



EMPLOYMENT LAW ARTICLE: R.I.P GIG ECONOMY?

An examination of the recent Supreme Court decision in Uber BV and others v Aslam and others

Romana Canneti (1997)

On February 19th, the Supreme Court dismissed Uber's appeal upholding the decision of the Employment Tribunal: a ruling upheld both by the EAT and the Court of Appeal. Lord Leggatt's judgment confirmed that the claimant Uber drivers were workers for the purposes of the Working Time Regulations, national minimum wage legislation, and the Employment Rights Act 1996. In a unanimous judgment, the Supreme Court sent the case back to the Employment Tribunal to determine the claims on their merits.

<https://www.bailii.org/uk/cases/UKSC/2021/5.html>

Background

As Lord Leggatt explains at [38] of his judgment, '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 and undertake work for their clients or customers; and an 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. Some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all "workers"'.

A "worker's contract", according to section 230(3)(b) of the Employment Rights Act 1996, has three requirements: (1) that the individual undertakes to perform work or services for the other party; (2) an undertaking to do the work or perform the services personally; and (3) that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.

The distinction matters because the Employment Rights Act 1996 [ERA] gives workers the right to bring a whistleblowing claim without suffering detriment, as well as an entitlement to holiday pay. Both were issues in these proceedings.

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The four main strands of the decision

1. The first issue concerns agency: on Uber's case, the company acts as the agent of the drivers carrying passengers using its App, and is not hiring those drivers' services. According to Uber, drivers contract directly with the passengers. Whilst recognising that agency may potentially be inferred in an agreement from the conduct of the parties, the Supreme Court saw nothing in the evidence to justify such a finding. The lack of any written agreement appointing Uber as the agent was fatal to Uber's argument.

More importantly, Lord Leggatt found it likely that under the regulatory regime which regulates mini cab drivers both in London and in the rest of the UK, operators of private hire vehicles ('PHV's) who accept bookings from customers do so as principal, not agent. The operation of PHVs in London is governed by the Private Hire Vehicles (London) Act 1998 and associated regulations, which dictate that it is the person who handles the booking who sets and communicates the fare to the passenger. Uber, as the PHV licence holder, does exactly that on its App, with 'Riders' (Uber-speak for passengers) accepting the quoted fare independently of any involvement by the driver. The sole control exercisable by a driver in relation to fares is the discretion to *reduce* a specified fare should they wish to do so - a rare event, one might think.

That said however, Lord Leggatt arguably leaves the agency door open to other PHV operators [49]: 'It is unnecessary, however, to express any concluded view on whether an agency model of operation would be compatible with the PHV licensing regime because there appears to be no factual basis for Uber's contention that Uber London acts as an agent for drivers when accepting private hire bookings'.

And, at [53]: 'What is required is an overt act by the principal conferring authority on the agent to act on the principal's behalf. Even if lacking such actual authority, a person (A) who purports to act as agent for another (B) may still affect B's legal relations with a third party under the principle of ostensible or apparent authority, *but only if B has represented to the third party that A is authorised to act as B's agent and the third party has relied on that representation*' [italics added].

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- The second strand of the judgment, the 'Autoclenz' strand, concerns a Supreme Court decision some ten years ago: *Autoclenz Ltd v Belcher* [2011] UKSC 41, a case in which valeters performing car cleaning services for third parties were held to be workers, notwithstanding written contracts they'd had to sign which proclaimed 'they were subcontractors and not employees of Autoclenz; that they were not obliged to provide services to the company, nor was the company obliged to offer work to them; and that they could provide suitably qualified substitutes to carry out the work on their behalf' (as summarised by Lord Leggatt at [59]).

Lord Leggatt builds on this, the Supreme Court unequivocally stating that the usual rules do not apply to an employment contract. An employment relationship is not the same as a normal contractual relationship; it is not possible for an employer to viably contract out of its statutory duties and obligations.

The employment relationship is characterised by subordination and dependency on the one hand and correlative control, said Lord Leggatt, by the putative employer over working conditions and pay on the other. This makes it a hierarchical relationship, and effectively, as a matter of policy, those at the subordinate end of the bargain need the protection of the employment legislation.

So, although here the court is effectively applying *Autoclenz*, it focuses slightly differently on the language of that judgment, which had looked to determine what was the true agreement of the parties. In *Autoclenz*, Lord Clarke held that the 'tribunal was entitled to find that the actual understanding of the parties was that the claimants would be available to work, and would be offered work, whenever there was work available, and that they were required to perform the work personally. It followed that the employment tribunal was entitled to hold that the claimants were "workers" working under contracts of employment. If the true agreement of the parties is that this is a working relationship, then the tribunals entitled to so find, and to determine that the written agreement is a sham' [64, per Lord Leggatt in *Uber*].

- Lord Leggatt examines the issue from a different perspective: that of statutory interpretation, and the need to protect individuals who are in a relatively vulnerable situation. Hence the third, 'purposive construction' strand of this judgment.

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[71]: 'The general purpose of the employment legislation invoked by the claimants in the Autoclenz case, and by the claimants in the present case, is not in doubt. 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 (such as being victimised for whistleblowing). The paradigm case of a worker whom the legislation is designed to protect is an employee, defined as an individual who works under a contract of employment. In addition, however, the statutory definition of a "worker" includes in limb (b) a further category of individuals who are not employees'.

This effectively means that *any* provision in a contract of employment - whether directly or indirectly - preventing someone from bringing a claim before the employment tribunal is void. While it was previously clear that such protection concerns the right to bring a claim for unfair dismissal, the Supreme Court has now made it clear that anything in a contract that either directly or indirectly has the effect of preventing someone getting their case before an employment tribunal is void and unenforceable.

Explaining the policy underpinning this purposive approach - effectively to address the inequality of arms in the relationship between employer and worker - Lord Leggatt said; [76] 'it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place.'

4. The last (possibly less significant) issue determined by the Supreme Court in the Uber case was [131] 'the question of what periods during which a driver is employed under a worker's contract count as working time' – defined, in the Working Time Regulations 1998, as 'any period during which he is working, at his employer's disposal and carrying out his activity or duties'.

The answer, said Lord Leggatt, was to be found in CJEU jurisprudence, which held, for example, [133]: 'that time spent by firefighters on stand-by at their homes, which were required to be within eight minutes travelling distance of the fire station, was working time.'

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In the Uber case therefore - and given that no evidence was adduced to suggest that drivers were simultaneously available to other PHV hire companies when sitting in their cars with the Uber App activated – the Supreme Court held that any time a driver is available to Uber passengers is working time.

What are the implications of the judgment?

As ever, and particularly with regards to the issue of whether someone is an independent contractor or worker, the outcome of future cases will depend on their facts. In his judgment, Lord Leggatt painstakingly trawls through not only the facts of the case before the court, but those of comparable precedents cited unsuccessfully by Uber.

In the present case, he sets out the factors determining that the claimants are workers [94-100] – although fact-specific, they are recognisably of wider application:

- Fares are set by Uber and the drivers have no say in the fare or 'service fee';
- Uber dictates the terms of both (a) its relationship with drivers and (b) the relationship between drivers and passengers;
- Control/subordination pointer number 1: (a) once logged on to the app (at least the time the claim was issued in the ET) the driver had no discretion to accept or decline any request for a ride to a nominated destination, whereas Uber did; and (b) Uber monitored the driver's rate of acceptance and cancellation of trip requests, and penalised drivers who fell short of a certain level of acceptances;
- Control/subordination pointer number 2: Uber controls the method of delivery of the service: by (a) vetting the type of car used by drivers, (b) owning and controlling the service's technology and stipulating that the driver bears the financial risk of deviating from the route suggested by the App if the customer complains about the route taken and is owed a refund;
- Control/subordination pointer number 3: the driver ratings system – which potentially results in warnings and termination for drivers with poor ratings – is not used to inform passengers about the merits of different drivers so as to help them choose between them. Instead, it is an internal tool deployed to manage performance and inform termination decisions;

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- Control/subordination pointer number 4: drivers are not allowed to communicate directly with passengers other than by phone if they are having difficulties locating each other. First names only are provided to both (including on 'invoices' which the passenger does not see and which only records their first name), with Uber controlling the collection of fares, payments and complaints handling.

By comparison, Lord Leggatt runs through earlier judicial decisions cited by Uber concerning lap dancers, golf caddies and minicab drivers that had suggested, on the individual facts of each case, that the business models of the companies the claimants worked with did not render them workers. Lord Leggatt distinguished some on the facts, whilst others, he seemed to hint, would have been decided differently had they reached the final court of appeal.

R.I.P. gig economy?

The answer depends on what happens next. Already, Uber has reacted to the litigation with what it calls 'significant changes'. Its regional general manager for Northern and Eastern Europe said in a statement: 'We respect the Court's decision which focussed on a small number of drivers who used the Uber app in 2016... Since then we have made some significant changes to our business, guided by drivers every step of the way. These include giving even more control over how they earn and providing new protections like free insurance in case of sickness or injury.'

Be that as it may, Uber reportedly has around 60,000 drivers in the UK. If all were to claim minimum wage and back pay in compensation, alongside paid holidays and other rights, this would severely impact the profitability of the company. The floodgates to more litigation have now opened, so this is more than a theoretical possibility

Uber relies on its vast turnover, which in turn is driven by its almost irresistibly competitive pricing – a source of great resentment to London's traditional taxi drivers who compete mainly, they claim, on safety, reliability and the Knowledge (a compulsory mammoth memory-feat of streets, landmarks and routes for taxi drivers, introduced in 1865, that takes three to four years to complete). Cabbies will be rubbing their hands in glee at this judgment.

Will Uber now raise its pricing to accommodate the loss in profits, thereby levelling a crowded playing field shared with taxis and licensed minicabs?

Or will it take the hit and rely on volume to mitigate the loss of profits?

Alternatively, will it squeeze drivers' earnings – if it is possible to do that while meeting the minimum wage requirements – or reduce the number of drivers it employs?

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And how will other 'gig economy' businesses be affected? Many will no doubt be scrambling to change their t's and c's: but unless they alter the *actuality* of their relationship with their service providers – as opposed to whatever description they choose to give it – they may well find themselves in Uber's position. The government's Taylor Review in 2017 made certain recommendations to recalibrate the balance of power: to some extent, the Supreme Court has now stepped in to fill the gap identified in the Review between flexibility and employment rights.-

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