Supreme Court finds that Uber drivers are workers

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The Supreme Court (**SC**) has upheld the decisions of the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal that Uber drivers should be classified as 'workers', not independent self-employed contractors, and therefore are entitled to employment rights such as holiday pay, rest breaks and the minimum wage.

Key aspects of the judgment

Are the drivers workers or self-employed?

Uber had argued that they were, in effect, an intermediary or agency providing booking and payment services to self-employed drivers. Uber argued that the passengers contracted with the individual driver and not with Uber. Uber relied upon the quite complex written contractual arrangements that existed with the drivers.

In contrast the drivers argued that they were contracted by Uber to provide driving services for Uber. They argued that the passengers contracted with Uber not with them personally. The drivers relied upon the 'reality' of the position on the ground.

Uber is not merely an intermediary or agency

The SC rejected the argument that Uber was merely an agency or intermediary. In particular the SC pointed out that such an arrangement could not apply in an taxi context as it would be incompatible with the regulatory licensing rules that apply to taxi drivers in London.

Tribunals are entitled to look at the 'reality' of the situation

The SC confirmed that it is correct to consider the reality on the ground rather than just what the written contract between the parties might say. This followed a previous decision of the SC (the *Autoclenz* case from 2011).

Uber had argued for a narrower interpretation and that Tribunals should not depart from the written contract between the parties unless there was some actual evidence of an inconsistent approach.

The SC rejected this argument. The SC noted that employment/worker contracts were different from normal commercial contracts.

- The bargaining power of the parties was usually unequal. The worker usually had very little say in what the contract says.
- The issue concerns statutory rights such as the right to the National Minimum Wage and paid holiday.
- The purposes of these statutory rights is to protect vulnerable workers from being paid too little for their work, being required to work excess hours or being otherwise victimised.
- The actual terms of the written contract was, as in this case, decided by the would be employer.
- It would be contrary to the special rules that exist to protect employees/workers from waiving their employment rights.

In 'reality' the drivers were workers of Uber

The SC noted that the drivers had significant flexibility as to how they provided their services and, for example, could chose when and where they worked. However the SC listed a series of factors pointing to worker status.

- Pay was fixed by Uber (including Uber's own service fee)
- The contract terms were decided by Uber.
- The drivers ability to accept or reject passengers was restricted. Uber controls the information given to the drivers and would monitor their rates of acceptance and rejections of passengers. Uber would automatically log out drivers if they failed to accept passengers.
- Uber controls the type of cars, the technology used, the route, handles complaints etc. The SC particularly noted that the rating system was used by Uber, in effect, as a means of performance management of the drivers.

- Uber restricts communication between the driver and passengers.

When are the drivers "working"?

There was no dispute that drivers were working when they were actually transporting a passenger.

However, in addition the SC held that drivers were also working during any period when they were within their territory (i.e. in this case London), had the Uber app switched on and were ready and willing to accept trips.

- Uber described switching the app on as 'going on duty' and that by switching the app on drivers were indicating that they were willing and able to accept passengers.
- The SC noted that if a driver failed to accept a passenger they could be logged off by Uber for 10 minutes and that this was a form of penalty.
- The SC felt that this presented an obligation to accept a passenger if offered.
- Accordingly the SC felt that this waiting time should also count as working time.

There remained a debate about the scenario where a driver works for multiple separate taxi companies and waits for a passenger with multiple apps open at the same time. The SC court recognised that this might be relevant in certain situations and might change the analysis. However the SC felt it did not apply here due to Uber's market position.

What does this mean for employers?

The implications of this case are clearly wider than the Uber drivers. It follows the trend to closely scrutinise purported "self-employed" status. 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 – there have been exceptions and the SC does not preclude further exceptions arising. As such, other businesses who wish to use a freelance workforce should carefully consider the terms and arrangements they put in place, whilst remembering that what happens in practice will be as important, if not more important, as the terms and conditions written into any agreement with individuals.

Background

Uber has a smartphone app by which passengers can book rides from drivers who also have the app. The drivers own their own cars and are free to choose when they make themselves available to accept bookings.

The case which give rise to these appeals were brought by Uber drivers against the company claiming holiday pay under the Working Time Regulations 1998 and under-payments of wages under the National Minimum Wage Regulations 1999.

In order to bring their claims it is necessary for the drivers to first establish that they are "workers" within the meaning of the Regulations. The Employment Tribunal held a preliminary hearing to decide that question; and also, if the drivers were workers, the period during which they were working, which is necessary for the calculation of any holiday pay and wages due. It held (1) that the drivers were workers; and (2) that they were to be regarded as working during any period when they were within their territory (i.e. London), had the Uber app switched on and were ready and willing to accept trips. The EAT, CoA and the Supreme Court have now upheld that decision.

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