

Steen & Co.

Employment Solicitors

The Uber Judgement

The 2016 Uber judgement has been reported in many newspapers and on television programmes. At the end of September 2017, the Addison Lee case was decided. We have also had similar cases involving other companies such as Pimlico Plumbers. Almost at the same time, Transport for London decided not to renew Uber's licence to operate in London. Given this flurry of news we decided to update and republish this article.

Incidentally, we think that the Uber appeal will not be successful but, of course, the decision is one for the Employment Appeal Tribunal.

This article deals with aspects of the original Uber decision. At the time of the judgement the BBC and The Times newspaper said that it had been decided that the Uber drivers were employed. This might be misleading as the case did not decide that the drivers were employees. In fact, it decided that the drivers were 'workers'. We understand where the confusion came from as the judgement itself says that the drivers were employed as workers. Technically, whereas all employees are also workers, workers are not employees. The difference is explained by this chart:

Status	Characteristics
Employee	Has a contract of service or apprenticeship whether express or implied. Tests for employment include: <ul style="list-style-type: none">• is under the control of the employer• is part and parcel of the employer's undertaking• is not in business on their own account<ul style="list-style-type: none">• there exists mutuality of obligation between employer and employee
Worker	Someone who is not an employee but who has agreed pursuant to a contract (which can be oral or written, express or implied) to personally perform services for another party and who is not a client or customer of any profession or business carried on by the individual.
Genuinely self employed	Genuinely in business on own account – for example, provides own tools (other than hand tools) and accepts risk.

This article explains the original Uber judgement and, in particular, deals with one line from it:

Para 97 ... none of our reasoning should be taken as doubting that the Respondents could have devised a business model not involving them employing drivers. We find only that the model which they chose fails to achieve that aim.

In other words, the Employment Tribunal thought that Uber could have adopted a different way of working that would have avoided it having to pay minimum wage and holiday pay to the drivers. What is of more significance, although out of the scope of this article, is that, given that the Employment Tribunal held that the drivers were engaged by Uber, it is strongly arguable that Uber is likely to be required to pay VAT on all Uber journeys. A case is being taken by an organisation called the Good Law Project on that very subject.

The employment law significance of this judgment is that as workers, Uber drivers will be entitled to:

- 5.6 weeks' paid annual leave per year (equivalent to 28 days' leave including Bank Holidays)
- a maximum 48 hour average working week
- statutory minimum daily and weekly rest breaks
- the national minimum wage and national living wage
- protection under the 'whistleblowing' legislation
- protection against unlawful discrimination
- not to be treated less favourably if they work part time
- protection against unlawful deductions from wages

The issues in the Uber case were:

UK employment laws entitle workers to be paid at least the minimum wage (£7.50 per hour in 2017) and to have a certain number of days of paid holiday per year. Yet some Uber drivers found that, after the costs of running a car have been deducted, they took home less than the minimum wage. They were also not entitled to take paid holiday. So, they launched a claim against Uber.

However, Uber resisted the claim, saying that the drivers were self-employed, so Uber were not bound by employment laws.

The Uber drivers argued that:

- They are workers.
- Because they work in the UK they are entitled to benefit from UK employment laws.
- Uber's conduct raised serious health and safety issues as Uber does not ensure its drivers take rest breaks or work a maximum number of hours per week. This potentially poses a risk to anyone on the roads given that, according to Uber's CEO, there were 42,000 Uber drivers in London in 2016.

The Tribunal agreed with the drivers.

The case hinged on two things:

Firstly, the nature of Uber's business: Uber said that it is a technology company which acts as a linking platform between self-employed drivers and passengers, not a taxi company that employs taxi drivers.

The Tribunal disagreed. It said that a taxi service is at the heart of Uber's business. The company also holds a Private Hire Vehicle Operator's Licence for London. The language that Uber uses about itself – such as calling the drivers “our drivers” and claiming to generate “tens of thousands of jobs in the UK” – reinforces the notion that it is a taxi company employing drivers.

Secondly, the control it has over its drivers.

The Tribunal found that Uber exercises a level of control over its drivers that means they cannot be called self-employed. Some of the examples given by the Tribunal were:

- Uber interviews and recruits drivers.
- Uber claims it assists self-employed drivers with growing their businesses by providing drivers with 'leads'. The Tribunal said the drivers have no opportunities to grow their own business (other than by spending more hours in the car) or negotiate a higher fare with customers; trips are offered and accepted strictly on Uber's terms.
- Uber controls key information (such as the passenger's surname, contact details and intended destination) which drivers only find out after they have accepted a job.
- Uber drivers are rated by passengers (using 1-5 'stars') and these ratings are used by Uber to 'weed out' low performing workers. This mirrors an employer-employee relationship.

What happens next.

If this judgment stands then all Uber drivers will be entitled to rights granted to people who are classed as "workers" in employment law, such as being paid National Minimum Wage, receiving paid holiday and paid rest breaks.

But it could affect many more thousands of people. Many other companies operate similar systems based on websites and apps. The individuals using them are described as self-employed and so the companies ostensibly avoid the obligation to provide workers with minimum wages or holiday. Workers in this "gig economy" will gain support from the raft of recent cases for any claim that they are workers or employees.

However, the judgment is being appealed. Either side may also appeal and the case may, therefore, go from the Employment Appeal Tribunal through the Court of Appeal and all the way to the Supreme Court. Given the amounts of money at stake we think it would not be surprising if it gets to the Supreme Court.

The above deals with the judgment in the Uber case. What follows is a more general explanation of this area of law.

The status of individuals and their rights:

The process in any consideration of alternative forms of working is to consider the status of the individuals. Broadly speaking, individuals can be employees, workers or the genuinely self-employed. The difference is characterised by rights, in that employees get all rights including unfair dismissal, redundancy and maternity rights. These are known as the 'big three' rights. Workers get discrimination rights, unlawful deduction from wages rights, working time regulation rights and minimum wage rights. The genuinely self-employed have no employment rights; they may get certain rights in respect of trade unions and under the Human Rights Act but this need not realistically concern us.

An employee is someone who has a contract of service, or apprenticeship, whether expressed or implied. The tests for employment include whether that person is under the control of the employer, is part and parcel of the employer's undertaking, is not in business on their own account and that there exists mutuality of obligation between employer and employee. Mutuality of obligation is one of the most important tests: put simply it means the obligation on the employer to provide work and the obligation on the individual to accept that work. Included within the loose definition of being part and parcel of the employer's undertaking is a consideration of the degree of integration with the

employer's business. In this respect, things like business cards, being listed on the website as a member of staff, having a descriptive job title and other similar factors are all matters to be considered.

A worker is someone who is not an employee but who has agreed, pursuant to a contract, to personally perform services for another party in circumstances where that other party is not a client or customer of any professional business carried on by the individual. So 'workers' are not employees but aren't self-employed either. We can think of them as a sort of half-way house between employees and the self-employed. Individuals working through recruitment agencies are generally 'workers' so are entitled to holiday pay and minimum wage.

The genuinely self-employed can be said to be in business on their own account. This may involve providing their own tools or plant and equipment (other than small hand tools) and accepting a degree of financial or business risk in what they do. Ask any employment lawyer about the Ready Mix concrete case and you will get a good example of a case on this subject. In that case the driver of a concrete lorry was dressed in Ready Mix uniform, could only use the lorry for Ready Mix business, the lorry had Ready Mix on the side and to all intents he was part and parcel of Ready Mix. However, as he owned the lorry himself, he was held to be self-employed.

Some companies arrange "occasional workers" contracts to distinguish between "normal employees" and "others", who are described as occasional. One of the aims is to ensure that during periods when the occasional worker is not working there is not mutual obligation between that person and the company. This means that during such breaks their continuity of employment is broken so as to reduce the chance of them obtaining 2 years' service. For teachers and such like their continuity of employment is maintained throughout holidays as they are still covered by contracts of employment and, in any event, holidays do not break continuity.

Having considered the status of individuals, we return to the Uber judgement and that paragraph about an alternative form of organisation for Uber. It seems to us that the Tribunal Judge was right to say that, (in theory) Uber could have adopted a different model. We think of the accountancy software 'Sage' as an example. Sage is used by thousands of companies but also by a small army of independent bookkeepers and accountants. In respect of this group no one seriously suggests that they are engaged by Sage as workers or even employees. Nonetheless, in a similar way to Uber drivers, Sage accountants log on to Sage, use it to perform services to clients and charge those clients. Sage isn't a good enough example to take this point much further but, nonetheless, we think it is instructive. We could also use eBay as an example. Uber could have set itself up as a software company providing a service to self-employed taxi drivers in the same way eBay provides a service to a company selling its goods on eBay. The taxi drivers, in the theoretical new Uber alternative business model, could download the app and use it to book, organise, charge and navigate in the course of their business. In other words, Uber could be like Sage in providing a product that lots of other businesses could use in their business. However, Uber didn't do this originally. It wanted to be known as a taxi company – it drafted their software and business model to provide a high degree of control over the drivers, to provide feedback on the experience and to provide control over pricing. Doing so makes perfect sense as, of course, Uber wanted the passengers to have an excellent experience. That Uber is known as a taxi company is illustrated by the fact we talk about 'getting an Uber': we don't talk about 'getting an independent taxi using the Uber software'.

Let's return to those factors that counted against Uber in the original Employment Tribunal judgment:

- Uber interviews and recruits drivers.

Clearly, the business model adopted is that Uber only wants appropriate drivers to be associated with it. Unlike Sage it does not simply allow anyone to buy its software and set up in business as a Sage bookkeeper and, unlike eBay, no one can just set up an account and start running a taxi service using Uber's products.

- Uber claims it assists self-employed drivers with growing their businesses by providing drivers with 'leads'. The Tribunal said the drivers have no opportunities to grow their own business (other than by spending more hours in the car) or negotiate a higher fare with customers; trips are offered and accepted strictly on Uber's terms.

The first point looks very like Uber trying to claim it is more like Sage than it actually is. The control that Uber was operating includes not allowing advertising – such that 'Fred' can't advertise Fred's Taxi Service separately and use Uber's software in his business. Another control it was operating was against 'Fred' choosing what prices he charged. These are the two mentioned in the bullet point above. There are others also including control over future work as an Uber driver -too many poor feedback scores and your right to be an Uber driver is revoked. To return to the mythical 'Fred', even if he was a poor driver and had terrible customer service he would still be allowed to advertise his business and attempt to charge whatever he liked: not so 'Uber Fred'. Contrast this with eBay, however, which does control companies using its platform via feedback, it provides dispute resolution services, requires its users to provide for payment via its own PayPal system and maintains many other aspects of control. Nonetheless, eBay is clearly not engaging its sellers as 'workers' in any way.

- Uber controls key information (such as the passenger's surname, contact details and intended destination) which drivers only find out after they have accepted a job.

Again, aspects of control. Contrast Fred's Taxi service versus Uber's driver Fred and the difference is clear.

- Uber drivers are rated by passengers (using 1-5 'stars') and these ratings are used by Uber to 'weed out' low performing workers. This mirrors an employer-employee relationship

Again, aspects of control; this one is one we have mentioned above. We have contrasted Uber's feedback with that of eBay and consider the difference not to be that great. In the case of companies and professional sellers using eBay too much bad feedback risks your account being frozen. However, eBay's feedback model although similar does not have the same effect as that of Uber.

So, could Uber adopt a different business model so as to avoid the drivers being engaged as workers? Yes, of course, it could, if it adopted the Sage business model *we sell software*, but, in our view, not on its current model – not if it wants the world to 'get an Uber' to know that feedback is given, to know that the driver is not charging you whatever he or she likes, not if it wants to have the power to ban a driver that gets a certain amount of poor feedback, not if it wants to set minimum response times. These are, perhaps the things that made it successful though. If it loosens its grip, takes a back seat, exercises less control, genuinely improves the bargaining power of the drivers then yes, certainly we can see a model existing whereby the drivers are not engaged as workers. We still think it could maintain a one app interface for booking a taxi in any and all cities worldwide where Uber operates.

What then of the famous London black cabs? Those drivers are clearly self-employed. However, their pricing is controlled, they have to have an officially sanctioned taxi meter, they have to display

certain information, they have to have wheelchair accessible taxis and they can have their licence revoked in the case of certain poor behaviours. Are they then 'workers' engaged by Transport for London? In our view the answer is a big obvious no. The conditions under which a London licenced black cab operates are certainly not controlled in the sense of the 'are they workers' tests.

What can Uber do? It may or may not be too late for Uber. If, from the outset, it had not exerted so much control, allowed anyone to use the Uber app genuinely in the course of their own business (a bit like eBay allows businesses to use the website and app to buy and sell goods), allowed drivers to set prices and controlled every aspect of their business that the tribunal objected to far less, then yes they would have not been held to have engaged the drivers as workers. A question to ask, of course, is if they had done so, would they have such a large business now?

The fact is that Uber exists now having been extremely successful with its existing business model. Now that they have done so they may be able to start another business without the disputed 'control' aspects: 'Uber 2' if you like. However, if they continue as they are then, if they lose all their appeals, they will start paying minimum wage and providing for holiday pay. They are likely to also have to account for VAT and to start deducting tax on a PAYE basis. This last point relates to the fact that the law requires employers to operate PAYE for employees (and workers). The individuals have to earn more than a certain amount but registration for PAYE purposes is required if the person earns more than £113 a week. HMRC broadly categorises individuals as either employed – therefore PAYE, or self-employed: it does not recognise 'workers'.

So, the message is - do you want to be a software or website business such as Sage or eBay or a taxi company like Uber. Uber became massively successful worldwide on account of it overturning the established self-employed taxi driver businesses, by standardisation, price, control and making the best use of the gig economy. The big bad old world of rules and regulations have started to catch up with it as Britain is not the only country to determine that it engages the drivers. It may be too late for it to change but having gained such a large head start we suspect that a new, looser model might be forthcoming in due course.

It is, of course, beyond the scope of this article to discuss national taxation strategies and many others have written articles on taxation in the gig economy. Suffice to say that it appears that current models of taxation have simply not caught up with the gig economy and, whereas in the great scheme of things it is 'early days', we think that nation states will have to catch up eventually. Ultimately, we think that in respect of companies like Uber, governments are going to have to work on the basis that the larger party in any similar relationship is responsible for deducting and paying tax and national insurance rather than relying on the individuals to do so. Clearly, if Uber lose its appeal(s) and the drivers remain as workers then Uber will start to have to look carefully at the lovely PAYE system.

Of course, it also goes without saying that if any advice is needed on any aspect of this article or on employment law generally please do not hesitate to get in touch. We have a 'contact us' form on the website or if simpler please pick up the phone. We can even come out and visit you: whether using an Uber or not!