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Supreme Court confirms that Uber drivers are 'workers' (UK)

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Summary

The Supreme Court (SC) has unanimously decided that drivers engaged by Uber are workers rather than independent contractors. It also decided that drivers are working when they are signed in to the Uber app and ready to work.

Background

In 2016, various drivers brought claims against Uber for the national minimum wage, holiday pay and detrimental treatment for whistleblowing. To succeed, the drivers had to be 'workers' for the purposes of the relevant UK legislation rather than independent contractors.

While there are slightly different 'worker' tests in different statutes, for present purposes a worker is either (a) an employee (i.e. employed under a contract of employment); or (b) someone who works under a contract through which they undertake to perform work personally, for someone who is not by virtue of that contract their client or customer. In other words, workers agree to work personally and are not running their own business.

This definition has been considered in a series of 'gig economy' cases, with Uber being perhaps the most high-profile. Uber argued that the workers were independent contractors, and after successive appeals the case finally arrived at the SC.

Facts

People using Uber's service hail private-hire vehicles via a smartphone app. Uber locates the nearest driver and informs them of the request and, once the booking is confirmed, the driver and passenger can contact one another through the app. A route is plotted by the app and at the end of the trip the fare is calculated by Uber, based on GPS data from the driver's smartphone.

Uber's terms (with both passengers and drivers) stated that it did not provide transportation services but acted as agent for third-party providers, i.e. the drivers. Uber contended that it was providing 'lead-generation' opportunities for self-employed drivers. It did, however, impose certain requirements as to how the drivers provided the services. For instance, it would deactivate a driver's access to the app if customer ratings fell below an acceptable level. It also told drivers they should log out of the app if they did not wish to carry passengers.

Earlier decisions

The Employment Tribunal (ET) concluded the drivers were workers. It found that Uber was in the business of providing private-hire services rather than generating leads for drivers to grow their own businesses, taking into account the significant control Uber exercised over the drivers. The ET also concluded that drivers were engaged as workers for so long as they were in the territory in which they were authorised to work, signed in to the Uber app and ready and willing to accept bookings.

The Employment Appeal Tribunal (EAT) agreed that drivers were in reality incorporated into the Uber business of providing transportation services, rather than working in business on their own account. The EAT said that the drivers were clearly workers when they had accepted trips, but it was less sure the same applied in between accepting assignments. This issue is important because it is relevant to a determination of the drivers' 'working time' and their entitlement to the national minimum wage.

The Court of Appeal (CA) decided by a 2:1 majority that the drivers were workers. Although the written contractual terms said that Uber only acted as an intermediary, this did not reflect the practical reality of the relationship where Uber had significant control of the drivers. The CA majority judges also found that the drivers were workers for all the time they had the relevant app switched on. Although this issue was difficult,

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the key factors were the high level of trip acceptances required from drivers, and the penalty of being logged off if three consecutive requests were not accepted within a ten-second time frame.
The other CA judge (Lord Justice Underhill) disagreed with these conclusions, on the basis that the terms of the agreement made it clear that the drivers were not Uber's workers. An agreement needed to be inconsistent with the reality in order to be a sham, which Underhill LJ did not consider was the case here.

Judgment

The SC unanimously rejected Uber's appeal.
The SC first rejected Uber's argument that it operated as a booking agent for drivers. This part of the SC's decision turned on Uber's specific contractual arrangements. A key problem for Uber was that the operating licence was held by Uber London, not by individual drivers, and there was no written agreement between Uber London and drivers. Uber argued that, despite the lack of a written contract, Uber London was acting as an agent for the drivers. The SC was not convinced that an agency model complied with the licensing regime, but decided that, in any event, the drivers had never actually authorised Uber London to act as their agent.
Given this conclusion, the SC said it was difficult to see how Uber's business could operate without Uber entering into contracts with drivers under which they undertook to carry out the bookings that it accepted. Nonetheless, the SC suggested that the importance of the issue meant that it would not be right to decide the appeal on the basis of the arguments about agency alone, so it also went on to look at the wider arguments.
At the centre of those wider arguments was the SC's earlier judgment in *Autoclenz Ltd – v – Belcher and others* [2011] UKSC 41. In that case, the SC concluded that car valeters were workers, despite contractual documentation suggesting otherwise. According to *Autoclenz*, employment status cases should not be determined by applying ordinary principles of contract law. This reflected the fact that, in an employment context, the parties frequently have very unequal bargaining power.
In the *Uber* decision, the SC endorsed *Autoclenz* and spelt out a new theoretical justification for this approach. In employment status cases, individuals are claiming the protection of statutory employment rights, created by legislation. This means that the task for ETs is not to identify whether a business has agreed under the terms of its contracts to pay, for example, the national minimum wage or annual leave. Instead, their task is to determine whether individuals fall within the statutory definition of a 'worker' to qualify for these rights irrespective of what had been contractually agreed. As the SC summarised, the approach must be one of "statutory interpretation, not contractual interpretation".
The SC observed that the general purpose of employment legislation governing working hours and minimum wage etc. is to protect vulnerable workers. The fact that a business is often in a position to dictate contract terms gives rise to the need for statutory protections in the first place. It therefore could not be right that a business could use its written contracts to determine who qualifies for protection.
Adopting this approach to determining whether Uber drivers were 'workers', the SC concluded that, although the drivers had substantial autonomy and independence in some respects, the factual findings of the ET justified its conclusion that the drivers were workers. In particular, Uber's control over their remuneration was of major importance. The drivers' ability to charge less but not more than the fare suggested by Uber meant that their notional freedom was of no possible benefit to them. Overall, drivers' services were in fact "very tightly defined and controlled by Uber".
In light of this conclusion, the SC also had to assess when the drivers were working. Again, it followed the CA's decision to find that they were working whenever they were logged in to the app. The SC placed particular weight on Uber's practice of logging out drivers who were failing to accept bookings and keeping them temporarily logged out even if they were ready to work. This pointed to there being a penalty for drivers who failed to comply with an obligation to accept a minimum amount of work when logged in. The existence of such an obligation even when drivers were not performing a booking meant that drivers were working whenever logged in.

Commentary

The SC's decision in this case has been eagerly awaited by employment law and HR practitioners since it was heard in July 2020.
Like other recent status cases in the UK, the judgment is very specific to its own facts. Other claims concerning people working in the gig economy will not necessarily be decided in the same way. However, the SC's emphasis on the need for "statutory interpretation, not contractual interpretation" is significant. It is likely to sit alongside the SC's earlier decision in *Pimlico Plumbers Ltd – v – Smith* [2018] UKSC 29 as the leading guide to judicial decision-making on this topic. In *Pimlico Plumbers*, the SC ruled that a sufficiently broad, genuine and unfettered contractual right to appoint a substitute would result in the personal service requirement not being met, meaning that someone would not be a worker.
As the SC has dismissed Uber's appeal, the case will now return to the ET to decide the substantive claims, which concern holiday pay and minimum wage. The ruling that drivers were working whenever they were logged in is likely to increase the cost implications for Uber compared to if, for example, drivers had only been working while performing bookings. Uber is apparently set to argue, however, that it has changed its model

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since 2016, and that the SC's findings are limited only to those drivers who brought this claim.
The SC recognised that one of the most difficult issues in this case was whether a driver who was logged on could be said to be working even if they were also logged on and making themselves available for work with one or more competitor platforms. It concluded that this question cannot be answered in the abstract but will always be a matter of fact and degree. In this case, the ET had been provided with no evidence that drivers were in practice also making themselves available to Uber's competitors.
Producing evidence that individuals are making themselves available to other businesses while logged on to an app – so-called 'multi-apping' – may become a more important feature of future employment status cases. We can also expect to see some businesses make adaptations to their models – for example, by providing greater freedom to drivers to reject orders without facing sanctions, or potentially restricting the times when individuals can log in.
Finally, part of the UK government's 'Good Work Plan' published in 2018 was to consider legislation to improve the clarity of the employment status tests, but no specific proposals have yet been put forward. The government's planned Employment Bill, which may address this area, is also awaited. It is unclear whether the SC's decision means that the impetus for further legislative reform in this area has now diminished or whether the government might now be tempted to revisit this topic, potentially even abolishing the concept of 'worker' status altogether.

Comments from other jurisdictions

Germany (Dominik Ledwon and Tolga Topuz, Luther Rechtsanwaltsgesellschaft mbH): As already stated in the previous commentary (EELC 2018/09) on the Employment Appeal Tribunal decision, there is no decision by a German labour court, let alone the German Federal Labour Court (BAG), on the question of whether Uber drivers are to be classified as employees/workers or as self-employed.
This follows from the previous decisions of the German administrative courts. Uber drivers are not permitted under German law to offer their transport services for remuneration, as such activity violates the provisions of the Passenger Transport Act (PBefG). The German administrative courts have ruled that transport by private drivers via the 'Uber-Pop app' does not fulfil the licence requirements in the PBefG (Verwaltungsgericht Hamburg 27 August 2014 Case 5 E 3534/14; Oberverwaltungsgericht Hamburg 24 September 2014 Case 34 3 Bs 175/14; Verwaltungsgericht Berlin 26 September 2014 Case 11 L 353.14). This case law is also established for the 'Uber Black app', the 'Uber X app' as well as the 'Uber Van app' in the civil courts (Landgericht München I, 10 February 2020 Case 4 HK O 14935/16; Bundesgerichtshof, 13 December 2018 Case I ZR 3/16).
According to the latest case law of the BAG (judgment of 1 December 2020, Case 9 AZR 102/20) on 'crowdworkers', Uber drivers – assuming the Uber business model were permissible in Germany – would probably be classified as employees, just as the Supreme Court ruled on 19 February 2021 for British Uber drivers. Due to this current case law, the conclusions in the previous commentary (EELC 2018/09) can no longer be upheld.
German law does not distinguish between 'workers' and 'employees' as it does in the UK. A German labour court would have decided the question of whether Uber drivers are to be classified as 'employees' or as 'self-employed' on the basis of the concept of employee in Section 611a of the Civil Code (BGB). According to Section 611a sentence 1 BGB, an employee is obliged by the employment contract to perform work in the service of another, subject to the latter's instructions and in a personal relationship of dependence. The employer's right to give instructions may relate to the content, performance, time and place of the work (Section 611a sentence 2 BGB).
Anyone who cannot freely organize and determine his or her work and working hours is therefore bound by instructions and thus to be regarded as an employee (Section 611a sentence 3 BGB). In order to determine whether a contract of employment exists, an overall assessment of all circumstances must be made (Section 611a sentence 5 BGB).The designation of the contract chosen by the contracting parties might be irrelevant in this context (Section 611a sentence 6 BGB). So even if, for example, the contracts of Uber drivers state that they are self-employed, a German labour court would not be bound by this designation if the actual circumstances of the employment relationship indicate that it is an 'employment relationship' in the legal sense.
In its most recent case law, the BAG focused on the degree of personal dependency to assess the status as self-employed or employee. In this context, the Court clarified that the continuous performance of a large number of 'microjobs' by users of an online platform on the basis of a framework agreement concluded with the operator can lead to the assumption of an employee status. According to the BAG, in order to assume the status of an employee, it is necessary that the user is obliged to personally provide the service, that the nature of the owed task is simple and that its execution is predetermined in terms of content, and that the assignment of the job is controlled by the operator through the use of the online platform in the sense of external control.
If one now applies these criteria of the BAG to the Uber drivers on whom the Supreme Court had to decide, it follows that they would probably also be regarded as 'employees' under German law.

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Uber drivers are obliged to provide their transport service personally and are not allowed to transfer this task to third parties. After registering in the Uber app, the potential drivers have to submit all the necessary documents, such as driving licence, insurance, licences, etc. The Uber contract prohibits the delegation of the transport activity to third parties. Uber thus ensures that only Uber-approved drivers themselves carry out the transport assignments.

The transport service that the driver has to provide does not place any special requirements on the driver, meaning that the nature of the owed task can be regarded as simple.

The manner in which the transport journey is carried out is specified exclusively by Uber and controlled by the Uber platform. The passenger informs Uber of their location and destination using the GPS function on the smartphone. The Uber app calculates the route and the fare and assigns the ride to the nearest Uber driver. The Uber driver is obliged to follow the predetermined route by Uber. After the ride is completed, the passenger pays the fare via the Uber app, which is paid to the Uber driver after deducting the service fee of 20% of the fare. The assumption that Uber drivers are subject to third-party control is not contradicted by the fact that they may also work for other platform operators at the same time ('multi-apping'), since the possibility of working for several providers at the same time is in fact made impossible by the threat of exclusion from the Uber app if the acceptance rate falls below 80%. The fact that Uber drivers are not allowed to make contact with the passenger after a ride has been carried out and thus build up a certain customer base, shows that the drivers are always supposed to be personally dependent on the assignment of jobs by the Uber platform.

In summary, with regard to the current case law of the BAG, an 'employee status' of the Uber drivers would be assumed under German law.

Subject: Employment Status, Working Time

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