Employment status - Aslam and Ors v Uber BV and Ors

10 JANUARY 2017

CATEGORY:
ARTICLE

The most talked about case of 2016 was an Employment Tribunal's decision that two Uber drivers were not self-employed but were workers, entitled to the national minimum wage and paid holiday – a decision against which Uber has said it intends to appeal. A similar decision has followed in the new year, in favour of a cycle courier engaged by CitySprint. Unions are adopting other strategies with a view to obtaining statutory protections for individuals in the gig economy – for instance, the Independent Workers Union of Great Britain is seeking formal recognition from Deliveroo.

In effect the Uber case was an application to a new business model of the approach in the 2011 Supreme Court decision in *Autoclenz v Belcher* in which the Supreme Court decided that car valets who were working under written contracts that purported to make them independent contractors were on the facts of the situation not independent contractors at all, but employees. The tribunal in the Uber case took the same approach, looking beyond the convoluted documentation to the reality of the situation. The innovative element derives from the context – a company in the 'gig' economy using a technology platform to organise its business.

Uber's principal argument was that an Uber driver cannot be a worker because he or she is never under any obligation to switch on the Uber App which connects Uber's customers to drivers. The Tribunal plainly did not accept that argument and was much more interested in what happened once the App was switched on and whether after that point Uber drivers were sufficiently subordinate to Uber to be properly described as workers. Tribunals will always look at the situation in the round and once the tribunal in Uber had cut through the 'thicket' of documentation, it was clear to it that the drivers were being told by Uber what to do and how to do it in a way that was far more consistent with a worker relationship than one of self-employment. In the CitySprint case the employment judge also commented on the documentation used by CitySprint, describing it as 'contorted', 'indecipherable' and 'window-dressing'.

Aspects of the tribunal's judgment in the Uber case will resonate with the experience of Uber's customers – they download Uber's App, not that of the driver, and it is Uber that collects the costs of the journey from their bank account and emails them afterwards to confirm that it has done so. If there is an invoice between the driver and the customer, the customer never sees it. The idea that Uber is no more than a platform for enabling customers to connect with thousands of self-employed drivers is therefore inconsistent in every aspect with the experience of using the service. It remains to be seen whether Uber can convince the EAT that the employment tribunal has made an error of law in reaching its conclusion.

COMMENT

In its judgment the tribunal expressly allowed for the possibility that technology platforms do not inevitably lead to worker status. Airbnb and Ebay might be cited as examples of business which actually do what Uber was purporting to do, namely facilitate transactions between two third parties with whom they have no employment relationship. It is a question of looking at all the facts and features of the arrangement and the reality of what is actually happening. It remains to be seen whether Uber will make any changes in order to seek to avoid worker status (it is appealing the tribunal's decision, so this case has some distance still to run). Any such steps may well require significant changes to their trading model – which Uber may be loathe to take.

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