SUMMARY

2019/24 Court of Appeal rejects Uber's worker status appeal (UK)

Following an appeal by Uber against the Employment Appeal Tribunal's (EAT) finding last year, which was featured in EELC 2018/9, that drivers engaged by Uber are 'workers' rather than independent contractors (reported in EELC 2018-1), the Court of Appeal (CA) has now upheld the EAT's decision. The CA also upheld the finding of the Employment Tribunal (ET), which was featured in EELC 2017/10, that drivers are working when they are signed into the Uber app and ready to work (reported in EECL 2017-1). Uber has approximately 40,000 drivers (and about 3.5 million users of its mobile phone application in London alone) and so this decision has potentially significant financial consequences for the company.

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Legal 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'

rather than independent contractors (as Uber argued).

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.

An employment tribunal will look at a number of factors when determining the employment status of an individual, the most important of those being: (i) control, i.e. the degree of control that a company may (or may not) have over an individual in terms of what that individual does, how they do it and when they do it; (ii) mutuality of obligation, i.e. whether the company has an obligation to provide regular work and whether the individual has a corresponding obligation to do that work; and (iii) personal service, namely whether the individual has the right to appoint a substitute or whether they must provide the services personally. It will also consider the reality of the working relationship and just because an employment relationship is documented in a certain way will not necessarily be determinative of an individual's employment status.

Facts

Passengers using Uber's taxi service hail taxis 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. In reality however, Uber does control its drivers in various ways, for instance, it would deactivate a driver's access to the app if passenger ratings fell below an acceptable level and told drivers to log off the app if they did not want to carry passengers.

Additionally, Uber drivers are discouraged from cancelling trips after acceptance, from contacting passengers after the journey has ended and from collecting tips (on this latter point, Uber had claimed that it allowed its drivers to collect tips, but the ET was shown documents that proved otherwise). At the ET, Uber also revealed that it sometimes pays drivers' cleaning costs where a passenger has soiled the car and if, for example, a passenger complained that they had been overcharged, Uber would reimburse the passenger without recourse to the driver (and it might reduce the payment to the driver accordingly).

Judgment

The ET's decision (previously featured in EELC 2017/10)

It was accepted by both parties that drivers did not have to turn on the app unless they wished to, meaning that it was impossible for drivers to be contractually obliged to provide their services when not logged into the app. Uber used this to argue that its drivers could not be workers on the basis that this arrangement was not compatible with any contract under which the drivers undertook to provide services for Uber.

The ET did not agree with this approach and instead found that any driver who (a) logged onto the app; (b) is within the territory in which authorised to work; and (c) is able and willing to accept assignments, is a 'worker', provided that these three conditions are satisfied.

The ET also stated that Uber was in the business of providing driving services, as opposed to generating leads for drivers. The ET did not agree with Uber that a contract existed between the driver and the passenger, given that the fee was set by Uber and paid to Uber, Uber determined the route and the driver and the passenger did not negotiate or agree terms. The control that Uber had over its drivers was also taken into account, as well as the fact that passengers are required to rate drivers (out of a total of five stars) in what is effectively a performance-management process.

It was following this unfavourable decision that Uber appealed to the EAT, using arguments about agency – that the drivers were in business on their own account and Uber merely acted as agent to agree contractual terms between drivers and passengers.

The EAT's decision (previously featured in EELC 2018/9)

The EAT dismissed the appeal and upheld the ET's decision that the drivers were engaged as workers for as long as they were in the territory in which they were authorised to work, they were signed into the Uber app and were ready and willing to accept bookings. It rejected the argument that the drivers were working in a business on their own account in a direct contractual relationship with a passenger each time they accepted a trip.

The EAT nonetheless expressed difficulty with the issue of at what times the drivers could be treated as Uber's workers. They were clearly workers when they had accepted trips, but the EAT 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 CA's decision

The CA dismissed Uber's appeal, upholding the finding that the drivers were workers.

The CA found that although the written contractual terms said that Uber only acted as an intermediary, in reality the drivers work for Uber. A court or tribunal can disregard the terms of any documents produced by an employer if they do not reflect the reality of the relationship. The CA agreed with the ET that it was not 'real' to regard Uber as working 'for' the drivers and in fact the reality was the other way around: Uber runs a transportation business and the drivers provide the skilled labour through which the business delivers its services and earns its profits.

The CA also agreed with the ET's conclusion that each driver should be regarded as a worker when they have the app turned on and are ready and waiting to accept a fare. The CA relied in particular on 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. Doubt arose from the fact that a driver could have other rival apps switched on at the same time, in which case it was arguable that he/she was not at Uber's disposal until having accepted a trip but nonetheless, the majority upheld the ET's decision on this point.

Lord Justice Underhill disagreed with these conclusions and in his view there was no basis for setting aside the contractual documentation because the relationship argued for by Uber was neither unrealistic nor artificial. He compared the Uber arrangements with a minicab service, where drivers are booked through an intermediary. An agreement needs to be inconsistent with the reality in order to be a sham, which was not the case here.

If he was wrong about this, Lord Justice Underhill said that in any case the drivers were only workers when they had accepted a trip. There was no obligation to accept a trip when offered, and the threat of being disconnected did not mean that drivers had a positive contractual obligation to accept a minimum number of trips offered. He was troubled by the fact a driver could have multiple apps open at the same time.

Commentary

This is an eagerly awaited decision and comes as another blow for operators such as Uber whose business is premised on the 'gig economy' model. It is however clear that each individual case relating to the gig economy will need to be decided on its own facts – other cases concerning gig economy business would not necessarily be decided in the same way.

The majority judgment of the CA emphasises that written terms cannot be used to avoid the statutory protection afforded to workers, especially where the parties are in an unequal

bargaining position.

The CA has given Uber permission to appeal to the Supreme Court and the disagreement between the CA Judges suggests that there are still arguments to be made in this case.

In addition, on 30 November 2016, the Department for Business, Energy and Industrial Strategy launched the Independent Review of Employment Practices in the Modern Economy (known as the 'Taylor Review' as it was led by Matthew Taylor (chief executive of the Royal Society of Arts)). The purpose of the Review was to consider the implications of new models of working, including those used in the gig economy, on the rights and responsibilities of workers, as well as on employer' freedoms and obligations. The Taylor Review published its report, *Good work: the Taylor review of modern working practices*, on 11 July 2017. It included a long list of recommendations to improve working life and employment rights with a particular emphasis on vulnerable workers, including agency workers, casual workers and zero hours workers in the growing 'gig economy'.

The Government's Good Work Plan in response to the Taylor Review is looking at legislation to improve the clarity of employment status tests, although there are no specific proposals at present.

Lord Justice Underhill's view is that it is for legislation rather than the courts to address these policy issues and it will be interesting to see whether the Supreme Court takes a similar view.

Comments from other jurisdictions

Romania (Andreea Suciu and Gabriela Ion, Suciu I The Employment Law Firm): Despite the Uber business having been on the Romanian market since 2015, ridesharing activity is not regulated by the Romanian legislation (a legislative proposal is being debated).

Although preferred by many users, recently, Uber drivers have been prohibited from seeking trade in Romania by an amendment to Law no. 38/2003 regarding the taxi transport and renting regime. The amendment came as a result of numerous protests organised by taxi drivers in Romania. The change consists of removing the syntagma 'repeatedly' from the conditions of performing public transport of individuals for a fee. More exactly, Uber drivers can be sanctioned by the competent authorities if they perform public transport of individuals for a fee even once.

The main problem between Uber drivers and taxi drivers in Romania is the lack of regulation of the work performed by Uber drivers. In order to perform transport activity, taxi drivers must obtain a transport authorization and, therefore, the taxi service generates higher costs than

those at Uber.

Concerning the solution given by the UK Court of Appeal, it should be noted that it is based on an interesting and courageous argumentation. The interpretation of the Court of Appeal is in line with the extensive interpretation of the notion of 'worker' given by the European Court of Justice, also covering self-employed persons, in a context where such is increasingly used in practice, especially in carrying out transport activities such as Uber.

According to Romanian legislation, there is no distinction between 'workers' and 'employees'. So, even if the interpretation given by the UK Court of Appeal is very interesting, it focuses on the notion of 'worker', with no practical relevance for the Romanian legislation.

However, taking into consideration that taxi drivers may perform a taxi service as 'employees' or as 'self-employed', we assume that Romanian Uber drivers would have at least the same legal treatment. Until 16 April 2019, when the amendments to Law no. 38/2003 were adopted, Uber drivers were considered 'self-employed'.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): So far, the national courts have only had to deal with competition law issues in relation to Uber. Nevertheless, the classification of the gig economy under labour law is (still) up to date in Germany. Also in Germany, it is often questionable whether the professional activity constitutes a dependent employment or a self-employment. Depending on this question is whether the employee is entitled to a minimum wage, six weeks of continued remuneration in case of sickness and holiday, protection against dismissal and so on.

As in the UK, for the classification of the employment relationship all circumstances have to be considered in the overall view. Over the years, the German jurisdiction has developed various differentiation criteria. In particular, the classification of the employment relationship depends on the employer's right to give instructions regarding the time, place, duration and scope of the work. Other criteria can be the obligation to provide personal services or to work with the employer's equipment. As in the UK, the designation of the contract is irrelevant for the classification of the employment relationship. It only depends on actual execution of the agreement.

The classification of employment relationships can be difficult, especially with regard to the modern forms of employment (e.g. gig economy or crowd working), where instructions are largely avoided or the employee is bound by instructions indirectly, e.g. through evaluation systems combined with sanctions. Based on the tendencies in case law, there is a likelihood

that German courts will also consider Uber to be an employment relationship. However, the final decision remains to be seen.

Austria (Hans Laimer and Lukas Wieser, zeiler.partners Rechtsanwälte GmbH): In Austria, as far as can be seen, no court cases of Uber drivers claiming an employment relationship with Uber are pending at the moment. However, under Austrian law it would be decisive how the services are effectively carried out on a day-to-day basis independent of the title or the provisions in the concluded agreement or the mere intention of the parties with regard to the type of contract. Therefore, Austrian courts would especially take into account how the employee is integrated within the organization, uses the resources provided, has to comply with the instructions of the employer, has personally provided the services and is personally liable. In the decision in hand the courts especially stated that Uber had control over the drivers, e.g. by deactivating the access to the app and telling them to log off if they do not want to carry passengers. They further found that there were contractual relationships between the passenger and Uber and Uber and the driver but not directly between the driver and the passenger. These facts may also indicate an employment relationship under Austrian law. However, as stated also by Jemma Thomas above, each case relating to the gig economy has to be assessed individually based on its own facts. The facts especially change if an intermediary company, who owns the car and engages the driver, comes into the picture. Such a set-up may even raise the question if a hiring-out of labour (*Arbeitskräfteüberlassung*) takes place. As case law is currently missing in Austria and the set-up of the individual relationships may vary from case to case, a general legal qualification of Uber drivers under Austrian law is currently not possible.

Subject: Miscellaneous, Employment Status

Parties: Uber BV and other companies – *v* – Aslam and others

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