Uber v Aslam's Impact on Worker's Status Within "Gig Economy"

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Introduction

The Supreme Court's judgment in *Uber BV v Aslam [2021] UKSC 5* has been described as a "landmark", "revolutionary" and "one of the most important employment cases of our generation". The Supreme Court upheld the first instance Employment Tribunal decision that drivers are workers, listed in s230(3)(b) Employment Rights Act 1996 ("ERA") - colloquially known as "limb (b) workers" - and therefore are entitled to the national minimum wage ("NMW"), statutory annual leave, and are to be protected from detriment such as whistleblowing.

Whilst the case has been an excellent result for the claimants in the case – and recently for all drivers following Uber's announcement that all drivers will receive NMW and holiday pay, to which it is of no doubt that this case and the influx of ET claims was of great influence on this decision - it may not offer the revolutionary support for the "gig economy" that many hope.

Uber v Aslam further elucidated statutory provisions and case law, in particular, *Autoclenz v Belcher*. But *Uber* did not clarify the true boundaries between the different employment statuses; even after *Uber* they are still greatly confused. This is evident from Uber's back and forth following the decision to give all their drivers these rights – many companies believe that there are specific routes to avoid offering workers status (i.e. the right of substitution). As the Supreme Court ruled that *Uber* was in fact specific, the parameters of worker status have not been clearly drawn, nor named, to add greater clarity to these constant issues in employment law and this is reflected within the contrasting decision of *Royal Mencap Society v Tomlinson-Blake [2021] UKSC 8*. As there is no clear test from the highest appellate court in England and Wales we cannot reconcile these two disparate decisions within Labour Law, thus making it harder to determine employment statuses, unless the facts are somewhat, or wholly, analogous to existing labour and employment law cases.

NB: italicised "*Uber*" refers to the 2021 Supreme Court decision, and un-italicised "Uber" is in reference to the company 'Uber Technologies, Inc'.

Gig Economy

The Gig Economy is an app-based employment model that establishes flexible working practices as one off 'gigs'. The governmental definition is "*The … exchange of labour for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment by task basis*" (DBEIS 'The Characteristics of those in the Gig-Economy ' Report).[1] In the same government report, it was found that 4.2% of the population of Great Britain had worked within the gig economy in the last year, equating to roughly 2.8 million people. It was also found that the vast majority of those working within the gig economy were aged between 18 and 34 (56%) and that the majority were based out of London (24%). With regards to income, it was found that 25% of those working within the gig economy were earning less than £7.50 an hour, with £7.50 being the minimum wage for those aged 25 and over at the time the research was collected. It was estimated that the median income from the gig economy was £375.00, though two thirds of respondents stated that the money they earned from the gig economy equaled less than five percent of their total income

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687553/The_characteristics_of_those_in_the_gig_economy.pdf

for the last year. Whilst these statistics provide incredibly interesting insight into the reality of working within the gig economy, it is not surprising that these statistics have been proven to be out of date relatively recent, with the size of those within the gig economy doubling to 4.7 million workers within the space of two years. It therefore appears evident that the gig economy is growing in popularity. It is more important now than ever that we have the necessary tools to regulate the employment practices adopted within this business model.

The traditional imbalance between employers and employees is exacerbated within the Gig Economy, leaving workers vulnerable to having their employment status incorrectly identified. Gig Economy employers have tended towards identifying their workforce as self-employed contractors. This is particularly important as the definition of one's employment status defines which protections and rights they are entitled to. Those who are found to be self-employed contractors have minimal rights or protections under the law, meaning they have no entitlement to holiday pay, the minimum wage or protection from unfair dismissal. For those that are genuinely self-employed this is the result of their individual freedom to contract for work or run their own business, meaning they do not require the traditional protections afforded to employees. The Taylor Review, a government commissioned paper, identified that as many as one third of workers were unaware of their employment status, and the rights that attach to this status. The review goes on to suggest that the boundaries between the different employment statuses is greatly confused, and that the parameters should be redrawn and renamed to add clarity to employment law, leaning heavily on the need for legislative intervention rather than relying on the courts to reread the law for each new case it hears. Many cases have arisen in recent years that concern the intersection between the gig economy and employment status, with *Uber v Aslam* being the most recent and highly publicised.

Personal Service or Contractual Obligations

Employment status is confused and impractical as the determinant factor for distinguishing between employment statuses is repeatedly changed. Employment law is a fast-paced area of law that requires familiarity with a large amount of both statute and case law. Whilst this may be possible for those highly specialised individuals that work within the field of employment law, this does not lend itself well to clarity within the law, falling under the constitutional principle of the Rule of Law. There is a distinct power imbalance within employment, with the employer holding virtually all the bargaining power, allowing them an almost unfettered ability to set the terms of employment. With this in mind, it surely must be of utmost importance that workers are aware of the law that dictates their employment status. Even those that are aware of the current law that governs their employment, could be forgiven if they were not entirely sure about the boundaries between each of the employment status categories. In recent case law numerous tests have arisen to understand this troublesome barrier between self-employed contractors to limb(b) workers:

- In *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, the Court of Appeal ("CA") determined that Court and Tribunal interpreters are not employees and are instead independent contractors. Lord Justice Underhill allowed the appeal and determined that when deciding the employment status of an individual it is 'necessary to consider all the circumstances' [23]. Furthermore, at [23] LJ Underhill references 'common sense' as key principle in deciding workers status and uses the degree of independence, 'or lack of subordination' as being 'incompatible' with recognising employee status. Underhill LJ's point is comparable to Elias LJ's in *Quashie v. Stringfellows Restaurant Ltd.* [2012] EWCA Civ 1735, with regards to recognising employment status within an unfair dismissal claim. Underhill LJ concluded this should be the approach when working through the questions of employment status in 'the extended sense' under the Equality Act 2010.

- *Addison Lee Ltd v Gascoigne* UKEAT/0289/17 was an appeal against an Employment Tribunal ("ET") decision that the Claimant, a cycle courier, was a worker within the meaning of Regulation 2 of the Working Time Regulations and in consequence was entitled to holiday pay. The ET and EAT reached a clear conclusion that there was a contract during the log-on periods and mutual obligations from Addison Lee and the Claimant.

- *Addison Lee Ltd v Lange and others* UKEAT/0037/18, the claimants were successful as the court dismissed Addison Lee's appeal that they were not workers. This case also raised an important point for drivers as the EAT determined that just logging onto the company's system, and waiting for work, amounted to working time.

- In *Pimlico Plumbers Ltd and Mullins v Smith* [2018] UKSC 29, the Supreme Court dismissed the appeal of Pimlico Plumbers from the Court of Appeal decision that Mr Smith was a worker and not a self-employed contractor. The UKSC analysed the legal categorisations of Pimlico Plumber's business model. The model introduced operatives to their customers as staff – those who actively worked for the business – however, Pimlico attempted to maintain preserve that they were not workers irrespective of how they were presented.

- *B v Yodel Delivery Network Ltd Case* C-692/19, decided that the Claimant was not a worker for Yodel and was instead a contractor. However, this case's provisos are interesting as it follows domestic jurisprudence (*Autoclenz v Belcher* "sham" test) but either sets a difficult standard to meet, or opens an avenue to analogise case facts. As the case was fact-specific it potentially offered the opportunity to litigate about what happens in practice between the employee/er.

Uber v Aslam

Facts:

The Claimants, Yaseen Aslam and James Farrar, claimed under the Employment Rights Act 1996 and the National Minimum Wage Act 1998, that Uber failed to pay their drivers the NMW and failed to provide annual leave. They argued that Uber is a taxi company for whom they provide services as "workers". The claimants succeeded in both the CA (majority ruling) and in the Supreme Court (unanimous ruling), as well in earlier ET and EAT decisions.

Uber unsuccessfully asserted that they are a "ride hailing app" acting merely as an agent for drivers and that the claimants were not "workers", and therefore were not automatically protected under the various Acts and Regulations. Uber was also unsuccessful with the claim that drivers were not working when they were merely logged into the app. The UKSC decided that this did amount to work, notwithstanding breaks.

The Supreme Court:

The main question that the UKSC had to decide was if the ET was correct in finding that drivers, whose work is arranged through Uber, are workers and if they thus qualify for the national minimum wage, paid annual leave and other workers 'rights. Or if Uber is correct in arguing that they are self-employed contractors, performing services under contracts made with passengers through Uber as their booking agent.

The second question was whether drivers logged into the Uber app, within the territory in which they were licensed to operate and ready and willing to accept trips, was working. Or if, as Uber contends, they were working only when driving passengers to their destinations.
Uber argued that the drivers were not performing or working on behalf of Uber. Instead, when a driver accepts a booking with a customer, a contract between only the driver and customer formed. Uber stated that they were merely a booking agent between the customer and the driver – therefore the driver acted as principal by performing driving services for the customer. And thus, drivers were self-employed contractors.

To bolster this claim, Uber attempted to analogise the result of *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs* [2014] UKSC 16, who were successful in demonstrating that the company acted merely as an agent and nothing more. However, *Secret Hotels2* ("SH") surrounded VAT, and the UKSC highlighted that SH marketed and sold hotel accommodation to customers as an agent and acted solely as an intermediary for VAT purposes per [105]. The respondents also distinguished SH from the case at hand, as the customer using SH's website can pick and choose whichever product that they wanted from the site, whereas within the Uber app, drivers are simply assigned ("Uber London has accepted your booking, we are connecting you to a driver") and the price is set by Uber.

The respondent also argued that if a driver has multiple other private hire taxi apps open (i.e. OLA, Bolt and Kapten), this meant that they were not working for Uber in between accepted Uber trips, and therefore did not constitute Working Time Hours. Uber found that drivers were only working when they accepted an Uber trip. This point was essential in determining National Minimum Wage and pro-rata holiday pay entitlements.

The UKSC found the respondent's argument, that having other private taxi hire apps open whilst working for Uber, redundant and insufficient as they had been working for Uber when waiting for rides. As the driver is supposed to accept the first trip by Uber, there would be repercussions if the ride was not accepted. Therefore, they were working when it was open and thus waiting time constituted working time hours. Especially if the driver accepts a trip on different app, they must switch the Uber app off.

Autoclenz:

The UKSC was unanimous in holding that the character of the written agreement is not the "appropriate" starting point and is not conclusive. The court stressed the efficacy of legislation for employment protection and determined it would be undermined if companies could decide if protective legislation – designed specifically to protect those who work – should, and can, apply to those who supply their services on behalf of them. The UKSC noted that workers have specific vulnerabilities which necessitate the need for statutory protection as workers are "subordinate" and "dependent" on the company in question, per [87]. Lord Leggatt, who gave the leading judgment, stated that it would be "inconsistent" with the legislative framework to have the contract as the starting point, leading to the "mischief which the legislation was supposed to prevent". Therefore, the "armies of lawyers", cannot determine the contractual relationship to defeat these clear statutes. The court emphasised multiple times that there is no legal presumption that a contract can contain all of parties 'expectations, but there is no absolute rule that represents the true agreement of the parties just because a contract is signed. Moreover, *Uber* plainly ruled that no contract will be given effect if it attempts to limit statutory provisions.

Royal Mencap Society v Tomlinson-Blake [2021] UKSC 8

One month after *Uber*, the UKSC published a long-awaited judgment concerning care workers and "sleep-in" shifts. Whilst this case surrounds labour law, alike *Uber*, it would seem at odds with this article as it concerns completely different areas of employment: *Uber* concerns the gig economy and *Mencap* concerns employed carers. Nevertheless, the judgment of *Uber* and the judgment of *Mencap* are comparable and are largely paradoxical. This is because the UKSC decided that carers are not entitled to NMW whilst "sleeping" at work, yet in *Uber*, it was decided that waiting, dormant, for work is work and thus qualifies for NWM.

To ensure an appropriate standard of care, it is sometimes necessary for carers to sleep at work within a client's home. Within the Framed Flexibility Model, overnight hours (including sleeping) constitute working time. Yet, NMW covers when a worker is 'available 'at the workplace, but not where they 'by arrangement 'sleep there, unless they are 'awake for the purposes of working. 'But, before the Court of Appeal ("CA") decision, care workers 'overnight shifts were inclined to be classified as 'work 'and were entitled to the NWM. The UKSC upheld and agreed the CA's definition of overnight shifts by classifying them as 'availability.' Therefore, workers were only entitled to NMW when actively assisting their clients.

'The Supreme Court emphatically equated 'work 'with physical activity."[2]

Mencap places a strong emphasis on productivity regulation within waged-sleep – this is especially apparent within the UKSC's definition of "sleep-in" shifts, i.e. "*expected to sleep*" and "*may be woken if required*" para [6], rather than the Tribunal's more appropriate definition at [49]: "*expected to intervene where necessary*" and "*obviously expected to respond to and deal with emergencies*". The potential to sleep, perhaps, appears to have been overstated by the Supreme Court.[3] It was also reinforced by early reports of the Low Pay Commission that favoured exclusion of the 'paid-to-sleep'.[4] But, the UKSC appeared unaware that the government had since confirmed the unitary case law to accord with its policy,[5] and the Commission had accepted the unitary approach (the approach that calculates the entire expanse of time working and at the workplace, which includes times of availableness *('[b]eing available is an essential part of the service which the driver renders to Uber '* (Court of Appeal [101])).[6] [7] [8] The UKSC and CA's classification even holds when sleep is substantially disrupted: the judgments 'determined that occurrences of active care does not modify into a fully-waged shift 'however many times the sleep-in worker is …. woken '(para [45]). The

[2] https://ohrh.law.ox.ac.uk/mencap-and-uber-in-the-supreme-court-working-time-regulation-in-an-era-of-casualisation/

[3] https://uklabourlawblog.com/2018/08/15/three-steps-too-far-in-the-undervaluing-of-care-mencap-v-tomlinson-blake-ljb-hayes/

[4] https://webarchive.nationalarchives.gov.uk/ukgwa/20130708093623/http:/www.lowpay.gov.uk/lowpay/report/pdf/lowpay-nmw.pdf

[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/397182/bis-15-9-nmw-government-response.pdf

[6] https://www.judiciary.uk/wp-content/uploads/2018/12/uber-bv-ors-v-aslam-ors-judgment-19.12.18.pdf

[7] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645462/Non-compliance_and_enforcement_with_the_National_Minimum_Wage.pdf

[8] n(1)

UKSC seems to endorse the unitary model of working time regulation,[9] but this model was not applied within *Mencap*.

Mencap, whilst useful for the economic stabilisation of the care sector, holds considerable promise in creating more insecurity across the labour force. The judgment heightens the gendered mistreatment of care work, (further aggravated by the statistic that most Uber drivers are male (86% in the USA) and are entitled to NMW in between trips)[10] and highlights the disparaging treatment of night-time care work. Deidre McCann concluded this contrast as an '*outcome [that] is a regulated casualisation of night work while the unitary model is applied to other working arrangements.*[11]'

Impact:

The UKSC directly impacted the claimants and Uber. The Supreme Court did not, however, state that all Uber drivers are workers, nor all private hire drivers are workers, and did not offer a clear test on to determine worker status for the gig economy overall.

The Supreme Court did clarify that employment rights legislation 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)*" per [71]. And Lord Leggatt conclusively elucidates how courts and tribunals should approach the question of 'worker 'status for UK employment law purposes.

The judgment also clearly explained the conclusions that they reached, which offered specific factors on how they reached their decision, which acts as an indicator of worker status. Including,

- Who sets the fare – does the driver have any control over pricing?
- Does the driver have a choice on who they choose to collect?
- Does the driver have any say on the terms of their written agreement/contract?
- How much can the customer and driver communicate – is it limited by company control
- Consequences for poor performance/customer complaints – i.e. rating systems?

Uber, however, did not unequivocally settle the struggles in interpreting the debate between workers and contractors. *Uber* did not offer an exhaustive list of what constitutes a limb(b) worker. As stated, *Uber* is fact specific and is not a case that applies to all gig economy cases. It also seems that the contention between the two employment statuses is still largely a matter of fact for the Tribunal judge to decide. Many cases have been brought before the court to address the intersection between the gig economy and employment status. However, *Uber* is a well-publicised case to which many working people may now understand potential new or existing rights afforded to them. This was shown following the judgment where 8000 drivers have lodged new cases against Uber, by Keller Lenkner UK.[12] But companies can adapt their working practises and vary contracts to ensure that those who provide services to them remain as self-employed contractors – even though the hurdle to do so is much higher now.

All the circumstances will be considered including the conduct of the parties (not just the written terms), and what matters is whether the individual is in a position of dependency and subordination. A person can be a 'worker 'even where, as in the *Uber* case, the individuals have "in some respects a substantial

[9] Deirdre McCann & Jill Murray, *Prompting Formalisation Through Labour Market Regulation: A 'Framed Flexibility' Model for Domestic Work*, Industrial Law Journal, Volume 43, Issue 3, September 2014

[10] https://www.forbes.com/sites/ellenhuet/2015/04/09/female-uber-lyft-drivers/

[11] N(1)

[12] https://www.legalfutures.co.uk/associate-news/thousands-of-claims-lodged-against-uber-to-enforce-worker-rights

measure of autonomy and independence". The exercise will be highly fact-sensitive, and we are likely to see further litigation in the coming years from other gig economy industries.[13]

Uber, eventually, conceded in March 2021 – after stating that the judgment only applied to drivers pre-2016 - by stating that they will pay the National Living Wage for over 25s (under certain conditions), pay holiday based on 12.07% of driver earnings and provide a pension scheme. Nevertheless, even though Uber has made this concession, litigation has not vanished.

Uber will have its most immediate and obvious impacts on the gig economy as those working in this sector will wish to establish their working status. But, it will also have an impact for those wanting to establish that status in other contexts of working – it is not just limited to the gig economy. We imagine that if *Mencap* was being heard today, the claimants would be likely to submit the unitary model of working time regulations that was keenly accepted in *Uber* – however this submissions success is unlikely considering that the judgment was handed down after *Uber*'s and due to the UKSC's heavy reliance on the Low Pay Commission's recommendations.

As *Uber*'s focus was assessing a statute that is designed to protect, the respondent's main argument that the contract is the starting point – by relying on tax and consumer of goods case law, asserting that *Autoclenz* was not in the field of employment law at all - was unsuccessful and is likely to be an argument that will be thrown out quite quickly if advanced again.

Conclusion:

Uber v Aslam gave a more transparent application of working provisions and widened up workers status. However, as *Uber* did not offer a clear delineation between different employment statuses, it means that litigation will be ongoing each time the relationship between the working person and the company is unclear, diminishing its relevance in this context. *Uber* has certainly expanded our understandings of a "limb (b) worker" and the relevant laws that must apply – including the expansion of *Autoclenz* - but its relevance wavers when facts are not completely analogous.

The judgment has shown that when determining workers 'status, all circumstances will be considered - including party conduct and written terms - and if the individual is in a position of dependency and subordination to the company. The UKSC concluded that an individual can be a 'worker 'even where the individual has "in some respects a substantial measure of autonomy and independence" [90]. Calculating workers status will be highly fact-sensitive and further litigation is very likely in the next few years from not only drivers, but other gig economy industries. For instance, a question on our minds is how do we calculate working time hours if a driver constantly swapped between and accepted journeys on different apps – would both companies pay or just the one?

The gig-economy poses as an exciting space to watch as its legal parameters are constantly evolving.

[13] https://fieldcourt.co.uk/the-uber-judgment-what-it-means-for-the-gig-economy/