Health and Safety Executive

Consultation on proposals to exempt the self-employed from health and safety regulation

A response by the Association of Personal Injury Lawyers

October 2012

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have around 4,400 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Alice Warren, Legal Policy Officer
APIL
3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
Tel: 0115 9435428; Fax: 0115 958 0885
e-mail: alice.warren@apil.org.uk

Introduction

APIL welcomes the opportunity to comment on the proposals to exempt self-employed people from the scope of health and safety law. APIL has been campaigning for over twenty years to promote the safety and wellbeing of members of the public including all those at work. We would strongly recommend that these proposals should not go ahead, for a number of reasons:

- The basis for the consultation is misconceived and founded on false presumptions that health and safety statues and regulations are just "red-tape"- an unnecessary burden to the self-employed. Self-employed people are not expected, under current law, to take any disproportionate steps to comply with health and safety regulations, therefore it surely cannot be seen as a burden. This is demonstrated in Regulation 5 of The Management of Health and Safety at Work Regulations 1999:

  "5(1) Every employer shall make and give effect to such arrangements *as are appropriate,* having regard to the nature of his activities and the size of his undertaking, for the effective planning, organisation, control, monitoring and review of the preventive and protective measures" (emphasis added).

  In addition, Health and safety regulations are far from unnecessary "red-tape"- they are vital to the protection of workers and members of the public. According to the Trade Unions Congress (TUC), since the Health and Safety at Work Act was introduced in 1974, there has been an 80% decrease in fatalities; the HSE estimates that half of this is as a result of health and safety legislation and enforcement.[1] There is no justification for self-employed people to miss out on this protection- just because someone is self-employed does not mean that they are "low risk". In 2010/2011, there were 13 reported fatalities for employees, but 21 reported fatalities for self-employed people in the Agriculture, Farming and Fishing sector[2].
- It is suggested that the proposals would actually make things more difficult for the self-employed. Although the HSE premise was to remove statutory regulation for those who do not employ people, and pose no potential risk to others, we would suggest that the proposal is actually a Trojan horse- seemingly only exempting the self-employed from a number of statutory regulations, but in actual fact

[1] http://www.tuc.org.uk/workplace/tuc-20513-f0.pdf
[2] http://www.hse.gov.uk/statistics/tables/index.htm#riddor

removing common law protection as well, as common law can be influenced and affected by statute. This can be demonstrated by the requirement to provide risk assessments, which was a statutory regulation but has been recognized as a common law obligation too. By removing the requirement of self-employed people to carry out risk assessments, this will remove both the obligation in the regulations and also the obligation in common law.

- APIL believes that this is not in fact a full and proper consultation, because it lacks specific detail as to what the proposals would actually involve and the actual effect that they would have on the self-employed. At the very least, APIL suggest that the proposals should not be implemented until a full and complete consultation has taken place.
- APIL believes that the proposals are unclear, misconceived and lacking in specific detail. It appears that self-employed people are being targeted simply because the Government have made a promise to cut down on red-tape. Yet this is a misconception- it is not "red tape" that is being removed, it is necessary protection for vulnerable workers. Self-employed people are the easiest group to cut out of the scope of health and safety because they are on their own- they are not an organisation who has the power and know-how to fight back. However, being self-employed should not mean that a person is any less protected under Health and Safety law.

APIL has a number of general comments to make about the proposals before commenting on any of the proposed options for implementation.

The proposals are based on a false perception of how health and safety law is viewed by self-employed people.

Paragraph 5 of the consultation paper states that "it is clear that the fear of inspection and possible prosecution for minor transgressions of the law is a cause of unnecessary concern for the self-employed…" We believe that this is actually a distorted perception of how health and safety legislation is viewed by people who are self-employed. In reality, they do not feel that it is an unnecessary concern. In paragraph 4 of the consultation, it is even stated that "the actual burden that the regulations currently place upon these self-employed may not be particularly significant due to existing exceptions in some regulations." This is demonstrated by the defence of reasonable practicability in

paragraph 7 of the paper, which quotes section 3(2) of the Health and Safety at Work Act 1974 “It shall be the duty of every self-employed person to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable…” Currently, therefore, self-employed people are not expected to take any disproportionate steps to ensure the health and safety of anyone who they may pose a risk to.

To exempt the self-employed would have dangerous consequences.

The function of the Health and Safety Executive is to prevent people being killed, injured or made ill by their work[3]. The self-employed are surely worthy of this protection, because they are workers at work. It is difficult to see how they can be legitimately excluded from the scope of health and safety law. This again goes back to the above point, that it is unclear what exempting the self-employed would actually mean- would the Health and Safety Executive just no longer care about the welfare of the self-employed?

A further point is that there are already low reporting figures for this group of people. By exempting them from the requirement to report when injuries occur, the data that the HSE has access to regarding the self-employed will be reduced even further, and dangerous practices will go unmonitored. As stated above, just because a person is self-employed does not automatically mean that they are low risk.

The proposals would actually make the law more unclear and difficult to apply than at present, and therefore the self-employed would not actually benefit.

It is clear from Annex 2 of the consultation paper that only those self-employed who do not employ people, and pose no potential risk to others, are exempt from health and safety law. Whether someone is employed has always been a difficult concept in law. There are many borderline cases where it is difficult to identify whether a person is working under a contract for services (and so is a self-employed contractor) or a contract of service (and so is an employee). Doubts have been cast, for example, on the status of couriers working for a company (as demonstrated in the case of *James v Redcats Brands*[4]); and those who work on a casual, as required basis (*Carmichael v National Power*[5]). *O’Kelly v Trusthouse Forte*[6] is a case that demonstrates how complex the

[3] http://www.hse.gov.uk/index.htm
[4] [2007] IRLR 296
[5] [1999] UKHL 47

concept of “employee” actually is. Here, there were several people who worked as waiters at a hotel on a casual basis, and they were known as “regulars”. The case was appealed several times, with the court to-ing and fro-ing as to whether the people were employees or not. If a court has difficulty in determining this issue, it is unlikely that a lay person would be able to determine with certainty whether they were employed or self-employed thus this proposal is founded on unclear principles. Leaving this question to be determined by people who potentially have no knowledge of the law will make life difficult for those who are self-employed. This will surely only make the law more burdensome and create more “unnecessary concern” than there is now.

In addition, what happens if a person gets their self-assessment wrong, and decides that they are of no potential risk to others, and then subsequently injures someone? This means that they got the self-assessment wrong- they did in fact pose a potential risk to people. But are they exempt from liability because they have decided that they should be able to take advantage of the exemption?

The whole law seems confusing and circular- if a person decides that he is exempt, then he will presumably be exempt from having to carry out a risk assessment under Regulation 3 of the Management of Health and Safety at Work Regulations (1993 & 1999) and Article 3(a) of the Framework Directive. Yet, if they do not assess, then how will they know if they are exempt in the first place?

Another point about risk assessment is that if the proposals are seen to remove self-employed people from the scope of statute, then they may still have to risk assess anyway, because it is a part of the common law, as pointed out by Dame Janet Smith in *Threlfall v Hull City Council*[7]. She stated:

> “…for the last twenty years or so, it has been generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with his operations so that he can take suitable precautions to avoid injury to his employees. In many circumstances, a statutory duty to conduct such a risk assessment has been imposed. Such a requirement (whether statutory or not) has to a large extent taken the place of the old common law requirement that an employer had to consider (and take action against) those risks which could be

[6] [1983] ICR 728
[7] [2010] EWCA Civ 1147

reasonably foreseen. The modern requirement is that he should take positive thought for the risks arising from his operations".

This illustrates a point made above, that the scope of the proposals is unclear and could actually mean that the self-employed become exempt from the common law regarding health and safety law, as well as statute. APIL suggests that the proposal is actually a Trojan horse, seemingly only exempting the self-employed from the scope of statute but actually having a far wider reaching effect than this.

The proposals are unclear as to their actual effect, and so this is not a full and proper consultation.

There is a lack of detail in the consultation which makes it unclear what the actual effect of the proposals would be. For that reason, we would suggest that this is not a full and proper consultation. There is no actual draft law upon which APIL can comment. If health and safety law does not apply to the self-employed, does this mean that the self-employed person can never be civilly liable, or does the common law still apply? It is firstly not entirely clear which health and safety regulation the self-employed are exempt from. Secondly, as explained above with regard to risk assessments, statutory regulation can modify the common law. If a self-employed person is exempt from statute, then are they also exempt from the common law that has the same effect as the statute? The answer to this question is not made clear within the consultation.

Comment on the Proposed Options

In light of the comments and issues raised above, APIL would suggest that the proposals are not enforced. At the very least, a more complete consultation with more detailed proposals must take place.

Aside from this, all of the proposed options to implement the changes are flawed, as they are unclear and would be difficult for a self-employed person to work around. Option 1- Exempting from health and safety law, the self-employed who pose no potential risk of harm to others, would be too simplistic an approach; Option 2- Exempting from health and safety law, the self-employed who pose no potential risk of harm to others and who do not work in a high risk sector as prescribed by the Secretary of State, is flawed because the list of high risk sectors, on page 10 of the consultation

paper, appears to be a closed list, yet these are definitely not the only high risk sectors that a self-employed person may work in.

If it was necessary to choose an option, APIL's preferred choice is Option 3- Exempting from health and safety law, the self-employed who undertake office-type activities and pose no potential risk of harm to others. Yet this is also too simplistic, because offices can be dangerous places, and even though it is a comparatively low risk environment, it cannot be said that there is "no potential risk" of harm to anyone. People could trip over wires, fall down stairs, or perhaps get an injury from the way they sit at their desk.

Finally, we would like to reiterate our disappointment that these proposals have been ill-thought out, and it is obvious that the Government have targeted the self-employed as a group of people who would put up least resistance to the removal of vital health and safety regulations- just so that they can be seen to be keeping a promise to "remove unnecessary red tape". As demonstrated above, the "red tape" surrounding the self-employed is far from "unnecessary", and removing it will create far more burdens on the self-employed than there are now.

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Association of Personal Injury Lawyers

▶ 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

● T: 0115 958 0585 ● W: www.apil.org.uk● E: mail@apil.org.uk