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A New Direction for the Gig Economy (Part II)

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About the author

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INTRODUCTION

In February 2021, the Supreme Court handed down its decision in the case of Uber BV v Aslam.[1] This hotly anticipated and influential judgment explained that the Court would now take a purposive approach to interpreting employment relationships. Statute, not the contract, was now the most important factor. In Part 1[2], Jill Andrew and I explored how this judgment affected Uber, the company, as well as its drivers in the short and long term. In this, Part 2, I will look at the wider ramifications of this judgment for the 'gig economy' as a whole as well as the affect it will have on the forthcoming Employment Bill which has been promised "in due course."[3]

[1] *Uber BV v Aslam* [2021] UKSC 5

[2] Uber v Aslam: A New Direction for the Gig Economy (Part I), April 2021. Available at www.conservativelawyers.com/publications

[3] See Richard Kelly, The Queen's Speech 2021, Briefing Paper 09200, Commons Library (10 May 2021); Prime Minister's Office, *The Queen's Speech: Background Briefing Notes*, 19 December 2019

THE PLATFORM ECONOMY

As discussed in Part 1, the 'platform' or 'gig economy' is a loose term used to describe work picked up at short notice where the worker is paid for each job or 'gig' they complete. The majority of gig economy companies operate in the transportation sector (for people, parcels, or food). A broader definition might also include companies such as the home rental service AirBnB, or the marketplace website Etsy.com. This paper will focus on the former group as it is here where the lines between self-employed, worker, and employed, become most blurred.

The problem becomes particularly apparent when looking at the transportation of people. The question is whether drivers should be considered 'workers' or 'self-employed'. If they are in the former category, they receive a number of employment rights such as: national minimum wage; protection from wage deductions; whistleblowing rights; and working time rights (breaks, paid holidays, and limits on working week).[4] If, however, drivers are classified as self-employed, they receive none of these protections. From the perspective of the putative employer, it is plainly beneficial to classify its drivers as self-employed so they do not have to take on the financial burden of ensuring these rights.

[4] s.230(2) Employment Rights Act 1996.

Now that the Supreme Court has determined Uber drivers were workers, and Uber has extended this recognition to its current workforce, there is pressure on other raid-hailing apps to reclassify their drivers as well.

The first five app-based ride hailing apps in London were: Uber, Bolt, Kapten (now: Free Now), Via Van, and Ola. With the exception of Via Van, which focusses on shared rides, these apps are fundamentally similar. Each app connects a driver with a prospective customer, calculates the fee owed from customer to driver and takes a commission off that fee. As can be seen in Table 1 (next page) these fee structures are also roughly equivalent.[5]

In their judgment the Supreme Court highlighted five factors that made drivers subordinate to Uber: Control of pay; control of terms of service; control of trips (penalties prevented drivers from refusing too many trips); control of quality of service (driver rating system prevented poor service); and control of communication. This subordination was key in determining that they were workers and not self-employed.

[5] Figures taken from: Driver App London, Apps Comparative Table, January 2020 (Updated November 2020).

TABLE 1: FEE STRUCTURES

OPERATOR	UBER	BOLT	FREE NOW	VIA VAN	OLA
Base fare	£2.50	£2.50	£2.50	£2.50	£2.50
Fare	£1.43/mile £0.12/min	£1.28/mile £0.12/min	£1.25/mile £0.15/min	£1.25/mile £0.15/min	£1.25/mile £0.15/min
Commission	20% – 25%	15%	15%	15%	15%
Driver status	Workers	Self-employed	Self-employed	Self-employed	Self-employed

Andrei Donisa and Bolt

In March 2020 Andrei Donisa, a member of the Independent Workers' Union of Great Britain (IWGB), brought a case with the IWGB against Bolt. They allege that Donisa was removed from Bolt's platform for refusing too many trips (more than 50%).[6] This is the same 'control of trips' factor determined by the Supreme Court in the Uber case.

It seems likely that drivers at Bolt, Free Now, Ola and a number of other ride-hailing apps all have a similarly subordinated relationship, and therefore should be considered 'workers'. The problem from the drivers' perspective is how to how to enforce their rights. In the case of Uber, it took five years to conclude the case, and most drivers have neither the resources nor the patience to for such a lengthy pursuit. Other than judicial intervention there are two other ways in which these drivers are likely to see change: free market forces and legislative intervention.

[6] Louron Pratt, IWGB Launches Dispute with Bolt of Employment Status and Unfair Dismissal, Employee Benefits, 17 March 2020 (Accessed: 20 April 2021).

THE FREE MARKET AND EMPLOYMENT RIGHTS

Towards the end of March 2021, Deliveroo announced that it planned to list its shares on the London Stock Exchange at between 390p and 460p, placing it at a value of between £7.6billion and £8.8billion.[7] Deliveroo had benefitted from the structural growth opportunities provided by the pandemic and sought to solidify its advantage in the market. However, after two days the shares closed at just 280p, reducing its valuation to a mere £5.1billion. Commentators listed a number of reasons for this slump: Deliveroo's failure to turn a profit to date; its dual class share structure (allowing certain shareholders more voting rights than others); and a very high price to sales ratio (around 7.4 based on 2020 sales).

In addition, a number of observers listed a nervousness among investors around workers' rights. A number of UK investment firms – including Aberdeen Standard, Aviva Investors, BMO Global, CCLA, LGIM and M&G – publicly announced that they would not be buying any shares in Deliveroo in part because of their concerns over workers' rights. These were not purely moral motivations: one of the firms explained that "Deliveroo's narrow profit margins could be at risk if it is required to change its rider benefits to catch up with peers,"[8] making it a risk for investors.

[7] Richard Fletcher, Float puts £8.8billion price tag on Deliveroo, 22 March 2021.

[8] Rupert Krefting, Head of Corporate Finance and Stewardship at M&G, quoted in: Dominic O'Connell, More big investors shun Deliveroo over workers' rights, BBC, 25 March 2021.

Deliveroo's market flop stands in stark contrast to the IPO of the American food delivery giant DoorDash. In December last year, DoorDash, who control over half of the US' food delivery market, reached a value of $60 billion on its first day trading. This was 86% up on the price of their initial offering.[9] DoorDash also has a dual class share structure and has never turned an annual profit.

It would be narrow minded to put the share price difference down to the different approaches to workers' rights in the UK and the US. Nonetheless, they were clearly a material factor in the valuation slump of Deliveroo.

What does this mean? Free market forces in the UK appear to have woken up to the fact that the manner in which some gig economy workers are being treated is socially objectionable. For fear that this social conscience will directly, or indirectly, affect their bottom line they are taking action. They are bracing themselves for changes in gig economy law.

California Proposition 22

In 2019 California passed landmark employment legislation, AB5, which made the default assumption that all workers were employees. As opposed to individuals having to prove they were employees, companies now had to prove that employees were in fact self-employed. This gave large swathes of gig economy workers employee rights and protections overnight.

Uber and Lyft tried, and failed, to challenge this law in the courts. As a result, they banded together with other US gig heavyweights including DoorDash, Instacart, and Postmates to advocate 'Proposition 22', a ballot measure that exempted gig workers from AB5. One of the key arguments used by the gig giants was that workers would sacrifice their flexibility if they became employees. Employee status in both the UK and US does not automatically entail that you cannot have flexible hours. Together these companies are thought to have spent in excess of $180 million campaigning for the proposition, and Uber and Lyft even threatened to pull all of their operations in California if the measure failed to pass. It passed with 59% of the vote in November last year.

The story of Proposition 22 helps illustrate two points. First, it shows that the power of company's interests over those of the individual gig economy workers when lobbying is involved. Second, it provides a useful insight into the financial implications for parent companies of enforcing workers' rights, and the lengths those companies may go to protect the status quo. Nevertheless, the different market reactions to the IPOs of Deliveroo and DoorDash described above indicates that perhaps the market in the UK is more prepared for an immanent change in employment law than the US market.

[9] Miles Kruppa, Dave Lee, and David Carnevali, DoorDash shares jump 86% amid IPO frenzy, Financial Times, 9 December 2020.

STATE INTERVENTION AND THE TAYLOR REVIEW

The calls for legislative intervention in the arena of platform work have grown exponentially over the course of the pandemic. A recent report by the International Lawyers Assisting Workers Network (ILAWN) focussed on 46 legal challenges brought against gig economy platforms in 20 countries.[10] There is a clear trend within the European cases towards ensuring more rights for the individual workers.[11] So much so that in February 2021 the European Commission launched its own consultation on working conditions in platform work.[12]

The British Government has been ahead of the curve on this issue. In July 2017, a government commissioned report on Modern Working

[10] International Lawyers Assisting Workers Network, Taken for a Ride: Litigating the Digital Platform Model, March 2021.

[11] Ibid., p.39 ff.

[12] European Commission Press Release, Protecting people working through platforms: Commission launches a first-stage consultation of the social partners, 24 February 2021.

Practices was released.[13] Chaired by Matthew Taylor, Chief Executive of the Royal Society of the Arts, this made a number of recommendations focussing on agency workers, zero-hour contracts, and the gig economy. Relating to the gig economy the key recommendations were as follows:

(a) Legislate Employment Tests and Align with Tax Law.[14] There are currently a plethora of different tests for distinguishing employees from workers from the self-employed.[15] However, these are minimalistic, and in practice the tests have been dictated by case law.[16] Taylor argues that enshrining a single test in primary legislation would ensure clarity and accessibility.

(b) Using the Phrase 'Dependent Contractors'.[17] Currently the term 'workers' is either used to refer to anyone who is not self-employed[18] or to the third category of 'limb (b) workers' that exists between employees and the self-employed.[19] Using the phrase 'Dependent Contractor' in place of the later would help resolve confusion.

(c) Removing the Requirement for Personal Service.[20] Currently personal service is required to be classified as a worker. It was initially thought that if you could substitute yourself without restriction for another worker then you would be classified as self-employed. However recent case law has cast some doubt on this, though first instance decisions, as this was, are not binding on higher courts[21] Taylor suggested that the test should focus more on the degree of control exercised by the putative employer and less on personal service. This suggestion is in line with the Supreme Court's judgment in the Uber case.

(d) Written Statements for Workers.[22] All employers are required to provide employees with a written statement setting out their terms of employment and statutory rights. Taylor suggests that this should be a requirement for limb (b) workers as well.

(e) Determination of Worker Status.[23] Taylor suggests three changes to ensure that workers and the self-employed are more easily distinguished:

i An online tool that determines employment status in the majority of cases;

ii Expedited tribunal determinations of employment status which do not attract tribunal fees; and,

iii Reversing the burden of proof so that employer must disprove entitlement to a particular worker status (a similar proposal was adopted by California in the form of AB5).

These suggestions are clearly made with workers in mind and have been criticised for either being overly quixotic or merely cosmetic.[24] They are nonetheless a sensible starting point in relation to any changes in employment legislation in this area. In particular the review highlighted two levels to the problem of gig economy exploitation. At the first level was a perceived need to reform the law itself. At the second level was a need to reform the enforceability of the law. When individuals on or close to minimum wage are faced against multi-billion-pound companies they can be meet with Goliath obstructions. Even David, in this instance

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[13] Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices*, UK Crown Press (11 July 2017).

[14] Ibid., p.35.

[15] See: s. 230 *Employment Rights Act* 1996; s. 83 Equality Act 2010; and s. 2 Social Security Contributions and Benefits Act 1992.

[16] See, for example: *Rowlands v City of Bradford Metropolitan District Council* [1999] EWCA Civ 111 which relates to the requirement of having a contract with the employer; *James v Redcats (Brands) Ltd* [2007] ICR 1006 which sets out the requirements of personal service being a dominant purpose of the contract; and *Windle v Secretary of State for Justice* [2016] EWCA Civ 459which explores the requirement of mutuality of obligations.

[17] Taylor, p.35, 38.

[18] Employment Rights Act 1996, s. 230(3).

[19] Ibid., s.230(3)(a)-(b)

[20] Taylor, p. 36.

[21] In *Leyland and others v Hermes Parcelnet Ltd* ET/1800575/2017, although drivers had the right to substitute themselves, the lack of autonomy they otherwise had meant the Tribunal still classified them as workers not self-employed.

[22] Taylor, p. 39.

[23] Ibid., p.62.

[24] For example, Darren Newman, *The Taylor Review – the good, the bad and the cosmetic*, A Range of Reasonable Responses Blog (11 July 2017)

Aslam et al., would have balked at a five-year fight to vindicate himself. Indeed, given that the Supreme Court has already set the goal posts for the current law on workers' rights some lawmakers may feel as though law 'reform' is unnecessary. However, few can deny that enforceability reform is essential.

So far only option (d) has been implemented by the government.[25] A full response was published in 2018,[26] and a new Employment Bill is expected this parliament. There have been hints that a new Enforcement Body will be set up to help protect vulnerable workers and make them aware of their rights, but it is unclear how much power this body will be given. Beyond this there are no further indications as to whether any of the Taylor Review's other suggestions will be implemented.

[25] Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (SI 2018/1378).

[26] HM Government, Good Work A response to the Taylor Review of Modern Working Practices, February 2018

CONCLUSION

The government will need to tread a fine line with whatever changes they do implement. On the one hand they will look to protect vulnerable workers from exploitation, but as a traditional Conservative government they will be wary of making any moves that may stifle innovation or business growth.

Nevertheless, this paper has indicated that intervention is required in some form. The current law surrounding gig economy workers is unfit. The Supreme Court's judgment in the Uber case has made it clear that a large number of persons who should be receiving the rights and protections of a limb (b) worker are still being classified as self-employed. The market in the UK has recognised the fact that this may have profound consequences for a number of companies and is braced for change accordingly.

The advice of the Taylor Review is simply one voice among many suggesting how employment law needs to progress and in what direction. As we come out of the restrictions imposed by this pandemic working life for many will change. The government can and ought to ride this wave of change.

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