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‘Labour Law: The Medium and the Message’ in F. Hendrickx (ed) *Game Changers in Labour Law: Shaping the Future of Work* (Wolters Kluwer, 2018)

Chapter 4 Labour Law: The Medium and the Message

David Mangan

From the contract of employment to the ‘gig economy’, attention in the United Kingdom (UK) has been fixed on the medium through which personal work relationships have been facilitated. Fragmentation and the associated decline in trade unions (the most evident medium in labour law) have been evident. ‘Gig’ work does not warrant ‘game changer’ standing because it is a continuation of the enduring issue of employment status. Still, innovations in information technology prompt further reflection, such as the lure of app-based work. Conversely, algorithms as a tool of workplace management may be perceived as ‘game changers’. Appealing to the concept of ‘scientific management’, algorithms ostensibly promise an objective means through which to measure workplace performance.

§4.01 Introduction

Contemporary challenges in labour law have historical precursors. There is a continuity of message connecting past endeavours with the present circumstances. A tool for detecting these connections is the phrase ‘the medium is the message’. It emerged first in Marshall McLuhan’s 1964 book *Understanding Media: The Extensions of Man*.¹ McLuhan gained widespread attention for his work, and this phrase (as well as the concept of the global village) is perhaps the touchstone. For the present analysis, the exact meaning of McLuhan’s seminal notion is not the focus. Instead, McLuhan is utilized as an instrument in exploring contemporary personal work relations. He identified the message of any medium as ‘the change of scale or pace or pattern that it introduces into human affairs’.² Relying on a pioneer in communications theory focuses attention on the use of information technology through which ‘gig’ work relationships have been conducted. The salience of McLuhan’s analysis further emerges when considering the theme of game changers in labour law. With the implicit challenge to discern what is a game changer, labour law has a penchant for being diverted by the novelties and overlooking of what that item may be an emblem. The ‘gig

1. Toronto: McGraw Hill, 1964.

2. *Ibid.*, 1.

economy’³ has been such a diversion; drawing attention away from substantive changes to the employment relationship. Consequently, app-based work (a hallmark of the gig economy) has shaped and controlled the scale and form of association in the personal work relationship.

The use of algorithms in the workplace, however, may pose a more profound challenge to personal work relationships because they offer the potential of a neutral means for measuring workers’ performance. Although a history can be traced to Frederick Winslow Taylor’s ‘scientific management’ from the early twentieth century,⁴ there may be something approaching game changer status with algorithms. Overarching the discussion are innovations in applicable technologies coupled with the regulatory framework of the General Data Protection Regulation (GDPR). The challenges of algorithms as well as the difficulty in discerning protections for workers under the GDPR mean that these systems may constitute a medium through which the message of scientific management may be actualized.

§4.02 Discerning the Message from the Medium

In labour law, trade union action stands out as one of the most evident media for workers. Trade unions are the medium through which workers channel efforts to resolve workplace issues and to effect workplace change. It is the conglomerate of worker decision-making being the majority decision of the membership. The perception of the union as a medium requiring constraint stands out in UK labour law.⁵ Unions have been fragmented over a lengthy period. The Trade Union Act 2016⁶ serves as a recent example of constraint. These changes are set within the context of the ongoing influence of non-standard work on trade unions.⁷ The union as medium has dwindled over time and so turning attention to the more individualized means of redress garners greater reflection. For this reason, the introduction of tribunal fees instituted an added challenge. If the effectiveness of trade unions was curbed, then the most viable alternative has been through the individual (or group) claim to enforce employment protections. While the original fee scheme introduced was found by the UK

3. Differing understandings of what this term means range from economic practices to labour arrangements. Here a working definition applies to employment exclusively: ‘participants who trade their time and skills through the Internet and online platforms, providing a service to a third party as a form of paid employment’: CIPD, *To gig or not to gig: stories from the modern economy* (March 2017), 3. Different names have also been used such as the sharing economy or the on-demand economy. Miriam Cherry uses ‘virtual work’ as a collective term: Miriam Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. Rev. 951 (2011).

4. Frederick Winslow Taylor, *The Principles of Scientific Management* (Harper Brothers, 1919).

5. David Mangan, *No Longer. Not Yet. The Promise of Labour Law*, 26 KLJ 129 (2015).

6. For further commentary, see Michael Ford QC and Tonia Novitz, *An Absence of Fairness ... Restrictions on Industrial Action and Protest in the Trade Union Bill 2015*, 44 ILJ 522 (2015).

7. See Valerio De Stefano, *Non-standard Work and Limits on Freedom of Association: A Human Rights-Based Approach*, 46 ILJ 185 (2017).

Supreme Court to be unlawful,⁸ this does not mean that the debate regarding charging has been abandoned. Now, the ‘gig economy’ is perhaps the most overt example for labour law of the message in a medium.

Roger Blanpain wrote in 1999 about globalization and technological innovation ‘causing enterprises to explode into networks of teams where work will be done on a project basis, fundamentally altering the employment relationship, the role of the social partners and the like’.⁹ As we reflect on the entirety of his work, Blanpain once again anticipated contemporary developments. The ‘gig economy’ represents a network of individuals occupied by discrete projects.

The term ‘gig’ refers to the use of wireless communication applications through which work relationships have been formed. In the English language, there is another meaning, from the music industry, referring to a paid performance. This connotation emphasizes the individuals who are electing to take on work through these app-based opportunities.

The ‘gig economy’ is not the only influence on forms of work that has enacted a nomenclature of fragmentation. Part-time work has long been an example. Between 1951 and 1989, the ratio of part-time to full-time workers grew from 1:25 to approximately 1:4.¹⁰ Short-time working has also arisen as a response to fluctuations in demand. In the UK, steps were taken in order to extend certain protections to this cohort to the effect that short-time working ‘assumed a special and technical meaning’.¹¹ Gig work dissects the components of full-time work into smaller parts. Unsurprisingly, remuneration is apportioned in relation to a job.¹² The query is whether or not there should be (and, if so, to what extent) legislation pertaining to this workforce. The question is not new.¹³ Gig work falls within the parameters of non-standard employment (NSE) as outlined by De Stefano et al. in this volume: ‘Non-standard employment (NSE) is a grouping of different employment arrangements that deviate from standard employment. It includes temporary employment; part-time work; temporary agency work and other multiparty employment relationships; and disguised employment

8. *R (on the application of UNISON) (Appellant) v. Lord Chancellor (Respondent)* [2017] UKSC 51.

9. Roger Blanpain, *European Social Policies: One Bridge Too Short*, 20 Comp. Lab. L. & Pol’y J. 497 (1999).

10. Lord Wedderburn *The Social Charter in Britain: Labour Law – And Labour Courts?* (Lord Wedderburn (ed.), *Employment Rights in Britain and Europe – Selected Papers in Labour Law*, Lawrence & Wishart, 1991), 361.

11. Erika Szyszczak, *Employment Protection and Social Security* (Roy Lewis (ed.), *Labour Law in Britain*, Blackwell, 1986), 372.

12. Usual terms like work or labour are not mentioned: Valerio De Stefano, *The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy*, 37 Comp. Lab. L. & Pol’y J. 471, 477–478 (2016).

13. It was posed in 2007 regarding non-standard work in Paul Davies and Mark Freedland, *Towards a Flexible Labour Market* (OUP, 2007), 2.2.3.

relationships and dependent self-employment.’ While terminology remains contested, the ‘sharing economy’ has developed with support from innovations in information technology where digital intermediaries connect ‘self-employed’ individuals with clients. App-based work also recalls the persistent challenge to employment status.

[A] The ‘Gig Economy’ as a Challenge to Orthodoxy

Despite criticism of the ‘gig economy’ as an exploitation of workers, the continued attraction to this form of work remains a matter for further attention. A positive dimension has been advocated that sees individuals avoiding the traditional detractions of workplaces (such as not being watched at work) and enjoying the associated flexibility. The difference in message may depend on how one dissects the medium. The argument regarding positives in app-based work may be contingent on how the ‘gig economy’ is construed. In the UK, the *Taylor Review*¹⁵ noted testimony in support of the gig economy.¹⁶ Anticipating the *Review*’s contention, the Chartered Institute of Personnel and Development (CIPD) has found that a minority of workers (14%) participated in it because they could not find full-time work.¹⁷ This figure appears to be subject to interpretation. A significant number of individuals take on this work because of the absence of full-time, traditional employment opportunities.¹⁸ The CIPD contend the ‘gig economy’ is of particular value to those seeking supplementary income.¹⁹ This view, though, reveals part of the struggle with nomenclature. While there are different names for the shared economy, these are collective terms referencing work by platforms such as Deliveroo and Airbnb. Gig workers are not a uniform cohort and neither are these platforms. Airbnb illustrates an income generating opportunity that is not necessarily related to taking on remunerated work. Associated factors remain relatively untouched, such as socio-economic status, gender and race of gig workers.

Convenience and control are two aspects of the message that can be extracted from app-based work. For the consumer, food delivery from any outlet (as one example) represents a

15. Matthew Taylor (chair), *Good Work: The Taylor Review of Modern Working Practices* (July 2017).

16. Though no reference was given in the *Taylor Report*, ‘gig’ companies have contended that the flexibility of ‘gig’ work has been part of the appeal to work with them: Work and Pensions Committee, *Self-employment and the gig economy* HC 847 (1 May 2017), para. 12. To this same Committee, company and worker representatives from Uber and Deliveroo asserted that the flexibility was pivotal.

17. CIPD, *To Gig or Not to Gig: Stories from the Modern Economy* (March 2017).

18. For example, 30% of temporary employees took on this form of work because no permanent position could be found: Office for National Statistics, *Labour market release*. (ONS, 2016).

19. The variation in interpretation underscores the diversity in definition of the term ‘gig’ worker – illustrated further in Full Fact, *Who’s Working in the ‘Gig Economy’?* (10 July 2017) <https://fullfact.org/economy/whos-working-gig-economy/> (accessed 29 November 2017).

significant convenience. There can also be expediency for individuals (viewing app-based work more generally than just food delivery) seeking work on-demand. The possibility of working from home and the opportunity to supplement income stand out as examples.²¹ There is an element of choice that the worker in the traditional workplace does not have. In choosing the specific task, the individual can exert greater control over the execution of the task. This form of ‘self-employment’ may be enticing to those ‘who might feel that the system doesn’t accommodate the reality of their working relationships’.²² Whether this is in fact the case will be discussed in the next section. Still, in a time of contesting the orthodoxies of contemporary life, there is reason to be alert to similar attitudes for change in personal work relationships.

[B] Employment Status Redux

‘Gig’ work is another aspect of the ‘common doctrinal’²³ employment status issue. Arguments surrounding its benefits tap into the arguments often associated with labour regulation. There is an imminent importance, then, in mapping this ‘digital transformation’²⁴ because misclassifying ‘gig’ work poses the potential of deepening the spectrum of precarity that has been a gradual outcome of a neoliberal policy shift.

[1] The Difficulty in Discerning Who Is a ‘Gig’ Worker

Alluded to above, there are taxonomical questions, such as who are ‘gig’ workers and how many are there? The importance of these queries emerges when unpacking the range of interpretations of the collective term ‘gig economy’ as well as the varied conclusions drawn. Part of the stated appeal for engaging in ‘gig’ work is that ‘most gig economy workers see their gig economy income as supplementary rather than as their main source of income’. Around 51% of those in a CIPD survey expressed satisfaction with their income from ‘gig’ work.²⁵ It seems difficult to determine with sufficient precision how many individuals in the UK are supplementing their income through ‘gig’ work. In the United States (US), the impression of widespread uptake included figures combining both users and suppliers.²⁶ In

21. Janice Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 Comp. Lab. L. & Pol’y J. 543, 552 (2016).

22. *Taylor Review*, *supra* n. 15 at 7.

23. Miriam Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 Comp. Lab. L. & Pol’y J. 577, 578 (2016).

24. *Ibid.*, 579.

25. CIPD, *supra* n. 17, at 13.

26. Katy Steinmetz, ‘See How Big the Gig Economy Really Is’ (6 January 2016) <http://time.com/4169532/sharing-economy-poll/> (accessed 29 November 2017).

the UK, the Labour Force Survey (LFS) identifies the number of individuals in employment. 32.136 million in employment and 1.119 million workers with second jobs comprised the total September 2017 LFS figure of 33.254 million.²⁷ The measurement from Workforce Jobs (WFJ) is the number of jobs, instead of the number of individuals in work. This figure for June 2017 was 34.949 million leaving a difference between the two surveys of 1.695 million (the LFS being lower). Adjusted for measurable differences, this figure was 1.016 million.²⁸ Part of the trouble in assessing the number of workers supplementing their income through ‘gig’ work is that the numbers are hard to reconcile; let alone determining the total number of ‘gig’ workers. Therefore, it is hard to suggest that this figure represents the total number of workers earning a supplemental income from ‘gig’ work.

App-based companies contend that ‘gig’ workers are self-employed. Looking at available data, innovations in information technology have developed rapidly and overlap with the time since the Great Recession. UK employment since 2008 has predominantly increased as a result of self-employment: between the first quarter of 2008 and the second quarter of 2014, employment rose by 1.1 million, with 732,000 being self-employed.²⁹ Self-employment has been estimated at 4.8 million,³⁰ constituting approximately 15% of the workforce.³¹ When at 4.6 million, the Office of National Statistics characterized this figure as indicative of ‘strong performance’ and as being ‘among the defining characteristics of the UK’s economic recovery’.³² The aforementioned CIPD figure of 14% may be at the lower end of a range, considering a survey by the Royal Society for the Encouragement of Arts, Manufactures and Commerce (RSA) which found, in the five years leading to 2014, that 27% of ‘gig’ workers started self-employment in order to escape unemployment.³⁴ A 2017 RSA survey estimated there were 1.1 million ‘gig’ workers.³⁵ It may be that there is a smaller portion of ‘gig’ workers if the figure is based upon self-employment. The age range for the gig cohort tends to be 16–30 year old.³⁶ Based on the Office of National Statistics data, 35–54-year-old

27. ONS, *Reconciliation of Estimates of Jobs: September 2017* (13 September 2017), 2.

28. *Ibid.*, 4.

29. ONS, *Self-Employed Workers in the UK – 2014* (2014).

30. In contrast, there are about 5.44 million workers in the UK public sector: ONS, *UK Labour Market: November 2017* (15 November 2017), 10.

31. ONS, *UK Labour Market: October 2017* (18 October 2017); ONS, *UK Labour Market: November 2017* (15 November 2017). The majority of this growth (since 2001) has come from full-time self-employment: ONS, *Trends in Self-Employment in the UK: 2001 to 2015* (13 July 2016), 44.

32. ONS, *Trends in Self-Employment in the UK: 2001 to 2015* (13 July 2016), 2.

34. RSA, *Salvation in a Start-Up?* (May 2014).

35. RSA, *Good Gigs: A Fairer Future for the UK’s Gig Economy* (April 2017), 13.

36. Full Fact <https://fullfact.org/economy/whos-working-gig-economy/> (accessed 29 November 2017).

workers comprise the majority of the self-employed.³⁷ The growth in self-employment had also been located in two notably different areas, construction (30%) and finance/business (20%). These are not the typical locales for ‘gig’ work such as Uber or Deliveroo. However, it may be that these roles fit within discrete task-oriented platforms such as TaskRabbit. An RSA survey also noted that about 80% of ‘gig’ workers worked what (using a traditional concept of a job) equated to part-time hours.³⁸ It may be that in fragmenting portions of what would have been called a job into discrete tasks, the ‘gig economy’ has created a larger pool of part-time work. This work may be classified as part-time simply because it is a default term for work falling outside of the orthodox job.

The question of who is a ‘gig’ worker and the classification of that work reveals that the ‘gig economy’ may be a repackaging of existing jobs in a manner that: (1) deconstructs the orthodox job into discrete tasks and as a result (2) reconfigures the remuneration scheme and relationship between service provider and service user. On the latter point, the importance of the intermediary (the one connecting the service provider and the service user) stands out as pivotal. The intermediary connects the two, but it also has much to gain by this type of arrangement.

[2] ‘Gig’ Work as Repackaging Jobs

The lure of greater individual control suggests an absence of subordination that inaccurately characterizes work in the ‘gig economy’. Instead, the pursuit of increased control over work recalls the tests for employment status that started with the ‘control test’ (itself crumbling soon after adoption in the nineteenth century UK³⁹). With the ‘gig economy’, contract continues to be the cornerstone; but with an amendment that the message remains the limitation of a worker’s control over her work.

Consider this statement by CrowdFlower’s CEO: ‘Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don’t need them anymore.’⁴⁰ Although intermediaries are in the most desirable position, it is still better to be

37. ONS, *Trends in Self-Employment in the UK: 2001 to 2015* (13 July 2016): 2.3% among those 45–54; 2.5% among those 35–44.

38. RSA, *Good Gigs: A Fairer Future for the UK’s Gig Economy* (April 2017), 20.

39. Lord Wedderburn, *Labour Law – From Here to Autonomy? A Franco-British Comparison* (Lord Wedderburn (ed), *Employment Rights in Britain and Europe – Selected Papers in Labour Law*, Lawrence & Wishart, 1991), 110.

40. Of interest, this quotation was cited in the following: European Parliament, *The Situation of Workers in the Collaborative Economy* (October 2016), 15.

the one seeking work to be done than the one performing the task: the underlying theme of app-based work. This disposition recalls common notions of the employment relationship in which the worker is in most ways subordinate.

The distinct nature of app-based work reveals some of its nuances. A brief comparison with ‘homework’ assists in unpacking these aspects. ‘Gig’ work is closer to the idea of ‘homework’ or piecework where a worker is paid per item produced. Finkin explored useful examples where the concern was ‘only with the price and quality of the product turned in [and not] time and money in the supervision of the work process. ... the pace of work need not be monitored, so long as a product of acceptable quality is produced on time’.⁴² Gig work renders the job more abstract insofar as it splinters tasks into components individually falling short of a job. A departure from the orthodox form of labour, there is a ready argument that since it is digital work, there should be other differences. Recall that this work is composed of discrete tasks; that is, components of a job, but never the entirety. It is not even the equivalent of a part-time job.

The business model depends upon the flexibility of employment status: ‘by characterizing the relationship as one of arms-length dealing with self-employed independent contractors, not employees’.⁴³ Flexibility is the message of the medium for ‘gig’ companies and its value can be seen in the numerous employment status cases involving gig companies. The singular motive ascribed to this framework by a House of Commons committee was profit.⁴⁴

Employment law has seen flexible work in different forms for some time. ‘Gig’ work has been found, so far, to be questionable on the analysis of mutual flexibility.⁴⁵ An insightful simplicity comes from the blunt statement of the District Court of Northern California in relation to Uber claiming to be a technology and not a taxi company:

Uber is no more a “technology company” than Yellow Cab is a “technology company” because it uses CB radios to dispatch taxi cabs, John Deere is a “technology company” because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a “technology company” because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are *not* technology companies if one focuses solely on *how* they create or distribute their products. If, however, the focus is on the substance of what the firm actually does (e.g., sells cab rides, lawn

[http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) (accessed 29 November 2017). This same CEO’s comments proved deleterious to employment status litigation in the United States; though these comments also yielded further investment: Cherry, *supra* n. 23, at 592–593.

42. Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 Comp. Lab. L. & Pol’y J. 603, 609 (2016) [references omitted].

43. *Ibid.*, 611.

44. House of Commons Work and Pensions Committee, *Self-Employment and the Gig Economy* HC 847 (1 May 2017), para. 19.

45. See *Pimlico Plumbers v. Smith* [2017] EWCA Civ 51 (permission to appeal to the UKSC granted 9 August 2017; hearing 20–21 February 2018) and *Uber v. Aslam* [2017] UKEAT 0056_17_1011.

mowers, or sugar), it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one.⁴⁶

When considering (what might be called) the philosophy underpinning Uber's argument, the premise quickly falls apart. It is tantamount to stating: 'I use technology therefore I am a technology company.' This premise entirely ignores the fact of a networked society in which technology has become ubiquitous, in day-to-day business as well as social communications. The above-cited passage may well become a plain language reference in the future for arguments that seek to distract from the fact of change and its impact.

Although it may be said that the 'gig worker' has more autonomy, for example over when to work, this is first a question turning on the particular facts of a case. Second, where there may be autonomy it is more a matter of degree. Finally, there is a cost to the work autonomy obtained in the 'gig economy': the fragmentation of work coupled with the commensurate fragmentation of remuneration. The larger picture is that 'gig' work contributes to the ongoing decline of the standard employment relationship. If the development of currency contributed to the 'recoding' of labour as a commodity,⁴⁷ the 'gig economy' adds another layer of code that further whittles away the notion of standard employment.

A supplementary note on the concept of the 'gig economy' is that analysis can replicate past constructs. App-based work has tended so far to focus on manual homework. With a platform such as TaskRabbit, application to cognitive homework is easily perceivable. The difficulty here is that cognitive work has been underdeveloped in labour law in comparison with the orthodoxy of industrial work. Professional work, such as legal services, has been repackaged into discrete tasks undertaken by a global workforce which in itself can drive down the associated workplace costs.

Concerns have been voiced at government level regarding the growth of self-employed workers. The tension is apparent when considering citizen demands on public funds (whether that is during times of low income or at retirement).⁴⁸ There is a likelihood of a tipping point at which time the state cannot accommodate the range of calls on it. Furthermore, 'gig' work may, like some NSE such as temporary work,⁴⁹ not even be a stepping stone to an improved financial situation. The more recent disquiet also reveals the absence of effective government

⁴⁶ *O'Connor et al v. Uber Technologies, Inc.*, C.A. No. 13-03826-EMC (N.D. Cal.), 10.

⁴⁷ A Aneesh, *Global Labor: Algocratic Modes of Organization*, 27 Socio. Theory 347 (2009), 365.

⁴⁸ This point has been mooted in House of Commons Work and Pensions Committee, *Self-employment and the gig economy* HC 847 (1 May 2017).

⁴⁹ On temporary work see De Stefano et al., in this volume.

action.⁵⁰ It has not been unprecedented to regulate this type of work. ‘Homework’ was the subject of regulation in the US pursuant to the *Fair Labor Standards Act* of the 1930s which provided the Secretary of Labor with the authority to restrict or prohibit industrial homework to ‘prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter, and all existing regulations or orders’.⁵¹ A query to be answered is whether or not the foreseeable calls on public funds of those who find ‘gig’ work to be insufficient for meeting financial obligations will be sufficient to compel a sustainable government response. On this point, the Work and Pensions Committee and the Business, Energy and Industrial Strategy Committee have published *A Framework for Modern Employment*⁵² which contains a draft bill. Among other points, the bill requires: individuals to be classified as either employees or workers, creating a default worker status⁵³ (where the burden of proof has been placed on employers to establish individuals are self-employed); as well as a premium hourly rate for non-guaranteed work,⁵⁴ targeting zero-hours contracts.⁵⁵

§4.03 Regulation by Algorithm

As presently perceived, algorithms provide all the certainty that numbers ostensibly offer. And so, they could be game changers in labour law. Algorithms in the workplace recall the spirit of Frederick Winslow Taylor’s ‘scientific management’, where workers required an unusual amount of cajoling.⁵⁶ Algorithms afford the metrics to coax optimal effort.⁵⁷ To Taylor’s chagrin, algorithms are immune from neither critical analysis nor scrutiny. Viewing them as potential sources of information, instead of solutions in themselves, can yield a better understanding of technology in the workplace. Moreover, further investigation can contribute

50. Susan Bisom-Rapp has called this ‘the paradoxical role [played by government] in the growth of nonstandard work and increasing precariousness’: Susan Bisom-Rapp and Urwana Coiquaud *The Role of the State Towards the Grey Zone of Employment: Eyes on Canada and the United States*, 58 Rev. Inter. Econom. (2017), para. 5.

51. Finkin, *supra* n. 42, at 607 citing 29 U.S.C. §211(d).

52. HC 352 (20 November 2017). This report takes into consideration testimony before the committees as well as the *Taylor Review*.

53. Amending the Employment Rights Act 1996.

54. Amending the National Minimum Wage Act 1998.

55. The draft bill can be found at

https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/352/35209.htm#_idTextAnchor048 (accessed 29 November 2017).

56. Taylor called ‘underworking’ the ‘greatest evil with which working-people in both America and England were afflicted’: Taylor, *supra* n. 4, at 13–14.

57. Algorithms can be used at any point in the employment process, such as hiring. The focus here is on work performance algorithms. Algorithms may also present costs savings at management level on tasks such as scheduling: Cherry, *supra* n. 23, at 596–597.

to ‘a more nuanced anticipation of future developments’⁵⁸ as well as assist in avoiding the ‘transparency fallacy’.⁵⁹ A message to be derived from the medium of algorithms is that the workplace is not devoid of social considerations.⁶⁰

One of the difficulties with algorithms is their design. For example, an algorithm that assigns gendered pronouns according to the individual’s title (Mr or Ms) may be set as the male default for titles outside of those two, such as Professor. This discrimination instance is a simple illustration but it is not the focus here. This discussion centres around design aspects related to worker monitoring in regulating the personal work relationship.

The GDPR⁶¹ overarches this topic. Within this framework, employers fall under the definition of ‘controller’.⁶² The GDPR contemplates ‘profiling’ algorithms for workplace outputs.⁶³ Article 22 provides the data subject with a right to avoid a decision based solely on automated processing that carries a legal effect. The distinction targeted here is between automated decision support (where a person would make the final decision) and automated decision-making (where there is no human judgement involved). Article 22 does not apply where the decision arrived at by automated processing ‘is necessary for entering into, or performance of, a contract between the data subject and a data controller’. The Article 29 Working Party, in its *Opinion 2/2017 on data processing at work*,⁶⁴ explained that ‘performance of a contract and legitimate interests can sometimes be invoked, provided the processing is strictly necessary for a legitimate purpose and complies with the principles of proportionality and subsidiarity’. It remains unclear what qualifies as performance of a contract.

Employer monitoring of employees serves as an instructive scenario for exploring the GDPR, which contains an expansive definition of ‘processing’.⁶⁵ Additionally, lawful processing of data includes that ‘necessary for the performance of a contract to which the data subject is party’.⁶⁶ When an employer has referenced, for example, a social media policy within the employment contract, it may form part of the parameters for performance of the

58. Daithí Mac Sithigh, *Medium Law* (Routledge, 2018), 16.

59. Lilian Edwards and Michael Veale, *Slave to the Algorithm? Why a ‘Right to an Explanation’ Is Probably Not the Remedy You Are Looking For*, 16 *Duke L. & Tech. Rev.* (2017) 18

60. There is a more pronounced interconnectedness in labour law to facets of human life than may be as evident in other legal disciplines.

61. Regulation (EU) 2016/679. An overview of the GDPR is found in Rónán Kennedy and Maria Helen Murphy, *Information and Communications Technology Law in Ireland* (Clarus Press, 2017).

62. GDPR Art. 4(7).

63. Article 4(4) (profiling).

64. WP 249 (8 June 2017).

65. GDPR, Art. 4(2).

66. GDPR, Art. 6(1)(b).

contract. Consequently, the rights outlined within the GDPR may be attenuated more than at first appearance. Perhaps, there will need to be a distinction made (such as monitoring the content of communications, duration or volume of data traffic).⁶⁷ The decision in *Bărbulescu v. Romania*⁶⁸ illustrates how monitoring of employees intersects with the processing of personal data. Based on the Grand Chamber's ruling, at work monitoring may be permissible in order to ensure that workers are performing contractual duties. In order to do so, an employer must put into place certain safeguards.⁶⁹ The employee must be 'informed in advance of the extent and nature of his employer's monitoring activities, or of the possibility that the employer might have access to the actual contents of his communications'.⁷⁰ With the blending of social and work lives through social media,⁷¹ the challenge of monitoring via algorithms is compounded. Even in the workplace, there is scope for protection of privacy.⁷² Any conduct of an employer as a data controller must be proportionate. As such, the ruling anticipates the consent provisions of the GDPR in Article 7.

Employers have relied upon employee consent to the employment contract at the point of hiring to justify a range of subsequent activities that can take place during the life of the employment relationship. The GDPR scrutinizes this type of consent. Article 7(2) emphasizes clarity, accessibility and plain language when consent is sought.⁷³ Based on this provision, an employer would likely need to draw the worker's attention specifically to a distinct part of the contract that deals with special categories of personal data processing. Article 7(4) reiterates the importance of defining consent to processing of personal data necessary for the performance of a contract. Although the consent provisions endeavour to protect the individual, the GDPR has simultaneously galloped into a long-held debate by creating a potentially impractical expectation. Consent in contract law has long been a matter of debate because of the inherent difficulty in determining what constitutes voluntary consent within the context of contemporary circumstances. There may be motivating factors for consenting to a contract which could well be more generally characterized as coercion of the will⁷⁴ and

67. The latter points being noted in Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

68. Application 61496/08 (5 September 2017).

69. These are enumerated at *ibid.*, para. 121.

70. *Ibid.*, paras 78, 121.

71. *Ibid.*, para. 71.

72. *Ibid.*, para. 80.

73. Article 7 would be read in conjunction with Art. 9 (processing of special categories of personal data). In particular Art. 9(1), (2)(a), (b) would be applicable.

74. Considered in the labour law context in Lord Wedderburn, *Economic Duress*, 45 Mod. L. Rev. 556 (1982).

yet still not vitiate consent.⁷⁵ The rapid entrenchment of new technology within the day-to-day of any business queries the viability of obtaining the stipulated form of workers' permission.

Additionally, the framework of the GDPR raises a question about the separation between ancillary function and regular systematic processing. The matter of monitoring based on algorithms that keep track of (for example) the number of times social media platforms are accessed at work and for how long is problematic. If the demarcation point is data processing that is regular versus irregular, employer monitoring raises some issues. Although the remarks were made in the context of appointing a Data Protection Officer pursuant to Article 37 of the GDPR, the Article 29 Working Party touches on the present query. It interpreted 'regular' and 'systematic' (respectively): 'Ongoing or occurring at particular intervals for a particular period; Recurring or repeated at fixed times; Constantly or periodically taking place'; and 'Occurring according to a system; Pre-arranged, organised or methodical; Taking place as part of a general plan for data collection; Carried out as part of a strategy'.⁷⁶ Monitoring workers' online activity would seem to fall within this spectrum. The framework of the GDPR, in this instance, demonstrates the intricate nature of the outlined obligations and protections. It also compels concerted attention in order to map out important points of distinction.

§4.04 Conclusion

This chapter emphasizes the way labour law has been recently diverted by the means instead of the effect. Workplace metrics constitute a significant challenge: the search for a 'scientific' way in which to manage the workforce. Algorithms have been imbued with this potential. The message in this medium rests in the same predisposition that we can trace to Frederick Winslow Taylor; that is, the presumption of underperformance and the correlative necessity in worker cajoling mechanisms.

75. The common law debate has been defined by the mental state and contextual approaches where the former describes what is going on in an individual's mind and the latter references complete freedom to consent absent any pressure: Stephen A. Smith, *Atiyah's Introduction to the Law of Contract* (OUP, 2006), 275. In response, responsible use has been suggested as an alternative framework: Executive Office of the President of the United States, 'Big Data: Seizing Opportunities, Preserving Values' (May 2014) https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf (accessed 29 November 2017).

76. Article 29 Working Party, *Guidelines on Data Protection Officers*, WP243 (13 December 2016), 8.