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LAW UPDATES

Issue 1

Uber 2017 | Uber and the gig economy: the law decides

The on-demand gig economy promised much. Workers gained flexibility – they were able to work when they wanted to and could e.g. plan their work around childcare. If their life pattern was irregular, their working hours could also be irregular. They were treated as self-employed, with the freedom from bosses that that term implied. The media portrayal is of thrusting entrepreneurs; the reality is bleaker. While the self-employed nowadays constitute 15% of the workforce, they earn less on average than do employees, a surprising statistic to some. New business models were instituted. The taxi firm Uber, the subject of this briefing note, could for example derive profit from these taxi drivers without suffering the risks and administrative burdens of being employers such as paying National Insurance Contributions for the drivers who used their app which they would have had to pay if the drivers were employed by them. In the jargon firms like Uber were part of the 'disruptive economy', undercutting rivals and grabbing market share from black cabs. It has come to be seen, however, that such companies' profits, their 'business model', derive in part from shifting the risks normally on them to the people who work for them by describing them in written contracts as self-employed and not as workers or employees. The effect is that people doing the work may have to take on several such jobs, often low-paying ones, in order to earn a living, and the rate of pay may be under the National Minimum Wage/National Living Wage. The phrase which is used in this context is bogus self-employment. Perhaps it should be replaced by the term 'forced employment'? There is no choice about the matter.

Self-employed, workers, and employees

In legal terms disputes about the status of those who work depends on how the relationship between the employers and those who work for it are categorised: some contracts involve employees, some workers, some the self-employed.

Depending on which category the person who works fits into, has different employment law rights. An employee has for example the rights not to be unfairly dismissed and to receive a redundancy payment, whereas they do not have these rights if they are a worker. Both an employee and a worker have rights to, as in *Uber* itself, the National Minimum Wage and to paid leave (holiday pay) under the Working Time Regulations 1998. The self-employed have the fewest number of employment law rights: some have the right not to be discriminated against, for example, because of race or sex.

Employment law has weapons that can aid those who work. If the contract describes the person who works as self-employed but in practice they as an employee or a worker, an employment tribunal can cut through the sham and hold that the truth is that the person is not a self-employed independent contractor. In the main authority the Supreme Court held that car valeters were not self-employed as described in their contract but employees or workers. This law is different from that of ordinary contract law. This authority was applied in the CitySprint case noted below *(Dewhurst v CitySprint UK Ltd.)* The author here deploys one of this favourite employment law quotes: 'Two people may agree to call a knife a fork, but that does not make the object a fork' (S. Keen, (2011) 161 New Law Journal 1235). Another technique is that an employment tribunal has the freedom, even when the written contract is not a sham, to classify a contract of a person who works as being one of a different category from that laid down in the contract by looking at all the factors and finding that the person is an employee or a worker and not self-employed.

The Uber contracts

The lawyers working for Uber drafted the contract to make the cab drivers appear self-employed and therefore lacking employment law rights. The drivers were called 'partners', who paid a service fee to Uber, and Uber called itself 'a technology services provider that does not provide Transportation Services': it facilitated work; it did not provide it. Drivers were free to decide not to work and when to work. Two drivers, GMB members, brought a case against Uber claiming that they were entitled to the National Minimum Wage and paid holidays. The case is called *Aslam v Uber BV.*

The employment judge (Snelson EJ) savaged the contracts of the drivers. They resorted to 'fictions, twisted language, and even brand-new terminology.' He looked at the 'practical reality' of what the drivers did and rejected Uber's argument that they just provided leads to drivers: there were also no negotiations between the driver and the person being driven. Each driver was bound by Uber's rates of payment and Uber's terms of working and had to drive Uber's routes. The judge said: 'The employer is precluded from relying on its carefully crafted documentation because … it bears no relationship to reality.' Uber was in truth a taxi service, not merely the provider of a technology platform, an app, for use by drivers who were self-employed: Uber did in truth and contrary to what the written contract said employ the drivers as workers. Since the drivers were workers, not self-employed, the consequence was that they received the employment rights appropriate to that status e.g. paid holidays, the National Minimum/Living Wage, sick pay, and limits on the hours worked.

After Uber

A similar victory for the workers was achieved in the CitySprint case, again at the employment tribunal on 6 January 2017. The employers classified one of their couriers as a self-employed freelancer, an independent contractor in legal phraseology. The ET recategorised her as a worker for the purposes of her obtaining holiday pay; she can now also gain back holiday pay. The claimant said: 'CitySprint argued that we weren't part of the company, but you cannot run a £145M courier business without employing a single courier.' She is quoted on the BBC website as saying: 'We spend all day being told what to do, when to do it and how to do it. We're under their control. We're not a mosaic of small businesses … http://www.bbc.co.uk/news/business-38534524. The phrase 'a mosaic of [30,000] small businesses' is that of the Employment Judge; there are 30,000 Uber drivers in London and 40,000 in the UK. CitySprint for example provided uniforms and delivered induction. Employment Judge Joanna Wade described the firm's contract with the courier as 'window-dressing' and 'indecipherable'. While CitySprint has noted that the case affects only one person because it was not a test case, it does open the door to the firm's 3,500 couriers being found to be 'workers' and therefore having the rights which workers have. The union which supported the courier has hearings in spring 2017 against other courier firms: Addison Lee, eCourier, and Excel. It would be difficult suggesting that carrying freight and carrying passengers is different for the purposes of employment status. Another delivery service, Deliveroo, finds itself the subject of their deliverers' attempts to unionise. The people who deliver are called 'riders' and their contracts describe them as self-employed. Collective bargaining by unions covers employees and workers but not the self-employed. The courier service Hermes is under investigation by Her Majesty's Revenue and Customs on the same ground as other employers of workers called self-employed. Other groups also have a claim e.g. it may be surprising to readers that e.g. chambermaids and warehouse staff are described in their contracts as being self-employed, when they look to outsiders very much like workers and indeed employees. They may well, for example, wear the uniform of the company and be indistinguishable from those employees who are working side by side with them. However, it should be realised that some people who work are indeed self-employed: if you ask a person to design a website and she works for lots of different people, the likelihood is that she is self-employed.

More to come?

The Uber decision is being appealed to the Employment Appeal Tribunal. If it fails, Uber prices will go up!

There have been many recent developments affecting the future business models of companies working in the gig economy. The House of Commons Work & Pensions Committee is conducting an inquiry into self-employment and the gig economy. HMRC has established a team, the employment status and intermediaries unit, to delve into companies which use large numbers of self-employed persons. And Matthew Taylor was commissioned by the Prime Minister to conduct a six-month review into modern working practices https://www.gov.uk/government/news/taylor-review-on-modern-employment-practices-launches

His review covers worker representation. ACAS will also be looking at the gig economy in 2017. The Labour Party's Future of Work Commission under Tom Watson and Helen Mountfield QC is inquiring into the same issues.

One problem is that employment law seems not to have kept up with technology-driven business models, the very issue in the Uber case. The Taylor report may lead to the first legislation in this area. Labour abuses are also to the fore. The following three changes stem from the Immigration Act 2016. The Gangmasters Licensing Authority, now renamed the Gangmasters and Labour Abuse Authority, is no longer restricted to abuses by gangmasters in the shellfish and agricultural sectors of the economy; there is a new officer, the Director of Labour Market Enforcement: https://www.gov.uk/government/news/sir-david-metcalf-named-as-the-first-director-of-labour-market-enforcement

New labour market abuse orders are about to be launched. The regulation of the market to prevent exploitation is long overdue. What will happen, however, on Brexit remains to be seen!