

Response to the strategy paper ‘Success at Work: Protecting vulnerable workers, supporting good employers’

Introduction

The Professional Contractors Group is the cross-sector representative body for freelance contractors and consultants in the UK. Its members operate their own one or two-person companies and provide their services to a range of clients. They work in IT, engineering, project management, oil and gas extraction, marketing and many other sectors.

The UK’s freelance contractors and consultants are a highly skilled, highly flexible and highly mobile workforce. The UK’s model of freelancing is uniquely sophisticated and, by affording companies the ability to acquire specialist skills on a flexible basis, offers the UK a meaningful competitive advantage, particularly in the knowledge-based industries on which its future growth depends.

PCG’s members are among the 1 in 7 workers in the UK who choose to work for themselves in some way. They sit outside the traditional divide of employer and employee; as part of the “third way” of working, they are therefore often overlooked in the policy discourse, which remains dominated by the traditional dichotomy.

PCG finds much that is positive within the DTI’s paper ‘Success at Work’ and here offers comment both on where it is particularly strong and on areas where it could usefully be developed further. PCG will always be pleased to assist the Department with issues pertaining to freelance small businesses and the self-employed.

The discussion below will be divided into the following sections:

- Freelancing and the modern global economy
- Freelancing and ‘Success at Work’
- “Atypical working” and the “nominally self-employed”
- Flexible working
- Freelancing and the Government
- PCG Recommendations

Freelancing and the modern global economy

It is rightly stated in ‘Success at Work’ that, “much has changed in Britain over the past decade... At work we want greater fulfilment as well as good pay.” The UK’s freelancers illustrate this trend.

Freelance contractors and consultants are highly skilled professionals who have decided to set up in business and work for themselves as a career and lifestyle choice. By working freelance, they provide their services to a succession of different clients, meeting the clients’ needs for specialist skills on an interim or project basis.

This has many benefits.

- The clients benefit because they have the flexibility they need.
- Contractors benefit because they have the advantages of being in business, such as career advancement and a more flexible lifestyle.
- Employees benefit because they can be given greater rights without increasing their employers’ costs across the board and thus harming their competitiveness.
- Government benefits because it can award employees such rights without wreaking economic damage by compromising the flexibility and efficiency of client companies.
- The UK benefits because this way of working gives rise to a more flexible economy than would otherwise exist.

The presence in the UK of a uniquely sophisticated freelancing model therefore allows for a combination of fairness and flexibility, while affording the UK a meaningful competitive advantage.

This trend is only likely to grow. The Labour Force Survey showed that in 2004, out of 4.3 million enterprises in the UK, 2.7 million were run by self-employed people without employees. The number of small businesses with employees has actually been falling gradually in recent years.

The self-employment rate in the UK rose from 6.6% of the non-agricultural workforce in 1979 to 11.9% in 1993. These facts all demonstrate the growth in freelancing and strongly suggest that it has arisen out of genuine economic need.

This need for a flexible supply of skills is not going to diminish: as 'Success at Work' states, with India and China becoming ever-stronger forces in the world economy, the UK must, "compete on the basis of innovation and technical excellence [...]. We need an ever-higher skilled workforce and regulatory practice that promotes enterprise, competition and adaptability." The UK's vibrant sector of freelance small businesses will prove to be extremely valuable in this regard.

Freelancing and 'Success at Work'

Freelancing was not directly addressed in 'Success at Work', although discussions of other ways of working did appear to touch on it. The sub-title of the document, 'Protecting vulnerable workers, supporting good employers', encapsulates this: as neither vulnerable workers nor employers, freelancers were not the document's main concern. Nonetheless, as a strategy document for employment law over the current parliament, 'Success at Work' does address many different groupings within the labour market. The repeated use of the formulation "managers, employees, trade unions and entrepreneurs" shows this; it comes close to including all groups, but does not quite include those who work for themselves.

That said, although it is not directly addressed, freelancing can be seen to sit neatly alongside many of the fundamental points set out within the document. It states that the UK faces two key economic challenges: the growing pace of economic, technological and social change throughout the world, and the need to extend opportunity and fairness. PCG agrees wholeheartedly that these two challenges are vital to the economic future of the UK: freelancing not only offers the UK a competitive advantage to assist it in meeting the first of these challenges, but also offers individual workers considerable opportunity in both their careers and their lifestyles.

This opportunity afforded by freelancing is echoed by 'Success at Work' when it states that the government is helping "employers and employees" to "reap the benefits of a diverse workforce" and "help people balance work and family life". Although the presence of the old-fashioned dichotomy of "employers and employees" is unhelpful and ignores a large section of the workforce, it can be observed that freelancing is a vital element of the diverse workforce mentioned and that it has a vital role to play in helping people balance work and family life.

This also ties in with the observations in 'Success at Work' that Britain has, "a labour market where adaptability and flexibility to promote employability and competitiveness are combined with a commitment to fairness," and, "Britain's labour market is characterised by diversity and flexibility." PCG would add that freelancing not only offers a key element of this diversity and flexibility, but is also important in affording opportunity and fairness to workers: for workers to be able to take advantage of opportunity, they must have the freedom to do so; this is an important route by which fairness can be increased within the workforce.

PCG agrees with 'Success at Work' that, "opportunities must be created for workers at all levels to upskill and reskill," because workers increasingly desire variety throughout their careers, and welcomes the statement that the Government aims to make sure that, "individuals are equipped to be both employable and personally fulfilled" (using the term "employable" in its broadest sense). Freelancing

offers workers considerable opportunities in all of these respects and PCG recommends that the government considers how best to encourage it and also how best to ensure that training opportunities for freelancers are readily available.

The assertion that a vibrant environment for entrepreneurial activity is essential in an open, competitive global economy is entirely correct and PCG agrees with the aims identified in 'Success at Work': promoting enterprise and innovation; a stable and clear regulatory framework; and helping good businesses to comply with their obligations.

PCG therefore welcomes the conclusion in 'Success at Work' that the present legal framework reflects the diversity of working arrangements in the UK and that no further legislation is needed in this area. The fundamental elements of the current framework do indeed offer an appropriate balance of flexibility and protection. It can be said, however, that in places some clarification would be desirable.

The objections raised during the consultation to an extension of employment rights to all workers are well-founded. Opportunity and fairness can be extended to workers by means other than employment rights. PCG considers that current grey areas over where the boundaries for employment status lie need to be clarified: they are denying some workers the freedom to make use of the opportunity offered by freelancing, while in other cases they are not providing adequate protection for the vulnerable. Such areas of ambiguity will be considered in the following section.

“Atypical working” and the “nominally self-employed” – misunderstandings and grey areas **i) Depiction of “atypical working” in ‘Success at Work’ and consultation responses**

In the summary of responses to the consultation exercise carried out in 2002, a section was devoted to “workers, independent contractors and their representatives”. Many of the issues and workers discussed in this section are absent from 'Success at Work', and while this omission is to be regretted, the commentary provided on the consultation responses suggests that there is, in any event, some fundamental misunderstanding of freelancing and its role in the economy.

The use of the term “atypical working” is particularly unhelpful: in light of the acknowledgement in 'Success at Work' of the importance of diverse and flexible ways of working, it is surprising to see an accompanying document treat all forms of working that are not permanent employment as being somehow aberrant.

One passage bears quoting at length:

“[Some respondents] said that they enjoyed particular freedoms and rewards from working atypically and proactively choose not to be employed. Some set up their own limited companies and see themselves as small businesses trading on their knowledge and skills, even though they may be economically dependent on a single organization at particular times.”

The concept of dependency is a substantial red herring. Freelance small businesses supply their services to a succession of clients, and it is no difficulty to them that they may have only one client at a particular time. If that contract ends, they will simply move on to the next one: that is the nature of freelancing and freelancers embrace it as a conscious choice. PCG believes that all workers should have the freedom to work for themselves and to offer their services on a freelance basis: the opportunity of which 'Success at Work' speaks would be worthless if workers do not have the freedom to make use of it.

The submissions to the consultation by trades unions, as reported in the summary of responses, also demonstrate a misunderstanding of the nature of the modern economy. Their position that employment

rights should be “extended” to all workers is misguided. For freelancers, such an extension of rights would in fact be an imposition and would take away their freedom to work for themselves; the suggestion reported in paragraph 23 of the summary of responses that there should be a burden of proof on employers to prove that a worker is not employed assumes that no worker would ever wish to be anything other than an employee – as has been set out above, this is wholly unrealistic. It would render freelancing unviable. By placing increased burdens on employers, it would also make it much more difficult for employment rights to be enhanced without causing economic damage: with all workers owed employment rights, costs would increase and economic flexibility would decline.

The suggestions reported in paragraph 23, for an extremely broad statutory definition of “employee” and a legal presumption of employment would therefore reverse decades of development within the economy of flexible ways of working to meet economic need. At a time when the UK needs to compete with the growing Asian economies, this would be disastrous.

ii) The real problems and possible solutions

The submissions to the consultation suggesting that remedying bad practice – as distinct from a blanket extension of employment rights - would be a better way of extending opportunity and fairness have identified a good point.

Currently there are two scenarios in which workers are treated unfairly by a lack of clarity in employment relations. The first is when an employee is obliged to become a contractor against their wishes. The second is when a freelance contractor is offered a contract that obliges them to act as if they were an employee. The tax legislation IR35 has had the effect of crystallising these abuses and giving them an official status: where previously they would have been in something of a legal grey area, workers in both of these positions will now typically be IR35-caught contractors.

PCG’s position is that these grey areas should be eradicated: companies should engage people either as external suppliers or as employees. If they require someone to work as if they were an employee, they should hire them as an employee. If they wish to hire an external supplier, they should do so on proper business-to-business terms. Obliging companies to adopt good practice along these lines would completely remove the need for IR35.

The problems identified by the trades unions are therefore a result of bad practice by employers or client companies: a clarification of the legal framework to prevent such behaviour would rectify this and would also end the uncertainty created by IR35 and the Muscat case¹. A blanket extension of employment rights would settle the issue at the expense of increased costs for business and hampering the UK’s economic performance.

iii) Problematic definitions

The discussion of these issues in ‘Success at Work’ and the accompanying documents was hindered by imprecise definitions. ‘Success at Work’ itself did, however, reach a good definition of a vulnerable worker: one with a high risk of being denied employment rights; and with no capacity to protect themselves against that abuse. This excludes freelance contractors and consultants from the category, as they do not seek or need employment rights, nor are they entitled to them.

Definitions elsewhere were less clear, however, and often straddled groups inside and outside the “vulnerable worker” category. The use of the term “agency worker” is particularly unhelpful in this

¹ In *Cable and Wireless v Muscat* (2006) the Court of Appeal upheld the verdicts of lower courts that Mr Muscat was an employee of Cable and Wireless, despite supplying his services on a contract basis using a limited company. Mr Muscat’s circumstances were somewhat unusual, however, and it remains unclear how widely applicable the principle of this judgment will be. This uncertainty is causing considerable anxiety for many businesses.

regard: it could be taken to refer to low-paid cleaning staff (potentially vulnerable workers), secretarial staff (ranging from the low-paid and vulnerable to the highly-skilled and not vulnerable) or highly-skilled freelance contractors.

The term “atypical worker” is similarly unhelpful: the points made in the summary of responses that such workers can assist companies with fluctuating demand and with sourcing specialist skills for particular projects are well-made, but again workers in this category run the gamut from the low-paid and vulnerable to the highly-skilled and professional. Grouping these categories together under one heading will not allow for sound policy-making, as measures to assist one end of the spectrum could be highly damaging if applied at the other.

PCG recommends that the DTI consults on compiling more thorough and discriminating working definitions.

Flexible working

PCG is somewhat surprised that, having acknowledged the significance of flexibility to the economy, ‘Success at Work’ does not make a thorough connection between, on the one hand, flexible ways of working beyond permanent employment and, on the other, work-life balance. The extension of enhanced rights such as paternity leave is of course to be welcomed, but there are ways for workers to strike a work-life balance other than by utilising employment rights. Freelancing and other forms of flexible working are a significant alternative way of doing so. It is therefore important that workers have the freedom to make use of the opportunity offered by them.

That said, ‘Success at Work’ does have much to say on the subject of flexible working that is sensible. It is right to observe that workers adopt a variety of working arrangements, although the reference to agency working again fails to discriminate between the different forms this can take. PCG agrees entirely with the passage that states:

“Part-time, agency or fixed-term work is to the benefit of both parties. The employer [sic]² has a flexible source of labour... Individuals have the chance to try out different forms of work and different workplaces.”

It is surprising, however, that the document addresses these forms of working only as interim and short-term options, particularly in view of the research cited that shows that such workers are among the happiest in the EU. Many workers choose to work in this way long-term, from PAYE agency workers to limited company freelance contractors. Again, a lack of accurate definitions and distinctions hinders ‘Success at Work’ in following its own fundamentally sound analysis to its logical conclusions.

Freelancing and the Government

Freelance and other small businesses are not necessarily desirous of extensive government support schemes. The low take-up rates for most existing schemes indicates this. They are particularly unhelpful for small businesses: the owners of the smallest companies have to devote all their time to running their businesses, and do not have the time to investigate government support schemes, let alone take them up.

The most useful support that can be provided by government is:

- a sound economic and regulatory framework for business
- sound infrastructure (transport and technological eg broadband)

² In such relationships, the company hiring the worker is, of course, not that worker’s employer.

- sound basic education so that young workers have necessary literacy and numeracy; further training can be demand-led and left to the market.

PCG is pleased that an “Advisory Forum” is to be established, involving the social partners, although the use of the latter term in the absence of a full social dialogue structure in the UK begs the question of the Forum’s exact role. PCG looks forward to the publication of further details on this point.

The recognition in ‘Success at Work’ of the costs that inefficient regulation can impose on business without improving regulatory outcomes is also welcome.

The Business Link “No Nonsense Guide to Government rules and regulations for setting up your business” is also a promising development. PCG would like it to be accompanied by a guarantee indemnifying businesses against prosecution or penalties by other government agencies or departments should they follow its advice. PCG members have in the past been obliged to defend themselves through the courts against government agencies after following advice given by Business Link with which other departments have disagreed. In one recent instance, a member was presented with a tax bill by HMRC which, according to the advice on Business Link, he should not have owed – a view which the Court of Appeal agreed. For Business Link to be a credible source of information to businesses, such things must never be allowed to happen again.

PCG Recommendations

Below are recommendations by PCG to the Government for meeting the two key challenges of increasing global competitiveness and increasing fairness, also responding to the statement in ‘Success at Work’ that the Government remains open to suggestions about how to simplify the employment framework. Some are duplicated from the discussion above.

The “grey area” of employment status must be eradicated and companies who seek to exploit it when hiring workers prevented from doing so.

- workers obliged to act as employees should be hired as employees and not obliged to incorporate at a later date
- external suppliers should be hired on business-to-business terms and not be obliged to work as de fact employees

Clarifying the law to prevent bad practice in this way would remove the uncertainty caused by the recent Muscat case and by IR35.

All workers should have the right to work freelance if they choose; no barriers should exist to deny them this opportunity. All existing and forthcoming legislation should be screened to ensure that this is the case and amended by Regulatory Reform Order or full primary legislation if necessary.

The Government should consider how best to encourage freelancing, to assist in extending opportunity and fairness and to enhance the UK’s competitiveness further.

All Business Link advice must carry a guarantee that other government departments and agencies will not prosecute or penalise businesses who comply with it.

The DTI should develop accurate definitions of different categories of worker in consultation with stakeholders. These should be used when drawing up any future legislation and regulations across Government.