

## Rise of the ‘Gig Worker’ Economy or Just Mending the Legislative Leak?

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### SUMMARY

*This article assesses the extent to which the UK’s Supreme Court (UKSC) rulings in Uber and Pimlico Plumbers have resolved the long-standing conundrum facing employers of the label ‘worker’. This analysis raises critical issues relating to the effectiveness or otherwise of regulation of the gig economy. Furthermore, it seeks to question how the gig economy is reframing employment law.*

### KEYWORDS:

*Employment law, employment status, worker status, gig economy, employment rights*

### I THE GIG ECONOMY AT WORK

The term ‘gig economy’ has become readily used in our lexicon to mean technological change and is a free market system in which temporary positions are common and organizations contract with independent workers for short-term engagements. The trend towards a gig economy has created a growth in independent contractors. Similarly, it has become synonymous with globalization. Within that context, it is hard to recognize that ‘globalization’ began in 1993,<sup>1</sup> yet remains governed by legislation enacted in 1996, yet whose provenance predates that, back in time to the 1970s. Though the ambitions and impact of globalization with its gig economy knows no bounds with its aspiration to have 40% of the global workforce as independent contractors by 2020. Whist this is likely solely to remain an aspiration, such a motivation continues to fuel the debate about employment status in UK employment law.

The UK’s gig economy is made up of around 7.25 million workers.<sup>2</sup> In fact, one in seven UK working adults are deemed to be ‘gig workers’, contributing some GBP 20bn to the UK economy. The growing significance of these workers is that the gig economy is a large and growing section of the working population, where short-term flexible workers are paid on completion of tasks (known as gigs). Common gig workers include taxi (Uber) drivers, despatch riders (Deliveroo), care workers, dog walkers, plumbers (Pimlico), builders and cleaners, but it also extends to qualified professionals, such as teachers, translators, publishers, IT/Tech workers or gaming designers.

However, at the centre of this debate are a set of well-thumbed and used labels, yet not without controversy. They are: employee, self-employed and worker. To that end, section 230 of the Employment Rights Act 1996 (hereinafter ERA) provides that:

*Employees, workers etc.*

(1) In this Act ‘employee’ means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act ‘contract of employment’ means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act ‘worker’ (except in the phrases ‘shop worker’ and ‘betting worker’) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) 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; and any reference to a worker’s contract shall be construed accordingly.

(4) In this Act ‘employer’, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act ‘employment’ –

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and ‘employed’ shall be construed accordingly.

(6) This section has effect subject to sections 43K, 47B (3) and 49B (10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, ‘worker’, ‘worker’s contract’ and, in relation to a worker, ‘employer’, ‘employment’ and ‘employed’ have the extended meaning given by section 43K.

(7) This section has effect subject to section 75K (3) and (5).

Put simply, this provision ensures that workers have the right to certain minimum rights, including national living wage, holiday and discrimination, whilst employees have more extensive rights, including the right not to be unfairly dismissed.

Essentially, under section 230(3)(b) ERA, a worker means: *an individual who has entered into or works under a ... contract of employment, or (b) any other contract, ... whereby the individual undertakes to do or to 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.*

Consequently, ‘worker status’ remains a controversial issue in the growing gig economy. Whilst many decisions were pending both in the Tribunals and Courts on appeal, the UK Government in the meantime commissioned an independent review of modern working practices, which examined this aspect of worker status in light of ever-changing business models.

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<sup>1</sup> A. Sen, *The Quality of Life* (Clarendon Press: Oxford 1993).

<sup>2</sup> BEIS, *The Characteristics of the Gig Economy*, Final Report (2020).

## 2 THE PIMLICO PLUMBERS RULING

In *Pimlico Plumbers*<sup>3</sup> Mr Smith, who is by trade a plumbing and heating engineer, worked for Pimlico Plumbers Ltd. In fact, in August 2011 Mr Smith issued proceedings against Pimlico in an Employment Tribunal (hereinafter ET), asserting that he had been an ‘employee’ of Pimlico under a contract of service within the meaning of section 230(1) of ERA 1996 and as such Mr Smith complained, among other things, that Pimlico had dismissed him unfairly contrary to section 94(1) of it; and/or that he had been a ‘worker’ for Pimlico within the meaning of section 230(3) of ERA and as such he complained that Pimlico had made an unlawful deduction from his wages contrary to section 13(1) of ERA. The ET held that he was not an employee, but agreed that Mr Smith had been a ‘worker’ for Pimlico within the meaning of section 230(3) of ERA and that he had been a ‘worker’ for Pimlico.

Consequently, Pimlico brought an appeal against the Tribunal’s decisions to the Employment Appeal Tribunal (hereinafter the EAT) which dismissed it.<sup>4</sup> Pimlico subsequently brought an appeal against the appeal tribunal’s decision to the Court of Appeal,<sup>5</sup> which agreed with both of them, dismissing the appeal. Thereafter, Pimlico appealed to the UK’s Supreme Court (hereinafter UKSC). As Lord Wilson explains:

*It follows that the tribunal held that, although Mr Smith was not an ‘employee’ under a contract of service, he was an ‘employee’ within the meaning of section 83(2)(a) of the Equality Act. It is regrettable that in this branch of the law the same word can have different meanings in different contexts. But it gets worse.*<sup>6</sup>

Yet, notwithstanding the historical context, section 230(3) of ERA, in which a ‘worker’ is defined, accordingly, the EAT in its judgment (Judge Serota QC) concluded that, on the one hand, Pimlico wanted to present their operatives to the public as part of its workforce but that, on the other, it wanted to render them self-employed in business on their own account; and that the contractual documents had been ‘carefully choreographed’ to serve these inconsistent objectives. But the judge rightly proceeded to identify a third objective, linked to the first, namely to enable Pimlico to exert a substantial measure of control over its operatives; and this clearly made development of the choreography even more of a challenge. In any event, however, the case proceeded before the ET on the basis that even after 2009 the manual remained as much a part of the contract as, on any view, it had previously been. Its relevant provisions are as follows:

- (1) [Y]our appearance ... must be clean and smart at all times ... The Company logo-ed uniform must always be clean and worn at all times.
- (2) Normal Working Hours consist of a five days week, in which you should complete a minimum of forty hours.
- (3) Adequate notice must be given to Control Room for any annual leave required, time off or period of unavailability.

Arguably, if he was to qualify as a limb (b) worker, it was necessary for Mr Smith to have undertaken to ‘perform personally’ his work or services for Pimlico. An obligation of personal performance is also a necessary constituent of a

contract of service; so decisions in that field can legitimately be mined for guidance as to what, more precisely, personal performance means in the case of a limb (b) worker. Notably, in *Express & Echo Publications Ltd v. Tanton*<sup>7</sup> was a clear case whereby Mr Tanton contracted with the company to deliver its newspapers around Devon. A term of the contract specifically provided that:

In the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services.

The Court of Appeal in that case held that the term defeated Mr Tanton’s claim to have been employed under a contract of service. Nevertheless, in his classic exposition of the ingredients of a contract of service in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance*,<sup>8</sup> MacKenna J articulated an important qualification. He observed<sup>9</sup> that the:

*Freedom to do a job either by one’s own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be*

Where, then, lie the boundaries of a right to substitute consistent with personal performance?

To that extent, the Court of Appeal interpreted the findings to be that Mr Smith’s facility to substitute another Pimlico operative to perform his work arose not from any contractual right to do so but by informal concession on the part of Pimlico.

Critical of the ET, the UKSC found that Mr Smith had the right to substitute another Pimlico operative to perform his work, the tribunal unfortunately saw fit to turn its attention to the terms of a revised contract between Pimlico and its operatives which was introduced following the termination of Mr Smith’s contract. The tribunal quoted two of the new terms. One of them gave the operative a right to assign or subcontract his duties ‘subject to the prior consent of the Company’. The other obliged him either to perform his duties personally or to ‘engage another Pimlico contractor to do it’. The two terms appear to be inconsistent, unless they can be reconciled on the basis that Pimlico’s prior consent would always be necessary but would not be given unless the assignee of the duties were to be another Pimlico operative.

The UKSC found that Pimlico had therefore put an irrelevant contract before the ET, casting highly confusing terms. Irrespective of whether a wider right of substitution would have been fatal to Mr Smith’s claim, the UKSC found that the ET was entitled to find that Mr Smith’s only right of substitution was of another Pimlico operative. But in *James v. Redcats (Brands) Ltd*,<sup>10</sup> Elias J, then as President of the EAT, convincingly suggested that an inquiry into the dominant purpose of a contract had its difficulties; that, even when a company was insistent on personal performance, its dominant purpose in entering into the contract was probably to advance its business; and that the better search might be for the dominant feature of the contract. The terms of the contract made in 2009 are clearly directed to performance by Mr Smith personally. The right to substitute appears to have been regarded as so insignificant as not to be worthy of

<sup>3</sup> [2018] UKSC 29.

<sup>4</sup> [2015] EAT, 21 Nov. 2014.

<sup>5</sup> [2017] EWCA Civ 51.

<sup>6</sup> At para. 7.

<sup>7</sup> [1999] ICR 693.

<sup>8</sup> [1968] 2 QB 497.

<sup>9</sup> At 515.

<sup>10</sup> [2007] ICR 1006.

recognition in the terms deployed. Pimlico accepts that it would not be usual for an operative to estimate for a job and thereby to take responsibility for performing it but then to substitute another of its operatives to effect the performance.

It is unusual for the law to define a category of people by reference to a negative – in this case to another person's lack of a particular status. It usually attempts to define positively what the attributes of the category should be. In determining whether Pimlico should be regarded as a client or customer of Mr Smith, how relevant was it to discern the extent of Pimlico's contractual obligation to offer him work and the extent of his obligation to accept such work as it offered to him? The answer is not easy. Clearly the foundation of his claim to be a limb (b) worker was that he had bound himself contractually to perform work for Pimlico. No one has denied that, while he was working on assignments for Pimlico, he was doing so pursuant to a contractual obligation to Pimlico. Does that not suffice? Is it necessary, or even relevant, to ask whether Mr Smith's contract with Pimlico cast obligations on him during the periods between his work on its assignments?

Consequently, the Court of Appeal construed that Pimlico's contractual obligation was to offer work to Mr Smith but only if it was available; indeed, if the work was available, it would seem hard to understand why in the normal course of events Pimlico would not be content to be obliged to offer it to him. Mr Smith's contractual obligation by contrast was in principle to keep himself available to work for up to forty hours on five days each week on such assignments as Pimlico might offer to him. But his contractual obligation was without prejudice to his entitlement to decline a particular assignment in the light (for example) of its location; and it did not preclude Pimlico from electing, as seems to have occurred, not to insist on his compliance with the obligation in any event. So, therefore the ET found, legitimately, that there was an umbrella contract between Mr Smith and Pimlico. It is therefore unnecessary to consider the relevance to limb (b) status of a finding that contractual obligations subsisted only during assignments.

Further, it is worth noting that the EAT previously held with in *Cotswold Developments Construction Ltd v. Williams*,<sup>11</sup> where Langstaff P held that:

a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.

Within EU jurisprudence, the ruling of the Court of Justice of the European Union (hereinafter CJEU) in *FNV Kunsten Informatie en Media v. Staat der Nederlanden* is significant.<sup>12</sup>

A Dutch union negotiated terms for the minimum remuneration of self-employed musicians when engaged as substitutes to play in Dutch orchestras. But were the terms anti-competitive under EU law? Not so, held the CJEU, as the musicians were 'false self-employed', being conceptualized to equate to that of a limb (b) worker. The CJEU held:

*a service provider can lose his status of an independent trader ... if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the ... commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking ... It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work ... , does not share in the employer's commercial risks ... and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking*

Consequently, the UKSC dismissed Pimlico's appeal. The result of doing so would be that the substantive claims of Mr Smith as a worker could proceed to be heard in the ET.

Whilst the UKSC in *Uber* distinguished between drivers and bookings clerks,<sup>13</sup> the Supreme Court held that the correct legal analysis of the tripartite relationship between the agency, hoteliers and customers was that the agency in fact marketed and sold hotel accommodation to customers as the agent of the hoteliers and was in these circumstances acting solely as an intermediary.<sup>14</sup> Evidently, a platform of this kind was an emerging typical model and the manner in which such a platform operates is materially important in the determination of existing employment status and any consequential rights. Ultimately, it hinged upon whether 'worker' status could be established through the employment law lens.

However, more recently the CJEU made a ruling in *B v. Yodel*.<sup>15</sup> This case involved a Yodel parcel courier who argued that, although he had signed a contract stipulating that he was a self-employed independent contractor, he was in fact a 'worker' for the purposes of the Working Time Regulations 1998 (WTR). If successful, this would have entitled him, amongst other things, to paid holidays. In the instant case, the claimant B, a gig worker, chose to work exclusively for Yodel, but was also free to deliver parcels for third parties at the same time. He was able to appoint a substitute, if they had appropriate skills and qualifications. He did not have to accept any parcels and could set a limit on the number of parcels he was willing to deliver. He used his own vehicle and mobile phone but had to use Yodel's handheld delivery device (on which he received training). Parcels needed to be delivered between certain hours, but the courier could use his discretion over the exact timing, route and order in which deliveries were made. Accordingly, the British ET asked the CJEU for a ruling on whether the WTR personal service requirement was compatible with the requirements of the Working Time Directive (WTD). The CJEU in fact ruled that the legal issues had already been decided by existing EU jurisprudence and opined that the WTD does not define the concept of 'worker' (gig worker or otherwise). Consequently, being classified as an independent contractor under national law does not prevent a person being classified as an employee within the meaning of EU law, 'if his independence is merely notional, thereby disguising an employment

<sup>13</sup> Paragraphs 10–108 (*Uber*, UKSC Judgment).

<sup>14</sup> Per Lord Neuberger @ para. 34, *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v. Revenue and Customs Comrs* [2014] UKSC 16.

<sup>15</sup> C-692/19, [2020].

<sup>11</sup> [2006] IRLR 181.

<sup>12</sup> C-413/13, [2015] All ER 387.



*relationship*'. Applying such reasoning, the WTD therefore, does not cover independent contractors who are afforded the discretion to undertake substitution and/or to determine whether or not to accept tasks unilaterally, as well as fix their own working hours rather than work to those set by their putative employer. In summary, the CJEU concluded that it was ultimately for the referring national court to decide if the Yodel courier should be classified as a worker because it requires an assessment of all the circumstances.

Under the current UK law, if the individual has an unfettered right to appoint a substitute, then they are not a 'worker'. As declared by the UK Supreme Court in *Pimlico* the correct test in determining whether someone was a worker was whether there was an obligation of personal performance. Similar factors were relevant in the Uber ruling. Notwithstanding these legal rulings, arguably these Uber drivers and plumbers concerned may find themselves still left in the same legal position as other zero hours contract workers. That is, these rulings only secure guaranteed basic employment benefits and protection rights to these gig workers. Namely, they will now be provided with minimum wage, holiday pay and access to a pension scheme, although, a far cry from self-employment entitlements. Whilst the 'worker' categorization provides gig workers with more rights, it also makes resourcing more costly for businesses. Therein lies a different scenario for those who are on zero hours contract, as there is an employment contract in existence. Plainly where businesses managed temporary working/staffing on an ongoing basis, the *Uber* ruling opens the door for the rise of 'gig workers' marching towards such rights.

### 3 THE 'PRACTICAL REALITY' LEGAL CONUNDRUM

Historically, in *Autodenz*<sup>16</sup> the intentions of the parties were found to be key to determining the employment relationship. Yet, in *James v. Redcats*,<sup>17</sup> mutuality was canvassed as the ultimate determinator of employment status. However, as long ago as 2006, two key cases considered the issue of the 'practical reality' of the situation. For instance, genuinely being in business on their own account was considered to be the most important factor. Notably in *Cornwall County Council v. Prater*<sup>18</sup> it was held that: 'where there are long-standing working arrangements, employers are likely to find it increasingly difficult to treat the worker as a casual worker rather than as employees'. Moreover, in *Cotswold Developments*<sup>19</sup> the reality of the situation was emphasized as the determining factor for categorization of the employment relationship. Notably, the focus must be on whether or not there is some obligation upon an individual to work and some obligation upon the other party to provide work and pay for it. Such reasoning is found in *Young & Woods Ltd v. West*,<sup>20</sup> where Stephenson LJ affirmed that the 'truth in the contract' represents the intentions of the parties.

More recently, in *Uber*,<sup>21</sup> in 2018 the Court of Appeal, by a majority (the Master of the Rolls and Lord Justice Bean), upheld the decisions of the ET and the EAT. That is, that

the Claimant Uber drivers are workers. Essentially the majority reasoning of the Court was that since Uber has a smart-phone app, by which passengers can book rides from drivers who also have the app, whilst the drivers own their own cars and are free to choose when they make themselves available to accept bookings, they were workers rather than self-employed. At the time of the original hearing in 2016, there were about 30,000 Uber drivers operating in the London area, and 40,000 in the UK as a whole.

Accordingly, the drivers were workers, employed by Uber London Ltd; and that they were to be regarded as working during any period when they were within their territory (i.e., London), had the Uber app switched on and were ready and willing to accept trips. The EAT upheld that decision. The essential question as regards worker status was whether, as the drivers argued, Uber contracts with the passengers to provide driving services, which the drivers perform for it; or whether, as Uber argued, it acts only as an intermediary, providing booking and payment services, and the drivers drive the passengers as independent contractors. The written contractual terms say the latter; but the majority hold that they do not reflect the practical reality of the relationships and can therefore be disregarded in accordance with the principle established in an earlier Supreme Court decision called *Autodenz Ltd v. Belcher*.<sup>22</sup> The majority of the Court of Appeal approved the reasoning of the ET, which relied on a number of features of Uber's working arrangements as being inconsistent with the driver having a direct contractual relationship with the passenger.<sup>23</sup>

To the contrary, Lord Justice Underhill, dissenting, would have held that there was no inconsistency between the written terms and the working arrangements: those arrangements were not essentially different from those commonly applying where taxi and minicab owner-drivers are booked through an intermediary.<sup>24</sup> As regards the period during which drivers are to be regarded as working, drivers are free whether to switch the app on at all and when it is switched on they have the right to choose whether to accept any particular trip offered. However, given that Uber has the right to disconnect drivers from the app for a period if they turn down offers too frequently, the majority hold that in those circumstances drivers are under a positive obligation to be available for work while the app is on, and that that amounts to 'work' for the purpose of the Regulations.<sup>25</sup> Lord Justice Underhill would have held that drivers should only be treated as working from the moment that they accept a particular trip.<sup>26</sup> However, given the 2:1 ruling, the Uber ruling went onto the Supreme Court.

### 4 THE UBER RULING

Dismissing the appeals by Uber, the UK Supreme Court<sup>27</sup> held that as there was no written contract between the drivers and Uber, the nature of their legal relationship had to be inferred from the parties' conduct, and consequently there was no factual basis for asserting that Uber had acted as an

<sup>16</sup> [2011] UKSC 41.

<sup>17</sup> [2007] ICR 296.

<sup>18</sup> [2006] IRLR 362.

<sup>19</sup> *Ibid.*

<sup>20</sup> [1980] EWCA Civ 6.

<sup>21</sup> [2018] EWCA Civ 2748.

<sup>22</sup> [2011] UKSC 41.

<sup>23</sup> Compare Judgment at paras 71–97.

<sup>24</sup> Compare Judgment at paras 135–154.

<sup>25</sup> Compare Judgment at paras 99–104.

<sup>26</sup> Compare Judgment at paras 156–163.

<sup>27</sup> [2021] UKSC 5.

agent for drivers. Accordingly, the correct inference was that Uber contracts with passengers and engages drivers to carry out bookings for them. Adopting its previous decision in *Autodenz*, the correct approach is to consider the purpose of the relevant employment legislation.<sup>28</sup> That purpose is to give protection to those with unequal bargaining power who are subordinate and in a dependent relation to a person or organization which exercises control over their work. In fact, as Lord Leggatt explained:

*Before using the Uber app as drivers for the first time, the claimants were required to sign a “partner registration form” stating that they agreed to be bound by and comply with terms and conditions described as “Partner Terms” dated 1 July 2013. In October 2015, a new “Services Agreement” was introduced to which drivers were required to signify their agreement electronically before they could again log into the Uber app and accept trip requests. The differences between the old and new terms are not material for present purposes and it is sufficient to refer to the new terms contained in the Services Agreement. The Services Agreement is formulated as a legal agreement between Uber BV and “an independent company in the business of providing transportation services,” referred to as “Customer”. It contains an undertaking by “Customer” to enter into a contract with each driver in the form of an accompanying “Driver Addendum”. This arrangement is inapposite for the vast majority of drivers who sign up as individuals and not on behalf of any “independent company” which in turn engages drivers.<sup>29</sup>*

As observed above, given that a ‘contract of employment’ is defined in section 230(2) of ERA 1996 to mean ‘a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing’. An ‘employee’ means an individual who has entered into or works under a contract of employment: see section 230(1). These cornerstones of employment law thereby find themselves distinguishing between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. The latter being ‘gig workers’ and/or Uber drivers.

However, in Uber’s appeal, they contended that the question whether an individual is a ‘worker’ for the purpose of the relevant legislation ought in principle to be approached, as the starting point, by interpreting the terms of any applicable written agreements. This submission, as observed above, seeks support from the UK Supreme Court’s previous ruling in *Autodenz*. Notably, Lord Clarke’s distinction between certain principles ‘which apply to ordinary contracts and, in particular, to commercial contracts’, and ‘a body of case law in the context of employment contracts in which a different approach has been taken’. Applying that approach, the UK Supreme Court in *Uber* reminded itself that there is nothing that gives an ET a free hand to disregard written contractual terms which are consistent with how the parties worked in practice but which it regards as unfairly disadvantageous and which might not have been agreed if the parties had been in

an equal bargaining position. This argument was postulated by Underhill LJ in his dissenting judgment in the Court of Appeal in *Uber*.<sup>30</sup> In fact, a modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.<sup>31</sup> Furthermore, the UK Supreme Court relying upon its previous decision in *Bates van Winkelhof*,<sup>32</sup> Baroness Hale<sup>33</sup> cautioned that, while ‘subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker’, endorsed the approach of *Autodenz* on the relative bargaining power of the parties in the employment context and the rationale for a purposive approach to the problem.

The critical 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? The UK Supreme Court found that it plainly does, as Uber exercises a significant degree of control over the way in which drivers deliver their services. The fact that drivers provide their own car means that they have more control than would most employees over the physical equipment used to perform their work. Nevertheless, Uber vets the types of car that may be used. Moreover, the technology which is integral to the service is wholly owned and controlled by Uber and is used as a means of exercising control over drivers. Thus, when a ride is accepted, the Uber app directs the driver to the pick-up location and from there to the passenger’s destination. A further potent method of control found by the Supreme Court was the usage of the ratings system, whereby passengers are asked to rate the driver after each trip and the failure of a driver to maintain a specified average rating will result in warnings and ultimately in termination of the driver’s employment with Uber.

In any event, the UK Supreme Court found that Uber, as an employer, had designed and organized its business in such a way as to provide a standardized service to passengers in which drivers are perceived as substantially interchangeable and from which Uber retains its customer loyalty. Such restricts Uber drivers from offering either a distinctive service or to exercise any entrepreneurial skill. Accordingly, Uber drivers were workers and not self-employed, within the gig economy in which they were engaged.

## 5 MARCH OF THE GIG WORKER

Whilst the gig economy is not a new phenomenon, in its twenty-first century context it is its use of digital technology and its reliance upon platform business models which has secured its growth. To that end, this new working model challenges the established law on employment relations which were cast in a bygone era, devoid of technology and digitalization and one where the employment relationship was much simpler, based on a fixed salary and hours. A natural evolution of the gig economy is one where more complex work can be performed efficiently, providing transparency to the clients/customers. Evidently, as more work components and/or services become fully or partially automated, work

<sup>28</sup> Compare. Judgment at para. 70.

<sup>29</sup> Compare Judgment at paras 22–24.

<sup>30</sup> At para. 120.

<sup>31</sup> See *UBS A/G v. Revenue and Customs Commissioners* [2016] UKSC 13. [2014] UKSC 32.

<sup>32</sup> At para. 39.

performed in so-called ‘Gig Economy 2.0’ systems offer service providers the ability to achieve more. Yet, the latter also means that existing employment law frameworks become outmoded and no longer fit for purpose.

Therefore, given the growing case law in this important area, the law appears at odds with the reality of many modern day employment scenarios. Notably, the UK retail sector, worth some GBP 395 billion to the UK economy,<sup>34</sup> employs some 2.8 million workers (i.e., loosely defined) within 319,000 retail businesses. Yet, some of these roles are online, given the increase in online, internet sales, amounting to 18% of retail sector sales. Such online platforms are heavily reliant on gig workers. Often these gig workers are properly regarded as carrying on businesses which are independent of the platform and as performing their services for the customers who purchase those services and not for the platform. Notably, in the *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v. Revenue and Customs Commissioners*,<sup>35</sup> the company Med Hotels marketed hotel rooms and holiday accommodation through a website. The issue was whether Med Ltd was purchasing accommodation from hoteliers and supplying it to customers as a principal or whether Med Ltd fell within a category of persons who ‘act solely as intermediaries’ to whom more favourable tax treatment applied. The UK Supreme Court held that the correct legal analysis of the tripartite relationship between Med Ltd, hoteliers and customers was that Med Ltd marketed and sold hotel accommodation to customers as the agent of the hoteliers and was in these circumstances acting solely as an intermediary for Value Added Tax (VAT) purposes. As Lord Neuberger aptly opined:

*the right starting point is to characterise the nature of the relationship between Med, the customer, and the hotel, in the light of ... “the contractual documentation”, one must next consider whether that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts.*<sup>36</sup>

Although such an online platform operates materially differently, for its gig workers the legal protections remain the same.

## 6 MENDING THE LEGISLATIVE LEAK?

The UKSC may well be right on the strict interpretation of the emerging law in relation to the growing gig economy. Yet, it remains unclear where this leaves the future for the traditional category of employee under section 230 ERA 1996. Perhaps, this will now become the remit of the UK Parliament, given that these rulings by the UKSC serve to remind the British legislators that they have anachronistic principles underlying the prevailing modern employment law. Similarly, the *Uber* and *Pimlico* cases reiterate the urgent

need for a new kind of employment status, ‘gig worker’. Such a status might retain some of the rights of established employment law, for instance discrimination or unfair dismissal rights, but not all of them, such as holiday pay or compulsory pensions.

Whilst these Supreme Court rulings resolve individual disputes amongst these gig workers and their respective employers, and even though they might have wider appeal and application, the sole remaining problem is enforcement of such new labour market regulation. Evidently, in future gig workers will have to challenge their existing status before ET and/or the Courts to gain access to these upgraded employment benefits and protections. Such makes it currently a lottery of employment rights. Alternatively, Parliament might choose to amend the long-standing legislative provisions. Otherwise, perhaps the Government’s new watchdog<sup>37</sup> – the Employment Agency Standards Inspectorate – is now well placed to ensure more scrutiny and bring about the necessary change in the gig economy.

Clearly these legal rulings, notwithstanding their impact and potential for wider gig economy application, raise salient issues for the future of policymaking when it comes to employment status. Evidently, these are legal rulings and therefore binding on employers. Yet, these rulings collectively highlight that the law on employment status is outmoded. The latter will either cause employers to reduce their level of control over such gig workers and/or will such businesses which are heavily reliant on gig workers to adjust their pricing, in order to afford the changes brought by these legal rulings. In any event, a post-BREXIT era now means that the existing guidance given by EU jurisprudence applies until it is replaced. Clearly, the Government could seek to provide new guidance on employment status, in particular redefining and/or clarifying the law on the concept of ‘worker’ and/or, more specifically ‘gig worker’. The latter now needs to be addressed by UK policy-makers and legislators alike, now that the judiciary have clarified the parameters.

More expectantly, the UK Government will have to legislate for that. Evidently, these significant rulings highlight that the gig economy is much needed, but the law lags behind with its outmoded labels and definitions. Whilst the UKSC rulings certainly give much food for thought as to how online platforms in the gig economy continue to mislabel their workforce. These rulings also encourage the march of the gig worker, yet they simultaneously serve only to temporarily mend the legislative leak which advocates for wider change in the future. Consequently, these rulings mark the start of the journey for many other gig workers to march along to the Parliament’s doorway.

<sup>34</sup> C. Rhodes, *Parliament Briefing Paper – Retail Sector in the UK* (Oct. 2018).

<sup>35</sup> [2014] UKSC 16.

<sup>36</sup> Compare Judgment at para. 107.

<sup>37</sup> <https://www.gov.uk/government/news/government-to-protect-workers-rights-and-clamp-down-on-workplace-abuse-with-powerful-new-body> (accessed 10 June 2021).