

Is it becoming more difficult to engage self-employed contractors.... what can we learn from Uber UK?

Like most businesses in the UK, Uber UK has faced a challenging year. But not only has it struggled with the impact of the Covid-19 pandemic, Autumn 2020 has proven to be a critical time for Uber in relation to two major Court battles.

The first of these relates to Transport for London (TfL's) refusal to renew Uber's licence to operate as a private hire transport operator in London. TfL had determined that Uber was not a "fit and proper" operator, primarily due to concerns regarding passenger safety, and refused to grant a new or extended licence to Uber.

On Monday 28 September, Uber succeeded in its appeal against TfL's decision. The magistrates acknowledged that there had been "historic failings" in relation to Uber's previous record on passenger safety but agreed that Uber had made improvements and was now "fit and proper" to operate in London. But the magistrates were only prepared to grant an 18 month licence extension, rather than the standard five year licence. Uber will have to work hard to continue to prove to TfL that it has really changed.

The battle to establish self-employed status

Uber's second litigation battle relates to its long-running feud as to whether its drivers are genuinely self-employed or are workers. The dispute reached the Supreme Court in July this year. Uber, and its drivers, are anxiously awaiting the publication of the Supreme Court's decision which is expected imminently. This battle has implications for all who engage self-employed contractors.

Uber has lost so far at the Employment Tribunal, Employment Appeal Tribunal, and Court of Appeal stages, all of whom found that Uber drivers were workers and were not self-employed. Key to the Courts' decisions were the level of control that Uber was found to exert over drivers (including controlling how fares operate, being able to lock drivers out of the app for not accepting rides, etc). The Courts held that, for the time in which drivers had logged into the app at least, the relationship was consistent with the driver being a worker of Uber.

Although the TfL licence decision is not directly linked to the Supreme Court driver status decision, the impact of the licence decision has a bearing on worker status. If Uber is required to put in place further checks and controls over drivers to ensure that it is continuing to protect passenger safety to the standards required by TfL, it is likely that the level of control Uber will have to exercise over drivers will only increase, which, in turn, strengthens the argument that drivers are workers rather than truly independent self-employed contractors.

Although litigation is never guaranteed, given the trajectory of the driver status litigation so far, most commentators expect the Supreme Court to agree that Uber drivers are workers.

The impact for City businesses

If the decision is as expected, it is likely to create a perfect storm. Given the current economic uncertainty the pressure is increasing for many City businesses to reduce their permanent headcount and to fill vacancies with consultants. In these circumstances, what steps can businesses take to reduce the likelihood of these individuals claiming worker status?

There are a number of factors that are relevant. A determining factor in the Uber litigation is the level of control that the business has over the individual. To avoid worker status individual consultants must not be subject to direct control as to how they perform their services but allow consultants freedom to act as they consider appropriate to complete the task. But other factors

are relevant too. If the worker can appoint a substitute and is not obliged to perform the services personally this may also avoid worker status. Another feature is how integrated the individual is to your business. If the individual markets his or her services to the world in general this suggests s/he is self-employed.

Whatever the Supreme Court decision, it will be a landmark decision for UK employment law, and important for all of you who engage self-employed contractors. We will keep you updated on developments!

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