EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/42 Legal status of electronic forms of employment

The UK Employment Tribunals and England and Wales Court of Appeal (case [2018] EWCA Civ 2748) have ruled that any Uber driver who has the Uber App switched on, is in the territory where he/she is authorised to work, and is able and willing to accept assignments, is working for Uber under a worker contract. The UK courts disregarded some of the provisions of Uber's driver agreement. They had been entitled to do so because the relevant provisions of the driver agreement did not reflect the reality of the bargain made between the parties. The fact that Uber interviews and recruits drivers, controls the key information, requires drivers to accept trips, sets the route, fixes the fare, imposes numerous conditions on drivers, determines remuneration, amends the driver's terms unilaterally, and handles complaints by passengers, makes it a transportation or passenger carrier, not an information and electronic technology provider. Therefore the UK courts resolved the central issue of for whom (Uber) and under a contract with whom (Uber), drivers perform their services. Uber is a modern business phenomenon. Regardless of its special position in business, Uber is obliged to follow the rules according to which work is neither a commodity nor an online technology.

Introduction

p style="margin-right:-29px">The online employment technology introduced by the fourth

industrial revolution poses a threat to the employment status of workers. It deprives them of the majority of universal employment and social rights officially guaranteed by the standards established by the International Labour Organization. A spectacular example of changes taking place in global employment relations is the legal situation of persons employed at Uber BV (UBV), Uber London Limited (ULL) and Uber Britannia Limited (UBL) managing passenger transport in London and other cities of the United Kingdom.[1] These companies and their specialised units have been recognised by labour lawyers as the 'modern business phenomenon'. Established in 2009 in the United States to provide passenger transport services, Uber is not considered an employer in the traditional sense, although it manages work performed by drivers. It does so through modern electronic devices – a smartphone functioning as a computer, and programs – mobile applications (apps). Modern online employment technologies enable entrepreneurs organising the work of Uber drivers to claim that they are not subject to international standards and national labour law – individual and collective – and social security law. Lack of legal regulation of platform work means that nowadays only the judicial authorities (labour courts) are able to assess the legal situation of the employed persons and determine their legal position and position of organisers of work consisting in the provision of transport services.

p style="margin-right:-29px">In *Aslam, Farrar, Dawson and Others – v – UBV, ULL, UBL* heard by the UK courts: Employment Tribunal (ET), Employment Appeal Tribunal (EAT) and the England and Wales Court of Appeal, drivers were recognised as workers, and Uber as an employer (Thomas, 2019).[2] A subject of interest of a labour lawyer are the criteria adopted by the courts granting worker status to the employed persons with whom the entrepreneur has concluded agreements excluding the entitlement to employment and social benefits and preventing the possibility of adjudicating claims regarding the minimum wage and financial benefits normally paid to employees during periods considered by the legislature to be justified breaks in work (paid leave). These court rulings concern approximately 40,000 drivers employed by Uber (30,000 in London alone) and 3.5 million passengers using the mobile App of this communications service company.[3]

Legal position and terms of employment at Uber companies

p style="margin-right:-29px">The legal position and terms of employment of drivers are regulated in detail in legal documents (the *Partner Terms,*[4] the *New Terms*[5] and the *UK Rider Terms*[6]) developed independently without consultation, in particular representatives of persons employed by Uber companies: UBV – owner of electronic authorisations used to provide transport services, ULL and ULB – holders of Private Hire Vehicle (PHV) licences authorising the carrying out of transport activities within London's administrative borders (ULL) and outside the city limits (ULB). These documents imply, *expressis verbis*, that Uber

companies accept PHV as an intermediary in the provision of transport services, while they themselves do not provide any transport, logistics, delivery or vendor services, because all types of these services are provided by independent third party contractors/providers who are not parties to legal relations consisting in the provision of passenger transport services. Persons providing this type of service through third-party contractors independent of Uber are not employed at Uber companies or other entities associated with Uber.[7] These documents emphasise that Uber is not a transportation or passenger carrier.[8] Its sole task is to provide information and tools to connect potential customers seeking passenger transportation services to persons with the necessary professional passenger transport licences (drivers). Persons named in documents produced by Uber are called 'partners' or 'customers'. Such terminology is typical. It was used in official Uber documents to justify a special hypothesis according to which it is not drivers who perform work consisting in the provision of transportation services to Uber, but Uber that provides services to self-employed drivers who provide services to persons using private transport means. In the legal documents regulating the legal status of Uber drivers, potential drivers were required to submit a statement in which they acknowledged the fact that Uber is a technology services provider. Therefore, it cannot be perceived by drivers as a transportation services provider (*does not provide transportation services*).[9] This is of significant importance since in the case at hand a dissenting judgment was presented, in which Lord Justice Underhill negated the fundamental findings and statements made by the first and second instance courts, the ET and EAT, that Uber created a legal and direct business relationship between the customer and the driver. Since it is not certain who should be considered the 'customer', whether it is a passenger, a driver or Uber, Underhill LJ suggests that Uber acts as an intermediary between the driver and the passenger.[10] This is unrealistic, yet a compromise proposal, seeking a fair balance between the findings of the ET and EAT and their decisions according to which persons providing services (drivers) are workers.[11] A necessary condition for obtaining this status is compliance with the requirements set out in the provisions of the UK Employment Rights Act of 1996 (ERA 1996).

Legal definition of 'employee' and 'worker'

p style="margin-right:-29px">Following the analysis of legal documents issued by Uber, the ET as a court of first instance came to the conclusion that a legal employment relationship between a driver and Uber can be considered as established when the driver is within the territory in which they are authorised to provide services, has the App switched on which enables online contact with a representative of Uber and decides to accept and execute assignments provided to them by Uber.[12] In addition to the above-mentioned conditions for the provision of services under legal relationships governed by UK labour law, it is necessary

to mention the ability and availability to perform the service, because the driver may also at the same time have two or more offers to perform work for other employment platforms.[13] In employment relationships not governed by labour law, potential providers of individual services, in this case drivers, are not restricted by non-competition clauses.

p style="margin-right:-29px">According to section 230(1) ERA 1996, an 'employee' is defined as an individual who has entered into or works under a contract of employment. 'Contract of employment' means a contract of service or apprenticeship, oral or in writing (section 230(2) ERA 1996). The specificity of UK labour law is a regulation distinguishing an employee from a person employed under an employment relationship, but not having an employee status within the meaning of the provisions of section 230(1), (2) ERA 1996. The above provisions specify the legal situation of employees, workers and other persons, such as the self-employed. In terms of deliberations on the position and employment and social rights of platform workers, it is necessary to clearly identify the differences between these three categories: employees, other employed persons whose situation is governed by labour law (workers) and the self-employed.

p style="margin-right:-29px">According to the ERA 1996, a 'worker' means an individual who has entered into a contract of employment (section 230(3)(a) ERA 1996) or any other contract, whereby the individual undertakes to do or perform personally any work or services for another party to the contract (section 230(3)(b) ERA 1996). The status of the latter cannot be by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual concluding the contract of employment or other services contract. The legal effect of the conclusion of one of these contracts is the establishment of a legal relationship under which both persons mentioned in section 230(1) and (3) ERA 1996 – 'employee' and 'worker' are employed persons. Section 230(5) ERA 1996 uses the legal term 'employment' to describe persons providing work under a contract of employment – employees, and other persons performing work or providing other services, considered employed persons by the provisions of section 230 ERA 1996. The term 'worker' is broadly used today among UK lawyers to denote a natural person employed under the terms laid down in section 230(3)(b) ERA 1996.[14] Before the entry into force of the ERA 1996, the term 'worker' was used in UK labour law to define the type and nature of work, manual work, performed by the worker (Terry & Dickens, 1991). The common characteristics of an employee and worker, as distinct from a self-employed person, is the organisational and economic dependence of the person performing work or services under a contract other than a contract of employment. In the UK case law, the difference between a worker and a self-employed person is seen in the classification of the legal relationship under which the work or other services are performed. The judiciary distinguishes two basic types of relationship between employees and employers

and service providers and services recipients – dependent and independent relationships. Employees and other persons in dependent work relationships are seen as persons dependent on the person managing the workplace – the principal. They are employed to perform work or provide other services for the latter. The activities they perform are an integral part of the undertaking managed by the person who employed them. In employment relations, relationships between people are classified explicitly. Work and other types of services can be provided on someone's behalf or on one's own account. Such division of professionally active people into employed and self-employed people created by the UK jurisprudence makes it possible to distinguish one group from another. Employees and dependent workers are subordinated to those who organise their work and manage the activities in which the employed persons participate.[15] Contractual employment and dependent work are fundamentally different from the contract concluded by two independent business undertakings.[16] UK labour law establishes a clear distinction between workers whose work relationship is governed by the provisions of the ERA 1996 and professionally active persons conducting independent economic activity consisting in the provision of various types of services, including work for other persons and/or entities.[17] The line between the status of workers providing subordinate work to the employer becomes less clear when a person making efforts to differentiate the legal position of a self-employed person, previously presented by third parties as an independent person to the world in general, does not undertake business activities solely on their own behalf, but is commercially oriented. Given the need to undertake business activities for specific social categories (target groups), the self-employed person becomes dependent in a professional, organisational and economic sense on a specific group of people, perceived and classified by marketing specialists as prospective buyers of manufactured goods or provided services. The distinction between two, theoretically different, types of self-employment: 'dependent' and 'independent' is risky, because in the modern world, experiencing the fourth industrial revolution initiated by new, previously unknown online employment technologies, the existing criterion for the division of work and other services consisting in the provision of work into those performed on one's own behalf and those performed on someone else's account, loses its sense. The judgment issued by the England and Wales Court of Appeal in *Stringfellow Restaurants Ltd – v – Quashie*[18] dismissed the claim of a person employed as a lap dancer in a club who accused the employer of unjustified dismissal. For additional remuneration, she accepted restaurant customers' invitations to dance. Another example was a dismissal of a claim of a caddie employed in a golf club.[19] In this case, the claimant was issued by the golf club with a number, a uniform and a locker. In both of these cases, the adjudicating judicial authorities, the Court of Appeal and the Privy Council, did not recognise the claimants as employees. The respondent entities providing catering and sports services were not obliged to provide the applicants with work. A

necessary condition to be considered an employee or worker (not a self-employed person) is the mutuality of the obligations of parties to legal relationships under which work is performed or other services are provided. The restaurant where the dancer provided her services and the managers of the golf club did not create employment opportunities for persons providing services, as they were offering them the opportunity to earn money under civil law contracts. Uber as a company related to passenger transport creates for drivers providing transport services a chance to earn (business opportunities) in this extended sphere of services.[20] It allows 'its drivers' (Uber drivers, Uber vehicles[21]) to take up employment as employment 'dependent' on Uber.

p style="margin-right:-29px">The company regulations governing the terms of cooperation with Uber – referred to as *Partner Terms* and *Rider Terms* – clearly indicate that the company enjoys the following authority over candidates for employment in the positions of drivers:[22]

It has sole and absolute discretion in making personnel decisions regarding the employment of drivers.
It conducts the recruitment process.
It requires, and then keeps at its sole disposal, sensitive personal data of drivers such as their contact details and information about their decisions on how to perform work. It indicates the routes that drivers should use when carrying out individual transport assignments, gives drivers specific instructions in such cases and uses the power to take action – to apply disciplinary sanctions to drivers who do not accept decisions passed to them by the institution managing the passenger transport services.
Uber obliges employed drivers to compete with each other in accepting assignments submitted by a dispatcher. The internal competition among the 'dependent' employed person consists in accepting assignments as quickly as possible, without logging out of the system enabling the person organising work to divide tasks falling to specific services received at Uber's headquarters. It also applies to the obligation of immediate and diligent performance of individual tasks. In this sphere of professional activity of drivers, Uber representatives have the greatest impact on drivers acting as performers of precisely defined tasks.
It determines – according to the App – default routes which the drivers can change at their peril.
The price of the transportation service is determined by Uber. The driver cannot increase it. Although they may lower it, thus reducing the lump sum of 20% due to them, this does not however, in the opinion of the judicial authorities, significantly change the assessment of the role of the transport company.
Uber sets for the drivers the terms of provision of service consisting in work. It defines the

colours of passenger cars (black and silver) that the drivers can use to transport passengers and instructs drivers how to behave when performing services. For example, it forbids them to socialise with passengers. It supervises drivers and systematically controls their behaviour. For this purpose, it uses assessment questionnaires of how drivers perform work which are regularly filled in by passengers. It uses them to assess the quality of work provided and to reward and discipline the employed drivers.
It sets fares for passengers per kilometre of travelled routes and/or time for the provision of transport services, deciding to reduce them for reasons that it determines unilaterally. Often, it determines issues about rebates without even involving the driver.
It bears the risk of losses which, for professional reasons, it could charge to drivers in accordance with the law.
It handles passenger complaints and claims about the drivers. Therefore, in relation to the drivers it acts as an employer. It has direct power over them and has unlimited rights to make independent decisions about changing their employment conditions.

p style="margin-right:-29px">According to the ET, EAT and the England and Wales Court of Appeal, an Uber driver is a worker in a legal relationship. However, ‘partners’ acknowledge and agree that Uber does not provide any transportation services, and that Uber is not a transportation or passenger carrier. Uber offers information and a tool to connect customers seeking driving services to drivers who can provide the driving service, and it does not intend to provide transportation or act in any way as a transportation or passenger carrier. Notwithstanding this, Uber provides the service of a transport company consisting in the transport of passengers and it was recognised as such a company by the UK judicial authorities.[23] Drivers employed on the basis of contracts for the provision of services other than work systematically provided on the basis of a contract of employment and in the legal framework of such a contract, reporting the readiness to perform work consisting in the transport of passengers, not classified by Uber as an employee, may be considered employees within the meaning of section 230(1), (2) and (3)(a) of the ERA 1996. They can also be treated as workers who do not have the status of self-employed persons (section 230(3)(b) ERA 1996). The entity that employs them decides independently what should be their relationship to the customers. Such entity is Uber, for which – according to UK courts – drivers perform work. This is how a passenger carrier is defined by the UK legislature. Pursuant to section 230(5) ERA 1996, an employer in legal relations with an employee or a worker is considered to be anyone who has employed the above-mentioned persons. The terms used by the legislature in relation to employees and employers do not lose their relevance in relation to workers. Within the meaning of section 230(5)(b) of the ERA 1996, the difference between an employee and a worker is that each of them performs work under a different contract. In each of these contracts, there is a person or entity acting as the employer. If the terms of legal relations

established by employers with employees and/or workers differ, the employer shall be construed accordingly. The above statement makes it difficult for Uber to be perceived as an intermediary between the employed person (driver) and the beneficiary of the legal relationship between the driver and Uber. Perhaps in principle Uber could operate on the intermediary model, though it was of course their case that on the Tribunal's findings it did not do so. Although the intermediary may be as much as the employer interested in the quality of services provided, it does not however have a sovereign authority over those providing such services. The fact that Uber creates employment opportunities for persons holding a passenger transport licence wishing to make profit from the above professional skill does not, in a legal sense, make Uber an employment agency. It is not Uber who provides services to drivers, but drivers transporting passengers performing for Uber the services regulated by labour or employment law.

Legal requirements to acquire the status of driver employed by Uber

p style="margin-right:-29px">In the light of the labour law provisions in force in the EU Member States, an employee is a person who performs work for the employer personally, for remuneration and is obliged to follow the instructions of the employer specifying the manner, place and time of performance of work.[24] Following the analysis of Uber's legal documents regulating the legal situation of persons providing the passenger transport services, the ET as a court of first instance obligated to establish the facts of the case came to the conclusion that the provisions governing the terms and conditions of employment of drivers at Uber differ from the practice followed by the parties to legal relations under which the transportation services are performed.[25] The regulations governing the basis and legal framework for the employment of drivers at Uber have been drafted in such a way as to give the impression that Uber is not involved in passenger transportation services within a certain agglomeration, in this case London. It uses the services of drivers with whom it does not enter into any contracts, in particular contracts of employment or employment on any other legal basis. The vast majority of drivers providing transport services through Uber are self-employed persons. Uber strives to present them as sole operators. Few supervisory activities towards the 'independent' self-employed, such as constant monitoring of drivers, are carried out by Uber and only with the prior consent of individual drivers interested in the above interference in the services they provide. Officially, Uber provides drivers who independently perform transportation services only with technology services. To this end, it uses modern electronic devices used solely to inform where and whom to transport within the London administrative borders. Therefore, it sells to the interested 'independent contractors' certain know-how and electronic instruments enabling it to establish and maintain permanent communication with them. It also requires drivers to independently carry out all inspections, to repair vehicles approved by Uber, to pay

for the costs of fuel, and to register and maintain the cars. It imposes on them the obligation to accept at least 80% of trip requests in the area indicated by it.

p style="margin-right:-29px">The conditions laid down by Uber for the provision of ‘independent’ transportation services by drivers raised doubts at the ET. In substantive terms, the most important is that the ET exercised its right to assess the credibility of internal regulations at Uber applicable in the process of development of legal relations between the company and drivers. British judicial authorities are required to assess the credibility of the company’s laws. Judicial practice developed at the turn of the first and current decade of this century requires courts in the UK to examine whether the arrangements made between Uber and drivers based on the company’s regulations that are in force can be considered true (*true agreement*) and real – and thus reflect the reality of the bargain made between the parties to legal relations under which passenger transport services are provided.[26] It is important whether the internal regulations of entrepreneurs for whom the services are performed were observed by the parties to legal relations.[27] The adjudicating first instance authority – the ET – was required to verify the actual situation of persons providing services and determine their legal position. It was obliged to do so under section 230 ERA 1996, which allows the provision of services under three types of contracts: a contract of employment, a ‘dependent’ worker contract or the ‘independent’ performance of services. The starting point for such determination is the statutory language used in the company’s regulations. Entrepreneurs most often use in these documents specific terminology, characteristic of legal relations established with individuals performing services on their own account, i.e. with self-employed persons. In the judgment issued in *Autoclenz Ltd – v – Belcher,* the ET and EAT had to determine the actual meanings of legal terms used by the parties to the legal relationships under which services were provided (in fact by one party – the entrepreneur acting as an employer). The parties to these relationships cannot use ‘labels’, because the language and terms used by and in relation to self-employed persons do not mean that services are actually provided under two different contracts listed in section 230(1) and (2) ERA 1996. In another ruling issued in this series, the court had to determine relevant facts in unclear legal relations and to examine the true intentions of the parties.[28] This was to eliminate the practice of the parties concluding sham contracts liable to rectification. Such ‘agreements’ agreed between the parties or prepared independently by one of the parties – the entrepreneur, could be disregarded by the ET and EAT.[29] The England and Wales Court of Appeal in the case at hand did the same. It disregarded the clauses introduced by Uber into company acts that did not reflect the real intention of the parties to legal relations.[30]

p style="margin-right:-29px">The ET ruled that drivers selected by Uber to provide services are under no obligation to switch on the App enabling communication with the dispatcher

managing the transport. Using an illustrative comparison, the ET concluded that there is no prohibition against 'dormant drivers' who refuse to work. This means that when a driver has the App switched on, they notify the Uber dispatcher about their readiness and willingness to accept transport assignments. Because of the differences between the range of the App and the territory in which the Uber driver is licensed to provide transportation services, a necessary condition for being ready to work is to remain in the designated administrative territory. An Uber driver ready to perform transportation services is a driver willing to work, able to work and able to perform it legally. The status of Uber's employed driver is reflected in the sentences according to which being available is an essential part of the service which the driver renders to Uber (*"They also serve who only stand and wait"*).[31]

Dissenting judgment

p style="margin-right:-29px">The above rulings, in favour of those who were deemed workers, were contested by one judge of the England and Wales Court of Appeal, Lord Justice Underhill.[32] In a dissenting judgment to the majority judgment issued on 19 December 2018[33] he stated that an Uber driver providing the passenger transport service is not a worker.[34] According to him, the jurisprudence of the Court of Justice of the European Union (CJEU) recognises that the term 'worker' has a special, autonomous meaning in EU law.[35] To support this thesis, he referred to three rulings of the CJEU: *Allonby – v – Accrington & Rossendale College,*[36] *Trojani – v – Centre Public d'Aide Sociale de Bruxelles*[37] and *Fenoll – v – Centre Public d'Aide par le Travail "La Jouvene"*.[38] It is worth recalling that according to Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses,[39] an employee within the meaning of EU law is an employed person who meets the requirements laid down in the labour law of an EU Member State necessary to be considered an employee (Świątkowski, 2012).

p style="margin-right:-29px">The legal definition of worker has been presented in the provisions of section 230 ERA 1996. There are no terms or expressions that would prevent an Uber driver from being considered a worker. Underhill LJ's concept, according to which the driver does not work for Uber, but Uber provides services for the driver, is not very convincing. Underhill LJ does not indicate what could be the Uber services provided to an independent, self-employed driver. Uber creates employment opportunities because it initiates, as I previously mentioned, a legal work or employment relationship. However, during the period of work or employment it provides almost no services to the driver. Financial benefits, in particular 80% of the remuneration due to the driver for the transport of persons ordered by Uber cannot be considered a service. The fact that the driver, not Uber, bears the risk of non-payment for the transport as a result of a defect in electronic technology devices or bankruptcy

announced by Uber does not create factual and legal grounds for the harmed drivers to demand payment of amounts due from customers. Contrary to Underhill LJ's hypothesis, no legal relationship is created between the Uber driver and a passenger directly related to the type of contract (employee or worker employment) under which the transportation service is provided. The easiest way would be to classify the situations described above into the third category of legal relations, under which services are provided by self-employed drivers. Because of Uber's participation and terms of participation in the performance of such services, it is not possible to transfer to passengers (customers) the obligations arising from their non-compliance with the obligations to the driver.

p style="margin-right:-29px">Lord Justice Underhill's rigorous views were weakened by an EU court order published on 22 April 2020.[40]

p style="margin-right:-29px"> According to the court order Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by their putative employer under a services agreement which stipulates that they are a self-employed independent contractor from being classified as a 'worker' for the purposes of that Directive, where that person is afforded discretion: (1) to use subcontractors or substitutes to perform the service which they have undertaken to provide; (2) to accept or not accept the various tasks offered by their putative employer, or unilaterally set the maximum number of those tasks; (3) to provide their services to any third party, including direct competitors of the putative employer; and (4) to fix their own hours of 'work' within certain parameters and to tailor their time to suit their personal convenience rather than solely the interests of the putative employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and their putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity they carry on, to classify that person's professional status under Directive 2003/88.

Final remarks

p style="margin-right:-29px">The latest research commissioned by the European Commission Directorate-General for Employment, Social Affairs and Inclusion Directorate B on electronic forms of employment (Kilhoffer *et al.*, 2020) has shown the following:

The legal concepts of 'worker' or 'employee' at EU and national level are not entirely clear and

consistent. The assessment is based on the factual relationship between the platform and the platform worker, or the client and the platform worker. These assessments are subject to interpretation and rapid change.
Determining whether platform workers are genuine or bogus self-employed is frequently challenging. National judiciaries' interpretation of the employment is not unanimous and sometimes contradictory within and between Member States. At the same time CJEU case law is only gradually evolving and clarifying the concept of 'worker'.
These legal developments are slow and seem to continuously lag behind the fast-changing business practices characterising platform work. Some platforms seem to operate at the margins between self-employed and employee, adjusting practices to maximise control over platform workers without unequivocally assuming the role of employer.
CJEU case law has defined the 'worker' concept with a central focus on the subordination requirement, the economic and genuine character of the service and its remuneration requirement.
Platform work may still be slipping through these requirements, as do other forms of non-standard work performed in economic dependency.
Unless Member States widen the concept of employee or introduce a rebuttable presumption on the employment status of platform workers, platforms are likely to continue or expand their reliance on labour from self-employed individuals. Reclassification of individual cases may happen on the basis of EU law or on the basis of national legislation (Świątkowski, 2019).

p style="margin-right:-29px">The judgment in *Aslam, Farrar, Dawson and Others – v – UBV, ULL, UBL* is a global-scale precedent. It has been broadly commented on, not only by labour lawyers (Uber BV, 2018; Courtin, 2018). I believe it is decisive for the future of contracts of employment in the post-industrial era. I am aware that this is at the very least a bold statement which must be qualified by the fact that each case has to be decided on its own merits. This was at least partially corrected by ECJ Decision (C-692/10) on 22 April 2020. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which they receive remuneration.[41] Since an employment relationship implies the existence of a hierarchical relationship between the worker and their employer, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties.[42]

p style="margin-right:-29px">A contract of employment is the central legal institution in every system of national and international labour law. It guarantees the parties to employment relations, individual and collective, adequate legal protection, balances the position of individual employees, employee collectives and – to a limited extent – also their trade unions

in relation to employers and employer's organisations (Freedland *et al*., 2016). A contract of employment imposes two fundamental obligations on employers and employed persons. The first relates to the employer. It refers to the need to provide work to the employed persons and orders performance of work to employers. The second also refers primarily to the employer. It obliges it to pay at least the minimum wage to an employee who does not work but is ready to work (Elias, 2018). The worker is therefore subject to special protection. Thus, the international system for the protection of workers' rights, which has been developed over a substantial period of time, cannot be undermined by the concepts brought by the fourth industrial revolution which develop differently the new online employment technologies. On the other hand, one could argue that such system also should change as the society as a whole has changed.

p style="margin-right:-29px">The lack of response of State authorities to dynamically developing employment platforms and of other institutions to the ideas according to which humans work – despite explicit International Labour Organization declarations 75 years ago – that people are not considered a commodity, means that in the early period of the post-industrial era we are dealing with an impersonal phenomenon presenting human work as modern electronic technology. The above approach to work poses a serious risk to the fundamental values that in employment relations are created[43] and supervised by international and regional organisations operating on a global scale – the International Labour Organization, and in Europe – the Council of Europe and the European Union. Values (work is not a technology) and legal principles (decent remuneration, the right to protection in cases of termination of employment) that are particularly threatened by the ideas of the GIG economy and other processes of digitisation of employment relations and social security are the legal systems that guarantee the protection of employees' rights and social rights.

p style="margin-right:-29px">The UK court ruling in case [2018] EWCA Civ 2748 brought into focus a universal need to adapt modern labour law systems to the requirements of the fourth industrial revolution, without jeopardising the interests of entrepreneurs and persons employed within work platforms and other new, modern technologies invading the global labour market. The latest jurisprudence of the ECJ in the proceedings *B – v – Yodel Delivery Network Ltd* means that in EU Member States the boundaries between an employee and a self-employed person are beginning to be drawn more clearly. In my opinion, in the case of the UK, the reconstruction of labour law should start with the liquidation of the three forms of employment presented in this study: 'dependent', 'independent' and 'employee' employment (Good Work, 2017-2018). The employment system established in the ERA 1996 is not only outdated, but mainly incomprehensible in continental Europe and beyond. It should be replaced by a universal system, based on contractual principles, i.e. equal rights and special

protection of employees as the weaker party to individual labour relations (McGangey, 2017a and 2017b). The judgments presented in this study are the first, most advanced, attempt to protect the 'traditional' labour law system against electronic employment technology (McGangey, 2018). One should only hope that the decisions issued recently in the UK will not be corrected, but will be repeated by labour courts in other countries.

[1] Case: *Uber BV, Uber London Limited, Uber Brittannia Limited – v – Aslam, Farrar, Dawson and Others*, England and Wales Court of Appeal (Civil Division), [2019] WLR(D)6. ICLR report: [2019] ICR 945, Case No: A2/2017/3467, Neutral Citation Number: [2018] EWCA Civ 2748.

[2] See also EELC 2017/10, 2018/1 and 2018/9.

[3] One may assume that the ruling does not really apply to the workers, but is 'merely' a precedent. Cf. Jemma Thomas in her case report in EELC 2019/24: "*It is however clear that each individual case relating to the gig economy will need to be decided on its own facts.*"

[4] [2018] EWCA of 1 July 2013, § 32-35.

[5] [2018] EWCA of October 2015 (no date specified), § 36-37.

[6] [2018] EWCA of 16 June 2016, § 28-30.

[7] [2018] EWCA of 16 June 2016, § 29.

[8] *Uber BV & Others – v – Aslam & Others*, [2018] EWCA Civ 2748 judgment of 19 December 2018, § 32. The claimants are former drivers for Uber and its associated companies. In the ET the judge had found that they were workers, broadly as they were not in control of setting fares and were subject to various forms of control through the Uber App. That decision was upheld by the EAT at *Uber BV & Others – v – Aslam & Others* UK EAT/0056/17/DA. In their joint judgment, Sir Terence Etherton and Bean LJ recap much of the detail from the original ET decision and the employment judge's reasoning. They then focus on two issues: whether the drivers had a contract with their passengers and at what point they could be considered to be working for Uber: was it when they picked up a passenger or when they logged onto the App to accept any trips offered? They agree with the ET's findings on both issues at [95] stating that: "*We agree with the ET's finding at paragraph 92 that it is not real to regard Uber as working 'for' the drivers and that the only sensible interpretation is that the relationship is the other way round. Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits.*" And at

[104] find that while in theory it was possible for a driver to work for Uber and other providers at the same time Uber's requirement to accept a certain level of trips and the imposition of penalties if too many trips are refused meant that the ET was entitled to conclude that the drivers waiting for a booking were available to ULL and at its disposal. https://www.employmentcasesupdate.co.uk/site.aspx?i=ed38107.

[9] [2018] EWCA of October 2015, § 37.

[10] [2018] EWCA of 16 June 2016, § 113.

[11] [2018] EWCA Civ 2748, § 86.

[12] [2018] EWCA Civ 2748, § 86.

[13] [2018] EWCA Civ 2748, § 108.

[14] [2018] EWCA Civ 2748, § 29.

[15] See the judgment of the EAT in *Cotswold Developments Ltd – v – Williams* [2006] UKEAT 0457, [2006] IRRL 181.

[16] See the judgment of the EAT in *James – v – Redcats (Brands) Ltd* [2007] UKEAT 0475, [2007] ICR 1006.

[17] See the judgment of the Supreme Court in *Bates van Winkelhof – v – Clyde & Co LLP and another* [2014] UKSC 32, [2014] 1 WLR 2047.

[18] [2013] IRLR 99 CA, [2013] EWCA Civ 1735.

[19] Judgment in *Cheng Yuen – v – Royal Hong Kong Golf Club* [1988] ICR 131 PC.

[20] [2018] EWCA Civ 2748, § 94.

[21] *Ibid.*

[22] [2018] EWCA Civ 2748, § 96.

[23] [2018] EWCA Civ 2748, § 31 (judgment of ET) and § 103 (judgment of EAT dismissing the appeal).

[24] An argumentation *a contrario* to the *Yodel* case, see footnote 40 below; (C-692/19) – Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L. 299.18.11.2003, pp. 9-19).

[25] [2018] EWCA Civ 2748, § 38.

[26] See the judgment in *Autoclenz Ltd – v – Belcher* [2011] UKSC 41, [2011] ICR 1157.

[27] Judgment in *Consistent Group Ltd – v – Kalwak* [2007] UKEAT 0535, [2007] IRLR 560.

[28] *Secret Hotels2 Ltd (formerly Med Hotels Ltd) – v – Revenue and Customs Commissioners* [2014] UKSC 16, [2014] All ER 685.

[29] Judgment in *Addison Lee Ltd – v – Lange* [2018] UKEAT 37.

[30] [2018] EWCA Civ 2748, § 65.

[31] [2018] EWCA Civ 2748, § 101.

[32] [2018] EWCA Civ 2748, § 107 *et seq*.

[33] Royal Courts of Justice, The Strand, London WC2A 2LL 19 December 2018.

[34] [2018] EWCA Civ 2748, § 155.

[35] [2018] EWCA Civ 2748, § 151.

[36] C-256/01 [2004] ICE 1328.

[37] C-456/02 [2004], 3 CMLR 38.

[38] C-316/13 [2016] IRLR 67.

[39] OJ L No. 82, p. 16.

[40] Order of the Court (Eighth Chamber) 22 April 2020, In Case C-692/19, Request for a preliminary ruling under Article 267 TFEU from the Watford Employment Tribunal (United Kingdom), made by decision of 18 September 2019, received at the Court on 19 September 2019, in the proceedings *B – v – Yodel Delivery Network Ltd*, The Court (Eighth Chamber), C-692/19, ECLI:EU:C:2020:288.

[41] Judgments of ECJ 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 27, and of 21 February 2018, *Matzak*, C-518/15, EU:C:2018:82, paragraph 28.

[42] Judgments of ECJ 10 September 2015, *Holterman Ferho Exploitatie and Others*, C-47/14, EU:C:2015:574, paragraph 46, and of 20 November 2018, *Sindicatul Familia Constanța and Others*, C-147/17, EU:C:2018:926, paragraph 42.

[43] Although one could also argue that even fundamental values should be reconsidered from time to time.

Verdict at:
Case number: