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Worker status and the Gig Economy

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The significance of status

The law provides for different rights depending on status, for example:

- *Workers:*
 - Rights under the Working Time Regulations
 - Protection under the Equality Act
 - Protection against whistleblowing detriment

- *Employees:* In addition to the rights enjoyed by workers
 - Right to claim unfair dismissal
 - Maternity leave and pay
 - Right to request flexible working

Status: *The Statutory Test*

S.230 Employment Rights Act 1996

- (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
 - (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...

S.83(2) Equality Act 2010

“Employment” means—

- (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
- (b) ...

Critical issues in recent cases

- What is the reality of the relationship between the parties?
- The issue of Mutuality of Obligation
- The Right of Substitution

These issues are best analysed through the prism of recent cases, including *Uber* and *Windle*

Key Case Citations

First Instance Cases:

- *Aslam v Uber* ET2202550/2015; [2017] IRLR 4
- *Dewhurst v CitySprint* ET2202512/2016

Appellate Cases:

- *Autoclenz v Belcher* [2011] UKSC 41
- *Pimlico Plumbers v Smith* [2017] EWCA Civ 51; [2017] IRLR 323
- *Windle v Secretary of State for Justice* [2016] ICR 721
- *Capita Translation & Interpreting v Siauciunas* UKEAT/0181/16

Armies of Lawyers

- Autoclenz
- Contracts which define reality or conceal it

Autoclenz: purposive approach

- Court of Appeal, per Lady Smith para 69:

“it matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee. ...even where the arrangement has been allowed to continue for many years without question on either side, once the courts are asked to determine the question of status, they must do so on the basis of the true legal position, regardless of what the parties had been content to accept over the years. In short I do not think that an employee should be estopped from contending that he is an employee merely because he has been content to accept self-employed status for some years.

- Supreme Court, per Lord Clarke para 35:

“the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represented what was agreed and the true agreement will often have to be gleaned from all the circumstances... This may be described as a purposive approach..”

The Parties' Relationship

What is the reality of the relationship between the parties?

- *CitySprint*: recruitment process, methods of pay was a payslip in all but name, tools and insurance provided by company, disciplinary process and control over working patterns
- *Pimlico Plumbers*: despite express term that there was no obligation to provide/perform work, in reality, there was an obligation on plumber to do 40 hours a week [109-112]
- Faintly ridiculous to suggest that *Uber* is a mosaic of 30,000 small businesses [90] and the 'reality' as set out at [91]

Mutuality of Obligation

The issue of Mutuality of Obligation and its significance between contracts

- *Windle*: the absence of mutuality of obligation outside the period of work could shed light on the character of the relationship during the period of work; supplying services on a job-by-job basis indicated a degree of independence incompatible with worker status
- *Capita*: essential that the tribunal considers mutuality of obligation in considering status

Right of Substitution

The need for and the significance of personal service

- *Uber*: no question of substitution – access to the App is personal to the driver and non-transferable
- *CitySprint*: the substitution clause was “contorted and self-destructive”, no substitution in practice, for medical deliveries substitution was not permissible

Right of Substitution – Pimlico Plumbers

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- Applicable principles summarised at para 84
 - i. An unfettered right is inconsistent with undertaking of personal service
 - ii. A conditional right may or may not be consistent
 - iii. A restricted right to substitute, e.g. only when the principal is ill, is very likely to be consistent with personal performance
 - iv. A right to substitute, subject only to requirement to demonstrate the substitute's qualifications, is inconsistent with personal performance
 - v. A right to substitute only with consent of employer is consistent with personal performance
- Here, there was a requirement to provide personal service full-time, with limited right to substitute and highly restrictive PTRs

Pimlico Plumbers cont'd

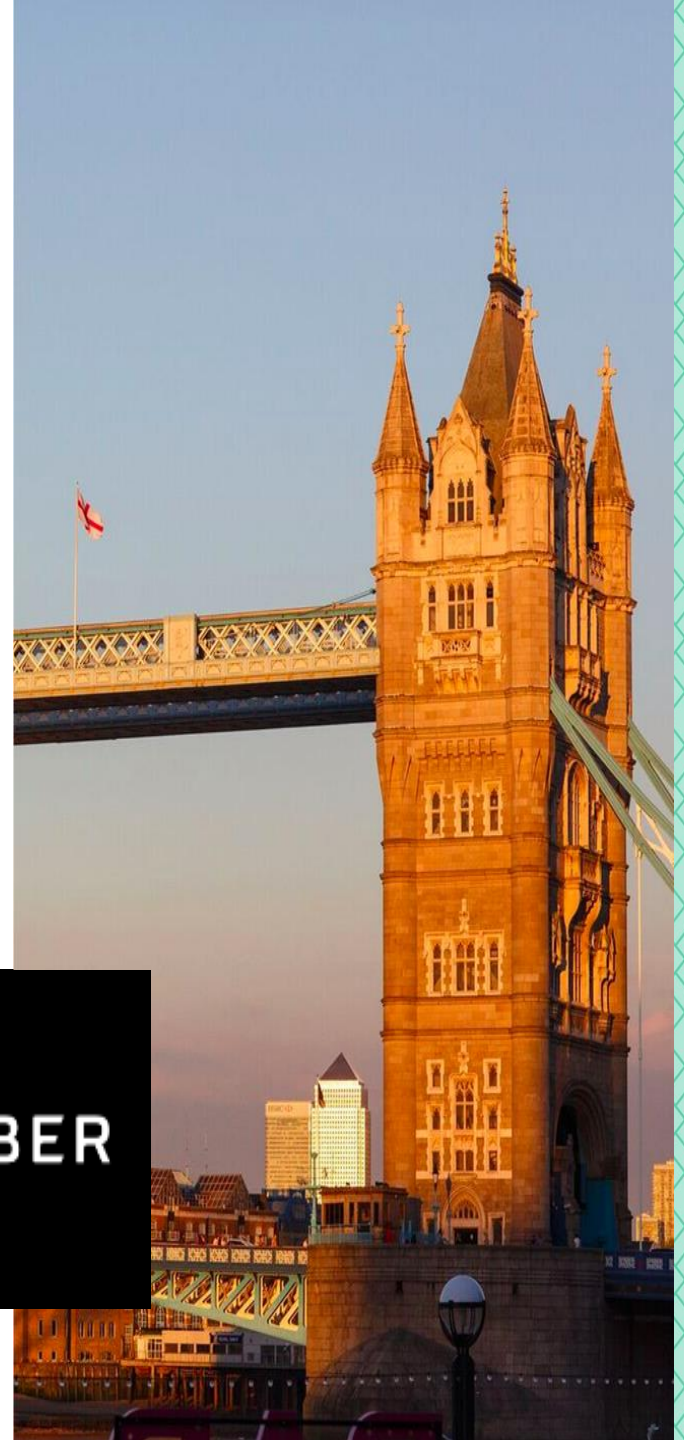
- Significant limitations on the right of substitution
 - The contract did not expressly provide a right of substitution
 - CA rejected submission that this could be read into the contractual wording “You shall provide services”
 - In practice, PP engineers swapped with each other, rather than with external plumbers
 - There was no scope for an implied term conferring an unfettered contractual right to substitute

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In-House at Uber

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20 September 2017



What is Uber?

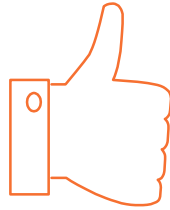
- **How it works**
 - Nothing new
 - Intermediary - *Get a ride at the touch of a button*
 - Flexible - no shifts, no requirement to log on at any time in any place, or to take trips
- **Drivers & Riders** - commonality of interests - *fluidity*
 - Drivers - (i) Immediate access to a pool of potential customers (ii) Benefitting from Uber's services and efficiencies
 - Riders - Quick, safe, affordable, reliable ride

The app has to be a positive experience for people to keep making the choice - efficiency, earnings, treatment, freedom and flexibility

Tribunal

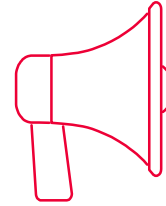
- **The claim**: a recap
- **EAT Appeal** - 27 & 28 September
 - Mutuality of obligation
 - Agency principles
 - Reliance on regulatory requirements
 - Working time
- **Wider context** - other claims, gvt enquiries, public perception

What are we working on? - Drivers



Trust

- Mythbusting for drivers
- Public perception
- Extensive press coverage



Giving Partners a Voice

- Voice for drivers - hundreds of roundtables and engagement initiative as well as the quality of communications
- Driver Appeals Panel

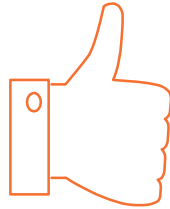


The Experience

Advising on products/features to improve Uber for drivers

- Tipping
- IPSE
- Auto-offline
- No Thanks button
- Rating changes
- POOL/Cash info up front
- Driver preferences
- Support on when & where
- Portable ratings & Compliments

What else are we working on?



Employees and Culture - UK

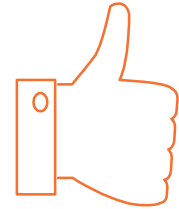
- US headlines
- Initiatives for employees
- Pension scheme
- Diversity and inclusion
- Gender pay reporting
- Extended family friendly benefits



UberEATS

2017 launch of UberEATS
and expansion across the
UK

- 3 cities launch in March 2017
- Now 24 cities
- Approx 185k orders per week



Future of Work

- Supporting the policy teams on future of work consultations
- Promoting the choice of independent work, 2 way flexibility and freedom of choice - a worker model threatens this

Thank you.

Any questions?

