HOW DOES THE UBER DECISION IMPACT THE GIG ECONOMY AS A WHOLE?

Analysis of Uber v Aslam [2021] UKSC 5

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"UBER DRIVERS NOT IN BUSINESS ON THEIR OWN ACCOUNT", SUPREME COURT FINDS

We take a deep dive into this judgment which has had a final say on whether Uber drivers (and potentially other gig economy individuals) are workers.

A. ISSUES

- Were Uber drivers working under workers' contracts (and therefore qualify for the national minimum wage, paid annual leave and other workers' rights)?
- If so, were the drivers working under such contracts whenever they were logged into the Uber app (and not just when they were driving passengers to their destinations)?

B. PROCEEDINGS BELOW

The employment tribunal found that the drivers were "workers" as defined under s.230(3) of the Employment Rights Act 1996 (**ERA**), more commonly known as the limb (b) workers. The tribunal further found that the drivers were working for Uber London during any period when a driver had the Uber app switched on, was within the territory in which he was authorised to work and was able and willing to accept assignments.

The EAT and the Court of Appeal dismissed Uber's appeal of the tribunal decision and the issues ultimately ended up in the Supreme Court. The case was heard on 21 and 22 July 2020 and the judgment was handed down on 19 February 2021.

C. BACKGROUND KNOWLEDGE

Section 230(3) ERA

The term "worker" is defined by s.230(3) 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 or any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly."

Limb (b) has three elements:

(i) a contract whereby an individual undertakes to perform work or services for the other party;

(ii) an undertaking to do the work or perform the services personally;

(iii) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual

This case was concerned with the first element of limb (b) viz., whether there was a worker's contract. There was no dispute between the parties as to whether the services were performed personally (which they were) and that Uber was not a client or customer of the drivers.

The issue of whether there is a right of substitution in the contract and whether this was actively utilised in practice by the workers is an issue that is more pertinent to the second element of limb (b). This issue did not arise in this case (see below Section E Analysis).

Lady Hale ***Bates van Winkelhof*** maintained that employment law distinguishes between three types of people:

- those employed under a contract of employment;
- those self-employed people who are in business on their own account;
- intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else.

D. SUPREME COURT JUDGMENT

Issue 1: Were drivers working under workers' contracts (and therefore qualify for the national minimum wage, paid annual leave and other workers' rights)?

The central plank of this judgment centres whether Uber drivers are to be regarded as working under contracts with Uber whereby they undertook to perform services for Uber as opposed to in business on their own account. The conclusion that Uber drivers are workers and not in business on their own account is based on three premises which will be considered below.

1. THAT WRITTEN TERMS OF A CONTRACT BETWEEN THE DRIVERS AND UBER ARE NOT A STARTING POINT IN DETERMINING THEIR WORKER STATUS.

The Supreme Court maintained that to state that a contract is a starting point is at odds with the purpose of statutory protection afforded to workers. Employers are often in a position to dictate contract terms and the individual performing the work has little or no ability to influence those terms that give rise to the statutory protections stipulated under the National Minimum Wage Act or the Working Time Regulations.

This approach is further supported by the fact that there is prohibition on contracting out of such statutory protections as can be found under s.203 (1) ERA which renders as null and void any provision or agreement that purports to exclude or limit the operation of the statute.

2. THE STARTING POINT FOR DETERMINING WORKER STATUS IS THAT ENDORSED IN THE CASE OF CARMICHAEL V NATIONAL POWER.

The House of Lords decision in Carmichael v National Power [1999] 1 WLR 2042 stated that where there is no written contract between the parties or at least where the written contract did not represent the true nature of the relationship, it would be appropriate to look at the following factors:

- the language of the correspondence between the parties;
- the way in which the relationship had operated;
- evidence of the parties as to their understanding of it.

The Supreme Court stated that although written terms should not be ignored they are not to be treated as a starting point for analysis, especially where the bargaining power of the parties means that the individual had no say in drafting the terms and the written agreement would not represent how the parties actually conducted themselves. The Court also maintained that often the objective of the written terms is to circumvent altogether the statutory protections that would otherwise be afforded to the individuals concerned.

3. IN DETERMINING THE STATUS OF AN INDIVIDUAL WORKER, THE DEGREE OF CONTROL EXERCISED EMPLOYER IS OF UTMOST IMPORTANCE: THE GREATER THE CONTROL, THE MORE LIKELY THE INDIVIDUAL WILL BE CLASSIFIED AS A WORKER.

Key indicators of this control are subordination and dependence upon another person (employer) in relation to the work done. The greater the subordination and dependence, the greater the degree of control exercised by the employer.

CONCLUSION

Applying the above analyses, the Supreme Court identified five aspects of the employment tribunal's findings to support the conclusion that Uber drivers were working for and under contracts with Uber.

- The remuneration paid to the drivers is fixed by Uber and the drivers have no say in it.
- The contractual terms under which they work are dictated by Uber.
- Once logged onto the Uber app, the driver's choice of accepting or rejecting requests is constrained by Uber, for example if the acceptance rate falls below a certain percentage then a penalty is imposed on the driver by way of being logged out for 10 minute before they can be logged back on.
- The way the services are delivered by the drivers is tightly controlled by Uber, for example under the rating system, if it falls below a certain level for a period of time Uber can effectively terminate the contract with that driver.
- Restriction of communication between driver and customer means that the drivers have little or no ability to improve their economic position through professional or entrepreneurial skill other than working longer hours whilst constantly meeting Uber's measures of performance.

Issue 2: Were the drivers working under workers' contracts whenever they were logged into the Uber app (and not just when they were driving passengers to their destinations)?

Put the question another way: during what periods where the drivers working?

The tribunal at first instance found that a driver was working under a worker's contract when:

- he had the Uber app switched on;
- he was within the territory in which he was authorised to use the app; and
- he was ready and willing to accept trips

Uber argued that the drivers were only working under workers' contracts when they were actually driving passengers to their destinations. This is because, they argued, the driver had a right to turn down work even when they were logged onto the app and so the driver had no contractual obligation to undertake work for Uber whilst logged onto the app.

The Supreme Court rejected this argument on several grounds:

- that the driver has the right to turn down work does not preclude a finding that he is employed under a worker's contract so long as there is an "irreducible minimum of obligation" i.e. if there is an obligation to do some work, then the right to turn down work is not fatal.
- the Welcome Packet issued to drivers at the start referred to logging onto the Uber app as "going on duty" and instructed drivers that "Going on duty means you are willing and able to accept trip requests".
- in reality, there was more than an irreducible minimum of obligation because a penalty would be imposed on those who turn down work too often.

E. ANALYSIS

This judgment is consequential not least because it does not just affect Uber but the companies in the wider gig economy which will have to (if haven't done so already) review and rearrange their working model, in some cases quite drastically. As part of this effort, any analysis that relied on previous judgments that focused on the right of substitution will have to be adjusted to take into consideration this judgment. Although the substitution analysis is relevant to the second element of limb (B) under s.230(3) ERA (namely, personal service), this judgment will form the bedrock of determining the worker status going forward.

A key takeaway is that the Supreme Court has somewhat relegated the importance of written agreements between the parties as a mere factor to consider, and not a starting point for substantial analysis. This does not mean that employers should pay less attention to the written agreement but it does mean that the employers have to place greater weight and effort into aligning the written agreement with the actual practical aspects of how the workers work.

Another key commercial impact of this judgment is that attempts to maintain the quality of their brand will likely be construed as tools for control that enhance subordination and dependence of workers on the organisations.

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