One small step towards decent work: *Uber v Aslam* in the Court of Appeal

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Introduction

In holding that Uber drivers are 'workers' for the purposes of the National Minimum Wage and paid holidays, the majority of the Court of Appeal has made an important contribution towards the goal of decent work for Uber drivers in London.[1] At the same time, the decision underscores yet again the fragility of using the distinction between 'workers' and 'independent contractors' as the foundation for rights at work. The distinction is especially unsuited for the large and growing number of workers whose working relationships cannot easily be characterized within the bipolar contractual model, but whose working lives are precarious and vulnerable to exploitation. It is precisely these workers who should be entitled to the benefit of basic employment rights. These strains are particularly acute in the case of 'platform' workers,[2] where technology permits a radical dispersal of the functions of traditional employers and a multiplicity of work relationships.

It is by now familiar to note that the role of contract in policing the gateway to basic rights in the workplace provides an incentive to reconfigure employment relationships to avoid responsibility for workers' rights. The Court of Appeal's willingness to recognize the potential for such manipulation in the *Aslam* case is therefore to be applauded. In doing so, the Master of the Rolls and Bean LJ relied on the powerful Supreme Court decision in *Autoclenz*,[3] which held that 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the

[1] *Uber BV v Aslam* [2018] EWCA Civ 2748
[2] By this we mean work which is digitally mediated, in that work and worker are brought together through the platform or digital base (J. Woodcock and M Graham: The Gig Economy: A Critical Introduction to Platform Work (Polity Press, London, 2019, forthcoming)). Although often referred to as "gig economy" workers, we prefer the term 'platform workers', to avoid the impression that these kinds of work are characterised by ad hoc jobs for random customers or users. In Uber's context of disguised employment, the use of the word directs attention at the once-off provision of rides to users whereas attention should be focussed on the continuous service being provided to Uber.
[3] *Autoclenz Ltd v Belcher* [2011] UKSC 41 (UK Supreme Court).

case, of which the written agreement is only a part.'[4] The majority took seriously the imbalance of bargaining power between the contracting parties in order to look behind the contractual documents to the reality of the relationship. Indeed, even a quick glance at the contractual documents underscores the majority's view of their artificiality. This contrasts with the view of Underhill J, who held that the relationship was neither unrealistic nor artificial.[5]

Following *Autoclenz*, the courts have taken their role seriously in ensuring that employment rights are not precluded by employers able to use their power to construct contracts.
It is hoped that the Supreme Court in *Aslam* continues to exercise the vigilance it has itself demanded since *Autoclenz*. At the same time, skirmishes over the demarcation of 'employment' will no doubt continue. In its preoccupation with characterizing the nature of the contract, labour law has not paid enough attention to the situation of workers outside the magic circle, and the challenges of providing decent work for workers in these complex permutations of relationships. In this respect, innovative solutions, going beyond the outdated dichotomy, are sorely needed.

The Aslam Case

The case was brought by five Uber drivers claiming minimum wages under the National Minimum Wage Act 1998 (NMWA) and paid leave under the Working Time Regulations 1998 (WTR). Three key questions were therefore at issue. To be rights-holders under these two sets of provisions, it is necessary to fall within the statutory definition of 'worker.' The first and central question therefore was whether Uber drivers are 'workers', a status which Uber has gone to great lengths to deny. Secondly, if Uber drivers are 'workers', how should their working time be determined? Uber argued that, at most, their working time began when the passenger entered the car, and ended when the trip was concluded. This would discount the 'waiting time' when drivers have switched on the app but have not yet picked up a passenger. The drivers argued that Uber's need for a surplus of drivers hovering in expectation of a call is central to its ability to respond to passengers' calls within a few minutes. Thirdly, who are the workers employed by? Uber has characteristically fragmented

[4] Ibid. para 35.
[5] *Uber BV v Aslam* [146].

itself into different entities. In this case, there were three respondents: Uber BV, Uber London Ltd, and Uber Britannia Ltd.

In a preliminary hearing, the Employment Tribunal (ET), held that the drivers were indeed workers for the purposes of the legislation. Secondly, their working time started as soon as they were within their 'territory' (in this case, London), had the app switched on and were ready to accept trips, and ended as soon as any of these three conditions ceased to apply. Thirdly, the employer was held to be Uber London Ltd (ULL). The finding were upheld by the Employment Appeal Tribunal (EAT) and Uber's appeal to the Court of Appeal was rejected by a 2-1 majority.

Each of these three main issues is discussed in more detail below.

1. Are Uber drivers 'workers'?

(a) The concept of 'worker'

The strains created by a changing workforce on the traditional binary distinction between workers employed under a contract of employment and independent contractors are well documented. There are three inter-related sources of strain. The first is that, paradoxically, eligibility for statutory employment rights has, from the very start, depended on common-law concepts of contract, whether of service or for services. The extent to which the challenges of the changing workforce can be addressed therefore depends on what the majority of the Court of Appeal in *Aslam* called the 'flexibility' of the common law. The second source of strain arises because of the incentive created for employers to avoid being responsible for statutory employment rights by reconfiguring the employment relationship. The question of what safeguards can be put in place to avoid 'sham' self-employed contracts is constrained by common law principles of contract, which tend to defer to the written agreement between the parties. The third source of strain arises from the discordance between the reality of the modern workforce and the assumption that the contract of employment accurately demarcates the group of workers who should be the subject of employment rights. This leaves out of consideration the many workers who lack the bargaining power in the market to secure for themselves the basic prerequisite for employment protection, namely continuous employment

under a contract of employment.[6] The question is therefore whether the introduction of a third category, the 'worker' employed under a contract for personal services who is not a client or a customer, is capable of filling this gap.

The centrality of the common law in defining eligibility for statutory employment rights has always been a feature of employment protection legislation in this country. Thus, in a formula which has barely changed since the introduction of statutory employment rights, current legislation states that '"contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if express) whether oral or in writing.'[7] The reference to the contract of service imports the common law tests, which were already developed in other contexts such as vicarious liability, as well as the distinction with the common law concept of the contract for services, which signifies independent contractors. Discrimination legislation, by contrast, has always permitted a wider gateway, including contracts for services provided the services are provided personally. Now incorporated into the Equality Act 2010, the definition for the purposes of discrimination law is as follows: "Employment" means employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.'[8]

The Employment Rights Act 1996, aiming to widen the eligibility for selected employment rights, drew on the discrimination law conception of contracts to do work personally, but also added the caveat that the other party should not be a client or customer of any profession or business undertaking carried on by the person doing the work. Thus a 'limb (b)' worker is defined as an individual who works under any 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.'[9] This is also the definition used for those who are entitled to minimum wages[10] and maximum working time, including paid holidays.[11] It was as 'limb (b)' workers that the Uber drivers founded their claim.

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[6] S Fredman and J Fudge, 'The Contract of Employment and Gendered Work' in M Freedland and others (eds), *The Contract of Employment* (OUP Oxford, 2016) , 231 – 252.
[7] Employment Rights Act 1996, s.230(1) and (2)
[8] Equality act 2010, s.83(2)(a)
[9] ERA 1996, s.239(3)(b)
[10] National Minimum Wage Act 1998, s.54(3)(b)
[11] National Working time regulations 1998, Reg 2(1)

(b) Addressing the 'sham' contract

The basis in contract of both the contract of employment and the limb (b) definition has always opened the way to manipulation by employers to avoid being responsible for statutory rights. Ever since the courts developed the doctrine of 'mutuality of obligation' to hold that casual waiters were not employed under a contract in between specific work assignments,[12] employers have included clauses in the contract placing no obligation on workers to carry out the work. This semblance of autonomy in choosing work is, however, belied by the social reality.[13] Similarly, the reference in the legislation to 'personal service' has led to employers introducing 'substitution clauses' into the contract, ostensibly permitting workers to choose other workers to do their work.[14] Again this has frequently been without support from the reality of the working relationship.

In a string of cases over the last decade, however, UK courts and tribunals have been alive the risk 'that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.'[15] This has led to several leading cases setting out the principles of the circumstances in which a tribunal 'may disregard terms which were included in a written agreement between the parties and instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties or the true intentions or expectations of the parties.'[16] Crucially, Lord Clarke in the seminal case of *Autoclenz v Belcher* accepted that the relative bargaining power between the parties should be taken into account in determining the answer to this question.[17]

It was this principle which was at the centre of the decision in *Aslam*. The majority of the Court of Appeal in *Aslam* emphasized that *Autoclenz* puts paid to the idea, at least in the employment context, that it is only the terms of the written contract that matter. Indeed, the Master of the Rolls stressed, *Autoclenz* went considerably further in endorsing the advice to

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[12] *O'Kelly v Trusthouse Forte* [1983] IRLR 369 369 (CA); see also *Netherrmere (St Neots) v Gardiner* [1984] ICR 612 (Court of Appeal).
[13] See Woodcock and Graham (above, n.2).
[14] *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367 367 (CA).
[15] Elias J *Consistent Group v Kalwak* [2007] UKEAT 0535 (Employment Appeal Tribunal) [57]; approved by Lord Clarke in *Autoclenz v Belcher*.
[16] *Autoclenz Ltd v Belcher* [17].
[17] Ibid. [35].

tribunals to be worldly wise and robust in ensuring that form should not be used to undermine substance.[18] Moreover, and particularly significantly, he rejected the submission on behalf of Uber that *Autoclenz* was not applicable because the contract in this case was between the passenger and the driver, rather than an employment contract: 'We disagree. *Autoclenz* holds that the Court can disregard the terms of any contract created by the employer in so far as it seeks to characterize the relationship between the employer and the individuals who provide it with services (whether employees or workers) in a particularly artificial way. Otherwise employers would simply be able to evade the consequences of *Autoclenz* by the creation of more elaborate contrivances involving third parties.'[19] The Master of the Rolls went on to hold that, in determining the true nature of the relationship between the employer and the individual who claims to be a worker, 'the court may disregard the terms of any documents generated by the employer which do not reflect the reality of what is occurring on the ground.'[20]

(c) Uber's contractual construction

The above observation is particularly apt in the *Aslam* case. Uber's commitment to reconfiguring the contractual relationship to avoid any commitment to decent work for its drivers emerges strikingly from the documents before the Court. Most conspicuous is the attempt to impose an artificial entity between Uber and the drivers. This entity was initially called the 'Partner'. Thus, the terms purporting to govern the relationship between Uber and the drivers, issued in 2013, were entitled 'Partner Terms', where the 'Partner' was defined as having sole responsibility for the 'driving service' provided by the Partner (through the Driver). The 'Driver' was defined as 'the person who is an employee or business partner of, or otherwise retained by the Partner and who shall render the Driving Service of whom the relevant… details are provided to Uber.' The passenger was known as the 'Customer.' As the employment tribunal put it, it was common ground that 'the vast majority of Uber drivers, including the applicants, were and are sole operators. …Nonetheless, for the purposes of the Partner Terms, they provided "Driving Services" through their "Drivers' (i.e. in the ordinary case, themselves) to the "Customers".'[21]

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[18] *Uber BV v Aslam* [49], [73].
[19] Ibid., [54].
[20] Ibid. [66].
[21] ET decision, para [34].

Revised terms issued in 2015 left the model unchanged but radically altered the nomenclature, turning the nominal roles upside down. The entity previously known as the 'Partner' is now labelled the 'Customer' of Uber, while the passenger, previously called the customer, is now labelled the 'User'. The 'Customer' is now held responsible for 'its Drivers' in relation to Uber and 'Users'. The 'Customer' is further obliged to require the Driver to enter into a 'Driver Addendum' with the Customer, to be provided to Uber. Even more confusingly, in the Driver Addendum, the 'Customer' morphs into the 'Transportation Company.' According to the Addendum, drafted by Uber, the 'Transportation Company' enters into an agreement with the Driver to define the terms on which the Driver receives Uber services which the Transportation Company (alias the 'Customer' and formerly the 'Partner,' but in reality the same person as the Driver) has in turn received in a separate agreement with Uber. As the employment tribunal observed, 'of course, in all but a tiny minority of cases, "Customer" and "the Driver" are one and the same individual.'[22]

The majority of the Court of Appeal agreed with the tribunal that there was a high degree of artificiality in these documents. This was particularly true of the reference to the 'Partner' or 'Customer' as if it were a separate legal entity employing one or more drivers, and indeed as an 'independent company providing transportation services.'[23] It was common ground that the vast majority of drivers are sole operators. The majority also agreed with the claimants that the contractual documents required the drivers to agree to numerous facts and legal propositions about the position of others who were not party to the contract, rather than confined to setting out the mutual obligations of the parties. Drivers could not be bound by facts or legal propositions which were false or of which they were unaware.

This opened the way to looking behind the written documents. The majority in *Aslam* took the view that, under *Autoclenz*, the courts can ignore written contractual terms not considered by reasonable people to reflect the reality of the working relationship. This was clearly such a situation. 'We consider that the extended meaning of "sham" endorsed in *Autoclenz* provides the common law with ample flexibility to address the convoluted, complex and artificial contractual arrangements, no doubt formulated by a battery of lawyers, unilaterally drawn up and dictated by Uber to tens of thousands of drivers and passengers, not one of whom is in a

[22] ET decision, footnote to paragraph 2.5 of the New Terms; *Uber BV v Aslam* [16].
[23] Ibid.[90].

position to correct or otherwise resist the contractual language.'[24] The fact that a person signed a document would be relevant evidence, but not conclusive where the terms are standard and non-negotiable and parties are in an unequal bargaining position.

(d) Looking beyond the contractual documents:

With permission to look beyond the contractual documents, two major issues required resolution. The first was whether there was a contractual relationship with Uber at all; and the second was whether that relationship fell within the definition of a limb (b) worker. On both these issues, the majority upheld the tribunal's findings that each of the Claimant drivers was working for ULL as a limb (b) worker.

The documentation went to great lengths to deny any direct contractual relationship between Uber and the drivers, reflecting Uber's position that the contract was between driver and passenger, rather than Uber and driver. Instead, the contractual documentation stated that as soon as the passenger makes a request to ULL for a ride and the driver accepts the request, a contract exists between passenger and driver. This, the majority held, could not be correct. At the point at which a request is made to ULL by the passenger and it is accepted by the driver, there could be no contract between the passenger and the driver because vital elements of any such contract were missing. In particular, there has been no agreement on an essential term, namely, the passenger's destination (which is only revealed to the driver at the moment of pick-up).[25] Nor can there be a contract between driver and passenger obliging the former to pick up the latter. When the driver accepts a request to pick up a passenger, the only contract is with ULL, to fulfil the expectation that the driver would proceed to collect the passenger from the notified location and complete the journey. Even if there is subsequently a contract with the passenger beginning at the time of pickup, this could subsist simultaneously with the contract which commenced earlier between the driver and Uber.

So far as the nature of the contract was concerned, ULL was found to exercise and enforce a high degree of control over the drivers: it could not exercise such control other than pursuant to a contractual relationship between itself and the driver.[26] Indeed, the Driver Memorandum,

[24] Ibid. [105].
[25] Ibid. [76].
[26] Ibid. [91].

despite stating that 'Uber and its affiliates… do not, and shall not be deemed to, direct or control Driver generally or in Driver's performance of Transportation services or maintenance of any Vehicles,' immediately goes on to provide that the Driver may be deactivated or restricted from using the App in the event of a violation of the Addendum, and even any act or omission that causes harm to Uber's brand, reputation or business. Such deactivation or restriction is stated to be at the sole discretion of Uber. Even apart from the documentation, the practice, as found by the ET and endorsed by the majority, made the extent of this control even clearer. Firstly, Uber in effect requires drivers to accept trips and not to cancel trips, enforcing these requirements by logging off drivers who breach them. Secondly, Uber subjects its drivers through the rating system to what is in effect a performance management or disciplinary procedure. Thirdly, Uber imposes numerous conditions on drivers, including the choice of acceptable vehicles. It also instructs drivers on how to do their work and controls them in the performance of their duties. Uber interviews and recruits drivers; and controls the key information, including the passenger's surname, contact details and intended destination, and excludes the driver from it.

Clearly therefore, the contract between the driver and ULL was not one under which ULL was the driver's client or customer for the purposes of the limb (b) definition.[27] This was underscored by Uber representatives' own public statements. In particular, in written evidence to the Greater London Authority Transport Scrutiny Committee, it was stated that 'Uber drivers are commission-based… Drivers are paid a commission of 80% for every journey they undertake.'[28] [cited in para 94]. As the majority put it: 'This statement neatly encapsulates the Claimants' case that they are workers providing their services to ULL as employer.'

The application of the *Autoclenz* test to Uber's web of contractual documentation reveals the crucial role of the court in appreciating the social reality beyond the contract. This is particularly striking when comparing the approach of the majority to that of Underhill LJ, dissenting. It is both in the legal formulation of the *Autoclenz* principle and its application that the major disagreement between the majority and Underhill LJ in dissent lies. The legal question concerned the extent to which *Autoclenz* permits the court to ignore written

[27] Ibid. [82].
[28] Ibid. [94].

contractual terms not considered by reasonable people to reflect the reality of the working relationship. Underhill LJ saw no basis in *Autoclenz* for protecting against abuses of inequality of bargaining power – this he regarded as the role of legislation.[29] The factual question concerned what reasonable people would actually consider to be the reality of the working relationship. Underhill LJ took the view that on a reasonable interpretation of the situation, the drivers were only supplying their services under a contract with the passengers. Therefore there was no warrant for disregarding the contractual paperwork under *Autoclenz* principles.

On both questions, the majority position was robust and, it is respectfully submitted, correct. The dissenting judgment proceeds almost entirely from the sanctity of contract and examines the features of the relationship between drivers and Uber from this perspective, setting an extremely – or, arguably, impossibly – high standard for disproving the reality of the very contractual terms which the ET, the EAT and the majority of the Court had found to be fictitious. Elements militating against the notion of a contractual relationship between drivers and passengers – for example, the fact that the passenger makes payment not to the driver but, by credit card, to Uber – are dismissed as not being incompatible with the notion of such a contract while, conversely, Underhill LJ did not find *any* of the elements of an employer-worker relationship between Uber and drivers identified by the ET – for example, the fact that drivers transport passengers under a license granted to Uber – to be indicative of such a relationship. [30]

The furthest that the dissenting judgment goes in acknowledging the basis for a contrary interpretation is in not rejecting outright the ET's findings that 'the drivers' relationship with Uber [is] "dependent"' and 'that their services are marketed to the public as "an integral part of [Uber's] operations"'. However, Underhill LJ goes on, '[t]hose are plainly – to put it no higher – legitimate conclusions. But they are not decisive of, or indeed directly relevant to, the issue on this appeal, which is whether the putative worker is providing the relevant services for, and under a contract with, a third party, namely the direct beneficiary of the services.'[31] By the same reasoning, it would seem, a shop assistant serving customers of the business where she works could be deemed to be entering into a private contract with each

[29] Ibid. [147].
[30] Ibid. [145].
[31] Ibid. [143].

'direct beneficiary' whom she serves, without being a worker or employee of the business on which she is dependent and the services of which she is marketing as an 'integral part' of its operation, if that is what her contract with the business says. On balance, it is suggested, the assiduous adherence to contractual doctrine embodied in the dissenting judgment may be said to strain at the limits not only of logic but also of legal policy, given that labour law was born out of the very recognition of the inadequacy of that doctrine in regulating the complex and unequal relationship between working individuals and those on whom they are dependent for their living.

The risk remains that, having been alerted to these factors, Uber might rearrange its contractual documentation with a view to avoiding the results reached in this case. Certainly, the current complex contractual terms reflect such efforts in the past. On the other hand, Uber is likely to be reluctant to change the practice behind the contractual arrangements, since much of the control it exercises over drivers is central to its business model. These include its reliance on the rating system, its concealment of passengers' surnames and contact details, the conditions it places on drivers and the use of deactivation of the app as a means of enforcing aspects of its control. It is thus crucial that the court continues to look behind the contractual documentation to the actual practice.

2. Who is the 'employer'?

Uber has become adept at fragmenting its corporate personality to give it the opportunity to claim that a different entity is the real respondent. This was successfully achieved in a recent case in South Africa, where a group of deactivated Uber drivers sought to claim unfair dismissal in the Commission for Conciliation, Mediation and Arbitration (CCMA). Lacking legal representation, they merely cited 'Uber' as the respondent. The legal representatives of Uber BV (UBV, a Dutch corporation) and Uber South Africa Technological Services (Pty) Ltd (U-SA) then persuaded the CCMA that U-SA was the intended respondent. Although a CCMA arbitrator subsequently ruled that an employment relationship existed between the drivers and U-SA,[32] the Labour Court held on review that the sole contractual relationship was between UBV (which was not a party to the dispute) and the 'partners' involved. While

[32] *Uber South Africa Technological Services (Pty) Ltd / National Union of Public Service and Allied Workers and South African Transport and Allied Workers Union obo Morekure and others* [2017] 11 BALR 1247 (CCMA).

the nature of this relationship was expressly left open, the court did not find sufficient evidence of an employment relationship with U-SA.[33]

In *Aslam*, the applicants sensibly cited three different Uber entities, although only two were material in the case. The first is UBV, the parent company of the other two cited entities. UBV holds the intellectual property rights in the app. The second is Uber London Ltd (ULL), a UK registered company which holds the Private Hire Vehicle (PHV) licence in London, under the Private Hire Vehicles (London) Act 1998 (PHVA) ULL's functions include accepting PHV bookings.

According to Uber, the only contract held by the driver was with UBV for the use of the app. This, it was argued, meant that Dutch law applied so that the claimants would not have any protection under UK employment legislation. The majority of the CA, however, had no difficulty in rejecting this claim. It endorsed the ET's finding that ULL is the obvious candidate as employer of the drivers. 'It recruits, instructs, controls, disciplines and, where it sees fit, dismisses drivers.'[34] At the point at which the driver accepts a request to pick up a passenger, the court held, the contract to fulfil the expectation of picking up the passenger and completing the journey must be with ULL. There was nothing in the documentation stating that ULL was acting as agent for UBV at that point.

The majority of the CA found it particularly striking that ULL, despite holding the PHV licence and therefore being the only entity legally permitted to operate the business, was scarcely mentioned in standard form agreement between UBV and each of the drivers. This was 'all the more striking because ULL enforces a high degree of control over the drivers and for the most part does so… in order to protect its position as PHV operator in London.'[35] ULL could only exercise this control pursuant to a contractual relationship between itself and each driver. This also reinforced its view that ULL was not merely acting as a local enforcer for UBV, which holds the intellectual property in the app.

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[33] *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and others* [2018] 4 BLLR 399 (LC).
[34] *Uber BV v Aslam* [98].
[35] Ibid. [91].

Similarly, the regulatory regime imposed on ULL by the PHVA underpinned the ET's conclusion that Uber could not be regarded as working for the drivers. Rather, the regulatory regime supported the finding that Uber runs a transportation business, and the drivers provide the skilled labour through which it delivers its services and earns its profits. In particular, under the PHVA, only ULL can in its sole discretion accept or decline bookings. This means that ULL could not be regarded as the agent of the drivers. This gained further support from the PHVA requirement that Uber must fix the fare and the driver cannot agree a higher sum with the passenger; and that Uber should handle complaints by passengers. Equally importantly, the licence is held by ULL, which is required to satisfy the licensing authority that it is a fit and proper person to hold the licence. 'For ULL to be stating to its statutory regulator that it is operating a private hire vehicle service in London, and is a fit and proper person to do so, while at the same time arguing in this litigation that it is merely an affiliate of a Dutch registered company which licenses tens of thousands of proprietors of small businesses to use its software, contributes to the air of contrivance and artificiality which pervades Uber's case.'[36]

4. When are the drivers working?

If the claimants were held to be 'workers', the next question was what would count as working time for the purposes of the Working Time Regulations and the National Minimum Wage Act. Uber argued that, at most, drivers' working time began when the passenger entered the car and ended when the trip was concluded. This would discount the 'waiting time' when drivers have switched on the app but have not yet picked up a passenger.

The ET disagreed. Given that Uber's business model was based on its ability to get a driver to a passenger as quickly as possible, it necessitated the availability of drivers who were circling around waiting for a call. As the tribunal put it, 'To be confident of satisfying demand, it must, at any one time, have some of its drivers carrying passengers and some waiting for the opportunity to do so. Being available is an essential part of the service which the driver renders to Uber.'[37] This led the tribunal to hold that the driver was working as soon as she was in the territory (London) and had the app switched on. The majority of the Court

[36] Ibid. [88].
[37] Ibid. [100].

of Appeal, while finding this point more difficult, decided to accept the ET's decision on the basis that it was a finding of fact which could not be disturbed on appeal.

Uber placed much emphasis on the fact that its standard terms expressly permit drivers to use other competing apps and can have more than one switched on at any one time. Here too, however, the reality on the ground was given more emphasis than the contractual documents. There was no evidence put before the ET to show how often drivers in fact worked for others. To the contrary, even though formally drivers are not obliged to accept all trip requests, in fact they face a penalty of being logged off if three consecutive requests are not accepted within a ten second time frame. The Court of Appeal held that this justified the ET's conclusion that drivers waiting for a booking are at ULL's disposal. This could, however, be displaced by evidence to the contrary.

5. The way ahead

The decision of the Court of Appeal in *Aslam* is to be welcomed, and it is hoped that it will be upheld in the Supreme Court. By recognizing the extent to which inequality of bargaining power can undermine the consensual foundations of contract, UK courts, led by the Supreme Court in *Autoclenz*, have made important strides towards ensuring that non-standard workers can benefit from basic employment rights. The decision will also be helpful to Uber drivers in other jurisdictions which similarly rely on the classification of the contract as the gateway to employment rights. However, Uber's advisors will no doubt immediately be setting to work to find new ways to reconfigure the relationship to escape responsibilities to drivers. Indeed, one of the paradoxical results of the rigid divide between 'worker' and 'self-employed' is that companies like Uber are reluctant to make any concessions in case these lend support to a construction of the relationship as one of worker and employer.[38]

This suggests that it is time to consider ways of transcending this binary divide and ensuring decent work in the labour market irrespective of employment status. Central to this would be to regard the worker as a rights-bearer regardless of the ways in which the contract is configured. The platform economy is only one manifestation of the reality in which large numbers of workers work outside of the standard employment relationship, while having no

[38] We are indebted to Mark Graham for this point.

pretence or aspiration to being independent entrepreneurs. The Taylor Report's proposal of a presumption of worker status has some promise[39], as can be seen from the South African experience where such a presumption has been on the statute books since 2002. Section 200A of the South African Labour Relations Act 1995 (LRA) provides that, if any one of seven typical features of 'employment' is present, the relationship is presumed to be one of employment 'regardless of the form of the contract', and the onus shifts to the presumed employer to prove that it is not. However, a legally enforceable contract must exist between the parties before the presumption can apply. Moreover, if such a contract does exist, the same common law test is used to determine the nature of the relationship. In the case of Uber, this would narrow the focus to the relationship between the entity of Uber's choosing and the 'Customer' or other party or parties whom the controlling Uber entity elects to designate as a contractual partner. These complexities should be borne in mind when framing any legislative reform.

Potential for change can also be found in Sprague's proposition that the assessment should not be based on whether the worker is dependent on the platform, but whether the business model of the platform depends on the existence of the contractor.[40] Since Uber clearly could not exist without drivers, this is a valuable potential pathway. It would, for example, dispose of the questionable rationale adopted in yet another South African arbitration ruling, where the arbitrator accepted that the 'undertaking' of UBV is situated in the Netherlands, not in South Africa, and that the dispute therefore fell beyond the territorial jurisdiction of the LRA.[41] Given that UBV's income is ultimately derived from fares generated by drivers in South Africa and other countries, it is difficult not to see it as being dependent on those drivers' labour and, therefore, understanding the drivers to play an essential part in UBV's business model.

Although there is scope for tinkering with the current tests, the potential for discrepancies between the reality of the modern workforce and the traditional distinction between

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[39] Good Work: The Taylor Review of Modern Working Practices (July 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf (accessed 4 April 2019) p.62

[40] R. Sprague 'Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes' 31 A.B.A. J. Lab. & Emp. L. 53 (2015-2016) 53 - 76

[41] *NUPSAW obo Mostert v Uber South Africa Technology Services (Pty) Ltd, Uber B.V. & Uber International Holding B.V.* (WECT 18234-18, 31 May 2018).

independent contractors and workers, however defined, prompts more radical thinking. One promising option is to recognise the impact of inequality of bargaining power on traditional common law constructions of the contract in a more thoroughgoing manner. This might draw on the approach to consumer contracts, where inequality of bargaining power in relation to standard form contracts has been recognized as legitimating statutory overriding of contractual terms to protect consumers.[42] This would be particularly helpful in the case of platform workers because it would apply regardless of whether the workers are characterised as employees or self-employed.

The analogy with consumer contracts was directly relied on in a recent case concerning Uber drivers in the Court of Appeal for Ontario,[43] where an arbitration clause requiring all disputes to be settled in the Netherlands was held to be unconscionable. Nordheimer JA stated: 'I would add that, for the purposes of this analysis, I do not see any reasonable distinction to be drawn between consumers, on the one hand, and individuals such as the appellant, on the other. Indeed, I would note that, if Uber is correct and their drivers are not employees, then they are very much akin to consumers in terms of their relative bargaining position. Alternatively, if Uber is wrong, and their drivers are employees, we are not speaking of employees who are members of a large union with similar bargaining power and resources available to protect its members. Rather, the drivers are individuals who are at the mercy of the terms, conditions and rates of service set by Uber, just as are consumers. If they wish to avail themselves of Uber's services, they have only one choice and that is to click "I agree" with the terms of the contractual relationship that are presented to them.'[44]

The test for unconscionability under Ontario law has four elements: a grossly unfair and improvident transaction; a victim's lack of independent legal advice or other suitable advice; an overwhelming imbalance in bargaining power and the other party knowingly taking advantage of this vulnerability. The Court in the Ontario case found that all four elements were met in relation to the arbitration clause, which required any dispute whatsoever arising from the agreement to be mandatorily submitted to mediation proceedings and, if not settled, to be exclusively and finally resolved by arbitration to take place in Amsterdam. What this

[42] Unfair Contract Terms Act 1977: ('An Act to impose further limits on the extent to which under the law of England and Wales and Northern Ireland civil liability for breach of contract, of for negligence or other breach of duty, can be avoided by means of contract terms and otherwise').
[43] *Heller v. Uber Technologies Inc*., (2019) ONCA 1.
[44] Ibid [71].

meant, the Court found, was that the up-front administrative and filing costs for a driver to participate in the mediation and arbitration proceedings in the Netherlands would be $14,500. This sum did not take account of counsel fees, travel or other expenses relating to participating in the arbitration. It also found that, as an UberEATS driver, the appellant earned about between $20,800 and $31,200 per year, before taxes and expenses.

As well as protecting workers as quasi-consumers, consumer law opens up a further avenue for regulating platforms. If workers are treated as running separate and independent businesses, the fact that their prices are fixed centrally could be in breach of competition. Like many aspects of the digital economy, the competitive aspect and the meaning of price-fixing may not fit easily into the traditional mould, and more research is needed to explore the issue.[45]

More innovative still is the important initiative of the Fair Work Foundation, which draws on the influence of publicity, reputation and consumer power to achieve decent work for platform workers. Building on the model of Fair Trade and the highly successful Living Wage initiative in London, the Fair Trade Foundation uses a rating scheme to determine the extent to which platforms are providing decent work for those who carry out platform-mediated tasks.[46] Particularly important, from a labour law perspective, is the need to formulate appropriate standards in an environment which is freed from contractual scaffolding. The project of formulating such standards is one which desperately requires detailed attention.

Existing steps in this direction, extending worker protection beyond the 'employment' paradigm include the Australian Independent Contractors Act 2006 and the (Italian) Self-employment Statute.[47] The latter is particularly significant since it was enacted in a time when independent contracting (sham or otherwise) by means of digital platforms was part of a problem crying out to be addressed. Del Conte and Gramano note that this statute "is not a

[45] See, for example, Joseph E. Harrington 'How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies' (August 24, 2018). Available at SSRN: https://ssrn.com/abstract=3238244 or http://dx.doi.org/10.2139/ssrn.3238244

[46] The authors of this note are co-investigators on an ESRC funded grant entitled 'Fairwork in the Platform Economy in the Global South', with Mark Graham (PI), Jean Paul van der Belle, Richard Heeks and Jamie Woodcock (Grant ES/S00081X/1) See further Graham, M. and Woodcock, J. (2018) 'Towards a Fairer Platform Economy: Introducing the Fairwork Foundation', Alternate Routes, 29: 242-253.

[47] Law No. 81/2017.

small-scale imitation of the rights typical of subordinate work" but, rather, "recognizes the specific characteristics of the autonomy of organization and management of professional activity, supporting all those … who want to set up their own businesses by asserting their professional skills in the market".[48] For example, the abuse of "economic dependence" on the part of contractors is prohibited and forms of "abuse" are defined, including "the imposition of unjustifiably burdensome or discriminatory contractual conditions, or the arbitrary termination of existing business relationships".[49] The statute also extends various forms of social security from the national social insurance system to self-employed workers, such as maternity allowance and parental leave allowance for self-employed parents. These and other provisions deserve closer study in the conceptualisation of a model of worker rights unrelated to the worker's contractual status.

The *Aslam* decision, by determining the working time of Uber drivers, takes an important step in this direction. More attention now needs to be paid to other aspects, such as guaranteed minimum pay, protection from harassment and unfair termination, and freedom from discrimination. Most challenging of all, it is crucial to find ways of protecting collective rights that will enable all workers to engage collectively with those for whom they work and, in the event of disputes, act collectively in promoting their interests.

[48] Maurizio Del Conte and Elena Gramano "The new legal status of independent contractors in the Italian legal system" (2018) 39 *Comparative Labor Law & Policy Journal* 579 - 605 at 605.
[49] Del Conte and Gramano (above n 48) p.602