ALERT MEMORANDUM

The Gig Economy and UK Worker Rights

30 November 2017

The rights of workers in the so called "gig economy" have been a topic of significant importance in recent years due to the rapid expansion of this business model. In a highly anticipated judgment in the case of *Uber BV and others v Aslam and others [2017]*, the Employment Appeal Tribunal ("**EAT**") upheld a finding that Uber drivers were workers and not self-employed individuals.

However, this judgment was quickly followed by the decision in *Independent Workers Union of Great Britain v RooFoods Ltd T/A Deliveroo [2016]* in which the Central Arbitration Committee ("**CAC**") found that Deliveroo riders were not workers in the context of an application for union recognition.

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UK employment law provides for three ways in which individuals can provide their services: as "employees", as "workers" or as "independent contractors" (i.e. self-employed persons). This distinction is important because the level of legal protection afforded to an individual depends on how their service relationship is categorised. Employees enjoy the most rights, independent contractors enjoy the least rights and workers sit somewhere between the two.

While statutory definitions differ slightly depending on the context, a worker is essentially either: (i) an employee; or (ii) an individual who, pursuant to a contract, undertakes to perform work or services personally for another party who is not a client or customer of any business carried on by the individual. In other words, unlike a self-employed person, a worker is not in business on his or her own account. Rights enjoyed by workers (but not genuinely self-employed persons) include protection from unlawful deductions from wages, an entitlement to receive the national minimum wage and a right to be paid for annual leave.

The Uber case

A. Facts

Uber operates a smartphone app through which customers order taxis.

Uber is comprised of different legal entities. This case primarily involved Uber London Ltd ("**ULL**") and its parent company, Uber BV ("**UBV**"), a Dutch corporation. Uber's position on the nature of the relationship between itself, its drivers and its customers can be broadly summarised as follows:

- It is a technology platform facilitating the provision of taxi services;
- The taxi services are provided by the drivers, with the contract for transportation being between the driver and passenger (not between Uber and the passenger);
- ULL acts as agent for the driver;
- All drivers are self-employed; and
- ULL holds the required private hire vehicle operator licence.

Under the above arrangements, there is no contract between ULL and the drivers but there is a contract between UBV and the driver.

A number of Uber drivers claimed that Uber had failed to pay them the national minimum wage and had failed to provide paid annual leave. To succeed, the drivers needed to be able to demonstrate that they were workers and not self-employed persons. Two of the drivers were selected as test claimants.

B. Employment Tribunal judgment

The Employment Tribunal ("**ET**") found that the drivers were workers during any time that they:

- Had the app switched on;
- Were in the territory in which they were authorised to work; and
- Were willing and able to accept assignments.

Importantly, the ET also found that drivers were workers not only when they were transporting passengers, but also whilst they were waiting for their next booking (provided the above tests were met).

In reaching this decision, the ET found that Uber's complex contractual documentation did not reflect the reality of the legal relationship between Uber and the drivers. The ET did not agree that a contract existed between the driver and the passenger.

C. EAT judgment

Uber appealed to the EAT. Its principal submissions were that:

- Agency relationships are common in the private hire vehicle sector. Uber's agency model was nothing new, it was simply the scale of the arrangement that was different, as a result of new technology;
- The ET had been wrong to disregard the legal relationships described in the written agreements between Uber and the drivers;
- The ET had incorrectly found that: (i) the holding by Uber of certain documentation regarding the drivers and their vehicles; (ii) the obtaining and recording of passenger details; and (iii) the operation of a complaints procedure, indicated worker status. These were simply regulatory requirements; and
- The ET had made internally inconsistent and perverse findings of fact in concluding that the claimants were required to work for Uber. For example, the claimants were at liberty to take on or refuse work as they chose and could work for others, including direct competitors of Uber.

HHJ Eady QC (sitting alone) dismissed the appeal and stated that the crucial question was: "when the drivers are working, who are they working for?" The EAT found that the ET had considered whether a true agency relationship existed in this case (and had not dismissed the possibility that it may have) but had been entitled to find on the facts that the drivers were integrated into Uber's business and subject to its control. Therefore, the overall nature of the relationship indicated that the drivers were not in business on their own account.

The main factors which allowed the EAT to reach this decision were:

- Whilst not determinative, the size of Uber's operation, i.e. the fact that Uber has 30,000

drivers in London suggested that they were unlikely all to be operating as separate businesses;

- The drivers could not grow their own businesses by establishing relationships with passengers, not least because they were not provided with any passenger details. Drivers also had no ability to negotiate terms with passengers (save to agree a fare reduction);
- Drivers had to accept Uber's terms; and
- The ET had been correct not to disregard regulatory requirements if they assisted in the analysis of the true status of the drivers. Relevant to the issue of control, Uber had also imposed certain obligations on drivers that went beyond regulatory requirements. For example, whilst Uber was required to obtain and record passenger details, there was no regulation stopping Uber passing them on to the drivers (although Uber argued that these were matters of common sense, arising due to security concerns or for obvious commercial reasons such as concerns about solicitation). Uber also operates a driver ratings system which is not a regulatory requirement.

Having made these findings, the EAT then addressed the question of *when* the drivers were actually workers. This is a question of fundamental importance because it determines actual "working time" under the relevant legislation, which is in turn relevant to whether the drivers have received the national minimum wage. Should this be limited to the time that drivers spend transporting passengers, or should it also include the time during which drivers are waiting for their next assignment? This was a vexed question because, during waiting periods, drivers are able to accept bookings from other sources. Notwithstanding this, the EAT found that the drivers continue to be workers while they are waiting for their next assignment based on the ET's findings of fact (Uber disputed that such a finding had been made) that the driver's access to the app would be suspended or blocked if they failed to accept at least 80% of offered trips.

The Deliveroo case

A. Facts

Deliveroo is also an app-based business that delivers food from restaurants to customers. Deliveries are made by Deliveroo's "riders".

The Independent Workers Union of Great Britain (the "**Union**") applied to the CAC to be recognised to conduct collective bargaining in respect of some of Deliveroo's riders. To succeed, the Union needed to show, amongst other things, that the riders were workers under the relevant legislation.

The CAC heard evidence on a number of issues including rider recruitment, how work was organised and the terms of "supplier agreements" between Deliveroo and its riders.

The supplier agreements described the riders as independent contractors and provided that they could decide when and where they worked, could work for competitors and were not obliged to wear Deliveroo branded clothing.

Crucially, the terms also included detailed provisions as to substitution, including:

- Riders could provide a substitute to perform deliveries on their behalf;
- Deliveroo exercised very little control over who could be used as a substitute;
- It was the rider's responsibility to ensure that his/her substitute had the requisite skills and training; and
- Any substitution was a private arrangement between the rider and the substitute, and the rider was wholly responsible for paying the substitute.

The issue of substitution was so important in this case because, as noted above, the requirement of personal service is a fundamental component of worker status. The Union argued that the terms regarding substitution were not genuine and that the CAC should disregard them.

B. CAC decision

The CAC found that, in practice, substitution by riders was rare as there was little need for it. This was because there was no obligation on the rider to accept

or be available for work and no adverse consequences for declining work or not being available.

However, whilst the CAC found that the "vast majority" of riders saw no point in engaging a substitute, some riders had done so, including one who took a 15-20% cut of the fee that he received from Deliveroo and paid his substitutes. This individual was exercising the substitution provisions for his own profit, but Deliveroo did not object to this practice.

The CAC also observed that the question of whether the true purpose of Deliveroo's terms with its riders was to avoid them gaining worker status was not relevant. They key question was what status was actually achieved.

The "central and insuperable difficulty" for the Union was that the CAC found the right of substitution to be genuine, as evidenced by the fact that it had been operated in practice. This finding was fatal to the Union's claim and, as a result, its application for recognition failed.

The impact of these cases

These decisions are clearly of significant importance to the gig economy. However, the fact that Uber drivers were found to be workers, whilst Deliveroo riders were not, emphasises that these decisions are highly fact-specific. The level of risk of a finding of worker status will be determined by the precise business model operated by the organisation in question, rather than the label that the parties apply to their relationship.

For example, the EAT stated in the Uber case that drivers may not have been workers during waiting time if they had been genuinely free to accept other assignments during that time. Further, the ET observed in that case that "there is no question of any driver being replaced by a substitute" so, unlike in the Deliveroo case, lack of personal service was not a significant issue in that case.

Also, the CAC expressly stated that the factual situation as regards Deliveroo riders was very different to that of Uber drivers.

It is also important to note that Uber has requested permission to appeal the EAT's decision directly to the Supreme Court, 'leap-frogging' the Court of Appeal. It has been reported that Uber hopes its case will be considered by the Supreme Court shortly after the appeal to the same court in the case of *Pimlico Plumbers Ltd and Mullins v Smith [2017]*, a case which also relates to the question of worker status.

Any challenge by the Union in the Deliveroo case would be by way of judicial review in the High Court.

Finally, the Taylor Review, which was published in July 2017, examined various aspects of the gig economy. The Review's recommendations are currently being considered by Parliament, including those relating to employment and worker status rules. However, even if the UK government decides to introduce reform in this area, this will not happen immediately, so the outcome of the appeal by Uber (and the Union if they decide to pursue that course of action) will be eagerly awaited.

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