

UK - What next for alternative employment models?

Overview

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Introduction

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A network of independent contractors, as established by Uber, is one example of an alternative employment model being adopted by employers. Other examples include the use of agency workers, zero-hours contracts, short-term contracts and increased flexible working.

Uber has announced that it will appeal the decision. Whatever the outcome, it is worth noting that the Tribunal did not consider that anything in its reasoning meant that Uber could not have a business model in which it did not employ drivers, but considered that its chosen model does not currently achieve this aim.

As the decision shows, achieving a balance between flexibility, autonomy, and financial risk (indicative of an independent contractor relationship) and maintaining control over working practices and requiring personal service (indicative of a worker or employment relationship) is difficult to strike.

Contents

Overview	1
Introduction	1
Aslam and Others v Uber BV and others	2
Top takeaways from the Employment Tribunal decision	2
The employment model should reflect the reality of the business operation	2
Written documentation must reflect the reality of the relationship	3
Flexibility alone is not sufficient to establish independent contractor status	3
Nature of the contractual relationship is relevant ..	3
Government Inquiry into the Future of the World of Work	3

Employers may wish to consider whether aspects of their own employment models are fit for purpose or expose them to risk.

Aslam and Others v Uber BV and others

Uber operates an App through which passengers can book journeys by car in return for a fare. Drivers also log on to the App when they are available to work and are offered journeys based on their proximity to passengers making requests, which they can accept or reject.

Under the business model that Uber operates, drivers are engaged as independent contractors operating their own businesses. In this case, the drivers claimed that they are workers, not independent contractors, and therefore entitled to the national minimum wage and holiday pay, which they claim not to have received. At a preliminary hearing the Employment Tribunal found the individuals to be workers.

Top takeaways from the Employment Tribunal decision

The Tribunal gave a number of detailed reasons for its conclusion. We consider the key points below.

The employment model should reflect the reality of the business operation

It was central to Uber's arguments in the Tribunal that it works as agent for the drivers. It maintained that it is not a transportation business but a technology company which connects providers of "Driving Services" to passengers through its App. However, the Tribunal found from looking at the practical details of the relationship between Uber and its drivers that Uber does not work 'for' the drivers but the other way round. It referred to a number of factors relevant to this analysis, most of which suggest that Uber has a degree of control over the drivers that is more indicative of a worker relationship than one of independent contractors. These include;

- Control of key information about passengers by Uber which drivers are excluded from;
- The fact that drivers who refuse consecutive trips or cancel trips they have accepted are penalised by being temporarily logged out of the App;
- Setting of a default route by Uber. Drivers may suffer negative consequences if they depart from it;
- Drivers being precluded from agreeing higher fares with passengers;
- The rating system (under which customers rate Uber drivers and under which they have to maintain a minimum rating to be able to continue logging onto the App) being a form of performance management;
- Uber, rather than the drivers, accepting the risk of loss in the case of fraud or when a car is soiled;

- The fact that Uber handles complaints from passengers and offers refunds, sometimes without referring these to the drivers whose remuneration is impacted.

Written documentation must reflect the reality of the relationship

The written agreements between Uber and its drivers suggest that the drivers are operating as independent companies providing “Driving Services” through their “Drivers”. Uber’s passenger terms and conditions state that Uber is not a ‘Transportation Provider’ but an agent for ‘Transportation Providers’ (i.e. drivers) and that passengers are entering into a contract with the driver directly in relation to the provision of that service. The Tribunal noted that it was accepted by both the drivers in the case and Uber that, despite what was set out in the agreements, the vast majority of Uber drivers are sole operators and not small businesses. It went on to find that in practice passengers do not agree terms with individual drivers. It therefore found that Uber could not rely on its documentation to support its case.

Flexibility alone is not sufficient to establish independent contractor status

Uber emphasised that drivers are never under any obligation to switch on the App or, when logged on, to accept any journey offered to them. It argued that such freedom was incompatible with any form of employment. However, the Tribunal found that a worker relationship can still exist once a driver has logged on to the App, is in the territory in which he is authorised to work, and is able and willing to accept assignments.

Nature of the contractual relationship is relevant

The Employment Tribunal found that the contracts between Uber and its drivers were not contracts at arm’s length between two independent business undertakings. The relationship was one akin to a dependent work relationship. Further, the drivers did not market themselves to the world in general in the provision of their “Driving Services” but were recruited by Uber to work as integral components of its organisation. These principles were derived from case law and complimented the statutory definition of a worker.

Government Inquiry into the Future of the World of Work

BEIS has launched an inquiry focussed on the ‘rapidly changing nature of work’, including the status and rights of agency workers, the self-employed and those working in the ‘gig’ economy. Its aim is to foster “an economy with laws that deliver the benefits of flexibility but which prevent exploitation”. You can read more [here](#). The deadline for written submissions is 19 December 2016 with evidence sessions in the New Year.

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