The Pensions Regulator
Making workplace pensions work

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The Rt Hon Sir Stephen Timms MP
Chair
Work and Pensions Committee
House of Commons
London
SW1A 0AA

1 July 2022

Dear Sir Stephen,

Automatic enrolment and the gig economy

Thank for you for your letter of 22 June following the oral evidence hearing on 8 June. I hope the following answers about automatic enrolment and the gig economy are helpful to you and to the Committee.

The gig economy is set to grow further as the UK emerges from the pandemic and businesses recover. As I hope I made clear to the Committee, we want to see eligible workers in the gig economy receive the pensions they are entitled to and, as such, we are working on a number of individual cases across the delivery and transport sectors with a total of 150,000 – 200,000 workers affected.

It is only right that workers contributing to the economy have the opportunity to save for retirement. Employers in the gig economy should recognise and comply with their automatic enrolment (AE) responsibilities voluntarily and promptly.

We will take enforcement action where appropriate to ensure savers are protected. However, as set out in our answers below, we face considerable legal complexities and routine challenges from employers when intervening. We work hard to overcome these hurdles as part of our role to protect savers.

In response to your questions:

1) ***Jamie Heywood of Uber told us on 15 June that he thinks the legal position of workers in the taxi and private hire industry is now clear (Q216). Do you agree that this is the case, i) for the taxi and private hire industry, and; ii) for the gig economy more broadly?***

TPR does not consider that the legal position of workers is clear, whether those individuals operate in the taxi and private hire industry, or more generally, across the gig economy. While TPR welcomes the Supreme Court analysis in the Uber case (found here), the circumstances of an individual's employment, including the terms and conditions they operate under, makes satisfying the "worker" test under s88 PA08 entirely specific to the facts of each case.

Significant challenges remain even where we have a ruling from the Employment Tribunal (ET). For example, we have encountered situations where staff at an employer may have been designated as "workers" by an ET, but that still does not mean the employer will award the same worker status to other members of staff within the organisation who were not subject to the ET case. We go into more detail about the challenges later.

2) ***Have you considered producing guidance to ensure employers and workers understand their duties and rights?***

We do provide guidance to all employers (which includes gig economy employers) on the definition of a "worker" and how to identify who is a worker (Please see: Detailed guidance no.1 – Employer duties and defining the workforce). We have also published guidance on employers' AE duties.

In addition, there is guidance available on the different types of employment status, and the rights associated with each of them, which is provided by the Money and Pensions Service on their MoneyHelper website here.

3) ***You said there are gig economy employers with contractual mechanisms in place with workers who do not come under the definition in the Pensions Act 2008 (PA08). Could DWP use its powers under section 98 to include them? Have you advised it to do this?***

In the scenario I described when giving evidence to the Committee, gig economy employers are providing pensions through contractual mechanism for workers they consider to be self-employed (as outside the definition of worker in the PA08).

We continue to work with DWP on AE policy matters and, as part of our discussions, we have highlighted our experiences with gig economy employers and will continue to do so. Being a "worker" also gives rise to wider employment law rights and protections and we have also discussed this with BEIS as part of the work it is leading to improve the clarity of employment status. However, legislative change to expand the scope of the worker definition, whether through use of section 98 or otherwise, is a matter for Government.

4) ***When following up on an employment tribunal decision (Q175), is it your policy to apply the principles of that decision to other workers with similar employment arrangements? Have you used, or threatened the use of, your enforcement powers in such circumstances?***

TPR's approach is to monitor Employment Tribunal (ET) decisions on worker status and then consider regulatory intervention where an entity has been found to employ workers.

We engage with an employer which has been party to the ET decision, and we also consider whether that ET decision applies the same status on those working under the same terms and

conditions under different employers. To do this, TPR utilises its information gathering powers to check those terms and conditions.

The Committee will appreciate that this is complex. Employers routinely claim, in direct challenge to our approach, that only the actual litigants of the ET's decision are affected by the outcome, and/or that the terms and conditions are now different (usually re-cast to emphasise self-employment), or that pension rights were not included in the decision.

However, we routinely use our enforcement powers where we continue to believe that staff are workers for the purposes of AE, to achieve compliance and we have done so in a number of cases.

I would add that we continue to monitor if other employers make changes and do the right thing for their staff following an ET decision, which they were not a party to, without the need for enforcement action.

5) ***If you were following up on a whistle-blower's report, on what basis would you take a decision about employment status? Do you have the employment law expertise you need in-house?***

At TPR we utilise our powers, gathering contractual information, and the testimonies of whistleblowers, to form a view on employers within the gig economy. As explained above, we primarily rely on the evidence and findings of ETs on the status of workers, which is sometimes enhanced with the information we receive from whistleblowers. This helps provide clarity on worker status before we proceed with regulatory action.

Reports from whistleblowers provide an important indicator that an employer may be non-compliant and every report is assessed on its own merits. Understanding employment status is a key part of this assessment. However, as referenced above, we recognise the complexities in determining if an individual is a worker.

Assessing terms and conditions, and the circumstances of employment, to determine if an individual is likely to be a "worker" for the purposes of Section 88 of PA08 is something TPR is able to do in-house. If additional input is required, we also have the option to engage specialist external legal resource.

6) ***If an employer disagreed with your decision that they had to auto-enrol people working for them, would their right of challenge be under the procedure set out in PA08, s42-43?***

An employer is entitled under Section 43 of PA08 to seek a review of any of the notices specified in section 43(2). Where TPR has issued a Fixed Penalty Notice (FPN), and/or Escalating Penalty Notice (EPN), an employer has the right to challenge that in the First Tier Tribunal, as per s44 of PA08, provided either (i) the FPN/EPN has been upheld by TPR at the Section 43 review stage or (ii) that TPR has determined not to carry out such a review.

To provide some contextual information, employers consistently challenge our use of powers via the Section 43 review process and appeal (or reference) to the First Tier Tribunal (FTT). For example, in a case last year, following a reference to the Upper Tribunal on a point of evidential law, the FTT determined that it cannot directly adopt the ET's decision on worker status, forcing TPR to seek new, separate and/or fresh evidence in support of our contention as to worker status. While whistleblower evidence is helpful, the evidential burden for TPR remains significant, despite earlier ET outcomes.

Yours sincerely

Charles Counsell
Chief Executive

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Charles Counsell
Chief Executive
The Pensions Regulator

From the Chair

22 June 2022

Dear Charles

Thank you again for your oral evidence to the Committee on 8 June. We would be grateful for some additional information to help us better understand your approach to enforcing compliance of auto-enrolment duties for gig economy workers. For example:

- Jamie Heywood of Uber told us on 15 June that he thinks the legal position of workers in the taxi and private hire industry is now clear (Q216). Do you agree that this is the case, i) for the taxi and private hire industry, and; ii) for the gig economy more broadly?
- Have you considered producing guidance to ensure employers and workers understand their duties and rights?
- You said there are gig economy employers with contractual mechanisms in place with workers who do not come under the definition in the Pensions Act 2008 (PA08). Could DWP use its powers under section 98 to include them? Have you advised it to do this?
- When following up on an employment tribunal decision (Q175), is it your policy to apply the principles of that decision to other workers with similar employment arrangements? Have you used, or threatened the use of, your enforcement powers in such circumstances?
- If you were following up on a whistle-blower's report, on what basis would you take a decision about employment status? Do you have the employment law expertise you need in-house?
- If an employer disagreed with your decision that they had to auto-enrol people working for them, would their right of challenge be under the procedure set out in PA08, s42-43?

We would be grateful for a response by Wednesday 13 July.

Yours sincerely,

Rt Hon Stephen Timms MP, Chair