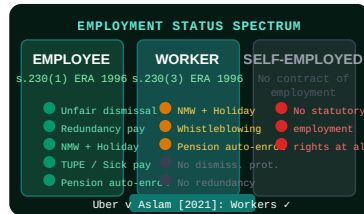


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The Employment Status Trilemma: A Critical Analysis of the Tripartite Model in the Gig Economy

Employment Law Report — Examining Legislative Adequacy and the Case for Reform

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// EXECUTIVE SUMMARY

English employment law classifies working people into three categories — employees, workers, and the self-employed — each carrying different statutory entitlements under the Employment Rights Act 1996. The rise of digital labour platforms has exposed fundamental inadequacies in this tripartite model. The Supreme Court's decision in *Uber BV v Aslam* [2021] UKSC 5 represented a critical correction, confirming that courts must look beyond written contract terms to the actual working relationship. However, judicial intervention alone is insufficient. This report argues that the current model is structurally unfit for the gig economy and calls for legislative reform establishing a unified worker status with a sliding scale of rights, reversing the burden of proof in status disputes, and engaging constructively with the EU Platform Work Directive.

1. INTRODUCTION

The question of who counts as an "employee" or "worker" in English employment law has never been a merely taxonomic exercise. Employment status is the gateway to a comprehensive edifice of statutory protections — from the right not to be unfairly dismissed, to entitlement to the national minimum wage, paid annual leave, and automatic pension enrolment. The precise location of an individual on the spectrum between dependent employment and independent self-employment therefore carries considerable material consequence.

The emergence of the so-called "gig economy" — characterised by platform-mediated, task-based work undertaken by individuals formally classified as independent contractors — has placed the existing tripartite model under acute pressure. Platforms such as Uber, Deliveroo, and TaskRabbit have deployed contractual structures purporting to establish independent contractor relationships, thereby denying workers the statutory protections they would otherwise attract. Courts across the United Kingdom, culminating in the Supreme Court's landmark ruling in *Uber BV v Aslam*,¹ have repeatedly rejected such characterisations. Yet the underlying legislative framework remains unchanged. This report critically examines the adequacy of the current tripartite model, traces the judicial developments that have attempted to mitigate its deficiencies, and proposes a programme of legislative reform commensurate with the realities of twenty-first-century work.

2. THE LEGISLATIVE FRAMEWORK: EMPLOYMENT STATUS IN ENGLISH LAW

The tripartite model of employment status rests upon a set of statutory definitions that have accreted over decades of piecemeal legislation. At its apex sits the "employee," defined by section 230(1) of the Employment Rights Act 1996 (ERA 1996) as an individual who has entered into or works under a contract of employment.² Employees enjoy the most comprehensive suite of statutory rights, including

protection from unfair dismissal, statutory redundancy payments, and rights under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

Beneath the employee category, section 230(3) ERA 1996 defines the "worker" as an individual who works under any contract to personally perform work or services for another party — unless that other party is a client or customer of a profession or business undertaking carried on by the individual.³ Workers access an intermediate tier of rights: entitlement to the national minimum wage under the National Minimum Wage Act 1998,⁴ paid annual leave under the Working Time Regulations 1998,⁵ whistleblowing protection under the Employment Rights Act 1996, and automatic enrolment into a workplace pension. They do not, however, enjoy protection from unfair dismissal or statutory redundancy pay. At the base of the hierarchy, the genuinely self-employed — those who contract as independent businesses — receive no statutory employment protections whatsoever.

Table 1: Statutory Rights Across the Tripartite Employment Status Model

Statutory Right	Employee (s. 230(1))	Worker (s. 230(3))	Self-Employed
Unfair Dismissal (ERA 1996, s. 94)	✓ Yes	✗ No	✗ No
Statutory Redundancy Pay (ERA 1996, s.135)	✓ Yes	✗ No	✗ No
National Minimum Wage (NMWA 1998)	✓ Yes	✓ Yes	✗ No

Statutory Right	Employee (s. 230(1))	Worker (s. 230(3))	Self-Employed
Paid Annual Leave (WTR 1998, reg.13)	✓ Yes	✓ Yes	✗ No
Whistleblowing (ERA 1996, s. 47B)	✓ Yes	✓ Yes	✗ No
Equality Act Protection (EA 2010, s.83)	✓ Yes	✓ Yes	Partial
Auto-enrolment Pension (PA 2008)	✓ Yes	✓ Yes	✗ No
TUPE Protection (TUPE 2006)	✓ Yes	✗ No	✗ No
Statutory Sick Pay (SSCBA 1992)	✓ Yes	✗ No	✗ No

Source: ERA 1996; NMWA 1998; WTR 1998 (SI 1998/1833); EA 2010; PA 2008; SSCBA 1992; TUPE 2006 (SI 2006/246).

1. *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657.
2. *Employment Rights Act 1996*, s 230(1).
3. *ibid* s 230(3).
4. *National Minimum Wage Act 1998*, s 54(3).
5. *Working Time Regulations 1998* (SI 1998/1833), reg 2(1).

3. CASE LAW DEVELOPMENT: FROM READY MIXED CONCRETE TO UBER

3.1 Establishing the Test: Ready Mixed Concrete and Autoclenz

The foundational judicial test for determining whether a contract of employment exists was articulated by MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*.⁶ The Court identified three essential conditions: the servant agrees to provide his own work and skill in the performance of some service for his master; he agrees, expressly or impliedly, to be subject to the other's control; and the other provisions of the contract are consistent with it being a contract of service.⁷ This tripartite test — personal service, control, and consistency — provided workable criteria for traditional bilateral employment relationships but proved ill-suited to increasingly complex contractual structures.

The courts developed further refinements. In *Montgomery v Johnson Underwood Ltd*,⁸ the Court of Appeal confirmed that both personal service and mutuality of obligation are irreducible minimum requirements for a contract of employment. However, the most significant judicial development came in *Autoclenz Ltd v Belcher*,⁹ where the Supreme Court

held that, in the employment context, the court is not confined to the written contractual terms when there is an unequal bargaining relationship between the parties. Lord Clarke, delivering the judgment of the Court, stated that the question is simply "what was the true agreement between the parties";¹⁰ where the written terms do not reflect the actual reality of the relationship, the court must look to the conduct and circumstances of the parties to identify that true agreement. *Autoclenz* thus introduced a purposive and contextual approach to employment status determination that would prove decisive in the gig economy litigation that followed.

3.2 Uber BV v Aslam [2021] UKSC 5: The Landmark Decision

The Supreme Court's judgment in *Uber BV v Aslam*¹¹ is the most significant employment status ruling in a generation. Uber had argued that its drivers were self-employed independent contractors: they worked when they chose, set their own routes, and Uber was merely a technology intermediary facilitating bookings between drivers and passengers. The written agreements described Uber as an "agent" and drivers as independent service providers. The Supreme Court unanimously rejected this analysis.

Lord Leggatt, delivering the Court's judgment, applied the *Autoclenz* principle with particular force, holding that "the purpose of the legislation is to give protection to vulnerable individuals who have little or no ability to influence the written terms of their

engagement."¹² Examining the reality of the relationship, the Court identified five indicators of control that fundamentally contradicted the independent contractor characterisation: Uber set the fare unilaterally; Uber imposed standard terms on both drivers and passengers; acceptance rates were algorithmically monitored; driver ratings were used to terminate relationships below a threshold; and communication between drivers and passengers was restricted to prevent future off-platform bookings.¹³ The Court concluded that drivers were integrated into Uber's business in a manner incompatible with genuine independent contractor status, and were accordingly "workers" for the purposes of section 230(3) ERA 1996 when logged into the Uber app and ready to accept trips.

Critically, *Uber* establishes that algorithmic control — the capacity of a platform to determine the conditions of work through technology rather than conventional management instruction — is as much an exercise of "control" in the statutory sense as the traditional employer's direction. This has profound implications for the wider platform economy. Similar findings have been reached in relation to cycle couriers (*Pimlico Plumbers Ltd v Smith*¹⁴) and, in a different context, in respect of partners in limited liability partnerships (*Bates van Winkelhof v Clyde & Co LLP*).¹⁵

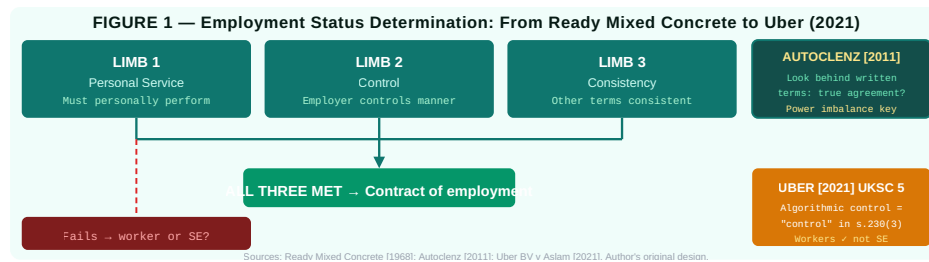


Figure 1: Employment status determination framework. The Ready Mixed Concrete three-limb test, modified by Autoclenz's true agreement principle and Uber's recognition of algorithmic control as statutory control. Source: Author's original design.

1. Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 (QB).
2. *ibid* 515 (MacKenna J).
3. *Montgomery v Johnson Underwood Ltd* [2001] EWCA Civ 318, [2001] ICR 819.
4. *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2012] 1 All ER 744.
5. *ibid* [32] (Lord Clarke).
6. *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657.
7. *ibid* [76] (Lord Leggatt).
8. *ibid* [70]–[72].
9. *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] ICR 1511.
10. *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730.

4. THE GIG ECONOMY: TECHNOLOGICAL PLATFORMS AND PRECARIOUS WORK

The term "gig economy" encompasses a variety of working arrangements, but the unifying feature is the mediation of labour through digital platforms that match supply (workers) with demand (consumers or client businesses) on a task-by-task basis. The platforms — which include ride-hailing applications, food delivery networks, domestic services aggregators, and freelance marketplaces — have grown substantially since the mid-2010s. The Office for National Statistics estimated that approximately 4.4 million people were engaged in some form of gig work in the United Kingdom by 2022, a figure that continues to grow.

The legal significance of platform work lies in the contractual architecture deployed to characterise the working relationship. The standard platform model presents the platform as a neutral intermediary — a technology company rather than a labour market actor — whose terms cast the worker as an independent contractor supplying services to end customers. As Prassl has observed, this structural manoeuvre serves to "fragment the employer concept," distributing the functions of employment across multiple parties and thereby obscuring the employment relationship that

would otherwise attract statutory regulation.¹⁶ Platforms thus exploit the "client or customer" exclusion in section 230(3)(b) ERA 1996, which removes from the definition of "worker" any individual who contracts with a client or customer of a business genuinely carried on by the individual.

The consequences for workers of misclassification are severe. A gig worker wrongly classified as self-employed is denied the national minimum wage for all hours worked (including waiting time), receives no paid annual leave, has no whistleblowing protection, and — crucially — is excluded from automatic pension enrolment at a stage of life when contributions would compound most significantly. The Taylor Review of Modern Working Practices (2017) identified these harms as a matter of urgent concern, characterising the situation of misclassified gig workers as "corrosive of the principles of fairness that should underpin the labour market."¹⁷

The Review made a central recommendation that the worker category be renamed "dependent contractor" and redefined by reference to the degree of control exercised by the platform rather than solely by reference to the requirement of personal service.¹⁸ By focusing on economic dependence and platform control as the relevant criteria, the Taylor Review sought to bring more gig workers within the protected tier whilst preserving the genuinely self-employed from over-regulation. The government's response — endorsing the principles but declining to legislate —

exemplifies the political difficulty of reform in a sector that presents itself as an engine of flexible, accessible work.

// KEY INSIGHT – ALGORITHMIC CONTROL

The concept of "control" in employment status law was designed for a world of human supervisors. In the gig economy, control is exerted by code: algorithmic assignment of tasks, automated rating systems, surge pricing, and app-mediated communication. *Uber v Aslam* [2021] UKSC 5 confirmed that algorithmic control is control in the statutory sense — but this principle must now be legislatively embedded to ensure consistent application across all platform models.

5. CRITICAL ANALYSIS: INADEQUACIES OF THE TRIPARTITE MODEL

The tripartite model has been subjected to sustained academic criticism for its conceptual incoherence. Davies has observed that the worker category is "an awkward intermediate resting place" created by ad hoc legislative accretion rather than principled design, with the result that the rights attached to each tier bear no systematic relationship to the degree of economic dependency or vulnerability that characterises the working person's actual situation.¹⁹ The employee/worker/self-employed taxonomy maps poorly onto the spectrum of real working arrangements, generating litigation at every margin.

A structural deficiency particular to the gig economy is the mutuality of obligation problem. Traditional employment implies ongoing mutual obligations: the employer is obliged to offer work; the employee is obliged to accept it. Gig platforms have sought to

exploit the absence of such obligations to deny employment status — a strategy endorsed by some earlier tribunal decisions.²⁰ Yet, as *Uber* demonstrates, where a worker is contractually required to be available and to accept a minimum proportion of offered tasks or face app suspension, the absence of formal mutuality is illusory.

Equally problematic is the personal service requirement. Genuine independent contractors may engage substitutes; the right to do so is inconsistent with employment status. Platform contracts have sought to include notional substitution clauses — provisions allowing the worker to substitute another person to perform the service — that courts have nonetheless disregarded where the clause does not reflect operational reality.²¹ As Freedland and Kountouris have argued, the analytical focus should shift from formal contractual entitlement to substitute to the practical reality of whether substitution actually occurs in the course of the relationship.²²

A third structural inadequacy is the burden of proof in status disputes. Currently, a misclassified worker must bring a tribunal claim, establish the facts of their working relationship, and persuade the tribunal that they fall within the protected category. The costs, delays, and risks of litigation operate as a significant deterrent, particularly for workers in precarious financial circumstances. The Law Commission has

identified this as a systemic barrier to the vindication of statutory rights.²³

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1. **Jeremias Prassl**, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (OUP 2018) 4.
 2. **Matthew Taylor and others**, *Good Work: The Taylor Review of Modern Working Practices* (Department for Business, Energy and Industrial Strategy 2017) 8.
 3. *ibid* 35–36.
 4. **ACL Davies**, *Perspectives on Labour Law* (3rd edn, CUP 2021) 87.
 5. *James v Redcats (Brands) Ltd* [2007] ICR 1006 (EAT); *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735.
 6. *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] ICR 1511 [31]–[33].
 7. **Mark Freedland and Nicola Kountouris**, *The Legal Construction of Personal Work Relations* (OUP 2011) 12–14.
 8. Law Commission, *Employment Law Hearing Structures* (Law Com No 390, 2020) paras 4.1–4.19.

6. COMPARATIVE AND POLICY PERSPECTIVES: THE CASE FOR REFORM

The inadequacy of the tripartite model has prompted legislative responses in comparator jurisdictions. In the European Union, the Platform Work Directive 2024/2831²⁴ establishes a rebuttable presumption of employment for platform workers: if two or more of five specified criteria indicating control are present, the worker is presumed to be employed, and the burden falls on the platform to rebut that presumption. This represents a fundamental inversion of the current English law position and reflects a political judgment that the systematic misclassification of platform workers warrants structural correction at the legislative level.

The United Kingdom, post-Brexit, is not bound by the Directive. However, its adoption by 27 Member States creates a compelling policy precedent. If UK-based platforms operating across the EU must comply with the presumption of employment for EU-based workers, the resulting divergence in regulatory frameworks may generate pressure for domestic reform. The Equality Act 2010 extends its definition of employment broadly — section 83(2)(a) covers employment under any contract personally to do work²⁵ — but this broader definition for discrimination law purposes

does not resolve the underlying fragmentation in the ERA 1996 framework.

From a purely domestic perspective, the most convincing reform model is that proposed by Freedland and Kountouris: the replacement of the binary contract of service/contract for services distinction with a "personal work relations" framework that focuses on the degree of personal work, economic dependence, and the allocation of risk as the primary indicators of the protection required. Under this model, rights would be allocated on a sliding scale, with the most economically dependent and least risk-bearing workers attracting the fullest protection, regardless of the label attached to their contractual arrangement.

7. CONCLUSIONS AND RECOMMENDATIONS

The tripartite model of employment status — designed for a post-war economy of stable bilateral employment relationships — has proved structurally inadequate to the challenge of platform capitalism. The Supreme Court in *Uber BV v Aslam* delivered a necessary correction, embedding the *Autoclenz* principle at the apex of the employment status jurisprudence and recognising algorithmic control as control in the statutory sense. Yet judicial activism cannot substitute for legislative design: the underlying statutory framework remains the product of incremental patching, and the costs and risks of status litigation

continue to deter the most vulnerable workers from vindicating their rights.

This report makes the following recommendations for legislative reform:

- R1 Reverse the burden of proof** in employment status disputes: where a platform engages an individual to perform personally executed, remunerated work, a presumption of worker status should arise, rebuttable only by the engaging party demonstrating the existence of a genuinely independent business relationship.

- R2 Consolidate the employee/worker distinction** into a single "worker" category with a sliding scale of rights calibrated to the degree of personal work, economic dependence, and platform control, drawing on the framework proposed by Freedland and Kountouris.

- R3 Legislatively codify the algorithmic control principle** from *Uber v Aslam* [2021] UKSC 5, specifying that automated management, dynamic pricing set by the platform, and algorithmic acceptance monitoring shall each constitute evidence of "control" for the purposes of section 230 ERA 1996.

- R4 Engage constructively with the EU Platform Work Directive 2024/2831** model of a rebuttable presumption of employment, adapting its criteria to the domestic tripartite framework as the most proportionate mechanism for addressing systematic misclassification.

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1. Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work [2024] OJ L, 2024/2831.
 2. Equality Act 2010, s 83(2)(a).

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