

EMPLOYEE OR PRIVATE CONTRACTOR? LESSONS FROM THE UBER & OTHERS UKSC JUDGMENT

Introduction

The UK Supreme Court recently delivered its judgment confirming that Uber drivers are “workers” as defined by the relevant employment legislation. This decision has potentially afforded a large number of the 40,000 Uber drivers in the UK certain protections such as minimum wage and paid leave. However, the implications of the judgement extend far beyond the UK and technology based businesses like Uber. In fact, the Supreme Court’s analysis is relevant to every business in Barbados that engages the services of persons on any basis other than as employees.

The Uber decision is a timely reminder that we cannot avoid somebody being our employee by simply having them sign a contract that describes them as a contractor or a consultant. If we get this wrong, we are at significant risk of having to meet our obligations as an employer retrospectively. This can be costly. Every business should therefore give careful consideration to the nature of their relationships with persons who they engage as contractors or consultants. By doing so we can take the necessary steps to ensure that, as far as possible, those relationships are structured and operated in a manner that reduces any risk of creating an employer-employee relationship.

The Courts Reasoning

The Supreme Court compared the definition of “worker” from the UK Employment Rights Act to the particular characteristics of the relationship between Uber and its drivers. Under the UK Act a worker includes any person who works under a contract “*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*”. Against this context, the Judges made their decision that Uber drivers were classified as “workers” based on five key points:

1. Uber sets the price and drivers are not permitted to charge more than the fare calculated by Uber. Therefore, Uber dictates how much drivers are paid for the work they do.
2. Uber imposes contracts and terms of service and drivers have no say in them.
3. Once a driver has logged onto the app, Uber monitors their acceptance rate and imposes "penalties" if too many trips are declined.
4. Uber exercises "significant control" over drivers, by using a passenger ratings system that impacts whether the driver can continue working for Uber.
5. Uber restricts communications between the passenger and driver to prevent drivers from establishing a relationship capable of extending beyond an individual ride.

Barbados' Legislative Context

The Barbados Employment Rights Act contains no equivalent definition of a worker. However, under the First Schedule to the Act, there is a non-exhaustive list of factors to be considered in determining the existence of a contract of employment. It is this list of factors that a Court or Employment Tribunal will consider, along with the actual circumstances of the working relationship, to determine whether a person qualifies for the protections afforded by the Act. Persons would be well advised to consider the list of factors provided within the Act and carefully compare them to the circumstances of their own work arrangements.

In summary, the list of factors to be considered includes that:

- a. There is an obligation to give personal and exclusive service.
- b. The manner of the work is subject to the control and direction of the employer.
- c. The work has continuity, creating an economic dependence upon the employer.
- d. The work has fixed hours or is carried out at a workplace(s) specified by the employer.
- e. The employee is integrated into the business, including by subjection to its policies.
- f. The employee is subject to procedures for addressing grievances & disciplinary matters.
- g. The employee is in receipt of periodic remuneration payable on a stipulated business.
- h. The employee is entitled to holiday with pay.
- i. The employee makes no or nominal investment in tools and equipment.

Many of these factors are markedly similar to those that were considered by the Supreme Court. Primarily, the level of control the person or company exerts over the individual in the context of their relationship is crucial. Such control could be in relation to determining the amount of remuneration the person receives, or on the level of independence they can exercise when it comes to choosing clients or executing their services.

Key Takeaways

The Uber judgement comes as a timely reminder to local employers that we cannot simply avoid somebody being an employee by calling them a contractor or a consultant. Those who get it wrong can end up having to meet their obligations as an employer retrospectively. Under the local legislation this may mean paying lost wages, lost statutory contributions, or even reinstating the employee by court order in the event of unfair dismissal. Fortunately, the factors listed within the local legislation and the circumstances considered by the UK Supreme Court, provide useful guidance for structuring and managing your working relationships appropriately.

Please note, this article seeks to provide general information and does NOT constitute legal advice. If you require legal assistance, then we recommend that you consult with a suitably qualified Attorney.

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