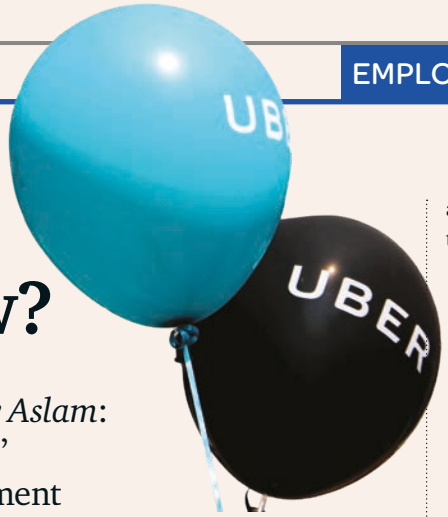

Uber: can we see clearly now?

Assessing the early legacy of *Uber v Aslam*: Charles Pigott examines the courts' approach since the landmark judgment

IN BRIEF

- We now have more than a year's worth of employment status cases since the Supreme Court's decision in *Uber v Aslam* in February 2021.
- As a result, its impact on the courts' approach to resolving these disputes is becoming clearer.

Since the decision of the Supreme Court in *Uber BV and others v Aslam and others* [2021] UKSC 5, [2021] All ER (D) 89 (Feb) last year, we have had four significant rulings from the Court of Appeal, plus a number of Employment Appeal Tribunal (EAT) decisions which have all cited the case. Arguably, after a period of rapid development, the law in this area is beginning to settle down.

Right of substitution: no longer primarily a contractual issue

Stuart Delivery Ltd v Augustine [2021] EWCA Civ 1514, [2021] All ER (D) 62 (Oct) was one of the earliest Court of Appeal rulings to consider *Uber*. This was another gig economy case, where the employment tribunal had decided that Mr Augustine, who worked ad hoc shifts delivering parcels, should be categorised as a non-employee worker. This decision was affirmed by the EAT in December 2019.

As with most gig economy disputes, the appeal focused on the statutory definition of a non-employee worker (see for example s 230(3)(b) of the Employment Rights Act 1996). The definition has two elements, one positive and one negative. The positive requirement is that the individual must be engaged under a contract to perform work personally. The negative element is that the other party to the contract must not be a client or customer of a business or profession carried on by that individual.

On the employer's appeal to the Court of Appeal, the key issue was whether the claimant's limited ability to appoint a substitute was sufficient to defeat the obligation to perform work personally. In upholding the tribunal's decision that it did not have that effect, the Court of Appeal pointed out that since *Uber*, the distinction between a contractual right of substitution, and one that operates by the employer's concession, is no longer so important:

> 'It may be, in the light of the decision in *Uber*, that the distinction is no longer critical and the question is whether, looking at the contractual terms, and the way in which the arrangements operated in practice, the claimant was under an obligation of personal performance given the extent and nature of any practice of permitting substitution' (Lord Justice Lewis at para [58]).

Mutuality of obligation not necessary for worker status

The next employment status to reach the Court of Appeal was *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229, [2022] All ER (D) 02 (Mar), which involved a member of the council's fitness to practise panel. The council appealed against the employment tribunal's decision (affirmed by the EAT) that Mr Somerville had the status of a non-employee worker. It invited the Court of Appeal to reconsider whether to qualify as a worker, there had to be some degree of 'mutuality of obligation' in the contractual arrangements, in the sense of an 'irreducible minimum of obligation' over and above the obligation to perform work when an assignment was accepted.

Arguably there have been some inconsistent rulings at EAT level on this point, but the Court of Appeal points out that *Uber* makes it clear that an individual can still qualify as a worker during each engagement, even though there is no overarching obligation on the employer to offer work, or on the individual to accept any work offered.

That principle is subject to the qualification that 'where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status' (Lord Justice Leggatt at para [91] of the *Uber* judgment).

The council argued that there are other passages in Lord Leggatt's judgment which are inconsistent with this principle. However, the Court of Appeal points out:

> 'These paragraphs in the judgment in *Uber*, therefore, are directed towards identifying when the obligation to perform work arose. They are not intended to suggest that, even where a person is working or providing services personally under a contract, there must be some superadded, distinct obligation on a putative employer to provide work or an individual to accept work before that can fall within the scope of limb (b) of regulation 2 of the [Working Time] Regulations' (Lord Justice Lewis at para [52]).

Same case law applies in tax & employment protection litigation

A few months later, two tax appeals reached the Court of Appeal, which were heard together. These related to the operation of the so-called IR35 legislation, which applies where an individual is engaged via a personal service company—a common practice in the entertainment industry. In such a situation the Inland Revenue is required to establish the terms of a hypothetical contract, which the parties would have adopted had the individual been engaged directly. If this hypothetical contract is one of employment, then the individual is taxed on that basis.

Up to now it has not been completely clear whether there is a separate line of cases which governs decisions on employment status for tax purposes, or whether the sample principles need to be applied, regardless of whether the dispute is about tax or employment rights. This point has become more important now that *Uber* has established a new approach in employment protection disputes, which requires courts to focus on the purpose of the legislation they are being asked to interpret.

The Court of Appeal has now addressed this question head on in *Revenue and Customs Commissioners v Atholl House Productions Ltd* [2022] EWCA Civ 501, [2022] All ER (D) 21 (May). This was an appeal by HM Revenue & Customs against the determination of the hypothetical contract between Kaye Adams and the BBC by the tax tribunal. When addressing the correct test to apply for employment status, the Court of Appeal said:

> 'It would be intolerable if an individual's employment rights or tax position could depend on the choice of one out of two or more different, and potentially conflicting, tests' (Sir David Richards at para [60]).

That said, there is no equivalent of a non-employee worker for tax purposes, so

to that extent there will continue to be a degree of divergence between tax tribunal and employment tribunal cases. In addition, there is bound to be a difference in practice between constructing a hypothetical contract in IR35 cases, and looking at an actual contract in employment status disputes, even if, since *Uber,* this is no longer the starting point of the enquiry.

Is *Deliveroo* an outlier?

We have left the fourth and earliest of the four post-*Uber* Court of Appeal decisions until last: its June 2021 ruling in *Independent Workers Union of Great Britain v Central Arbitration Committee* [2021] EWCA Civ 952. In that case the union (IWUGB) was appealing against a December 2018 High Court judgment. In that ruling, it had dismissed IWUGB's challenge to the Central Arbitration Committee's (CAC) decision that Deliveroo riders were not workers for the purposes of the union recognition provisions in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992).

The Court of Appeal hearing took place before the Supreme Court's judgment in *Uber* was published, though the parties were given permission to file written submissions on it before the Court of Appeal pronounced its decision.

A full consideration of why the Court of Appeal dismissed the appeal is outside the scope of this article (see Ian Smith's 'Employment Law Brief', 171 *NLJ* 7941, 16 July 2021, p10), but we need to refer briefly to the reasons it gave for not revisiting the CAC's decision in the light of *Uber*. There were two main reasons for this. First the IWUGB's permission to appeal against the High Court's ruling was limited to arguments around whether the CAC's interpretation of the definition of worker in TULR(C)A 1992 was compatible with Art 11 of the European Convention on Human Rights. Second, the issue of how the new approach signalled in *Uber* would apply to the facts as found by the CAC was not 'straightforward'.

That rather suggests that the Court of Appeal accepted that, were the CAC have to answer a similar question in the future, the answer might be different.

The dust is beginning to settle

There will always be a degree of unpredictability about employment status disputes. As the *Uber* decision itself emphasises, tribunals are charged with conducting a close examination of how the relationship operates in practice, on the understanding that every case is unique. Despite the emphasis on a purposive approach to the underlying legislation, this approach is if anything more demanding than the more traditional approach which placed more emphasis on a study of the contractual documentation.

A review of EAT decisions over the past year reveals plenty of cases where employment tribunal decisions denying worker status have been upheld. These include at least two in the gig economy. In *Stojsavljevic and another v DPD Group UK Ltd* (2021) EA-2019-000259, the EAT upheld the employment tribunal's decision that individual franchisees who provided delivery services to DPD were neither employees nor workers. Here a right of substitution was regarded as sufficiently wide to negate any obligation of personal service.

A month or so later, in January 2022, the EAT dismissed the claimant's appeal in *Johnson v Transopco UK Ltd* [2022] EAT 6. He was challenging an employment tribunal ruling that as a black cab driver who used the MyTaxi app to supplement his other earnings, he was not a worker as far as his relationship with the operator of the app was concerned. In this case, a finding that he was in business on his own account appears to have been critical, with the income generated from the app forming a relatively small part of his annual earnings.

However, perhaps the most authoritative analysis of the practical impact of *Uber* from the EAT comes from a June 2022 decision: *Sejpal v Rodericks Dental Ltd* [2022] EAT 91. In this case, the ruling of the employment tribunal that an associate dentist was not engaged under a contract to do work personally was reversed. However, the case was remitted to a fresh employment tribunal to reconsider the negative elements of the definition of worker, ie whether the claimant carried out a profession or business undertaking, and if so whether the dental practice was its customer or client.

In his analysis of the law as it now stands, Judge James Tayler said this:

> 'Deciding whether a person is a worker should not be difficult. Worker status has been the subject of a great deal of appellate consideration in recent years. Worker status has come to be seen as contentious and difficult. But the dust is beginning to settle. Determining worker status is not very difficult in the majority of cases, provided a structured approach is adopted, and robust common sense applied. The starting point, and constant focus, must be the words of the statutes. Concepts such as "mutuality of obligation", "irreducible minimum", "umbrella contracts", "substitution", "predominant purpose", "subordination", "control", and "integration" are tools that can sometimes help in applying the statutory test, but are not themselves tests' (para [7]).

For this writer at least, reading this passage evoked the words chosen by Johnny Nash when describing a rather different kind of relationship: 'I can see clearly now…'. I do hope I'm not being overly optimistic. **NLJ**

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