Worker status: the latest chapter

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The Employment Appeal Tribunal (EAT) has today confirmed that Uber drivers were rightly classified as 'workers', not independent self-employed contractors, and therefore entitled to valuable employment rights such as holiday pay, rest breaks and the minimum wage.

This latest decision follows a string of recent cases involving courier and delivery firms which have focused on the categorisation of workers in the UK's booming gig economy. According to latest government estimates, there over 1 million people working in the gig economy in the UK, so the outcome of the high-profile Uber appeal has been hotly anticipated. Ultimately, the conclusion reached on worker status follows the direction of travel borne out of those other cases, all of which have found in favour of the individual workers and the protection of their basic employment rights.

Brief history

To recap on the case to date, back in October 2016 the Employment Tribunal (ET) had to decide the correct categorisation of the two Uber drivers. Were they independently self-employed, in business on their own account and risk, providing taxi services to passengers with Uber merely connecting drivers and passengers through its app based technology platform? Or were they working for Uber, providing personal service as an integral part of its transportation business and subject to various controls and limitations in so doing?

The ET was not persuaded by the complex contractual documentation which framed the relationship as one of self-employment. Having examined the reality of how the relationship operated day-to-day on the ground, the ET decided the level of control exerted over the drivers by Uber was incompatible with true self-employment. Those control factors included Uber interviewing and recruiting drivers, controlling fares and taking initial payment, drivers not knowing the identity of customers before accepting jobs, being unable to negotiate fares, being subject to potential penalties for deviating from directed routes and/or as a result of the driver rating system.

Appeal - key aspects

Through its appeal to the EAT, Uber sought to shift the focus of the debate, arguing that it was not part of the gig economy and was, albeit in more modern guise, essentially mirroring the traditional "agency" relationship between many existing minicab firms and drivers. Uber asserted that its booking app acted as an agent, giving drivers access to passengers in return for a cut of the fare, that its use by drivers or passengers was entirely voluntarily and resulted in no fee being due to Uber if not used.

This argument was not accepted by the EAT. It found no evidence of any documentation in which the drivers each appointed and authorised Uber to act as their agent, other than for the limited purpose of collecting fares. The fact that Uber resolved passenger complaints, dealt with rebates and had the power to agree discounted fares without recourse to any of the individual drivers was considered to be inconsistent with an agency relationship in which the drivers would be Uber's clients.

The EAT felt the ET had appropriately considered the relevant factual matrix in assessing the nature of the relationship between Uber and its drivers. This included the scale of Uber's UK operations - 30,000+ individual drivers sharing one point of contract - in deciding the correct characterisation of the relationship. Further, the degree of control which Uber retained over the drivers on the streets underscored the earlier ET's conclusion that the drivers were 'workers' and not in business on their own account.

What this means for Uber and others

Unless today's EAT ruling is appealed and reversed, it is likely to have a significant impact on Uber's operating model and costs in the UK. Provision will need to be made for holiday back-pay, possible minimum wage shortfalls and a framework introduced to address when 'working time' starts and ends for drivers making use of Uber's app. The challenges around defining working time and correctly calculating pay have wider significance across the gig economy, particularly where individuals work flexibly for a number of different organisations, possibly during the same day and using multiple app-based platforms in parallel. Arriving at an outcome that ensures the worker receives the required level of pay and statutory benefits and avoiding the potential for double recovery from different employers will require careful thought and analysis.

The EAT has sought to grapple with this conundrum. Here it concluded that the Uber drivers assumed an obligation when

they were within their allocated territory, with the Uber app switched on and able and willing to work. Given the ET's earlier finding that Uber's business model relied upon drivers then accepting at least 80% of trip requests, the EAT felt this tipped the scales in favour of all such time being classed as 'working time'. However, it recognised that such a conclusion was not inevitable in all cases and would be fact sensitive.

What remains clear is that the issue of worker status continues to be an issue of significance for employers and individuals alike, and one which polarises opinion. Although a number of business models and practices have been found to be incompatible with genuine self-employment by the courts and tribunals, all cases are heavily fact-sensitive. Therefore, whilst other businesses operating flexible workforce models, both in and outside the gig economy, will need to carefully reflect on this latest worker status case and be prepared to adapt contracts and working practices, a self-employment model founded on clear contractual documentation, which reflects the reality on the ground, and in which there is an appropriate measure of control, is perfectly feasible.

Where next?

It is likely that Uber will seek to appeal the EAT's decision to the Court of Appeal or, possibly, seek to have their appeal expedited and heard by the Supreme Court alongside the *Pimlico Plumbers* worker status case, slated for next February. In a poll conducted by ORB International last month, it was reported that 80% of Uber drivers would rather be self-employed than be classified as a worker, which may provide further impetus for continued legal challenge.

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