

Regulating the Scope of Employment in the Gig Economy: Towards Enhanced Rights at Work in the Age of Uber

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ABSTRACT

The growth of the gig economy sector presents challenges for employment lawyers. Firms such as Uber label their workforce as 'independent contractors', meaning many in the gig economy often lie outside the parameters of employment protection laws. Fortunately, recent cases show that courts are not prevented by the mere label of 'independent contractor' from holding those working in the gig economy as workers. However, as this paper argues, it is not satisfactory to rely solely on litigation to enhance rights at work in the gig economy. The Taylor Review 2017 suggests that updating statutory definitions of personal scope is needed to address the issue. Many commentators and think tanks have labelled this proposal as too pragmatic and argue that a uniform test of employment is preferable. The main thesis of this paper is that pragmatic change, building on the progress made in case law, would be more effective. This is because the retention of an intermediary category of worker, or 'dependent contractor', allows for both flexibility and enhanced rights. Nonetheless, the government has not implemented any form of legislative change, meaning that over one million people in the gig economy remain without the rights they should be entitled to. This paper concludes that legislative change is therefore greatly needed to protect gig economy workers.

* LLB (LSE) '21. Areas of interest include Employment Law and its relationship to Contract Law, Human Rights Law and Microeconomics. The inspiration for writing the article came from the growing prominence of the gig economy in media coverage. Recent case law, such as the Uber litigation, has rightly generated attention and concern over the lack of workers' rights in this new form of labour market. He is grateful to be able to contribute to the discussion with this paper.

INTRODUCTION

Labour markets are in a constant state of change. Many businesses are shifting their focus towards digital platforms, requiring a flexible workforce which can provide for consumer demands at the click of a button.¹ The emergence of the gig economy encapsulates this trend. The gig economy is defined as a “labour market characterised by the prevalence of short-term contracts or freelance work, as opposed to permanent jobs”.² Uber, Deliveroo and eCourier all operate under such a business model. In the UK, it is estimated that 1.1 million people work within the gig economy.³ These developments in the labour market can lead to uncertainty over the legal status and rights of workers,⁴ raising concerns over exploitation.⁵ Consequently, the gig economy has been the subject of contentious legal and political debate. The British Labour Party has criticised it to be creating more ‘insecure work’ which allows employers to ‘duck their responsibilities’.⁶ The American senator and presidential candidate, Elizabeth Warren, has expressed a similar view.⁷

The basis of this criticism is the argument that, in the gig economy, workers’ rights are side-lined in the guise of market efficiency. Gig economy businesses purport to be ‘matchmakers’ of consumers and self-employed independent

¹ Work and Pensions and Business, Energy and Industrial Strategy Committees, ‘A framework for modern employment’ (2017-2019 HC 352) 3.

² Rebecca Clarke, ‘The gig economy – what’s next for workers rights?’ (*HR Review*, 9 November 2018) <<https://www.hrreview.co.uk/analysis/the-gig-economy-whats-next-workers-rights/113055>> accessed 2 December 2019.

³ Adi Gaskell, ‘The demographics of the gig economy’ (*Forbes*, 1 August 2018) <www.forbes.com/sites/adigaskell/2018/08/01/the-demographics-of-the-gig-economy/#43c7cad769fb> accessed 13 February 2020.

⁴ Here, the word ‘workers’ is used in its non-technical, non-legal sense.

⁵ Work and Pensions and Business, Energy and Industrial Strategy Committees, ‘A framework for modern employment’ (2017-2019 HC 352) 3.

⁶ Labour Party, ‘Workers in the gig-economy will get sick pay and other rights under a Labour Government – McDonnell’ (11 September 2018) <<https://labour.org.uk/press/workers-gig-economy-will-get-sick-pay-rights-labour-government-mcdonnell/>> accessed 25 November 2019.

⁷ Alexia Fernández Campbell, ‘Warren just released the most ambitious labor reform platform of the 2020 campaign’ (*Vox*, 3 October 2019) <<https://www.vox.com/identities/2019/10/3/20895389/warren-plan-for-workers>> accessed 25 November 2019.

contractors, often through the means of a mobile app or website.⁸ As independent contractors, those working in the gig economy fall outside the scope of employment. The implications of this cannot be understated. Independent contractors have a separate legal status to ‘employees’ and ‘workers’, meaning they are not covered by employment law protections, such as unfair dismissal or the National Minimum Wage. Instead, they are treated like services under a commercial contract. As per Prassl, this means that “employers can dip into the crowd to meet their constantly changing staffing needs” whilst the so-called independent contractors “are left without security or protection”.⁹

Litigation emerging from the gig economy has successfully challenged the highly questionable notion that gig economy workers are self-employed contractors and thus not entitled to employment protection laws. The recent *Uber*¹⁰ case is a notable example of a successful worker status claim. However, even when a claimant is successful in claiming *worker* status, they are not afforded the same level of protections given to somebody with *employee* status. The legislative distinction between worker and employee means that even the successful claimants in gig economy cases are still not offered the full package of statutory protection. This has led to numerous proposals for legislative change. A pragmatic view of retaining the worker-employee distinction was taken in the 2017 Taylor Review.¹¹ However, the review has been criticised by groups such as the Institute of Employment Rights, who labelled its proposals “a gift to the gig economy”.¹²

This paper will assess how successfully the scope of employment in the gig economy is currently being determined by tribunals and courts. It will also make the case for greatly needed legislative change to ensure that *all* those working in the gig economy are afforded the same protections as other ‘workers’, not just the successful claimants. This analysis will consist of three parts: Part I will provide an overview of the gig economy, the current law on the scope of employment and

⁸ Sarah O’Conner, Aliya Ram and Leslie Hook, ‘Uber ‘workers’ ruling deals blow to gig economy’ (*Financial Times*, 10 November 2017).

⁹ Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (1st edn, OUP 2018) 4.

¹⁰ *Uber BV v Aslam* [2018] EWCA Civ 2748, [2019] ICR 845.

¹¹ Good Work: The Taylor Review of Modern Working Practices (July 2017).

¹² The Institute of Employment Rights, ‘Our guide to the Taylor Review’ (13 July 2017) <<https://www.ier.org.uk/news/ier-guide-taylor-review>> accessed 24 November 2019.

its importance. Part II will focus on the positive steps taken in recent cases to protect gig economy workers, by recognising them as *workers* rather than *independent contractors*. Finally, in Part III, there will be an assessment of the proposals for legislative change made in the Taylor Review and analysis explaining why such proposals would be more effective than a uniform test of employment.

I. THE LAW GOVERNING THE SCOPE OF EMPLOYMENT AND ITS IMPORTANCE IN THE GIG ECONOMY

In order to assess how rights at work can be extended to those working in the gig economy, it is important to appreciate the different levels of protection within the main categories of employment relationships. This is known as the scope of employment and is split into three main categories: employees, workers and self-employed. Determining an individual's employment status has significant implications for their rights and protections, as the following breakdown of the tripartite system demonstrates.

1. Employees

Employees have full access to employment rights and protections. The definition of an employee can be found in Section 230(1) of the Employment Rights Act 1996:¹³

In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

Due to the circularity of the definition, the courts have been required to interpret the parameters of what constitutes a contract of employment. This has resulted in the creation of several tests to determine the legal status of an individual engaged to carry out work, mainly aimed at distinguishing whether an arrangement is a contract *for services* or a *contract of services*. The courts take a practical approach and are willing to consider the reality of a situation rather than the express terms of a service contract.¹⁴ Whilst this paper will not consider the tests for employee status, it is important to appreciate the significance of the courts in

¹³ Employment Rights Act 1996, s 230(1).

¹⁴ Gillian Phillips and Karen Scott, *Employment Law 2018* (College of Law Publishing 2018) 10.

determining the appropriate employment category and the implications of such a decision.

Employees are entitled to the full set of statutory employment rights, including statutory minimum notice, protection from unfair dismissal and redundancy payments.¹⁵ They also have the benefit of protection on a business transfer.

2. Workers

The ‘worker’ category is the intermediary category between the self-employed and employees. Section 230(3) of the Employment Rights Act 1996¹⁶ defines a worker as:

an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, 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.

As per section 230(3)(a), employees are also classed as workers. But as paragraph (b) indicates, the category of ‘worker’ is wider than that of ‘employee’ as it also includes other contracts for work or services. Workers who are not employees are therefore known as ‘limb (b)’ workers.¹⁷ In the *Byrne Brothers*¹⁸ case, the Employment Appeal Tribunal described the intermediary category of workers as having the dependency on a single employer as an employee, but also the independent position to look after themselves as the self-employed do.¹⁹ Workers

¹⁵ Work and Pensions and Business, Energy and Industrial Strategy Committees, ‘A framework for modern employment’ (2017-2019 HC 352) 8.

¹⁶ Employment Rights Act 1996, s 230(3).

¹⁷ Work and Pensions and Business, Energy and Industrial Strategy Committees, ‘A framework for modern employment’ (2017-2019 HC 352) 8.

¹⁸ *Byrne Brothers (Formwork) Ltd v Baird and Others* (2002) IRLR 96 (EAT).

¹⁹ *ibid* [17].

are entitled to the Nation Living Wage (NLW) or National Minimum Wage (NMW), minimum levels of paid holiday, yet unlike employees they are not entitled to maternity or paternity leave and many other employee rights.²⁰

3. Self-Employment

The category of 'self-employed' people is analogous to the term 'independent contractors'. These are people who run their own business, meaning they are not covered by employment law.²¹ As Collins explains, this is because 'businessmen dealing with each other at an arm's length should not be responsible for each other's economic and physical security'.²² Self-employed people may be contracted by a business or consumer to perform a service, such as construction. These are classified as contracts *for* service, unlike an employee's contract *of* service. Contracts for service are governed by commercial contract rules, alongside a few rights provided at work, such as protection against discrimination and limited health and safety protection.²³

Most of those working in the gig economy are classed as self-employed independent contractors, rather than workers or employees.²⁴ Consequently, those working in the gig economy have very few rights at work. There is a clear incentive for gig economy firms to class those who work for them as self-employed independent contractors. In doing so, they forgo the statutory duties an employer has over both employees and workers. By evading the bulk of employment law, gig economy firms can reduce their costs as they have no duty to pay for sickness or holidays, for instance.

Commentators such as Collins argue that contract law alone is 'unsuitable' for regulating employment relationships.²⁵ As is the case for employment

²⁰ Work and Pensions and Business, Energy and Industrial Strategy Committees, 'A framework for modern employment' (2017-2019 HC 352) 8.

²¹ *ibid.*

²² Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protections Laws' [1990] 10(3) OJLS, 354.

²³ Work and Pensions and Business, Energy and Industrial Strategy Committees, 'A framework for modern employment' (2017-2019 HC 352) 8.

²⁴ Gillian Phillips and Karen Scott, *Employment Law 2018* (College of Law Publishing 2018) 20.

²⁵ Hugh Collins, *Employment Law* (2nd Edn, OUP 2010) 6.

contracts, a breach of contract may create secondary obligations, such as compensatory damages. However, the general law of contract does not confer the more extensive and substantive obligations which feature in employment law. This is because, to a large extent, contract law and employment law have separate aims and purposes. In the commercial context, contract law serves to “protect the free flow of trade” and puts a large emphasis on freedom of contract ideals.²⁶ On the other hand, as per Kahn-Freund, the purpose of labour law is to act as a “countervailing force” to the inequality of bargaining power which is inherent to the employment relationship.²⁷ As previously mentioned, the genuinely self-employed operate at arms-length from the business they contract with and they manage their own working life, making this a non-issue. On the contrary, for employees and workers, who are subordinate to the employer they are contracted to work for, commercial contract law alone would be inappropriate.

As will be explored throughout this paper, the working life of those in the gig economy is often far closer to that of a ‘worker’. This culminates into a concerning situation whereby, in reality, gig economy workers have the *obligations* of a ‘worker’, yet merely the far weaker *rights* of an independent contractor under a commercial contract. It is for this very reason that contract law alone is unsuitable in protecting gig economy workers. Those working in the gig economy are without the strong ‘countervailing force’ needed to protect them from inadequate pay and conditions.

An example of the ‘countervailing force’ of employment law, that is not afforded to many in the gig economy, is the minimum wage rate. The assumption behind the minimum wage is that market wage rates for certain labour markets would be too low for somebody to make a living off. The minimum wage sets a wage rate above the market equilibrium, to protect working people from exploitatively low pay. However, as gig economy workers are ‘independent contractors’, they are not entitled to such protection. The Taylor Review noted that a concerning implication is that the oversupply of labour in the gig economy can push the hourly rate below the National Minimum Wage.²⁸ This demonstrates

²⁶ Ewan McKendrick (ed) *Goode on Commercial Law* (5th Edn, Penguin Books 2016) 9.

²⁷ Paul Davies and Mark Freedland (eds), *Kahn-Freund's Labour and the Law* (Stevens & Sons, 1983) 12.

²⁸ Good Work: The Taylor Review of Modern Working Practices (July 2017) 37.

the tangible difference that the ‘independent contractor’ label makes for gig economy workers and their own financial situation.

Therefore, the rise of the gig economy as a new form of labour market is both celebrated and condemned. Proponents of this form of labour market point to the flexibility it allows for both employers and independent contractors, operating under the more laissez-faire rules of commercial contract law. Independent contractors are paid for the ‘gigs’ they do, whether that is food delivery for Deliveroo, or a car journey for Uber. In addition, independent contractors have greater independence and more control over their time.²⁹

The business model of Uber demonstrates this. Founded in 2009, Uber is a multinational company that matches independently contracted drivers to passengers who pay for a ride. Fare-paying passengers register via the Uber app in order to book a ride; the app then locates a driver in the area through GPS data, giving the option for the driver to accept or decline the booking.³⁰ The GPS data from the driver’s smartphone throughout the trip is used to calculate a recommended fare, but drivers have a degree of discretion over the price they charge. This discretion is limited, as Uber remains entitled to its “service fee”.³¹ In London alone, the company has around 30,000 drivers catering for over two million registered passengers.³²

The independence afforded by Uber drivers and other independent contractors in the gig economy has been labelled as “disruptive” innovation and “micro-entrepreneurship” by some proponents.³³ Prassl argues that these claims obscure the realities of work in the gig economy.³⁴ As recent case law has established, the notion of gig economy workers³⁵ as ‘independent contractors’ simply does not match the reality of their work. Prassl labels this as the “platform paradox” whereby gig economy firms purport to be matchmakers of consumers

²⁹ Gillian Phillips and Karen Scott, *Employment Law 2018* (College of Law Publishing 2018) 20.

³⁰ *Uber BV v Aslam* [2018] EWCA Civ 2748, [2019] ICR 845, [12].

³¹ *ibid.*

³² *Uber BV v Aslam* [2018] EWCA Civ 2748, [2019] ICR 845 [1].

³³ Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (1st edn, Oxford University Press 2018) 8.

³⁴ *ibid.*

³⁵ Here, the term ‘workers’ is used in its non-technical, non-legal sense.

and independent contractors through an app, yet the firm has close control over the delivery of the service,³⁶ for instance, by stipulating the terms and conditions, performance and payment.³⁷ In effect, the relationship between the gig economy firm and the ‘independent contractor’ is similar to that of an employer and an employee/worker.³⁸ The implications of this means that those working in the gig economy have no access to statutory employment rights, despite the reality of their work being more integrated into a business model than their contract suggests. The following section on recent case law explores how judges have approached this issue and the factors they have taking into consideration.

II. RECENT LITIGATION ON THE SCOPE OF EMPLOYMENT IN THE GIG ECONOMY

It is necessary to analyse the effectiveness of judicial decisions in relation to the scope of employment in the gig economy. This requires a consideration of what constitutes an effective decision. Essentially, it is the degree to which courts are ensuring those working in the gig economy are correctly categorised, distinguishing between truly ‘independent contractors’ and those who are actually ‘workers’ in all but name. The implication of the courts finding that an ‘independent contractor’ is indeed a ‘worker’ is that successful claimants are brought into the parameters of key statutory employment protections. This has the effect of enhancing rights at work for those in the gig economy, who could otherwise be vulnerable to exploitation and maltreatment by a firm.

Davidov argues that this can be done by a purposive approach to contractual interpretation.³⁹ The reason Parliament has retained the intermediary category of ‘worker’ is to broaden the reach of employment regulations by catching those with a degree of independence over their working life but who are still significantly dependent on a single employer.⁴⁰ Considering the analysis made in Part I, the category of ‘worker’ is arguably far more of an accurate description of those working in the gig economy. This is the line of argument that has been successful in recent case law.

³⁶ Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (1st edn, OUP 2018) 5.

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ Guy Davidov, ‘Who is a worker?’ [2005] 34(1) *ILJ*, 57.

⁴⁰ *ibid.* 58.

The *Dewhurst*⁴¹ case is one of many cases arising from the gig economy wherein which tribunals were asked to determine worker status. The claimant was a self-employed contractor, as stipulated by their contract with City Sprint, a bicycle courier service. As an independent contractor, the claimant was not entitled to two days' holiday pay, which is a right afforded only for workers and employees. The claimant successfully argued that they were a "limb b" worker, rather than self-employed. The tribunal Judge Joanna Wade held that the claimant's working practices did not reflect the contract, which she described as "indecipherable".⁴² The tribunal held that City Sprint had a significant degree of control over the claimant in order to maintain consistency throughout the business model.⁴³ Additionally, the bicycle couriers did not have security of tenure, as they had to toe the line in order to guarantee future work.⁴⁴ The level of control the firm has over a contractor is therefore a key factor taken into account by tribunals to determine employment status. The ruling in *Dewhurst* has been followed in subsequent tribunal decisions, notably *Boxer v Excel*,⁴⁵ where the employment tribunal held the courier was indeed a worker and entitled to one week's holiday pay.

Perhaps one of the most landmark judgments was laid down by the Court of Appeal in *Aslam v Uber*⁴⁶ in 2017. The case was concerned with whether Uber drivers, who were contracted as self-employed, were entitled to be paid the National Minimum Wage. As previously mentioned in Part I, Uber runs a lucrative business model, and has over 30,000 drivers in London alone. The Court of Appeal found that the claimants were workers. This drew widespread attention in the media as "the latest sign of the growing resistance" to the notion that gig economy workers are self-employed.⁴⁷ The Court of Appeal agreed with the tribunal that Uber's claim of being "a mosaic of 30,000 small businesses linked to a common platform" was "faintly ridiculous".⁴⁸

⁴¹ *Dewhurst v Citysprint UK Ltd* ET/220512/2016.

⁴² *ibid* [29.3].

⁴³ *ibid* [46.1].

⁴⁴ *ibid* [46.2].

⁴⁵ *Mr A Boxer v Excel Group Services Ltd (in liquidation)* ET/3200365/2016.

⁴⁶ *Uber BV v Aslam* [2018] EWCA Civ 2748, [2019] ICR 845.

⁴⁷ Sarah O'Conner, Aliya Ram and Leslie Hook, 'Uber 'workers' ruling deals blow to gig economy' (*Financial Times*, 10 November 2017).

⁴⁸ *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET) [90].

In its judgment, the Court of Appeal cited previous employment case law, such as *Autoclenz v Belcher*.⁴⁹ The *Autoclenz* case set a precedent for courts to read beyond the four corners of the contract, as “the written documentation may not reflect the reality of the relationship”.⁵⁰ In the *Uber* case, the evidence collected by the Employment Tribunal supported the claim that in reality Uber drivers met the statutory definition of a worker. The thirteen reasons given included the fact that Uber interviews and recruits its drivers; Uber sets the default route and “the driver departs from it at his peril”; Uber subjects its drivers to a rating system, in effect amounting to a performance management procedure; and, Uber reserves the power to amend the driver’s terms unilaterally.⁵¹ The Court of Appeal agreed with these points, meaning the claimants were workers and entitled to National Minimum Wage. The case is set to be heard before the Supreme Court.

The Financial Times commented on the case by stating that these decisions meant the stakes were high for gig economy companies.⁵² Although these decisions only extend to the claimants themselves, there is a clear implication for the Uber business model, as labour costs would rise and would therefore be passed on to consumers through higher prices. Another implication is that if drivers were no longer classed as independent contractors, they would have less flexibility. Although these observations are accurate, it is important to note the work of labour law academic Kahn-Freund. Kahn-Freund observed that the main purpose of employment law is to correct the imbalance of power between an employer and those they employ.⁵³ It is not sufficient to argue that some Uber drivers prefer the flexibility of being classed as an ‘independent contractor’, when the reality of their work says otherwise, as this would contradict the purpose of employment law to protect against exploitation.

In 2018, the Supreme Court gave further guidance on distinguishing between a worker and independent contractor in the *Pimlico Plumbers*.⁵⁴ In this case, a plumber was held to be a worker rather than an independent contractor,

⁴⁹ *Autoclenz v Belcher* [2011] UKSC 41, [2011] IRLR 820.

⁵⁰ *Uber BV v Aslam* [2018] EWCA Civ 2748, [2019] ICR 845 [73].

⁵¹ *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET) [92].

⁵² Sarah O’Conner, Aliya Ram and Leslie Hook, ‘Uber ‘workers’ ruling deals blow to gig economy’ (*Financial Times*, 10 November 2017).

⁵³ Paul Davies and Mark Freedland (eds), *Kahn-Freund’s Labour and the Law* (Stevens & Sons 1983) 12.

⁵⁴ *Pimlico Plumbers v Smith* [2018] UKSC 29, [2018] IRLR 872.

meaning that the claimant could pursue claims of unlawful deductions in pay and holiday pay. The Supreme Court built upon previous case law and focused particularly on two important factors. The first is the concept of personal service. It is necessary for a claimant to show they had undertaken to personally perform the service for the firm, known as a *contract for services*, rather than a *contract of services*.⁵⁵ It is relevant to ask whether the claimant could appoint a substitute to do their work, indicating the degree of independence afforded to independent contractors under a *contract of services*. Lord Wilson noted that the claimant in *Pimlico Plumbers*, Mr Smith, had limited faculties to appoint a substitute.⁵⁶ However, this right arose not from the contract itself but from concessions made by Pimlico Plumbers.⁵⁷

The second factor that the Supreme Court discussed was that Pimlico Plumbers had “tight control” over the claimant. This degree of control was reflected in the requirements on the claimant to wear branded uniform, carry an identity card and drive in a branded van which had a tracker installed in it.⁵⁸ The contract also made references to wages, unfair dismissal and ‘gross misconduct’, which Lord Wilson described as “a grip on his economy inconsistent with his being a truly independent contractor”.⁵⁹

The *Dewhurst*, *Uber* and *Pimlico Plumbers* cases all demonstrate a direction of travel taken by tribunals and courts to classify individual gig economy claimants as workers. Addison Lee drivers have also had successful worker status claims.⁶⁰ However, there is a notable exception. In *R (on the application of the IWGB) v Central Arbitration Committee*,⁶¹ the Independent Workers Union of Great Britain lost a judicial review against the decision of the Central Arbitration Committee (CAC), who held their union was not eligible for statutory recognition. Statutory recognition is the process whereby a trade union can be allowed to represent a group of workers in order to collectively bargain on their behalf. As per Section

⁵⁵ *ibid* [24]-[25].

⁵⁶ *ibid* [25] (Smith LJ).

⁵⁷ *ibid*.

⁵⁸ *ibid* [48].

⁵⁹ *ibid* [48] (Smith LJ).

⁶⁰ Addison Lee workers successfully claimed worker status in the following Employment Appeal Tribunal cases: *Addison Lee Ltd v Lange* UKEAT/0037/18/BA; *Addison Lee Ltd. v Gascoigne* UKEAT/0289/17/LA.

⁶¹ *R (on the application of IWGB) v CAC* [2019] EWHC 728, [2019] IRLR 530.

296 of the Trade Union and Labour Relations (Consolidation) Act 1992,⁶² only a union whose membership comprises of workers can satisfy the requirements of statutory trade union recognition. The CAC held that the Deliveroo drivers were independent contractors, not workers. Therefore, the IWGB union, who sought to represent the drivers, was not eligible for statutory recognition in relation to Deliveroo. A key factor behind this reasoning was that Deliveroo drivers had an express right to use a substitute, meaning they were not obliged to provide a personal service. In practice, substitution was uncommon. Deliveroo drivers were not obliged to accept work and therefore had no need to use a substitute. Substitution also has the drawback for drivers of having to lend someone else their equipment and password.

The High Court subsequently dismissed the judicial review challenge, holding that the CAC's decision did not violate Article 11 of the European Convention on Human Rights, which protects the right to freedom of assembly, as the drivers were deemed to be self-employed.

It is clear from recent case law that tribunals and courts have been instrumental in ensuring that those working in the gig economy do not have their workers' rights side-lined as a result of firms labelling them as independent contractors. The decisions have, for the large part, been in favour of the claimant. Notable gig economy companies such as Uber and Addison Lee have been affected by these decisions. What links *Denbursht*, *Uber* and the *Pimlico Plumbers* decisions together is the role of courts and tribunals looking beyond the contract at the reality of the claimant's working conditions. These decisions have ensured that the purpose of "limb b" worker category is not redundant, particularly in the gig economy where it may be a stretch to argue that workers are employees. This is exactly the purposive approach commentators such as Davidov have advocated for.⁶³

However, the common law alone is not enough to ensure enhanced rights at work in the gig economy. Firstly, tribunals and courts have made it clear that these decisions only apply to the claimants, not to the entire workforce of a firm. This means that all those working in the gig economy would have to bring claims of worker status in order to claim for the employment protections they should be

⁶² Trade Union and Labour Relations (Consolidation) Act 1992, s 296.

⁶³ Guy Davidov, 'Who is a worker?' [2005] 34(1) ILJ, 57.

afforded anyway. This is not a satisfactory position for the law to be in. It almost implies that it is down to the gig economy worker⁶⁴ to protect themselves by bringing litigation, rather than the firm itself, completely undermining the Kahn-Freund notion that the purpose of employment law is to protect the weaker position of the worker.

In addition to this, as shown in the *Deliveroo* case before the CAC and High Court, not all decisions are held in favour of the claimant, even when the basis for the ‘independent contractor’ label is questionable. The implications of such decisions mean that trade unions cannot bargain on behalf of gig economy workers, leaving many in the gig economy who are underpaid without any form of representation.

Finally, it is worth noting that even when someone in the gig economy is classed as a worker, they still are not afforded the full set of employment law protections which an employee has. This asymmetry in rights cannot be dealt with at common law level. In fact, all tribunals and courts can do is give effect to the legislative distinction between an employee and worker, not challenge it. Therefore, notwithstanding the positive steps made by the common law to protect many in the gig economy, some form of legislative change is essential to enhance their rights at work.

III. THE TAYLOR REVIEW PROPOSALS ON THE SCOPE OF EMPLOYMENT AND THE EFFECTIVENESS THESE PROPOSALS COULD HAVE IN PROTECTING WORKERS IN THE GIG ECONOMY

As Prime Minister, Theresa May commissioned the Taylor Review of Modern Working Practices in order to review the difficulties many workers face, which she highlighted in her “burning injustices” speech.⁶⁵ The review was led by Matthew Taylor, Chief Executive of the Royal Society of the Arts.

⁶⁴ Here, the word ‘worker’ is used in its non-technical, non-legal sense.

⁶⁵ Work and Pensions and Business, Energy and Industrial Strategy Committees, ‘A framework for modern employment’ (2017-2019 HC 352) 3.

Chapter five of the report, “Clarity in the law” deals with the scope of employment.⁶⁶ Whilst Taylor concluded that the tripartite distinction of employee, worker and independent contractor “works reasonably well”, the report also said there is a need to amend it in order to deal with changing labour markets.⁶⁷ The focus of the amendment would be on the line drawn between ‘workers’ and ‘self-employed’, which as Part II of this paper highlights is not always a clear distinction. Taylor recommends that the category of ‘worker’ should be renamed ‘dependent contractor’, which is the term used in Canadian employment law.⁶⁸

It is important to clarify what this change in terminology could mean for those in the gig economy. The Taylor Review acknowledges the flexibility afforded to gig economy workers,⁶⁹ such as the freedom to take on or refuse work.⁷⁰ However, as Taylor mentions, over-supply of contractors in the gig economy can push the hourly rate below the National Minimum Wage. It is therefore important to ensure these key protections are extended to these types of contractors, who are not genuinely self-employed.

A ‘dependent contractor’ category would update legislation to reflect new types of business models, whereby contractors are not necessarily independent, rather they are deemed sufficiently dependent on the firm contracting them. This would provide greater clarity and scope to the intermediary category, meaning that gig economy firms would no longer be able to justify the ‘independent contractor’ label. This modernises the law, as it covers gig economy workers more explicitly. Taylor states that this could all be done by adapting current legislation, not overhauling it. Other recommendations which would help in more borderline cases include an online tool to provide individuals with an indication of employment status.

This could tackle the limits of the common law in only being able to grant successful claimants worker status, and would likely also have the effect of bringing the Deliveroo drivers from the *Deliveroo* case into the parameters of

⁶⁶ Good Work: The Taylor Review of Modern Working Practices (July 2017) 32.

⁶⁷ *ibid.*

⁶⁸ *ibid* 35.

⁶⁹ Here, the word ‘worker’ is used in its non-technical, non-legal sense.

⁷⁰ Good Work: The Taylor Review of Modern Working Practices (July 2017) 37.

‘dependent contractor’ status. Additionally, it would greatly enhance rights at work in the gig economy, by ensuring the rights currently afforded to workers, such as holiday and sickness rights, cover *all* dependent contractors, whilst not compromising the flexibility of their work.

Whilst to some degree implementing the Taylor proposals would allow for legislation to do “more of the work and the courts less” when determining the scope of employment in the gig economy, the report has been criticised for its pragmatism.⁷¹ The IDS Employment Law Brief labelled the proposal to rename workers ‘dependant contractors’ as “cosmetic rather than substantive”, and argued that it only serves to give the impression that the Government is doing something to help those in the gig economy.⁷² This is true to some degree, but there is no reason why governments cannot implement Taylor’s proposals whilst also extending many employee rights to ‘dependent contractors’.

Hugh Collins, a notable employment law academic, wrote that the Taylor Review was a “missed opportunity” for the government to adopt a unified test of employment, rather than the current employee-worker distinction.⁷³ This alludes to the fact that even when worker status is extended to those in the gig economy, they are still not afforded the bundle of rights that an employee has. Collins argues that there is rarely a justification in affording workers some rights but not others.⁷⁴ Instead, the distinction which concerns the reach of employment protections should be made on the question of whether one is an employee or self-employed.

The Institute of Employment Rights (IER), who are influential in the formation of the British Labour Party’s employment policies, also advocate for a unified test of employment. They note that retaining the worker category, or ‘dependent contractors’, means that many in the gig economy have their rights undercut.⁷⁵ Consequently, the IER states “this rebranding exercise is a gift to the gig

⁷¹ *ibid* 35.

⁷² IDS Employment Law Brief (2017, 1074, 2).

⁷³ Hugh Collins, ‘A Missed Opportunity of a Unified test for Employment Status’ (*UK Labour Law Blog*, 31 July 2018) <www.uklabourlawblog.com/2018/07/31/a-missed-opportunity-of-a-unified-test-for-employment-status-hugh-collins/> accessed 8 December 2019.

⁷⁴ *ibid*.

⁷⁵ The Institute of Employment Rights, ‘Our guide to the Taylor Review’ (13 July 2017) <<https://www.ier.org.uk/news/ier-guide-taylor-review>> accessed 24 November 2019.

economy”.⁷⁶ It is worth noting that the 2019 Labour Party Manifesto proposes to “end bogus self-employment”, and “create a single status” of employment.⁷⁷ The implications of this policy would be far-reaching. It would not only afford those in the gig economy the rights of worker status, but also extend employee rights to them too.

Indeed, no approach is a silver-bullet. However, Taylor is right to acknowledge that “redefining the boundaries of employment”, such as through a unified test, fails to take into account the flexibility that many in the intermediary category enjoy.⁷⁸ A unified test of employment would essentially put a nail in the coffin for the current gig economy business model. Take the example of Uber. By overly tightening the rules of employment, Uber would perhaps no longer be able to successfully compete with the traditional ‘black cab drivers’. Politicians such as Ian Austin, a former Labour minister, have opined that Uber’s technological approach should be applauded and not be punished by stringent regulations.⁷⁹ By adopting a unified test of employment, there would be less incentive for many firms to operate, since it is the flexibility enjoyed by both Uber and its drivers that contributes to the firm’s success.

The Taylor Review notes that the binary employment and self-employment exists in regards to taxation, but also notes that if it were brought into employment law, it would overly restrict the flexibility that work in the gig economy provides.⁸⁰ Those who push for a unified test must realise that the consequence would probably culminate in the end of the gig economy, resulting in many people potentially losing their jobs. However, the Institute of Employment Rights would perhaps argue that this is acceptable given the perceived inadequacies of the current law.⁸¹

⁷⁶ *ibid.*

⁷⁷ Labour Party Manifesto, ‘It’s time for real change’ (2019) 61.

⁷⁸ Good Work: The Taylor Review of Modern Working Practices (July 2017) 36.

⁷⁹ Ian Austin, ‘Instead of moaning about Uber, Labour should embrace its potential’ (*New Statesman*, 26 February 2016)

<www.newstatesman.com/politics/economy/2016/02/instead-moaning-about-uber-labour-should-embrace-its-potential> accessed 13 February 2020.

⁸⁰ Good Work: The Taylor Review of Modern Working Practices (July 2017) 35.

⁸¹ The Institute of Employment Rights, ‘Our guide to the Taylor Review’ (13 July 2017) <<https://www.ier.org.uk/news/ier-guide-taylor-review>> accessed 24 November 2019.

Unless a Labour government was to be elected under its current manifesto, it seems unlikely that the unified test approach would be adopted, especially considering the current Conservative government has yet to enact the Taylor proposals from two years ago.⁸² On that basis, the recommendations made by Taylor would likely be welcomed, as they would give greater clarity on the employment status of those working in the gig economy, which would mean enhanced rights for over 1.1 million people. The Taylor Review proposals are pragmatic but, given the inaction by Parliament to address the issues facing gig economy workers, their implementation would be a step in the right direction.

CONCLUSION

It is clear that those working in the gig economy are currently not afforded the rights they should be entitled to. As per recent case law, the day-to-day realities for those working in the gig economy do not correspond with the ‘self-employment’ label purported by the contract. As self-employed independent contractors, those working for popular companies such as Uber, Deliveroo and Addison Lee have very limited rights. Not allowing for these workers⁸³ to be covered by employment law protections, in the guise of market efficiency and flexibility, is scandalous. Tribunals and courts have been right to rebut this false notion.

If the Kahn-Freud account of employment law is still held to be true, that the law must rectify imbalance of power in employer-employee relationships, then further action needs to be taken. Whilst there have been positive steps made in recent case law, only successful claimants are granted worker-status, not the entire workforce. It is unsatisfactory to put the burden of regulation upon workers to litigate for rights they should be entitled to regardless. In addition, the judiciary have understandably found it challenging to establish a clear and consistent set of principles, despite Supreme Court cases such as *Pimlico*. Whilst judgments such as *Uber* and *Dewhurst* should be welcomed, cases such as *Deliveroo* demonstrate that it can be evidentially challenging to prove one’s worker status.

Legislative change is desperately needed to clarify the scope of employment in the gig economy. The pragmatic view taken in the Taylor Review to retain the

⁸² This paper was written during the 2019 General Election campaign.

⁸³ Here, the term workers is used in its non-technical, non-legal sense.

tripartite distinction, but to clarify the distinction between workers and independent contractors, would be a positive step. However, for many commentators this proposal does not go far enough to give gig economy workers full access to employment rights. They prefer the adoption of a uniform test of employment, allowing for those working in the gig economy to be classed as 'employees'. It is persuasive to argue a uniform test would be too onerous on firms who are engaging in technological innovation. As a consequence, many who enjoy the flexibility offered to them in the gig economy would potentially lose their job as a result of more stringent regulations. It is beyond the scope of this paper to assess the extent to which this would be true. Despite this, it is still worth highlighting to show that, for now, a pragmatic change in legislation could be more effective.

The trade-off between flexible labour markets and stricter regulations on employers is the question at the centre of any proposal to change legislation. Given the current political uncertainty in the UK, even pragmatic change will be welcomed by those who advocate for enhanced rights at work in the gig economy.