Is employment law due an upgrade?

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Arpita Dutt and Paul McAleavey take a look at the state of employment law following Deliveroo’s recent pay rows.

It’s not just the characters in Downton Abbey that have servants at their beck and call. We all know in a few clicks or swipes you can have a cleaner (Handy), a driver (Uber) or a meal (Deliveroo) at your door. The growth of Uber in London

has put almost 13,000 additional private hire vehicles on London’s roads.
Is it right, therefore, that this exciting, on-demand industry is still regulated by laws which largely date from twenty years ago in the Nokia age, when mobile phones were owned by just 16% of the population?
Deliveroo founder William Shu thinks not, criticising UK employment law as being based on “laws drawn up years ago” that may be “less relevant for today’s economy”. His comments came in the midst of Deliveroo’s highly-publicised spat with its delivery drivers, who objected to new employment terms that could see them paid less than the minimum wage.

When is a contractor not a contractor?

The hidden cost of relying solely on self-employed contractors is the lack of legal protection for those individuals. Businesses may also be exposed to legal claims if the true situation is that the business has in fact engaged workers or employees. Self-employed contractors have no protection from unfair dismissal, have no entitlement to the national minimum wage or living wage and are rarely paid during holidays or periods of illness. Individuals working for Uber have launched legal claims, backed by the GMB trade union, to change all that and attain worker status based on the reality of their relationship.
Tech startups who seek to rely on cheap and efficient methods by engaging self-employed contractors need to be aware of the risks. Failing to distinguish between an employee and a truly freelance contractor can be one of the most expensive but easy mistakes a business makes. The question of what makes an employee is one the courts have grappled with for many years. As unbelievable as it may be, the courts and HMRC do not have an agreed definition of what defines an employee.

The terms of the contract between a startup and the contractors will only be part of the picture. An employment

tribunal will look at the reality of the situation – if it is the case that the individual is an easily-exploited servant at the beck and call of a master (think of the Uber model), the likelihood is that they will be judged to be a worker or employee. To top it all off, the tech startup would be exposed financially. Not only would it face recovery of underpaid tax and national insurance contributions from HMRC (which can go back six years), they could face claims from the newly-established employee for non-payment of the national minimum wage or holiday pay and perhaps an unexpected claim for compensation for unfair dismissal if they are found to be an employee.

Achieving an agile business with a flexible workforce is not the holy grail

It is not surprising that some companies view employment law as inflexible, costly, burdensome and stifling for growth and innovation. However, the UK employment market is one of the least regulated in Europe and the law here is certainly more employer-friendly than the equivalent workplace laws in France, Germany or Italy. Every employee in Britain is on a probationary period for the first two years of their employment – as it is only once they reach that stage that they acquire unfair dismissal rights. Up to that point, an employer can dismiss any employee for any reason (provided it is not due to discrimination, whistleblowing, or a small number of exotic reasons). All the employer needs to do is give the employee the right amount of notice. Even when employees reach two years of service and attain unfair dismissal rights, the prospect of them successfully suing their employer is now more remote than ever. The requirement to pay fees totalling £1,200 to bring an unfair dismissal claim has deterred many would-be litigious employees, with the number of claims being handled by the employment tribunal dropping by 80%.

Protecting businesses – the important of the bespoke service or employment contract

London's tech firms could do worse than move their gaze away from the Silicon Roundabout and look at how financial services firms in the City, Mayfair and Canary Wharf have overseen a period of growth and increasing profits by relying on employment or partnership employment and remuneration models as a means to engage their staff. The much-vaunted John Lewis model, in which employees own a stake in the business and share in its profits, has been rolled out to other industries. The law firm at which I work, Brahams Dutt Badrick French LLP, operates a firm-wide points-based profit-sharing scheme for employees. There is no reason why an innovative tech startup could not follow a similar path.

The cost of getting it wrong

Tech startups should keep an eye on the legal claims brought against Uber and Addison Lee. If the judgements are in favour of the drivers, this could open the floodgates to many other claims from the estimated 1 in 7 of the UK workforce who are currently categorised as "self-employed". While Deliveroo sought to avoid this by amending their drivers' contracts to include a promise not to sue the company, these types of clauses are automatically void.

The number of models of 'employment' that UK employment law enables, coupled with a basic understanding of rights and obligations means that tech companies can still retain an agile workforce that suits their strategy and business model. To use a tech analogy, I would say that employment law is more like the iPhone 6 than the Nokia 3310, although some still hark back to the Nokia age.

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