# UK Supreme Court Rules Drivers Are "Workers" Under UK Employment Statutes

The UK Supreme Court has unanimously ruled that licensed private hire drivers using Uber's smartphone application ("**Uber App**") are "workers" and therefore enjoy certain protections under the relevant UK statutes: *Uber BV and others v Aslam and others* [2021] UKSC 5 ("***Uber BV***").

## Our Comments

While the case involved interpretation of UK legislation, the decision has spurred discussions questioning the efficacy of the current legal protections offered to gig economy workers.

Singapore does not have the UK's three categories of working relations, nor does the concept of "workers" exist under Singapore employment legislation. Presently, private hire car drivers generally are considered own account workers or "self-employed persons".

That said, the UK Supreme Court's decision is still potentially of relevance, particularly in determining whether, in substance, a person is engaged as an employee or otherwise. In this regard, the UK Supreme Court's comments on the issue of subordination and dependence would be potentially instructive in determining whether an individual is (within the context of Singapore legislation) an employee or an independent contractor as this determination is still very much related to the touchstone of control by the putative employer.

The issues raised in the case are relevant also to the current debates and discussions on what legal protections should be afforded to independent contractors. The recent Singapore Budget 2021 discussions touched on the possibility of the National Trades Union Congress representing independent contractors to fight for their legal protections and amending employment laws to better represent vulnerable freelancers, who number around 200,000 today.[1] This issue is more pressing today given that the economic contractions following from the COVID-19 pandemic has led to in a rise in individuals seeking self-employment. Aside from transportation, there has also been an uptick of self-employment in the food delivery and e-commerce sectors.

## Background

In 2016, the UK Employment Tribunal considered whether two test claimants who were licensed private hire vehicle drivers utilising the Uber App were "workers" for the purposes of the UK Employment Rights Act 1996, the UK National Minimum Wage Act 1998 and the UK Working Time Regulations 1998.

If so, the drivers argued that this entitled them to the minimum wage, paid leave and other legal protections.

[1] https://www.straitstimes.com/singapore/jobs/ntuc-to-push-for-changes-in-laws-so-it-can-better-represent-freelancers-ng-chee-meng

Uber argued that the drivers did not have those rights because the drivers work for themselves as "independent contractors".

The UK Employment Tribunal found that the drivers were "workers" who worked for Uber under "workers' contracts" within the meaning of section 230(3)(b) of the UK Employment Rights Act 1996 whenever they: (a) had the Uber App switched on; (b) were within the territory in which they were authorised to work; and (c) were able and willing to accept assignments. These findings were subsequently upheld by the UK Employment Appeal Tribunal and the Court of Appeal of England and Wales.[2]

Uber then appealed to the UK Supreme Court, which unanimously dismissed the appeal, finding that the UK Employment Tribunal was entitled to decide that the drivers were "workers" based on the specifics of the relationship. A central theme was that the drivers were in a position of subordination and dependency, having little or no ability to improve their economic position through professional or entrepreneurial skill. Practically speaking, the only way drivers could increase their earnings was by working longer hours while constantly meeting Uber's measures of performance. Uber's terms were also very tightly defined and controlled by Uber,[3] from deciding who could become a driver, to setting their fares and routes, and regulating their performance and conduct. The UK Supreme Court rejected Uber's argument that the drivers were contracting with passengers rather than Uber itself, and dismissed Uber's argument that it was merely an intermediary booking agent.

## Key distinctions between "employees", "independent contractors" and "workers" in the UK

In the UK, there are three categories of working relationship:[4]

(a) Employees, who are employed under a contract of employment. These individuals have the most rights and benefits under UK employment law.
(b) The self-employed (sometimes referred to as "independent contractors"), who are in business on their own account. These individuals have the least legal protections.
(c) "Workers", a hybrid category who are self-employed but provide services as part of a profession or business. These individuals are entitled to some basic protections under UK employment law.

While "workers" are not equipped with the full range of rights and protections available to employees, unlike independent contractors they are entitled to some of them, including: (a) paid annual leave and other breaks under the UK Working Time Regulations 1998; (b) payment of the minimum wage under the UK National Minimum Wage Act 1998; and (c) the right not to suffer detrimental treatment on the grounds of having made a protected disclosure as a whistle-blower under the UK Employment Rights Act 1996.[5]

2 [39] of *Uber BV*
3 [101] of *Uber BV*
4 [38] of *Uber BV*
5 [34] of *Uber BV*

## Key points from the UK Supreme Court Decision

We set out below several important takeaways from the UK Supreme Court's decision that business owners operating in the gig economy should bear in mind when entering into working relationships.

*In light of the unequal bargaining power between parties, the courts will look beyond the terms of the written contract to ascertain the true nature of the employment relationship*

The UK Supreme Court recognised that the unequal bargaining power of parties in the employment context requires the court to look beyond written terms of the contract, and examine the conduct and other evidence to show what the written terms were understood and agreed to be.[6]

Uber's case was that the starting point of ascertaining the parties' working relationship should be the written agreements between Uber BV and drivers, and between Uber companies and passengers. The written agreements stated that a contract was created directly between the driver and passenger when a booking request was made on the Uber App. Further and in an attempt to limit Uber's involvement, the written agreement stated that Uber BV was to provide technology services and act only as payment collection agent, while Uber London Ltd was merely to act as booking agent for the drivers.

The UK Supreme Court however had difficulty with this argument and inferred the nature of the relationship from parties' conduct against the relevant factual and legal context. In particular, it found relevant the fact that the holder of the private hire vehicle operator's licence was Uber London Ltd and not the drivers, which meant that it would not be possible for Uber to operate its business without Uber London Ltd entering into contracts with its drivers, a finding which goes against what the written agreements provided for.[7]

*Where rights asserted by claimants are created by legislation, the primary question is one of statutory interpretation, not contractual interpretation*

The claimants sought rights under the UK Employment Rights Act 1996, the UK National Minimum Wage Act 1998 and the UK Working Time Regulations 1998. The main exercise in interpretation was thus to determine whether the claimants fell within the definition of "worker" in the relevant statutory provisions to qualify for these rights, irrespective of what had been contractually agreed between parties.

The approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language in the way which best gives effect to that purpose. In this context, the UK Supreme Court affirmed that the general purpose of the employment legislation is to protect vulnerable workers from being paid too little, working excessive hours or being subjected to other forms of unfair treatment.[8] In this regard, taking the written agreement as a starting point would reinstate the mischief which the legislation was enacted to prevent. The purpose of the protections afforded by the relevant legislation is to address the vulnerabilities of workers who were in a relationship of subordination to and dependence upon another person in relation to work done, and not only serve those who are identified by their employers as qualifying for protection.[9] Determining the true nature of the employment relationship thus

6 [85] of *Uber BV*
7 [45]-[47] of *Uber BV*
8 [71] of *Uber BV*
9 [76] of *Uber BV*

involves assessing whether it is truly a relationship that is within the scope of the protection of the relevant statutory regime.

The UK Supreme Court further made it clear that any terms in a contract which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other "worker's contract" are of no effect and must be disregarded.[10]

*A touchstone of subordination and dependence is the degree of control exercised by the putative employer over the work or services performed by the individual concerned*

As to the relevant employment legislation having the purpose of addressing the vulnerabilities of workers in subordination to and dependent upon another person, the UK Supreme Court held that the touchstone of such subordination and dependence is the degree of control exercised by the putative employer over the work or services performed by the individual concerned: the greater the control over the individual, the stronger the case for classifying the individual as a "worker" employed under a "worker's contract".[11]

While the UK Supreme Court recognised that the drivers had in some sense a substantial measure of autonomy and independence in terms of deciding when, where and how long to work, the relationship between the driver and Uber was very tightly defined and controlled by Uber. In light of the control exercised over the drivers, the UK Supreme Court agreed with the UK Employment Tribunal that the drivers should be accorded "worker" status based on these five points:

(a) Uber controlled the remuneration paid to drivers for their services, as Uber set fare prices;
(b) Uber dictated the contractual terms on which drivers performed their services;
(c) Uber retained absolute discretion over accepting or declining requests for rides, and monitored drivers' performance pursuant to a passenger ratings system when delivering services (which could result in a driver's service being suspended);
(d) Uber monitored drivers, subjecting them to penalties if they declined a certain number of ride requests and vetted the types of cars permitted for their service; and
(e) Uber restricted communication between a driver and a passenger and took active steps to prevent parties from forming an independent commercial relationship beyond each individual ride.[12]

*The drivers' working time included any period when the driver was logged into the Uber App within the territory in which the driver was licensed to operate and was ready and willing to accept trips*

The UK Supreme Court also held that the UK Employment Tribunal was entitled to find that the drivers' working time included any period when the driver was logged into the Uber App within the territory in which the driver was licensed to operate and was ready and willing to accept trips, and was not limited to periods of driving passengers to their destinations as Uber argued.

10 [85] of *Uber BV*
11 [92] of *Uber BV*
12 [94]-[101] of *Uber BV*

Pertinently, the UK Supreme Court took the view that the fact that an individual has the right to turn down work neither detracts from finding that the individual is an employee or a worker, nor precludes a finding that the individual is employed under a "worker's contract". In the UK Supreme Court's view, it was relevant that logging onto the Uber App was presented by Uber London Ltd to drivers as undertaking an obligation to accept work if offered. In Uber London Ltd's "Welcome Packet" of material issued to new drivers, Uber referred to logging onto the Uber App as "going on duty" and instructed drivers that "[g]oing on duty means [the drivers were] willing and able to accept trip requests".[13]

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