

The intersection between General Data Protection Regulations, Employment Status and the Gig Economy; the good, the bad and the future.

What is the Gig economy and how will it be affected by the new general data protection regulations? Both the Gig economy and the General Data Protection Regulation¹ [GDPR] are prevalent areas of the law; which have been the cause of much recent discussion, particularly within the employment sphere. The gig economy is an increasingly popular free market system in which temporary positions are common and organisations contract with independent workers for short-term engagements, such as Uber drivers². The General Data Protection Regulation has updated data control throughout the EU, placing greater emphasis on an individual's right to protect their own data. This has been deployed with particular focus on individual consent and harsh penalties for data breaches. This essay will explore the intersection between the gig economy and GDPR, looking closely at the impact on defining employment status, the benefits of transparency and the impact of GDPR on the employment law sphere going forward.

The Gig Economy – A brief overview

In a governmental paper the gig economy was defined in the following fashion “...involves the exchange of labour for money between individuals or companies via digital platforms that

¹ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119

² *Uber BV v Aslam* [2018] EWCA Civ 2748

*actively facilitate matching between providers and customers, on a short-term and payment by task basis*³.

A central component of the gig economy is that those who work within it are classified as self-employed contractors. Employment status in the UK is largely broken down into three categories; employee⁴ and worker⁵ which are defined in s230 Employment Rights Act⁶ and self-employed contractors which is outlined in case law. The courts have relied on numerous factors⁷ to ascertain the differences between each employment category including control⁸, mutuality of obligation⁹, integration and the requirement for personal service¹⁰.

The benefit of engaging a self-employed contractor is that the employer will owe fewer rights to the individual; they are not afforded the minimum wage, holiday or sick pay and are required to organise their own taxes. For employers the gig economy presents a business-savvy approach to employment, bringing in the workforce as and when they are required, with no obligation to secure work for those they contract. It also significantly reduces business costs, particularly in the form of tax. For employees a balancing act is at work, the gig economy presents enormous flexibility for individuals to pick up work as and when they require or want it. The work is usually relatively accessible as it largely menial labour based on apps and has a quick application procedure. However, there is a great deal of uncertainty

³ Department for Business, Energy and Industrial Strategy, *The characteristics of those in the Gig Economy* (BEIS Research Paper. 2018; No 2) page 13

⁴ S230(1)(2) Employment Rights Act 1996

⁵ S230(3) Employment Rights Act 1996

⁶ Employment Rights Act 1996

⁷ Ready Mixed Concrete (South East) Ltd v Minister of Pension and National Insurance [1968] 2 QB 497

⁸ Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29

⁹ Carmichael v National Power plcs [1999] UKHL 47

¹⁰ Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29

that comes with gig work; there is no guaranteed pay rate, hours or protection from dismissal. Recent case law has also shown a trend of employers to pigeon-hole their workers into contracts stating that they are self-employed contractors, which when assessed by the courts has not stood up to scrutiny. Meaning many individuals are deliberately deprived of their working rights and protections.

The requirement for personal service appears to be a particularly potent factor when assessing whether an individual is a worker or a self-employed contractor¹¹.

Personal Service & Data Control

The stricter control on data protection and the nature of the self-employed contractor within the gig economy are largely irreconcilable. This is for two main reasons; the juxtaposition between an interchangeable workforce and the requirement for a strict control of data access by companies, and secondly, the individualistic obligations laid down for data processors by GDPR¹². The interchangeability of the workforce, particularly highlighted in the case of Deliveroo¹³, runs contrary to a company's obligation to maintain a tight control on data access as required by GDPR¹⁴. As even incidental data breaches have been heavily penalised under GDPR¹⁵, to allow an almost unfettered substitution amongst the workforce that are privy to information regarded as sensitive by GDPR appears contradictory. Though it has

¹¹ Independent Workers' Union of Great Britain v RooFoods Ltd (trading as Deliveroo) (2017) TUR1/985 (2016)

¹² European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119

¹³ Independent Workers' Union of Great Britain v RooFoods Ltd (trading as Deliveroo) (2017) TUR1/985 (2016)

¹⁴ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119

¹⁵ Ibid

been noted that those seeking the substitution will be responsible for their alternates behaviour, this does not aid in the discussion about the requirement for personal service, or the potential for data breaches.

Furthermore, GDPR¹⁶ places tighter holds on those considered to be processing data.

Processing is defined in Art 4(2)¹⁷ ranging from organising to collecting or simply storing information. Those who come into contact with data are regarded as data controllers or data processors, defined in Art 4(7)¹⁸ and 4(8)¹⁹ respectively.

Data controllers²⁰ manage and determine how data is to be utilised. Data processors²¹ process data on behalf of data controllers. Employees are usually exempt from the title of data processor, however as those that work within the gig economy are unlikely to be considered employees, this exemption does not apply.

Gig workers are likely to be exposed to sensitive information during the course of their employment, as simple information such as name and gender, information a Deliveroo rider or Uber²² driver would have access to, are considered sensitive under GDPR²³. As this information is used by the gig workers to perform their job at the behest of their employer,

¹⁶ Ibid

¹⁷ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119, Article 4(2)

¹⁸ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119, Article 4(7)

¹⁹ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119, Article 4(8)

²⁰ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119, Article 4(7)

²¹ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119, Article 4(8)

²² *Uber BV v Aslam* [2018] EWCA Civ 2748

²³ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119

gig workers can be considered data processors.

This being the case, GDPR²⁴ places stringent controls on data processors and how they interact with personal data. Article 28(2)²⁵ in particular states that a data processor may not engage with another data processor without prior written notice from the data controller.

Meaning that if a gig worker wished to substitute themselves for a particular job, they would have to seek out permission of their employer first. Whilst substitutability is usually written into worker contracts, this cannot be seen as rising to the same level as preapproved consent. If an individual has to seek out prior written consent for substitution this places a barrier on unfettered substitutability, which would in turn perhaps suggest that those employed in the gig economy are in fact workers rather than self-employed contractors.

Taking into consideration the stricter controls GDPR²⁶ has introduced and the obligations it now places on data processors, the test of personal service is arguably undermined. This being so, there would be further ramifications. For employers, they would be liable for a greater set of rights, not only that but certain rights attached to worker status are retrospective, such as holiday pay²⁷. For workers they would have access to a greater range of rights and protections, greater certainty regarding pay and from April 2020 a mandatory statement regarding their working role.

Transparency & Subject Access Requests

²⁴ Ibid

²⁵ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119, Article 28(2)

²⁶ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119

²⁷ King v Sash Windows C-214/16 CJEU

Subject access requests present a medium to enforce transparency within the Gig economy. Subject access requests mandate that companies must inform individuals about all the data that they hold on them. Whilst retrieving this information may be a laborious task for companies, it allows workers to access information which may otherwise be obscured from them. During the case of *Uber*²⁸, a driver in the case set up the Worker Information Exchange, so that a collective network of information could be established. This in turn created transparency and a better understanding of Ubers work allocation algorithms. Subject access requests would also make it possible for individuals to ascertain their pay rate, and how companies monitor them whilst they are working.

This transparency could bring greater certainty to the gig economy, not only for the hired workers but also the general populus. As companies such as Uber and Deliveroo have been tarred in the media for the poor working conditions they have previously been offering²⁹, this new transparency could aid their image and public perception. The pressure of transparency places a burden on gig economy businesses to run ethical enterprises, due to the potential of being outed by disgruntled employees otherwise.

Transparency would also likely attract a larger workforce, which would in turn allow for business expansion, benefitting employers. Although subject access requests may require more work for employers in the short term, in the long run they are likely to be beneficial for both employer and workforce.

Proposed changes

²⁸ *Uber BV v Aslam* [2018] EWCA Civ 2748

²⁹ Homa Khaleeli, 'The truth about working for Deliveroo, Uber and the on-demand economy' (The Guardian, 15 June 2016) <https://www.theguardian.com/money/2016/jun/15/he-truth-about-working-for-deliveroo-uber-and-the-on-demand-economy> (accessed 5 March 2020)

The law has already provided a fair amount of redress for gig workers, however there are further changes that could be implemented. As the courts have reviewed the employment status of many gig workers establishing that sham contracting will not be accepted, and correcting employment status of those affected, a great deal has already been done for gig workers in the short time since the gig economies conception. The Taylor review³⁰ has suggested addressing the current employment status categories, changing ‘worker’ to ‘dependent contractor’. The hope is that this will create less confusion regarding employment status and will create a helpful distinction between those that are genuinely self-employed and those who are not.

This however has been critiqued as a superficial change, without changing the substantive difficulties presented by confusion regarding employment status. In their essay Butlin and Allen³¹ suggest that aligning employment status with vicarious liability would be a more profitable route to take. They support this by pointing to the recent trend of personal service being undermined by the courts and noting that vicarious liability looks at non-typical employment relationships through the lens of ‘something akin to a working relationship’ to establish liability. They also note that if employment status and vicarious liability drift this will create a legislative gulf, making claims involving vicarious liability harder to understand and rule on.

³⁰ M. Taylor, G. Marsh, D. Nicol & P. Broadbent, *Good Work: The Taylor Review of Modern Working Practices*, Department for Business, Energy and Industrial Strategy (2017)

³¹ S. Fraser Butlin & R. Allen QC, ‘Worker Status and Vicarious Liability: The Need for Coherence’ [2018] Cambridge Faculty of Law

Although the courts can not address the clash between GDPR³² and the gig economy unless it is brought before them, it could be addressed by Parliament. As the gig economy is of going concern it would be useful for clarity to be provided as to what impact GDPR³³ will have on employment status and working rights. As employment law is incredibly fast moving there is scope for any manner of changes, and since the break away from the EU, how EU law will continue to operate within the UK is largely unknown. However, both GDPR³⁴ and the gig economy appear to have staying power, which should act as an incentive to provide clarity for their intersection.

Furthermore, after the recent economic downturn caused by the COVID pandemic, businesses will be looking for easy cost cutting measures, the Gig economy style of hiring may be a highly attractive option for many employers.

This should further incentivise parliament to create legislative clarity regarding employment status particularly the distinction between workers and self-employed contractors, to avoid vulnerable individuals being taken advantage of by future employers.

In conclusion, GDPR³⁵ has the potential to create a great deal of change within the gig economy. As GDPR³⁶ came into effect after the conclusion of the Deliveroo case³⁷, the impact could not be assessed under that factual scenario. However, with many more gig economy workers bringing their cases before the courts there is an opportunity for the

³² European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119

³³ *Ibid*

³⁴ *Ibid*

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ *Independent Workers' Union of Great Britain v RooFoods Ltd (trading as Deliveroo)* (2017) TUR1/985 (2016)

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obligations laid down in GDPR³⁸ to be assessed against tests commonly used to ascertain employment status. Subject access requests will make it easier for workers to retrieve their data from employers and establish a degree of transparency within the gig economy. The changes that GDPR³⁹ may bring about could however undo the flexibility the gig economy offers. As the primary attraction of the gig economy, this may undermine its operation, though when reconciled with greater benefits and security for workers this may be a meaningful compromise.

Bibliography

Department for Business, Energy and Industrial Strategy, *The characteristics of those in the Gig Economy* (BEIS Research Paper. 2018; No 2)

European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018]

Harry Abrams ‘Gig economy drivers on collision course with GDPR’ (Personnel Today, 15 August 2018) < <https://www.personneltoday.com/hr/gig-economy-drivers-on-a-collision-course-with-gdpr/>> (accessed 6 March 2020)

Homa Khaleeli, ‘The truth about working for Deliveroo, Uber and the on-demand economy’ (The Guardian, 15 June 2016) <https://www.theguardian.com/money/2016/jun/15/>

³⁸ European Parliament and Council Regulation (EU) 2016/679 *General Data Protection Regulation* [2018], OJL 119

³⁹ Ibid

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[he-truth-about-working-for-deliveroo-uber-and-the-on-demand-economy](#) (accessed 5 March 2020)

M. Taylor, G. Marsh, D. Nicol & P. Broadbent, Good Work: The Taylor Review of Modern Working Practices, Department for Business, Energy and Industrial Strategy (2017)

Employment status (5): gig economy, practical law employment, Practical Law UK Note w-007-0956