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Empowerment or Exploitation? Legal Responses to the ‘Gig Economy’

Blánaid ní Bhraonáin

Introduction

What is the ‘gig economy’? Concerned legislatures and a string of cases in the courts indicate that it is something more serious than a new buzzword in the public discussion around the modern world of work. Supporters of the ‘gig economy’ argue that it heralds a new flexibility and autonomy for workers. Meanwhile, its detractors see it as a force capable of reversing hard-won protections of workers’ rights and promoting the exploitation of workers by more powerful economic forces.¹ This article examines the rise of the gig economy and analyses how employment law has grappled with its challenges, specifically in the UK.² The first section of this paper attempts to define the gig economy and analyses who works in it and why. The second section provides an overview of how the common law defines different working statuses. The third section outlines legislative interventions in the employment relationship in Ireland and the UK. This paper then goes on to examine how the UK courts have located ‘gig’ work within the existing employment law framework, before briefly outlining and evaluating other legal responses to the gig economy worldwide. Finally, the last section addresses how the legislatures of Ireland and the UK have responded to the gig economy.

1. Defining the ‘Gig Economy’

The term ‘gig economy’ generally refers to new patterns of work made possible by the ubiquity of the Internet and smartphones. The Taylor Review, an independent review of modern working practices commissioned by the UK government, defined ‘gig’ work as the phenomenon of new smartphone and app technology being used to match sellers and buyers of goods and services.³ Uber (taxi services) and Deliveroo (food deliveries) are two high-profile examples.⁴ The term is controversial, however, as some commentators such as Pressl and Freeland prefer ‘on-demand economy’, arguing that:

... there is little about the business models at the core of the phenomenon which would justify altruistic notion such as sharing or helping out: the on-demand economy is clearly driven by economic incentives... the language of ‘gigs’ and ‘tasks’ and ‘rides’ devised by different operators must not obscure the reality of the underlying

¹John Holden, ‘Stop whinging about the gig economy: it works for many’ *Irish Times* (Dublin, 20 June 2017); Fionn Rogan, ‘Gig economy is the mass exploitation of millennials’ *Irish Times* (Dublin, 5 February 2017).

² However, there have also been some interesting developments in Ireland and elsewhere which are considered.

³ Taylor Report, *Good Work: The Taylor Review of Modern Working Practices* (July 2017).

⁴ *ibid* 25.

arrangements, which... often closely resemble the working conditions found in the traditional low-wage sector.⁵

To contextualise this today, it is worth taking into account the 2017 RSA/Ipsos survey, which provides an overview of the state of the 'gig economy' in the UK.⁶ At present, 4% of all workers in the UK work in the 'gig economy'. Yet, most of these are in permanent employment and work in the 'gig economy' on the side.⁷ Most work is not frequent: 50% work of gig economy employees work less than once a month; 14% work once or twice a month; a further 13% once or twice a week; and 12% most days. Indeed, a mere 12% work every day.⁸ 'Gig' workers are more concentrated in London than regular corporate employees or those who are self-employed, and 'gig' workers predominantly male.⁹ On average, they are also younger than regular employees or those who are self-employed, and only 44% have university degrees.¹⁰

While Uber and Deliveroo are the most high-profile 'gig' companies, delivery and driving services only account for 16% of all 'gig' work, while professional, administrative and creative services (at 59%) and skilled manual or personal services (33%) make up most of the gig economy.¹¹ The former (professional, administrative and creative services) includes both traditional high-skilled, high-paid freelance jobs such as consulting, accountancy, and web development, and newer platforms which crowdsource human labour for simple 'microtasks' (eg data entry, captioning photographs, transcribing audio, etc), paid on a per-piece basis. Meanwhile, the latter category relates to skilled manual work (plumbing, carpentry) and unskilled personal services (such as cleaning, DIY, running errands).

When asked why they have chosen to work in the 'gig' economy, more than half of those surveyed cited the positive characteristics of 'gig' work (eg better opportunities, flexibility, pay), whereas around a third of those surveyed stated that they were looking for extra money. Surprisingly, only a quarter of those surveyed said they had not been able to find sufficient work outside the gig economy.¹²

⁵ Jeremias Prassl and Mark Freedland, 'Employees, Workers and the 'Sharing Economy': Changing Practices and Changing Concepts in the United Kingdom, (Oxford Legal Studies Research Paper No 19/2017, March 14, 2017) <<https://ssrn.com/abstract=2932757>> accessed 18 May 2018.

⁶ RSA, *Good Gigs: A fairer future for the UK's gig economy* (April 2017).

⁷ CIPD puts the figure at 58% (Chartered Institute of Personnel and Development, *To gig or not to gig? Stories from the modern economy* (March 2017) 4). The RSA/Ipsos survey found it was slightly higher, at 62% (RSA, *Good Gigs: a fairer future for the UK's gig economy* [April 2017] 20).

⁸ RSA, *Good Gigs* (n 6) 19.

⁹ *ibid* 16.

¹⁰ *ibid*. 34% of them are aged 16-30 (compared with 11% of the self-employed and 26% of employees).

¹¹ *ibid* 14.

¹² *ibid* 22. These answers were in response to an unprompted question about why they were in gig work and the interviewee could cite as many factors as they wished.

2. The Legal Framework at Common Law

Historical Roots of the Employment Relationship

Traditionally, when examining a contract that involves provision of labour, the first question asked by a courts is whether this qualifies as an employment contract (a 'contract of service') or some other kind of arrangement (eg a 'contract for services', where the worker is an independent contractor)? This binary distinction has its roots in the definition of the master-servant relationship historically established in common law, where the master exercises a degree of control: 'A servant is a person who is subject to the command of his master as to the manner in which he shall do his work'.¹³ The control of the Master, the obligations of the Servant, and the social importance and ubiquity of such employment relationships has led the development of specific doctrines to govern this area of common law. For example, it imposed vicarious liability upon employers for torts committed by an employee in the course of their employment, implied duties into the employment contract, and emphasised that the wording of the contract is not determinative. Rather, the court looks at the underlying situation to determine the true nature of the parties' relationship.¹⁴ Thus, courts have identified a number of factors relevant to determining whether a given relationship is one of an employer and employee.

The Control Factor

In *Lynch v Palgrave Murphy Ltd*¹⁵ the Irish Supreme Court adopted the test from older UK cases that in a contract of service, the employee has the right to control not just the work the employee does, but the manner in which he or she carries this out. However, the UK Court of Appeal argued in favour of a more nuanced approach to this judgement in *Troutbeck SA v White & Anor*,¹⁶ noting that absence of control cannot be treated as determinative. It is merely one factor in an overall assessment of the agreement and the relationship between the parties. Similarly, in Ireland, the Supreme Court in *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare*¹⁷ considered a lack of continuous supervision persuasive - but not decisive - evidence of a contract of service.

Today, in the modern world of work, skilled employees carry out their work with a degree of independence. Employers do not directly control how work is performed. Indeed, many employers hire professionals precisely so that they may avoid having to micromanage tasks. Through a bureaucratic model employees are trusted to perform the work competently,

¹³ *Yewens v Noakes* (1881) 6 QBD 530.

¹⁴ *Ready Mixed Concrete (South-East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QBD 497, 515: 'Whether the relation between the parties to a contract is that of master and servant is a conclusion of law dependent upon the provisions of the contract. If the rights conferred and the duties imposed by the contract are such that the relation is that of master and servant, it is irrelevant that the parties who made the contract would have preferred a different conclusion.'

¹⁵ *Lynch v Palgrave Murphy Ltd* [1964] IR 150.

¹⁶ *Troutbeck SA v White & Anor* [2013] EWCA Civ 1171.

¹⁷ *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34.

without constant instruction and supervision. This was recognised in *Re Sunday Tribune Ltd*,¹⁸ where it was held that a control test was inadequate to analyse the work of highly skilled professionals. This case pertained to a regular newspaper columnist, and the judge citing English decisions on similar facts, applied an 'integration test' to examine whether the work done was an integral part of the business.¹⁹

Mutual Obligations

Since this judgement, both Irish and UK courts have also held that there must be a minimum obligation on both parties to the contract to provide work and to perform that work respectively.²⁰ A crucial factor indicative of an employment relationship is the requirement for *personal* service: a worker who can send someone else to perform the services does not fit into the traditional master-servant paradigm. In *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare*, the Supreme Court held that the fact a supermarket demonstrator was not free to engage a substitute to carry out the work indicated that she was an employee.²¹ Similarly, in *Roche v Patrick Kelly and Co Ltd*, the plaintiff undertook to construct a barn, a job requiring at least two men: 'therefore the conclusion is inescapable that the plaintiff, in undertaking to perform this two-man job, was doing so as a contractor and not as a servant'.²² However, retaining some control over who the worker may substitute does not automatically point back towards employee status,²³ though very strict limitations might in themselves demonstrate the degree of control typical of a contract of service as discussed above.²⁴

The Enterprise Factor

The classic independent contractor - such as the self-employed consultant, freelancer, or skilled tradesperson - works for themselves, in contrast to employees, who by definition work at the behest of someone else. In *Market Investigations Ltd v Minister of Social Security*, the English High Court framed the 'enterprise test': 'is the person engaged to perform the services

¹⁸ *Re Sunday Tribune Ltd* [1984] IR 505 (HC).

¹⁹ *ibid* [14].

²⁰ *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 113: 'there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer'; *Minister for Agriculture and Food v Barry* [2008] IEHC 216, 47: 'the requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service.'

²¹ *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34, 50: 'On the other (employee) side of the equation are the facts that Ms. Mahon ... did not as a matter of routine engage other people to assist her in the work: where she was unable to do the work herself, she had to arrange for it to be done by someone else, but the person in question had to be approved by the appellant.'

²² *Roche v Patrick Kelly and Co Ltd* [1969] IR 100, 109.

²³ *Tierney v An Post* [1999] IESC 66, 14: 'It is not surprising to find that the respondent has, as it were, a right of veto over the appointment of persons who for any reason it might not be appropriate to employ in a post office: the fact remains that it is not normal to find in a contract of service that the employee can hire assistants to perform the work which he or she is employed to do.'

²⁴ In *ESB v Minister for Social Community and Family Affairs & ors* [2006] IEHC 59, Gilligan J upheld a decision at the Employment Appeals Tribunal which inferred a change in the nature of the relationship in part from the introduction of stricter requirements around substitution.

performing them as a person in business on his own account?’²⁵ Keane J cited this test in *Henry Denny & Sons*, noting that when considering this question, the court should have regard to whether the worker has the opportunity for profit and bore the risk of loss, whether they provide their own equipment and materials, whether they provide their own insurance, etc.²⁶

3. Legislative Protections for Workers

The distinction between a contract of service and a contract for services at a common-law basis is carried through into legislative entitlements. In both Ireland and the UK, employees are on top of the totem pole in terms of legal rights and entitlements, as the legislatures have tended to intervene to protect workers in traditional employment contexts while leaving those outside this narrow definition largely unregulated.

However, the UK has also developed an intermediate category of ‘worker’ which includes a broader range of working patterns than the traditional common-law definition of ‘employee’. Section 230(3) parts (a) and (b) of the Employment Rights Act 1996 respectively define ‘worker’ status as including employees and those working under a contract ‘whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual’.²⁷ (A similar distinction is made in other legislation regulating work.²⁸) Those covered under the second clause are known as ‘limb (b) workers’. Under the Employment Rights Act 1996, they have some of the same protections as full-blown employees (eg protection of wages, protected disclosures) but not others (notably, protection against unfair dismissal).

In Ireland, the *Oireachtas* (Irish Parliament) has made significant interventions in employment contracts with regards to unfair dismissal,²⁹ working time,³⁰ employment equality,³¹ minimum notice periods,³² and health and safety.³³ However, since there are only two legally recognised categories, employee or self-employed, if workers cannot bring themselves within the category of ‘employee,’ they are self-employed, and most legislative protection is unavailable to them. One recent exception is the Protected Disclosures Act 2014, which follows the UK model of a more inclusive ‘worker’ category along the lines of the Employment Rights Act limb (b) provision discussed above. The Act covers not only employees, but also those

²⁵ *Market Investigations Ltd v Minister of Social Security* [1969] QB 173 (available as [2010] BTC 103, 108.)

²⁶ *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34, 50.

²⁷ Section 230 (3) of the Employment Rights Act 1996.

²⁸ Eg in the National Minimum Wage Act 1998 and Working Time Regulations (SI 1998/1833).

²⁹ Unfair Dismissals Act 1977.

³⁰ Organisation of Working Time Act 1997.

³¹ The Employment Equality Acts 1998-2015 provide that employees must not be discriminated against on any of 9 protected grounds (characteristics such as gender, ethnicity, religion, etc); other statutes also protect employees from being treated less favourably due to working under a part-time or fixed-term contract.

³² Minimum Notice and Terms of Employment Acts 1973-2001.

³³ Safety, Health and Welfare at Work Act 2005.

who provide services under a contract as part of someone else's business,³⁴ subcontractors and those in similar positions,³⁵ and people receiving work experience or training.

4. 'Gig' Work Addressed in the Courts

The rise of 'gig' work has forced the courts to examine how these novel types of work fit into the existing employment legislation and case-law. In recent years, the UK has seen a number of challenges to the designation of workers as 'independent contractors' where the underlying agreement was arguably more consonant with an employment relationship.

Key Precedents

In *Autoclenz Ltd v Belcher*,³⁶ the Supreme Court considered whether valets providing car-cleaning services – referred to as 'sub-contractors' in the written contract – were workers (whether employees or 'limb [b] workers') for the purposes of minimum age and working time regulations.³⁷ The workers' contracts repeatedly and stridently asserted that it was a contract for services and was never intended to be an employment contract. It stated that the company was not obliged to provide work and neither were the valets obliged to be available to perform work on any specific occasion.³⁸ It also stated that the valets could engage someone else to carry out work on the employees' behalf (ie a right of substitution existed).³⁹ The Supreme Court upheld the Court of Appeal's decision⁴⁰ to uphold the Employment Appeal Tribunal's⁴¹ arguing that the valets were employees. This was based on 'findings of fact' as to the actual relationship between the parties, Lord Clarke duly noted:

...the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.⁴²

Likewise, in *Pimlico Plumbers Ltd v Smith*⁴³ the Court of Appeal upheld a finding of the Employment Tribunal, namely that a plumber whose written agreement with the applicant

³⁴ Defined as those 'who entered into or works or worked under any other contract...whereby the individual undertook to do or perform (whether personally or otherwise) any work or services for another party to the contract for the purposes of that party's business' (Protected Disclosures Act 2014, s 2).

³⁵ Defined as an individual who 'works or worked for a person (where) the individual is introduced or supplied to do the work by a third person, and the terms on which the individual is engaged to do the work are or were in practice substantially determined not by the individual but by the person for whom the individual works or worked, by the third person or by both of them' (Protected Disclosures Act 2014, s 2).

³⁶ *Autoclenz Ltd v Belcher* [2011] UKSC 41.

³⁷ National Minimum Wage Regulations 1999 (SI 1999/584); Working Time Regulations 1998 (SI 1998/1833). Though not strictly speaking an example of 'gig' work, aspects of the scenario are applicable to 'gig' work arrangements.

³⁸ *Autoclenz* (n 38) [6], [9].

³⁹ *ibid* and [37].

⁴⁰ *Autoclenz Ltd v Belcher* [2009] EWCA Civ 1046.

⁴¹ *Autoclenz Ltd v Belcher* [2008] UKEAT 0160_08_0406.

⁴² *Autoclenz* (n 38) [35].

⁴³ *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51.

company described him as an ‘independent contractor,’ was a worker under section 230(3) of the Employment Rights Act 1996 and s 83(2)(a) of the Equality Act 2010. The Court followed *Windle v Secretary of State for Justice*⁴⁴ in finding that the two definitions may be treated as equivalent (though Prassl questions the correctness of this).⁴⁵ Pimlico’s subsequent appeal to the Supreme Court was dismissed.⁴⁶ Lord Wilson’s decision, with which the other four judges agreed, highlighted the lamentable profusion of different legislative definitions of ‘employee’ and ‘worker’.⁴⁷ He parsed the obligation to provide personal service (vital to qualify as a limb [b] worker) where it seemed to exist alongside the possibility of substitution. The right to substitution was limited and peripheral to the main elements of the contract.⁴⁸ Thus, Lord Wilson stated, the Employment Tribunal was ‘clearly entitled to hold...that the dominant feature of Mr Smith’s contracts with Pimlico was an obligation of personal performance’.⁴⁹ Secondly, Pimlico argued that they were a client or customer of Mr Smith’s, as he was free to reject any particular offer of work (despite his general obligation to make himself available for 40 hours of work a week), he was free to work for others, and his work was not supervised. However, Pimlico exercised a much greater degree of control than a client usually would: Mr Smith was obliged to wear the company’s uniform and carry their ID, he was paid ‘wages’, and his contract referred to ‘gross misconduct’ and ‘dismissal’. Indeed, Lord Wilson argued quite firmly in favour of Pimlico not being a mere customer or client of Mr Smith, so much that he appeared to be tempted to overstep the limited function of courts in reviewing the decision of the Employment Tribunal:

Accurate though it would be, it would not be a proper disposal of this issue to describe this court’s own conclusion to be that Pimlico cannot be regarded as a client or customer of Mr Smith. The proper disposal is, of course, for it to declare that, on the evidence before it, the tribunal was, by a reasonable margin, entitled so to conclude.⁵⁰

The Uber Dilemma

In *Aslam v Uber BV*,⁵¹ the Employment Tribunal (ET) considered whether drivers with Uber were employees, limb (b) workers, or independent contractors. In the wording of its written contract with drivers and before the tribunal, Uber argued that its app aimed only to connect drivers with those seeking lifts and that its business was providing a platform enabling this; it was not itself involved in the business of transport. The Tribunal examined the nature of the drivers’ relationship with Uber, the degree of control Uber exercised over their work, and how Uber monitored driver performance (penalising drivers who refused too many trips or had

⁴⁴ *Windle v Secretary of State for Justice* [2016] EWCA Civ 459.

⁴⁵ Jeremias Prassl, ‘Who is a worker?’ (2017) 133 LQR 366.

⁴⁶ *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29.

⁴⁷ *ibid* [7]-[15].

⁴⁸ *ibid* [20]-[34]. The substitute had to be another Pimlico contractor, substitution was rare in practice, and the contractor’s manual – which formed part of the contract – referred to obligations in the second person.

⁴⁹ *ibid* [34].

⁵⁰ *ibid* [49].

⁵¹ *Aslam v Uber BV* [2016] EW Misc B68 (ET) (28 October 2016).

low customer ratings).⁵² The tribunal was unimpressed by the strained legal construction Uber placed on its relationship with drivers:

resorting in its documentation to fictions, twisted language and even brand-new terminology, merits, we think, a degree of scepticism...we cannot help being reminded of Queen Gertrude's most celebrated line: 'The lady doth protest too much, methinks.'⁵³

The ruling goes further than the idea that the written contract cannot be determinative: the fact that company placed such emphasis on what the contract is *not* actually led to the inference that the opposite scenario was extant. The Tribunal also found Uber's account of its businesses (as a service to independent drivers rather than a transportation company) to be implausible.⁵⁴ It concluded that while drivers were logged into the Uber app and ready to accept work, they were limb (b) workers, under the 1996 Act.⁵⁵ Referring to the discussion of imbalance of bargaining power in *Autoclenz*, the tribunal also held:

Many Uber drivers (a substantial proportion of whom, we understand, do not speak English as their first language) will not be accustomed to reading and interpreting dense legal documents couched in impenetrable prose. This is, we think, an excellent illustration of the phenomenon ... of 'armies of lawyers' contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides.⁵⁶

The decision was appealed to the Employment Appeals Tribunal (EAT), which confirmed that, following *Autoclenz*, the Tribunal was 'entitled to disregard the terms in the written agreements and the labels used therein' where these did not reflect reality, and consequently the decision was upheld.⁵⁷ The decision was welcomed as a positive step in legal protection for 'gig' workers, and hailed as a victory by trade union activists,⁵⁸ but Prassl and Freeland noted:

Uber drivers – even when classified as workers – will still face many of the problems encountered by zero-hours workers across the United Kingdom: from low income to struggling with unpredictable shifts due to a lack of guaranteed work.⁵⁹

However, although Uber failed in its bid to appeal directly to the Supreme Court,⁶⁰ the case proceeded to the Court of Appeal, where a majority again upheld the Employment Tribunal's

⁵² *ibid* [32],[57].

⁵³ *ibid* [87].

⁵⁴ *ibid* [89].

⁵⁵ *ibid* [100].

⁵⁶ *ibid* [96].

⁵⁷ *Uber BV v Aslam* [2017] UKEAT/0056/17 (10 November 2017) at [91].

⁵⁸ Rob Davies, 'Uber loses appeal in UK employment rights case' *The Guardian* (London, 10 November 2017).

⁵⁹ Prassl & Freeland (n 5) 9.

⁶⁰ Hannah Boland, 'Uber request to take drivers' rights case directly to top UK court rejected' *The Telegraph*, (London, 4 December 2017).

decision.⁶¹ The central issue was the distinction between limb [b] workers and self-employed contractors. The majority applied *Autoclenz* as the EAT had, noting that the court:

...can disregard the terms of any contract created by the employer in so far as it seeks to characterise the relationship between the employer and the individuals who provide it with services (whether employees or workers) in a particular artificial way.⁶²

The majority examined Uber's business model in light of the company's argument that all the conditions put forward as evidence of limb [b] worker status were consistent with being conditions of the licence to use the app and therefore of the driver's written agreements with Uber.⁶³ They analysed the sequence of events as three distinct stages. First, the passenger uses the app to request a ride; the company arranges this so that it will appear to a nearby driver who is logged into the app as available for work, and the driver may then accept the request. Second, the driver picks up the passenger (the driver only learns of the passenger's destination at pickup). Third, the journey is completed and fare calculated. The majority noted that the driver's obligation to collect the passenger is created at the first stage, but that this obligation must be to Uber (rather than to the passenger, as stated in the written agreements) because 'vital elements' of a contract with the passenger – such as knowledge of the destination – are missing.⁶⁴

The majority emphasised that the regulatory regime under which Uber operated, further indicates that drivers are limb [b] workers. Under the Private Hire Vehicles (London) Act 1998, in order to accept bookings, the company had to satisfy the authorities, proving that a fit and proper person holds private hire vehicles operator's licence.⁶⁵ Obviously, Uber's participation in this regime was inconsistent with its claim to be merely in the business of connecting drivers and passengers, rather than itself providing transport services. The Court of Appeal shared the Employment Tribunal's disapproval of this rather two-faced approach. It also agreed with the Employment Tribunal that Uber's references, in unguarded moments, to 'our drivers', Uber having 'more and more passengers', and creating 'job opportunities'. This phrasing in and of itself proved that the company was aware that it was essentially a transport company and drivers worked for them.⁶⁶

However, the Court of Appeal was not unanimous in its approval of the Employment Tribunal decision. Lord Judge Underhill's dissent rested on his interpretation of the ratio of *Autoclenz*, which he summarised as: First, the Employment Tribunal may disregard any terms of a written agreement between an employer and an employee or worker which are inconsistent with the true agreement between the parties; second, what the true agreement is may be gleaned from all the circumstances of the case, of which the written agreement is part (but only a part); and third, in ascertaining whether the written agreement does in fact represent the true agreement, the relative bargaining power of the parties will be a relevant

⁶¹ *Uber BV v Aslam* [2018] EWCA Civ 2748.

⁶² *ibid* [54].

⁶³ *ibid* [74].

⁶⁴ *ibid* [76].

⁶⁵ Section 3, Private Hire Vehicles (London) Act 1998.

⁶⁶ *Uber BV v Aslam* [2018] (n 61) [94].

consideration. This is because employers will typically be in a position to dictate the terms of the paperwork, including terms that do not reflect the true agreement, and hence tribunals should take a realistic and worldly-wise approach to deciding whether that is the case.⁶⁷ However, Underhill noted that these principles do not empower the tribunal to disregard the written agreement where it reflects the parties' actual agreement – even if that agreement is 'unfairly disadvantageous' and the product of an inequality of bargaining power.⁶⁸ He went on to consider previous decisions regarding the legal relationship of taxi and minicab drivers to intermediary booking services. Indeed, precedent indicated that a business model similar to what was described in Uber's written agreements was not unheard of.⁶⁹ Underhill also criticised the Employment Tribunal's suspicions towards Uber's over-protestations and twisted legalese, arguing that there is an element of question-begging in this interpretation of Uber's actions (that is, stating that this use of language is 'tortured' assumes that the written agreement fails to capture that actual agreement between the parties – and that is the precise question which the tribunal is supposed to be answering).⁷⁰

Indeed, precedent is worth noting, as in *Dewhurst v City Sprint*⁷¹ a bike courier, arguing that she was a limb [b] worker under the 1996 Act, made a claim for unpaid holiday pay at the Employment Tribunal. Her written contract with 'CitySprint' provided that she would tell them what days she could work. Even though she was under no obligation to work on any particular day, they would endeavour to provide her with work on those days (despite having no obligation upon them to do so), and they were entitled to right to substitution. However, Ms Dewhurst argued that the written terms did not reflect the actual relationship.⁷² The Employment Tribunal agreed: in reality, the business model required fairly consistent working patterns, half days or irregular hours were not facilitated, and the couriers, since they had no security of tenure, 'felt obliged to do what they were told to keep being offered work'.⁷³ Furthermore, there was no real right to substitute: the 'contorted and self-destructive' clause was ineffective in practice.⁷⁴ The tribunal found that Ms Dewhurst was a worker, but only while she was 'on circuit, in other words while she was logged in (and hence indicating to the company she was available for jobs).⁷⁵

The Deliveroo Challenge

However, the November 2017 decision of the Central Arbitration Committee (CAC) in *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)*⁷⁶ contradicted this increasing trend towards recognising gig workers as workers under statute. Here the IWGB sought recognition of a bargaining unit of Deliveroo riders in the Camden zone. The

⁶⁷ *ibid* [119].

⁶⁸ *ibid* [120].

⁶⁹ *ibid* [122]-[134].

⁷⁰ *ibid* [137].

⁷¹ *Dewhurst v City Sprint* UK Employment Tribunal (2202512/2016).

⁷² *ibid* [9].

⁷³ *ibid* [46.2].

⁷⁴ *ibid* [29.1].

⁷⁵ *ibid* [87].

⁷⁶ *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* TUR1/985(2016)

definition of 'worker' in the relevant statute⁷⁷ was slightly different from that in the 1996 Act, and yet, this did not affect the decision much. The two main issues between the parties around the application of the 'worker' status were, firstly, whether riders had an obligation to perform work, and secondly, whether personal service was required of them. The CAC was puzzled by inclusion of a right to substitution in the written terms since it could not see that it was of any use to either party,⁷⁸ but still found that since it was present and genuine, there was no personal duty to carry out work.⁷⁹

O'Byrne highlights the relevance of the Irish Supreme Court decision in *Castleisland Breeding Society Ltd v Minister for Social and Family Affairs*⁸⁰ to the analysis of restrictions on substitution. In this case, such restrictions did not prove the existence of an employment relationship in light of the high level of regulatory control of the business. Thus:

[t]ighter controls in relation to substitutions are to be expected in more heavily regulated industries. The corollary of this is that courts are likely to attach greater weight to substitution control for less regulated and less prescriptive roles.⁸¹

Frustratingly for the applicants in *Deliveroo*, the stumbling block they faced had already been identified as unfair to vulnerable 'gig' workers. The Taylor Review, published a few months before the decision, highlighted the problems that the substitution test posed for workers. Suggesting that limb (b) workers be re-designated as 'dependent contractors,' the Review also recommended that the government re-balance the control and personal service elements of the test, arguing that it was unfair and unrealistic to deny the status of worker to someone who in every respect was subject to the control of a business, merely because a genuine right to substitution exists. Even more presciently, it noted that this change would make it harder for employers to 'hide behind substitution clauses.'⁸²

The Independent Worker's Union sought permission to apply for judicial review.⁸³ The CAC's view of the significance of the wide substitution clause in the contract was upheld,⁸⁴ as was its interpretation of the limb (b) worker definition.⁸⁵ However, permission was granted on the sole argument which the CAC had not addressed, deeming it unnecessary in light of its factual findings. This ground was that the right to collective bargaining enshrined in Article 11 of the European Convention on Human Rights requires that section 296(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (containing the 'limb [b]' test) and the personal

⁷⁷ Section 296 Trade Union and Labour Relations (Consolidation) Act 1992: "'worker" means an individual who works, or normally works or seeks to work - (a) under a contract of employment, or (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his...'

⁷⁸ *RooFoods Ltd (t/a Deliveroo)* (n 78) 98 - Riders who did not wish to work could simply not log into the app, and it was difficult to see why Deliveroo would train its riders in health and safety but allow them a broad right to substitution.

⁷⁹ *ibid* [100].

⁸⁰ *Castleisland Breeding Society Ltd v Minister for Social and Family Affairs* [2004] IESC 40.

⁸¹ Louise O'Byrne, 'Employment status and the gig economy: where are we now?' [2018] 15 IELJ 10, 17.

⁸² Taylor Report (n 3) 36.

⁸³ *Independent Workers Union of Great Britain v Central Arbitration Committee* [2018] EWHC 1939 (Admin).

⁸⁴ *ibid* [32].

⁸⁵ *ibid* [39].

performance requirement be interpreted so that the riders are not prevented from exercising these rights. However, this argument was dismissed in the High Court, it was found that the right did not apply outside the employment relationship.⁸⁶ As a result, the Union has attempted to appeal the decision.⁸⁷

While Deliveroo's current agreements with drivers have managed to avoid creating employment relationships - and attracting the concomitant duties and obligations - this does not seem to indicate a broader laissez-faire or pro- 'employer' trend in judicial thinking: in most cases, 'gig' workers have succeeded in seeking worker or employee status.⁸⁸

5. International Developments

The legal status of 'gig' workers has come before the courts international, and often in a larger scale than in the UK. In Spain, a Deliveroo driver sued for unfair dismissal and a Valencian court found he was an employee rather than a self-employed contractor.⁸⁹ In Australia, food delivery company Foodora was facing proceedings taken by the Fair Work Ombudsman when it went into voluntary administration.⁹⁰ In an unprecedented admission, administrators subsequently stated it was 'more likely than not' that its riders were in fact employees - but this may be cold comfort, as workers are owed far more in unpaid wages than can be covered from the \$3 million pot offered to creditors.⁹¹ This surrender, which does set a significant precedent even if it may not have much practical impact in light of Foodora pulling out of Australia, appears to be a reaction to an increasingly hostile, pro-regulation environment for 'gig' employers. Indeed, Australian tax authorities had previously classified riders as employees and sought contributions accordingly,⁹² and the Fair Work Commission awarded \$16,000 to a Foodora rider they found to be an employee for unfair dismissal after he refused to hand over control of a private group chat set up by riders to discuss pay and conditions.⁹³

Decisions at European level have further undermined 'gig' employers' classification of its workers as 'independent contractors'.⁹⁴ In *Asociación Profesional Élite Taxi v Uber Systems Spain SL*⁹⁵ a licenced taxi company argued that Uber was illegally operating without a licence; as in

⁸⁶ *Independent Workers Union of Great Britain v Central Arbitration Committee* [2018] EWHC 3342 (Admin).

⁸⁷ Sarah Butler, 'Deliveroo riders lose High Court battle to gain union recognition' *The Guardian* ((London, UK) 5 December 2018).

⁸⁸ Haroon Siddique, 'Hermes couriers are workers, not self-employed, tribunal rules' *The Guardian* (London, UK) 25 June 2018).

⁸⁹ Jesús Aguado, 'Spanish court rules Deliveroo rider is employee, not self-employed' (*Reuters*, 4 June 2018) www.reuters.com/article/us-spain-deliveroo/spanish-court-rules-deliveroo-rider-is-employee-not-self-employed-idUSKCN1J0269 accessed 27 February 2019.

⁹⁰ *In the matter of Foodora Australia Pty Ltd (Administrators Appointed)* [2018] NSWSC 1426 (11 September 2018).

⁹¹ Naaman Zhou, 'Foodora Australia admits riders owed \$5m were 'more likely than not' employees' *The Guardian* (London, 10 November 2018).

⁹² Anna Patty, 'Foodora faces claims for unpaid tax and superannuation' *Sydney Morning Herald* ((insert country), 28 August 2018).

⁹³ *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

⁹⁴ Ciarán O'Mara, 'Uber: Digital Platform or Transport Company? The boundaries of the gig economy in employment law' [2017] 14(3) IELJ 94.

⁹⁵ (2017) Case C-434/15.

Aslam,⁹⁶ Uber's defence was that it did not need one since its business was providing 'information services', not transport. The judgement held:

Uber actually does much more than match supply to demand: it created the supply itself. It also lays down rules concerning the essential characteristics of the supply and organises how it works...⁹⁷

Although the judge was careful to distinguish his findings about the nature of Uber's business vis-à-vis the relevant Directives from the issue of worker status,⁹⁸ this (along with the subsequent legal opinion held in *Uber France SAS*)⁹⁹ emphasises the elements of Uber's set-up indicating employee status in Irish and UK courts. And in fact, both opinions were subsequently accepted by the CJEU. The court's decision in *King v The Sash Window Workshop Ltd*¹⁰⁰ also encourages 'gig' employers to be far more careful. In this case, a window salesman employed on a 'self-employed commission only contract' who was designated a 'worker' under UK law, succeeded in arguing that a worker wrongly categorised as 'self-employed' can claim back holiday pay, with no limit on carrying over entitlements from year to year. This established that companies who get the classification of workers wrong can be left holding the bill even after many years have passed.

6. Responding to the 'Gig Economy'

The United Kingdom

The Report of the Work and Pensions Committee in the UK identified two main challenges posed by the 'gig economy'.¹⁰¹ These were its implications for the contributory philosophy of the UK's welfare state¹⁰² and the potential for exploitation of low-income workers by large companies who use the 'self-employment loophole' to avoid duties they would otherwise owe to workers.¹⁰³ It highlighted the experience of some 'self-employed' gig workers as one of low pay, instability, and lack of flexibility around working times.

⁹⁶ (n 51).

⁹⁷ *ibid*, Opinion of AG Szpunar 43.

⁹⁸ *ibid* 54: 'The above finding does not, however, mean that Uber's drivers must necessarily be regarded as its employees. The company may very well provide its services through independent traders who act on its behalf as subcontractors. The controversy surrounding the status of drivers with respect to Uber... is wholly unrelated to the legal questions before the Court in this case...'

⁹⁹ Case C-320/16 *Uber France SAS* (2018)

¹⁰⁰ Case C-214/16 (2017).

¹⁰¹ House of Commons Work & Pensions Committee, *Self-employment and the gig economy* (HC 2016-2017 847).

¹⁰² *ibid* [4], [10]. This arises from the historical link between deductions from employee wages for National Insurance contributions and benefits for which they would later be eligible; the self-employed did not have to pay in and consequently received less welfare support. However, employee and self-employed entitlements were equalised in 2016. The Committee therefore recommended increasing the contributions required from the self-employed. This would increase revenue from highly-paid self-employed people but is unlikely to have much impact on gig workers: the RSA (n 6) found that 61% earn below the personal tax allowance of £11,500 p/a.

¹⁰³ *ibid* [11]-[21].

Referring to the recent court challenges (discussed in the third section of this paper), the report noted that such decisions apply only to that particular company and group of workers: others, even those with similar practices, can continue with their exploitative business model until challenged through the courts.¹⁰⁴ This is a real weakness in any strategy to improve protections for gig workers by means of litigation alone. This is because the ‘gig’ workers who are likely to be the most adversely affected are also those who face the most obstacles in mounting a complaint; namely those who are paid poorly and are low-skilled. Such workers are entirely dependent on their companies, and will naturally be reluctant to risk their only source of income. Moreover, most workers – especially who do not speak English as a first or native language – are very likely to be intimidated by clauses purporting to deny them right to challenge the contract in court, (even such clauses are not always legally binding).

The Work and Pensions Committee’s report also challenged the arguments of companies like Uber and Deliveroo, namely that ‘self-employed’ status is needed to facilitate flexible work practices. Thus profit is declared true motive behind such arrangements.¹⁰⁵ To combat this, the Committee recommended that the default assumption should be of a ‘worker’, rather than ‘self-employed’. This would ensure that companies actively justify a business model that provides for a basic protections for workers.¹⁰⁶

In February 2018, the UK Government released ‘Good Work’, its response to the independent Taylor Review.¹⁰⁷ Published in December 2018, the ‘Good Work’ Plan broadly accepted the recommendations of the Taylor Review.¹⁰⁸ But, the plan also crucially the Taylor Review stated that the Government (should and) will prepare detailed proposals on aligning the different classifications of workers across employment law and other areas, such as tax law, to clarify workers’ positions.¹⁰⁹ While the plan acknowledges Taylor’s argument that the law as it stands is unfair, unfortunately, the plan stops short of committing to changing this.¹¹⁰

Ireland

Meanwhile, the legislation and government strategy in Ireland is worth noting, as the UK may stand to learn a lesson or two. Indeed the Employment (Miscellaneous Provisions) Act 2018 will come into force in the first week of March 2019.¹¹¹ The Act seeks to further protections for employees by including: provisions of ‘basic terms of employment’ within five days of

¹⁰⁴ *ibid* [16].

¹⁰⁵ *ibid* [19]: ‘this is a fiction. Self-employment is genuinely flexible and rewarding for many, but people on employment contracts can and do work flexibly; flexibility is not the preserve of poorly paid, unstable contractors. Profit, not flexibility, is the motive for using self-employed labour...’

¹⁰⁶ *ibid* [21].

¹⁰⁷ HM Government, *Good Work: a response to the Taylor Review of modern working practices* (February 2018).

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679765/180206_BEIS_Good_Work_Report.pdf accessed 26 February 2019.

¹⁰⁸ HM Government, *Good Work Plan* (Cm 9755, 2008).

¹⁰⁹ *ibid* 28.

¹¹⁰ *ibid* 29. The plan is unfair as it allows businesses to classify workers as self-employed if a right to substitution exists (even if every other factor tends to show a traditional employee status).

¹¹¹ Martin Wall, ‘New law aimed at curbing zero-hours contracts comes into effect’ *Irish Times* (Dublin, 4 March 2019).

starting work,¹¹² minimum payments for low-paid workers who are called into work but sent home again without compensation,¹¹³ and ‘banded hours’ provisions for employees whose regular hours of work are not reflected in their written contract.¹¹⁴ The Protection of Employment (Measures to Counter False Self-Employment) Bill 2018 also contains the declaration that ‘the employment relationship is a status relationship’ and reaffirms that its existence and terms are to be determined by reference to the actual relationship.¹¹⁵ The second section of the Bill states:

where an individual executes work or service for a person under a contract, there may be an employment relationship between them notwithstanding that, inter alia... (d) the individual does part-time work, temporary work, seasonal work or occasional work, or... (f) the hours of work or remuneration of the individual are otherwise uncertain.

This touches upon the problem raised by the case *Minister for Agriculture v Barry*,¹¹⁶ that has yet to be settled by the Supreme Court. The case leads us to ask: if mutuality of obligation is an indispensable element of the employment contract,¹¹⁷ would it mean that if a worker can turn down shifts or otherwise dictate hours of work, is he or she thereafter automatically disqualified from employee status? The phrase ‘occasional work’ seems to cover a situation where the employer is not obliged to provide work at any particular time, but will on occasion make an offer of work which the individual may accept or refuse. If passed, this section could prevent a decision like that held in the Deliveroo case.

Conclusion

This conclusive study clarifies that ‘gig’ workers are not a homogenous group. Rather, they are made up of a number of different demographics with varying needs for employment protection. In my opinion, someone who works forty hours a week for Uber to support a family and pay a mortgage cannot be equated to a college student who does a couple of hours’ work for Deliveroo. Equally, skilled, experienced and well-paid tradespeople (such as those engaged by Pimlico) are not as vulnerable and do not experience the same inequality of bargaining power as an Uber driver who lacks the capital or skills to work individually. The multifactorial approach to identifying the employment relationship at the common law is, to a certain extent, suited to the case-by-case assessment required in such disparate scenarios. However, the courts can only do so much. As I have tried to demonstrate through this article, legislative intervention is required clarify ambiguous areas of the law and ensure that workers’ rights are protected without the need to launch a legal battle. The recent decisions that have been mentioned in this article demonstrate that yet again, drivers have even been compelled to appeal to the Employment Tribunal to obtain the recognition of their

¹¹² Section 7, Employment (Miscellaneous Provisions) Act 2018.

¹¹³ *ibid* Section 15.

¹¹⁴ *ibid* Section 16.

¹¹⁵ This Bill was passed at the Third Stage by all parties in the Seanad (the upper House of the Oireachtas) in March 2018, but never proceeded to Committee Stage and has languished since then.

¹¹⁶ *Minister for Agriculture and Food v Barry* [2008] IEHC 216.

¹¹⁷ Itself debatable, since the trend in the case-law has been away from necessary conditions and toward a holistic, multifactorial assessment.

entitlements from the minicab service Addison Lee.¹¹⁸ The recent expansions of protection beyond employees should be welcomed. Ireland might usefully observe how the UK's innovations with regard to worker status play out and consider introducing it as a category here.

Furthermore, this assessment is not an uncritical approval of 'gig' work other than that performed by vulnerable individuals (ie the minority of unskilled, low-paid workers who are completely dependent on gig work for an income stream). The use of technology to monitor and micro-manage worker performance and the dangers of structural injustice and inequity built into seemingly neutral platforms (the 'rule of the algorithms') concerns all modern societies.¹¹⁹ Such technological innovations have the potential to unilaterally redistribute power within the employment relationship in favour of large companies. Thus, these innovations should also be critically assessed by the legislature and the wider public. Today, through no more than the touch of a button, a low-wage worker can be summoned to deliver food, perform chores, or act as a personal chauffeur. Ironically, society has to some degree returned to the unequal 'master-servant' relationship from which the common law's definition of employment derives. Indeed, today, there is an additional layer of depersonalisation, since 'service users' need never use the same worker twice, or even think about the conditions under which they work. So just as the law – driven by public opinion – historically began to protect workers from the most exploitative practices of employers, the technological advances driving the 'gig economy' should spark a public debate about the new imbalance of bargaining power between workers and employers, and how we want to relate to those who provide us with services.

¹¹⁸ *Addison Lee Ltd v Lange and Others* UKEAT/0037/18/BA.

¹¹⁹ Sarah O'Connor, 'When your boss is an algorithm' *Financial Times* (8 September 2016).