The Uber Test Case: the ride ahead for the insurance industry

by

Jeff Heasman MABP, PGCert CELTA, LL.B (Hons), LL.M

Certified Practitioner Member of the Academy of Modern Applied Psychology

Member of the Association for Business Psychology

linkedin.com/in/jeffheasman

Learning objectives

By the end of this session, participants will be able to:

- understand the main principles decided by the Supreme Court in the Uber test case.
- recognise the implications that the judgment will have on the "gig economy" and the way we work.
- implement a strategy around how the judgment of the Supreme Court will impact underwriting decisions going forward.

The scale of the "gig economy"

- A labour market of short-term or freelance work. Traditionally treated as independent contractors.
- Prevalence of a "false gig economy" is becoming a socio-economic concern.
- 4.7 million workers.
- 1 in 10 adults of working age earn through platforms related to the "gig economy".
- The key challenges in legal terms relate to minimum pay, working hours and holiday pay.
- Is this likely to have changed during the current socio-economic conditions?

Our legal system in context

- The common law system and interpretation of statute.
- The good, the bad and the sometimes ugly.
- A judge´s own sense of justice?
- An era of distributive justice?
- Allocation of risk based on control, profit and freedom.
- Control = imposition of duties (though each case turns on its facts).

Employment Rights Act 1996

- A worker is defined in section 230(3)(b) as someone who doesn´t have a contract of employment and works under:

  "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."

Aslam & Farrar v Uber BV [2021] UKSC 5

- Uber contended drivers were "independent contractors". If there was a principal/agent relationship, then Uber was the agent and the drivers were the principal.
- In essence, the Employment Appeal Tribunal, the Court of Appeal and now the Supreme Court, have ruled that the drivers are "workers" and fall within the definition of section 230(3)(b).
- The key is the reasoning behind this.
- Warning: don´t try to draft contracts around laws! The objective evidence is the key!

1) Control over remuneration

- Fixed by Uber.
- A “notional freedom” to charge less.
- Service fee to Uber is non-negotiable.
- Full or partial refund is at the “sole discretion” of Uber.

2) Contractual terms

- “Dictated” by Uber.
- The terms on which passengers are transported are “dictated” by Uber.
- Think about the negotiation process. What freedom is there to negotiate?

3) Freedom to choose work

- Whilst drivers could choose when and where (within their licence area) the freedom was restricted once logged in.
- Control of work:
  - only know rating of passenger
  - don´t even know the destination until pick-up
  - penalties for not accepting jobs (rate of acceptance monitored)
- How is information restricted in a relationship?
- Can work be declined without “penalty”?

4) Delivery of service

- Uber exercises a “significant degree of control over the way in which drivers deliver their services”.
- Cars are vetted.
- Technology is used as a way to control the driver:
  - Uber suggests routes and the driver may deviate but the driver faces the financial risk if the customer complains.
- The rating system is used to penalise and is not solely for customer information (“subordination”).

5) Restricting communication with the end customer

- Communication is restricted. Uber handles:
  - collection of fares
  - payments to drivers
  - handling of complaints
  - refunds
- If service level agreements are in place. What do these say and what is the reality?

The guiding principles behind the judgment

- Subordination.
- Vulnerability (economic, social and psychological).
- The only way to earn more is to work harder under Uber´s terms.
- A comparison with other platforms (holiday booking platforms): not standardised services, they choose the prices, service levels determined by property and ratings are for customer information.
- Don´t try to be clever with the way documents are drafted:

"It is unlikely that many drivers ever read these terms or, even if they did, understood their intended legal significance. In any case there was no practical possibility of negotiating any different terms."

- paragraph 77

"… there is no legal presumption that a contractual document contains the whole of the parties´ agreement and no absolute rule that terms set out in a contractual document represent the parties´ true agreement just because an individual has signed it … [and] any terms 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."

- paragraph 85

"The question…is not whether the system of control operated by Uber is in its commercial interests, but whether it places drivers in a position of subordination to Uber. It plainly does."

- paragraph 97

Vicarious liability

- When combined with the two decisions of the Supreme Court from April 2020, the scope widens even further:
- *Various Claimants v WM Morrisons* [2020] UKSC 12
  - Purporting to be acting on behalf of the employer / issuing orders.
  - Furthering the business of the "employer". Motive.
  - Doesn´t have to be on the premises.
  - In the Uber case the Supreme Court decided that the drivers were working when they "logged in". How does this extent "in the course of employment"?
- *Various Claimants v Barclays Bank* [2020] UKSC 13
  - Specific reference was made to the "gig economy".
  - Criteria must be considered as at the time of the litigation.

- It is an objective test. In this case, the court looked at:
  - Retainer (in this case paid per job).
  - Other part time employment (yes, with the NHS)
  - Freedom to refuse work (yes).
  - Own insurance (yes).
  - Portfolio of other patients/clients (yes).
  - "Yes, the bank set the questions and made arrangements but much would be the same for their window cleaners and "auditors".
- If the other person has their own insurance this can be a significant factor in assessing the relationship!

Other authorities

- There is a definite trend in the Employment Appeal Tribunal towards "worker" status within the "gig economy":
  - Cycle couriers. *Dewhurst v Citysprint UK Ltd & Gascoigne v Addison Lee Ltd*
  - Minicab drivers. *Lange v Addison Lee Ltd*
- In Spain, food delivery companies have faced similar claims and the "workers" have been successful.

The impact

- "Workers" benefit from statutory protection in terms of rights.
- The Health & Safety at Work Act 1974 refers to "persons at work". Think of the extension of the "six pack" and especially equipment, systems of work and the workplace itself. Many in the "gig economy" buy and use their own equipment. What about PPE?
- We are no longer just examining an employer-employee relationship.

The impact on underwriting considerations

- We need to be clear with definitions around who or what is an “employee”, an “independent contractor” and a “worker”.
- Can we define when someone is “working”?
- Widened scope of cover. Will this lead to an increase in claims? Vicarious liability extended?
- Misrepresentation of risk: people now considered as workers may not have been included in a presentation. There needs to be a review of proposal forms.

- There is now also an opportunity to offer cover to those currently “uninsured” or where gaps exist: a policyholder may mistakenly believe they are sub-contracting. Think about construction sites.
- The gaps must be filled!
- Think of the impact on disclosure of wage rolls etc. Risks need to be reviewed.
- The Insurance Act 2015 requires fair presentation but it is our duty to ask probing type questions and to provide guidance.
- The allocation of rights has extended to the duty of care. This is a significant impact on underwriting considerations.

Summary

- The implications are wide-ranging.
- Subordination = vulnerability.
- Don´t be clever with drafting of documents.
- Consider the 5 criteria.
- We need to fill the gaps in cover and define cover.
- We need to have conversations now!
- We need to review proposal forms now!

Restatement of learning objectives

During this session, we have:

- understood the main principles decided by the Supreme Court in the Uber test case.
- recognised the implications that the judgment will have on the "gig economy" and the way we work.
- learnt how to implement a strategy around how the judgment of the Supreme Court will impact underwriting decisions going forward.