# EMPLOYMENT LAW

## Workers and the gig economy: an appraisal of the Supreme Court's decision in the *Uber* case

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### Introduction

This article will examine the decision of the Supreme Court in *Uber BV v Aslam*[1] and its implications for workers in what is called "the gig economy". It is important, however, to set that decision in context and to look at the ways in which over the years the legislature and the judges have approached the question of "status". By that term is meant the status in Employment Law of those who provide their work and skills for the benefit of others.[2]

The fact that a person does work for someone else does not mean that that person is necessarily an employee of that other. He or she may be an employee or a worker or self-employed. For convenience, the other person will be called "the employer", but that term is not meant to imply that those who provide their work and skills to the "employer" are employees. It is a term of convenience.

The first part of this article will look at the developments in the law and judicial thinking in relation to those customarily called "employees". The second part will chart the emergence of the concept of "worker". That in turn will lead to a consideration of the cases in which that concept has been considered by the higher courts and, finally, to a discussion and analysis of the Supreme Court's decision in the *Uber* case.

### Employees, servants and workmen

The modern term for persons in this category is "employees", but that only emerged as a commonly used term in the second half of the 20th century. In the late 19th century and well into the 20th such persons were called either "workmen" (not "workers") or servants. As late as the 1960's, judges can be seen referring to them as "servants".[3] Indeed, for a considerable part of the 20th century the area now known as "Employment Law" was called the "Law of Master and Servant". This section will look at the terminology used in the legislation.

Employment protection legislation of the late 19th and early 20th centuries referred to "workmen". One of the first Acts of this type was the Employers' Liability Act 1880,[4] which enabled employees (to use contemporary parlance) to seek compensation from their employers for injuries suffered as a result of the negligence of a fellow-employee. The Act applied to "workmen", defined[5] as "a railway servant and anyone to whom the Employers and Workmen Act, 1875,[6] applies". The definition of "workman", in s.10 of the 1875 Act, excluded "domestic or menial servants" but went on to include "any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered

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[1] [2021] UKSC 5.

[2] The question of status is also relevant in the context of taxation and social security.

[3] In *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance* [1968] 2 QB 497, for example.

[4] 43 and 44 Vict. c. 42

[5] In s.8 of the Act. See Lord Wilson's observations about this Act in *Pimlico Plumbers Ltd v Smith* [2018] ICR 1511, at paras. 8 and 9.

[6] 38 and 39 Vict. c. 90.

into or works under a contract with an employer, whether the contract . . . be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."[7] Thus, the definition applies to those engaged in manual labour. It is interesting to note that it uses terminology, which is later to be found both in the definition of "employee" and of "worker" in legislation passed almost 100 years later,[8] and that there was no separation between the two definitions. So, the term "workman" encompassed both the modern definition of "employee" and of the so-called "limb (b) worker". As will be seen, the modern definition includes some persons (but not all) who are self-employed.

The 1880 Act was replaced by the Workmen's Compensation Act, 1897.[9] This Act applied to "any person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise".[10] The employments covered by the Act were railways, mining and quarrying, factory work and laundry work. The courts interpreted the Act restrictively. In *Simpson v Ebbw Vale Steel, Iron and Coal Co*,[11] for example, the Court of Appeal refused to apply the Act to a colliery manager, on the grounds that, although the Act applied to non-manual workers, the victim must still "be a workman".[12] Collins, MR, said:[13]

> On going through the Act, it is obvious that its whole scheme rests on the fundamental interpretation that an ordinary person would put on the word 'workman'. It presupposes a position of dependence; it treats the class of workmen as being in a sense '*inopes consilii'*, and the Legislature does for them what they cannot do for themselves: it gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves. In no sense can such a principle extend to those who are earning good salaries. It is of course very difficult to draw the exact line, but it is easy in a particular case to say on which side of the line it falls.

The judge refers to "common parlance" and "the standard of the man in the street" - an approach reminiscent of the approach sometimes used by judges in later cases.

The Workmen's Compensation Act, 1906,[14] replaced the earlier legislation and widened its ambit. It excluded those employed "otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year".[15] It also excluded casual workers, those "employed otherwise than for the purposes of the employer's trade or business", policemen, outworkers or "a member of the employer's family dwelling in his house". It applied, however, to "any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is express or implied, is oral or in writing." Stripped of some of the express restrictions, this definition bears a striking similarity to the definition of "employee" used in the late 20th century legislation.

The legislation so far considered was replaced by the National Insurance (Industrial Injuries) Act 1946. As can be seen from this brief survey, the purpose of the legislation was to give a degree of protection to injured "workmen". The legislation of the post-1945 era was to provide greater protection for employees.

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[7] An idea of the Courts' approach to this legislation is to be found in *Morgan v The London General Omnibus Company* (1884) 13 QBD 832, in which the Court of Appeal held that the 1880 Act did not apply to a bus conductor. Brett MR expressed the view that the claimant did not fall within any of the categories set out in the 1875 Act, as he was not engaged in manual labour: see *ibid.* at p. 834.
[8] See below.
[9] 60 and 61 Vict. Cap. 37.
[10] Section 7.
[11] [1905] I KB 453.
[12] *Ibid.* at p. 457.
[13] *Ibid.* at p. 458.
[14] 6 Edw. 7 Cap. 58
[15] See s.13.

The first of the post-1945 Acts was the Contracts of Employment Act 1963[16] (repealed and replaced by the Contracts of Employment Act 1972) and the Redundancy Payments Act 1965. The other Acts of note were the Industrial Relations Act 1971, which introduced the right for employees not to be unfairly dismissed, and the Trade Union and Labour Relations Act 1974, which repealed much of the 1971 Act but retained the Act's provisions relating to unfair dismissal. All these Acts were consolidated into the Employment Protection (Consolidation) Act 1978. The definition of "employee" is to be found in s.153(1) of that Act, which stated:

> 'employee' means an individual who has entered into or works under […] a contract of employment.

"Contract of employment" was defined as

> a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing.

These definitions were continued in the latest consolidation Act, the Employment Rights Act 1996. They are to be found in s.230(1).

These definitions, being phrased in general terms, have given rise to an extensive body of case law. The starting point for a discussion of employment status is usually taken to be the decision of MacKenna J in *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance*.[17] This is not the place to examine the ebbs and flows of judicial thinking over the years, since this article is concerned with the definition of "worker" rather than "employee".

## The emergence of the statutory definition of ''worker''

In the post-1945 legislation, the term "worker" is first found in the Industrial Relations Act 1971.[18] By contrast, the legislation relating to discrimination used an extended definition of "employee" which has been interpreted by the courts to mean that legislation also applies to workers. This will be examined first, and then the definition of "worker" will be discussed.

*The Discrimination Legislation definition*

The first major piece of legislation in relation to discrimination was the Sex Discrimination Act 1975.[19] This was followed by the Race Relations Act 1976 and then by the Disability Discrimination Act 1995. The 1975 Act defined "employment" as

> employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly.[20]

There is no definition of "employee". The subsequent legislation used the same definition.[21]

The Equality Act 2010, which consolidated the pre-existing Acts and Regulations, defines "employment" as "employment under a contract of employment, a contract of apprenticeship or a

[16] For a comment on the Act, see Grunfeld (1964) 27 MLR 70.
[17] [1968] 2 QB 497.
[18] See s.167(1).
[19] The Race Relations Acts of 1965 and 1968 are not considered here.
[20] See s.82(1). The definition sections in the other two Acts are RRA, s. 78(1) and DDA, s. 68.
[21] See the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), reg. 2(1), the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661), reg. 2(1) and the Employment Equality (Age) Regulations (SI 2006/1031), reg. 2(1).

contract personally to do work."[22] In substance, the definition used in the Act is no different from the definitions used previously. As will be seen, it differs from the definition of "worker".

These definitions bear striking similarity to the definition of "workman" in s.10 of the Employers and Workmen Act, 1875. In view of the restrictive interpretation judges applied to these statutory provisions, it is likely that they would have considered that the definition applied only to employees (or "workmen", to use the terminology of that legislation). If someone claimed to come within the Act on the grounds that they had a contract to provide personal service, it is likely that the judges of that era would have applied the *eiusdem generis* rule of construction to such a person and held that they were an employee (to use contemporary parlance).

The main question to have arisen in relation to the above definition has related to the meaning of the phrase "contract personally to execute any work or labour". The first major case to consider this phrase was *Mirror Group Newspapers Ltd v Gunning*.[23] The respondent's father was an independent wholesale newspaper distributor who held an area distributorship from MGN in respect of their newspapers. His request to transfer the distributorship to his daughter was refused and she brought a complaint of unlawful sex discrimination. The Court of Appeal held that the dominant purpose of the relevant statutory provision[24] was the execution of personal work or labour, whereas the facts of the case showed that the dominant purpose of the father's contract with MGN was the regular and efficient distribution of newspapers. He had failed to show that he was obliged to engage personally in the execution of the contract. The decision in this case is consistent with earlier decisions under the 19th century legislation discussed earlier.[25] It is clear from those cases that it was not sufficient that the person *may* do the work or some of it personally; provided, however, that the person contracted to do at least some of the work personally, it did not matter that he or she had assistants. It should be borne in mind, however, that the question in the earlier cases was whether the individual was a workman (employee) or not.

In view of the fact that the words used in the Equality Act 2010 are very similar to those used in the 1875 Act, it would have been open to the courts to conclude that the Equality Act only applied to employees. The point at which this definition was equated with the statutory definition of "worker" can be identified in *Bates van Winkelhof v Clyde & Co LLP*.[26] In that case, Baroness Hale of Richmond DPSC (as she then was) observed that the definition in the Equality Act yielded a result similar to the exclusion of work for those with the status of a client or customer in s.230(3) of the 1996 Act. The effect of her judgment was thus to assimilate the two definitions. Later, in commenting on this approach, Lord Wilson JSC observed that the distinction between the two definitions was one without a difference,[27] and treated Baroness Hale's decision as settled.[28]

*The statutory definition of "worker"*

The Industrial Relations Act 1971 was the first of the post-1945 Acts to give a definition of a "worker". Section 167(1) of the Act states:

> 'worker' means an individual regarded in whichever (if any) of the following capacities is applicable to him . . . as a person who seeks or normally seeks to work –
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> (a) under a contract of employment, or

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[22] Equality Act 2010, s.212(2), read with s.83(1).
[23] [1986] ICR 145.
[24] SDA 1975, s.82(1).
[25] For examples, see *Weaver v Floyd* (1852) 21 LJOB 151, *Ingram v Barnes* (1857) 7 E&B 115, *Pillar v Llynvi Coal & Iron Co Ltd* (1869) LR 4 CP 752, *Marrow v Flimby & Broughto Moor Coal & Fire Brick Co Ltd* [1898] 2 QB 588 and *Squire v Midland Lace Co* [1905] 2 KB 448.
[26] [2014] UKSC 32, at paras. 31 and 32. The core of Lady Hale's reasoning is to be found in paras. 31-39 of her judgement.
[27] In *Pimlico Plumbers v Smith* [2018] ICR 1511, at para. 14.
[28] *Ibid.* at para. 15.

(b) under any other contract (whether express or implied, and, if express, whether oral or in writing) whereby he undertakes to perform personally any work or service for another party to the contract who is not a professional client of his . . .

The 1971 Act was repealed by the Trade Union and Labour Relations Act 1974, which re-enacted some of the 1971 Act's provisions. The definition of "worker" used in the 1971 Act was re-enacted in identical terms in the 1974 Act.[29] When that Act came to be consolidated into the Trade Union and Labour Relations (Consolidation) Act 1992, the definition of "worker" remained substantially the same.[30]

The statutory provisions so far considered relate to what is called "collective labour law", the law relating to the relationship between employers and trade unions.

The significance of the definition in the present context, however, is that it increasingly came to be used as employment protection rights were extended during the 1990's. Some of the legislation extending those rights was passed because of the UK's obligation to implement the provisions of EU Law into the domestic law of the United Kingdom.[31] In other cases, the legislation implemented an election manifesto commitment.[32] Both the Working Time Regulations 1998 and the National Minimum Wage Act 1998, for example, use a very similar definition of "worker" as the definition used in the Industrial Relations Act 1971 (above).[33] The only difference is that, instead of the phrase "who is not a professional client of his", the legislation substitutes the phrase "whose status is not by virtue of the contract that of a client or customer of any professional or business undertaking carried on by the individual". On the face of it, the new definition is wider than the definition in the 1971 Act.

The definition used in the Working Time Regulations and the National Minimum Wage Act is also in the Employment Rights Act 1996, which is a consolidation of the previous enactments relating to individual employment law. It uses the same definition of "worker" as those two measures. Because its provisions will be discussed extensively in the discussion of the relevant case law, it is set out in full here. Section 230(3) states:

> In this Act 'worker' . . . means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
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> (a) a contract of employment, or
>
> (b) 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 . . .

Thus, all employees are workers as they are included in paragraph (a) of the definition. Workers who fall within paragraph (b) are usually called "limb (b) workers" and are referred to as such by the judges. This usage will be followed in the discussion of the case law below.

*A summary of the present position*

It may be helpful to summarise the present position before discussing the case law relating to workers.

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[29] TULRA 1974, s.30(1).
[30] TULR(C)A 1992, s.296(1).
[31] For example, the Working Time Regulations 1998 (SI 1998 No 1833).
[32] For example, the National Minimum Wage Act 1998.
[33] See reg. 2(1) of the WTR and s.54(3) of the NMWA.

Until the 1990's, when employment protection measures increasingly conferred rights on workers, Employment Law protected employees and did not protect the self-employed. The term "worker" was usually confined to legislation dealing with collective labour law, as has been seen. The definition of "employment" in the equality legislation was held to give rights to a wider group than "employees" and thus emerged the notion that in certain circumstances the self-employed might enjoy the protection of legislation.

The consequence of the emergence of the concept of the "worker" has been to complicate the legal position. The position – as far as Employment Law is concerned – is that there are two groups who may enjoy protection depending on the wording of the relevant legislative provisions. The self-employed enjoy no statutory rights when those statutory rights are confined to "employees". They do, however, enjoy statutory rights if the legislative provisions extend to "workers" *and* they fall within the definition. But, not all self-employed persons fall within the definition. As Baroness Hale of Richmond observed in *Bates van Winkelhof v Clyde & Co LLP*:[34]

> [E]mployment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class. Discrimination law, on the other hand, while it includes a contract 'personally to do work' within its definition of employment . . . does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route.

This leads to the anomaly that a person may be self-employed for tax purposes but also given a measure of employment protection. So, far as the tax legislation is concerned,[35] the two categories of persons liable to pay income tax remain employees[36] and the self-employed.[37] Tribunals called upon to decide into which category a taxpayer falls apply the same tests to determine their status as those applied by employment tribunals when deciding whether someone is an employee.[38] The consequence of the emergence of the "worker" concept is that a person may be classified as self-employed for tax purposes, but as a worker for statutory Employment Law purposes. This is hardly conducive to clarity.

## The pre-*Uber* case law

*Introduction*

A useful starting point for a discussion of the case law is the judgment of Aikens LJ in *Autoklenz v Belcher*.[39] The judge said this:

> The second 'sub-group' of 'worker' is a person who fulfils the requirements set out in para. (b) of s.230(3) of the ERA. . . There are three requirements. Two are positive and one is negative. First, the worker has to be an individual who has entered into or works under a contract with another party for work or services. . . The second requirement . . . is that the individual undertakes to do or perform personally the work or services for the other party. If . . . the parties have agreed a contractual term whereby the individual can sub-contract performance of the work or services to another person, then the individual will not have undertaken to perform the work or services personally and so will not be within the definition of 'worker' set out in para. (b). The third requirement relates to the status of the

[34] [2014] UKSC 32, at para. 31.
[35] And other legislation, for example the Social Security legislation.
[36] See Income Tax (Earnings and Pensions) Act 2003, s. 4. Employees previously paid tax under what was called Schedule E.
[37] See Income Tax (Trading and Other Income) Act 2005, s. 5. The self-employed previously paid tax under what was called Schedule D.
[38] See *Hall v Lorimer* [1992] ICR 739, *per* Mummery J (as he then was), at p. 743.
[39] [2010] IRLR 70, at paras. 75-77.

> other party to the contract. That other party must not, by virtue of the contract, have the status of a client or customer of any profession or business undertaking carried on by the individual who is to perform the work or services. No further explanation of what is meant by a client or customer of a profession or business undertaking is given, but, in most cases at least, it is easy enough to recognise someone who has this status. It includes, for example, the solicitor or accountant's client or a customer who seeks and obtains services of a business undertaking such as from an insurance broker or pension's adviser.

Before considering the decision in *Uber*, it will be convenient to look at decisions dealing with the second and third requirements. In *Uber* itself it was the first requirement that was considered by the Supreme Court. Uber conceded that the other two requirements were met.[40]

*The requirement to perform the work or services personally*

As Lord Wilson observed in the *Pimlico Plumbers* case,[41] "an obligation of personal performance is also a necessary constituent of a contract of service." He went on to observe that decisions in that field "can legitimately be mined for guidance as to what, more precisely, personal performance means in the case of a limb (b) worker."[42]

If one looks at those decisions, it is possible to see some of the boundaries between the obligation to provide personal service and the right to substitute. So, for example, in *Express & Echo Publications Ltd v Tanton*,[43] the Court of Appeal held that a term of the contract which provided that "in the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the service" defeated a claim to be an employee. On the other hand, in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*,[44] MacKenna J observed that an occasional or limited power of delegation might not be inconsistent with a contract of employment. In *Pimlico Plumbers* itself, Mr Smith was given a contract in 2009. The contract referred to a manual which was incorporated into his contract.[45] Lord Wilson examined the provisions of the two documents and concluded that the only right of substitution was of another Pimlico operative. In doing so, he upheld the Employment Tribunal judge's conclusion that there was no unfettered right to substitute at will.[46] He then went on to say:[47]

> [T]here are cases, of which the present is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part.

He went through the terms of the 2009 contract and concluded that the tribunal was entitled to decide that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance.[48]

*Customer or client?*

Lord Wilson JSC said of this part of the definition in the *Pimlico Plumbers* case:[49] "It is unusual for the law to define a category of people by reference to a negative – in this case to another person's lack of a

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[40] [2021] UKSC 5, at para. 42.
[41] *Pimlico Plumbers v Smith* [2018] ICR 1511, at para. 20.
[42] Ibid.
[43] [1999] ICR 693.
[44] [1968] 2 QB 497, 515.
[45] *Pimlico Plumbers v Smith* [2018] ICR 1511, at para. 19.
[46] *Ibid*. at para. 25.
[47] *Ibid*. at para. 32.
[48] *Ibid*. at para. 34.
[49] *Pimlico Plumbers v Smith* [2018] ICR 1511, at para. 35.

particular status." He quoted the view of the judge in *Bryne Bros (Formwork) Ltd v Baird*[50] - that the requirement that the other party to the contract should be neither a client nor a customer was clumsily worded – and said: "It is hard to disagree."[51]

The third part of the definition was considered by the Court of Appeal, in *Hospital Medical Group Ltd v Westwood*.[52] The case involved a general practitioner who contracted to provide hair restoration services to HMG. The contract described him as a self-employed independent contractor and was expressed to be a contract for services. He engaged to provide his services personally and supplied his own professional indemnity insurance. Dr Westwood claimed to be a worker, *inter alia*. The Court of Appeal upheld his claim and held that HMG did not have the status of a client in relation to him. The Court considered earlier decisions of the Employment Appeal Tribunal, in which the EAT had considered this issue.[53] In *Cotswold Developments Construction Ltd v Williams,*[54] *Langstaff J said:*

> [I]t seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.

In relation to this observation, Maurice Kay LJ said:[55]

> I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his "integration" test will often be appropriate, as it is here.

The judge agreed that Dr Westwood was an integral part of HMG's business and so a worker in relation to it.[56]

## The *Uber* case

The basic issue in the case was set out by Lord Leggatt at the start of his opinion:[57]

> The central question on this appeal is whether an employment tribunal was entitled to find that drivers whose work is arranged through Uber's smartphone application ('the Uber app') work for Uber under workers' contracts and so qualify for the national minimum wage, paid annual leave and other workers' rights; or whether, as Uber contends, the drivers do not have these rights because they work for themselves as independent contractors, performing services under contracts made with passengers through Uber as their booking agent.

Therefore, the first requirement of ERA 1996, s.230(3) was engaged here. As a preliminary to examining this issue, it is important to examine the contractual provisions which were involved. There were two groups of provisions: those relating to use of the app by the drivers and those relating to the use of the app by potential passengers.

*The contractual provisions*

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[50] [2002] ICR 667, at para. 16.
[51] *Loc. cit.* at para. 35.
[52] [2013] ICR 415.
[53] *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 and *James v Redcats (Brands) Ltd* [2007] ICR 1006.
[54] *Loc. cit.* at para. 53.
[55] *Loc. cit.* at 427.
**[56]** See also *Suhail v Barking Havering & Redbridge University Hospitals NHS Trust* (2015) UKEAT/0536/13 and *Gunny v Great Ormond Street Hospital for Children NHS Foundation Trust* (2018) UKEAT/0241/17.
[57] [2021] UKSC 5, at para. 1. His opinion was the opinion of the entire Court.

Before using the app for the first time drivers were required to sign a 'partner registration form'. The nature of the agreement was that Uber BV (the holding company[58]) agree to provide electronic services to the driver. These included access to the Uber app and payment services. The effect of Clause 2.3 of this agreement was expressed to be that when the driver (called in the agreement "Customer") accepted a request from a potential passenger (called "User"), the driver was responsible for providing transportation services to the passenger and "creates a legal and direct business relationship between Customer and the User, to which neither Uber nor any of its affiliates . . . is a party". Clause 4.1 of the Agreement provided that the drivers appointed Uber BV as their "limited agent for the purpose of accepting the Fare . . . on behalf of the Customer" and agree that "payment made by User to Uber BV shall be considered as payment made directly by User to Customer."

So far as potential passengers are concerned, they are required to accept written terms and conditions, called the "Rider Terms". Clause 3 of these terms states as follows:

> Uber UK accepts PHV Bookings acting as disclosed agent for the Transportation Provider (as principal). Such acceptance by Uber UK as agent for the Transportation Provider gives rise to a contract for the provision to you of transportation services between you and the Transportation Provider (the 'Transportation Contract'). For the avoidance of doubt: Uber UK does not itself provide transportation services, and is not a Transportation Provider. Uber UK acts as intermediary between you and the Transportation Provider. You acknowledge and agree that the provision to you of transportation services by the Transportation Provider is pursuant to the Transportation Contract and that Uber UK accepts your booking as agent for the Transportation Provider, but is not a party to that contract.

It is clear that the intended effect of the agreement between (i) Uber BV and the drivers and (ii) Uber BV and potential passengers was to provide for a contract to come into existence between the driver and the passenger, as would be the case if the driver were, for example, a driver of a "black cab". If this effect were held to be achieved then the first requirement of ERA, s.230(3) would not be complied with and the argument that a driver was a worker within its provisions would fail.

The crux of Uber's argument was that Uber London (the subsidiary licensed to operate private hire vehicles in London) acted as an agent for drivers when accepting private hire bookings. This argument was rejected by the Supreme Court. As has been seen, the "Rider Terms" stated that Uber London accepted private hire bookings as agent for the driver and that such acceptance gave rise to a contract between the passenger and the driver. Lord Leggatt, giving the opinion of the Court, said:[59]

> It is, however, trite law that a person (A) cannot create a contract between another person (B) and a third party merely by claiming or purporting to do so but only if A is (actually or ostensibly) authorised by B to act as B's agent.

He went on:[60]

> In accordance with basic principles of contract and agency law, therefore, nothing stated in the Rider Terms is capable of conferring authority on Uber London to act as agent for any driver (or other "Transportation Provider") nor of giving rise to a contract between a rider and a driver for the provision to the rider of transportation services by the driver.

This led him to the conclusion that, by accepting a booking, Uber London contracted as principal with the passenger to carry out that booking and, therefore, that it would have no means of performing its contractual obligations to passengers or of obtaining compliance with its regulatory obligations as a licensed operator under the Private Hire Vehicles (London) Act 1988 without either employees or sub-

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[58] One of the holding company's subsidiaries is Uber London Ltd, which is licensed to operate private hire services in London. Another subsidiary, Uber Britannia Ltd, holds licenses to operate private hire vehicles outside London.
[59] [20321] UKSC 5, at para. 50.
[60] Ibid. at para. 51.

contractors to perform driving services for it.[61] In other words, to operate its business Uber London needed to enter into contracts with drivers to provide services.

Although that conclusion would have been sufficient to dispose of the appeal, Lord Leggatt went on to deal with Uber's arguments relating to the basis for dealing with the question whether an individual is a "worker" within the legislation. This involved a consideration of the Supreme Court's previous decision in *Autoklenz Ltd v Belcher*.[62]

*Autoklenz Ltd v Belcher*

In that case, the sole judgment was given by Lord Clarke of Stoke-cum-Ebony. It is not necessary to set out the facts of the case here, but Lord Clarke concluded his discussion of the approach to dealing with cases involving those claiming to be workers by saying:

> So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.[63]

Applying that approach, he concluded that the employment tribunal was entitled to decide that the contractual documents did not reflect the true agreement between the parties and that it was entitled to conclude that they were workers. Lord Leggatt pointed out that the theoretical justification for this approach was not fully spelt out in Lord Clarke's judgement and went on to say:[64]

> Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a 'worker' in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

He went on to set out the modern approach to statutory interpretation as being "to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to its purpose".[65] From this starting point, he went on to consider two issues: (i) the purpose of protecting workers; and (ii) restrictions on contracting out of the statutory provisions.

*The purpose of protecting workers*

He took as his starting-point the observations of Mr Recorder Underhill QC (as he then was) in *Byrne Bros (Formwork) Ltd v Baird*:[66]

> [T]he policy behind the inclusion of limb (b) ... can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* . . . The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one

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[61] Ibid. at para. 56.
[62] [2011] UKSC 41.
[63] *Loc. cit.* at para. 35.
[64] *Loc. cit.* at para. 69.
[65] *Loc. cit.* at para. 70.
[66] [2002] ICR 667, at para. 17.

> hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

In view of the fact that the Working Time Regulations 1998 implemented Directive 93/104/EC on working time, he went on to consider the approach of the European Court of Justice to the question of whether someone is a worker. In *Allonby v Accrington and Rossendale College*,[67] which considered the meaning of worker in the context of the EC Treaty provisions relating to equal pay for equal work,[68] the Court said:[69]

> there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration."

The court added[70] that the authors of the Treaty clearly did not intend that the term "worker" should include "independent providers of services who are not in a relationship of subordination with the person who receives the services".[71]

In later cases in which the Court was specifically concerned with the meaning of the term "worker" in the context of the Working Time Directive, it identified the essential feature of the relationship between employer and worker in the same terms as in the *Allonby* case.[72] In the most recent case, *Syndicatul Familia Constanta v Directia Generala de Asistenta Sociala siProtectia Copilului Constanta,*[73] the Court of Justice said: "[i]t follows that an employment relationship [i.e. between employer and worker] implies the existence of a hierarchical relationship between the worker and his employer." The Supreme Court followed this approach in *Hashwani v Jivraj*.[74] It held that an arbitrator was not a person employed under "a contract personally to do any work" for the purposes of the relevant provisions of the discrimination legislation and so not a worker for the purpose of provisions which expressly refer to workers.

This analysis led Lord Leggatt to the conclusion that "it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'." He went on:[75]

> To do so would reinstate the mischief which the legislation was enacted to prevent. 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 need for statutory protection in the first place. . . In these circumstances to treat the way in which the relationships between Uber, drivers and passengers are characterised by the terms of the Services Agreement as the starting point in classifying the parties' relationship, and as conclusive if the facts are consistent with more than one possible legal classification, would in effect be to accord Uber power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers.

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[67] Case C-256/01, [2004] ICR 1328.
[68] At that time, Article 141.
[69] *Loc. cit.*, at para. 67.
[70] *Loc. cit.*, at para. 68.
[71] For a fuller discussion of this issue in the context of EU private law, see Upex and Cavalier, "The Concept of the Employment Contract in European Union Private Law" (2006) 55 ICLQ 587.
[72] These cases are referred by Lord Leggatt in para. 72 of his opinion.
[73] Case C-147/17), [2019] ICR 211, at para. 41.
[74] [2011] UKSC 40. See also Baroness Hale in *Bates van Winkelhof v Clyde & Co* [2014] UKSC 3e2, at para. 39.
[75] *Loc. cit.* at paras. 76 and 77.

*Restrictions on contracting out*

Lord Leggatt continued by saying that the purposive approach under discussion was further justified by the fact that statutes or regulations which confer rights on workers contain restrictions on contracting out. He cited as an example s.203(1) of the Employment Rights Act 1996, which provides a paradigm of the sort of wording which is usually found.[76] It states:

> Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports –
>
> (a) to exclude or limit the operation of any provision of this Act, or
>
> (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.

Referring to the provisions contained in the Services Agreement considered earlier (clauses 2.3 and 2.4), he pointed out that the effect of those provisions was to exclude or limit the operation of the relevant statutory provisions and, therefore, that they were void.[77]

This approach to the issue is notable for the fact that the judge expressly refers to and relies upon the contracting out provisions contained in the relevant legislation. There are few previous cases that have done so.

## Conclusions

The main question raised by the *Uber* case is this: what effect is it likely to have on the rights of workers in the gig economy?

The first point to make is that, in the light of the Supreme Court's approach to the question, the wording of individual contracts will be of less importance. The task for a court or tribunal will be to decide whether the status of an individual is that of a worker. This will inevitably proceed on a case-by-case basis since the facts of one case are not replicated in another. The significant feature of the *Uber* case is the (unsuccessful) attempt by Uber to create a contractual relationship between the drivers and the passengers. Part of the reason for the failure of its appeal to the Supreme Court was the fact that the sector involved is subject to a regulatory regime which, as Lord Leggatt observed, necessitates a contractual relationship between the entity operating the app (Uber BV) and those wishing to avail themselves of its services – in this case the drivers and passengers. Different considerations will arise where the providers of the app operate in a different set of circumstances.[78] In all cases, it will be a question whether the reality of the situation is that the individual is a worker. Matters such as contractual terms will be one of the factors to be taken into account.

An example of this point is recent litigation involving Deliveroo. The litigation does not involve the rights that were in issue in the *Uber* case; it involves collective bargaining rights and, therefore, a different litigation route.[79] Nevertheless, the status of Deliveroo drivers, known by Deliveroo as

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[76] See also the National Minimum Wage Act, s. 49(1) and the Working Time Regulations 1998, reg. 35(1).
[77] *Loc. cit.* at para. 82.
[78] In cases at ET/EAT level involving City Sprint, Hermes and Addison Lee bicycle couriers, delivery drivers and private hire firm tax drivers, respectively, have been held to be workers. See *Dewhurst v CitySprint UK Ltd* ET/2202512/2016, *Leyland v Hermes Parcelnet Ltd* (ET) and *Addison Lee Ltd v Lange* [2018] UKEAT 0037/18/1411.
[79] The case involved an application to the Central Arbitration Committee by the Independent Workers' Union of Great Britain that it should be recognised for collective bargaining purposes by Deliveroo. The CAC rejected the application and the Union applied for judicial review of that decision: see *R, ex parte Independent Workers' Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo* [2018] EWHC 3342 (Admin). Supperstone J rejected the application. The case was heard on appeal by the Court of Appeal early in 2021 and on 24 June 2001, the Court of Appeal dismissed the Appeal, finding that the CAC was entitled to

"Riders" is a relevant issue. The applicable legislation is the Trade Union and Labour Relations (Consolidation) Act 1992, and "worker" is defined in the same terms as in ERA 1996, s.230(3).[80] The relevant contractual provisions were contained in a contract headed "Supplier Agreement", clause 8 of which gave Riders the right to appoint substitutes. Clause 2(3) also made clear that Riders could work for other parties, including competitors of Deliveroo. The CAC accepted that the substitution right was genuine and that in practice a few Riders did exercise their right to appoint substitutes. That led to their conclusion that the Riders were genuinely self-employed and, therefore, not workers. This conclusion was upheld by Supperstone J.

As can be seen, the decision that Deliveroo Riders were not workers related to a different issue to that raised in the *Uber* case. Deliveroo did not dispute that there was a contract between them and the Riders. Their contention was that the contract was not a contract "whereby the individual undertakes to do or perform personally any work or service", a point which was not in issue in the *Uber* case. At the time of writing, the Court of Appeal's decision had yet to be delivered. Whatever the outcome, however, it is likely to shed little, if any, additional light, simply because of the different contractual provisions applicable to Deliveroo Riders. It also sheds no light on the contractual relationship between consumers and Deliveroo, since that was not in issue in the proceedings.

Although it would be premature to exult over the Supreme Court's decision in the *Uber* case – and certainly premature to claim that all gig economy workers have the status of Limb (b) workers, it is possible to make a number of points with a reasonable degree of certainty. First, as has been pointed out, the contractual provisions applicable to the individual will be of relevance, but will only be a factor in the equation. Second, a court or tribunal will look carefully at how in practice the individual has performed the contract and whether, for example, there has been delegation of the work. Third, bearing in mind that the issue of whether a person is a worker is a matter of statutory interpretation, those drafting contracts for organisations involved in the gig economy will need to be alert to the risk that the court or tribunal will follow the Supreme Court's approach in *Uber* and declare the provision to be one which has the effect excluding or limiting the operation of the relevant legislation and is, therefore, void.

So, the question is: where next? It will be recalled that in 2017 the Taylor Report appeared.[81] Section 5 deals with what it calls "Clarity in the Law". In examining the present state of the law it comments on the fact that agreeing on the correct status for individuals, particularly those involved in various types of casual work, depends on the individual facts of each case. It points out that the courts have tried to provide clarity by introducing tests or factors but goes on to say: ". . .the relevance and weight given to these varies depending on the circumstances; without an encyclopaedic knowledge of case law, understanding how this might apply to your [sic] situation is almost impossible".[82] This leads it to two conclusions in relation to this matter.

First, it concludes that the Government "should replace the minimalistic approach to legislation with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail."[83] Second, it proposes that the current three-tier approach to employment status should be retained, but that those who are eligible for worker rights but who are not employees should be renamed 'dependent contractors'.[84] Although it rejects arguments that this approach should be aligned to the binary choice used in the tax system,[85] it goes on to suggest that in developing the new 'dependent contractor' test attempts should be made "to

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conclude that the riders were not workers and thereby not entitled to join a trade union as covered by Article 11 of the Convention.

[80] By s.296(1).

[81] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_date/file/62761/good-work-taylor-review-modern-working-practice-rg.pdf.

[82] Ibid. at 33.

[83] Ibid.

[84] Ibid. at 33.

[85] Ibid.

align the employment law status framework with the tax status framework. This is to ensure that differences between the two systems are reduced to an absolute minimum".[86] It leaves vague the methods by which this might be achieved. The Government's response in 2018 broadly accepted these recommendations.[87] In addition, in 2020, some relatively minor changes were made to the legislation.[88]

At first sight, the argument that the determination of status should be left to primary and secondary legislation is attractive. Bearing in mind, however, that employment protection legislation going back over 100 years has not attempted to go into detailed definitions, and has been content to leave the question of status to the courts, there is no reason to suppose that secondary legislation would be any better at addressing the issues than the courts. If anything, it would lack the suppleness that enables the courts and tribunals to consider the facts of individual cases. Equally, although there is a superficial attraction in the argument that there should be a three-tiered approach to employment status, the Taylor report is light on detail as to how an alignment between tax law and employment law frameworks might be achieved if a three-tiered approach is retained.

At the end of the day, it would be better to bite the bullet and accept that there should be two categories of employment status, but go on to define the status of 'employee' in such a way as to include 'dependent workers'. In other words, if one accepts that 'dependent workers' need protection, the logical corollary of that is to accept that their status should be aligned with employees. That would leave two statuses: 'workers' and 'self-employed', a framework which could be equally applied to tax law. It would require relatively little legislative effort to achieve such a change. A binary definition would not, however, remove the hard cases that crop up. Nor would it resolve the problems caused by employments with an irregular work pattern. But then no construct, however perfect, is capable of addressing all the vagaries inherent in the patterns of working life in the context of the demands of a modern economy.

[86] Ibid. at p. 38.
[87] https://www.gov.uk/government/publications/government-response-to-the-taylor-review-of-modern-working-practices
[88] The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (SI 2020 No. 1378, w.e.f. 6 April 2020.