

Employment status in the 'gig economy'

Recently, there has been much media coverage of the so called 'gig economy'. The Uber case in particular has attracted plenty of attention. This, and other cases, shows how employment judges are looking beyond the employer's characterisation of their relationship with their workers.

To understand the basis of the Uber case and other recent challenges, it is worth restating the characteristics of an employee, a worker and a self-employed contractor.

1. Employees are covered by the whole range of employment rights and protections.
2. A self-employed contractor running a business and recruiting customers and clients is not protected at all, if genuinely in business on their own account.
3. The intermediate category of worker has the benefit of fewer rights than an employee but is entitled to some benefits from National Minimum Wage, to paid holiday under the Working Time Regulations and protection from discrimination.

Due to the fundamental differences of protection for these three classes, the question of employment status is crucial but in the case of atypical workers the position can be far from clear cut.

An employee is an individual who works under a contract of employment or any other contract whereby he/she undertakes to perform work personally for another party who is not a client or customer (s230 Employment Rights Act 1996).

The tests of employment status are well established. There is, at least, the requirement of personal service and mutuality of obligation, that is an on-going obligation on the employer to offer work and an obligation on the employee to discharge the work offered. The feature of control is also central to the employment relationship; the employer broadly directs how, when and where the work is undertaken even though senior employees may be largely self-directing and subject to a minimum of day-to-day supervision or control.

A worker, meanwhile shares the obligation of personal service with an employee but frequently the requirement of mutuality of obligation is absent. Say, for example, in the case of a casual worker, the organisation would not be under an obligation to provide on-going regular work (just 'as and when') and, in turn, the worker would not be obliged to accept the work offered.

A self-employed contractor, by contrast is in business on his own account providing services to customers or clients, investing in their business, generally providing their own equipment, marketing their business and engaging in financial risk. The features of mutuality of obligation, personal service and control are absent. Generally, a genuine ability to sub-contract or substitute another worker will rule out employment status hence the reference to substitution in self-employment contracts. However, the ability to substitute must be genuine and unfettered.

Uber case

In the case of *Aslam v Uber BV and others* the Employment Tribunal found that the model Uber had developed whereby drivers were characterised as self-employed and the contractual documentation created to support self-employed status did not accord with the reality of the working arrangement.

In order to become an Uber driver applicants are required to sign up online and undergo a process called 'on boarding' involving providing approved documentation – driving licence, PHV licence, MOT, insurance etc. The driver then supplies their own vehicle and is responsible for all running and maintenance costs.

Uber as a technology platform

Uber sought to present itself as a technology platform facilitating the provision of taxi services. The UK company's agreement with passengers states that the contract for the taxi service is between the driver and the passenger. Uber drivers are not required to make any commitment to work however once they sign into the Uber app, the selected driver has 10 seconds to accept the booking through the app, failing that, Uber assumes that the driver is unavailable and locates another. If a driver fails to accept bookings, warning messages are generated which can lead to the driver's access to the app being suspended or blocked. Uber also operates a rating system and can withdraw the driver's access to the app if their ratings fall below a prescribed level.

The Uber driver does not invoice the passenger directly. Uber servers calculate a recommended fare based on mileage data from the driver's phone and the passenger pays the fare directly to Uber via the app. The company then generates a document that appears to be an invoice from driver to passenger. Uber however pays drivers weekly in respect of the fares they have earned minus a 'service fee' of 20-25% for the use of the app.

Asserting worker status

A number of Uber drivers brought claims asserting worker status. The Tribunal accepted that they were workers for the purposes of the Employment Rights Act, the National Minimum Wage Act and the Working Time Regulations at all times when they were authorised to drive, had turned on the Uber app and were ready and willing to accept passengers. The Tribunal effectively found that the contractual arrangements were a sham e.g. the invoices apparently generated by the drivers and references to drivers as 'customers' of Uber to provide the appearance of the business working for the drivers. The Tribunal found that the reality was that Uber was running a straightforward transport business and that the drivers applied to and were recruited to that business.

There have been other interesting recent cases including a case brought by a cycle courier again establishing worker status. In *Dewhurst v City Sprint UK Ltd* an Employment Tribunal held that a courier was a worker rather than being in business on her own account.

City Sprint

The case shared the same characteristic of the company obfuscating the true employment relationship. Couriers were required to pass a two-day recruitment process and were then presented with a 'confirmation of tender to supply courier services' which purported to treat them as self-employed contractors. They were then asked to electronically acknowledge a number of key terms. These made clear that the courier is under no obligation to provide services and City Sprint under no obligation to provide work, that the courier might use a substitute to provide the work as long as the substitute fulfilled certain criteria and that if the

courier did not work, they would not get paid. The courier was not entitled to holiday, maternity or sick pay. Once the couriers were 'on circuit', couriers were paid by the job. Although the company referred to the payment process as a self-billing and invoice system, in practice couriers did not submit invoices for individual jobs and City Sprint automatically calculated the payment due and paid them weekly in arrears.

The Tribunal found that the 'confirmation of tender' document did not reflect the true relationship between the parties and looked at the reality of the situation. The claimant was required to log into the company's city tracker system when she was on circuit and log out at the end of the day. She wore a uniform, was expected to work when she said she would, was directed by a controller through radio and mobile phone and was told to smile as part of providing a professional service. It was held that the claimant had been recruited by City Sprint, she was integrated into the business and accordingly was a worker during the period when she was logged into the City tracker system.

Pimlico Plumbers

A third case considered the status of a plumber engaged by the firm Pimlico Plumbers. Mr Smith had worked for the company for approximately five and a half years when they terminated the relationship approximately four months after he suffered a heart attack. Mr Smith issued proceedings claiming employment status and seeking to enforce rights of unfair dismissal, wrongful dismissal, entitlement to pay during medical suspension, holiday pay, unlawful deduction from wages and disability discrimination.

The contractual documentation stated among other things that Mr Smith was an independent contractor, in business on his own account, was under no obligation to accept work and that the company was not obliged to offer him work though there was a separate provision stating that he should complete a minimum of 40 hours per week and in reality he could not reject work. He was subject to restrictive covenants preventing him from working as a plumber in the Greater London area for three months following termination, he had to drive a Pimlico Plumbers branded van and wear a Pimlico Plumber's uniform. However, he also had to provide his own materials and tools and was not paid if the customer failed to make payment and was responsible for his own insurance.

Mr Smith was registered for VAT, submitted invoices to the company and filed tax returns on the basis that he was self-employed.

Although there was no express right to sub-contract, plumbers were able to swap assignments between themselves and in addition Mr Smith was permitted to bring in external contractors for specialist jobs for which he or other Pimlico plumbers did not have the necessary skills provided he obtained the company's agreement.

The Tribunal held that Mr Smith did not have employment status but had worker status and the Employment Appeal Tribunal upheld that finding.

Mr Smith did not appeal the finding on employment status but Pimlico Plumbers appealed the worker status finding and the Court of Appeal considered the matter.

The Court of Appeal upheld the finding of worker status. It held that there was no unfettered right of substitution and Mr Smith was required to provide a personal service. A limited ability to provide a substitute e.g. one approved by the employer or otherwise is not necessarily inconsistent with personal service. It also rejected the argument that Pimlico was a client or customer of Mr Smith, finding that the degree of control exercised by Pimlico was inconsistent with it being a client or customer of a business run by Mr Smith. The court also highlighted the restrictive covenants.

Behind artificial contractual arrangements

These cases all demonstrate how fact-sensitive the decisions are but they do show the willingness of the courts to look behind artificial contractual arrangements to the reality of the legal relationship.

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