

UK Supreme Court delivers verdict in Uber case

In its recent ruling, the Supreme Court unanimously concluded that the Uber drivers who brought claims against Uber in 2015 are workers rather than independent contractors, giving them the range of rights attached to that status, such as the national minimum wage, the right to paid leave and whistleblowing protection.

The ruling is the final round of a 5-year legal battle initiated by 25 Uber drivers who claimed the company had misclassified their employment status, and that they should be afforded worker status and the statutory protection that goes with it. Uber disputed the claim, arguing that it was only a third-party booking agent and that its drivers were in effect running their own businesses. On this basis, it claimed that it was not responsible for paying its drivers any minimum wage or holiday pay.

Overview

The dispute began in 2016, when the Uber drivers brought their claim to the Employment Tribunal (ET). The ET disagreed with Uber's classification of its relationship with its drivers and instead ruled that the drivers were workers. This decision led to a series of unsuccessful appeals by Uber; first to the Employment Appeal Tribunal (EAT) in 2018, then to the Court of Appeal later in 2018, and finally to the Supreme Court in 2020.

When upholding the ET's finding that Uber drivers were workers, the EAT also considered the matter of working time and how working time is to be determined in order to calculate minimum wage. The Court of Appeal also addressed this issue when it heard Uber's second appeal. It agreed with the ET's ruling on the drivers' worker status and determined that drivers are not only working when they are completing a trip, but also when their Uber app is on and they are waiting for journey requests from passengers.

The Supreme Court made the same finding on its determination of this issue.

Immediate impact of the decision

Since the Supreme Court ruling, Uber has made a number of changes to its drivers' working entitlements, including introducing the national living wage for over-25s, after expenses, irrespective of age, as the minimum hourly rate for drivers once they accept a ride. Initially, Uber responded to the decision in a carefully measured way, making it look as though it was going to try to minimise the impact of the decision and regard it as only representing the legal position at the time of the claims. However, it has since taken further steps to reform its operations.

The ruling does not affect Uber in isolation. The Supreme Court's decision is not a blanket ruling that applies to all businesses using self-employed contractors in the gig economy, as each case needs to be considered on its facts. However, it does set guidelines for future cases.

The Supreme Court's decision centred on the relationship between Uber and its drivers; Uber's control over its drivers was highly significant in assessing the case. This may cause other gig economy businesses to re-evaluate the nature of control they assert over their contractors. A higher degree of control strongly suggests worker status.

Contractors operating in this sector will be encouraged by the ruling to bring similar claims of their own against their employer. However, providing workers' rights would increase costs and decrease returns for gig economy firms. It will also fundamentally disrupt many of their business models, where an independent contractor workforce helps keep prices low for the consumer.

One option may be for gig economy businesses to give their workforce more control over how they perform their service. However, the merits of transferring control will need to be weighed up against possible downsides: a potentially inconsistent customer experience could affect a company's brand and reputation. Are consumers so keen on seeing gig economy workers' rights that they are prepared to pay more for

Adam Lambert, (Partner), and Peter Summerfield, (Associate), at Bryan Cave Leighton Paisner LLP explain the UK Supreme Court findings in the Uber case and look at the implications for businesses operating in the gig economy

the service or products?

Facts and Employment Tribunal decision in 2016

Uber is a ride-hailing service which operates through an app downloaded to a user's smartphone. The app enables a user to request a ride and be collected from a pre-selected location. Uber argued that it served as an agent, with the driver and passenger entering into a direct contract for each journey that was distinct from the contract between Uber and its drivers. Uber claimed that, in practice, this meant that the drivers did not work for Uber, but for the passengers.

When making these claims, Uber relied on the wording of the written contract between Uber and its drivers, which described Uber as an "independent company". The contract also said that drivers were the "customer" of Uber, and that the drivers received access to the app in exchange for a service fee. Uber argued that it was not itself providing transportation services, but rather the use of the app.

The ET concluded that the drivers were workers. In reaching this decision, the ET considered the following factors:

- Uber mandated drivers to accept bookings. Drivers who repeatedly cancelled would face sanctions;
- Uber imposed conditions on its drivers and instructed them on how to carry out their roles; and

- Uber controlled fares, disputes and refunds.

The ET concluded that it was entitled to look at the reality of the situation, rather than what the contracts between the drivers and Uber stated.

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interpretation. This interpretation should reflect the purpose of the legislation, which the court said was to protect vulnerable individuals who have little or no say over their pay and working conditions as they were in a subordinate position.

Based on this analysis, the court stated that "it would be inconsistent with the purpose of this legislation" if they treated the terms of the written contracts as the starting point when determining whether an individual falls within the definition of a worker.

The court noted that a written contract may not always fully represent the true working relationship between the parties, even where it had been read,

understood and signed by all signatories. Indeed, it was not unusual for there to be unequal bargaining power between the parties in situations such as these, which could lead to employers using written contracts to contract out of statutory protections. The court held that, where this was the case, the dubious provisions could be disregarded. It was therefore necessary for the court to consider the reality of the circumstances and the conduct of the parties.

Supreme Court verdict

Uber unsuccessfully appealed against the ET decision in the EAT and the Court of Appeal before it exercised its final right of appeal to the Supreme Court.

In a unanimous decision delivered on 19 February 2021, the court explained that the rights asserted by the Uber drivers in their claims were not contractual rights, but statutory rights. Therefore, the task before the court was one of statutory interpretation rather than contractual

Five crucial factors

The court then went on to consider five factors which led to the conclusion that the Uber drivers were workers:

- It was Uber, not the drivers, that set the fixed fares for each booking and determined the service fee deducted from these fares. Similarly, it was Uber that held the right to control whether fares were refunded partially or fully following a passenger complaint. It was therefore Uber who decided how much drivers received for their work;
- The contractual terms on which the drivers provided their services were imposed by Uber, with the drivers having no say in those terms and no right to amend;
- Once the driver was logged into the app, Uber controlled whether the driver accepted rides. Uber did not share the destination of the trip with the driver until after the driver accepted the journey, preventing the driver from turning down the journey based on the destination. Uber was also entitled to take enforcement action against the drivers if they cancelled or rejected trips repeatedly;
- Uber also had significant control over how its drivers performed their services. For example, through the in-app rating function. Where a driver's performance ratings did not meet Uber's standards, Uber was entitled to prevent the driver from accessing the app; and

(Continued on page 10)

[\(Continued from page 9\)](#)

- Uber took steps to prevent the relationship between the driver and customer developing beyond an individual ride by restricting communications. Uber handled all complaints and post-journey interactions.

The court stated that by “taking these factors together, it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber”.

The court therefore reached the conclusion that these conditions placed the drivers in a position of subordination and that the drivers “have little or no ability to improve their economic position through professional or entrepreneurial skill”.

Therefore, the court upheld the verdict that Uber drivers are workers, meaning they could claim 5.6 weeks’ paid annual leave each year, and acquired whistleblowing and other statutory rights.

The court also considered the national minimum wage question, and reached the conclusion that the drivers constituted workers from the moment they turned on the Uber app and were available for work until the moment they signed off from the app. This included the periods in which the drivers were waiting to accept journey requests. It followed that the drivers should have been paid the national minimum wage for the entire duration of time they were signed into their app and available for work.

Uber’s reaction to the Supreme Court ruling

Uber has announced that, from 17 March 2021, all of its UK drivers will be paid at least the national living wage for over-25s, after expenses, once they have accepted a trip request. The drivers will receive this payment irrespective of their age. Uber has said that this pay rate, which amounts to £8.72 per hour, will create an earnings floor, not an earnings ceiling. It will be applied on top of free insurance to cover sickness, injury, maternity and paternity payments,

to which all drivers have had access since 2018.

Alongside the new pay rate are other changes Uber has implemented following the Supreme Court decision. All drivers are now automatically enrolled into a pension plan, to which both Uber and its drivers will contribute. The drivers will also be paid holiday time based on 12.07% of their earnings, paid out on a fortnightly basis. Uber has confirmed that these changes will not affect the drivers’ freedom to choose if, when and where they drive.

Do Uber’s changes go far enough?

Uber has commented that it is “turning the page” on workers’ rights; that its changes are “a significant improvement in the standard of work for UK drivers”. However, the changes have not been without criticism.

Uber has been accused of “cherry picking” from the Supreme Court ruling, which you will recall states that Uber’s drivers should be considered workers from the time they log into the app until the time they log off. By contrast, Uber’s drivers’ entitlements only take effect from the moment they have accepted a trip request. The Independent Workers Union of Great Britain is calling on HMRC to enforce the Supreme Court ruling to address this discrepancy.

Uber has been silent as to whether it will be compensating its drivers for past entitlements. It is also worth noting that Uber’s recent changes do not apply to the couriers working in its food delivery business, Uber Eats, who will remain as independent contractors for the time being.

Key takeaway

The key takeaway is that the question of whether an individual is a worker is a question of statutory interpretation and not simply a contractual exercise. The contract between the parties is something that the court can consider, but the correct approach is to consider all the relevant circumstances, including the relationship between the

parties in practice and also the general purpose of the legislation in question.

Comment

The question of employment status – whether an employee, a worker or an independent contractor – remains an area of debate. Determining status, whether it is for tax reasons or for employment rights, involves considering a range of factors. The Supreme Court decision has not changed that. Indeed, it places emphasis on the importance of considering the facts rather than the contract. The importance of considering all the facts means that the Uber decision will not necessarily mean that individuals engaged with other service platforms must also be workers. Different arrangements could mean a different status.

In 2016 and 2017, the UK government -commissioned Independent Review of Employment Practices in the Modern Economy (known as the Taylor Review after Matthew Taylor who led it) examined employment status as part of its review of the UK labour market. Its report in 2017 led to a government response in 2018 and then a policy paper later that year. However, it lacked clarity on how to reform employment status and there is currently no sign of any changes in the pipeline.

Adam Lambert

Peter Summerfield

Bryan Cave Leighton Paisner LLP

adam.lambert@bcplaw.com

peter.summerfield@bcplaw.com
