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EMPLOYMENT REVIEW

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Uber drivers are workers, rules EAT

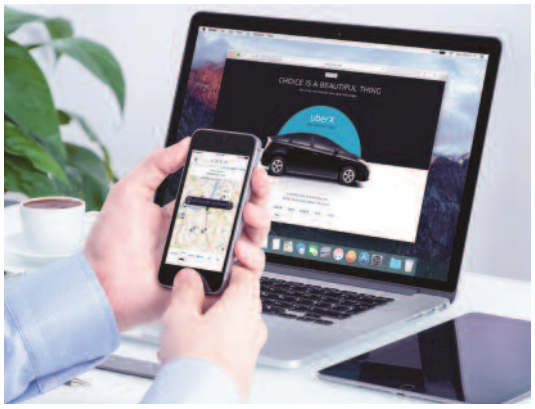
The Employment Appeal Tribunal (EAT) has upheld the decision of the Employment Tribunal last year that Uber drivers are workers, rather than being self-employed, and thus have the right to be paid the National Minimum Wage or the National Living Wage and to receive holiday pay.

The case was brought by a number of past and present Uber drivers, who argued that they were entitled to protections under the Employment Rights Act 1996, the Working Time Regulations 1998 and the National Minimum Wage Act 1998.

Uber argued that it merely provided, through its smartphone app, a means for drivers to facilitate running their own businesses and that it did not run a transportation business. Uber also emphasised that drivers were free to decide when they worked and were not obliged to be logged on to the app at any given time or to accept any specific driving assignment, maintaining that this freedom was incompatible with the existence of any form of employment.

The ET dismissed these arguments, commenting that 'the notion that Uber in London is a mosaic of 30,000 small businesses linked by a common "platform" is to our minds faintly ridiculous'. The ET found that drivers were under a 'worker' contract for the time they were in the area where they were allowed to work, were using the app and were able and willing to accept assignments.

The documentation governing Uber's relationship with its drivers contained 'twisted language' and 'brand new terminology' and went to great efforts to stress that Uber did not provide transportation services.



Uber appealed against the ET's decision, arguing that, like other taxi drivers, its drivers are self-employed and are under no obligation to use its booking app. It contended that the ruling could deprive drivers of the 'personal flexibility they value'.

The EAT disagreed, however, and dismissed Uber's appeal. In the EAT's view, there was nothing inconsistent or perverse about the ET's conclusions. The contractual documents did not reflect the true relationship between the drivers and the London subsidiary. The reality was that the drivers formed a central part of Uber's business in providing transportation services. The level of control to which they were required to submit and the obligations imposed on them pointed away from a conclusion that they worked on their own account and that their direct contractual relationship was with their passengers. It could not be said that the London subsidiary merely acted as the drivers' agent.

Commenting on the case, TUC general secretary Frances O'Grady said, "Uber should throw in the towel and accept today's judgment. No company, however big or well-connected, is above the law. Uber must play by the rules and stop denying its drivers basic rights at work."

However, Uber is adamant that its drivers value the freedom self-employment provides and intends to appeal against the EAT's decision.

For advice on any employment issue, please contact Clive Hitchen, our Employment Specialist on email: clive.hitchen@allanjanes.com

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Parental Bereavement Bill published

Under the law as it stands, employers are not required to give paid leave to grieving parents. Section 57A(1) of the Employment Rights Act 1996 gives employees the right to take a reasonable amount of time off to take action which is necessary for dependants – for example, if they are ill or injured – and Section 57A(1)(c) of the Act specifically refers to action which is necessary 'in consequence of the death of a dependant'.

In a 2004 case *(Forster v Cartwright Black Solicitors)*, the Employment Appeal Tribunal ruled that Section 57A(1)(c) does not cover sickness absence due to grief. The relevant wording of the Act refers to the numerous arrangements that have to be made when someone dies, such as registering the death, making funeral arrangements, applying for a grant of probate etc. It does not extend to compassionate leave as a result of bereavement.

In July this year, a Private Members' Bill, the Parental Bereavement (Leave and Pay) Bill 2017-19, was introduced into Parliament by Kevin Hollinrake MP. The Bill, which has now been published, is being supported by the Government and received its second reading in Parliament on 20 October 2017. Scheduled to come into force in 2020, the Bill will give employees who lose a child under 18 the right to two weeks' paid leave. Employees who lose a child will also be entitled to statutory parental bereavement pay if they have at least 26 weeks' continuous service.

Employers will be able to recover some or all of the cost of this from the Government.

Workplace mobility clauses – Employment Appeal Tribunal guidance

Mobility of labour is vital to any modern economy and many employment contracts require staff to relocate from one workplace to another if their employer's business demands it. One such clause came under consideration in a case in which a care worker who refused to move was dismissed for gross misconduct *(Aziz v The Fremantle Trust)*.

The care worker had experienced a difficult relationship with two colleagues at the home where she worked. That had resulted in various grievance procedures, periods of suspension and sick leave. An independent investigator who was instructed to look into the matter commented on the dysfunctional working environment at the home and questioned the ability of the three employees to work together.

The investigator rejected the woman's grievances, but she refused to accept those findings and made unsuccessful complaints of race and religious discrimination to an Employment Tribunal (ET). She subsequently announced her intention to return to work at the home after eight months of absence but failed to attend a number of meetings which the charity hoped would resolve the matter.

In exercise of a mobility clause in her contract, the charity required her to attend for duty at another of its facilities. When she failed to do so, she was dismissed for unauthorised absence and failing to engage with the charity. Her complaints of unfair and wrongful dismissal were subsequently rejected by an ET.

In dismissing her challenge to that ruling, the Employment Appeal Tribunal found that the reason for her dismissal was her refusal to attend work and her failure to engage with the charity on any meaningful level after she stated her intention to return to work. She had not been victimised in that the decision to sack her had not been influenced by her previous complaint to an ET.

She had been given a lawful instruction pursuant to the mobility clause and her dismissal for non-compliance fell within the range of reasonable responses open to her employer. The clause required her to change her workplace if the needs of the charity so required and her failure to do so amounted to a repudiatory breach of her contract. The ET had correctly addressed all the issues in the case and had adequately explained its reasoning and conclusions.

If you have a grievance or disciplinary matter that requires legal advice, please contact Clive Hitchen on email: clive.hitchen@allanjanes.com

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