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# UBER - IMPLICATIONS OF DECISION THAT DRIVERS ARE "WORKERS"

Journalists routinely describe events as "historic" and "landmark". Lawyers use that terminology much more sparingly, but Friday's Employment Tribunal decision that Uber drivers are workers protected under the Working Time Regulations, the National Minimum Wage Act and the whistleblowing provisions of the Employment Rights Act can fairly be described in that way.

The implications for Uber, Deliveroo, Handy or other businesses seeking to create new flexible structures in the so-called "gig" economy are profound. Uber has already indicated it will appeal.

The case is not about whether the drivers were "employees". The question for the Tribunal was whether Uber's 40,000 UK drivers are genuinely self-employed and in business on their own account, or whether they fall into the intermediate category of "workers" and so are entitled to some (though not all) employment protection.

The Tribunal had to choose between two competing versions of how the Uber model actually operates in practice. Uber's essential case was that:

- Uber is just an electronic platform. It does not run a transportation business;
- the drivers do not provide Uber with services. Rather it is the other way round, and Uber provides drivers with the chance to gain passengers via the app;
- passengers and drivers contract with each other for each trip, using the Uber app;
- the terms of business for the app make it clear that Uber is just a platform, and that drivers are driving for themselves, but subject to mandatory service levels;
- Uber's share of each fare is effectively its commission for having provided the app and the platform; and
- drivers are free to work elsewhere or not to work at all.

However, the Tribunal accepted the drivers' rival interpretation of the position, holding that Uber is in reality a transportation business, engaging drivers to provide Uber services to passengers. The key factual findings were that:

- the idea that the passenger and driver create a contract with each other was unrealistic: the driver and passenger never know the other's identity (apart from their first name); the driver does not know the destination until the journey actually begins; the route is determined by a third party (Uber); and the fee is also determined by that third party;
- Uber marketed a range of products (UberX, UberPOOL, UberEXEC etc.). Marketing material continually referred to "Uber's customer experience" and "taking an Uber", stressing to the passenger Uber's responsibility for the quality of the service;
- to that end, drivers who were logged in but who either rejected trips offered to them, cancelled trips once they had been accepted, or received poor customer ratings could have their accounts "deactivated" which was in essence a disciplinary sanction;
- prospective drivers were interviewed and had to present set documentation to Uber;
- their cars had to meet certain specifications;
- drivers were sent text messages with "tips" and "recommendations", which were in essence instructions as to how work was to be performed; and
- certain risks were borne by Uber - passenger fraud, refunds for customer complaints, cleaning a car if it is soiled by a passenger. Those would typically be borne by a driver genuinely in business on their own account.

All of those findings allowed the Tribunal to discount the carefully-crafted language of the terms of service, looking to the real relationship as it operated "on the ground". The drivers were integral parts of the Uber transport system, and entitled to protection on that basis. The definitions of "worker" in the Working Time Regulations 1998, the National Minimum Wage Act 1998 and the whistleblowing provisions of the Employment Rights Act 1996 use slightly different language, but were all held to be satisfied in this case. Drivers are therefore entitled to limits on their daily and weekly working time, minimum rest periods and, most significantly, paid annual holiday. Their income must also not fall below the national minimum wage of £7.20 per hour (for those aged 25 or over) for working time, which

the Tribunal determined to be the entire period when a driver is logged on and ready to accept trips in the particular territory for which they are licensed.

The decision follows a similar finding in the US, and poses real challenges to the operating business models of a number of companies that make use of technology to enable providers of services and potential customers to reach each other. The Tribunal alluded to the fact that it ought to be possible to structure a business so as to avoid employment and worker protection legislation, but whether that can be achieved in practice remains to be seen. The more a business wants to create a brand, where the customer experience is uniform and standardised, the greater the risk that those providing the experience will be workers or even employees.

It is worth noting that there are two reviews into employment status. The Government has appointed Matthew Taylor to look at working practices and the UK employment rights regime, and the Business, Energy and Industrial Strategy Committee has launched an inquiry focusing on non-traditional modes of working. The recommendations of both reviews should make interesting reading in the months ahead.

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