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King's Bench Walk

## Uber & the Supreme Court: The last word on worker status?

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# Central Question

- ▶ Whether an employment tribunal was entitled to find that drivers whose work is arranged through Uber's smartphone application work for Uber under workers' contracts and so qualify for the national minimum wage, paid annual leave and other workers' rights; or whether the drivers do not have these rights because they work for themselves as independent contractors performing services under contracts made with passengers through Uber as their booking agent.
- ▶ If drivers work for Uber under workers' contracts the secondary question is whether the employment tribunal was entitled to find that the drivers were working under such contracts whenever they were logged into the Uber app within the territory in which they were licensed to operate and ready and willing to accept trips; or whether they were only working when driving passengers.

# The Parties

- ▶ Uber BV – the Dutch company which owns the rights in the Uber app.
- ▶ Uber London Ltd – UK subsidiary of Uber BV which is licensed to operate private hire vehicles in London.
- ▶ Uber Britannia Ltd – UK subsidiary of Uber BV which holds licences to operate private hire vehicles outside London.
- ▶ Claimants – individuals who worked as private hire vehicle drivers performing driving services through the Uber app.

# The Agreements

- ▶ Drivers were required to sign a Services Agreement between Uber BV and “an independent company in the business of providing transportation services” [In practice such independent companies were in fact usually individual drivers and not companies who in turn engaged the drivers]
- ▶ In short, Uber BV agrees to provide the driver with access to the Uber app and payment services and the driver agrees to provide transportation services to passengers. The Agreement states that there is a “legal and direct business relationship” between the driver and the passenger which neither Uber BV nor its affiliates is party to.

# The Agreements

- ▶ Passengers, when downloading the Uber app to their smart phone accept that there is an agreement between themselves, Uber BV and Uber London. It states that Uber London is accepting the booking as agent for the driver and that the contract for provision of the transportation service is between the passenger and the driver.
- ▶ The passenger is also granted a licence to use the Uber app.

# Private Hire Vehicle Licensing

- ▶ Regulated in London by the Private Hire Vehicles (London) Act 1998 and regulations made under it.
- ▶ A vehicle may only be used for private hire if both vehicle and driver are licensed by the licensing authority (Transport for London) and a licence is also required to accept bookings for the hire of a private hire vehicle.
- ▶ If a person makes provision for the invitation or acceptance of private hire bookings, or accepts such a booking, without such a licence they are guilty of a criminal offence.
- ▶ Uber London held a private hire vehicle operator's licence for London. The holder of such a licence is obliged to ensure that any vehicle provided for carrying out a booking accepted by them is a vehicle for which a London PHV licence is in force, driven by a person holding a London PHV driver's licence.

# Private Hire Vehicle Licensing

- ▶ Pursuant to the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000 it was a condition of the grant of a PHV operators' licence that the operator should, if required by the person making the booking, agree a fare for the journey booked or provide an estimate of that fare.

# Definition of worker

▶ Section 230(3) Employment Rights Act 1996:

“an individual who has entered into or works under (or, where the employment has ceased, worked under)-

a) a contract of employment, or

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 virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a workers' contract shall be construed accordingly”

## Effect of definitions

- ▶ **Bates van Winkelhof v Clyde & Co LLP [2014] 1 WLR 2047** - employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else.

## The Proceedings

- ▶ The Employment Tribunal found that the Claimants were limb (b) workers of Uber London and that they were working for Uber London during any period when they:
  - a) had the Uber app switched on;
  - b) were within the territory in which they were authorised to work;
  - c) were willing and able to accept assignments.

The Employment Appeal Tribunal and Court of Appeal both upheld the Employment Tribunal's original decision.

# The relevant facts found by the ET

- ▶ First – the remuneration paid to drivers is fixed by Uber and the drivers have no say in it. Uber also fixes the amount of its own service fee which it deducts from the fares paid to the driver. It has sole discretion to decide whether to issue a refund.
- ▶ Second – the contractual terms on which drivers perform services are dictated by Uber.
- ▶ Third – once a driver has logged in to the Uber app a drivers' choice about whether to accept requests for rides is constrained by Uber. Uber retains the absolute discretion whether to accept or decline a request for a booking. Uber controls the information provided to the driver (including not telling them the passenger destination) and monitors the drivers' rate of acceptance and cancellation of trip requests. Penalties are imposed on those who do not meet required standards. It places the drivers in a position of subordination.

# The relevant facts found by the ET

- ▶ Fourth – Uber exercises a significant degree of control over the way in which drivers deliver their services. Uber vets the type of car, the technology that is integral to the service is owned and controlled by Uber and is used to exercise control over the drivers. The Uber app provides the route to be used and the driver bears the financial risk of any deviation from Uber's chosen route. The passenger rates the driver, and this is used by Uber to manage driver performance including making termination decisions. This is a classic form of subordination.
- ▶ Fifth – Uber restricts communication between the driver and the passenger and takes active steps to prevent the driver from establishing any relationship with the passenger capable of extending beyond the individual ride. Drivers are prohibited from exchanging contact details with a passenger or contacting them after the trip ends.

## The main issue in the Supreme Court

- ▶ Limb (b) has three elements:
- ▶ (1) a contract whereby the individual undertakes to perform work or services for the other party;
- ▶ (2) an undertaking to do the work or perform the services personally;
- ▶ (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.
- ▶ Case concerned the first of those requirements – not in dispute that the drivers worked under contracts whereby they undertook to perform driving services personally and not suggested that any Uber company was a client or customer of the claimant drivers.

# Uber's Case

- ▶ Uber's case was the written agreements should be relied upon – they state that the only contract made is between the driver and the passenger via the “agency” of the Uber app.
- ▶ The only role of Uber BV is to provide technology services and to act as a payment collection agent for the driver and the only role of Uber London is to act as a booking agent for the drivers.

# The fatal flaw

- ▶ The Supreme Court began by stating that there was, in effect, a fatal flaw in Uber's whole argument the written agreements describe the whole relationship between the parties and can be relied upon to describe the agency of Uber London.
- ▶ There was no written agreement between Uber London and the drivers.
- ▶ Therefore, the written agreements do not assist the Supreme Court in deciding what the relationship is between the Claimants and Uber London – that must be inferred from the parties' conduct.
- ▶ An important feature of the relationship between Uber London and the Claimant drivers is that they must comply with the regulatory regime for PHV. It is unlawful for anyone in London to accept a private hire booking unless they hold a PHV operators' licence and the only entity holding that licence in relation to bookings via the Uber app was Uber London.

## The fatal flaw

- ▶ Uber maintained that the acceptance of private hire bookings by them, acting as agent for the drivers would comply with the regulatory regime.
- ▶ The Supreme Court were not convinced – acceptance of a private hire booking connotes acceptance (personally) of a contractual obligation to carry out the booking and provide a vehicle for that purpose.
- ▶ If both Uber London and the driver were deemed to have accepted such an obligation, then both would have accepted the booking and the driver would be in breach of the regulatory regime by not having their own operators' licence. Therefore, the only compatible contractual arrangement is one where Uber London as the licensed operator accepts private hire bookings as a principal (and not as an agent) and to fulfil the obligation to the passenger enters into a contract with the Claimant driver.

## The fatal flaw

- ▶ Further, there is no factual basis for Uber's contention that Uber London acts as an agent for drivers. The passenger terms state that Uber London acts as an agent for the driver.....but the driver is not a party to that agreement!
- ▶ The only contract the driver has agreed to is the agreement with Uber BV (who simply owns the app) and it does not confer the authority on Uber London to act as agent for the driver.
- ▶ The Tribunal made no finding that the drivers did anything that conferred authority on Uber London to act as their agent in creating a contract between the driver and the passenger.
- ▶ The inevitable conclusion is that by accepting a booking Uber London contracts as principal with the passenger to carry out the booking – Uber London then enters into contracts with the drivers under which the drivers undertake to provide services to carry out the bookings.

# The true nature of the relationship

- ▶ Substance not form – what was the actual relationship
- ▶ Not a question of simply asking ‘what does the contract say?’
- ▶ Uber’s argument: Privity of contract
  - ▶ Where consistency between contract and possible status, defer to contract
  - ▶ *Autoclenz* only applies where inconsistent
- ▶ No: Ordinary principles of contractual interpretation are not helpful
- ▶ Para 68: *The judgment of this court in the Autoclenz case made it clear 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 law such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake.*

# Statutory rights, not contractual rights

- ▶ Fundamentally unequal bargaining positions
- ▶ Statute sets out minimum 'floor' for workers' rights and must be upheld
- ▶ As such, question is one of statutory interpretation, not contractual
- ▶ *Para 69: Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.*

## How should we interpret the statutes?

- ▶ Purposive approach: *“Have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.”* (Para 69)
- ▶ Purpose was to protect vulnerable workers with unequal bargaining power
- ▶ Para 71: *The general purpose of the employment legislation invoked by the claimants in the Autoclenz case, and by the claimants in the present case, is not in doubt. It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment* (such as being victimised for whistleblowing).

# The danger of a contractual approach

- ▶ In that context, to assess status by starting with the contract would be illogical
- ▶ Para 76: ...it would be inconsistent with the purpose of this 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.* Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.

# Contracting out

- ▶ Backdrop: generally, parties cannot contract out of employment rights
  - ▶ Clearly the case for *express* exclusion clauses
  - ▶ But what about *indirectly* contracting out?
- ▶ Para 80: *These provisions, as I read them, apply to any provision in an agreement which can be seen, on an objective consideration of the facts, to have as its object excluding or limiting the operation of the legislation. It is just as inimical to the aims of the legislation to allow its protection to be limited or excluded indirectly by the terms of a contract as it is to allow that to be done in direct terms.*
- ▶ Para 85: *any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.*
- ▶ Bear in mind EJ Snelson at first instance, describing the contracts as “resorting [...] to fictions, twisted language and even brand new terminology”

# How to determine status

- ▶ Starting point: The statutory definitions
- ▶ Contract not irrelevant, but:
  - ▶ Must view the facts realistically
  - ▶ Must keep in mind the purpose of the legislation
- ▶ Overarching issue = Subordination and dependence
  - ▶ Touchstone of subordination and dependence = degree of control

# What does that mean for us practically?

- ▶ Have to revisit contracts – and our way of advising
- ▶ No more attempts to contract out (expressly or impliedly)
- ▶ Need to understand what client wants and tell them what that means

# What's next for Uber?

## **Statement**

**Jamie Heywood, Uber's Regional General Manager for Northern and Eastern Europe, said:**

"We respect the Court's decision which focussed on a small number of drivers who used the Uber app in 2016. Since then we have made some significant changes to our business, guided by drivers every step of the way. These include giving even more control over how they earn and providing new protections like free insurance in case of sickness or injury. We are committed to doing more and will now consult with every active driver across the UK to understand the changes they want to see."

# What's next for Uber?

- ▶ Unlikely to achieve what they want it to achieve
- ▶ Where is the entrepreneurial opportunity?
  - ▶ Para 101: *From the drivers' point of view, the same factors - in particular, the inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers - mean that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance.*
- ▶ Fact that business is set up this way for regulatory reasons makes no difference

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## Questions

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