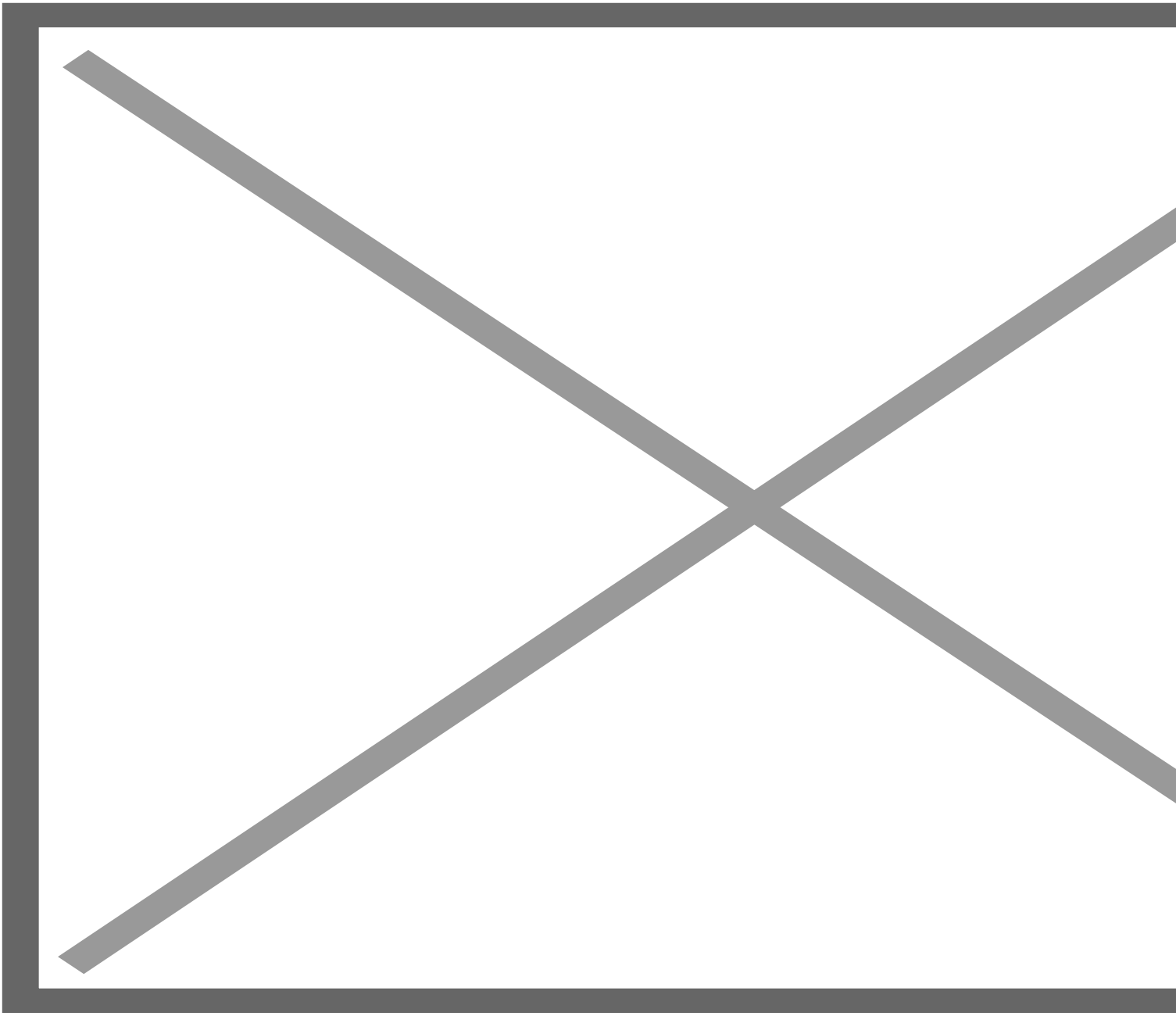
They think it’s all Uber

Employment Tax



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Keith Gordon looks at the Supreme Court’s decision in Uber and considers how it is relevant to tax advisers

Key Points

What is the issue?

In the Uber case, it was accepted that the drivers were not employees of Uber. However, many rights conferred by 'employment law' (such as the right to holiday pay and protection for whistleblowers) extend beyond employees to a subset of self-employed individuals. Three drivers asserted their entitlement to these rights on the basis that they were workers as defined.

What does it mean for me?

Although the case is generally about employment rights, there are a number of reasons why it should not be overlooked by tax advisers, including considerable repercussions on the economic models relied upon by many in the gig economy.

What can I take away?

The commercial reality in Uber was that the company was providing a taxi service to the passengers, leading to the question of whether there is an undeclared output tax VAT liability.

The Uber case (Uber BV v Aslam [2021] UKSC 5) was not a tax case. It was a case about what is generally referred to as employment rights, although its scope might be more strictly explained using the rather more old-fashioned phrase, labour law. However, there are at least four reasons why the case should not be overlooked by tax advisers.

First, many tax advisers will be expected by their clients to have a basic understanding of employment law concepts such as national minimum wage legislation. Secondly, much of the approach taken by the Supreme Court when construing the relevant employment law statutes will equally be applicable to the interpretation of tax statutes. Thirdly, the Supreme Court made frequent reference to leading tax cases in order to reach its decision, and it is inevitable that future tax cases will return the favour by referring to the Uber decision. Finally, the decision could well have considerable repercussions on the economic models relied upon by many players in the gig economy, and advisers need to be ready to advise on any structural changes that might follow.

The facts of the case

Just in case it needs to be stated, Uber operates what may be loosely described as a minicab service in a number of cities. This case concerned services provided in London. There were several Uber entities involved; for clarity, this article refers to them as 'Uber'. Using a smartphone, a potential passenger uses an app provided by Uber which identifies a vacant vehicle close to the passenger's location, invites the driver to accept the passenger and, if acceptance is given, puts the driver and passenger in contact with each other.

There were detailed contractual provisions governing the various relationships between the parties (particularly between Uber and the drivers and between Uber and the passengers). These contracts provided (amongst many other things) that the driver could not charge the passenger more than the amount stipulated by Uber for the journey and also determined the commission that the driver was required to pay Uber, based on the fares as calculated by Uber (and not any lower amount actually charged by the driver should that unlikely scenario ever arise). One key part of these contractual arrangements was the provision that, once a journey is accepted by the driver, a separate contract was deemed to come into being between the driver and the passenger, a contract to which Uber is not a party.

It was accepted that the drivers were not employees of Uber. However, many rights conferred by 'employment law' (such as the right to holiday pay and protection for whistleblowers) extend beyond employees to a subset of self-employed individuals, often referred to as 'workers' (but which has been tentatively rebranded as 'dependent contractors'). The Uber case concerned three drivers who asserted their entitlement to these additional rights on the basis that they were indeed workers as defined.

The statutory definition of such workers is found in the Employment Rights Act 1996 s 230(3)(b), which covers any individual who works under:

> 'any other contract [i.e. not a contract of employment], 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'.

In the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal successively, the drivers succeeded in their assertions that they were workers under the legislation and therefore entitled to the rights claimed by them. Uber appealed to the Supreme Court.

The Supreme Court's decision

Recognising the relative importance of the case, Uber's appeal came before seven (rather than the usual five) justices of the Supreme Court. Due to illness, one of the justices did not put his name to the judgment. However, the remaining six (Lord Reed, Lord Hodge, Lady Arden, Lord Sales, Lord Hamblen and Lord Leggatt) did. They unanimously dismissed Uber's appeal.

The first question considered by the court was whether, using the words of s 230(3)(b), the drivers had undertaken 'to do or perform personally any work or services for' Uber. Uber relied on the contractual arrangements to argue that there was no such service being provided to Uber (more strictly, to Uber London, which was said to operate merely as a booking agent for the drivers).

This argument suffered from the fundamental difficulty that there was no written contract between Uber London and the drivers (the contracts with the drivers were entered into by another Uber entity), yet it was Uber London that had the licence to operate the private hire services in the London area. The Supreme Court felt that, in the absence of any evidence to the contrary, it was to be assumed that the parties would want to operate within the law. Accordingly, the natural conclusion was that the drivers were indeed providing their services to Uber London under a contract whose terms would have to be inferred by the parties' conduct. On the basis of the legal presumption about the parties complying with the law and the evidence available to the court, the court was compelled to reach the conclusion that the drivers were acting as Uber London's subcontractors when delivering the latter's services as a supplier of private car hire. Accordingly, the terms of s 230(3)(b) were met, and the drivers qualified as workers.

Commentary

I hesitate to open this part of the article with a comment that is pure speculation. However, I do wonder whether the contracts drafted by Uber have been read more times because of their publication by the Supreme Court than they were ever read by the millions of drivers and passengers who were supposedly governed by these contracts.

The basis on which the court reached its decision suggests that, despite their immense complexity and the clear intention of the drafters to sever any contractual connection between Uber and the drivers, the contracts did not

have that effect. The main stumbling block was the restriction on the provision of unlicensed taxi services in the capital.

It should of course be stated at this stage that, on a strict procedural approach, there would be nothing to prevent Uber from resisting the claim of another driver with a view to seeking to displace the presumption on which the court's decision was based. Indeed, the court made it clear that it was deciding the case on the basis of the evidence that had been adduced before the Employment Tribunal – any tribunal hearing a different case is likely to be presented with different evidence. As to whether Uber wishes to adopt such a strategy (and attract the inevitable opprobrium) is of course a matter for it to decide.

In any event, the court proceeded to look at other issues, possibly with a view to preventing any such return journeys.

Accordingly, the court addressed the argument advanced by Uber that sought to place primacy on the terms of the written agreements. Ordinarily, when an agreement has been put in writing and acknowledged by both parties, contract law proceeds on the basis that the written terms are definitive, even if one or more of the parties did not necessarily appreciate the terms being notionally agreed.

There are of course exceptions but, as a general rule, one is bound by such written terms. However, a decade ago, the Supreme Court introduced a new exception which operates in the world of work. That was in the case of Autoclenz Ltd v Belcher [2011] UKSC 41. In the work context, the written terms are now merely considered to be one part of the factual matrix that the courts will use to determine 'the true agreement' between the parties. The Autoclenz decision has meant that workers' rights cannot necessarily be circumvented by the insertion of clauses of which the workers would have no actual knowledge.

One of the issues arising in the Uber case was how widely this Autoclenz 'relaxation' applies. For example, does it apply to contracts between the passenger and Uber (which, when taken out of context, are ordinary commercial agreements and therefore subject to the conventional rules about written contractual terms) simply because they are part of the wider factual framework concerning the provision of work by Uber drivers?

On that point, the Court of Appeal had been divided and there are undoubtedly merits to both sides' arguments. For example, it would be rather odd (and possibly unworkable) if the contractual terms between the passenger and Uber were different depending on whether the question arose in the context of a dispute involving a driver or simply in the course of a dispute between the passenger and Uber.

It is not clear to what extent the Supreme Court tried to grapple with these particular issues. However, what is clear is that it was not keen to depart from the approach taken by the court in Autoclenz¸ no doubt because the Autoclenz approach protects vulnerable workers. Accordingly, the Supreme Court in Uber sought to set out a rational basis for the Autoclenz approach. After citing from well known tax decisions (including the Supreme Court's own decision in UBS AG v HMRC [2016] UKSC 13) about the approach to be taken when interpreting all statutes, the Supreme Court noted that the Autoclenz approach is not about determining the terms of a worker's contract but whether that contract is one that attracts the statutory benefits that certain types of contract confer. Once looked at through that prism, a court ought not to get bogged down with classifying the nature of any particular contract but should instead focus on whether the nature of the working arrangements meets the statutory test.

The overwhelming nature of the drivers' success in Uber has prompted some commentators to speculate that drivers might want to go further and push for a court to confirm that they are actually employees (and therefore entitled to even more rights). I make no comment on their likelihood of success but note that it was not that long ago when a similar case (Pimlico Plumbers [2018] UKSC 29) concluded that the individuals in that case were

workers but not employees.

In my view, the question of employment status cannot be resolved in the same way as the drivers' entitlement to workers' rights. The Supreme Court's approach in Uber carefully avoided having to answer any question about the type of contract in place between the drivers and Uber but focused on the statutory test itself.

However, when it comes to employment status, a court or tribunal cannot but classify the contractual arrangements. Indeed, in the tax context, there is usually no statutory purpose to guide the court or tribunal as to whether or not there is a contract of employment. To do so would undoubtedly be a case of putting the cart (or should I say 'the Hackney Carriage') before the horse.

It is true that the Supreme Court proceeded to state that 'in determining whether an individual is an employee or other worker for the purpose of the legislation', a more flexible approach to a written contract should be exercised (as demonstrated in Autoclenz). However, the court then justified the policy behind this approach by emphasising 'the essential feature of a contract between an employer and a worker as the existence of a hierarchical relationship', the implication being that the worker needs protection. It is unclear how this would operate where the employee is actually the party with the commercial advantage, although in many such cases (for example, the appointment of a chief executive) one might expect both parties to be more careful about negotiating and checking the contractual terms, so that the issue could be moot.

Finally, it is worth noting that VAT cases did not escape the Supreme Court's attention. The Court considered Secret Hotels2 Ltd (formerly Med Hotels Ltd) v HMRC [2014] UKSC 16. Uber had hoped that the result of that case (which upheld the principle that 'taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens') could be used to its advantage. However, the Supreme Court differentiated between the two cases on the basis of the differing underlying policy considerations governing VAT and employment law.

Furthermore, the facts of Secret Hotels2 show that the taxpayer there was genuinely offering no more than a booking service, whereas the commercial reality in Uber was that it was Uber that was providing the taxi service to the passengers.

This conclusion, of course, shines light on the elephant in the room: if Uber is indeed the provider of a minicab service to millions of passengers, is there an undeclared output tax VAT liability lurking under somewhere under the bonnet? Even if Uber's VAT position was not previously on HMRC's radar, it is now.

What to do next

If there is one certainty emanating from the Supreme Court's decision, it is that there will be little sympathy for parties who insert lots of contractual terms in order to disguise the true commercial nature of a relationship. Whilst, outside the work arena, there will be the presumption that the contract is as set out in the written terms, the Uber case demonstrates that overly complex arrangements can still fall down if one overlooks the basics.

However, within the sphere of work, it is now clear that the contractual terms will not be determined solely by reference to the written agreements. Nevertheless, disputes can often be avoided (especially when it comes to status disputes brought about by HMRC which is not a party to the contract) if the contracting parties take greater care to consider the written terms of any contract and do not simply rely on boilerplate terms just because it provides some short-term simplicity.

Note: Since writing this article, Uber has announced a prospective introduction of workers' rights to its drivers (but not those working under Uber Eats), with some commentators predicting a price-rise to follow as a result. It

is unclear, however, whether that move will resolve all disputes, particularly in relation to prior periods. The legal principles established by the Supreme Court's decision are, of course, unaffected by Uber's decision.