ENGLISH ELECTRONIC EDITION

2021/4

Revue de Droit Comparé du Travail et de la Sécurité Sociale

STUDIES

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I. Zoppoli How to overcome the paradoxes of redundancy in France and Italy?
H. Barretto Ghione The emergence of the concept of "due diligence" in labour law and the forms of its legal integration
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English Electronic Edition

Revue de Droit Comparé du Travail et de la Sécurité Sociale

REVUE
ENGLISH ELECTRONIC EDITION
2021/4

DE DROIT COMPARÉ DU TRAVAIL ET DE LA SÉCURITÉ SOCIALE

REVIEW SUPPORTED BY THE INSTITUTE OF HUMAN AND SOCIAL SCIENCES OF THE CNRS

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THE UBER CASE

Modern forms of employment[1] organised through digital platforms pose pressing problems on the employment status of persons working therein. The UK Supreme Court[2] affirmed the judgments of the Employment Tribunal, the Employment Appeal Tribunal and the majority of the Court of Appeal which held that the Uber drivers[3] enjoyed the employment status of « worker » thus guaranteeing them certain limited rights. It is proposed to analyse in a skeletal way how the Supreme Court came to its decision.

The Supreme Court had to decide whether the lower tribunals and Court of Appeal were right to hold that drivers should enjoy the status of « worker » and therefore qualify for remunerated annual leave, the minimum national wage and other rights or whether as Uber contended, drivers were self-employed, performing services under contracts made with passengers with Uber acting as their booking agent. Uber argued that being self-employed; the drivers enjoyed no employment rights.

British employment law distinguishes between three types of persons, those who are self-employed, those who work under a contract of employment or apprenticeship known as employees and an intermediate class of persons known as « workers » who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. In this article we are only concerned with the latter type of persons.

The legal definition of the term « worker » is an individual who has entered into and works under a[4] « 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 ».

1 See J. Carby-Hall and L. M. Mendez (Eds), *Labour Law and the Gig Economy: Challenges Posed by the Digitalisation of Labour Processes*, Routledge, 2020.

2 Transcript of the *Uber BV and Others (Appellants) v Aslam and Others (Respondents)* given on 19th February 2021 (Heard on 21 and 22 July 2020).

3 There are some 70,000 Uber drivers in the UK.

4 Employment Rights Act 1996, s. 230 (3) (b).

Limb (b) of the Employment Rights Act 1996, as this convoluted section's terminology is known by, has three important requirements. First, a *contract* whereby the individual undertakes to perform work or services for another party; secondly, an undertaking to perform the work or carry out the services *personally* for the other party and thirdly, a requirement that the other party to the contract is *not a client or customer* of any profession or business undertaking carried on by the individual.

The critical issue in this case concerns only the first of these requirements, namely whether the claimants are working under contracts with Uber whereby they undertook to perform services for Uber or as Uber contended they were regarded as performing services solely for and under contracts entered into with passengers through the agency of Uber.

Whereas employees enjoy all employment rights such as redundancy payments, unfair dismissal, etc., workers have a limited set of rights granted to them by legislation.

The rights claimed by the claimants in this case were rights under the Minimum Wage Act 1998 and the Regulations made under that Act to be paid at least the national minimum wage for work performed and the Working Time Regulations 1998 which provide for the right to receive remunerated annual leave and in the case of two of the claimants the right under the Employment Rights Act 1996 not to suffer detrimental treatment by reason of a protected disclosure, in this case, whistleblowing.

Lord Leggatt (with whom the other five justices concurred) talking of the policy behind the inclusion of limb (b) put it very aptly when he said[5] :

> « It is to protect vulnerable workers from being paid too little for the work they do; required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing) »

or suffer unlawful deductions from their wages or denied pension rights.

The reason why workers are thought to need such protection is that they are substantively and economically subordinate to, and dependent on, their employers.

Lord Leggatt posited[6] :

> « It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine … whether or not the other party is to be classified as a worker ».

5 Judgment transcript, p. 20 § 71.

6 *Ibid.*, p. 23 § 76.

The British courts have struggled over the years to identify the frontiers between dependent and autonomous workers. In doing so the courts developed a variety of tests[7], the control test being the predominant one.

There were three parties involved in the Uber case, namely Uber, its drivers and the passengers. The focus of the case rested on the nature of the relationship which exists between Uber and the drivers.

As far as the passengers were concerned they were considered to be third parties, but the Supreme Court had to consider the relative *degree of control* exercised by Uber and the drivers respectively over the service provided to those passengers.

Three matters needed to be addressed in relation to the degree of control exercised by Uber towards the drivers :

a) A particular consideration was who *determines the price* charged to the passenger,
b) who was *responsible for defining and delivering the service* provided to passengers and
c) to what extent were the arrangements with passengers afforded drivers the potential *to market their own services* and thus develop their own independent business.

The answers to those three questions were to be found in the conclusions reached by the Employment Tribunal with which the Supreme Court agreed. Having examined the evidence, the Employment Tribunal held that although free to choose when and where to work at times when they were working they were doing so for, and under, contracts with Uber.

The Supreme Court emphasised five of the tribunal's findings. The first of these was that the remuneration paid to drivers was unilaterally fixed by Uber, Drivers could not negotiate their pay though they had the freedom to choose, when and how much to work. Passenger fares were set by Uber and calculated by the Uber app and drivers were not allowed to charge more. Were they to charge less than the fare calculated by the app, such discount would have to be paid by the drivers. Uber also fixed the amount of its service fee which it deducted from the fares paid to drivers. Uber had sole discretion whether to make a full refund of the fare to a passenger in cases where a passenger had complained about a service made by the driver.

Each of these showed that Uber had complete control over drivers' remuneration and other financial matters.

The second of the tribunal's findings was that the contractual terms on which drivers performed their services and the terms on which they transported passengers were dictated by Uber on a standard form and drivers had no say in the matter.

7 For example, the economic reality test, intention of the parties test, intuitive test, mutuality of obligations test, integration into the organisation test and the various facets of the control test. See J. Carby-Hall, « New Frontiers of Labour Law-Dependent and Autonomous Workers», *in* B. Veneziani and U. Carabelli (Eds), *Du Travail Salarié au Travail Indépendant: Permanences et Mutations*, Socrates Programme, Cacucci Editore especially, 2003, p. 246.

Thirdly, although drivers had the freedom to choose when and where to work, once drivers logged on the Uber app their choice, whether to accept the ride or not, was constrained by Uber because Uber exercised control over the acceptance of a request by drivers in two ways.

One of these ways was by controlling the information provided to drivers. Drivers when informed of a request were told by Uber a passenger's average rating from previous trips allowed drivers to avoid low-rated passengers who may be problematic.

In addition, drivers were not informed of the passenger's destination until the passenger was collected thus drivers not being given the opportunity to decline a booking because drivers may not have wished to travel to a particular destination. This indicated control by Uber.

Control was also exercised by Uber monitoring drivers' rates of acceptance and cancellations of passengers' requests for trips. Drivers' whose percentage rate of acceptance and cancelation rates fell below a level set by Uber received an escalating series of warnings which, if performance was not improved led to drivers' being automatically logged off the Uber app and shut out from being logged back for ten minutes[8]. This put drivers in a position of subordination to Uber.

In the fourth instance, Uber exercised a great deal of control over the way in which drivers delivered their services. Although drivers purchased their own cars Uber veted them in the way in which they were being used. The technology which was integral to the service was wholly owned and controlled by Uber. Such control was used as a means of exercising control over drivers.

So, when a ride was accepted the Uber app directed the driver to the pick-up location and once there to the passenger's destination. Although the driver was not compelled to follow the route indicated by the Uber app, should the passenger complain because a different route was taken, the driver took the financial risk for any deviation. A further method of control used by Uber was the drivers' rating system. Passengers were asked to rate the driver after each journey. Should the driver have failed to maintain the required average rating a warning would follow and if such rating persisted Uber would terminate the contract.

Thus, Uber used those passenger ratings as an internal tool for managing drivers' performance as a basis of making termination decisions where customer feedback did not meet the performance levels required by Uber. As Lord Leggatt put it[9] « This is a classic form of subordination that is characteristic of employment relationships ».

A fifth factor was that Uber restricted solely to the individual ride any communication between passenger and driver thus preventing drivers from establishing a relationship with the passenger. When passengers book a ride their request was directed to the nearest available driver. The passenger had therefore

8 The effect constituted a penalty by docking pay from the driver and preventing her/him earning while being locked out of the Uber app.

9 Judgment transcript, p. 31 § 99.

no choice of driver. The collection of fares, the payment of drivers and the handling of complaints were all orchestrated by Uber in such a way as to avoid direct contact between passengers and drivers. The electronic document, (which Uber called the « invoice ») from the driver to the passenger, was never sent to the passenger and though available to the driver, recorded the passenger's first name only.

Furthermore, drivers were prohibited from exchanging contact details with passengers or contact the passenger on completion of trips other than to return lost property.

These five findings by the tribunal which were endorsed by the Supreme Court led it to the opinion that[10] « the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill.

From the drivers' point of view, the same factors - in particular, the inability to offer a distinct service or to set their own prices and Uber's control over all aspects of their interaction with passengers - mean that they have little or no ability to improve their economic position through professional and entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance ».

The Supreme Court found that on the facts of this case the Employment Tribunal was entitled to find that the claimant drivers were « workers » who worked for Uber under « workers' contracts » within the meaning of limb (b) of the statutory definition. In Lord Leggatt's opinion[11] « It was the only conclusion which the tribunal could reasonably have reached ». The appeal was thus dismissed.

Conclusion

This case decided following a five- year legal battle will have far reaching consequences in three spheres. In the Uber workers' rights sphere, drivers will enjoy holiday pay based on 12.07% of their wages paid out fortnightly; they will automatically receive a pension paid for in part by Uber and the drivers; they will receive at least the national minimum wage[12] for over 25s after accepting a trip request and after expenses; drivers will continue to receive free health and injury insurance as well as maternity and paternity payments which they have enjoyed since 2018 and drivers will retain the freedom to choose when and where to drive.

These constitute a significant improvement in the standard of work of UK drivers, however Uber would still not pay its drivers for the time they spend waiting in between jobs. Drivers only have these entitlements from the time a trip is accepted to the time of the drop off. Drivers will not be entitled to compensation for past

10 Per Lord Leggatt at p. 31 § 101 of the judgment transcript.

11 Judgment transcript, p. 37 § 119.

12 Currently £8.72 a hour.

entitlements which they missed out on. Nor does this judgment apply to Uber Eats individuals who continue to be considered as self-employed.

In the international sphere, Uber is being challenged by its drivers in numerous countries over whether they should be classed as workers rather than as self-employed. Uber has disrupted labour markets world-wide, this case may contribute to the international debate and therefore have global repercussions.

The third sphere is the impact of this case over the gig economy companies. This case could have ramifications across the whole of gig economy. This dubious employment model is used by numerous gig companies.

The Uber decision is such that those companies will be asking themselves for how long they would be able to argue that the individuals they employ are not workers in accordance with limb (b). It would be unwise for gig companies' managers not to take careful and serious note of the Uber case decision!

REVUE

DE DROIT COMPARÉ
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Manuscripts submitted for publication in the **Comparative Law Review of Labour and Social Security** [Revue de Droit Comparé du Travail et de la Sécurité Sociale] should be sent by e-mail or by post before **February, the 1st** of each year (for the Studies, the Comparative Social Jurisprudence and the International Social Jurisprudence) and before **June, the 1st** of each year for the Thematic Chapter. About the contributions to the International Legal News, they must be sent before **February, the 1st** (for the first issue) and before **September, the 1st** (for the third issue).

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IALLJ CALL FOR PAPERS ~ 2022 MARCO BIAGI AWARD

To stimulate scholarly activity and broaden academic interest in comparative labour and employment law, the International Association of Labour Law Journals announces a **Call for Papers** for the 2022 Marco Biagi Award. The award is named in honor of the late Marco Biagi, a distinguished labour lawyer, victim of terrorism because of his commitment to civil rights, and one of the founders of the Association. The Call is addressed to doctoral students, advanced professional students, and academic researchers in the early stage of their careers (that is, with no more than three years of post-doctoral or teaching experience).

1. The Call requests papers concerning comparative and/or international labour or employment law and employment relations, broadly conceived. Research of an empirical nature within the Call's purview is most welcome.

2. Submissions will be evaluated by an academic jury to be appointed by the Association. Submitted papers should include an abstract.

3. The paper chosen as the winner of the award will be assured publication in a member journal, subject to any revisions requested by that journal.

4. Papers may be submitted preferably in English, but papers in French, or Spanish will also be accepted. The maximum length is 12,500 words, including footnotes and appendices. Longer papers will not be considered.

5. The author or authors of the paper chosen as the winner of the award will be invited to present the work at the Association's 2021 meeting which is to be announced soon on the website of the Association. Efforts are being undertaken to provide an honarium and travel expenses for the presentation of the paper. Until that effort bears fruit, however, the Association hopes that home institutional funds would be available to support the researcher's presentation.

6. The deadline for submission is 1 March 2021 (final date of submission). Submissions [and a short bio of the author] should be sent electronically in Microsoft Word both to Lavoro e diritto at lavoroediritto@unife.it and to Frank Hendrickx, the President of the Association, at frank.hendrickx@kuleuven.be and his secretariat: iar@kuleuven.be.

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AuR = Arbeit und Recht (Germany)
AJLL = Australian Journal of Labour Law (Australia)
AJP/PJA = Aktuelle juristische Praxis - Pratique juridique Actuelle (Suisse)
BCLR = Bulletin of Comparative Labour Relations (Belgium)
CLELJ = Canadian Labour & Employment Law Journal (Canada)
CLLPJ = Comparative Labor Law & Policy Journal (United States)
DRL = Derecho de las Relaciones Laborales (Spain)
DLM = Diritti Lavori Mercati (Italy)
E&E = Employees & Employers: Labour Law & Social Security Review (Slovenia)
EuZA =Europäische Zeitschrift für Arbeitsrecht (Germany)
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ILR = International Labour Review (ILO)
JLR = Japan Labor Review (Japan)
JCP = Juris-Classeur Périodique (France)
LD = Lavoro e Diritto (Italy)
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REVUE DE DROIT COMPARÉ
DU TRAVAIL ET DE LA SÉCURITÉ SOCIALE

(PRINT) ISSN 2117-4350
(E-JOURNAL) ISSN 2262-9815

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Achevé d'imprimer en janvier 2022
sur les presses de l'imprimerie Aquiprint
Dépôt légal 1er trimestre 2022
Imprimé en France

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2021/4
DE DROIT COMPARÉ
DU TRAVAIL
ET DE LA SÉCURITÉ SOCIALE

The Comparative Law Review of Labour and Social Security [Revue de Droit Comparé du Travail et de la Sécurité Sociale] has been published by COMPTRASEC, UMR 5114 CNRS of the University of Bordeaux since 1981. It is edited three times a year in order to contribute to the development of analyses and exchanges on labour and social security law around the world. The Comparative Law Review of Labour and Social Security is a member of the International Association of Labour Law Journals (IALLJ), an international network for the exchange of ideas and publications on labour law and social security.

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ISSN 2117-4350