‘Worker, employee or neither…’ a comparison between two recent Uber decisions.

In November 2017 the Employment Appeal Tribunal (‘ET’) sitting in London concluded that any Uber driver who had the ‘Uber app’ switch on and who was within the territory in which they were authorised to work and was able to accept assignments provided to them by Uber London Ltd (‘Uber’) was a ‘worker’ in accordance with section 230 (3) (b) of the *Employment Rights Act 1996.*[1]

A little over a month later the Fair Work Commission (“FWC’) in Australia came to an entirely different conclusion when considering whether an Uber driver was an employee for the purpose of accessing unfair dismissal legislative protections. In both cases the decision makers considered much the same factual scenario and yet came to entirely different conclusions, despite the indicia used to determine the ‘employment relationship’ being similar in both the United Kingdom and Australia.

In perhaps the most interesting part of the judgment, Deputy President Gostencnik in the Australian FWC stated that the UK legislation had a broader interpretation and that:-

‘ *traditional legal tests may be out-dated in their failure to account for an evolving digital economy in which tempory and short-term positions are common*’.

This naturally leads to the question of how legislators could develop laws to refine notions of the employment relationship and broaden protections for participants in the digital economy.

The ‘Uber’,’Deliveroo’ and ‘Airtasker’ brands – ‘hyper-flexibility’ for whom?

Over the last two decades countries including Australia and Britain demonstrate a lack of real wage growth and a decline in union membership despite the fact that unemployment in both countries is relatively low[2]. Wages growth in Australia is the slowest since the late 1990’s according to the Australian Bureau of Statistics[3].

In Australia the number of independent contractors has surged from 8.5% of the workforce to 11.2%, a result which is mirrored in the UK[4]. The move toward a greater number of those self-employed redefines the nature of work and undermines the tradition ‘work-wages bargain’ because of the demise of collective bargaining power.

The creation of software applications such as Uber, Airtasker and Deliveroo facilitates a different model to the traditional employment contractual relationship. Instead we have an ‘enabling relationship’, whereby the software application simply allows users to access ‘gigs’ or jobs seemingly with no strings attached. Despite companies such as Uber extracting a commision or service fee, legally the only contractual arrangement is between the person undertaking the task such as the driver and the passenger, each time they accepted a trip on Uber’s ride-hailing app. This model allows workers to be treated at law as independent contractors instead of an employee, meaning workers are often not covered by essential workplace protections such as insurance, superannuation, sick or holiday leave, or minimum hours or rates of pay. The user of the software application simply becomes a ‘business of one’ but also subject to the uncertainty of being ‘underbid’ at any time and rendered disposable.

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[1] https://assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam_and_Others_UKEAT_0056_17_DA.pdf

[2] http://www.abc.net.au/news/2017-05-17/wage-price-index-abs-march-quarter/8532810

[3] Ibid

[4] http://www.selfemployedaustralia.com.au/Research/How-Many/independent-contractors-how-many

Some argue that the increase in the "freelance workforce' is driven by a demand for flexibility[5] but conversely the rise in the number of people working from job to job, gig to gig could be seen as a failure of governments to devise policies that address fundamental structural changes in the global marketplace. The failure to consider new employment like arrangements can also mean that governments are denied revenue for example from payroll tax.

The Master-Servant relationship

In determining whether a worker is an employee or an independent contractor the ultimate question is whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf.

This question is concerned with the objective character of the relationship. It is answered by considering the terms of the contract and the totality of the relationship[6]. In Australia, the test at common law is a multi-factor test which considers a number of factors including:-

- The direction and control a company exercises over how and when the work is performed;
- Who provides the equipment necessary to perform the work;
- Who pays the cost of work-related expenses;
- Is there a uniform required, indicating that the person is a representative of a company;
- Is there an ability to delegate work to others or must the work be personally performed;
- Is payment of fees determined by time or simply the completion of a task?[7]

In the recent UK Uber decision (*Uber B.V and others v Aslam and others*) the Employment Appeal Tribunal declared two Uber drivers were "workers" within the meaning of the *British Employment Rights Act*. In doing so the Tribunal essentially ignored key indicators of self-employment to and instead chose to consider the full the circumstances and nature of the arrangement between Uber and the drivers, this assessment was made in consideration of the following:-

(1) The contradiction in the Rider Terms between the fact that Uber purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings.

(2) The fact that Uber interviews and recruits drivers.

(3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.

(4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements.

(5) The fact that Uber sets the (default) route and the driver depart from it at his peril.

(6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory.)

(7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties.

(8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.

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[5] See McCrindle 'Happy working in the gig economy? Depends on whether it is a choice or forced', 10 August 2017, available at:- http://mccrindle.com.au/the-mccrindle-blog/the-gig-economy

[6] *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 at para 47 citing *Jiang Shen Cai trading as French Accent v Do Rozario*

[7] See further *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16

(9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.

(10) The guaranteed earnings scheme (which at the time of the Appeal had been discontinued).

(11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.

(12) The fact that Uber handles complaints by passengers, including complaints about the driver.

(13) The fact that Uber reserves the power to amend the drivers' terms unilaterally."

The Tribunal noted that in a 'normal commercial environment' the starting and end point would be to examine the contractual documentation. Here, however the Tribunal was required to consider the relationship between Uber and the drivers as governed by the statutory provision of employment law, including provisions designed to provide protection to those disadvantaged from the contractual bargain.

The Tribunal found that the contractual documentation did not reflect the reality of the relationship between Uber and its drivers and thus it was entitled to disregard the terms of the written agreements and the labels used therein[8].

In contrast, the Australian Uber decision (*Kaseris v Rasier Pacific V.O.F*)[9], which was heard by the Fair Work Commission in Melbourne, considered whether an Uber driver was a 'worker' for the purpose of accessing unfair dismissal remedies under the Fair Work Act 2009 (Cth) ("FWA). Section 382 of the FWA dictates that a person is only protected from unfair dismissal if, at that time they were covered by 'a modern award' or an 'enterprise agreement'. Although the FWC decision referred to the common law multifactorial approach detailed above, arguably by relying on the definition of a 'worker' as defined in the legislation, the decision maker was allowed only a cursory view of the nature of the relationship between the parties. The FWC found that Mr Kaseris was not an employee for the purposes of s.382 of the Act at the time of the ending of the relationship between the Applicant and the Respondent. He is therefore not a person protected from unfair dismissal. The application must be dismissed.

Section 230 (3) (b) of the *Employment Rights Act 1996,* which was considered by the Tribunal in the UK decision is much more expansive and includes the following expanded definition of a contract of employment: -

'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'.*

In September 2017 the Senate Education and Employment References Committee published numerous recommendations in a report entitled '*Corporate Avoidance of the Fair Work Act 2009*'[10].

[8] https://assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam_and_Others_UKEAT_0056_17_DA.pdf
[9] [2017] FWC 6610
[10] Available at :- www.aph.gov.au/Parliamentary_Business/

Committee members noted submissions provided by Maurice Blackburn Lawyers regarding the absence of a definitive test at common law differentiating independent contractor from employee relationships. The Committee recommended that the Act must be amended to clearly set out a statutory definition of 'employee' and 'contractor'[11].

The Gig economy – brave new world?

It is not surprising that the 'gig' economy first gained momentum in 2009 after the global financial crisis. Since that time the number of people using online platforms such as Uber, Airtasker and Freelancer which offer to 'pair workers with tasks' has expanded[12]. Clearly legal definition of 'independent contractor' does not encompass the reality of the 'gig' economy. Those seeking to find a 'gig' are in fact highly dependent on the platform to provide them with 'gigs' and face both a lack of control and a lack of bargaining power. An entrepreneur with specialised, in-demand skills may agree to sell their expertise for a high fee, but in reality the more desperate a person's financial circumstances, the less they might agree to work for. The government now needs to consider redefining traditional concepts of 'worker' and 'independent contractor' to allow regulation of the digital economy to avoid exploitation.

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This article is meant for reference only and should not be construed as legal advice.

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[11] Ibid at page 94
[12] Ibid at page 100