

EMPLOYMENT

Uber drivers' long and bumpy ride to becoming workers

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1. This article explores the potential ramifications the recent judgement by the United Kingdom Supreme Court in **Uber BV and others (Appellants) v Aslam and others (Respondents)** may have on how other jurisdictions regard platform work.
2. The United Kingdom Supreme Court in the above mentioned case, had the occasion to deal with the status of Uber drivers, particularly whether this cohort of individuals are 'workers' or independent contractors. The Court decided that Uber drivers were 'workers' within the meaning of section 230(3)(b) of the Employment Rights Act 1996. For the sake of completeness, section 230(3)(b) defines a 'worker' to mean:

"(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.."

One of Uber's main defences to the claim made by the drivers was that they had signed agreements which *inter alia* state that, when a request to book a private hire vehicle ("PHV") through the Uber app is accepted, a contract is thereby created between the passenger and driver, to which no Uber entity is a party and under which the driver is solely responsible for providing transportation services to the passenger. Uber also asserted that in terms of the agreement with the drivers, it only provides technology services and acts as a payment collection agent for the driver. The Court held that the question of whether the drivers were 'workers' of Uber could not be answered by relying on terms of the agreements concluded between Uber and the drivers.

3. The Court reasoned that what the claimants were seeking in the case were not contractual rights but rights afforded to them in legislation. As such the function of the court in this case was to determine whether the claimants fell within the definition of 'worker' in the relevant statutory provisions so as to qualify for rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation. As such, Uber's reliance on the contractual terms was never going to be sufficient to answer the question before the Court.
4. The Court reasoned that the modern approach to statutory interpretation is to have regard to the purpose of the particular provision and interpret its language in a way which best gives effect to that purpose. The purpose of section 230(b) of the Employment Rights Act could only have been to protect 'workers'. That is why it is couched in such wide terms.
5. The Court remarked that it would be inconsistent with the purpose of legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'. To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even *prima facie*, whether or not the other party is to be classified as a worker. If the classification of the relationship could be

left in the hands of Uber, Uber could arrogate to itself the power to determine whether legislation designed to protect workers would apply to its drivers.

6. To illustrate the above point with reference to the facts of the case between Uber and the drivers, the Court reasoned that the Services Agreement was drafted by Uber's lawyers and presented to drivers as containing terms which they had to accept in order to use, or continue to use, the Uber app. In any case there was no practical possibility of negotiating any different terms. The relative bargaining power of the parties in the employment context is inherently unequal that is why the Court has to look beyond the written agreement and look at what has been described as the 'true agreement' in order to take a purposive approach to the problem.
7. The true agreement will often be gleaned from all the circumstances of the case, which a written agreement is only a part. The definition of a 'worker' will then be applied to the facts of the case bearing in mind the purpose of the legislation.
8. On the purposive interpretation of the definition of 'worker', the Court identified the following facts as indicative of an employment relationship between Uber and the Uber drivers – largely because of the control Uber exercises over the drivers.
 1. The remuneration paid to drivers for the work they do is fixed by Uber and the drivers have no say in it (other than by choosing when and how much to work).
 2. It is Uber that sets the fares and drivers are not permitted to charge more than the fare calculated by the Uber app. The notional freedom to charge a passenger less than the fare set by Uber is of no possible benefit to drivers, as any discount offered would come entirely out of the driver's pocket.
 3. The delivery of the service is organised so as to prevent a driver from establishing a relationship with a passenger that might generate future custom for the driver personally. Uber also fixes the amount of its own "service fee" which it deducts from the fares paid to drivers.
 4. Uber's control over remuneration further extends to the right to decide in its sole discretion whether to make a full or partial refund of the fare to a passenger in response to a complaint by the passenger about the service provided by the driver.
 5. The contractual terms on which drivers perform their services are dictated by Uber. Not only are drivers required to accept Uber's standard form of written agreement but the terms on which they transport passengers are also imposed by Uber and drivers have no say in them.
 6. Although drivers have the freedom to choose when and where to work, once a driver has logged onto the Uber app, a driver's choice about whether to accept requests for rides is constrained by Uber.
 7. Uber itself retains an absolute discretion to accept or decline any request for a ride. Where a ride is offered to a driver through the Uber app, however, Uber exercises control over the acceptance of the request by the driver in two ways. One is by controlling the information provided to the driver. The fact that the driver, when informed of a request, is told of the passenger's average rating to allow the driver to avoid low-rated passengers who may be problematic. Two?
 8. The driver is not informed of the passenger's destination until the passenger is picked up and therefore has no opportunity to decline a booking on the basis that the driver does not wish to travel to that particular destination.
 9. Another form of control is exercised by monitoring the driver's rate of acceptance (and cancellation) of trip requests. A driver whose percentage rate of acceptances falls below a level set by Uber London (or whose cancellation rate exceeds a set level) receives an escalating series of warning messages which, if performance does not improve, leads to the driver being automatically logged off the Uber app. This places drivers in a position of subordination to Uber.
 10. The fact that drivers provide their own car means that they have more control than would most employees over the physical equipment used to perform their work. Nevertheless, Uber vets the types of car that may be used. Moreover, the technology which is integral to the service is wholly owned and controlled by Uber and is used as a means of exercising control over drivers. Although it is not compulsory for a driver to follow the route indicated by the Uber app, customers may complain if a different route is chosen and the driver bears the financial risk of any deviation from the route indicated by the app which the passenger has not approved.
 11. A further potent method of control is the use of the ratings system whereby passengers are asked to rate the driver after each trip and the failure of a driver to maintain a specified average rating will result in warnings and ultimately in

termination of the driver's relationship with Uber. These ratings are used by Uber purely as an internal tool for managing performance and as a basis for making termination decisions.

12. Uber restricts communication between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride.

9. The Court concluded that taking these factors together, it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. The inescapable conclusion was that Uber was for all intents and purposes the employer of the drivers.

10. In South Africa, section 213 of the LRA defines the 'employee' to mean:

*"(a) Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive remuneration, and;
(b) any other person who in any matter assists in carrying on or conducting the business of an employer..."*

11. The question regarding the status of Uber drivers in South Africa was considered in a CCMA arbitration award case no. WECT12537-16. The Commissioner had determined that the true nature of the relationship between Uber SA and the Uber drivers, was that of employer and employee (an employment relationship). This arbitration award was reviewed and set aside on the basis that Uber SA was not the employer of the employees. See, *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* [2018] 4 BLLR 399 (LC); (2018) 39 ILJ 903 (LC). The reasons for finding that Uber SA was not the employer of the drivers were:

1. Uber SA and Uber BV were distinct and separate legal entities. This distinction was material and common cause. The drivers had no contractual relationship in any form with Uber SA. There were no written contracts between them and Uber SA. Such agreements were between the drivers and Uber BV.
2. The on-boarding process followed by the drivers at Uber SA's premises is not mandatory and is aimed at helping the driver improve his or her business. This process does not transform the relationship between Uber SA and the drivers to one of employment.

12. On the conspectus of the facts, the Court held that the drivers had concluded contracts with Uber BV and their claim potentially lay against Uber BV. According to the Court, the commissioner ought to have upheld the jurisdictional challenge raised by Uber SA because there was no contract between Uber SA and the drivers. Such a decision would be in line with binding authority of the LAC. The learned Judge does however posit that had Uber BV been joined in the proceedings that would have presented a better opportunity to determine the true nature of the relationship between the drivers and Uber BV. We are not aware of any judgment delivered subsequent to this.

13. The United Kingdom Supreme Court had the best opportunity to determine the true nature of the relationship. As explained above it adopted a purposive approach to interpretation rather than a contractual one.

14. Although this is a decision of a foreign jurisdiction, we argue that there is room for a purposive interpretation to the definition of an 'employee' rather one which places great emphasis on contractual terms. It will undoubtedly serve a useful tool in assessing the complex arrangements presented by platform work. Further, the judgement confirms a universally held view that employment contracts are *sui generis* and in interpreting them certain principles of contract are relaxed or do not find application at all.



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