

Supreme Court decides that Uber drivers are workers

written by Craig Upton

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Supreme Court decides that Uber drivers are workers

The Supreme Court has upheld a Tribunal's decision that drivers working for Uber were workers and not self-employed contractors. This decision is important for employers engaging contractors as it highlights the continued

willingness of the Courts and Tribunals to scrutinise the way a relationship works in practice, regardless of contractual labels.

What does the law say?

Certain important employment rights are granted to those who qualify as “workers”, even where they do not qualify as “employees”. For example, workers have the right to:

- be paid in line with the National Minimum Wage;
- to take paid annual leave and have rest breaks;
- to be paid statutory sick pay when sick;
- be auto enrolled into a pension scheme (if an eligible jobholder);
- protection from discrimination;
- protection if they blow the whistle; and
- protection from unlawful deductions from pay.

A worker is defined as an individual who has entered into, or works under a contract of employment or any other contract where the individual performs personally any work or services for another person who is not a client or customer of that individual’s profession or business undertaking.

In the last few years, there have been a steady stream of cases (often brought against businesses operating in the gig economy) looking at whether individuals held out as self-employed contractors are, in fact, workers. When considering these cases, the Courts and Tribunals have consistently demonstrated a willingness to examine the reality of the relationship despite what the contractual documentation says.

What happened in this case?

As most people will know, Uber operates via a smartphone application (**the app**) by which customers order taxis and make payments for journeys. Uber’s position is that it is not in the business of providing taxi services, but merely

facilitates the provision of such services by linking self-employed taxi drivers with prospective passengers. Uber say they act as the drivers' agent via the app, but the contract is between the driver and passenger for each journey.

In 2016, a number of Uber drivers brought claims for unlawful deductions from wages (relating to a failure to pay in line with the National Minimum Wage) and for a failure to provide paid annual leave. As stated above, these are rights afforded to workers (and employees). Accordingly, the drivers had to get over the hurdle of showing that they were workers.

The Employment Tribunal held that the drivers were workers, concluding that the contractual documentation did not reflect the reality of the relationship. Rather, Uber had constructed fictions and used "twisted language" which misrepresented the way things really worked. The suggestion that Uber was acting as an agent for 30,000 separate small businesses linked by the app was said to be "faintly ridiculous".

The reality was the other way around. Uber exercised a high degree of control over their drivers in a number of ways, which meant they could not be viewed as genuinely self-employed. The Tribunal decided that the drivers were working under a worker contract when they were:

- in the territory in which they were authorised to work;
- signed into the app; and
- ready and willing to accept fares.

The Tribunal's decision was upheld by both the Employment Appeal Tribunal and by a majority of the Court of Appeal. Uber appealed again to the Supreme Court arguing that the Tribunal had been wrong to disregard the clear terms of the contractual documentation. Uber maintained that the drivers were not workers but, if they were, then their working time was limited to when they were driving passengers to their destinations.

What was decided?

The Supreme Court ruled unanimously that the Uber drivers are workers.

The Court said that in the employment context, the first step is to look at the underlying purpose of the relevant employment legislation (in this case, the national minimum wage and working time legislation). The purpose of such laws is to protect individuals in a subordinate position to the organisation which controls their work. The task for the Courts and Tribunals was to determine whether a claimant fell within the definition of "worker" so as to qualify for those rights. To take the contractual documentation at face value (where the facts suggested more than one possible legal classification) would allow the employer to decide whether or not employment legislation applied.

Here, the Court said there was no factual basis for asserting that Uber acted as agents for the drivers. The correct position was that Uber contracted with the passengers and engaged drivers to carry out those bookings. The nature of the relationship between Uber and the drivers had to be inferred from the parties' conduct.

The Court held the Tribunal had been justified in finding that the drivers were workers. Although the drivers were free to decide when and where they worked, once they were working, they were workers. In reaching this conclusion, the Court highlighted the following five key aspects of the relationship:

1. Of major importance was the fact that Uber **dictated the remuneration** paid to the drivers. Uber set the passenger fares (which, in turn, determined the drivers' pay). The drivers were not permitted to charge higher fares. They were free to charge lower fares, but they had to absorb the full cost of any reduction.

2. Uber **imposed the contractual terms** on the drivers. The Court noted that there was “no practical possibility of [the drivers] negotiating different terms”.
3. Once logged onto the Uber app, the drivers’ **freedom to accept fares was constrained** by Uber. Uber controlled the passenger information provided to the drivers and also monitored the drivers’ acceptance of fares. Uber penalised drivers for not accepting rides by automatically logging them off the app. The Court said this plainly placed the drivers in a position of subordination to Uber.
4. Uber exercised **significant control over how the drivers delivered their services**. It vetted the drivers’ vehicles. It owned and controlled the technology at the heart of the service. It operated a rating system for drivers. Any driver who failed to maintain average ratings was issued with a warning and, ultimately, could have their contract terminated. The Court said this was “a classic form of subordination that is characteristic of employment relationships”.
5. Uber **restricted communications** between drivers and passengers and took steps to prevent an ongoing relationship being established, for example, neither had access to the other’s mobile telephone number.

Together, this meant that the taxi service was tightly defined and controlled by Uber. The drivers were subordinate to Uber and had no ability act in an entrepreneurial fashion to improve their earning potential. The only way they could increase their earnings was to work more hours under the rules imposed by Uber.

Having ruled that drivers were workers, the Court also agreed with the Tribunal that their working time was not limited to the time spent driving passengers to their destinations. Instead, it included any period when they were logged onto the

app in the territory in which they were authorised to work, and they were ready and willing to work. The Court noted that the existence of a right to refuse work was not fatal to a finding of worker status, provided there was at least an obligation to do some amount of work, which was the case here.

What does this mean for employers?

This decision doesn't mean that the contractual documentation put in place with contractors will be ignored. It will be a relevant factor, but the conduct of the parties in practice will also be considered. The worker status test will then be applied to those facts. As the Court said "...it is necessary to view the facts realistically and to keep in mind the purpose of the legislation".

Although this decision will have most impact in the gig economy sector, it would be sensible for all employers who engage self-employed contractors to audit how those relationships operate in practice to assess whether the contractual labels reflect reality. Where the hallmarks of a worker contract are present, the choice is to treat the individual as a worker and comply with applicable employment legislation or adjust the way the relationship works in practice to move it closer to a genuine contractor arrangement.

[Uber BV and others v Aslam and others](#)

If you would like to know more please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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