SCL SOCIETY OF CONSERVATIVE LAWYERS

UBER V ASLAM

A New Direction for the Gig Economy (Part I)

Jill Andrew and Hugh Rowan

About the authors

Jill Andrew, Principal of Beam Law and Member of the SCL Executive Committee. Jill is a solicitor who has practised in employment law for over 40 years, formerly a Partner and Head of Employment Law with a number of leading practices.

Hugh Rowan holds a Master of Laws in Bar Training from City Law School after a degree in Philosophy and Theology. He was the 2019 Wilfred Watson scholar at Gray's Inn. He works regularly with the Free Representation Unit on employment tribunal cases. Hugh starts pupillage later this year at Tanfield Chambers.

Acknowledgements

The views expressed in this paper are those of the authors alone, who take sole responsibility for all errors and omissions.

London, April 2021

INTRODUCTION

The year before the pandemic hit the UK it was estimated that nearly 1 in 10 workers, or 5 million working-age adults, worked in the 'gig' economy.[1] This was double what it had been in 2016. The 'gig' or 'platform economy' refers to the rise of temporary freelance jobs which can be picked up at short notice. These are often transportation-based roles, for people, parcels, or food. Gig contracts are not to be confused with zero-hour contracts where employers provide an hourly wage but offer no fixed minimum hours.

The attraction of the gig economy is its flexibility. Workers can work at times which suit them to meet their income needs and companies can source staff to meet fluctuating demand. However, critics contend that these benefits only really accrue to the company and not the worker. While the company has an easy, cheap source of labour, self-employed gig workers are not afforded the statutory protections of their employed counterparts. More significantly they are not guaranteed the national minimum wage, and in 2018 a quarter of workers were earning less than that.[2]

This may all be about to change. In February, the Supreme Court handed down judgment in a claim brought by 25 Uber drivers against their putative employer.[3] The Supreme Court rejected Uber's argument that the drivers were self-employed. Instead, it unanimously held that they were 'workers' and thus entitled to a number of additional rights and protections. This paper is the first of two in a series on the future of employment law. This first paper will consider the Uber judgment and look at its immediate effect on the gig economy. The second paper will explore the wider ramifications of the judgment in the context of the 2017 Taylor Review and the forthcoming *Employment Bill* pledged this parliament.[4]

[1] This included those who worked at least once a week in a gig economy job. Statistical Services and Consultancy Unit (SSCU) & University of Hertfordshire and Hertfordshire Business School (HBS), '*Platform Work in the UK 2016-2019*', 2019

[2] Department for Business, Energy and Industrial Strategy, *The Characteristics of those in the Gig Economy*, Final Report, (February 2018), p. 6.

[3] [2021] UKSC 5.

[4] See Prime Minister's Office, *The Queen's Speech: Background Briefing Notes*, 19 December 2019

WHAT ARE 'WORKERS'?

UK employment legislation recognises three categories of employment: employee, worker, and self-employed. Employees are subordinate and dependent on their employers but have access to full range of employment rights. Workers are less dependent and have fewer rights, and the self-employed who, are largely free of control, have virtually no protection under employment law. Table 1 sets out the key differences between these categories:[5]

Unhelpfully, these categories are not clear, with the employment legislation, equality legislation, and social security legislation each using marginally different tests.[6] The problem is further compounded by tax law which only distinguishes between employees and the self-employed, ignoring any middle category. Pension regulations, by contrast, have their own tripartite distinction which again fails to align with the employment law categories. The consequences of this are discussed further below.

[5] s.230(2) Employment Rights Act 1996. Some of these rights are affects by qualifying periods.

[6] See: s. 230 *Employment Rights Act* 1996; s. 83 Equality Act 2010; and, s. 2 *Social Security Contributions and Benefits Act* 1992.

TABLE 1: KEY DIFFERENCES BETWEEN CATEGORIES OF EMPLOYMENT

	EMPLOYEES	WORKERS	SELF-EMPLOYED
Basic test	A contract of service. This arises where: • Work is done personally for pay; • The employer must provide the work and the employee must do the work (mutuality of obligation); • The employer has a degree of control over the work; and • The contract is consistent with the rights and benefits due to an employee.	Any other contract where: • Work is done personally; and, • The other party to the contract is neither a customer nor a client.	Indicators include: • No personal service obligation, meaning the work can be sub-contracted. • Freedom to choose when, where and how the service is performed; • No mutuality of obligation.
Rights	Main rights include: • national minimum wage; • protection from wage deductions; • health and safety protection; • whistleblowing rights; • working time rights (breaks, paid holidays, and limits on working week); • parental leave; • unfair dismissal rights; • redundancy rights; • flexible working rights; • notice period.	Main rights include: • national minimum wage; • protection from wage deductions; • health and safety protection; • whistleblowing rights; • working time rights (breaks, paid holidays, and limits on working week).	Right to health and safety protection while working for an employer.
Tax	• Income tax and primary National Insurance Contributions (NICs) deducted at source by employer under PAYE. • Employer also liable for secondary NICs.	• No 'third' category for tax law (see below).	• Payments received gross of tax. • Responsible for own tax and NICs

UBER BV V ASLAM: THE FACTS

Uber is a ride-hailing app. When the case was brought in 2016 it had approximately 40,000 drivers and 2 million prospective customers who had downloaded the app.[7] The process of 'booking' an Uber cab was relatively simple. When a passenger wished to use the service they simply had to log on to their app and request a driver. Nearby drivers would be notified of this request and had ten seconds to accept. If accepted the app then acted as a messaging platform connecting the driver and passenger allowing them to arrange precise location for pick up. Once the trip was completed Uber servers calculated the fare depending on time spent, distance covered, and any 'surge' multipliers that may have applied in high demand areas. This sum was debited to

[7] *Aslam & Ors. v Uber BV* [2016] 10 WLUK 681, §1

the passenger's stored payment details and an 'invoice' generated which the driver had access to. Uber would then pay make a weekly payment to their drivers for the sums paid by passengers less a 'service fee', which in the case of these claimants was 20%.[8]

Drivers used their own vehicles and were issued with written 'service agreements' setting out the terms of work. These clearly stated that Uber was merely a platform and did not itself provide any transportation services. The only "legal and business relationship" was between the driver and passenger.[9] Hence, Uber argued the drivers were self-employed independent contractors and it was merely an agent who arranged the contract and collected payment from passengers.

[8] Ibid., §15-22.

[9] Ibid., §32-38

UBER BV V ASLAM: JUDGMENT

Uber's argument was rejected by the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal. Leave to appeal to the Supreme Court was given on two issues namely whether the drivers were 'workers' and if so, what constituted their 'working time'.

The Supreme Court held that there was no written contract between the parties and therefore the true relationship had to inferred by the parties' conduct. Factually speaking, the Supreme Court held that as Uber, not the driver, had the Private Hire Vehicle (PHV) licence with Transport for London (TfL) they were required to accept private hire bookings as principal. Hence Uber was engaging drivers to carry out the bookings and was not acting as those drivers' agent.

It has been long debated by employment lawyers whether normal contractual principles are applicable to employment contracts given the nature of the employment relationship and the relative inequality in the bargaining power between the employer and employee. In *Autoclenz Ltd v Belcher*[10] the Supreme Court made it clear that workers' contracts should not be determined by the ordinary principles of contract law and said that such a departure was justified because of the very unequal bargaining power between the parties. The Supreme Court emphasised the need to look at the nature of the relationship and not any written agreement between the parties.

In the Uber case the Supreme Court developed this aspect of the law further and concluded that written terms should not be the starting point in defining the relationship between the parties. Instead, the Supreme Court took a purposive interpretation, stating: "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."[11] In this case, the Supreme Court held that the purpose of the legislation was to protect vulnerable workers and prevent exploitation and that such rights lay in statute and not in contract.

Using this starting point, the Supreme Court highlighted five factors to show that the drivers were workers and not merely self-employed:

1. *Control of Pay*: Uber dictated the fare and drivers were not permitted to charge above this;
2. *Control of Terms*: Uber dictated the terms of service to drivers;
3. *Control of Trips*: Uber would impose 'penalties' on drivers who refused too many trips, thereby constraining their choice whether to accept or reject a passenger request;
4. *'Significant' Control of Service*: A number of measures, such as a driver rating system, were used to control the quality of service provided. If a driver rating fell too low, then the driver's relationship with Uber would end; and
5. *Control of Communication*: Uber restricted driver or passenger from having access to each

[10] See: *Autoclenz Ltd v Belcher* [2011] UKSC 41

[11] §70, quoting Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454, §35.

other's contact details to prevent a relationship extending beyond an individual ride.

It is clear from this judgment that the well-defined and tightly controlled parameters under which Uber drivers were allowed to operate made them subordinate to Uber. Drivers could only earn more by working more. There was no scope for them to do so through entrepreneurship as with other self-employed people.

The second issue for the Supreme Court was when a driver could be considered to be working for Uber. The Supreme Court declined to answer this question in the abstract, and on the facts of the case agreed with the Employment Judge's decision that an Uber driver was working whenever logged onto the app and available.

UBER'S FIRST RESPONSE

Uber's initial response was cautious. At first Uber stated that the judgment only related to a "small group of drivers using the Uber app in 2016", since which time Uber had made "significant changes to [their] business" meaning "many of the examples called out in the judgment are no longer relevant."[12] It is true that over the last few years Uber has taken some steps to protect its drivers, for example in 2018 it introduced an insurance scheme in partnership with AXA to cover injury, sickness, parental leave, and jury duty.[13]

Uber subsequently sent a new survey to all of its UK drivers which they claimed would inform their response plan. In the meantime, some 12,000 of Uber's current 70,000-strong workforce joined a number of suits to claim compensation.[14] Keller Lenkner and Leigh Day, the firms representing them, estimate each claimant is entitled to around £10,000–12,000 for minimum wages and holiday entitlements due to them.[15]

Then, in March 2021, Uber pulled its own U-turn. A month after the Supreme Court judgment Uber decided to recognise the worker status of its drivers and from the middle of that month all drivers would be entitled to holiday pay, pension plans, and the national minimum wage while driving passengers.

If agreement cannot be reached with the original 25 drivers the case will return to the Employment Tribunal for a remedy hearing. At stake will be back pay for the hours where the Uber drivers did not earn the minimum wage as well as to cover their holiday and break entitlements.

[12] Uber UK, An Update on today's Supreme Court verdict, (February 19 2021).

[13] Ashleigh Webber, Uber to give drivers medical cover, sick pay and other benefits, Personnel Today (24 May 2018).

[14] Legal Futures, Thousands of claims lodged against Uber to enforce worker rights following landmark Supreme Court Ruling, 2 March 2021

[15] Ibid.

UBER'S REVERSAL

Uber is yet to reach profitability,[16] its business model relies on it not having onerous financial commitments to its drivers. As such Uber may initially have thought to amend its terms of service so as to escape classifying all of its drivers as workers. However, this approach has been tried and failed in the past. For example, CitySprint attempted to amend its contracts after a similar judgment in 2016.[17] A second case was brought in 2018 which found that the change to the terms had made no difference to the underlying status of the workers.[18]

Moreover, the Supreme Court made it clear that any attempt to contract out of the employment legislation directly or indirectly is void.[19] Even Uber's armies of lawyers would struggle to evade

[16] Uber Investor Report, 10 February 2021.

[17] *Dewhurst v CitySprint UK Ltd ET/2202512/2016*.

[18] *O'Eachtiarna and others v CitySprint (UK) Ltd* ET/2301176/18.

[19] §80.

the consequences of this judgment. If they want to ensure that drivers are truly self-employed then Uber would need to completely remodel its relationship with its drivers and ensure that its terms do not create a subordinate relationship. However, the scope to do this may be significantly limited by the PHV licence which Uber has with TfL. There is an outlier in the case law coming from the food courier service, Deliveroo. In 2016 Deliveroo was able to persuade the Central Arbitration Committee that its riders were not 'workers'.[20] As riders were able to substitute someone else to do the job for them and even cancel during a job without direct penalties the service was not 'personal', and hence they were not workers. However, because of the safeguarding constraints placed on Uber's PHV licence to operate following its revocation in 2019,[21] it is inconceivable that drivers would be allowed to genuinely substitute themselves and so fall within the self-employed category.

The majority of case law in this area in the last five years has fallen in favour of the worker, with recent findings of worker status being made against Pimlico Plumbers,[22] Addison Lee,[23] and Hermes.[24] It is likely that such judgments are going to become even more common in Employment Tribunals given the Supreme Court's purposive statutory interpretation in the Uber judgment. Lord Leggatt was unequivocal in his statement of the purpose of the 'worker' category in employment legislation: "It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment."[25]

With nearly 20% of its workforce preparing to bring cases against the taxi giant,[26] Uber had lost its bargaining power and was out of options. Following the lead of Hermes, the courier service, Uber has now gone hat in hand to its drivers offering them all worker status.[27] Nonetheless, conscious of the financial burden this has created, Uber held out on one point, namely *when* its drivers are workers. Although the Supreme Court held on the facts that drivers were entitled to minimum wage whenever logged onto the app, it did not decide, because it did not need to do so on the facts of this case, what happens when a driver is logged on to multiple hailing apps. Uber have referenced this and are now only offering the minimum wage once drivers have accepted a trip request.

The National Minimum Wage

Under the National Minimum Wage Act 1998, employers are liable for fines and criminal charges if they fail to pay workers an hourly figure at least equal to the national minimum wage. The hourly wage is calculated differently depending on whether the worker is on a salary, paid per hour, paid according to their output, or paid for work unmeasured.[28] Uber's drivers were found to fall into the last, residual, category.[29]

In this category workers must be paid for their 'working time'[30] which includes "any period during which they are working, at the employer's disposal and carrying out their activity or duties".[31] The Supreme Court sided with the Employment Judge that any answer to this question was a matter of fact and degree, but in 2016 Uber's dominant market share led the Employment Judge to

---

[20] *Independent Workers Union of Great Britain v RooFoods Ltd (t/a Deliveroo)* TUR1/985(2016)

[21] BBC News, Uber Loses Licence to Operate in London, 25 November 2019.

[22] *Pimlico Plumbers Ltd v Smith* [2014] 11 WLUK 646; *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51; *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29.

[23] *Lange and others v Addison Lee Ltd* ET/2208029/2016; and *Addison Lee Ltd v Gascoigne* UKEAT/0289/17 [2018] 5 WLUK 202.

[24] *Ms E Leyland and Others v Hermes Parcelnet Ltd*, 1800575/2017

[25] *Uber BV v Aslam* [2021] UKSC 5, §71.

[26] Figures collected by Wired and cited in Natasha Bernal, The Supreme Court owned Uber. What comes next is much worse, Wired UK (25 February 2021).

[27] Uber UK, Worker Announcement – Frequently Asked Questions, Driver Announcements (16 March 2021).

[28] Regulations 3, 4, 5, 6 of the National Minimum Wage Regulations 1999.

[29] *Uber BV v Aslam* [2021] UKSC 5, §138

[30] Regulation 45(a), National Minimum Wage Regulations 2015.

[31] Regulation 2(1), Working Time Regulations 1998.

conclude that drivers were, "in practical terms, unable to hold themselves out as available to any other PHV operator."[32]

Since 2016, a number of other ride-hailing apps have arrived in the UK. Competitors to Uber in the UK now include Bolt, Hailo, Kabbee, Kapten, Lyft, Ola, ViaVan, Wheely, and Xooox. If a driver has the ability to genuinely switch between these apps then it is unlikely that a court will find that a driver is working at the disposal of Uber, rendering Uber solely liable for the whole payment of the national minimum wage. Whether drivers will be able to pursue a claim for the national minimum wage at all times they are logged on to the various available apps will therefore depend on whether they can, in practical terms, switch between multiple apps at once and how liability is to be assessed across the range of providers in such circumstances.

[32] Judge Eady QC, quoted by Lord Leggat in *Uber BV v Aslam* [2021] UKSC 5, §136.

Although the Supreme Court did not find it necessary to decide this issue on the facts of the Uber case, litigation on the "multiple apps issue" is anticipated and is clearly something the courts will need to resolve.

The problem of what time is to be included in calculating the national minimum wage was considered by the Supreme Court in *Mencap v Tomlinson-Blake*[33] shortly after the Uber decision. In this case the Supreme Court held that time spent on 'sleep-in' shifts was not to be counted towards the national minimum wage. Although factually distinct[34] there is a clear suggestion between these two cases that the Supreme Court will place limitations on what should be counted as working time, as this may have wider implications for the gig economy and the economy as a whole.

[33] See: *Mencap v Tomlinson-Blake* [2021] UKSC 8.

[34] The *Mencap* case applies to 'time work' and 'salaried work' not 'unmeasured work'.

WHAT NEXT FOR UBER, TFL AND HMRC

There are two other entities that have a key role to play in the Uber dispute. The first is TfL, who control Uber's PHV licence to operate in London which comes up for renewal in March 2022. Lord Leggatt in the Supreme Court cast some doubt over the legality of Uber's licensing regime in light of the Private Hire Vehicles (London) Act 1998.[35] TfL, who have clashed with Uber before over licensing terms, will likely examine this judgment closely and may put pressure on Uber to recognise the rights of its drivers as part of its licensing.

The other major player in this dispute will be HMRC, who have the power to make determinations on the national minimum wage, and who could force Uber to pay its workers when logged on. Indeed, HMRC is currently already involved in an assessment of Uber's VAT liability potentially amounting to £1.5billion in retrospective liabilities.[36]

[35] *Uber BV v Aslam* [2021] UKSC 5, §47

[36] Securities and Exchange Committee, Quarterly Report on Uber Technologies Inc., 30 June 2020, p.38.

In the meantime, this judgment and Uber's subsequent response is likely to have profound implications for those working in the wider gig economy. It is, no doubt, of wider significance that institutional investors withheld support for Deliveroo's recent flotation on the grounds, inter alia, of the poor terms and conditions of those working for them. In the Uber judgment the primacy of employment rights was made very clear and was justified as necessary to address the imbalance between contracting parties and the need to protect vulnerable workers within the gig system. Moreover, the spotlight this case has shone on the gig economy is likely to inform the Government's forthcoming Employment Bill.[37] Above all however, Uber's U-turn and the outcome of the Deliveroo floatation has shown the other major players in the gig economy that there is both an economic and legal need to treat those working for them fairly and failure to do so will almost certainly have an adverse effect on their business.

[37] As promised in the December 2019 Queen's Speech.

For further information on the Society of Conservative Lawyers contact:
The Administrative Secretary, The Lodge, Deaks Lane, Cuckfield RH17 5JB
administrator@conservativelawyers.com
www:conservativelawyers.com

April 2021