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THE GIG ECONOMY – QUID IURIS?

RYNEK UMÓW KRÓTKOTERMINOWYCH – QUID IURIS?

Summary: Definition of the term "gig economy". Its rapid growth. Advantages and disadvantages of the gig economy. The three legal stauses and their importance. The self-employed, employee and worker a distinction and their significance. Case law evaluation and analysis providing equitable developments to worker status. Judicial creativity. Epitome.

Kewords: Gig economy growth, Employment status, False categorisation by employers

Streszczenie: Definicja terminu „rynek umów krótkoterminowych". Jego szybki rozwój. Plusy i minusy rynku umów krótkoterminowych. Trzy statusy prawne oraz ich ważność. Różnica między pracownikiem samozatrudnionym, pracownikiem etatowym i robotnikiem oraz ich ważność. Ocena i analiza prawa opartego na orzecznictwie zapewniającego sprawiedliwe opracowania statusu zatrudnienia. Kreatywność sądów.

Słowa kluczowe: rozwój rynku umów krótkoterminowych, status zatrudnienia, fałszywa kategoryzacja dokonywana przez pracodawców

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DEFINITION OF THE EXPRESSION

The expression "gig economy" describes the growing trend of companies who employ a flexible freelance workforce[1] on a temporary basis, normally on short term work. They are remunerated upon the completion of tasks, known as "gigs," instead of being paid by the amount of time spent at work. This type of work has been popular with some companies such as Uber taxis, Uber Eats, Deliveroo, Lyft and Just Eat. Thus with Uber and Lyft, drivers drive their customers in cars by the use of ride share apps on their mobile telephones; Deliveroo, Uber Eats and Just Eat deliver on bicycles and mopeds takeaway meals to individual houses using their delivery apps. The gig economy workforce is also used as cleaners or, to walk dogs and other domestic animals. Nor is the gig economy confined to manual work. Digital freelancers provide services such as website development or graphic design and much more through the Fiverr and Peopleperhour sites

It may therefore be said that the gig economy is diverse and includes full-time, part-time and casual workers all of whom choose to work flexibly in their own chosen time for their companies or apps, They also include workers performing gigs full-time such as a band playing in a pub every day; alternatively the band members playing occasionally to supplement their income from other. One person businesses providing a service to customers may well come into the gig economy category as indeed would a freelance worker

The UK Government definition is "the gig economy involves the exchange of labour for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on short-term or payment-by-task basis".

GROWTH OF THE GIG ECONOMY NUMBERS, PLATFORM OPTIONS AND GIG WORKERS' CONTRIBUTION TO THE BRITISH ECONOMY

There has been in the UK a sustained growth of employment figures in the gig economy in the past five years. In 2016 there were 2.3 million recorded active gig workers. This figure grew substantially to 4.7 million in 2019 and by 2022 it is estimated that there will be in the region of 7.25 million active gig workers[2].

There exist numerous gig employment platforms in the UK. As such, gig workers are offered an enormous choice but the most popular one is Uber who employs

[1] As at May 2021 the key statistics relating to the UK gig economy show that 1 in 7 adults have worked on a gig job monthly. Gig workers contribute £20 billion to the UK economy which compares with that of the aerospace industry. 40% of gig workers also have a full-time job. Women earn 10% less than men in the gig economy. 71.5% gig work makes up less than half of their income. It is estimated that in 2022 7.25 million workers are likely to work in the gig economy. (Source: Standout CV – Gig Economy Statistics UK, https.//standout-cv.com/gig-economy-statistics-uk (Retrieved 9th August 2021).

[2] Based on the 2022 historic demographic projections of the British Government's Office of National statistics.

some 150,000 drivers[3]. Deliveroo's business increased considerably in the 2020s and 2021s as a result of the numerous nationwide COVID-19 lockdowns imposed by the British Government, In 2020 alone the total deliveries on the app rose by 64.3%[4] and 50,000 additional riders/drivers were hired.

The seven most popular platforms at the time of writing, are Uber hiring 18% of gig economy workers; Deliveroo hiring 12% of gig workers; Peopleperhour hiring 12%[5]; Flvrr hiring 10%; Upwork hiring 9%; TaskRabbit8%; Amazon Flex also 8% and Gig workers who are working freelance contribute about £20 billion annually to the British economy[6]. It is estimated that £3.2 billion (16%) of the contributions are made from earnings by Uber drivers[7] and 1.5 billion by Deliveroo riders/drivers[8]. Although strong in the UK, the USA and the European Union, on a global scale the gig-economy platform's share of total employment is currently modest at between 1% and 3% of total employment according to the OECD. However the OECD is well aware that its share is growing fast. According to Mastercard, global gig-economy transactions are forecast to grow annually by 17% to reach by 2023, approximately $455 billion[9].

THE ADVANTAGES AND DISADVANTAGES OF THE UK GIG ECONOMY

Numerous gig companies, especially those delivering food such as Deliveroo and Uber Eats exceeded trade expectations during the COVID-19 pandemic with very high recorded deliveries[10]. Do gig workers enjoy their gig employment or benefit from this kind of employment? A UK Government survey indicates that 53% of gig workers who are employed on a full-time basis appear satisfied with providing services on websites and apps[11].

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[3] Source: See Stand Out CV Gig Economy Statistics UK May 2021 at p.3,https://standout-cv.com/gig-economy-statistics-uk (Retrieved 9th August 2021).

[4] Source: https://standout-cv.com/gig-economy-statistics-uk.

[5] This popular gig platform allows freelancers to obtain gig employment in a wide range of online activities, as for example, marketing, graphic design, copywriting and so on.

[6] Source: Centre for Research and Self-Employment. The Freelance Project and Gig Economies of the 21st Century. June 2019, http://crse.co.uk/research/freelance-project-and-gig-economies-21st--century (Retrieved 9th August, 2021).

[7] Source: Uber. The Impact of Uber in the UK, https://www.uber.com/en-GB/newsroom/the-impact-of-uber-in-the-UK/ (Retrieved 19th August 2021).

[8] Deliveroo proposes to create 70,000 jobs. Source: https://uk.deliveroo.news.news-creating-restaurant-jobs.html (Retrieved 19th August 2021).

[9] See "A growing gig. Image: Mastercard Gig Economy Industry Outlook and Needs Assessment. The projected gross volume of the global gig economy (in billions USD) 2018 $204.0; 2019 $248.3; 2020 $296.7; 2021 $347.8; 2022 $401.4; 2023 $455.2.

[10] Source: Economic Observatory. Update. How is the coronavirus affecting gig economy workers? 2nd March 2021, https;//www.economicobservatory.com/update-how-is-the-corona-virus-crisis-affecting-gig-economy-workers (Retrieved 9th August 2021).

[11] Source: Department of business, Energy, Industrial Strategy. The Characteristics of those in the Gig Economy. Final Report. February 2018, https://assets.publishing.service.gov.uk/government/uploads/attachment_data/file/687553/The _characteristics_of_those_in_the_gig_economy.pdf (Retrieved 9th August 2021).

On the advantages side flexibility and independence are by far the main sources of satisfaction of gig workers. Gig workers are able to choose when and how they work and they have the ability to increase their earnings with good performance. The survey score for flexibility was 56% whereas the score for independence was even higher at 58%. What is also interesting is that those gig workers who saw their gig work income as significant enjoyed a satisfaction level of 74%. However the satisfaction level was lower for those on casual gigs at 48%. There were also differences of satisfaction based on the gig activity. Thus those gig workers who provided courier services proved to enjoy the highest level of satisfaction at 69%. The taxi drivers' level of satisfaction followed closely at 68% and the food delivery gig workers reported a 65% satisfaction rate. The other advantages consisted of the number of hours available at 46% and the cost of providing services at 38%. There are some hidden advantages which the gig economy is able to offer and which could be useful when applying for future employment. Gig workers employed by Deliveroo, Uber, DPD and other companies acquire much experience in dealing with the public. Such experiences can be good and bad ones, Whatsoever the experience, gig workers learn quickly how to deal with the contented and discontented public. Another hidden advantage is flexibility. The gig economy itself spells flexibility in that an individual can work for as long hours at peak times as desired thus enabling such individual to earn more. Another hidden advantage is the acquisition of skills while employed in the gig economy. Gig workers often have to adapt in the course of their gigs which requires a largesse of mind and a spirit of inventiveness. Gig workers who have numerous customers will experience complicated financial transactions. Managing effectively such transactions would be beneficial to them when applying for jobs.

On the disadvantages side gig workers considered that their income levels were very low at 25%. Work benefits received a low score of 25% while career opportunities scored 23% and irregular workload 18%.

As the gig economy markets and the companies get larger, new challenges arise on policy makers in the company and government officials as to how to balance the innovations created by modern technology which create jobs versus the need to ensure that companies are not exploiting the workforce by offering to gig workers a fair deal. The gig economy companies present complications to a variety of governmental and other bodies some of which include, *inter alia*, the competition policy of the government, market regulation, taxation and labour market policies and laws. It is with this latter issue that this chapter is primarily concerned.

THE LEGAL ASPECTS OF THE GIG ECONOMY

When discussing the advantages and disadvantages of the gig economy it will be recalled that independence and flexibility where hailed by the persons working in the British gig economy as the principal reason for their satisfaction. However respondents were less satisfied with the work-related benefits which they received as well as their levels of income with one person in four holding the opinion that they were either very or fairly dissatisfied with those aspects of their work.

On the international stage, the OECD states that[12] "Overall, most gig workers are satisfied with their job and working for gig economy platforms appears to reflect mainly voluntary choices rather than the lack of other options…However a significant minority of platform workers – around 20% – uses platforms because they are not able to find work as dependent employees". A McKinsey Global Institute study categorised independent workers into four segments, namely "1. Free agents, who chose independent work and derive their primary income from it; 2. Casual earners, who use independent work by choice for supplemental income; 3. Reluctants, who make their primary living from independent work but would prefer traditional jobs; 4. Financially strapped who do supplemental independent work out of necessity." The author of the article rightly points out that policy makers face a task of keeping each of those four categories happy by providing policy settings fit for the digital age and quoting the authors "independent workers and traditional jobholders alike will have to become more proactive about managing their careers as digital technologies continue to reshape our world of work".

The British Gig economy has more recently, and during the pandemic in particular, raised important legal questions on the levels of gig worker rights and worker protection. A significant tranche of the British workforce feels insecure because of the lack of balance between employer and labour power. There has been a slackening of health and safety laws which has caused many front line workers in hospitals and elsewhere to suffer injury and even death and many coronavirus patients died unnecessarily in miserable circumstances in care homes and hospitals. As mentioned above, some sectors of the gig economy, such as Deliveroo and Uber flourished as a result of the pandemic but many gig employment workers had no access to holidays, to statutory sick pay and other basic legal rights. The reason for that is the three different employment statuses provided for by British law.

[12] Source: Emma Charlton "What is the gig economy and what's the deal for gig workers?" World Economic Forum 21st May 2021, p.5,https://www.weforum.org/agenda/2021/05/what-gig-economy-workers/ (Retrieved 10th August 2021).

WHAT ARE THE THREE LEGAL STATUSES AND WHY ARE THEY SO IMPORTANT?

There has recently been a string of law cases against companies such as Uber, Deliveroo. Addison Lee and Pimlico Plumbers each of whom employ gig economy labour. In each of these cases the employment status of persons working in the gig economy was put under the magnifying glass. The three statuses are (a) independent contractor; (b) employee and (c) worker. Each of those enjoy different statutory and/or common law legal rights.

(a) The Independent Contractor Status

Since the introduction of the status of "worker", there is no statutory definition for this status[13]. Such a person is self-employed and is therefore in business for himself and is not attached to an employer. He has complete control of the business and pays tax in accordance with the company's profits[14]. He is responsible for his business success or failure. An independent contractor does not enjoy any employment rights although he does enjoy some rights such as those connected to discrimination under the equality laws.

(b) The Employee Status

An employee is a person who works under a contract of employment or a contract of service or apprenticeship. The Employment Rights Act 1966 defines the employee as[15] "an individual who has entered into or works under (or where employment has ceased worked under) a contract of employment". A legally binding contract can be concluded in writing or verbally or be a mixture of both but "particulars of employment" specifying the important features of employment have to be put in writing within two months of recruitment[16]. The issue on whether or not the employee status has been reached is left to the common law and is established on a case-by-case basis in accordance with the various tests which have evolved through the court judgments over the last one hundred years[17].

[13] At one time it was defined as "a person who is not an employee" but when the status of "worker"was introduced the definition became very blurred.

[14] Her Majesty's Revenue and Customs (HMRC) has its own complicated rules on status but they are not important for our current purposes.

[15] S. 230(1).

[16] It should be noted that as of 6th April 2020 a statement of written particulars gives to both those holding the status of employee and worker a day one right.

[17] For a detailed analysis on these tests see Jo Carby-Hall "New Frontiers of Labour Law:- Dependant and Autonomous Workers" in "Du Travail Salarié au Travail Indépendant: Permanances et Mutations"(Professor Bruno Veneziani and Professor Umberto Carabelli (Eds), SOCRATES PROGRAMME Cacucci Editore (2003) at pp. 163-308.

(c) The Worker Status

The term "worker" is a category in between that of employee and that of independent contractor and is defined by the Employment Rights Act 1966 as[18] "any individual who undertakes to do or perform personally any work or service for another party, whether under a contract of employment or other contract[19] but is not, by virtue of that contract a client or customer of any profession or business undertaking carried on by the individual". Indeed a very tortious definition, difficult to understand and to apply but the tribunals and courts are making good sense of this definition in the gig employment cases heard of late.

The salient features of this status are. (i) that the individual must provide a *personal service* for the work or services (ii) that the employer *must not be a customer or client of the individual's business* and (iii) as shown in the gig economy case law, the degree of *control* the employer exercises over the individual.

(d) Why is it important to know the status of the individual?

Individuals holding the employee status are entitled to all employment rights whereas workers are entitled to a limited number of rights with independent contractors enjoying virtually no such rights. All employees are workers but not all workers are employees!

An employee is entitled to all workers' rights as given below and in addition statutory sick pay; to protection against statutory unfair dismissal and constructive dismissal after two years' continuous employment and at common law wrongful dismissal; if made redundant, the employee is entitled to redundancy pay but only if the employee has worked for two years; statutory maternity, paternity, adoption, parental leave and pay(workers are only entitled to leave); minimum notice period if their employment comes to an end; the right to request flexible working; time off for emergencies; rights under transfers of undertakings; rights to preferred payment where the employer becomes insolvent and rights under the equality legislation.

Workers on the other hand have limited employment rights which include receiving the minimum national wage; protection against deductions from wages; the statutory minimum period of paid holiday; the statutory minimum length of rest breaks; to not work more than 48 hours on average per week or to opt out of this if they choose; protection against unlawful discrimination under the Equality Act; protection for whistleblowing[20] and if working on a part time basis not to be treated less favourably.

[18] S.230(3)(b). Also popularly known as "Limb (b)".

[19] It does not matter whether the contract be express or implied, verbal or in writing so long as the work or service is performed *personally* for the employer who is *not a client or customer* of the individual.

[20] Which means reporting wrongdoings in the workplace.

Depending on company rules and/or their contracts, workers may additionally be entitled to statutory maternity pay; statutory paternity pay; statutory adoption pay; statutory parental pay and statutory sick pay.

THE FALSE CATEGORISATION BY EMPLOYERS OF THE SELF-EMPLOYMENT STATUS FOR GIG WORKERS

The importance of ascertaining the status of an individual is of primordial significance in the field of the gig economy as that status, if ascertained, would give individuals basic employment rights to which they have been denied over a long period of time. Gig employment platform employers have always considered that their gig workers were self-employed and compelled such individuals to enter into contracts as such. In that manner unscrupulous employers had no legal responsibilities towards their gig workers and the workers themselves being classed as independent contractors or self-employed in their contracts, acquired no employment rights whatsoever. It was a take it or leave it contract and if an individual wanted a job he had no choice other than to accept the unilaterally imposed independent contractor status imposed by the employer. The voice of the employer was stronger than that of the gig worker. This situation which is endemic right through the gig economy which accounts for more than five million people, amounts not only to severe exploitation but also to modern slavery as gig workers are denied holidays, the minimum wage, rest periods and other basic rights. Many gig workers were and are contented with this situation but others felt exploited by their employers so they had to have recourse to employment tribunals and the courts to fight for their rights.

EQUITABLE DEVELOPMENTS IN THE GIG ECONOMY THROUGH THE CASE LAW

The lack of legislation supporting the gig economy and its workers has proved to be a growing problem. The legislator leaves it to the Employment Tribunals and courts to deal with the rising numbers of cases relating to the gig economy. So as to give the reader a taste of the equitable developments which have taken place in that field, it is proposed to analyse briefly a selection of gig economy cases which have been heard before the tribunals and courts.

In the case of *Byrne Brothers (Formwork)Ltd v Baird et al*[21]. Baird and others were building trade workers employed in 1999 by Byrne Brothers Ltd. The standard form contract signed by Baird and others at the start of their employment

[21] [2002] IRLR 96 (EAT).

stipulated that they were not entitled to sick pay, holiday pay or to any pension rights. After the Christmas of 1999 and the new year 2000 holidays they claimed that they were entitled to holiday pay for that period. They based their claim of the definition of the word "worker" under regulation 2(1) (b) of the Working Time Regulations 1998. That regulation provides that the word "worker" means a person who works under "a contract of employment or under a contract to provide work or services personally for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertakling carried by the individual.." The Employment Tribunal held that on the facts of the case Baird *et al*. were workers and therefore were entitled to holiday pay. Byrne Brothers Ltd appealed against that decision to the Employment Appeal Tribunal which upheld the Employment Tribunal finding and dismissed the appeal. Baird *et al* were "workers" for the purpose of the 1998 Regulations for they had undertaken *personally* to carry on work or services for Byrne Brothers Ltd. When a worker is offered work the understanding is that it is he *personally* who will be doing that work. Recorder Underhill QC. talking of regulation 2(1)(b) posited that it was targeted towards "protecting an intermediate type of worker who is not carrying on his own business but equally is not an employee. Though normally free to move from contracror to contractor in practice… they work for long periods for a single employer as an integrated part of the workforce; their specialist skills may be limited, they may supply little or nothing by way of equipment and undertake kittle or no economic risk. They have long been regarded as being near the border between employment and self-employment; it is for this reason that their status has for many years been a matter of controversy".

The Supreme Court case of *Jivraj v Hashwani*[22] arose out of a claim that a term in an international commercial arbitration agreement which provided that all arbitrators had to be members of the Ismaili community, was void because it constituted unlawful religious discrimination. The main issue was whether the arbitrator was employed as defined by the Employment Equality (Religion and Belief) Regulations 2003 which implemented Directive 2000/78. Numerous interveners were concerned that were arbitrators to be classed as employees, in British employment discrimination law, provisions requiring arbitrators to be of a particular nationality could also be void. The Supreme Court held that arbitrators are not employees, rather they were found to be "independent providers of services". They were not in a position of subordination to the parties receiving the arbitration services and therefore, could not be said to be employed by them. Under UK discrimination law to specify the religion of arbitrators did not constitute unlawful discrimination. The Supreme Court also held that the term would have fallen within the genuine occupational requirement

[22] [2011] UKSC 40.

exception. There was a great deal of detailed discussion in this case on the distinction between the self-employed, employees and workers which highlighted the difficulties encountered by the courts when determining the employment status.

In *Dewhurst v City Sprint Ltd.*[23] a bicycle courier, Maggie Dewhurst, worked for a courier company, City Sprint. At the start of each day she spoke with her company controller and kept in touch with her on her mobile telephone and radio. She also signed on the company's city tracker software which showed her position and which allocated deliveries for her. Her contract clearly stated that she was to be an independent contractor and in her contract there were many other clauses which were consistent with that status, namely, that the company was not under a duty to allocate work for her and if it did she had no obligation to accept it. She was given freedom on how to execute her work and chose her routes for deliveries. She was given freedom to work for other companies while she was working for City Sprint and she could provide a substitute to carry out her job provided that such substitute met certain criteria. Ms Walker claimed that she was a worker and therefore entitled to certain employment rights under limb (b) of s. 230 (3) of the Employment Rights Act 1996 (see above for an explanation) these being, the national minimum wage, rest breaks, paid annual holidays, a 48 hour maximum week and auto-enrolment pension contributions. She argued that she was a worker under limb (b) because she was not allowed to work for others while she was on the company's books; that she could not turn down jobs allocated to her and that it was not up to her how she carried out jobs particularly since she had to wear a uniform, follow a script when meeting customers and follow the company procedure if a parcel could not be delivered. Nor could she easily provide a substitute, unless it was another courier already inscribed in the company's books. Following a detailed examination of the facts of the case the Employment Tribunal judge held that she was a worker and was therefore entitled to the basic employment law rights. It is not sufficient that the contract stated that the claimant was an independent contractor, the actual working practices should be *consistent* with those contract terms.

Pimlico Plumbers Ltd. et al v Smith[24] was heard on appeal by the Supreme Court which upheld the decisions of the lower courts and tribunals. The claimant (Smith) issued proceedings against the appellants (Pimlico Plumbers) before the Employment Tribunal alleging that he had been unfairly dismissed, that an unlawful deduction had been made from his wages, that he was not paid during his statutory annual leave and that he had been discriminated on grounds of his disability. The Employment Tribunal decided that he had not been an employee of the appellants under a contract of employment; he was thus not entitled to claim

[23] Case Number ET/2202512/2016.
[24] [2018] UKSC 29.

unfair dismissal[25]. The tribunal however held that he was a limb (b) worker under s. 230(3) (b); had been a worker within the meaning of Reg. 2(1) of the Working Time Regulations 1998 and had been in employment for the purpose of s 83(2) of the Equality Act 2010. These findings meant that the claimant could proceed with the other three complaints. The Supreme Court upheld the tribunal decision that the company was neither his client or customer and that the dominant feature of the claimant's contract with the company was an obligation of personal performance. Furthermore the claimant was allowed to reject work and accept work outside Pimlico. There were also features of the contract which strongly militated against recognition of Pimlico as a client and customer of the claimant. They included Pimlico's tight control over his clothing and the administrative aspects of any job, the severe terms as to when and how much it was obliged to pay him and the suite of covenants restricting his working activities after termination.

Another win for workers in the gig economy featured in the EAT case of *Addison Lee Ltd v Gascoigne*[26]. A cycle courier employed by Addison Lee made a modest claim for a week's holiday pay which the employer refused to pay on the grounds that the cycle courier was an independent contractor under the terms of his contract and therefore not a worker within the meaning of the Working Time Regulations 1998. The Employment Tribunal held that when the courier was logged on to Addison Lee's app through which he received his courier jobs, he had to be available for, and willing to, work. He could not refuse the jobs he was ordered to do and thus was under a sufficient degree of employer control to qualify for the worker status. Addison Lee appealed against this decision on the grounds that there was no requirement to log on to the system which was similar to a zero- hour contract and thus did not create the mutuality of obligation required for worker status. The second grounds of appeal was that the multiple facts to assess whether the courier was a worker was factually erroneous. The EAT disagreed with both these grounds of appeal. Regarding the first ground the tribunal considered that there was indeed a mutuality of obligations between the parties. Once the courier obtained a job it was expected that he would complete it. The employer tracked the couriers by GPS to ensure their obligation to deliver timely. Their drivers were required to drive a branded car or bicycle, adhere to strict company rules including a dress code and conduct rules. The fact that the courier was free to choose when to log onto the system did not negate the worker relationship arising during the log-on periods. All this showed that the employer had sufficient control and the riders/drivers could not be considered as self-employed. On the second of appeal, namely the multi-factorial assessment of worker status was correctly applied. The EAT judge stressed that "the written terms of the contract did not reflect the reality of the situation." The tribunal and courts have shown their

[25] He did not contest that finding in the Supreme Court and agreed that he was not an employee.
[26] [2018] UKEAT 0289-17-1105.

readiness to use the *reality* of the situation based on the facts and evidence of the case rather than what appears in the contract. By lifting the reality veil the tribunals and courts will ignore the written contract classification terms if those do not match the reality of the situation.

There was another series of *Addison Lee* cases, namely *Addison Lee v Lange*, which went on appeal from the Employment Tribunal to the Employment Appeal Tribunal both of which held that Mr Lange and his colleagues came within the definition of "workers" under the Employment Rights Act 1996. Addison Lee Ltd. then applied to the Court of Appeal for permission to appeal[27] against the EAT decision. The Court of Appeal granted permission but stayed the case until the outcome of the Uber case was known in the Supreme Court. The Supreme Court in the Uber case held that the Uber drivers are "workers" and are not independent contractors. There being strong similarities between the Uber and Addison Lee cases, the Court of Appeal refused Addison Lee permission to proceed with the appeal because such appeal had no reasonable prospects of success.

In *Addison Lee Ltd v M.Lange et al*[28]. three minicab drivers were classified by Addison Lee Ltd. as independent contractors and it was specifically stated in their respective contracts that they were neither employees or workers. They claimed that they were paid £5 an hour for their services. The Employment Tribunal (with whom on appeal the EAT agreed) having examined the facts of the case, found that in reality and based upon the facts of the case, the drivers held the status of "worker". They were working from the time they logged onto the system regardless of whether they were actually working by carrying passengers. The tribunals therefore disregarded the contractual provisions applicable to status as these did not reflect the true agreement between the contracting parties. Holding the status of "worker" entitled the drivers to the national minimum wage and holidays with pay. Furthermore, the tribunals considered on the facts of the case, that the drivers provided a *personal service* to the company. It was also shown in this case that Addison Lee had over drivers, for example by restricting car use, and imposing the company's branding. When notified of a job on the system, the driver had to accept immediately, failing that he would be sanctioned if he did not have an acceptable reason for refusing.

In the important test case of *Uber BV and Others v Aslam and others*[29] dealing with some 46,000 drivers working for Uber passengers used their smartphone apps to locate a driver to take them to their destination. Uber pleaded that the drivers ran their businesses as independent contractors and thus they were not entitled to

[27] The grounds of appeal were twofold. First, that the Uber case can be distinguished from the Addison Lee case because of differences in the contractual documentation. Second, Addison Lee sought a re-consideration of the Employment Tribunal's decision that when drivers were logged on this satisfied the definition of working time.

[28] UKEAT/0037/18/BA in the EAT and [2021] EWCA Civ.594 in the Court of Appeal.

[29] [2021] UKSC 5 (on appeal from [2018] EWCA Civ. 2748).

employment rights. However, the Employment Tribunal, the EAT and Court of Appeal and subsequently the Supreme Court held that the Uber drivers were entitled to rights as workers. Lord Legatt, talking of the policy behind limb (b) put it very aptly when he said[30] "It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing)" or suffer unlawful deductions from their wages or denied pension rights. The reason why workers are thought to need such protection is that they are substantively and economically subordinate to and economically subordinate to, and dependant on, their employers. Lord Legatt continued[31] "It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine… whether or not the other party is to be classified as a worker".

It will be recalled that over the years the courts devised a number of tests to ascertain the difference between an independent contractor and an employee. The predominant one was the control test in its various forms which continues to be applied to the gig employment cases. There were three parties involved in the Uber case Namely, Uber, the drivers and the passengers. The focus of the case rested on the relationship between Uber and the drivers. The passengers were regarded as third parties. The Supreme Court had to assess the relative degree of control exercised by Uber over the drivers. To do so three matters needed to be addressed. First, who determines the *price* charged to the passengers? Second, who was responsible for *defining and delivering* the service provided to the passengers? Third, to what extent did the arrangements with passengers afford drivers *the potential to market their own services* in order to develop their own business? The Supreme Court emphasised five of the tribunal's findings. with regard to *control* by Uber. The first of these was that the remuneration paid to drivers was *unilaterally* fixed by Uber. Drivers could not negotiate their wages. Passenger fares were *set and calculated* by the Uber app. Uber fixed the amount of its *service fee*. Uber had complete control over drivers' *pay and financial matters*. In the second instance, the *contractual terms* on which the drivers performed their services and the terms on which passengers were transported were *dictated* by Uber. Drivers had no say. Thirdly, once drivers logged on the Uber app *Uber exercised control over the driver in two ways*. Namely, by *controlling the information* provided to drivers and by *not informing drivers* of passengers' destinations. Uber also controlled the drivers' rates *of acceptances and cancellations* which, if they fell below a level set by Uber received *warnings* and if their performance did not

[30] At page 20, paragraph 71 of the judgment transcript, op.cit.
[31] At page 23, paragraph 76 of the judgment transcript, op.cit.

improve they were *logged off* the Uber app and *shut out* from being logged back for ten minutes. This put drivers in a position of *subordination* to Uber. Fourthly Uber exercised a great deal *of control in the way the drivers delivered their services*. The technology which was integral to the service, such as driver rating, etc…was *wholly owned and controlled by Uber*. The fifth factor was that Uber restricted solely any communication between driver and passenger so as to prevent the driver establishing with the passenger. As Lord Legatt put it[32] "This is a classic form of subordination that is characteristic of employment relationships. While agreeing with the Employment Tribunal's findings and those of the EAT and the Court of Appeal the Supreme Court held that the drivers held the status of "worker" within the meaning of limb (b) of the statutory definition. The drivers were thus entitled to the national minimum wage; to 5.6 week paid annual leave; an average 48 hour working week; protection against the unlawful deduction from wages and whistleblowing protection and dismissed the appeal.

AN EPITOME

A number of important issues arise from the gig economy cases. The tribunals and courts are anxious to establish a level playing field in the gig economy which has hitherto given opportunities to less than scrupulous employers to exploit individuals whom they employ by denying them their employment rights. They have succeeded in doing so in each of the above cases by the use of limb (b) of s.130 (3) of the Employment Rights Act 1996 which is a tortious piece of legislation *per se*! Most importantly, the tribunals and courts have lifted the status veil on what had been imposed unilaterally by the employer in the contract by looking at the reality of the relationship between the parties. They use a fact-specific system which has become the norm in every case heard whether it be Deliveroo, Uber, Pimlico Plumbers, Addison Lee or any of the other cases. It is the facts that are key in deciding an employment status case and not necessarily what the contract provides.

The employment status issue is a complicated one and the courts have devised a number of tests over the past century to clarify this aspect of the law. The Taylor Review on Modern Workplaces suggested that the status issue tests be consolidated into legislation[33]. It is understood that the British Government has accepted Matthew Taylor's views. It is, however, doubtful in this author's opinion, if by consolidating the tests developed at common law into legislation will make the status issue any clearer to employers, trade unions, academics and others than it is now.

[32] At page 31 paragraph 99 of the judgment transcript, op.cit.

[33] See the discussion in Jo Carby-Hall *The Taylor Review 2017 – A Critical Appreciation on a Selection of its Legal Content* in Jo Carby-Hall and Lourdes Mella Mendez, (Eds) "Labour Law and the Gig Economy – Challenges Posed by the Digitalisation of Labour Processes" (2020) Routledge at pp. 17-65.

The courts have done in the past, and are currently doing, an excellent job in solving this problem. What is required is for employers, when drafting a contract, to foresee the exact status of the individual by giving careful consideration to that issue and to ensure with all honesty that the contractual element agrees with the factual element. Otherwise the employer may, as he did in Uber, Addison Lee, Pimlico Plumbers and the other cases, be faced with a hefty bill.

The cases litigated above are only applicable to the parties concerned. Nevertheless, it is suggested that these cases are having a significant impact over the whole of the gig economy. This dubious employment model is used by numerous gig economy companies. The Uber decision as well as the decisions reached by the tribunals and the courts in the other cases are such that companies will be asking themselves for how long they would be able to argue that the individuals they employ are not workers within the meaning of the limb (b) provisions. It would not be prudent for gig economy company managers to ignore the overwhelming case law on this topic.

Furthermore Uber has been challenged by its drivers in numerous countries and has disrupted labour markets globally. The Uber and the other jurisprudence examined above may contribute towards the international debate and thus have global repercussions.

References

Book:

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