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UK SUPREME COURT'S DECISION ON STATUS OF UBER DRIVERS AND ITS SIGNIFICANCE ON GIG ECONOMY

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Over the past decade, the rapid technological advancement has led to the emergence of the so-called "gig economy". This term often refers to a market system whereby platform companies engage temporary or freelance workers to perform "gig" work, often through digital platforms. Well-known examples are car ride companies and food delivery companies.

Gig workers usually are not paid a regular wage, but are paid for the "gig" work they do. They usually do not have a formal employment relationship with the platform companies, and have flexibility as to when and where to work. As such, many platform companies have tended to treat gig workers as self-employed persons or independent contractors, rather than their employees or workers.

The status of Uber drivers was at issue in the UK Supreme Court case of *Uber BV v Aslam* [2021] UKSC 5.

Background

Uber (the appellant) owned the Uber app which provides ride-hailing services and had been licensed to operate private hire vehicles in the UK. The respondents were private hire vehicle drivers, performing driving services booked through the Uber app.

In very broad terms, the UK employment law distinguished between three types of people:

(a) Those employed under a contract of employment.
(b) Those self-employed persons who are in business on their own account and undertake work for their clients or customers.
(c) An intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else.

The "employees" under (a) enjoy the highest level of employee protection, while the "workers" under (c) enjoy some (albeit a lower level of) protection, including minimum pay and holiday pay. The "self-employed" persons under (b) do not have any employment protection.

Supreme Court's decision

The main issue before the UK Supreme Court was whether, under the relevant statutory provisions, the drivers should be regarded as "workers" who undertook to perform services for Uber. It was not suggested by any party that the drivers were "employees". Therefore, the issue was whether the drivers fell within (b) or (c) above.

First, after considering the evidence, the UK Supreme Court rejected Uber's argument that Uber acted merely as a payment collection agent and/or booking agent for the drivers.

Next, the UK Supreme Court considered the statutory definition of "workers" , and found that the purpose of the relevant legislation was to protect vulnerable workers which were in a subordinate and dependent position in respect of their employers.

In arriving at the conclusion that the drivers were "workers" and therefore within (c) above, the UK Supreme Court emphasised the following five aspects of the evidence:

1. The remuneration paid to drivers for the work they did was fixed by Uber and the drivers had no say in it.

2. The contractual terms on which drivers performed their services were dictated by Uber.

3. A driver's freedom to choose when and where to work was limited by Uber.

4. Uber exercised a significant degree of control over the way in which drivers delivered their services, e.g. by vetting the type of cars that may be used.

5. Uber restricted communication between passengers and drivers to the minimum necessary to perform the particular trip and took active steps to prevent drivers from establishing any relationship with passengers capable of extending beyond an individual ride.

Taking these factors together, the UK Supreme Court was of the opinion that the transportation service provided by the drivers was very tightly defined and controlled by Uber. The drivers had little or no ability to improve their economic position through professional or entrepreneurial skills. The only way in which they could increase their earnings was by working longer hours while meeting Uber's performance measures. Therefore, the UK Supreme Court found that the drivers were "workers" under UK employment law and therefore within (c) above.

Significance to Hong Kong "gig economy" employers

Under Hong Kong employment law, the classification is between "employees" and "self-employed persons". There is no intermediate class of "workers", namely item (c) above, under UK law.

In accordance with the Employment Ordinance (Cap 57), all employees engaged under a contract of employment, irrespective of their working hours, are entitled to basic protection including payment

of wages, restrictions on wages deductions and granting of statutory holidays. Further, employees are entitled to receive a minimum wage and MPF contributions. However, these protections and entitlements are not given to self-employed persons.

Therefore, gig workers in Hong Kong may be encouraged by this UK decision to try to argue that they fall within the definition of employees, in order to obtain the benefits that entails.

The test for determining whether a person is another person's employee in Hong Kong was set out in the Court of Final Appeal decision in *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951, which held that the modern approach is to examine all the features of their relationship against the background of the indicia developed in the case law with a view to deciding whether, as a matter of overall impression, the relationship is one of employment on the one hand, or that of self-employed / independent contractors on the other hand.

As stated above, platform companies tend generally to treat gig workers as self-employed persons or independent contractors, rather than employees. However, it cannot be ruled out that the Hong Kong courts may come to the "overall impression" – although each company's operations of course need to be reviewed individually - that an employer-employee relationship exists under the "gig economy" business model, especially if the platform companies exert a high degree of control over the gig workers.

Gig economy companies should review their contractual documents and legal relationship with gig workers, and consider the risk that the workers might be perceived as employees by the courts. This risk should be factor into any investment plan or business risk assessment of the company.

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