory can then choose their working hours, however, they must return to the depot later in the day and return their undelivered packages and/or get their record of delivery signed by their supervisor. If they do choose to work a shorter day the undelivered parcels will be added to their allocation the following day. The reality of this working practice means that all workers essentially work full-time in order to deliver the number of parcels required. The workers are expected to work every day from Monday to Friday and recently the company unilaterally changed this expectation to also include one Saturday in every four. The worker is entitled to only two weeks holiday (unpaid) and these weeks cannot be consecutive. The worker must apply to the company for the week that they would like to take leave and are often refused holiday at the time that they request. The worker must attend work on all other days or they face a £150 fine. The STUC is aware of instances where workers have requested time off for medical appointments and funerals and been subject to this fine. DPD workers must drive a DPD branded vehicle, which they lease from the company. They are then responsible for all ongoing maintenance of this vehicle and must meet fuel and insurance costs.

While there has been no tribunal case to date at DPD the evidence suggests that this company is operating a bogus self-employment model. Here the workers are subject to such a degree of control that they cannot choose their working hours, they cannot choose their days of work, they cannot choose to take a holiday, they cannot choose to provide their own vehicle, and they cannot be sick. They can in theory,

however, send a substitute to work in their place. No doubt this will be the employer's argument in favour of self-employment if any employment tribunal is forthcoming.

Equality and the Gig Economy

Precarious work and the gig economy offer few solutions to the issue of inequality within the workplace, in fact the evidence collected through Better than Zero and STUC affiliates suggest that these working practices are more likely to encourage discriminatory practices on the part of the employer. The vulnerability of the workers who are easily dismissed and replaced drives much of the discrimination, as does a general view by employers that their workers are simply commodities.

It should be noted that the term 'employment' for the purposes of discrimination legislation has an extended meaning and includes employment under a contract of employment, a contract of apprenticeship *or a contract personally to do work*. This covers employees, workers and some self-employed individuals.

As highlighted above, some employment rights that would be considered as facilitating equality – like maternity and paternity leave, time off for antenatal care and the right to request flexible working – apply only to employees. Equality protections are therefore reduced for workers, and self-employed workers are often seen as simply not having protections from discrimination, although there may be some limited examples where this isn't the case.

Evidence from trade unions suggests that companies in the gig economy are uninterested in any equality responsibilities they may have towards their workers. Where they do have a direct relationship with their worker, many companies will simply not take on workers when their 'face does not fit.' Apps that allow workers to work simply by signing in and are therefore impersonal, are also potentially failing to support workers with protected characteristics as they will have no way to identify those workers, provide reasonable adjustments or meet equal pay obligations.³ Evidence from the wider forms of precarious work suggests that a range of discriminatory practices are now common and while some tribunal cases have successfully been taken to challenge this, the knowledge

³ It should be noted that the requirement to provide equal pay within piecework is already established in law.

and understanding that equality rights apply in precarious work and zero hours settings by both employers and workers is limited.

There is of course a clear equality dimension within the gig economy as it is often targeted at young workers who aim to work around study or other commitments. While it is true that young workers do highlight some facets of the work as positive, for example bike couriers often enjoy being able to cycle as part of their work, and do cite the flexibility around study as a key requirement, they are often unaware that there are other forms of contracts that offer flexibility. When young workers are given more information about short hour employed status contracts, which offer paid holidays and paid study leave, they often state a preference for this way of working.

The question mentions specifically the recommendations of the Gender Pay Gap Inquiry; presumably this is due to a perceived benefit for workers in flexibility from the gig economy. There is no evidence that women working in the gig economy are supported by more flexible working. Often these workforces tend to be male dominated. For example Better than Zero is in touch with around 150 Deliveroo riders in Edinburgh, where only 3 are women. Equally women report that precarious work is often detrimental to supporting family life, with difficulty accessing childcare around work that comes with irregular hours or with a variable income that cannot be relied upon.

Conclusion

There are a variety of different business models operating within the gig economy which place different requirements on workers. At their heart, however, they tend to have one thing in common and that is the use of 'self-employed' workers to provide a service to their customers. Simply stating a worker is 'self-employed' is not sufficient, however, and in reality many of these companies, like Uber, may be operating business models based on bogus self-employment. If this is the case, it represents an erosion of rights and a growth in exploitation of a primarily young and unorganised workforce.

The Pimlico case is often cited by employment lawyers as a landmark ruling with regard to the gig economy, as it was the first to get to a senior court (the Appeal Court). The tribunal in finding that the claimant was indeed a worker rather than self-employed, made the general observation that this case required them to scrutinise a business model

under which staff are intended to appear as working for a business (through the use of branded equipment) while the business in turn seeks to maintain that there is no relationship of employer/employee or worker.

This, in many ways, is the key observation. These companies are in reality large companies, employing a large number of people who advertise their products in the course of their work, and who comply with the company's requirements and stipulations, but to whom no rights at work are offered. Where the gig economy appears to offer innovation or value for money for the consumer, it does so using a business model that pushes down on terms and conditions and reduces labour costs to employers at the expense of workers. These practices are not new, and they are not dependant on using new technologies, however, the use of apps and the rise of internet shopping, has encouraged a range of poor employment practice in the pursuit of ever lower prices for consumers.

The scale of precarious work is increasing and its wider effect on the labour market is now discernible. Is it appropriate to allow these practices to continue given their effect on the workforce and the wider downward pressure it places on other employers in the labour market?

Simply put, and to quote the film director Ken Loach when he spoke at STUC Congress in Aviemore this year: *"The gig economy, it sounds like a rave, but it's actually poverty and insecurity."*