

## Group Briefing November 2016

# The Lady doth protest too much? – Employment Status following the Uber Decision

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### INTRODUCTION

Uber markets itself as “a location-based app that makes hiring an on-demand private driver...easy.” Uber claims that “for drivers, Uber provides exceptional pay while allowing you to be your own boss and pick your own hours. Take on fares whenever you wish (work as little or as much as you want) while meeting people in your city from all walks of life.”

The Employment Tribunal in London, when tasked with making a decision on the employment status of Uber drivers, concluded that Uber drivers are workers for the purposes of the UK's Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations 1998.

The Tribunal published the detailed reasons, running to some 40 pages, for its reserved judgment on 28 October 2016.

### THE FACTS

There are 30,000 Uber drivers operating in the London area and 40,000 in the UK as a whole. The underlying claims related to unlawful deductions from wages (through an alleged failure to pay the national minimum wage) and in respect of a failure to provide paid leave.

The Tribunal analysed Uber's business model and forensically assessed the terms between Uber and the driver, including a

welcome packet used for ‘onboarding’ new drivers. The Tribunal went on to make the following findings of fact:

- » Drivers are not required to make any commitment to work. However, when a driver signs into the app, this usually signals that they are coming ‘on-duty’ and available for work.
- » Drivers supply their own vehicles and are responsible for all running costs, including the licence costs.
- » Passengers book trips through the Uber app. On receipt of a passenger request, the app locates a driver logged into the app. The selected driver has 10 seconds to accept the booking through the app, failing which Uber assumes that they are unavailable and locates another driver.
- » If a driver fails to accept a series of bookings, this can result in losing his account status. Acceptance statistics are recorded and Uber warns “you should accept at least 80% of trip requests to retain account status.”
- » Once a driver accepts a booking, Uber places the driver and passenger in direct contact, through the app.
- » The driver is not made aware of the destination until collecting the passenger. The app provides detailed directions to the destination and the driver is expected to follow those

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directions unless the passenger stipulates a different route.

- » At the end of the trip, Uber's servers calculate a recommended fare, based on GPS data from the driver's phone. The driver cannot negotiate or agree a higher fare.
- » The passenger pays the fare directly to Uber, via the app. Uber subsequently pays drivers, weekly in arrears, in respect of the fares they have earned, minus a "service fee" of 20% to 25% for connecting the driver to the passenger through the app.
- » Uber operates a rating system. If a driver falls below a set average rating Uber can withdraw the driver's access to the Uber app (effectively preventing them from being an Uber driver).
- » Uber takes the risk in some matters such as certain passenger fraud.
- » Uber deals with any fare complaints, often without requesting any comment from the driver.
- » Drivers are not required to wear any uniform and are not permitted to display the Uber logo in the London area.

#### THE CONCLUSION – THE LADY DOTH PROTEST TOO MUCH

The Tribunal commented on the "remarkable lengths" to which Uber had gone to compel agreement with its description of itself and the analysis of its legal relationship with drivers. The Tribunal flatly rejected that the terms on which Uber relied corresponded with the reality of the relationship – quoting Queen Gertrude's famous line from Hamlet.

The Tribunal noted that Uber had previously made numerous comments in

"unguarded moments" outside of the case before the Tribunal which ran contrary to the case it presented before the Tribunal. One example cited by the Tribunal was written evidence given to the Greater London Authority Transport Scrutiny Committee by Uber where it had referred to drivers receiving "commission". The Tribunal was satisfied this reinforced the Claimant's simple case that Uber runs a transportation business and employs drivers to that end.

Uber's case was that it is a technology platform providing business opportunities for drivers. The Tribunal was not convinced by this and concluded that it was "unreal to deny that Uber is in business as a supplier of transportation services" and contrived to regard Uber as working for the drivers.

The contract between Uber and the drivers was not considered to be at "arm's length between two independent business undertakings".

The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common platform was, in the Tribunal's mind, "ridiculous".

In light of the above findings, the tribunal concluded that the drivers are workers of Uber for as long the driver:

- » Has turned on the app.
- » Is ready and willing to accept fares.
- » Is in the territory in which they are authorised to drive.

This was an eagerly awaited decision as it was widely considered to be a test case of the "gig economy" model of working. People who work in the gig economy have agile/flexible jobs instead of - or as well as - more traditional "full time" jobs. Instead of a salary, workers get paid for the 'gigs' they do, such as food delivery or a taxi journey. It

is estimated that some five million people are employed by the "gig economy" in the UK. The vast majority of these enterprises operate in a very similar way to Uber's model and most have a presence in this jurisdiction. It is expected similar claims will arise in Ireland in the not too distant future. Uber has advised all of its app users that it intends to appeal the decision of the Employment Tribunal. Uber's grounds of appeal are not yet clear. Given the significant consequences of this decision and the implications for an emerging/new business model - we expect this legal saga to run for some time.

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