SUMMARY

2018/9 Uber’s work status appeal rejected (UK)

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detrimental treatment for 'blowing the whistle' against malpractice. 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.

Legal background

This case is the latest in a suite of much-publicised cases focusing on the 'gig economy' (the portion of the labour market focused on short-term contracts and/or freelance work). Uber's appeal to the EAT was launched after the ET decision last year that Uber's drivers were 'workers', and not self-employed, following a claim by a group of Uber drivers against Uber for not paying the NMW and for compensation for failing to provide paid holiday.

Under UK law, an individual contracted to do work for someone else could be an employee, a worker or self-employed. The distinction between a worker and someone who is genuinely self-employed is important – a worker has additional legal protections, from which the genuinely self-employed do not benefit (such as the right to the NMW and to paid holiday), although workers have fewer rights than employees.

Under UK law, a 'worker' is someone who works under: (i) a contract of employment, or (ii) any other contract under which the individual undertakes to perform work personally for someone who is not the client or customer of any profession or business of the individual.

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 – just because an employment relationship is documented in a certain way will not necessarily be determinative of an individual's employment status.

Facts

Customers hail Uber's taxis via its smartphone application. Following a request for a taxi, the App locates the nearest driver and sends the driver a notification of the request. Once the booking is confirmed, the driver and customer can contact each other. The App determines the route to be taken and the fare payable is calculated by Uber at the end of the journey, using

GPS data sent from the driver's smartphone.

Uber's position throughout the ET hearing was that it effectively acted as a broker, by providing 'lead-generation' opportunities to self-employed drivers. Uber's terms (in relation to both passengers and drivers) state that it does not provide transportation services but merely acts as an agent for third-party providers (i.e. the drivers).

In reality, Uber does control its drivers in various ways – for example, it has the ability to deactivate a driver's account if the driver's ratings fall below a certain level, the App determines the route to be taken and drivers are told to log out of the App if they don't want to collect 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 into 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

The EAT dismissed Uber's appeal and upheld the ET's decision, stating that whilst it was possible to have an agency relationship, the relationship between Uber and its drivers did not reflect this.

The network of arrangements and controls to which Uber drivers were subject suggested that the drivers had a direct contractual relationship with Uber and were not working on their own account. This was despite the label of "agency" used in Uber's contractual documentation.

The EAT looked at a number of different factors in order to reach its decision, from the size of the business – it is unlikely that tens of thousands of drivers sharing one point of contact would be separately self-employed – and the fact that drivers couldn't negotiate with passengers and had to accept Uber's terms, to the fact that drivers could not establish a business relationship with passengers (and were prohibited from contacting them after a ride).

The EAT similarly rejected Uber's arguments that it was contradictory to find that Uber had control over its drivers, whilst at the same time drivers were free to turn off the App as they chose. This was on the basis that, whilst a driver had no obligation to accept every trip, if he failed to accept at least 80% of trips, his account would be disconnected.

The EAT had greater difficulty in determining when the drivers should be considered to be Uber's "workers". It was evident that when drivers had accepted trips, they would be workers. The EAT was less clear on whether the drivers would be considered workers between jobs. The issue is highly significant from a UK law perspective as it is relevant to the calculation of the drivers' 'working time' (as well as their entitlement to the NMW). The EAT ultimately decided that it would be a question of fact in each individual case – if a driver had similarly agreed to accept 80% of trip requests from another operator, they clearly would not be at Uber's disposal.

Commentary

This case comes as another blow for operators such as Uber whose business is premised on the 'gig economy' model. It is however clear from the EAT's decision 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.

Indeed, in November 2017 the Central Arbitration Committee ('CAC') – a specialist body on trade union matters – rejected an application from the Independent Workers' Union of Great Britain for collective bargaining rights in respect of Deliveroo riders, in the first high profile 'worker status' decision to go in favour of the company in recent times. In this case, the CAC held that the right of Deliveroo drivers to appoint a substitute was 'genuine' and riders take advantage of this right in practice. This, it was held, was fundamentally incompatible with 'worker' or 'employee' status, leading the CAC to conclude that Deliveroo's drivers must be self-employed. The decision in this case illustrates the extent to which the specific facts of each case are highly relevant.

Uber has appealed the EAT decision and petitioned to 'leapfrog' the Court of Appeal to be heard directly by the Supreme Court. This request was denied, however, so the appeal will be heard by the Court of Appeal and, if Uber lose again, they will no doubt appeal to the Supreme Court. In the meantime, another appeal about worker status in a gig economy case, 'Pimlico Plumbers', is due to be heard in the Supreme Court on 20 and 21 February 2018.

The Taylor Review, commissioned by the government and published in July 2017, made a number of recommendations as to employment status and the gig economy. It is therefore also possible that the government might intervene and reform UK law, although any such process would inevitably take time. It is therefore likely that there will be more cases relating to the gig economy – including, it is hoped, some definitive guidance from the Supreme Court – in the meantime.

Comments from other jurisdictions

Belgium (Bartłomiej Bednarowicz, University of Antwerp): 'Another big step in the right direction: We won't get fooled again'

The EAT ruling upholding the ET first instance judgment should be welcomed with open arms. The tribunal was not fooled by appearances or the misleading and illusionary language of the Uber terms and conditions and focused on the functions of Uber as an employer. Uber's main line of argument that it was simply an intermediary platform matching passengers with drivers was quashed once more by a series of blunt arguments reiterated by the EAT from the first instance judgment.

This decision aligns well with the ECJ ruling in the Uber Spain case, where even though not faced with an employment law case, the judges highlighted that Uber is something more than

just a 'broker' facilitating passengers wishing to make urban journeys with nearby drivers by means of an eponymous application. The intrinsic features of Uber including: a one-sided pricing algorithm; influence over the drivers' code of conduct; and a driver-ranking system over which it exercised control that can even result in drivers being expelled from the platform if their ranking falls below a satisfactory level or their rejected rides ratio reaches 20% – all point to Uber being an employer.

Despite the differences under UK law between a worker and an employee, these factors still fitted into the concept of 'false self-employment'. This also fits in with EU law, for example, the landmark FNV Kiem case, in which the ECJ stated that the status of self-employed person which is given simply to avoid the application of employment law could be lost if one looked at the real relationship between the alleged self-employed person and the business, particularly if the person was operating as an auxiliary within that business.

The parallel drawn seems to apply to most cases of on-demand work via apps with Uber and similar platforms. It can be therefore inferred that the minute the platform oversteps a thin line and starts exercising control over the workforce – and therefore stops acting purely as a 'booking agent' – this might lead to it being regarded as establishing some sort of employment relationship. The EAT judgment can be best described as another small step for man, another giant leap for mankind, at least gig-wise.

Finland (Janne Nurminen, Roschier Attorneys Ltd): In Finland, the taxi service industry has traditionally been strictly regulated. In August 2017, the Supreme Court of Finland sentenced an Uber driver to a fine for operating an illegal taxi service. In July 2017, Uber announced that it would be on hiatus in Finland until summer 2018 as it does not want Uber drivers or Uber's admin employees to be exposed to unnecessary harm. According to Uber, it will continue operating in Finland in August 2018 after the new Transportation Services Act (320/2017) comes into force in July 2018. Uber has stated that the new regulation will significantly advance implementing new technology and business concepts and will, therefore, provide a better operational environment for Uber.

Germany (Dominik Ledwon, Luther Rechtsanwaltsgesellschaft mbH): There has been no decision by the German labour courts as yet as to whether Uber drivers are workers/employees or self-employed. However, under German employment law, it is very likely that the German courts would have decided the matter differently from the EAT. This is because Uber drivers are generally considered as self-employed in Germany.

First of all, there is no distinction between 'workers' and 'employees' under German law, unlike in the UK. Thus, the labour courts would have addressed the question in this case in a

slightly different way, asking if Uber drivers could be seen as employees or as self-employed.

The legal definition of 'employee' can be found in section 611a of the German Civil Code ('Bürgerliches Gesetzbuch', or 'BGB'). According to section 611a of the German Civil Code, an employee is obliged by the employment contract to perform work in the service of another person, subject to his or her instructions and in a relationship of dependence.

The right of the employer to issue instructions may relate to the content, implementation, time and place of work. Thus, those who are essentially not free to organise their work and determine their working hours are seen as employees.

In order to determine whether an employment contract exists, an overall assessment of all the circumstances must be made. If the reality of the working relationship indicates that it is an employment relationship, the designation in the contract does not matter. Thus, even if, for example, the contracts of Uber drivers state that they are self-employed, German labour courts will deem them to be employees if that is the reality. But by applying these criteria to Uber drivers, Uber drivers would be seen, in my view, to be self-employed.

It is true, and in line with the EAT judgment, that Uber has some control over the drivers because they cannot negotiate terms with passengers and therefore have to accept Uber's terms. As the EAT indicated, when drivers fail to accept at least 80% of their trips, their account will be disconnected. The app also determines the route to be taken and the fare is calculated by Uber.

On first sight, these arguments could lead to the conclusion that Uber drivers are in fact employees, as it is clear that Uber is exercising the right to issue instructions. However, one must look at one step before the actual driving takes place.

Uber drivers are free to open and sign up to the app whenever they want. Although this is comparable with a situation in which an employee is free to sign a contract of employment, in the case of Uber, it would be highly impracticable and legally doubtful to consider each sign-up to the app as a new contract of employment.

Even though there is an 80% acceptance rate rule, Uber drivers are essentially free to organise their work, especially the time and place of work, and they can also determine their working hours on their own. There is no contractual obligation for them to turn up at a certain place and time and start working/driving.

Thus, the actual right to issue instructions by the employer plays only an insignificant role in the contractual relationship. It simply sets the framework for the driving. As Uber drivers are

free to decide the time, place and length of work/number of trips on their own – and even not to work at all for a period of time – they must be considered as self-employed. Having said that, the main reason why this question of Uber drivers' status has not come before the German courts yet, is because of previous administrative court proceedings.

Currently, Uber drivers are not allowed under German law to driving because Uber has violated the provisions of the Passenger Transportation Act ('Personenbeförderungsgesetz' or 'PBefG'). According to the PBefG, any carrier offering passenger transportation for gain requires a concession. The administrative courts have ruled that transportation by private drivers using the UberPop App does not comply with the licensing requirements. (Verwaltungsgericht Hamburg 27 August 2014, Case 5 E 3534/14; Oberverwaltungsgericht Hamburg 24 September 2014 Case 34 3 Bs 175/14; Verwaltungsgericht Berlin 26 September 2014 Case 11 L 353.14).

It can be assumed that since Uber does not possess a licence, most drivers have either stopped their driving business or continued to work illegally. Thus, claims relating to employment status are not likely for the moment.

Subject: Miscellaneous, employment status

Parties: Uber B.V., Uber London Ltd and Uber Britannia Ltd – v – Mr Y. Aslam and Others

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