Supreme Court rules Uber drivers are workers under Employment Rights Act 1996

The Supreme Court has unanimously ruled that Uber drivers are 'workers' for the purposes of legislation giving workers rights to statutory entitlements, including receiving at least the national minimum wage and annual paid leave. The Supreme Court dismissed Uber's appeal, finding that drivers are not independent contractors who work under contracts made with customers but that they work for Uber. Melanie Tether and Oliver Segal QC, barristers at Old Square Chambers, who were counsel for the third respondent, comment on the 'landmark' judgment.

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Uber BV and others (Appellants) v Aslam and others (Respondents) [2021] UKSC 5

Background

The appellants were Uber BV, a Dutch company which owns the rights in the Uber app, Uber London Ltd, a UK subsidiary of Uber BV which operates private hire vehicles in London and Uber Britannia Ltd, a UK subsidiary of Uber BV which operates such vehicles outside London. The claimants, and respondents to the appeal, performed driving services booked through the Uber app.

The claimants alleged that they were 'workers' for the purposes of the Employment Rights Act 1996 (ERA 1996) and the national minimum wage (NMW) legislation and brought claims including for holiday pay, failure to pay the NMW and unlawful deductions from wages. The employment tribunal held that the claimants were 'workers' who worked for Uber London under 'workers' contracts' within the meaning of limb (b) of the statutory definition in ERA 1996, s 230(3), even though they were not employed under contracts of employment. That decision was challenged unsuccessfully by Uber in the Employment Appeal Tribunal ([2018] IRLR 97) and the Court of Appeal ([2019] ICR 845). Uber appealed once more to the Supreme Court.

Under Limb (b) of ERA 1966, s 230(3) a 'worker's contract' has three elements:

• a contract whereby an individual undertakes to perform work or services for the other party

• an undertaking to do the work or perform the services personally, and

• 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.

Only the first requirement was in dispute.

In the words of Melanie Tether and Oliver Segal QC:

'On appeal to the Supreme Court, Uber argued that the courts below had erred in law by disregarding the characterisation of the relationship in the written contracts between Uber BV and the drivers and between the Uber companies and the passengers. It pointed out that the written agreements state that the role of Uber BV is to provide technology services and act as a payment collection agent for the driver and that the only role of [Uber London Ltd and Uber Britannia Ltd] is to act as booking agent for the drivers.'

Issue

The court considered whether drivers were 'workers' under the relevant legislation and, if so, when they were considered to be working.

Judgment

Lord Leggatt gave the leading judgment, with which all judges present at the handing down of the judgment agreed. Our commentators summarised the judgment stating:

'Dismissing Uber's appeal, the Supreme Court unanimously held that the way in which a relationship is characterised in a written agreement is not the appropriate starting point in applying the statutory definition of "worker" and should never be treated as conclusive, even if the facts of the case are consistent with more than one possible legal classification. [At [76]] [t]he Court observed that the efficacy of employment protection legislation would be seriously undermined if putative employers were given the power to determine for themselves whether legislation designed to protect workers should apply to those who provide services for them.'

The court considered the decision in *Autoclenz Ltd v Belcher* [2011] UKSC 41, which clarified that whether a contract is a 'worker's contract', within the meaning of the relevant legislation, is not to be determined by applying ordinary principles of contract law such as the parol evidence rule and principles governing rectification on grounds of mistake.

It is, as highlighted by the court and our commentators, necessary to apply 'a 'modern approach to statutory interpretation' in the context of protective statutory provisions, approving the statement of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454, para 35:"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."'

Thus, 'the correct approach in deciding whether a person is a worker is that endorsed in *Autoclenz Ltd v Belcher* [2011] ICR 1157 and in *Carmichael v National Power plc* [1999] 1 WLR 2042 i.e. to consider all of the relevant circumstances', including, as well as written terms and the practical operation of the relationship between the parties, the general purpose of the employment legislation in question.

The court highlighted various factors which had been considered by the employment tribunal to determine whether drivers are in a position of subordination to, and dependency on, Uber. Taken together, the Supreme Court confirmed they did and that these vulnerabilities create the need for statutory protection, justifying the tribunal's conclusion that drivers work for and under contracts with Uber.

The court further accepted the employment tribunal's findings in relation to when a driver was held to be working. The claimants were held to be working when each one:

'(a) had the Uber app switched on, (b) was within the territory in which he was authorised to use the app and (c) was ready and willing to accept trips' (see paragraph [39] of the judgment).

The court further held that, as there was no evidence adduced that there was at that time any other app-based private hire vehicle transportation service in London or that drivers logged into the Uber app could also provide services for other private hire vehicle operators when waiting for a trip, the tribunal was not wrong to find these periods constituted 'working time' within the meaning of the Working Time Regulations 1998, SI 1998/1833.

Comment

Oliver Segal QC commented on this judgment as follows: 'The gig economy depends on relationships between companies and their workforces being described in contractual documentation designed to exclude employment rights (zero-hours contracts, rights of

substitution, relationships of agency, etc.). This judgment develops an approach to workers' rights that puts centre stage the protective purposes of those rights and the reality of the relationship between worker and employer, and relegates the written contracts between them to simply a piece of the evidential picture. This will make it much harder for such companies to negate or disguise a 'worker' relationship by drafting contracts (even if they are supposed to be adhered to) which provide on their face for a non-worker relationship. The same logic will apply to 'employee' protections.'

Written by Gloria Palazzi

Source: Uber BV and others (Appellants) v Aslam and others (Respondents)