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# Uber: Revolutionary? David Reade QC



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# Defining by Contract

- *Roberts v Redrow Homes Ltd* [2004] ICR 1126, Lord Justice Pill, at paragraph 21
- **“21 In my judgment there is force in the submission that employment tribunals should not be deflected from a consideration of the definition of "worker" and from a consideration of terms of the contract in that context by general policy considerations as to the nature of employment and self-employment. ...The 1998 Regulations leave parties free to enter contracts and, whether or not the contract includes an obligation to do the work personally, is a matter of construction.**

# Armies of Lawyers

- Autoclenz [2011] UKSC 41 [2011] ICR 1157
- Contracts which define reality or conceal it?



# Lord Leggatt

## (1) A change of Approach

- Uber’s argument that Autoclenz only applied if it was shown that the terms of the written agreement did not represent the true agreement or what was actually agreed
- SC rejected this:
- “Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a “worker” in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.” (para 69)

# The pithy sound bite

- UBS AG v Revenue and Customs Comrs [2016] UKSC 13; [2016] 1 WLR 1005
- “The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.” per
- Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454,

# Carmichael v National Power

- [1991] 1 WLR 2042
- Lord Irving
- “... it would only be appropriate to determine the issue in these cases solely by reference to the documents in March 1989, if it appeared from their own terms and/or from what the parties said or did then, or subsequently, that they intended them to constitute an exclusive memorial of their relationship. The industrial tribunal must be taken to have decided that they were not so intended but constituted one, albeit important, relevant source of material from which they were entitled to infer the parties’ true intention ...”

## (2) Status Terms

## (3) Contracting out provisions

- Looking for true statutory scope but this does not mean the contract is irrelevant
- “The Autoclenz case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the Carmichael case is appropriate even where there is a formal written agreement **(and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties)**. **This does not mean that the terms of any written agreement should be ignored.** The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties’ rights and obligations towards each other. But 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. **Furthermore, as discussed, 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”.** (para 85)

# Contract for services/Limb B Organisation/ Subordination/ Control?

- What of case such as *Tilson v Alstom* and *James v London Borough of Greenwich*
- Can the Agency worker rely on control, subordination and integration to assert worker relationship with the end user?
- Does Uber require us to revisit volunteers, is a contract necessary, if there is control, subordination and integration
- *X v Mid Sussex CAB*

# The need for a contract remains

- The Core Uber Argument:
  - Uber London contracted as an agent so that the “rider” contracted with driver through the medium of the Dutch operating company, Uber BV
- Lord Leggatt disposed of that argument on the basis of conventional agency law
- As a consequence Uber London contracted with the driver as principal. Although there was no written agreement between the driver and Uber London, the agreement had to be inferred to comply with the regulatory requirements of the PHV licence

# The first question the existence of a contract?

- It follows that SC did not decide that there was no need for there to be contract. They had found that a contract between the driver and Uber London existed. Implicitly by necessary implication
- At that fundamental level it would appear that the **starting point must remain the existence of a contract**
- Thus the necessity of implication argument in the agency situation remains good
- The volunteer continues to lack that essential condition of worker status

# The Platform Question Remains

- On the particular facts of Uber then the platform agency argument did not work. But it was not rejected as a concept
- Logically it follows that it might mean there is no contract with the intermediary, they are merely an agent
- The SC gives the example of the Holiday booking agent, the same proposition could apply. However, the intermediary would be unable to exert any control so to ensure consistency of service, absent a contract with the provider. Once that occurs then the statutory test might apply regardless of the terms

# Partnership

There is an essential circularity in the reasoning in Uber. Unless one perceives the relationship as being within the intended scope of the protection one does not approach the question simply applying the statutory test. Does this lead to a radical view of worker status in partnership

In the context of LLP's we know the answer: ***Bates van Winkelhof v Clyde & Co LLP [2014] 1 WLR 2047***

*The answer in the context of traditional partnership has been that a partner could not employ themselves.*

***Cowell v Quilter Goodison Co Ltd and another [1989] IRLR 392***

*But should that now be an obstacle when the Deed is a multi-party contract if one approaches the issue per Uber*

*An argument was mounted in Bates that the underlying rationale for Cowell was not good law following s.82 of the Law of Property Act 1925. The question was left open in Bates*

# An obligation for personal service

- Contractual terms that provide for substituted personal service will not of themselves resolve the issue
- But the reality of whether personal service is required will remain a critical question, its part of the statutory test. But it will need to be resolved looking at the facts on the ground. Thus Uber would not appear to change the decision in cases such as the CAC/ JR decision in **IWGB v Deliveroo** [2018] EWHC 1939 [2018] 911

# Independent contractor

- The application of the test still maintains, post Uber, the exclusion. Also part of the statutory test
- The other party to the contract's "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"
- The SC appear to have approved the reasoning in **Secretary of State for Justice v Windle [2016] EWCA Civ 459** that the position between contracts may inform this question.
- Leaves an uncertain position as to the point at which the regularity of the assignments might give rise to worker status for the duration of the assignment

# A sting in the tail

- The multi app issue parked – Surely this goes to whether the driver is in business on their own account
- Working time when logged in
- Umeasured hours for the purpose of NMW
- The engagement of NMW is important.
- We have the modified Reg 13 from 6<sup>th</sup> April 2020 but this provision remains
- Deducting expenditure incurred by the worker in connection with the employment in determining remuneration for the purposes of the NMW. The gig worker deducting costs, van hire petrol etc

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