FARRAR'S BUILDING

Employment Law Newsletter
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Editorial

It is with great pleasure that I introduce this winter edition of our employment newsletter.

In her article Emma Sole considers the EAT's decision in *Uber BV v Aslam*, a case confirming that Uber drivers do indeed enjoy 'worker' status. The decision itself seems orthodox. Its essential message is simple: substance will prevail over form. When examining parties' working relationships, judges will continue to focus on the reality and will not be distracted by labels or window-dressing (however artistic or inspired). Yet what will be the fall-out of the decision for those operating in the gig economy? Will, for example, the accepted tax status start to unravel?

The case law update is provided by our pupil, Rosalind Young. It will be of interest to anyone practising in the fields of discrimination (*Ayodele v City Link*), whistleblowing (*Royal Mail v Jhuti*) and holiday pay (*King v Sash Window Workshop Ltd*). Of particular note is the European Court of Justice's decision in the *Sash Window* case, which is an important ruling that has the potential to increase employers' exposure to a backlog of historic holiday pay claims.

Happy reading. As ever, comments are always welcome.

With best wishes for the New Year,

Changez Khan

The "Uber" Decision…Uber Unsurprising!

By Emma Sole

On 10th November 2017 HHJ Eady QC handed down her decision in **Uber B.V. & ors v Aslam & ors** UKEAT/0056/17, in which she upheld London Central Employment Tribunal's ("ET's") judgment that the two Claimants were *"workers"* as defined at section 230(3)(b) Employment Rights Act 1996 ("ERA"), for the purposes of regulation 36(1) Working Time Regulations 1998 ("WTR") and section 54(3) National Minimum Wage Act 1998 ("NMWA"). The decision received huge media coverage and was characterised as a further blow to companies operating in the "gig economy". To an employment lawyer, however, the decision reads less like a bombshell scoop and more like yesterday's fish and chip paper; the case applied well established employment law principles to the particular facts of the case. The comprehensively reasoned decision is, nevertheless, well worth digesting as an application of such principles to a contemporary working relationship.

This article summarises HHJ Eady QC's decision, briefly examines its "fit" with the CA decision in **Pimlico Plumbers Ltd v Smith** [2017] ICR 657 and asks whether the Trade Union backed race to confirm workers' rights for giggers could well back fire in light of possible tax implications.

Background

To the ordinary person on the street Uber is a company that provides private hire vehicles to users of its passenger app. Uber is not, however, a single entity; three Uber companies were named as Respondent, with two being relevant to the claim; Uber BV ("UBV") a Dutch company and parent company of the other two Respondents which holds the legal rights to the Uber app, and Uber London Ltd ("ULL") a UK Company which holds a Private Hire Vehicle ("PHV") Operator's Licence for London and makes provision for the invitation and acceptance of PHV bookings.

Prospective Uber drivers sign up online and are required to personally attend a specified location to present originals of relevant documentation and have a form of interview and induction, known as "onboarding". Once onboarded an Uber driver is given a personal, non-transferrable licence to access to the drivers' app, under a contract with UBV, and a "Welcome Pack", which contains information about the quality of service and standards expected. Drivers are paid weekly by UBV, calculated on the basis of the fares charged for trips, less 25% (service fee).

Contractual documentation was referred to by the ET in coming to its decision. There was a Rider Agreement, as between the passenger and ULL, in which *"booking services"* were described as being provided to the passenger by Uber as an agent of the "*Transport Provider"*, the Uber driver. A New Partner-Driver Agreement (which replaced the Partner Terms) was agreed to between the driver and UBV and was stated to comprise a *"Services Agreement*"

between *"an independent company in the business of providing Transportation Services…("Customer") and Uber"*, where the independent company/customer was the Uber driver. The New Partner-Driver Agreement expressly provided that the relationship between the parties was one of *"payment collection agent"* (Uber) and *"independent contractor"* (the driver), so that the agreement was *"not an employment agreement, nor does it create an employment relationship…"*. There was no contractual documentation as between the driver and ULL.

The ET's decision

The ET determined that a driver – who had switched the Uber app on, who was in the territory within which they were authorised to work and who was able and willing to accept assignments – was working for ULL under a *"worker"* contract. In these circumstances the Uber driver satisfied the relevant definition of *"worker"* in the ERA and was a *"worker"* for the purposes of the WTR and NMWA.

In reaching its conclusion the ET commented that any organisation:

"87….(a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator but (c) requiring drivers and passengers to agree, as a matter of contract, *that it does not provide transportation services…and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merit…a degree of scepticism…"*

The ET rejected Uber's argument that the contractual documentation should be relied on as setting out the true position of the parties, since the written terms did not correspond with the practical reality. The ET found that a number of Uber's propositions, for example, that its drivers could "grow" their own transportation services business, that Uber was simply providing "leads" and that there was a contract between the driver/passenger, were fictitious. The ET further disregarded the written terms relied on by Uber, noting the unequal bargaining positions of the parties.

The Claimants' *"working time"*, for the purposes of regulation 2(1) WTR, was found to start as soon as they were in their authorised territory, with the app switched on, ready and willing to accept trips and would end as soon as one of these conditions ceased to apply. (In the alternative, the ET found that working time began at the latest when the driver accepted a trip and when the trip was completed).

Finally, the ET determined that an Uber driver was to be treated as performing *"unmeasured work"* for the purposes of establishing whether national minimum wage was being paid under the NMWA.

Uber's Appeal

Uber challenged the ET's findings:

1. That the Claimants were "employed" as "workers" by ULL;

2. That the Claimants' working time was to be calculated in accordance with regulation 2(1) WTR; and
3. That for the purposes of the NMWA the Claimants were engaged in *"unmeasured work"*.

The EAT's decision

HHJ Eady QC's decision reiterates the pre-existing, general guidance for identifying whether or not a person was a *"worker"* as defined in the ERA, but made the point that seeking to provide anything more specific would be futile since *"the legislative language allows for the flexibility required in this field and respect has to be given to the nuanced assessment carried out by an ET at first instance"*:

a. The starting point must always be the statutory language and not the label used by the parties;
b. Each case will inevitably be fact-sensitive;
c. The statutory test does not require that there is an "umbrella" contract; there can be a series of contracts arising as and when work is undertaken (**Carmichael v National Power plc** [1999] 1 WLR 2042, HL and **James v Redcats (Brands) Ltd** [2007] ICR 1006 EAT);
d. There does, however, need to be a contract between the putative employer and worker and the determination of the nature of the relationship may be informed (as part of the overall factual matrix) by the fact that there are gaps between assignments (**Stringfellow Restaurants Ltd v Quashie** [2012] EWCA Civ 1735m paras 10-13, **Windle v SoS for Justice** [2016] ICR 721 CA, paras 22-25, **Pimlico Plumbers Ltd**, para 145);
e. The question in every case, in an employment context, is what was the true agreement between the parties. In answering this question a Tribunal should:
    i. have regard to the reality of the obligations and the reality of the situation; and
    ii. in investigating allegations that the written contractual documentation did not represent the actual terms agreed be realistic and worldly wise, taking into account the fact that the putative employer is likely to have significantly more bargaining power than the *"worker"* (**Autoclenz Ltd v Belcher and Ors** [2011] ICR 1157 SC(E));
f. It will be relevant to consider the nature of the obligations between the parties, but the absence of a general obligation to work cannot be fatal to those cases where it is accepted that there are gaps between particular engagements or assignments;
g. Other factors that may be helpful are likely to include the degree of integration into the business undertaken by another (**Hospital Medical Group Ltd v Westwood** [2013] ICR 415 CA, para 19) and the degree of true independence in the provision of the service (**Allonby v Accrington and Rossendale College** [2004] ICR 1328 ECJ, para 71).

Applying the general guidance to the facts of the Uber case, HHJ Eady QC rejected the appeal and noted:

a. Whilst in the normal commercial environment the starting point will be the written contractual documentation (unless it is said to be a sham or liable to rectification) and this will generally also be the end-point, in an employment context the ET was required to determine the nature of the relationship between ULL and the drivers for the purposes of the statutory provisions in the field of employment law. The ET's starting point was not the

contractual documents but rather to determine the true nature of the parties' bargain, having regard to *all* the circumstances;

b. Further, the ET was not bound by the label used by the parties. The arguments put forward by Uber effectively started from the assumption that the relationship was agent/principal and sought to identify factors that were consistent with that relationship and/or not inconsistent;
c. Having made the factual findings it did, in particular that the drivers were integrated into the Uber business of providing transportation services and that arrangements were inconsistent with the drivers acting as separate business, the ET was entitled to reject the label of agency and the characterisation of the relationship in the written documentation;
d. The fact that some matters which pointed towards ULL's control of the driver arose from the need to comply with regulation governing private hire vehicles, did not mean the ET had to disregard these factors, they were part of the factual matrix from which it had to assess the true nature of the relationship;
e. In most instances of assignment-specific work there will simply be no mutuality of obligation between assignments, no obligation for work to be offered and no obligation for any offer of work to be accepted. That was not what the ET found in the present case; Uber drivers were told that they should accept at least 80% of trip requests to retain their account status. Whilst, therefore, there was no obligation on the Uber driver to remain in the authorised territory or have the app switched on, when they did they had an obligation to be *"available"* and there was a requirement to *"accept trips"* (not all but a very high percentage) which was essential to Uber's business. On the facts of this particular case the Claimants were *"workers"* engaged on *"working time"* when they were in the territory, with the app switched on and ready and willing to accept trips;
f. Where it was genuinely the case that drivers were able to hold themselves out as at the disposal of other PHV operators when waiting for a trip, the analysis about *"working time"* would not apply, but that was not the case on the present facts.

As noted above, the decision of HHJ Eady QC is not ground breaking and followed the pre-existing guidance carefully and thoroughly. In fact, it appears that the decision was surprising only to Uber.

Fit with the Court of Appeal's decision in **Pimlico Plumbers**

Although HHJ Eady QC was at pains to point out that each case on employment status turns on its particular facts, her decision does sit happily with the Court of Appeal's finding in **Pimlico Plumbers Ltd v Smith** [2017] ICR 657 CA, which upheld the decision below that a plumber operative was a *"worker"* of the company rather than an independent contractor. In **Pimlico** the company again relied on the fact that the operative was not obliged to accept any particular work, which was found to be the reality. However, the operative could not refuse all assignments and the true position was that the relationship only worked if the operative was given and undertook a minimum number of hours' work. Again, the operative was found to be *"an integral part of* [the company's] *operations and subordinary to"* the company.

Tax Implications

Although the Uber case provides further clarification that giggers can be *"workers"*, in appropriate factual circumstances, enjoying the benefit of workers' rights, could this be a double-edged sword when one considers the tax implications of such a finding?

The Uber decision does not provide a conclusive answer to the question of whether or not drivers are *"employees"* for the purposes of tax, however the decision is likely to have resulted in ears pricking up at HMRC, where there is a particular enthusiasm to stamp out false self-employment. If drivers are employees they should be subject to national insurance contributions at the employee rate, higher than the self-employed rate. Further, a self-employed driver will offset their, likely high, expenses against monies earned and account for taxes only on that net profit. This process is not available to an employed person who could, then, end up with less in their pocket once income had been taxed on a PAYE basis.

In addition, it could be possible that an illegality argument is run against a "gigger" in circumstances where they have accounted for tax as a self-employed person but then seek to enforce workers' or employee rights in a Tribunal (although since **Patel v Mizra** [2016] UKSC 42 this would not necessarily be a determinative answer to the case).

Conclusion

The Uber decision has not broken new ground, but rather HHJ Eady QC's decision provides a clear illustration of how established legal principles can result in a fair and realistic decision in a contemporary setting, much to Uber's obvious disappointment. In the future what will be interesting is not how other factually specific cases will be determined but, rather, how the "gig economy" will react in terms of changing payment structures to reflect the possibility of tax implications.

Emma Sole

Case law update

By Rosalind Young

Royal Mail Group Ltd v Jhuti [2017] EWCA 1632

In this case, the Claimant was employed as a media specialist at the Royal Mail Group Ltd. During her time there she suspected a colleague was in breach of Ofcom rules and made protected disclosures to her manager, informing him of the suspected breaches. She was subjected to detrimental treatment by him from the point of disclosure until he ceased to be her manager. The Claimant complained to HR and went on sick leave. A new manager was appointed and was told that the Claimant had made an allegation against the Royal Mail to HR. The new manager dismissed the Claimant on grounds of capability.

The Claimant contended that she had been subjected to detriments for blowing the whistle and her dismissal was automatically unfair on whistleblowing grounds. The Employment Tribunal upheld the first contention, but rejected the second. It found that the Claimant's dismissal could only be automatically unfair on whistleblowing grounds if the new manager's decision was motivated by the whistleblowing disclosure. This was not found to be the case.

The EAT disagreed. It considered that a decision was attributable to the employer where that decision is made in ignorance of the true facts which are manipulated by someone in a managerial position who knows the true facts. The EAT held the Claimant was dismissed on whistleblowing grounds, rendering her dismissal automatically unfair. The Royal Mail appealed to the Court of Appeal.

The Court of Appeal overturned the EAT on the basis that when determining the reason for dismissal, the Employment Tribunal is only entitled to look at the knowledge and mental processes of the person authorising the dismissal. It held that the new manager had not been motivated by the whistleblowing disclosure when dismissing the Claimant. The dismissal was therefore held to be fair.

Conley King v Sash Window Workshop Ltd (C-214/16) (2017)

Mr King worked for The Sash Window Workshop on a 'self-employed commission only contract'. Under that contract he was paid on a commission only basis, which meant any leave he took was always unpaid. When he retired in 2012, Mr King sought to recover payment for the annual leave he had taken and not been paid for, as well as for the annual leave he had *not* taken and not been paid for. The relevant period spanned 13 years. Mr King brought his claim for holiday pay before the Employment Tribunal. The Tribunal found Mr King was a 'worker' within the meaning of the Working Time Regulations 1998 and, therefore, was entitled to payment in lieu of leave.

The company appealed. On hearing the appeal the Court of Appeal put questions to the European Court of Justice for a preliminary ruling on the interpretation of the Working Time Directive.

The Court of Justice responded with the following:

1. *In the case of a dispute between a worker and his employer as to whether the worker is entitled to paid annual leave, the Directive precludes the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave.*

2. *The Directive must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.*

In brief, where an employer has not provided a worker with paid annual leave, the right to paid leave carries over until she or he has the opportunity to exercise it. On termination of employment, the worker has the right to payment in lieu of the leave that remains outstanding.

A framework for modern employment

The Work and Pensions Committee and Business, Energy and Industrial Strategy Committee published a joint report on a draft Bill which attempts to close the loopholes that allow companies to use "self-employment" status as a route to cheap labour and tax avoidance. The report and Bill set out to tackle some of the flaws of the gig economy and implement protection to vulnerable workers and businesses alike. The Government primarily seeks to:

a) Provide clearer statutory definitions of employment status;
b) Implement a 'worker by default' model;
c) Pilot a pay premium on the National Minimum Wage and National Living Wage for workers who work non-contracted hours;
d) Extend the time allowance for a break in service from one week to one month, allowing the worker to continue accruing employment rights for continuous service;
e) Create an obligation on Employment Tribunals to consider increasing their use of higher punitive fine and costs orders where the employer has previously lost a similar case;
f) Extend the duty of employers to provide a written statement of employment particulars within 7 days of engagement;
g) Amend the Agency Worker Regulations 2010 to remove the opt-out for equal pay of all agency workers who have completed 12 weeks' service;
h) Bring forward stronger and more deterrent penalties and expand "naming and shaming" to all non-accidental breaches of employment rights by businesses and supply chains.

The Employment and Workers' Rights Bill 2017-19 is expected to have its second reading debate on Friday 27 April 2018.

In the meantime, the Employment Appeal Tribunal has taken the matter of employment status into its own hands this month…

Uber BV and others v Aslam and others EAT/0056/17

In this case, the Claimant Uber drivers brought claims against Uber for its failures to pay the National Minimum Wage and to provide paid annual leave under the Working Time Regulations 1998. The Claimants further complained of detrimental treatment on whistleblowing grounds. In order to qualify for these rights, the drivers had to show they were employed as workers.

The Employment Tribunal rejected Uber's contention that the technology platform facilitated the provision of taxi services by drivers who were self-employed. It found that the reality of the situation was that an Uber driver who (a) switches on the Uber app; (b) is within the territory where he is authorised to work; and (c) is willing to accept assignments, is a worker working for Uber under a worker contract, and is entitled to paid annual leave and the National Minimum Wage.

Uber appealed. The EAT found that the Employment Tribunal had been entitled to look behind the contractual documentation to determine the true nature of the relationship. Among other things it found that as drivers are unable to hold themselves out as being available to any other PHV operator, then, as a matter of fact, they are working at Uber's disposal, as part of the pool of drivers it requires to be available within the territory at any one time. This business control to which the drivers were subjected was a clear indication of their worker status. Uber's appeal was dismissed.

Uber has confirmed it intends to appeal the EAT's ruling.

It is worth noting that only a month after the EAT's ruling, a different decision based on a different employment relationship was made by the Central Arbitration Committee.

Deliveroo riders are not workers

The Central Arbitration Committee rejected an application for statutory employment recognition by the Independent Workers' Union, ruling that Deliveroo riders are *not* workers. It found that the Deliveroo riders exercised a contractual right to substitute another rider, making it incapable for the rider to undertake to do personally any work or services for Deliveroo. This finding ultimately caused the Union's claim to fail.

Michalak v General Medical Council and others [2017] UKSC 7

The case of *Michalak v General Medical Council and others* centred on a discrimination complaint brought by Michalak, a consultant physician, against the medical regulator in 2008.

The Claimant was found by an employment tribunal to have been unfairly dismissed and subjected to discrimination by Mid-Yorkshire Hospitals NHS Trust. She was awarded £4.4 million. The Trust had reported Michalak to the GMC to consider whether she should continue to be registered with the regulator. The GMC instigated fitness to practice

proceedings to determine this. In 2013 Michalak claimed the GMC had discriminated against her in the way it carried out those proceedings, and had failed to investigate the complaints she had made against other doctors employed by the trust. She brought a claim in the Employment Tribunal under the Equality Act 2010.

The Act enables the Employment Tribunal to hear claims of discrimination against a 'qualifications body', except where the conduct complained of is, 'by virtue of an enactment, subject to an appeal or proceedings in the nature of an appeal'.

The GMC argued that the trust's conduct in failing to investigate her complaints could only be properly challenged by judicial review and constituted 'proceedings in the nature of an appeal'- the exception to the Employment Tribunal's jurisdiction. The case, they argued, would therefore have to be brought in the High Court. It is worth noting that the nature and type of remedy for the discrimination claim would not have been the same as what is available in the Employment Tribunal.

The EAT agreed with the GMC's position. The Court of Appeal, however, overturned the EAT.

The case was brought before the Supreme Court, which unanimously dismissed the appeal. It was agreed the Employment Tribunal offers the natural and obvious means of recourse in respect of the doctor's surviving complaints. It was held that there was no need in this context to strain the ordinary usage or understanding of the concept of "appeal" to embrace judicial review.

The wider implication of this decision is that, in certain circumstances regulators, can be taken to Employment Tribunals.

Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

The Court of Appeal has resolved the uncertainty that surfaced earlier this year in *Efobi v Royal Mail Group Ltd* in relation to the burden of proof in discrimination claims brought under s.136 of the Equality Act 2010.

In *Efobi v Royal Mail Group Ltd* the EAT was thought to have clarified the position once and for all: there is no initial burden on claimants to prove a prima facie case of discrimination; tribunals are required to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not there are 'facts' from which it can conclude that discrimination occurred and, if so, it must so find unless the respondent can discharge the burden on it. The Court of Appeal however says it was wrong of the EAT to suggest that s.136 brought about a substantive change to the law.

The Court of Appeal could see no reason why a respondent should have to discharge the burden of proof unless and until the claimant has shown a prima facie case of discrimination that needs to be answered. Accordingly, it held that there is nothing unfair about requiring a claimant to bear the burden of proof at the first stage.

The Court of Appeal could find no reason to support the proposition that Parliament enacted s.136 to remove the burden of proof from a claimant. The legal community has proceeded for the last seven years on the assumption that no change of substance was made by s.136.

Rosalind Young

Employment Law Group

Ian Ridd Shabbir Lakha Huw Davies Guy Watkins Matthew Hodson Emma Sole
David Roderick Tom Bourne-Arton Grant Goodlad James Rozier Changez Khan
Robert Golin Joshua Hedgman Joel McMillan Rajiv Bhatt

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Farrar's Building
Temple
London
EC4Y 7BD

T: +44 (0)20 7583 9241

Email: Chambers@Farrarsbuilding.co.uk

@FarrarsBuilding