DEFINING THE EMPLOYMENT RELATIONSHIP IN THE PLATFORM ECONOMY – INDEPENDENT CONTRACTORS, WORKERS OR EMPLOYEES?

Abstract: This article discusses the emerging employment law in relation to the platform economy and the implications the characterisation of individuals has for their employment entitlements. The article explores recent Irish, European and English law on the definition of 'workers' in the labour market.

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> 'The world is going through a new economic revolution, disrupting the economy, businesses, labour markets and our daily lives in a way not seen since the industrial revolution. Driven by technological innovations and increased online connectivity, the role of digital labour market matching is rising. At the heart of this change is the rise of the platform economy.'
>
> - Daisy Chan and others.[1]

Introduction

Labour law is an important area of law dealing with rights and responsibilities of employees, employers, and organisations. While protecting, regulating, supporting, and restraining the functions and powers within the employee-employer relationship, 'it is the function of law to preserve and where it can promote industrial peace'.[2] Employment relations are constantly adapting and adjusting to the new environments of labour relations, regulations, and the demand for flexibility in certain fields of work. Environmental developments create a constant change in patterns of work, forms of work and the evolution of work. Notably, Todolí-Signes has highlighted the fact that the 'legal concept of an employee is rooted in a pre-Internet era', so it is not surprising to see that the emergence of the platform economy has played a significant role in transforming the industrial landscape of the 21st century.[3] The platform economy – also termed the 'gig' or 'digital' economy – utilizes recent developments in technology to create new boundaries and possibilities for all individuals involved in the world of work. Specifically, the platform economy is a new iteration of working.

This article seeks to explore the significance of the platform economy in the 21st century, the impact these working arrangements have on traditional employment relationships and whether recent case law in Ireland, the European Union and the United Kingdom has clarified the legal status of these working arrangements.

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[1] Daisy Chan, Freek Voortman and Sarah Rogers, 'The Rise of the Platform Economy' (Deloitte, December 2018) <https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/humancapital/deloitte-nl-hc-reshaping-work-conference.pdf> accessed 22 January 2021.

[2] Johan Piron, 'The Theory of Collective Bargaining' (1978) 41 THRHR 183, 196.

[3] Adrián Todolí-Signes, 'The 'Gig Economy': Employee, Self-employed or the Need for a Special Employment Regulation?' (2017) 23(2) Transfer 193, 193. See also Kevin Bell, 'Is the Gig Finally Up?' (2020) 17(1) Irish Employment Law Journal 9.

The Platform Economy

Dundon and Rollinson have defined the 'employment relationship' as

> [t]he formal and informal relationship between an organisation and its employees…includ[ing] a wide range of interactions and processes by which the parties to the relationship adjust to the needs, wants and expectations of each other in the employment situation.[4]

Meijerink and Keegan have defined the 'platform economy' as 'the performance of a fixed-term activities by individuals who perform a service on-demand for a firm or consumer, without actually being employed or having an employment relationship with an organization'.[5] Stanford neatly characterises the platform economy as:

i) sourcing and performing of fixed-term tasks;
ii) absence of an employment relationship; and
iii) intermediation by an intermediary platform firm.[6]

Evidently, when one looks at these definitions, it is clear that there is a lack of proximity in these working arrangements; potentially arising from the digital nature of the platform economy. As highlighted by Todolí-Signes, companies involved in the platform economy 'devote their business to building an online platform (web, apps, etc.) where clients can directly find a worker or workers to perform the task.'[7] Clients, users, and workers can be located anywhere in the world and work can range from a brief answering of a survey to an 18-month data base management project. There is no sense of the commitment traditionally associated with the Employer Employee relationship in these arrangements. The platform economy introduces a certain degree of flexibility to traditional working arrangements, providing lay persons with the option of gaining an (additional) income without committing to a rigid employment schedule, and companies with the option of expanding/reducing their workforce without committing to long-term contracts of employment and the obligations that flow from such contracts.[8]

These working arrangements on their face do not possess the principle of mutuality of obligation traditionally integral to a contract of employment. Significantly, Freeland found that an employment contract must include 'an exchange of work for remuneration' and 'the promises to employ and be employed'.[9] The platform economy, to a certain degree, removes the second element of Freeland's principle as there is no obligation on a company/employer to provide their 'workers' with work. In *Barry v Minister for Agriculture*, Edwards J found that this principle was an 'important filter' in establishing whether a contract is a contract of/for

[4] Tony Dundon and Derek Rollinson, *Understanding Employment Relations* (McGraw-Hill Higher Education, 2nd edn, 2011) 5.
[5] Jeroen Meijerink and Anne Keegan, 'Conceptualizing Human Resource Management in the Gig Economy Toward a Platform Ecosystem Perspective.' (2019) 34(4) Journal of Managerial Psychology 214, 215.
[6] Jim Stanford, 'The Resurgence of Gig Work: Historical and Theoretical Perspectives' (2017) 28(3) The Economic and Labour Relations Review 382; Meijerink and Keegan (n 6) 216.
[7] Adrián Todolí-Signes (n 3) 194.
[8] See generally Valerio De Stefano, 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig Economy' (2016) 37(3) Comparative Labor Law and Policy Journal 471.
[9] Mark Freeland, *The Contract of Employment* (Clarendon Press 1976) 20.

service – an issue that lies at the heart of the working arrangements that arise in the platform economy.[10]

The Irish Experience

According to McGuiness and others,[11] contingent work (or atypical work) – defined as 'any work that is non-permanent' – became favourable during Ireland's economic decline as part-time work, temporary work, agency work, zero-hours contracts, and independent contracting guaranteed an income where one could not secure stable full-time employment.[12] Unemployment rates reached its peak of 15% in 2012, with the young population being most heavily impacted, and individuals found innovative employment opportunities.[13] These opportunities continue to rise, while traditional employment declines. The ERSI recently reported that approximately 200,000 Irish workers engage in non-permanent employment arrangements.[14] These workers have the opportunity to participate in the labour market but at what cost? Digital platforms, such as Deliveroo, Uber Eats', Uber and Airbnb explicitly avoid characterising their workers as employees and opt to use more removed terms, such as agents or contractors – implying that the working relationship is one of a contracts for service(s).[15] In Uber Eats' terms and conditions, they describe their 'Delivery Partners' as 'agents' of the restaurant, rather than employees.[16] This careful characterisation creates a new category of 'workers' (discussed below) and leaves, it could be said, a lack of clarity as regards to these individual's status, entitlements and/or protections.

The Irish Constitution,[17] European Convention on Human Rights, EU directives and regulations, case law and a number of statutory instruments collectively protect an employee's rights. However, the characterization of 'employees' as workers, agents or independent contractors in a working arrangement allows companies to minimize their outgoings as they are no longer responsible for PAYE or PRSI contributions, which would see their employees benefit from protections under the Employment (Miscellaneous Provisions) Act 2018, Organization of Working Time Act 1997, the Maternity Protection

[10] See *Barry v. Minister for Agriculture* [2008] IEHC 216 [47]. See also Ailbhe Murphy and Maeve Regan, *Employment Law* (2nd edn., Bloomsbury Professional 2017), [2.43] – [2.49].

[11] Seamus McGuiness, Adele Bergin, Claire Keane and Judith Delaney, *Measuring Contingent Employment in Ireland* (The Economic and Social Research Institute, 2018)

[12] Brenda Daly and Michael Doherty, *Principles of Irish Employment Law* (Clarus Press, 2010) 52; Michael Forde, *Employment Law* (2nd edn, Round Hall Press 2001).

[13] Elish Kelly, Seamus McGuiness, Philip J O'Connell, David Haugh and Alberto González Pandiella, 'ERSI Research Bulletin: Impact of the Great Recession on Unemployed Youth and NEET Individuals' (*The Economic and Social Research Institute*, 1 March 2015) <https://www.esri.ie/system/files?file=media/file-uploads/2015-07/RB20150103.pdf> accessed 12 January 2021.

[14] Ingrid Miley, '200,000 are in temporary or non-permanent employment – ERSI' (RTE, 6 February 2018) <https://www.rte.ie/news/business/2018/0206/938745-conference-hears-200-000-are-in-temporary-employment/> accessed 12 January 2`021.

[15] David Chau, 'Uber Eats imposes "unfair contracts" and ruins deliveries, restaurateurs allege' (ABC, 17 July 2019) <https://www.abc.net.au/news/2018-04-22/uber-eats-criticised-over-conditions-on-restaurant-owners/9662814> accessed 12 January 2021.

[16] See *Amita Gupta v. Portier Pacific Pty Ltd.; Uber Australia Pty Ltd. t/a Uber Eats* [2019] FWV 5008; [2020] FWCFB 1698.

[17] See Artide 45.2(i) of Bunreacht na hÉireann, 1937 which provides: 'The State shall, in particular, direct its policy towards securing: That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.'

Act 1994, Paternity Leave and Benefit Act 2016, the Protection of Employees (Part-Time Work) Act 2001 and the Unfair Dismissals Act 1977, etc.

The European Union has addressed certain aspects of the employment relationship through Directive 99/70,[18] which was enshrined into Irish law by the Protection of Employees (Fixed Term Work) Act 2003. The Directive prevents employers using fixed-term contracts as a means of evading their responsibilities to their employees, as s 9 of the Act of 2003 prevents the use of successive fixed-term contracts and provides an employee with a permanent contract after 4 years (aggregate) of employment. In *Coyle v The Labour Court*,[19] Ms. Coyle, an art teacher employed on a series of fixed-term contracts, claimed that she was entitled to a contract of indefinite duration owing to her 34 years of employment at Blackrock College, which required her to sign on for social welfare payments from June to August every year before her contract was renewed for the upcoming academic year. Initially, the Workplace Relations Commission found in her favour, but the Labour Court subsequently found that Ms. Coyle was a 'permanent employee' and was not entitled to rely on the protections provided for under the Act of 2003. This decision was appealed to the High Court where Meenan J found that the respondent could not be deemed to be a 'permanent employee', relying on affidavits of the college which explicitly stated that 'your client is not employed by it during the summer months…however, as she has always had an expectation of returning to the school each year after the summer holidays…'. [20] Meenan J found that 'an "expectation" of returning to work falls short of a legal entitlement' and did not allow the respondent to find that Ms. Coyle was a permanent employee. [21] It seems that the 'expectation' of future employment did not satisfy the principle of mutuality of obligation and an expectation of future work is often absent from the platform economy as companies do not guarantee work to those who sign up to their platform. [22]

Additionally, the Protection of Employees (Part-Time Work) Act 2001 adopts the principle of equal treatment between part-time and full-time workers, with its application to 'workers' being recently discussed in the Irish courts. In *Karshan (Midlands) Limited Trading as Domino's Pizza v Revenue Commissioners,* O'Connor J assessed whether the decision of the Tax Appeals Commissioner, which found that pizza delivery drivers engaged by Domino's were on contracts 'of' service, leaving Domino's liable for PAYE and PRSI contributions for *their* drivers. [23] Domino's characterised their drivers as 'independent contractors', with their contracts being quite vague in terms of the actual employment relationship. As there was no guaranteed number of deliveries, drivers were obliged to submit their own invoices, keep their own records and provide their own vehicle, while also being permitted to engage in substitution. Unlike the workers in *Uber* decision (discussed below), Domino's drivers were also required to wear a branded uniform supplied by the company. [24]

Domino's argued that the Tax Appeals Commissioner erred in classifying the contracts as contracts 'of' services. O'Connor J considered the following concepts when assessing whether the driver's contracts could be classified as contracts 'of' service:

a) mutuality of obligation;

[18] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work conduded by ETUC, UNICE and CEEP [1999] OJ L175.
[19] [2020] IEHC 111.
[20] *Coyle v The Labour Court* (n 21), [17].
[21] ibid [18].
[22] See also *Kayed v Forbidden City Limited* [2016] IEHC 722 (unreported, High Court, 16th November 2016)
[23] [2019] IEHC 894.
[24] Bell (n 3) 11.

b) substitution;
c) integration; and
d) the written terms of the contracts.

On the question of mutuality of obligation, O'Connor J found that, relying on the reasoning in *Barry*, this factor was satisfied by the appellant agreeing to work when a driver was required. [25] O'Connor J agreed with the Commissioner's decision in relation to the substitution of workers and the maintenance of integration as Domino's requirements prevented workers delegating work, and required them to follow certain directions in relation to uniforms and their interactions with customers. Significantly, O'Connor J highlighted the insignificance of the 'umbrella agreement' which existed between the parties and echoed the words of Keane J in *Henry Denny & Sons (Ireland) Ltd. v Minister for Social Welfare*, who noted that written terms have 'marginal' value,[26] and Geoghegan J in *Castleisland Cattle Breeding v Minister for Social Welfare*, who referred to the necessity to '… look at how the contract is worked out in practice as mere wording cannot determine its nature.'[27] Dominos were liable for their drivers for tax purposes and the Tax Appeals Commissioner was found to be correct in their finding.

Recent Irish jurisprudence therefore indicates that the employment relationship in practice is more significant than the terms used by companies, and Irish courts will look at what is actually occurring as opposed to what is stated in words to be occurring.[28]

The EU Perspective

The European Convention of Human Rights, enshrined into Irish law under the European Convention of Human Rights Act 2003, recognises the importance of EU rights for its citizens. In addition to the Convention, the Charter of Fundamental Rights recognises the fact that '[e]very citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State'.[29] Recent case law in the European Union has focused on the definition of a 'worker', which is significant as the guarantee of freedom of movement allows EU citizens to relocate to various European countries while engaging with the platform economy and its seems as though a uniform definition of 'workers' and understanding of the platform economy is important in ensuring EU citizens can avail of their rights and obligations in various Member States.[30]

In *Asociacion Profesional Elite Taxi v Uber Systems Spain (Case C-434/15),*[31] the Advocate General distinguished the intermediatory nature of the platform economy for online booking facilities with the services offered by Uber:

> Drivers who work on the Uber platform do not pursue an independent activity that exists independently of the platform. On the contrary, the

[25] See *Weight Watchers (UK) Ltd v Revenue and Customs Commissioners* [2011] UKUT 433.
[26] [1997] IESC 9; [1998] I.R. 34, 53.
[27] [2004] IESC 40; [2004] 4 I.R. 150, 150.
[28] Bell (n 3) 10. See also Adam Elebert, 'Uber B.V. v Aslam: The Contract of Employment in Theory and in Practice' (2019) 37(19) Irish Law Times 279; and Stefano (n 9) 486 – 489.
[29] Artide 15(1) of the Charter of Fundamental Rights of the European Union (C-326/391) provides: 'Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.'
[30] Brian Bercusson, *European Labour Law* (2nd edn, Cambridge University Press 2009) 370 - 377.
[31] *Asociacion Profesional Elite Taxi v Uber Systems Spain* (Case C-434/15) [ECLI:EU:C:2017:364].

> activity exists solely because of the platform, without which it would have no sense.
>
> That is why I think it is wrong to compare Uber to intermediation platforms such as those used to make hotel bookings or purchase flights.
>
> Similarities clearly exist, for instance as regards the mechanisms for booking or purchasing directly on the platform, the payment facilities or even the ratings systems. These are services offered by the platform to its users.
>
> However, in contrast to the situation of Uber's drivers, both hotels and airlines are undertakings which function completely independently of any intermediary platform and for which such platforms are simply one of a number of ways of marketing their services. Furthermore, it is the hotels and airlines – and not the booking platforms – that determine the conditions under which their services are provided, starting with prices. These undertakings also operate in accordance with the rules specific to their sector of activity, so that booking platforms do not exert any prior control over access to the activity, as Uber does with its drivers.
>
> Lastly, such booking platforms give users a real choice between several providers whose offers differ on a number of important points from the users' perspective, such as flight and accommodation standards, flight times and hotel location. By contrast, with Uber, these aspects are standardised and determined by the platform, so that, as a general rule, the passenger will accept the service of the most quickly available driver.[32]

In *Ville de Nivelles v Rudy Matzak (Case C-518/15),*[33] the Court of Justice explored the definition provided for under Article 2 of Directive 2003/88, which defines 'working time' as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice' and 'rest period' as 'any period which is not working time.' In this case, a Belgian firefighter claimed that he was entitled to stand-by hours as he was required to be 'domiciled or reside in a place so as not to exceed a maximum of 8 minutes reach' of the fire station. The Court of Justice found that 'Article 2 of Directive 2003/88 must be interpreted as not meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities to have other activities, must be regarded as 'working time'.'[34] This was a significant finding as the precarious nature of the platform economy limits an individual's availability in an unusual manner, quite different to that of an employee or a person who is self-employed, as work is not guaranteed but their commitment is required.

Recently, in *B v Yodel Delivery Network Ltd. (Case C-692/19),*[35] the Court of Justice questioned the status of a Yodel delivery driver. Like many drivers in the platform economy, this delivery driver had a contract with Yodel for the delivery of parcels, had a degree of flexibility over his working hours, could work for third parties, and could sub-contract work. In assessing the classification of B's employment status, the CJEU indicated that B's relationship with the company was somewhat contradictory as he had a great deal of latitude in his work but was

[32] *Asociacion Profesional Elite Taxi v Uber Systems Spain (Case C-434/15)* (n 33), paras. 56 – 60.
[33] *Ville de Nivelles v Rudy Matzak* (Case C-518/15) [ECLI:EU:C:2018:82].
[34] *Ville de Nivelles v Rudy Matzak* (Case C-518/15) (n 36), para. 53.
[35] *B v Yodel Delivery Network Ltd.* (Case C-692/19) [ECLI:EU:C:2020:288].

limited in his ability to substitute work; had an absolute right over the acceptance/rejection of tasks but it was unclear whether this independence was real or notional; and was required to work within certain time constraints owing to the nature of the job. The Court referred the matter to the domestic courts and expressed the view that:

> In the light of all those factors, first, the independence of a courier, such as that at issue in the main proceedings, does not appear to be fictitious and, second, there does not appear, a priori, to be a relationship of subordination between him and his putative employer.[36]

The CJEU left open the possibility of the creation of a new category of 'worker' as the Yodel delivery driver did not seem to fit into the definition of an 'independent contractor' or an 'employee'.

The UK Perspective

The pivotal case of *Aslam and Farrar & Ors v Uber BV, Uber London Ltd and Uber Britannia Ltd* examines the issues surrounding the categorisation of 'workers' in the platform economy and the classification of 'worker' under s 230(3)(b) of the Employment Rights Act 1996 in the United Kingdom,[37] which defines a 'worker' as 'an individual who 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.[38]

Two individuals working for Uber argued that they were employees, consequentially entitling them to holiday pay and minimum wage. However, Uber argued that they were a 'ride hailing app' rather than a company employing individual drivers. Uber, a well-known taxi app, has revolutionised transport in London, providing commuters with access to transport at the touch of a button – with FreeNow (formerly MyTaxi) offering a similar service in Ireland. Considering the contentious issues surrounding the definition of a 'worker' and the need to seek clarity due to the rising numbers of individuals entering working arrangements in the platform economy, this issue has been litigated at various levels in the UK courts.

Employment Tribunal

The Employment Tribunal set out the facts of the case, highlighting the fact that Uber drivers were contracted for services that are non-transferable, are responsible for supplying their own vehicle (of which Uber prescribes the type and colour), are responsible for all maintenance costs, are not allowed to individually solicit rides and can only accept rides

[36] (n 36) [43].
[37] *Uber BV v Aslam and Farrar and others v Uber BV, Uber London and Uber Britannia Ltd.* [2018] EWCA 2748.
[38] Employment Rights Act 1996, s 230(3)(b).

through the Uber app. Drivers are also required to accept 80% of trip requests to retain their account with Uber and those who decline three trips in a row will be forcibly logged off the Uber app for 10mins. Their routes are also prescribed by the app and they are subjected to rated reviews, with a driver being required to achieve an average rating of at least 4.4/5. Despite the foregoing, drivers are permitted to work for third parties, are not provided with a uniform/branding and are self-employed for tax purposes.

The UK Employment Tribunal held that the claimants were 'workers' under the definition provided for in the Act of 1996 and were therefore entitled to their employee rights. The justification for this conclusion was as follows: any organisation (a) running an enterprise at the heart of which is the function of carrying people in motor car from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a private hired vehicle operator but (c) requiring drivers and passengers to agree, as a matter of contract, that it does not provide transportation services and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits a degree of scepticism. In practical terms, Uber's arguments did not correspond to the reality of the relationship as their drivers were working once they had the app switched on and were willing to work, or when they accepted a trip.

Employment Appeal Tribunal

Uber subsequently appealed to the Employment Appeal Tribunal,[39] which is tasked with hearing appeals from the Employment Tribunal where a legal mistake has been made.[40] Uber argued that the Employment Tribunal erred in (1) disregarding the written contractual documentation, (2) relying on regulatory requirements as evidence of worker status, (3) made a number of internally inconsistent and perverse findings of fact, and (4) failed to take into account relevant matters relied on by Uber. Elias J dismissed the appeal, concluding as follows:

> I am satisfied the ET did not err either in its approach or in its conclusions when rejecting the contention that the contract was between driver and passenger and that Uber was simply the agent in this relationship, providing its services as such to the drivers. Having rejected that characterisation of the relevant relationships, on its findings as to the factual reality of the situation, the ET was entitled to conclude there was a contract between ULL and the drivers whereby the drivers personally undertook work for Uber as part of its business of providing transportation services to passengers in the London area.[41]

Much like the Irish jurisprudence, the reality of the relationship determined the characterisation of an individual within the employment relationship. Interestingly, Elias J questioned 'when the drivers are working, who are they working for?' – a question that neatly nets the issue at the heart of the platform economy.[42] It is difficult to say that an individual is independent from Uber where they rely on the business/platform for economic gain; a platform without which they would not earn a livelihood.

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[39] *Uber BV v Aslam & Ors.* [2017] UKEAT 0056_17_1011 (10 November 2017).
[40] UK Government, 'Employment Appeal Tribunal' <https://www.gov.uk/courts-tribunals/employment-appealtribunal#:~:text=What%20the%20Employment%20Appeal%20Tribunal%20does&text=We're%20responsible%20for%20handling,got%20the%20law%20wrong> accessed 12 January 2021.
[41] (n 38) [116].
[42] ibid [103].

Court of Appeal

The Court of Appeal of England and Wales also found that the claimants were in fact 'workers' under s 230(3)(b) of the Employment Rights Act 1996. Interestingly, the Court pointed to the judgment of Elias J in *James v Redcats (Brands) Ltd*, where they questioned the test to be applied in the situation presenting:

> …the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? ... Its purpose is to distinguish between the concept of worker and the independent contractor who is in business on his own account, even if only in a small way.[43]

Here, there was no contract between the driver and passenger. The majority, Sir Terence Etherton MR and Bean LJ, were in agreement that the Employment Tribunal was not only entitled, but correct, to find that each of the Claimant drivers were working for Uber as a 'limb (b) worker'. They relied on the ET's reasoning and dismissed the appeal.[44] Underhill LJ delivered a dissenting judgment, where he disagreed with the majority on their interpretation of the Supreme Court decision in *Autoclenz Ltd. v Belcher,*[45] and stated:

> There is nothing in the reasoning of the Supreme Court that gives a tribunal a free hand to disregard written contractual terms which *are* consistent with how the parties work in practice but which it regards as unfairly disadvantageous (whether because they create a relationship that does not attract employment protection or otherwise) and which might not have been agreed if the parties had been in an equal bargaining position.[46]

Unlike the majority, Underhill LJ found that the contract between the parties was significant and reflective of the arrangement in place – regardless of the purported advantages/disadvantages it had for the parties.

The Supreme Court

Unsurprisingly, Uber appealed this decision to the final point of appeal – the UK Supreme Court. The following issues were put to the Supreme Court last July:

i) Whether the respondents were 'workers' providing personal services to the Second Appellant.
ii) If the Respondents were 'workers', what periods constituted their 'working time'?[47]

[43] [2007] UKEAT 0475; [2007] ICR 1006, para. 59.
[44] (n 38) [71].
[45] [2011] UKSC 41; [2011] ICR 1157.
[46] (n 38) [120].
[47] The Supreme Court, *Uber BV and others (Appellants) v Aslam and others (Respondents)* <https://www.supremecourt.uk/cases/uksc-2019-0029.html> accessed 22 January 2021.

The Supreme Court recently returned a unanimous decision in which they dismissed Uber's appeal.[48] Leggatt LJ delivered the sole judgment, affirming the conclusion of the Employment Appeal Tribunal and Court of Appeal (majority). In relation to the issue of whether the respondents were 'workers', Leggatt LJ found that the starting point for assessing the relationship between Uber and the drivers was not the written terms of the contract, but the parties' conduct.[49] The Supreme Court relied on *Autoclenz Ltd. v Belcher a*nd found that it was entitled to look beyond the terms of the contract to find the true employment relationship, characterising the drivers as 'workers', not agents as claimed by Uber.[50] Leggatt LJ continued to state that the purpose of the employment legislation (Employment Rights Act 1996) was to 'protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing).'[51] These fears are central to the platform economy and the workers involved in this case. The purpose of the second limb of the Act of 1996 was to recognise workers that did not fall within the traditional understanding of an 'employee'.

Notably, the Court highlighted the following five aspects of the findings of the Employment Appeal Tribunal which justified the conclusion that the claimants were workers:

i) remuneration for work/trips are set by Uber and the drivers cannot change this;
ii) contractual terms are set by Uber with drivers having no say in the terms;
iii) once a driver is logged onto the Uber app, their decision to accept/reject a ride is constrained by Uber;
iv) Uber exercises a significant degree of control over the way in which drivers deliver their services, e.g., sets routes, rating system, etc.; and
v) Uber takes active steps to prevent drivers establishing a relationship with a passenger capable of extending beyond a single trip.[52]

Considering the finding that the respondents were workers, Leggatt LJ went on to state that the workers could be said to be 'working', for the purpose of the Working Time Regulations 1998 and National Minimum Wage Regulations 2015, when they were logged onto the app, willing to accept trips, and were within the territory in which they were licensed to operate.[53] This decision, though decided on the merits of the respondents' case, will have implications for the platform economy as companies characterising their workers as agents/self-employed may soon enter into litigation with individuals who seek to assert employment rights.

To date, Irish case law has followed a similar pattern to that of the Tribunals, Court of Appeal and the UK Supreme Court, as the judiciary have looked beyond the wording and terms of a contract to find the true nature of the working arrangement.

[48] *Uber BV and Ors. v Aslam and Ors.* [2021] UKSC 5.
[49] ibid [45] – [46].
[50] ibid [68] – [69].
[51] ibid [71].
[52] ibid [93] – [100].
[53] ibid [137] – [138].

Conclusion

The platform economy provides individuals with a sense of autonomy in their working hours and methods of work.[54] During the current COVID-19 pandemic, the potential for greater control over where/how one works is appealing when persons are being asked to stay home.[55] However, there are certain disadvantages to remote working, and in the platform economy there may be an 'absence of employment relationship' potentially leading to a power imbalance in the relationship.[56] Those who rely on the platform economy to earn a livelihood may be left in the dark, especially if they are found to be independent contractors who are responsible for their own PAYE and PRSI contributions.[57]

Legislative initiatives, such as the Protection of Employees (Fixed Term Work) Act 2003, seek to provide individuals engaged in the labour market with a sense of security in their working arrangements. The judiciary have been capable of filling any perceived legislative lacuna by recognising the true nature of a working relationship – often to the worker/employee's advantage. The common law has provided justice as the courts adapt the law to meet the needs of an individual complainant, depending on the particular case and circumstances presenting. This evolving situation highlights the fact that the societal development of the platform economy has proceeded at a rate and speed with which legislation has not necessarily kept pace and is indicative of the Courts grappling with issues arising in society that have not always been provided for or legislated for.

[54] See Saori Shibata, 'Gig Work and the Discourse of Autonomy: Fictitious Freedom in Japan's Digital Economy' (2020) 25(4) New Political Economy 535.

[55] See Department of Enterprise, Trade and Employment, Making Remote Work: National Remote Work Strategy (Government of Ireland, 15 January 2021) <https://www.gov.ie/en/publication/51f84-making-remote-work-national-remote-work-strategy/#:~:text='Making%20Remote%20Work'%20is%20Ireland's,economic%2C%20social%20and%20environmental%20benefits> accessed 22 January 2021.

[56] Meijerink and Keegan (n 6) 215. See also Stefano (n 9) 479 – 480.

[57] Citizens Information, COVID-19 Pandemic Unemployment Payment (Citizens Information, 27 January 2021) <https://www.gov.ie/en/publication/51f84-making-remote-work-national-remote-work-strategy/#:~:text='Making%20Remote%20Work'%20is%20Ireland's,economic%2C%20social%20and%20environmental%20benefits> accessed 28 January 2021. See also Stefano (n 9) 480 – 485.