Uber, Employment Status, and Whether Statutory Reform Is Still Necessary

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Overview

1. On 19th February 2021, approximately 4½ years after the Employment Tribunal ('ET') held the preliminary hearing in the case[1], the Supreme Court handed down its 42 page unanimous judgment in **Uber BV and others v Aslam and others**[2] and thereby affirmed the conclusion of the Employment Appeal Tribunal ('EAT') and the majority of the Court of Appeal ('CoA') that the ET was entitled to find that:

   (1) Drivers whose work is arranged through Uber's smartphone application ("the Uber app") work for Uber under workers' contracts and so qualify for the national minimum wage, paid annual leave and other workers' rights; and

   (2) The drivers who brought the claims were working under such contracts whenever they were logged into the Uber app within the territory in which they were licensed to operate and ready and willing to accept trips[3].

2. Accordingly, the Supreme Court rejected Uber's contentions that: (1) the drivers did not have these rights because they worked for themselves as independent contractors, performing services under contracts made with passengers through Uber as their booking agent; and (2) the drivers were working only when driving passengers to their destinations.

[1] The preliminary hearing having taken place in July 2016 before EJ Snelson and the reserved judgment having been sent to the parties on 28th October 2016.
[2] [2021] UKSC 5 (on appeal from: [2018] EWCA Civ 2748).
[3] Ibid., paras.1, 2, and 39.

Relevant legal framework

3. The rights claimed by the claimants in the case were: rights under the National Minimum Wage Act 1998 ('NMWA') and associated regulations to be paid at least the national minimum wage for work done; rights under the Working Time Regulations 1998 ('WTR') which include the right to paid annual leave; and in the case of 2 claimants, a right under the Employment Rights Act 1996 ('ERA') not to suffer detrimental treatment on the grounds of having made a protected disclosure ("whistleblowing"). All of these rights are conferred by the relevant pieces of legislation on "workers".

4. To that end section 230 ERA materially provides:

> ***Employees, workers etc***
> *(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
> *(2) In this Act "contract of employment" means a contract of service…*
> *(3) In this Act "worker"….means an individual who has entered into or works under (or, where the employment has ceased, worked under)-*
> *(a) a contract of employment, or*
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;…*

5. Section 54(3) NMWA and regulation 2(1) WTR have definitions of 'employee' and 'worker' in almost identical terms.

6. The effect of these definitions is that employment law distinguishes between 3 types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who

provide their services as part of a profession or business undertaking carried on by someone else[4].

The ET decision[5]

7. In reaching its conclusion that it was not real to regard Uber as working 'for' the drivers and that the only sensible interpretation is that the relationship is the other way around, the ET cited and relied upon the Supreme Court judgment in **Autoclenz Ltd v Belcher and Others**[6] in which Lord Clarke had variously stated:

"*The question in every case is…what was the true agreement between the parties…*"[7]

"*So 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 case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.*"[8]

8. Furthermore, the ET based its assessment on the following 13 considerations[9]:

(1) The contradiction in the Rider Terms between the fact that ULL purports to be the driver's 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 departs 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).

[4] **Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32; [2014] 1 WLR 2047**, per Baroness Hale at paras.25 and 31.
[5] [2016] 10 WLUK 681, [2017] IRLR 4, Case No: 2202550/2015 & Others.
[6] [2011] UKSC 41.
[7] Ibid., para.29.
[8] Ibid., para.35.
[9] Ibid., note 5, at para.92.

(7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers on 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.

(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 earning schemes (albeit now 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 driver's terms unilaterally.

9. Uber appealed to the EAT.

The EAT judgment[10]

10. In her reserved judgment handed down on 10th November 2017 HHJ Eady QC dismissed the appeal. She held that the ET had been entitled to reject the characterisation of the relationship between the drivers and Uber set out in the written documents. Applying **Autoclenz**, the ET had to determine what was the true agreement between the drivers and Uber. In doing so it was important for the ET to have regard to the reality of the obligations and of the factual situation. The starting point must always be the statutory language, not the label used by the parties; simply because the parties have used the language of self-employment does not mean that the contract does not fall within section 230(3)(b).

11. HHJ Eady QC continued:

"*In the normal commercial environment…the starting point will be the written contractual documentation…unless it is said to be a sham or liable to rectification, the written contract is generally also the end point – the nature of the parties' relationship and respective obligations being governed by its terms. Here, however, the employment tribunal was required to determine the nature of the relationship between*

[10] [2018] ICR 453, [2018] IRLR 97.

ULL and the drivers for the purposes of statutory provisions in the field of employment law; provisions enacted to provide protections to those often disadvantaged in any contractual bargain. The tribunal's staring point was to determine the true nature of the parties' bargain, having regard to all the circumstances. That was consistent with the approach laid down in Autoclenz…and was particularly apposite give there was no direct written contract between the drivers and ULL. Adopting that approach, the tribunal did not accept that the characterisation of the relationship between drivers and ULL in the written agreements properly reflected the reality. In particular – and crucial to its reasoning – the tribunal rejected the contention that Uber drivers work, in business on their own account, in a contractual relationship with the passenger every time they accept a trip."[11]

12. Finally, HHJ Eady QC disagreed with Uber's case which was founded on the premise that the ET's starting point should have been informed by the characterisation of the relationship between Uber and the drivers as set out in the documentation[12].

13. Uber appealed to the CoA.

The CoA judgment[13]

14. In dismissing Uber's appeal, the majority of the Court of Appeal[14] reasoned that the effect of **Autoclenz** is that in determining for the purposes of section 230 ERA what is the true nature of the relationship between the employer and the individual who alleges he is a worker or an employee, 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[15]. They continued that:

"*…in the context of alleged employment (whether as employee or worker), (taking into account the relative bargaining power of the parties) the written documentation may not reflect the reality of the relationship. The parties' actual agreement must be determined by examining all the circumstances, of which the written agreement is only a part. This is particularly so where the issue is the insertion of clauses which are subsequently relied on by the asserting party to avoid statutory protection which would*

[11] Ibid., para.105.
[12] Ibid., para.109.
[13] [2019] ICR 845, [2018] EWCA Civ 2748.
[14] Sir Terence Etherton MR and Bean LJ.
[15] Ibid., note 13, para.66.

otherwise apply. In deciding whether someone comes within either limb of section 230(3) of the ERA 1996, the fact that he or she signed a document will be relevant evidence, but it is not conclusive where the terms are standard and non-negotiable and where the parties are in an unequal bargaining position. Tribunals should take a "realistic and worldly-wise", "sensible and robust" approach to the determination of what the true position is."[16]

15. However, in a compelling dissenting judgment, Underhill LJ saw **Autoclenz** as having a less purposive / more restricted scope, stating:

"*It is an essential element in that ratio that the terms of the written agreement should be inconsistent with the true agreement as established by the tribunal from all the circumstances. 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 worked 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…*"[17].

16. Uber appealed to the Supreme Court.

The Supreme Court judgment

17. Giving the unanimous judgment of the Court, Lord Leggatt identified the main issue in the case as being that 'limb (b)' of the statutory definition of a "worker's contract" has 3 elements: (1) a contract whereby an individual undertakes to perform work or services for the other party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual[18].

18. This case concerned requirement (1). It was not in dispute that the drivers worked under contracts whereby they undertook to perform driving services personally; and it was not suggested that any Uber company was a client or customer of the drivers. The critical issue was whether, for the purposes of the statutory definition, the drivers

[16] Ibid., note 13, para.73.
[17] Ibid., note 13, para.120.
[18] Ibid., note 2, para.41.

were to be regarded as working under contracts with Uber London whereby they undertook to perform services for Uber London; or whether, as Uber contended, they were to be regarded as performing services solely for and under contracts made with passengers through the agency of Uber London[19].

The 'agency' issue

19. The Court stated that it was unconvinced by Uber's argument that the acceptance of private hire bookings by a licensed London PHV operator acting as agent for drivers would comply with the regulatory regime[20]. However, it felt that it was unnecessary to express any concluded view on the issue as there appeared to be no factual basis for Uber's contention that Uber London acted as an agent for drivers when accepting private hire bookings[21]. The Court essentially stated that it could have decided Uber's appeal on the basis that if the assertion that Uber London contracts as a booking agent for drivers is rejected, the inevitable conclusion is that, by accepting a booking, Uber London contracts as a principal with the passenger to carry out the booking – and thus it would have no means of performing its contractual obligations to passengers, nor of securing compliance with its regulatory obligations as a licensed operator, without either employees or subcontractors to perform the driving services for it[22]. However, it did not do so, mindful of the wider issue.

Interpreting the statutory provisions

20. The Supreme Court stated that **Autoclenz** made it clear that whether a contract is a "worker's contract" within the meaning of the legislation designed to protect employees and other "workers" is not to be determined by applying ordinary principles of contract law. However, it acknowledged that what was not fully spelt out in **Autoclenz** was the theoretical justification for this approach[23].

21. Significantly, the Court stated that '*critical*' to understanding **Autoclenz** is that the rights asserted by the claimants were not contractual rights, but rather were created by legislation. Thus, the task for tribunals and courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed

[19] Ibid., note 2, para.42.
[20] Ibid., note 2, para.47.
[21] Ibid., note 2, para.49.
[22] Ibid., note 2, paras.54 to 56.
[23] Ibid., note 2, para.68.

that the claimants should be paid at least the national minimum wage or receive paid annual leave. Rather it was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed[24]:

"In short, the primary question was one of statutory interpretation, not contractual interpretation".

Applying the definition of worker

22. The Supreme Court went on to state that in determining whether an individual is a "worker", there can:

"…"be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation…the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done….a touchstone of such subordination and dependence is…the degree of control exercised by the putuative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract"[25].

23. This approach was also said to be consistent with the case law of the CJEU which treats the essential feature of a contract between an employer and a worker as the existence of a hierarchical relationship[26].

24. It held that 5 aspects of the ET's findings were worth emphasising:

(1) Of major importance, the remuneration paid to drivers for the work they do is fixed by Uber and the drivers have no say in it (other than by choosing when and how much to work). Uber also fixes its own "service fee" which it deducts from the fares paid to drivers. Uber's control over remuneration extends to the right to decide in its sole discretion whether to make a full or partial refund of the fare to a passenger

[24] Ibid. note 2, para.69.
[25] Ibid., note 2, para.87.
[26] Ibid., note 2, para.88.

in response to a complaint by the passenger about the service provided by the driver[27].

(2) The contractual terms on which drivers perform their services are dictated by Uber[28].

(3) Although drivers have the freedom to choose when and where (within the area covered by their PHV licence) to work, once a driver has logged onto the Uber app, a driver's choice about whether to accept requests for rides is constrained by Uber[29].

(4) Uber exercises a significant degree of control over the way in which drivers deliver their services[30].

(5) Significantly, Uber restricts communication between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride[31].

25. Finally, taking the aforementioned 5 factors together, the Court stated that: it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber; it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable; drivers have an inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers – mean they have little or no ability to improve their economic position through professional or entrepreneurial skill[32].

Commentary

26. Prior to the Supreme Court's judgment in **Uber**, it was generally accepted that the purposive approach adopted by the Supreme Court in **Autoclenz** had already made it demonstrably harder for employers with the power to determine the contractual bargain to manipulate the boundaries between employment status categories[33] (including severely limiting the scope of abuse of substitution clauses[34]) and ostensibly

[27] Ibid., note 2, para.94.
[28] Ibid., note 2, para.95.
[29] Ibid., note 2, paras.96 to 97.
[30] Ibid., note 2, para.98.
[31] Ibid., note 2, para.100.
[32] Ibid., note 2, para.101.
[33] A.C.L. Davies, 'Employment Law', 1st edition, page 101.
[34] Smith, Baker, Warnock, 'Smith & Wood's Employment Law', 14th edition, page 48.

prevent employment protection rights being undermined by the terms of contracts more generally (influenced as it was by a '*worker protective contextualism*'[35] and an emphasis on the importance of substance over contractual form).

27. However, **Autoclenz** left questions open as to what was the exact extent of the purposive approach and to what extent could it really prevent employment statutes being undermined by contractual terms. Specifically, was it limited to being used when the written contractual terms were contradicted by what was happening in practice? Or did it allow courts to look at all the evidence for the true agreement between the parties regardless of whether or not there were inconsistencies between the contract and practice? This uncertainty about the extent of the **Autoclenz** principle clearly manifested itself in the divisions between the majority and the minority judgments in the CoA in **Uber**.

28. The Supreme Court's judgment in **Uber** has now at least confirmed that the starting point which tribunals and lower courts must adopt when assessing cases involving requirement (1) of a 'limb (b)' "worker's contract" (see paragraph 17 above), is to determine whether claimants fall within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed (what Professors Ford and Bogg had called the '*purposive statutory approach*'[36] of the majority of the CoA prior to the Supreme Court's judgment being handed down). Thereafter tribunals and lower courts should look at the degree of control the putative employer has over the putative worker, whether the putative worker is in a subordinate or dependent position, and whether it can be said that there is a hierarchical relationship.

29. However, even in respect of requirement (1), **Uber** now leaves the question open as to whether a 'contract' is necessary at all if the starting point is whether claimants fall within the definition of the relevant employment protection statute. Indeed the Supreme Court even cited the brilliantly succinct phrase (or '*pithy*' as Lord Leggatt refers to it[37]) used by Ribeiro J in **Collector of Stamp Revenue v Arrowtown Assets Ltd**[38]: "*…the ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically*". This might

[35] Bogg and Novitz, 'Links between Individual Employment Law and Collective Labour Law: Their Implications for Migrant Workers', in Freedland and Costello, Migrants at Work (OUP, 2014), chapter 19, page 374.
[36] A Bogg and M Ford, 'Between statute and contract: who is a worker?', (2019) 135 LQR 347 at 352.
[37] Ibid., note 2, para.70.
[38] [2003] HKFCA 46, at para.35.

suggest that a contract might not be necessary any longer, although this is contradictory to the statutory language and the latter being a touchstone.

30. In addition, the judgment does not address whether this clarified purposive statutory approach should also be applied to requirements (2) or (3) of a "worker's contract" (see paragraph 17 above again) – these requirements essentially having been conceded on the facts of the case and therefore not dealt with.

31. Consequently, this potentially still leaves open the possibility (and bears out Elias J's empirical concern about '*armies of lawyers*' becoming involved in drafting contracts[39]), as from the case law the main focus of employers defending claims by individuals for 'employee', 'worker', or 'employee in the extended sense'[40] status has been twofold: (1) to argue that there is an absence of 'personal service' in the contracts by virtue of the presence of substitution clauses; and / or (2) that there is an absence of mutuality of obligations between the parties (something which is less important for establishing 'worker' status[41], but which is essential to establishing a contract of service).

Personal service

32. Thus in **Pimlico Plumbers Ltd and another v Smith**[42] the Supreme Court did not disapprove the Court of Appeal's 5 principles relating to substitution clauses and their respective effects on the requirement for 'personal service'[43], namely:

(1) An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.
(2) A conditional right to substitute another person may or may not be inconsistent with personal performance depending on the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional.
(3) By way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance.

[39] **Consistent Group Ltd v Kalwak** [2007] IRLR 560, UKEAT/0535/06/DM, at para.57 (EAT).
[40] Section 83(2)(a), Equality Act 2010
[41] **Cotswold Developments v Williams** [2006] IRLR 181.
[42] [2018] UKSC 29, [2018] ICR 1511.
[43] [2017] IRLR 323, [2017] ICR 657, [2017] 2 WLUK 293, para.84.

(4) By way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance.

(5) By way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.

33. Seemingly then, after **Pimlico,** the only 'silver bullet' or guarantee to undermine personal performance is for employers to insert an unfettered substitution clause into a contract which an employee can freely invoke if s/he is unable or unwilling to perform the work – as per **Express & Echo Publications Ltd v Tanton**[44].

34. But does the Supreme Court's judgment in **Uber** now render all substitution clauses nugatory if the effect of them is to deprive a worker or employee of an employment protection right?

35. Furthermore, will the Supreme Court judgment in **Uber** now apply to the facts of a case such as **R (on the application of Independent Workers Union of Great Britain) v Central Arbitration Committee & Deliveroo**[45], where the High Court dismissed the IWGB's application for judicial review of a decision to decline statutory recognition for collective bargaining purposes, as it found itself bound to accept the finding of the CAC[46] that the couriers were not 'workers' as there was a genuine substitution clause in the contracts by which Riders were free to substitute at will and which, albeit rarely, had been used?

36. Similarly, in **Town and Country Glasgow Ltd v Munro**[47], a claim for 'employee in the extended sense' status by a receptionist so as to advance her sex discrimination claim, the EAT allowed the company's appeal where it found that a substitution clause in the receptionist's contract showed that the employer's main interest was the provision of a suitably qualified worker the identity of which was not a significant factor. Will **Uber** now negate such a decision on these same facts?

[44] [1999] ICR 693.
[45] [2018] WLUK 17, [2019] IRLR 249, [2019] ACD 27.
[46] TUR1/985 (2016), [2018] IRLR 84, [2017] 11 WLUK 313, paras.100-102.
[47] UKEATS/0035/18/SS.

37. These questions remain very relevant post-**Uber** because even the ECJ in **B v. Yodel Delivery**[48] has indicated that an individual's ability to use substitutes to perform work might be inconsistent with 'worker' status.

Mutuality of obligation

38. In **Cheng Yuen v Royal Hong Kong Golf Club**[49] the claimant was a caddie at a Hong Kong golf club which allowed him to offer his services to its members and which exercised disciplinary and supervisory powers over him. Although the players paid the club and the club paid him, the Privy Council held that he was not an employee of the club because it was under no duty to pay him – the club was simply acting as his agent in collecting members' money. Thus after being told that he was no longer required his claim for wages in lieu of notice and a long service payment against the club was dismissed.

39. Similarly, in **Quashie v. Stringfellow Restaurants**[50] the claimant was a lap dancer in a nightclub. She was described in the written agreement as an independent contractor paid by clients. Clients bought vouchers in the club that they could use to pay her for dances. At the end of each evening, she would provide the vouchers she had earned to the club. It would give her money in return after deducting various fees for it providing services to her. A key fact in the case was that sometimes the claimant would be out of pocket at the end of a night[51]. The fact that there was no obligation on the club to pay her anything was inconsistent with a contract of employment and so she was not an employee and could not advance her unfair dismissal claim.

40. Would the claimants in **Cheng Yuen** and **Quashie** now be protected and able to pursue their claims in light of **Uber**?

41. Furthermore, it seems that Lord Leggatt might be thought to implicitly acknowledge that there are limitations on the scope of the Supreme Court's approach in **Uber**, as whilst commenting upon the problematic cases of **Jivraj v Hashwani**[52] (where the Supreme Court held that an arbitrator was not a person employed under "a contract personally to do any work" for the purpose of the Equality Act 2010) and **Windle &**

[48] [2020] IRLR 550 (ECJ).
[49] [1998] ICR 131 (PC).
[50] [2012] EWCA Civ 1735, [2013] IRLR 99.
[51] Ibid., para.20
[52] [2011] ICR 1004, SC.

Anor v Secretary of State for Justice[53] (where the CoA held that interpreters engaged on separate assignments by the courts service where there was no obligation between the parties to offer or accept assignments i.e. no umbrella contract between assignments and therefore no mutuality of obligation), he did not state that they had been wrongly decided.

Potential reform

42. It will be extremely interesting to see how the Supreme Court judgment's reasoning is applied in the lower courts in the future, but it may well be that the issue of employment status finds itself back in the same Court sooner rather than later to deal with a claimant who doesn't have a contract, or to deal with the ongoing arguments about valid substitution clauses versus the requirement for personal service for limb (a) or (b) workers or employees in the extended sense, or to deal with issues of mutuality of obligation in relation to alleged employee status.

43. Thus it may well be that the only way to definitively stop employment protection statutes being undermined is by statutory reform. In this regard, two particular documents are worthy of consideration as to what such reform would look like.

44. Firstly, the Taylor Review of Modern Working Practices[54] suggests that: the law should ensure that where individuals are under significant control in the way they work, they are not unprotected as a result of the way their contract is drafted[55]; the absence of a requirement to perform work personally should no longer be an automatic barrier to accessing basic employment rights[56]; and placing greater emphasis on control and less emphasis on personal service will result in more people being protected by employment law[57]. Whilst **Uber** addresses the first of these suggestions, it remains unknown at present whether it will be interpreted as addressing the second and third suggestions, particularly in light of well-drafted substitution clauses.

[53] [2016] ICR 721, CA.
[54] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf
[55] Ibid., page 34.
[56] Ibid., page 36.
[57] Ibid., page 36.

45. Secondly, a far more radical reform is set out in 'Rolling out the Manifesto for Labour Law'[58]. Therein it is proposed that there is a presumption that all employment rights are to have universal application and apply to all workers[59] and that there be a new joint definition of 'employee' and 'worker' under the ERA[60] (which is progressively extended to other employment protection statutes[61]) which would mean that all those individuals providing work to another party, other than those persons genuinely running a business on their own account, would benefit from all of the rights and protections contained in the employment protection statutes[62].

Conclusion

46. It seems to me that whilst Professor Bogg was insightful to observe following the CoA's decision in **Autoclenz** that '*The ingenuity of judges in devising legal tests to trace the boundary has been matched only by the ingenuity of employers in devising contractual arrangements to evade it*'[63], it remains to be seen whether the Supreme Court's judgment in **Uber** and the interpretation thereof will mean that those same employers have just met their match.

[58] Ewing, Hendy & Jones, 'Rolling out the Manifesto for Labour Law', The Institute of Employment Rights, chapter 6.
[59] Ibid., page 35, para.6.5.
[60] Ibid., page 36, para.6.11.
[61] Ibid., page 36, para.6.6; page 37, para.6.12.
[62] Ibid., page 37, para.6.12.
[63] AL Bogg, 'Sham self-employment in the Court of Appeal', (2010) 126 (April) LQR 166.

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Employment Status Consultation (February 2018) (Department for Business, Energy & Industrial Strategy, HM Treasury, and HM Revenue & Customs):
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679853/FINAL_-_Employment_Status_consultation_-_FOR_UPLOADING_and_PRINTING.pdf

Good Work Plan (17th December 2018):
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766187/good-work-plan-printready.pdf

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