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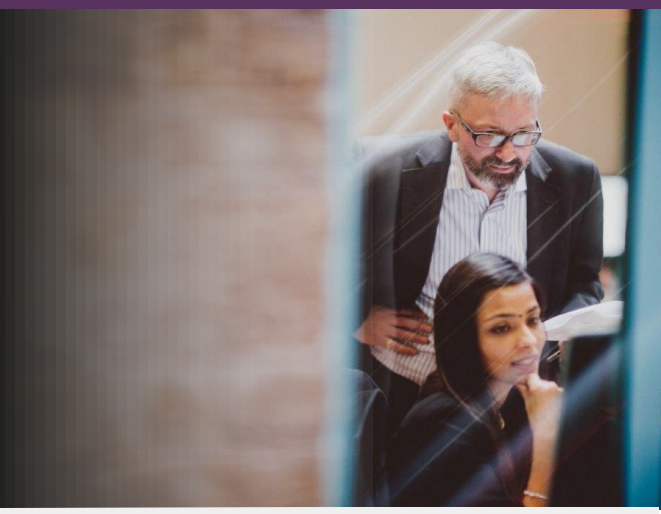
The "Gig Economy" What does it mean?



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The gig economy continues to make headlines but why and what does it mean?

The Oxford English Dictionary defines "gig" as "a job, especially one that is temporary or that has an uncertain future". It also defines "gig economy" as a "labour market characterised by the prevalence of short-term contracts or freelance work as opposed to permanent jobs".

It is common for the gig economy to be associated with companies using new technologies to promote their business, but it is just as common in other sectors such as social care, retail, cleaning and construction.

Historically, businesses with fluctuating demand would perhaps have maintained a core workforce with casual employees or workers. The term "casual worker" covers many different types of working arrangements including bank staff, seasonal workers and individuals working on zero hours' contracts. Casual workers have fewer rights than employees, but are still entitled to some employment protection including the national minimum wage and paid holiday.

Businesses within the gig economy have tended to engage individuals not as employees or workers, but as self-employed contractors who have the freedom to accept work (the gig) or reject it. Pimlico Plumbers, Deliveroo, City Sprint and Uber have all hit the headlines in recent times with cases in the Employment Tribunal (ET). This is because increasingly some individuals are challenging their employment status as independent contractors and arguing, with some success, that they are in fact workers; giving them increased protection at work. A self-employed person is not entitled to the statutory rights afforded to employees and workers and is responsible for their own tax and national insurance contributions. It is therefore an important distinction to make. Any self-employed person will need to fall outside the definition of "employee" or "worker" as defined in the Employment Rights Act 1996 (ERA 1996). However, the distinction between worker and self-employed is somewhat blurred.

A worker is defined in the ERA 1996 as either an employee or an individual working under "*any other contract, whether express or implied and (if 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*". All employees are therefore workers and the alternative, as cited above, has been subject to extensive scrutiny by the ET and courts to determine what types of working arrangements fall within its scope.

The difficulty with the "worker test" that has evolved through case law, is that it depends on the facts of each case. This can produce inconsistent results, making it difficult to know with any certainty whether someone is truly self-employed. The lack of certainty has been identified as one of the primary weaknesses of the current framework for clarifying those who provide services.

A further complication is that an individual can be self-employed for tax purposes, but be a worker for employment status purposes. This is because tax law only distinguishes between the self-employed and the employed. There is no "worker" category for tax purposes.

Further clarification was given last week, when the Employment Appeal Tribunal (EAT) dismissed Uber's appeal against the ET's decision that its drivers are 'workers' within the meaning of the ERA 1996 and the equivalent definitions in the National Minimum Wage Act 1998 and the Working Time Regulations 1998. It held that the ET was entitled to reject Uber's explanation of its

business as a technology platform rather than a provider of transport services, and to go beyond the contractual documentation describing drivers as self-employed contractors offering their services to passengers via the Uber app.

Uber says it is a technology platform allowing the provision of taxi services, not the provider of the taxi service itself. It claims it is acting as agent for the drivers, and its agreement with passengers states that the contract for the taxi service is between the driver and the passenger. Under the contract between Uber and the driver, the driver is not required to give any commitment to work. However, when a driver signs into the app, this usually signals that he is coming 'on-duty' and can therefore accept bookings. Prospective passengers book trips through the app. Upon receipt of a passenger request, the app locates an available driver (i.e. one who is logged in). The selected driver has ten seconds to accept the booking through the app, failing which Uber assumes that the driver is unavailable and locates another. If a driver fails to accept bookings, warning messages are generated which can lead to the driver's access to the app being suspended or blocked, preventing the driver working.

Several Uber drivers brought ET claims of unlawful deductions from wages, relying on failure to pay the national minimum wage, and failure to provide paid annual leave. Two of the drivers were selected as test claimants and the ET considered, as a preliminary issue, whether the drivers were 'workers' within the definition in the ERA 1996. The ET found that they were. It rejected Uber's case that the drivers were self-employed, and that it merely provided the technology platform that allows drivers to find and agree work with individual passengers. In the ET's view, this characterisation of Uber's business model and the contractual documentation created to support it did not fit with the reality of the working arrangements, which was that Uber relies on a pool of workers to provide a private hire vehicle service. Uber appealed to the EAT.

The EAT dismissed the appeal, holding that the ET was entitled to find that the contractual documentation did not reflect the reality and thus that it was entitled to disregard the terms and labels used in the documents. The ET had to decide the true agreement between the parties and, in so doing, it was important for it to have regard to the reality and the facts of the case. The ET was therefore bound to reach a fact-sensitive decision.

What's next?

The independent review of employment practices in the modern economy (the Taylor Review) which was launched last year, has made recommendations that the definition of "worker" needs to be clearer and more consistent. An enquiry into the Taylor Review started hearing evidence on 10 October 2017, and has questioned how the government should act to ensure rights and fair pay for gig economy workers. As yet there are currently no concrete plans to change the law but that may well be just a matter of time.

Meanwhile it is likely that Uber will appeal the EAT's decision and may well seek to fast track to the Supreme Court to have the case heard at the same time as Pimlico Plumbers case.

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