EXAMINING WORKER STATUS IN THE GIG ECONOMY

Anirudh Mandagere*

Abstract: The growth of the "sharing" or "gig" economy in the past five years has provoked concern over the lack of rights given to those who work in such industries. The Employment Tribunal's judgment in *Aslam, Farrar v Uber* applied traditional principles of employment law to find that Uber drivers were "workers" and not self-employed contractors. However, closed categories such as "workers" and "contractors" are no longer relevant in the age of the gig economy. Parliament must intervene to adapt employment law to new industries and reduce uncertainty over legal classification.

Keywords: *Uber; Employment Law; gig economy; self-employment; worker*

I. Introduction

The tendency of official statistics to formally distinguish between those who are in "employment" and those who are in "self-employment" elides the reality of the 21st century labour market. Data from HM Revenue and Customs suggest that close to a third of those who are "employed" also report income from self-employment.[1]

This, in part, is a feature of the new "gig economy". This tends to refer to people using apps to earn money from assets they own or their ability to do a certain type of work. The emergence of this form of work has challenged traditional notions of what constitutes a "worker" or "independent contractor". This was a concern highlighted by Judge Vince Chabria in the Californian case of *Cotter v Lyft, Inc*.[2]

---

* Anirudh Mandagere studied history at St. Catherine's College, University of Oxford and law at City University, London. He is grateful to the reviewer and Professor Anton Cooray for their valuable comments.

1 Emran Mian, "The Employment Divide: Is It Possible to Simplify the Distinction between Self-employment and Employment" *Social Market Foundation* (2016) p.4, available at http://www.smf.co.uk/wp-content/uploads/2016/11/Social-Market-Foundation-SMF-Publication-The-Employment-Divide.pdf.

2 (C13-4065 VC), available at http://law.justia.com/cases/federal/district-courts/california/candce/3:2013cv04065/269638/256:

> "The jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous."

JICL-4(2).indb 389 28/11/17 4:32 PM

English employment law defines a worker as an individual who has entered into:

(1) A contract of employment; or
(2) Any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.[3]

These provisions have proven to be increasingly difficult to apply today, as well illustrated in the recent case of *Aslam, Farrar v Uber*.[4] Uber is a digital business which allows consumers to request drivers via a smartphone app. When a nearby driver accepts the request, the app provides information about the driver including the vehicle type and license plate number. After arriving at the destination, the app calculates the fare and charges it to the consumer's Uber account.[5]

Uber is unique in that the drivers use their own vehicles. The infrastructure behind Uber is relatively small. It started out in 2009 as a map on a smartphone which connected the driver and the passenger and essentially it has not changed. It is true that Uber does impose certain requirements on its drivers. They must have a valid background check from the police, a four-door car and pass an interview. However, these checks are not as stringent as those taxi drivers have to face, particularly those in London who have to learn "the knowledge".[6] Uber drivers can set their own schedule and make money on their own terms. It enables individuals to carry out a full-time job and earn extra money as an Uber driver on the side. Indeed, Uber celebrates the range of individuals who work part-time as Uber drivers.

The model that Uber pioneered and specialised is central to the "gig economy". The arrival of this job market has prompted concern. Indeed, the 2016 US presidential candidate Hillary Clinton noted that the gig economy was raising "hard questions" about workplace protections.[7] The risk remains that workers are exploited in low-paid jobs with none of the basic rights that workers in the "traditional economy" are entitled to. These include sick pay, holiday pay and the minimum wage. For such workers, the "choice" and "flexibility" that such companies offer are euphemisms for precarious employment. In the United Kingdom, workers for the delivery firm, "Deliveroo", went on strike in protest against a new contract which would see them earn barely half the living wage.[8]

3 Regulation 2(1) of the National Minimum Wage Act 1998.
4 ET Case No 2202550/15.
5 "How Does Uber Work?", available at https://help.uber.com/h/738d1ff7-5fe0-4383-b34c-4a2480efd71e.
6 An in-depth study of London street routes and all places of interest that taxicab drivers in the city must complete to obtain a license to operate a black cab.
7 A Sundarajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (Cambridge: MIT Press, 2016) p.161.
8 H Osborne and S Farrell, "Deliveroo Workers Strike Again over New Pay Structure" (2016), available at https://www.theguardian.com/business/2016/aug/15/deliveroo-workers-strike-again-over-new-pay-structure.

JICL-4(2).indb 390 28/11/17 4:32 PM

It is within this context that *Aslam, Farrar v Uber* should be read. The claimants were current and former Uber drivers who issued proceedings against Uber under the Employment Rights Act 1996 (ERA) and the Working Time Regulations 1998 (WTR) for failure to pay the minimum wage and failure to provide paid leave.

A. The issue

The central issue within the case was whether Uber drivers could be characterised as "workers" or "self-employed contractors". A "worker" under s.230(b) of the ERA can claim minimum wage and sick pay for their employment. By contrast, no such protection is offered to self-employed contractors.

There were two subsidiary issues in relation to the claim. First, what would constitute "working time" for the WTR if it was found that Uber drivers were workers. Second, whether the choice of law within the contract effectively nullified any statutory rights that Uber drivers would be entitled to if they were workers.

B. Legal structure of Uber

Before examining the judgment, it is important to clarify the legal structure of "Uber". UBV (Uber's Dutch holding company) holds the legal rights to the Uber app, while UL Ltd acts as the agent for the drivers.[9] The contract between UBV and the driver was stated to be subject to Dutch law.

C. Judgment

The tribunal examined the drivers' contractual relationship with Uber. It noted that Uber had emphasised within their documents that drivers would be self-employed. They had referred to drivers as "customers" when this was clearly not the case and described "dismissal" as "deactivation".[10]

The tribunal took the view that Uber drivers were workers. In its view, Uber's approach was rooted in maintaining a pool of drivers whom it could call upon for work and threatened to block drivers from the app if they did not comply. In addition to this, the real nature of the legal relationship did not correspond to that portrayed in the contract. In reality, the app did not allow any real bargaining to take place between the two parties. Hence, the Tribunal felt entitled to disregard contractual terms which stated that the drivers were self-employed. In effect, this means that Uber drivers are workers and can claim sick pay and minimum wage for their time.

Having decided the central issue in the affirmative, the tribunal went on to determine what period would count as "working time" for the WTR. While acknowledging the difficulty of this classification in relation to Uber drivers,

9 *Aslam, Farrar v Uber*, [1–3].
10 *Ibid.,* [87].

the tribunal stated that "working time" would be defined when they are in territory in which they are authorised to drive and are ready and willing to accept fares.[11]

II. Interpretation of Employment Contracts

Determining the existence of a contract of employment is an increasingly difficult task for the courts. The natural approach of the court in these matters was discussed by Lord Hoffmann in *Carmichael v National Power plc.*[12] In effect, it means examining what the contract states about the relationship between both parties. As Alan Bogg notes, this approach has appeared "increasingly strained" in relation to modern employment practices.[13] The difficulty of applying Lord Hoffmann's approach is particularly pertinent in relation to the "gig economy", where drivers occupy a grey line between "working" and "contracting". The failure of parliament to intervene on this issue and legislate accordingly has placed the burden on the judiciary to address this problem. The decision in *Aslam, Farrar v Uber* is an example of a new approach to the interpretation of employment contracts which was pioneered in *Autoclenz Ltd v Belcher*. However, it shall be argued that the approach in *Autoclenz Ltd* and *Aslam, Farrar v Uber* risks undermining the certainty of employment contracts and that orthodox contractual interpretation techniques could have been used to arrive at the same results.

The tribunal in *Aslam, Farrar v Uber* made significant use of *Autoclenz Ltd v Belcher*.[14] This case concerned car valeters, whose contracts with Autoclenz described them as "self-employed". The valeters claimed that they were "workers" and were entitled to holiday pay and the national minimum wage. The Supreme Court held that the inequality of bargaining power between the valeters and Autoclenz meant that their contracts should not be taken at face value. Rather, the court would take a holistic view of the terms used in the contract and examine the context of the situation. Given that the valeters were always expected to attend work and undertake it themselves, they had no control over the way in which they did their work and were therefore workers.

While *Autoclenz Ltd v Belcher* turned on issues of sham self-employment rather than the sharing economy, the general principles remain the same. In *Autoclenz Ltd*, Lord Clarke stipulated that reliance should not be placed solely on the written document, but on whether "the terms of the written agreement *in truth*

11 *Ibid.*, [100–102].
12 [1999] 1 WLR 2042.
13 A Bogg, "Sham Self-Employment in the Supreme Court" (2012) 41 Industrial Law Journal 328, available at https://academic.oup.com/ilj/article-abstract/41/3/328/703206/Sham-Self-Employment-in-the-Supreme-Court?redirectedFrom=fulltext.
14 [2011] 4 All ER 745.

represent what was agreed" [emphasis added].[15] This represents a development of Lord Hoffmann's approach in *Carmichael v National Power plc*. While in most employment cases, the approach in *Carmichael* is sufficient to determine the nature of the relationship; the approach in *Autoclenz Ltd v Belcher* is appropriate when there is a claim of "sham" self-employment.

The Supreme Court's focus on the reality of contracting practices demonstrates the distinctiveness of the employment contract compared to a commercial contract. The courts generally assume that commercial contracts are negotiated between two parties who have an equal say in terms of the contract. By contrast, employment contracts are inherently unequal. The bargaining power of the "employees" is severely limited because of their subordinate status. In practical terms, this means that the courts are free to move beyond the restrictive approach to contractual interpretation to examine the reality of the employment situation.

Indeed, the employment tribunal made extensive use of extraneous evidence to identify the true contractual agreement. This included an analysis of Uber's business model, which relied on having a "pool of drivers" for customers' use, and its threats that it would block drivers from the app if they did not meet demand. As Bogg notes, this runs counter to the parole evidence rule in English contract law.[16] This means that where a contract has been reduced to writing, neither party can rely on extraneous evidence to ascertain its terms. The arrival of new employment practices meant that the tribunal adjusted its strict approach so as to reflect the reality of modern employment.

The new approach to employment contracts comes with difficulties. The approach in *Carmichael v National Power plc* promotes certainty and prevents a party from stating that there were oral terms which were not referenced in the written contract. Without either of these rules, employers now face uncertainty over their workers' status and the terms of their employment. This generates problems for businesses who wish to hire. They have to deal with the complexity of establishing the correct status of an individual, as well as the added administrative cost of determining their status.[17] The price of uncertainty was not considered in detail in *Autoclenz Ltd v Belcher* in their unorthodox approach.

The tribunal in *Aslam, Farrar v Uber* did not consider whether orthodox principles of contract law could be used to achieve the same result. Another technique to deal with the problem at hand is contractual interpretation. This ensures that judges can remain loyal to the text of the contract, while ensuring that words are interpreted in a commercially sensible manner so as to ascertain the

15 *Ibid*., [35].
16 "Sham Self-Employment", p.334.
17 Office of Tax Simplification, Employment Status Report (2015), pp.29–30, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537432/OTS_Employment_Status_report_March_2016_u.pdf.

true bargain of the parties. The principles of interpretation were summarised by Lord Hoffmann in the landmark case of *Investors' Compensation Scheme Ltd v West Bromwich Building Society*:[18]

(1) The intention of the parties is objective. The starting point asks what would a "reasonable person, having all the background knowledge reasonably available to the parties," understand the contract to mean?
(2) The parties' intention can be determined by the context of the disputed term. Therefore, it is possible for the parties to adduce evidence to show that the word had a different meaning for them.
(3) The parole evidence rule still applies.
(4) The words in a contract do not have to be taken literally. Knowledge of the admissible background facts allows the court to determine what the words actually meant.
(5) Where the "natural and ordinary meaning" reflects in an absurdity, the court can assign a more appropriate meaning to that word.

The approach in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* was not intended to be used in employment contracts. However, in relation to *Aslam, Farrar v Uber*, the court could have arrived at the same conclusion using these principles. The terms within the Uber contract were clearly absurd. It did not take any sense to describe the drivers as "customers" when they provided a service for Uber. Therefore, the court could have used the approach in *Investors' Compensation Scheme Ltd* to conclude that Uber drivers were workers rather than using extraneous evidence.

III. Employment Law in the Gig Economy

It is worth reflecting on the limits of the judgment in respect to the wider "gig" economy. If Uber had merely sold its app to self-employed taxi drivers and left it to drivers to negotiate fares directly with passengers, then such drivers would not be considered "workers". Arguably, demarcating categories of "workers" is necessary to avoid diluting standards. As Guy Davidov notes, it would be arbitrary to treat a plumber or tax consultant who is hired occasionally with the same rights as full-time employees.[19] Pursuant to this issue is whether such a divide is desirable. The tribunal faced an obvious limitation in that it could only characterise Uber drivers as either "workers" or "self-employed contractors". This fails to address the complex nature of the labour market in the 21st century.

18 [1998] 1 WLR 896.
19 G Davidov, "The Status of Uber Drivers: A Purposive Approach" (2017, forthcoming) Spanish Law and Employment Relations Journal 3, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2877134.

Indeed, Uber drivers do face some disadvantages by being classified as "workers". It would mean payment of National Insurance Contributions and make it difficult for them to combine driving with doing other work. While they would gain paid holidays, they would lose the right to take those holidays with no notice.[20] The choice between "self-employed contractor" and "worker/employee" is a crude dichotomy which fails to reflect the reality of the 21st century labour market.

As *Cotter v Lyft, Inc* demonstrates, this problem is not limited to the United Kingdom. An engaging suggestion has been made of a third category, the "intermediate worker". In their Discussion Paper, Seth Harris and Alan Krueger attempt to define an "independent worker".[21] Such workers operate in a "triangular relationship" in that they provide services to customers with the help of "intermediaries".[22] These intermediaries allow independent workers to select which customers they wish to serve, but set certain threshold requirements to determine who are eligible to use their service. They are distinct from regular "employees" because they only provide their service when they choose to do so. By contrast, workers cannot choose to completely forego their employment. Equally, they are distinct from independent contractors because their means of work and the price of their services are controlled by the intermediary.

This classification would reduce the legal uncertainty created by *Aslam, Farrar v Uber* ruling. Employers, workers, regulators and judges would no longer have to choose between two amorphous categories but would have a succinct definition on which to build employment jurisprudence on. In addition to this, it would reduce the incentive for companies such as Uber to classify its drivers as workers. Elements of social protection, such as collective bargaining rights, could be incorporated into this definition to ensure that such workers are not left bereft of any rights.[23] This would provide a more sustainable basis on which to categorise workers in the "gig economy" than the blanket terms of "worker" and "contractor".

IV. Conclusion

It seems likely that Uber will appeal the ruling made by the Employment Tribunal. Yet, regardless of whether Uber succeeds or not in the appeal, the question remains of how to adjust English employment law to the realities of the 21st century labour market. The crude dichotomy between "worker" and "self-employed contractor" is a relic of the 20th century and does not confer basic rights upon workers in

20 R Clark, "The Uber Ruling Will Change Little" (2016), available at http://blogs.spectator.co.uk/2016/10/uber-ruling-will-change-little/.

21 S Harris and A Krueger, "A Proposal for Modernising Labour Laws for Twenty First Century Work: The Independent Worker" *The Hamilton Project* (2016) p.9, available at http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

22 *Ibid*., p.9.

23 *Ibid*., p.26.

the "gig economy". The tribunal in *Aslam, Farrar v Uber* made creative use of *Autoclenz Ltd v Belcher* in an effort to examine the "true nature" of Uber's employment structure. However, delegating this aspect of employment solely to judicial discretion is not a long-term solution. It creates more uncertainty for employers and regulators over which category workers in the gig-economy belong. Parliament must intervene to create a new category of "intermediate workers" to best reflect the realities of 21st century employment. The recent "Taylor Review", with its recommendation for a new status of "dependent contractor", is a good indication of the model that Parliament should follow.[24]

24 Department of Business, Energy & Industrial Strategy, "Good Work: The Taylor Review of Modern Working Practices" (2017) p.6, available at https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices.

JICL-4(2).indb 396 28/11/17 4:32 PM