Employment

What Next for Status after Uber?

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The dust has now started to settle on the Supreme Court's decision in *Uber BV v Aslam* [2021] UKSC 5 ('*Uber (SC)*'). In this blog, Hitesh Dhorajiwala and Jesse Crozier examine to what extent the Supreme Court's decision alters our understanding of "worker" status, and look at the practical consequences and future battlegrounds for disputes over status.

Introduction

Almost five years after the Employment Tribunal delivered its decision in *Aslam v Uber BV* [2016] 10 WLUK 681 (ET), the Supreme Court delivered its judgment in one of the most contentious pieces of employment law litigation of the last decade. Touching on some of the fundamental questions of what it is to be a "worker", the Supreme Court refined the scope of the interpretive test articulated in *Autoclenz v Belcher* [2011] ICR 1157 (SC), holding unanimously that the courts and tribunals must take a 'purposive' approach to statutory protections in the employment arena.

Facts

The *Uber* case concerned the status of drivers who worked within the Uber app, and specifically whether those drivers were "workers" for the purpose of s 230(3)(b) Employment Rights Act 1996, the National Minimum Wage Act 1998, and the Working Time Regulations 1998 (now commonly referred to as "limb (b)" workers).

Uber BV is the Dutch parent company of Uber London Ltd and the owner of the Uber app. Uber London held the private hire vehicle licence for London. The claimant drivers worked as drivers for passengers booked via the Uber app under a contract with Uber BV. Upon completion of the journey, the fare would be debited from the passenger's bank card, and Uber BV would make weekly payments to the driver less a service fee which the former would retain.

The relationship was governed by a number of written agreements which purported to represent the relationship between all the relevant parties. There was a contract between Uber BV and the drivers, which represented the drivers as an independent company in the business of providing transportation services, and stated that Uber was a "payment collection agent" for the driver and did not provide transportation services. There was no express contractual relationship between ULL and the drivers, but a worker relationship was found to exist between that entity and Uber by the Employment Tribunal: a conclusion which survived through to the Court of Appeal's decision, and the correctness of which became the core issue that the Supreme Court would consider. Uber's case was that the drivers worked not under a contract with Uber but performing services under individual contracts made with passengers.

On a narrow and "fatal" point of construing the relevant agreements, the Supreme Court held that there must be a contractual relationship between Uber London and its drivers as the "only contractual agreement compatible with [Transport for London's] licensing regime." In the absence of a written agreement between the two, the Supreme Court inferred such a contract and that it met the requirements for a limb (b) worker.

The Purposive Approach

The Supreme Court, however, went further by rejecting Uber's argument that the analytical starting point must be interpreting the terms of the written agreement(s) between the various parties. Instead, the Supreme Court grappled with the contentious question of how the *Autoclenz* interpretative test ought to be applied. That test, as set out by Lord Clarke in *Autoclenz* states that in the context of work relationships:

> "35. … the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem."

The proper application of this principle was subject to discussion at the Court of Appeal. The majority of the Court (Sir Terence Etherton MR and Bean LJ) held that when determining what the true nature of the relationship between a putative worker and employer is, "the court may disregard the terms of any documents generated by the employer which do not reflect the reality of what is occurring on the ground" (*Uber BV v Aslam* [2018] EWCA Civ 2748 , para 66). This was in contrast to the dissenting interpretation of Underhill LJ, who understood the *Autoclenz* doctrine to represent a narrower interpretative principle, which allows a court or tribunal to disregard the written agreement only where it is inconsistent with the true agreement, and not where performance is consistent with those written terms.

The Supreme Court has now definitively resolved this dispute. The proposition that the relevant rights were created by legislation and not contract was critical to understanding the *Autoclenz* doctrine: the "primary question was one of statutory interpretation, not contractual interpretation" (*Uber (SC)*, para 69). This required a court or tribunal to adopt a "modern approach to statutory interpretation"; approving the statement of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454:

> "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

The general purpose of employment legislation was defined by Lord Leggatt as being (one imagines non-exhaustively) "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)" (Uber (SC), para 71). However, what was left unanswered by the Supreme Court was whether its vision of the purposive analysis for employment law was confined to the theoretical basis that it articulated at para 71. While Lord Leggatt spoke of this "general" purpose for employment law (viz. protecting workers), what shape that purpose takes in different regulatory contexts was left unanswered. For example, the purpose of worker protection may mean something different in the context of unfair dismissal from the context of collective bargaining rights. As such, Uber left open the question of what are the precise contours of the "purpose" in a purposive statutory analysis, and this will no doubt become the subject of significant future litigation.

In any event, against the backdrop of such a purpose or purposes, Lord Leggatt concluded that it would be inconsistent with the purpose of the relevant legislation to treat the written contractual terms of an agreement as the starting point for determining whether any work relationship is properly characterised as a "worker" relationship. Indeed, it was stated that the efficacy of legislative protections 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" (Uber (SC), para 76, our emphasis).* Moreover, in circumstances where any contractual terms purported 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 (Uber (SC), para 85).

Although the implications of such an approach will no doubt be subject to significant future litigation, in *Uber*, the Supreme Court took an approach whereby they applied the words of the statute to the facts, but in doing so considered that "it is necessary both to view the facts realistically and to keep in mind the purpose of the statute", and to apply that statutory language by reference to concepts of subordination and dependence *vis-à-vis* the putative employer. (*Uber (SC)*, para 87). The consequence of this approach was that the Supreme Court upheld the ET's decision that the drivers

were “workers”, based upon the various forms of control and dependence that existed between the drivers and Uber London.

The Future Role of the Contract?

The issue remains: what place does the contract between putative worker and principal have following *Uber*? Notwithstanding the Supreme Court’s clarion call to focus on the nature of the relationship viewed realistically, the statutory protections for limb (b) workers are nonetheless premised on some express or implied contractual relationship between the parties under which the worker will provide work personally. The Supreme Court neatly dodged the question Uber sought to raise, namely that there was no contractual relationship between Uber London and the driver, by finding as a matter of contract and agency one must be inferred.

Now that the Supreme Court has sharpened the tools available to employment lawyers in analysing the worker relationship, there remain two residual categories of personal contractors who may escape the pull of “limb (b)” status: those who are held to be in a profession or business on their own account (such as the dancer in *Quashie v Stringfellow Restaurants Ltd* [2013] IRLR 99 CA and the arbitrator in *Hashwani v Jivraj* [2011] UKSC 40) and those providing services in circumstances where there is no direct contractual relationship between putative principal and worker.

The latter category is neither niche nor one which the law is incapable of addressing. There are over a quarter of a million personal contractors providing services through personal service companies, and a whole industry of intermediary companies who provide “umbrella contracts” or agency terms for those providing services personally for a principal. The difficulty is that under such arrangements there is no direct, express contractual relationship between the putative worker and principal. The requirement for such a contractual nexus is not resolved by *Uber*.

How would the answer to Mr Aslam’s case have differed if he had, as some Uber drivers do, have contracted via a personal service company? Pursuing his own company for holiday pay and a minimum wage would be a Pyrrhic victory and, on its face, the lack of a contractual relationship between the individual driver and Uber would be fatal to his worker status. How the courts resolve this question is likely to be the central battleground for worker status over the next decade.

One route, similar to the approach taken by the Supreme Court in *Uber*, is to hunt for some legal or factual basis to infer a direct contractual relationship between putative worker and principal. In *Catamaran Cruisers v Williams* [1994] IRLR 386, the EAT held that the creation of an intermediary company would not necessarily alter a relationship which had previously been one of employment. More recently, in *Badara v Pulse Healthcare* UKEAT/0303/16, it was held that the ET would be entitled to disregard the intermediary contract where it did not reflect the true agreement between the parties. Yet in other cases, such as *James v Greenwich LBC* [2008] ICR 545, CA the courts have declined to imply a direct contractual relationship unless it was necessary to do so. It remains unclear how the courts will wrestle with privity of contract and the corporate veil, and this route may be viewed as too piecemeal or too great a departure from ordinary principles of contract law.

Alternatively, many of the rights to which limb (b) serves as a gateway are derived from retained EU law. Although not tackled head-on by the CJEU, its judgments suggest that a contractual relationship may not be determinative to whether there is a relationship of subordination sufficient for EU-derived rights to apply. How the courts will address the statutory requirement for a “contract” under limb (b), particularly in a post-Brexit legal landscape, remains to be seen.

Longer term, there remain potential statutory solutions. The Equality Act 2010 already makes provision for discrimination claims by “contract workers” and the whistleblowing provisions of the Employment Rights Act 1996 deem those supplied by a third part to provide services to be workers. These provisions extend the scope of these rights, but will not apply to all potential workers providing services via a string of contracts. An alternative statutory solution is to be found in the tax field where the tax tribunals apply a hypothetical “deemed contract” to the relationship between a supplier and recipient of services (*Usetech v HM Inspector of Taxes* [2004] EWHC 2248 (Ch)). The tax tribunals construct a notional direct contractual relationship between the parties, taking into account the contractual terms, the parties’ intention and the factual matrix, to test whether the relationship is that of an independent contractor.

Underhill LJ’s dissenting judgment the Court of Appeal observed that the questions posed by the *Uber* case were “quintessential policy issues of a kind that Parliament is inherently better placed to assess than the Courts.” Whether

Parliament will legislate, or whether the courts are able to use their interpretative tools to clarify further what is required for “limb (b)” status, are questions that remain post-*Uber*.

* - *Though note that “this does not mean that the terms of any written agreement should be ignored” (Uber SC, para 85).*

Jesse Crozier is recognised as a leading employment junior. His workload covers the full range of employment disputes: whistleblowing and discrimination; restrictive covenants, confidentiality and soft-intellectual property; collective rights and industrial action; contractual claims; and TUPE.

Hitesh Dhorajiwala accepts instructions in all of Chambers’ core practice areas. He has a specific interest in the law of employment status, and its relationship with both employment law and tax.