UBER BV AND ORS v ASLAM AND ORS

CIVIL WATCH – CASE NOTE

As part of Goldsmith Chambers' Civil Watch series, we have invited members of our Civil Team to write case notes on recent landmark judgments.

In this post, Katharine Stock explains the Supreme Court's decision in Uber BV and others (Appellants) v Aslam and others (Respondents) [2021] UKSC 5.

1. The Supreme Court has handed down its landmark decision in *Uber BV v Aslam & Others* which will have wide-ranging implications for "gig economy" workers and employers.

2. The Supreme Court dismissed Uber's appeal and unanimously upheld the employment tribunal's decision that Uber drivers are 'workers' for the purposes of legislation and therefore entitled to claim statutory entitlements such as the national minimum wage and paid annual leave.

3. The Claimants alleged that they were 'workers' for the purposes of the Employment Rights Act 1996 (ERA 1966) and they worked for Uber under 'workers' contracts' within the meaning of limb (b) of ERA 1966, s.230(3).

4. There are three elements to a 'worker contract' under limb (b):
    - a contract whereby an individual undertakes to do or perform work or services for another party,
    - an undertaking to do the work or perform the services personally, and
    - the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.

5. Only the first of the above requirements was in dispute. Uber contended that drivers work for themselves as independent contractors, performing services under contracts made with passengers and the written agreements stated that Uber BV's role is to provide technology services and act as a payment collection agent for the driver and that the only role of Uber London Ltd (a subsidiary of Uber BV) is to act as booking agent for the drivers.

6. The Court disagreed, holding that the way in which a relationship is characterised in a written agreement is not the appropriate starting point in applying the statutory definition of 'worker'. The Court observed that the efficacy

of employment protection legislation would be seriously undermined if putative employers had the power to determine for themselves, by the way in which the relationship is characterised in the written contractor, whether legislation designed to protect workers should apply to those who are providing services for them [para 76].

7. It had been well-established, prior to the Supreme Court's decision, that employment tribunals should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship (*Autoclenz Ltd v Belcher & Others [2011] UKSC 41*). The Supreme Court in Uber built upon *Autoclenz* and *Carmichael & Another v National Power plc [1999] UKHL 47*, in clarifying that the correct approach is to consider all relevant circumstances, including not only the written terms but the way in which the relationship operated in practice and the evidence of the parties as to their understanding of it and the general purpose of the employment legislation in question.

8. The Supreme Court stressed that the rights in question were not contractual rights, but rights created by legislation. Thus, the primary question was one of statutory interpretation, not contractual interpretation [para 69]. The Court endorsed the modern approach to statutory interpretation, which is to "*have regard to the purpose of a particular provision and to interpret its language, so far as possible, in a way which best gives effect to that purpose*" [para 70].

9. The Court also rejected Uber's appeal against the employment tribunal's finding that a driver was working under their contract with Uber when they (a) had the Uber app switched on, (b) was within the territory in which they were authorised to use the app and, (c) was ready and willing to accept trips [para 39]. This means that drivers are entitled to claim minimum wage (including backpay for minimum wage) based upon their entire working day, not just when they had a rider in their cab.

10. The purposive approach taken in the judgment puts the protective purposes of statutory rights for workers and the reality of the relationship between worker and employer at its centre and relegates the written contracts between parties to only part of the evidential picture. This will ultimately assist Claimant lawyers in future litigation to lift the veil on obscure agreements which seek to misrepresent the true nature of the employment relationship.

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