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THE UBERIZATION OF WORK CASE DEVELOPMENTS IN THE UK

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The emergence and rise of the «gig economy»¹, and in particular the use of internet platforms to «hire» workers to provide services, presents a number of challenges to the allocation of employment rights in the UK as elsewhere. In the UK, the allocation of employment rights depends on a distinction between «employees», «workers» and the «self-employed», with employees having access to the greatest range of employment rights and the self-employed the least. Each categorisation is made according to a series of fact-dependent tests, albeit that the tests to determine status overlap to a certain extent. In any event, the complex factual matrix at work in the organisation of work in the gig-economy makes it very difficult to «match» gig-economy workers to the «correct» status. The reality of this kind of employment is that it embodies characteristics which span the status divisions. For example, on the one hand, gig-economy workers may have a considerable degree of autonomy in certain aspects of their work, a feature which suggests a finding of self-employment status. On the other hand, there may be a high degree of control in other areas of work which suggests a relationship of employee and employer between the platform company and the service provider. This provides the first set of challenges presented by the gig economy.

A second set of challenges arises as a result of the action of platform companies in attempting to disguise the «true» nature of the relationship between

¹ The gig economy can span a range of business models. For a discussion of these models in the context of employment, see A. Todoli-Signes, «The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy and the Need for Protection for Crowdworkers», *International Journal of Comparative Labour Law and Industrial Relations*, 2018, 33(2), p. 241.

the parties. In a number of cases which have arisen in the UK courts, the presentation of the relationship between the platform and the platform worker has been called into question. On a number of occasions, the written terms of the contract between the parties have been found not to reflect the reality of the working relationship. Indeed, in the *Uber* case, the courts were scathing about the actions of the platform company in attempting to disguise the true nature of the relationship. The Tribunal found that *Uber* went to considerable lengths to distort the relationship, «resorting in its documentation to fictions, twisted language and even brand new terminology» in order to avoid a finding that they owed employment rights to the platform workers². Ironically, it was found that this only served to increase the weight behind the finding that the workers were dependent and had very little bargaining power in the relationship.

The third set of challenges concerns a deeper conceptual examination of whether and how far the current status classifications are a suitable vehicle for the protection of vulnerable workers. The lack of protections for self-employed workers under the current system for example appear to be particularly problematic in the context of the gig economy, under which «self-employment» can be a locus of vulnerability (albeit potentially artificially created). There is also a question mark in the UK context of the value of the distinction between «worker» and «employee» status, with vulnerable platform workers opting for a «worker» status as a safer litigation strategy, but this tends to reflect an underassessment of their vulnerability and therefore the rights that they deserve.

This article will focus on the first and second set of challenges, although inevitably deeper conceptual discussions about the suitability of the status divisions will arise through this analysis. The first section sets out the statutory and common law scheme which determines the delimitation of employment status in the UK. The second section identifies some of the problematic elements of those definitions when it comes to their application to workers in the gig economy. As the litigation so far has focussed on «worker» status, the problematic elements of this status will be considered: namely personal performance, «mutuality of obligation» and the existence of a contractual nexus between the employer and the employee. This section also discusses how these elements can be manipulated by powerful employers (such as *Uber*) to try to influence the outcome of a particular dispute. The final section outlines some UK government proposals concerned with improving the status outcomes for gig economy workers.

I - EMPLOYMENT STATUS CATEGORIES: EMPLOYEE, WORKER, SELF-EMPLOYED

For many years, employment status in the UK was based on a binary division between «employee» status on the one hand and «self-employed» status on the other. However, an intermediate employment status of worker was inserted into the statute book in the late 1990s, in order to extend a set of «core» employment rights to a greater range of individuals, and to modify some of the perceived harshness of the strict binary division. Hence, in the UK, there are now three categories of employment status: «employee», «worker» and «self-employed». Each of these status categories comes with a distinct set of employment rights. «Employees» are entitled to the full suite of employment rights, including rights to

² *Uber v Aslam* [2017] IRLR 4, para. 87.

unfair dismissal³, and protection on transfer of employment⁴. Workers do not have the full range of rights entitlements, but still benefit from a limited range of protections including rights under the Working Time Regulations⁵ and the National Minimum Wage Act⁶. The «self-employed» have a very limited range of rights, but do benefit from health and safety protection at work⁷ and equality rights⁸.

The statutory test for employee status is set out in section 230 (1) Employment Rights Act 1996 and provides that employees are those who work under a «contract of employment», which «means a contract of service or apprenticeship, whether express or implied». Given the rather bland and superficial nature of this statutory test, UK courts have developed a series of further tests in order to determine whether a person is an employee or not. The popularity of these tests has waxed and waned over time. At the turn of the century the issue of «control» was used to determine employee status, but this lost traction during the first half of the twentieth century and was replaced with other tests. The control test then enjoyed a resurgence with the case of *Ready Mixed Concrete* in 1968⁹ which suggested that a combination of tests should be used to decide employment status, including the issue of control. This test continues to be cited, but the key issue arising from this «multiple test» and which has come to dominate the consideration of employee status is that of «mutuality of obligation». There are a number of ways in which this «mutuality» has been interpreted. The concept of mutuality of obligation has denoted the rather straightforward claim that there must be an exchange of work for remuneration for there to be a contract of employment (and this was the sense it was used in *Ready Mix*). However, there has been a significant trend towards imputing a greater and deeper sense of obligation and meaning into this concept. As a result, the notion of mutuality of obligation has come to denote a sense of continuity, stability, and relationality at the heart of the employment contract¹⁰. Mutuality in this sense turns on whether there is an obligation on the employer to provide work and a corresponding obligation on the employee to perform it¹¹.

In practice, this kind of «mutuality of obligation» is extremely difficult to demonstrate, particularly for groups of «atypical workers» whose contracts deny the existence of this kind of relationship. This is particularly the case for workers in the gig economy, whose contracts are specifically designed to be flexible and independent of an on-going commitment for the «employer» to provide work and for the platform worker to accept it. It is partly for this reason that platform workers have not sought to claim employee status, but have relied on bringing claims for the lesser status of «worker» instead. However, in some ways the tests to prove worker status are even more vague and muddled than those concerning the status of employee. Indeed, there is even the suggestion in some case law, that mutuality

3 Employment Rights Act 1996, Section 94.

4 Transfer of Undertakings Protection of Employment Regulations 2006.

5 Working Time Regulations 1998, Regulation 2 (1).

6 National Minimum Wage Act, section 54.

7 Health and Safety at Work Act, section 53.

8 Equality Act 2010, section 83 (2).

9 *Ready Mixed Concrete v Minister of Pensions and National Insurance* [1968] 2 QB 497.

10 N. Countouris, «Uses and Abuses of 'Mutuality of Obligations' and the Autonomy of Labour Law», in A. Bogg, C. Costello, A. CL Davies and J. Prassl, *The Autonomy of Labour Law*, Oxford Hart Publishing, 2015, p.187.

11 *Nethermere v Gardiner* [1984] ICR 612 at 632.

of obligation is required not only for proving employee status but for proving worker status as well. This is a contention which is subject to challenge, particularly when it comes to the more expansive version of the definition¹².

The statutory definition of worker is provided in section 230(3) which provides that a worker is an individual who works under a contract of employment, or «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». There are two features to this definition. First, there must be the existence of a «contract» or a «contractual» nexus. This implies that the relationship between the individual and company must not be one of client/customer, as such a relationship would demonstrate the existence of a level of independence on the part of the worker more consistent with self-employment than worker status. Second, there must be a degree of «personal service» on the part of the individual providing the services¹³. The next two sections will consider how the courts have dealt with these two issues of in the context of the gig economy.

II - WORKER STATUS AND CONTRACTUAL NEXUS

In the UK, one of the first cases to consider the issue of employment status in the gig economy was *Aslam v Uber*¹⁴. The Claimants were Uber drivers. They claimed that they had been denied holiday pay, and that Uber had also failed to pay them the National Minimum Wage. Both of these claims rely on proving «worker» status, and so the Tribunal at first instance set out to determine whether or not the Uber drivers fell into this category. In October 2016, the ET concluded that the drivers met the definition of «worker» under section 230 (3)(b) ERA. Uber then appealed the judgement on the basis that the Tribunal had incorrectly determined the nature of the relationship between Uber and the drivers, and that the drivers were in fact «self-employed». The appeal was heard in November 2017¹⁵. There was then a further appeal to the Court of Appeal, and the Court of Appeal judgement was handed down on 19 December 2018¹⁶. Both the EAT and the Court of Appeal agreed in large part with the original findings of the ET.

The main question at appeal centred on whether or not there was a «contract» or a «contractual nexus» with the local Uber company (Uber London (ULL)) for the purposes of proving worker status. It was ULL's claim that the Uber drivers never worked under a contract with them. Rather, ULL merely acted as an agent for the drivers in their provision of transportation services to passengers. ULL pointed to the wording of contractual documentation which recorded the relationship between Uber and the drivers as one of agency and set out terms governing that relationship that were consistent with the label¹⁷.

12 J Prassl, «Who is a Worker», 2017, 133 LQR 366, 371.

13 D. Cabrelli.

14 [2017] IRLR 4.

15 [2018] ICR 453.

16 [2018] EWCA Civ 2748.

17 *Uber* (EAT) no. 15, para. 91.

The drivers disputed this reading of the relationship. They argued that they personally undertook work for ULL as part of its business of providing transportation services to passengers in the London area.

In deciding the issue, the CA confirmed that in order for the Uber drivers to satisfy the definition of worker under limb (b) of section 230 (3) ERA, it would be necessary to show that there was in fact a «contract» between the putative worker and the putative employer. That contract could be purely assignment based, arising as and when work is undertaken, but a contractual nexus must exist. However, the CA's approach to the issue was to determine the «true agreement» between the parties, in line with the Supreme Court case of *Autoclenz v Belcher*¹⁸. That required looking at the «reality of the relationship» which may or may not be reflected precisely in the contractual documents themselves¹⁹. Indeed, *Autoclenz* specifically recognised the risk inherent in relying on written contractual documentation in the context of employment relationships which were characterised by an inequality of bargaining power between the parties. The CA was thus tasked with taking a «purposive» approach in deciding the question of whether the terms of any written agreement represented the parties' true intentions²⁰.

In taking this approach, the CA found that the contractual documentation between ULL and the drivers did not reflect the reality of the relationship. In line with the findings of the first instance Tribunal, it found that in practice, the relationship between the ULL and the drivers was not one of agent and principal, with the drivers in a direct contractual relationship with passengers. Indeed, the evidence was that the drivers were excluded from establishing a business relationship with the passengers as they could neither obtain passengers' details nor provide their own. Instead, the drivers were workers under a «contract» with ULL. They were integrated into the Uber business of providing transportation services and marketed as such. They worked on the understanding that Uber would indemnify them for bad debts and were subjected to various controls in the performance of their work, albeit that these controls operated «indirectly». For example, although a driver was «able» to cancel a job once accepted, Uber recorded a warning for those that cancelled jobs in this way.

The CA went on to grapple with the issue of the extent and timing of the contractual obligations. Although it held that the Uber drivers were in a direct contractual relationship when «in the territory, with the app switched on and ready to accept assignments», the CA was more circumspect about the relationship between Uber and the worker in between assignments. However, it concluded that the first instance Tribunal was entitled to find that, on the facts, there was sufficient mutuality of obligation between assignments for the contract to extend this far²¹. Indeed, this overarching «mutuality of obligation» has been found in other cases concerning gig economy workers. In *Addison Lee* for example, the Court found that despite the lack of written evidence for a set of overarching obligations between the platform company and the delivery drivers, those obligations did exist in practice²². The recognition of the existence of mutuality of obligation of this kind is

18 [2011] ICR 1157.

19 Uber (CA) no. 16, para. 77.

20 Interestingly, was also influenced in this approach by the recognition of the statutory purpose behind the provisions at issue in this case, provisions which specifically recognised the need for the protection of weaker parties in the employment relationship Uber (EAT) no. 15, para 98.

21 Uber (EAT) no. 15, para. 121.

22 *Addison Lee Limited v Mr M Lange, Mr M Olszewski, Mr M Morahan* [2018] WLR 05929292.

important, because it illustrates just how close some of these workers come to «traditional» patterns of obligation, and how misleading the contractual documentation can be. On the other hand, there are certainly risks in introducing this kind of mutuality requirement into the adjudication of worker status²³. There are clearly many working in the gig economy who would not be able to show this ‘mutuality’ and this arguably would negate Parliament’s intention in attempting to extend employment protection through the worker definition.

III - PERSONAL SERVICE

The second major element in proving «limb (b)» worker status concerns personal service. The need to prove personal service is mentioned specifically in limb (b) and has been referred to in the case law as a necessary condition of worker status²⁴. This issue did not arise in the *Uber* case, because on the Uber model there is an expectation that the work is performed personally, and there are penalties for the failure to do so. However, proving personal service has been a significant issue in a number of other cases concerning workers in the «gig» economy. A particular area of difficulty has been how to deal with «substitution clauses» in worker contracts. These substitution clauses purport to allow workers to substitute their own labour for that of another, and hence their existence can be used to suggest a lack of personal service obligation between the individual and the platform company.

This particular line of argument was successfully pursued by the platform company Roofoods Limited (trading as *Deliveroo*), to deny that *Deliveroo* couriers reached the level of personal service required by law to prove worker status. This case differed from the *Uber* case in that it was brought not by the workers but by a union, the Independent Workers’ Union of Great Britain (IWGB). That union sought statutory recognition on behalf of the *Deliveroo* drivers, and this recognition required that the *Deliveroo* drivers were «workers» for the purposes of section 296 Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The case was first heard by the Central Arbitration Committee in November 2017. The union then appealed to the Queen’s Bench Division²⁵. The case was then further appealed to the High Court. Judgement was handed down in December 2018²⁶.

The High Court outlined the importance of proving personal service in order to reach a finding that the individuals were workers for the purposes of section 296 TULRCA. The Court referred specifically to the Supreme Court’s judgement in *Pimlico Plumbers*²⁷, in which it was stated that where there is a «generalised right of substitution» then there can be no personal service, and therefore no worker status²⁸. The Court relied on the CAC’s findings on the factual nature of the substitution clauses in the *Deliveroo* contracts. It concluded that the right to substitution was indeed «generalised» as it was both «unfettered» and «genuine». It was unfettered as there were very few conditions placed on the use of

23 J. Prassl, no.12, 371.

24 *Pimlico Plumbers Limited v Smith* [2018] ICR 1511.

25 *Independent Workers Union of Great Britain v Roofoods Limited (t/a Deliveroo)* [2018] EWHC 1939 (Admin).

26 *Independent Workers Union of Great Britain v Roofoods Limited (t/a Deliveroo)* [2018] EWHC 3342 (Admin).

27 [2018] ICR 1511.

28 *Deliveroo*, no. 26, para. 66.

substitutes by *Deliveroo*. The only real condition was that *Deliveroo* couriers could not use an individual who had previously been engaged by *Deliveroo* and had had their contract terminated for malpractice by the company. Furthermore, the High Court agreed with the Central Arbitration Committee that the substitution right was «genuine», in the sense that it was operated by drivers in practice. Both of these elements meant that the *Deliveroo* drivers could not prove personal service and therefore could not be workers under the law.

In contrast to the finding in the *Deliveroo* case, other recent cases have found that personal service does exist despite the existence of a contractual substitution clause. There are two avenues through which this distinction has been made. First, the substitution clause in question has been found as a factual matter to be narrow, subject to rather extensive conditions or rarely used in practice. Second, the Courts have been more willing to adopt a purposive approach to the construction of substitution clauses than the High Court in *Deliveroo*²⁹. Of course, these two avenues can be related: a more purposive approach might lead to a finding that a substitution clause is narrower than it appears on its face and therefore does not defeat a finding of worker status³⁰. This was certainly the finding in the *Pimlico* case, and this has been followed in other cases. In the *Pimlico* case, it was found that the Claimant did have a limited power to substitute other workers. However, the Supreme Court agreed with the Court of Appeal that this substitution right did not negative the Claimant's obligation of personal service. Rather the «dominant feature» of the contract remained personal service, and this was consistent with the vocative nature of the other terms of the contract³¹. This decision was followed in the case of *Leyland v Hermes*³². In this case, personal service was also found to be a «dominant feature» of the contract despite the existence of a substitution clause. This was found to be evidenced by the fact that even if there is the ability to nominate a substitute on a particular day, the «worker» maintained the responsibility for the nomination, communicate with management about the substitution or supervise the substitute. As a result, the contract required «at least part of the work to be carried out by the courier him or herself»³³.

Conclusion

The cases in the gig economy have brought into sharp relief the problems with the status categorisations in UK employment law. It appears that the «employee» categorisation is so difficult to achieve that it is rarely pursued as a litigation strategy by those seeking to enforce employment rights. This is despite the evidence that mutuality can often exist in a wide range of contracts, within the gig economy and beyond. As far as worker status is concerned, there is considerable inconsistency in the case law. This has a number of sources. First, the statutory definition is rather superficial and couched in negative terms. Second, there is a tendency to blur the boundaries between employee and worker status, as has been demonstrated with the introduction of the test of mutuality of obligation into the worker definition. Third, the gig economy throws up an extremely complex factual

29 The High Court in *Deliveroo* refused to countenance any arguments based on *Autoclenz*. See *Deliveroo*, no. 26, para. 64.

30 As was found in *Macfarlane v Glasgow City Council* [2001] IRLR 7.

31 *Pimlico Plumbers v Smith* [2018] UKSC 29, para. 33.

32 *Ms E. Leyland and others v Hermes Parcelnet* [2018] WLR 03145778.

33 *Ibid.*, para. 79.

patterns and contractual arrangements, which can be deliberately constructed to deny worker or employee status, and these must be negotiated by the courts. Ultimately, the cases turn on the age-old tension in employment law between honouring the agreement «struck» between the parties and recognising the imbalance in the bargaining power between the parties which colours the agreement made. The suggestions for reform of employment status in the UK, currently under consideration by the government do not address this fundamental tension, and so will only have a limited impact on improving the lives of workers in the «gig economy»³⁴.

34 M. Taylor, «Good Work: The Taylor Review of Modern Working Practices», July 2017.