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Room for one more: Employment in the gig economy; an analysis of UBER BV V ASLAM AND OTHERS [2021] UKSC 5

By Judith Kagere

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It is on rare occasions that digital businesses make their way to the UK Supreme Court. In February, the UK Supreme Court handed down judgment in the long- awaited case of Uber BV v Aslam & others. A thread that ran plainly throughout the judgment was that the UKSC is very much aware of modern employment in the recent times, and how the balances and boundaries of employment law have been significantly tested in the gig economy. Lord Leggat commenced the judgment by recognising that new ways of working organised through digital platforms have posed pressing questions about the employment status of the people who do the work involved. Uber appealed through three of its entities, Uber BV, the Dutch company that owns the Uber App, Uber London that is licensed to operate private hire vehicles in London, and Uber Britannia Ltd, another UK subsidiary of Uber BV that is licenced to operate such vehicles outside London. The Respondents were workers who used to perform driving services on the Uber App.

The respondents contended that during the period covered by their claims, they were "workers" for the purposes of the Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations 1998. Following this, the Respondents claimed they were entitled to minimum wage, paid leave and other legal protections. Uber, the Appellants, argued that the Respondents were independent, third party contractors and not "workers" and that they were "working" whenever they (a) had the app switched on, (b) were within the territory in which they were authorised to work, and (c) were able and willing to accept assignments. Both the Employment Appeal Tribunal and the Court of Appeal agreed with the Respondents.

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The judgment elaborated on the workings of the Uber App, the same as any other conventional ride hailing application. A passenger through their app makes a request for a ride, that may also be scheduled for a particular day and time, the nearest and available driver receives a request and follows the directions to the passenger, through the smartphone's geolocation system. The app incorporates route planning software and provides a driver with detailed directions to the destination. Drivers are onboarded after an orientation on the workings of the app. The public is usually offered the app for free. As regards the written agreements between Uber BV and drivers, the drivers were required to sign "partner registration forms", as at 1 July 2013 stating that they agreed to be bound by the terms. In addition, riders are required to accept before they use the app, stating that they constitute an agreement between the rider and uber.

The rights claimed by the claimants are rights under the National Minimum Wage Act 1998 and regulations to be paid at least the national minimum wage for work done; rights under the working time regulations, that is the right to annual leave, and the right not to suffer detrimental treatment on grounds of having made protected disclosure. What is vital to note is that under UK law, these rights are conferred by law on "workers" as defined by the Employment Rights Act 1996.

Uber's foremost argument was bringing the case between the parties back to the written agreements between uber BV and drivers and uber and their passengers, and uber is only providing a technology platform to act as a booking agent for the drivers.

The UK licensing regime provides for the operation of private hire vehicles that are regulated by the Private Hire Vehicles (London) Act 1998 and subsequent regulations. Under this Act, a vehicle may only be used for private hire if both the vehicle and driver are licensed by the licensing authority, a licence is also required to accept bookings for the hire of a private vehicle, similar to the licenses envisaged for transport network companies using online digital platforms for provision of passenger services under our Traffic and Road Safety Act, 1998 (Amendment) 2020. Simply put, for the purpose of regulatory compliance, uber holds the licence to operate the arrangement.

The court held that there appeared to be no factual basis for uber's contention that Uber London acts as an agent for drivers when accepting private hire bookings. There was no evidence that the rider terms created a contract between drivers and uber London. Once the assertion that uber contracts as a booking agent for drivers was rejected, the inevitable conclusion was that by accepting a booking, Uber London contracts as principal with the passenger to carry out the booking. In these circumstances, uber London would have no means of performing its contractual obligation to passengers, nor of securing compliance with its regulatory obligations as a licensed operator, without either employees or subcontractors to perform driving services for it. The court elaborated that it was hard to see how Uber London operates without entering contracts with drivers under which drivers undertake to provide services to carry out the private hire bookings accepted by Uber London.

The court further countered Uber's arguments through the Autoclenz case, in which claimants worked as valeters performing car cleaning services which the company had contracted to provide to third parties, and the claimants were made to sign contracts naming them sub- contractors and not employees, the company was not obliged to provide them work and they were also not obliged to provide their services. The Supreme Court in that case succinctly drew a distinction between certain principles which apply to ordinary contracts and in particular commercial contracts and employment contracts where a different approach has to be taken. It was considered that employment tribunals should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship. The courts should consider what was actually agreed between the parties, either as set out in the written terms, or if it is alleged that these terms are not accurate, what is proved to be their actual agreement.

Reference to the Autoclenz case buttressed the Supreme Court's ruling that whether a contract is a "worker's contract" within the meaning of the legislation designed to protect employees and "other" workers is not to be determined by applying ordinary principles of contract. The justification for this approach is that in an employment context, the parties are frequently of very unequal bargaining power. Although the court in the same breath explained that inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary contractual law.

In short, the issue was one of statutory interpretation and not contractual interpretation.

The court further, while elaborating on the purposive approach explained that the policy behind the inclusion of limb(b) was to extend the benefits of protection to workers who are in the same need of that type of protection as employees- workers that is, who are viewed as liable, whatever their employment status, to be required to work excessive hours or suffer unlawful deductions from their earnings. The age- old rationale that employees are in a more vulnerable position than employers was adopted. The court further explained that it is the nature of this hierarchical relationship that means that it can not be left to contractual regulation. To treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker" would be to reinstate the mischief which the legislation was enacted to prevent.

The findings of the employment tribunal justified its conclusion that, although free to choose when and where they worked, at times when they are working drivers work under contracts with uber. Five aspects of this principle were affirmed by the court. First, the remuneration paid to drive or for the work they do is fixed by uber and the drivers have no say in it, except by choosing when and how much to work. There is a price range set by uber for which the drivers may not charge more, and for which it does not make any sense that they would charge less. Secondly, the standardised agreement with uber and thirdly, although the driver is free to choose where and when they are covered within their PHV licence to work, once the driver has logged onto the app, their choice whether to accept rides is constrained by uber. By monitoring the driver's rate of acceptance of trip requests, a driver whose percentage falls below the level set receives escalated warning messages, and although this is economically justifiable, it nonetheless still buttresses the hierarchical position of drivers in this relationship.

Another reason is that uber places a significant degree of control on the way drivers deliver their services, through vetting the vehicles, selecting the technology and ratings posted by passengers. Furthermore, uber restricts the communication between the passenger and the driver to what is truly necessary to carry out the service. Also, the fact that a driver has the right to turn down work is not fatal to a finding that the individual is employed, what is necessary is finding that there should be a "irreducible minimum of obligation"- an obligation to do some amount of work. All these taken together show that the transportation service performed by drivers is defined and controlled by the digital platform.

The UKSC also viewed this relationship in comparison with that of mini-cab drivers where in the employment context such minicab firms are said to act as booking agents for drivers to provide transportation services, a caddie for a golf club and a lap dancer who performed for entertainment of guests, where it was importantly found that the Respondent in that case was not obliged to pay the claimant any money at all. Rather, they paid the respondent a fee for each night they worked. In all these, the court found the facts different from the uber case and so these did not offer much assistance. In reference to the Employment Tribunal's decision, the relationship has to be determined by an investigation of the factual circumstances in which the work is performed, the question of whether work is performed by an individual and an employer (or worker in the extended sense) or an independent contractor to be regarded a question of fact by the employment tribunal. This question of fact analogy will be explored further in many similar cases to come mainly through categories such tax and pensions. In the context of the case brought against uber, this was the only conclusion the tribunal could have reached.

From the uber case, it is clear that the UKSC adopted the purposive approach to construing employment contracts and turned away from a deeply rooted approach of contract construction and interpretation.

The gig economy will undoubtedly continue to test the balance and boundaries of statutes and age- old areas of the law, due to the very nature of their businesses and how they are run. This time, it was in the field of employment, although the next occasion it may be in the area of tax, pensions, international trade or dispute resolution. What is most important to take way from this judgment is that each case will present its on facts and will be treated on its own merit. What is clear about the status of gig workers is that it presents a hybrid category not previously envisaged by the statute, but that nonetheless, made good arguments for minimum wage and annual leave benefits for the respondents. Employment issues will no doubt continue to arise as the gig economy grows.

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