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BETWEEN STATUTE AND CONTRACT: WHO IS A WORKER?

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The judgment of the Court of Appeal in *Uber BV v Aslam* [2018] EWCA Civ 2748; [2019] I.R.L.R. 257 is the latest attempt to clarify what exactly is meant by 'worker'. UK law now confers many labour rights on 'workers', including entitlements to the national minimum wage and limitations on working time. This statutory concept embraces employees at common law but extends to a wider category, usually referred to as 'limb (b) workers'. They are defined as self-employed individuals who work under a contract "whereby the individual undertakes to perform personally any work or service for another party to the contract whose status is not by virtue of that contract that of a client or customer of any business undertaking carried on by that individual" (see e.g. s.230(3)(b) of the Employment Rights Act 1996, and the cognate definition in s.54(3) of the National Minimum Wage Act 1998). The persistent legal issue, highlighted by *Uber*, is establishing to what extent written contractual terms, typically drafted by "armies of lawyers" (*Consistent Group v Kalwak* [2007] I.R.L.R. 560 per Elias J at [51]), can effectively circumscribe the boundaries of relational status and oust statutory protections.

The written documentation in *Uber* was detailed and complex. Drivers pick up passengers via an app owned by Uber. The app confirms the booking, sets a route, calculates the fare, receives the payment and generates an 'invoice' recording the trip. There is a written contract between the passenger and Uber about the 'booking services', denying Uber is anything other than a technology platform and asserting Uber is an agent of the drivers. Separate detailed and elaborate terms exist between Uber's head company, Uber BV, and those who provide the transport, described in 2013 as 'Partners' and in 2015 as 'Customers'. According to these, Uber is no more than a 'tool' connecting passengers and drivers; and it does not itself provide transportation services or control the drivers. In sum, if the written documentation is treated as determinative, when providing transport the drivers are not working 'for' Uber, which is a mere agent. If that is so, they would seem to be outside the scope of the limb (b) category and its panoply of statutory protections.

The leading authority on limb (b) worker is now the UKSC judgment in *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32; [2014] I.C.R. 730. According to Lady Hale, while there is no "single key with which to unlock the words of the statute" and no substitute for applying the statutory wording, the degree to which the individual is integrated into the putative employer's undertaking will often be highly relevant (*Bates* at [37]-[39], citing Maurice Kay LJ in *HMG v Westwood* [2012] EWCA Civ 1005; [2013] I.C.R. 415 at [19]). The application of this test to the complex contractual arrangements in *Uber* was filtered through the principles of *Autoclenz v Belcher* [2011] UKSC 41; [2011] I.C.R. 1157. According to Lord Clarke in *Autoclenz*, the critical question is to ascertain "what was the true agreement between the parties." (at [29]). This enquiry was to take place within the context of the "relative bargaining power

of the parties”, so that the “true agreement” was to be “gleaned from all the circumstances of the case, of which the written agreement is only a part” (at [35]). For the majority in *Uber* (Sir Terence Etherton MR and Bean LJ), the drivers were workers because the reality was that they were working ‘for’ Uber, not the other way round. By contrast, Underhill LJ, held that *Autoclenz* provided no basis for disregarding written terms because those terms were not necessarily inconsistent with the facts on the ground. The pivot of disagreement in *Uber* was thus the application of *Autoclenz* in ‘worker’ cases.

Uber highlights the uncertain effect of *Autoclenz* where the discrepancy between written terms and factual circumstances is less palpable than it was in *Autoclenz* itself. There, written contracts labelled car valeters as self-employed and contained terms designed to deny certain essential elements of employee status, such as ‘personal service’ and ‘mutuality of obligation’. In fact, however, the valeters were under the control of *Autoclenz* and were required to turn up for work each day. In holding that tribunals and courts were entitled to disregard the written documentation, Lord Clarke’s judgment reached beyond employment law to the legal principles on ‘shams’ and ‘pretences’ in tax and tenancies. In so doing, *Autoclenz* went beyond the narrow ‘sham’ doctrine based on a common intention of the parties to create a false impression (*Snook v London and West Riding Investments Ltd* [1967] 2 Q.B. 786). A *Snook* sham is usually absent in employment cases because typically one party alone – the employer – has effective control over the drafting of the contractual documentation.

The Master of the Rolls and Bean LJ summarised the effect of *Autoclenz* as meaning that “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” (at [66]). In contrast to *Uber*’s characterisation of the agreements as mere licences to use the app, the reality was of a personal work contract between the driver and Uber once the driver accepted a request to pick up a passenger, in which Uber was not the driver’s client or customer (at [74]-[82]). The background regulatory regime, the control Uber exercised over drivers, and other factors all reinforced the conclusion that the drivers were workers providing services ‘for’ Uber within the meaning of the statutory concept (at [87]-[97]).

By contrast, Underhill LJ saw *Autoclenz* as having a more restricted function: it only enabled a tribunal to disregard terms of a written contract with an employee or worker which are “inconsistent with the true agreement”, with the agreement to be gleaned from the facts and the written contract (at [119]). It did not apply where the written terms were consistent with how the parties worked in practice (at [120]). Contrary to the findings of the employment tribunal (ET), the facts on the ground were entirely consistent with drivers contracting with the passengers through the agency of Uber, just as in the case of a traditional mini-cab firm (at [145]-[149]). For Underhill LJ, the descriptor in the contractual documents that Uber was an agent, acting as intermediary to connect drivers and passengers (at [112]-[113]), was not inconsistent with the reality (at [145]-[147]).

It is important to note that this agency characterisation was not simply establishing contractual rights which could then be measured against the facts - that would be the case, for example, if the contracts asserted that the worker was not subject to the control of the other party, which could then be undermined by a practice of subordination, supporting the existence of contractual *right* to control the execution of the work. This was similar to the situation in *Autoclenz*; but *Uber* is a far more difficult case. The agency characterisation was attempting to create a *legal classification* of the relationship; it is but one small step away from giving a label to the relationship, which the courts have long held is insufficient to establish its legal identity (*Street v Mountford* [1985] A.C. 809). Such a clause is inevitably less vulnerable to contradiction by the 'facts' on the ground because it implies less about those facts.

Both the majority and minority saw *Autoclenz* as mandating an inquiry into the 'true agreement' or 'actual agreement'. For the majority, priority was given to the factual arrangements, with the written documents reduced to relevant evidence (at [73]), whereas for Underhill LJ the written terms provided the reality of the agreement, only to be disregarded when inconsistent with practice (at [120]). What judges see as 'real' depends on the type of legal prism through which they view the arrangements: for Underhill LJ the written documents are in the foreground, whereas for the majority they are part of a wider canvass. The difference between these approaches is perhaps accounted for by the fact that the majority gave greater prominence to the protective statutory context to the enquiry: the statute was its legal prism (at [73]).

The 'contractual' reading of *Autoclenz*, in which the focus is on the 'true agreement', was highly influential in *Uber*. We think it was given undue emphasis. First, *Autoclenz* was an 'easy' case because there was ample evidence that neither party credibly regarded the offending terms, which were there simply to give an impression of genuine self-employment, as generating real contractual obligations. In *Uber*, by contrast, the configuration of the multipartite arrangements as an agency relationship was simply not amenable to contradiction by the working arrangements in the same way. In these circumstances, the 'true agreement' approach is liable to unpredictability in its application, as reflected in the divergence in the Court of Appeal as to the importance accorded to the written terms. In hard cases like *Uber*, the metaphysics of the 'true agreement' is an unreliable touchstone because, as Lord Hoffmann once astutely observed, "something may be real for one purpose but not for another" (*MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6; [2003] 1 A.C. 311 at [40]).

Secondly, it may also be relevant that *Autoclenz* was focused on whether the car valeters were employees, as were the cases of *Consistent Group v Kalwak* [2008] EWCA Civ 430; [2008] I.R.L.R 505 and *Protectacoat Firthglow v Szilagyi* [2009] EWCA Civ 98; [2009] I.C.R. 835, upon which Lord Clarke also relied. In relation to employees, the relevant statutory provisions adopt the contract of service, a subsisting common law category whose identity is constituted by its core contractual

obligations, such as personal service, a wage-work bargain, and so forth. It is natural, therefore, to identify the true contractual obligations as a prelude to characterising the identity of the contract. By contrast, limb (b) worker is an exclusively statutory category. In applying that test, it may be mistaken to draw analogies with authorities on contracts of employment, such as *Quashie v Stringfellow Restaurants* [2012] EWCA Civ 1735; [2013] I.R.L.R. 99 and *Cheng Yuen v Royal Hong Kong Golf Club* [1998] I.C.R. 131, as did counsel for Uber (*Uber* at [67]-[69]). This reflects a mistaken elision of the categories of employee and limb (b) worker, which ought to be kept distinct. The limb (b) worker is a statutory category, and the 'true agreement' approach obscures the central role of the statutory purpose in applying the criteria to work arrangements.

Is 'contractual' *Autoclenz* the only game in town? There were in fact two distinct streams to the pre-*Autoclenz* case-law, not one. Though the streams are partially confluent, their elision causes confusion in hard cases such as *Uber*. Given the statutory context to limb (b) worker cases, 'statutory' *Autoclenz* is a better approach than its 'contractual' counterpart.

This 'statutory' *Autoclenz* approach is reflected in the line of tax cases developing a 'purposive' construction of fiscal legislation (on the tax cases within the context of *Autoclenz*, see E. Simpson, 'Sham and Purposive Statutory Construction' in E. Simpson and M. Stewart, *Sham Transactions* (2013)). Its origin is often attributed to the decision of the House of Lords in *WT Ramsay v Inland Revenue Commissioners* [1982] A.C. 300. The analysis offered by Lord Nicholls in *Barclays Mercantile Business Finance Limited v Mawson* [2004] UKHL 51; [2005] 1 A.C. 684 continues to identify its basic character:

"[t]he essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction...answered to the statutory description" (at [32]).

It is crystallised in Mr Justice Ribeiro's now canonical formula that "the ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically" (*Collector of Stamp Revenue v Arrowtown* [2003] HKFCA 46 at [35], cited by Lord Nicholls in *Barclays Mercantile Business Finance Limited v Mawson* at [36]).

The difference between the statutory and contractual approaches is illustrated by one of the tenancy cases on which Lord Clarke relied in *Autoclenz*, *Bankway Properties Ltd v Pensfold-Dunsford* [2001] EWCA Civ 528; [2001] W.L.R. 1369. A rent increase clause was inserted into a tenancy agreement in order to trigger a compulsory statutory ground for possession: it was 'real' in the sense that the landlord intended to rely on it. In holding that the clause was an impermissible attempt to contract out of the protective legislation, Arden LJ based on her analysis primarily on statutory construction, and the court's role "to give effect to the intention of Parliament as expressed in the words that it has used." (at [49]). She contrasted her approach,

which is closely aligned with the ‘purposive’ statutory construction in the *Ramsay* cases, with that of Pill LJ (at [58]), who preferred “an analysis of the terms of the contract” (at [66]). He held the rent clause was not part of the true agreement because it was repugnant to the overarching commercial purpose, which was to enter into a statutorily protected assured tenancy. We think that Pill LJ’s approach has an air of artificiality and metaphysical obscurity, particularly in circumstances where the enforceability of the term was in fact critical to the employer’s plan to evade a protective statute. In this respect, Arden LJ rightly emphasised the intention of Parliament, *not* the intention of the contracting parties, in identifying the legal nub of the issue. It is significant that Lord Clarke in *Autoclenz* referred approvingly to Arden LJ’s judgment in *Bankway* as exemplifying an approach that “relevant contractual provisions were not effective to avoid a particular statutory result” (at [23]-[24]). He also described his own approach as ‘purposive’ (at [35]), terminology characteristic of the ‘statutory’ approach.

We consider that the purposive statutory construction approach is a better approach to adopt in hard limb (b) worker cases such as *Uber*. First, the legislative background points to a wide, inclusive concept of ‘worker’, which should not be defeated by labyrinthine written contracts. The limb (b) category was intended by Parliament to apply to fundamental social rights, such as the national minimum wage and working time, and was enacted in the context of statutes which prohibit contracting out or even include presumptions of inclusion (see e.g. ss. 28, 49 NMWA). The progenitors of the domestic concept equally adopted wide, inclusive terminology (see s.25 of the Truck Act 1831, s.10 of the Employers and Workmen Act 1875, s.2 Truck Amendment Act 1887). Sometimes the statute is underwritten by the EU concept of ‘worker’, such as in the case of the Working Time Regulations 1998 at issue in *Uber*, where the CJEU sees through legal or contractual form and gives overriding emphasis to whether the individual is under the direction of the employer, does not share its risks and forms an integral part of its undertaking (see *Kunsten v Staat der Nederlanden* (Case C-413/13) EU:C:2014:2411; [2015] All E.R. (EC) 387 at [33]-[36]).

Secondly, the policy considerations which led the *Ramsay* line of authorities to look beyond apparently ‘genuine’ transactions are equally apposite here. A narrow focus on whether each individual term or transaction was ‘real’, in the sense that it is not contradicted by the facts of the relationship, deflects attention from the overarching statutory purpose to limb (b). In contrast to *Autoclenz*, *Uber* involves elaborate multipartite contractual arrangements. The statutory approach would require the court to step back and examine the overall relationship between drivers and Uber in the round, rather than forensically scrutinising discrete elements within it to see if they are ‘real’. This also resolves the knotty issue of how far *Autoclenz* permits courts to disregard the written terms in the contract between Uber and the passengers. The task of classification gives priority to the statutory purpose, not how Uber classifies the web of legal relationships in its written documentation. On that approach, an individual driver can be working ‘for’ Uber, regardless of whether Uber is characterised as an agent in the contractual documents, where the other factors

relevant to the statutory test, such as integration and control, support that characterisation. Treating 'working for' as an exclusionary barrier, as Underhill LJ appears to do, would subvert the inclusionary statutory purpose of limb (b) in multipartite situations.

On the purposive statutory approach it is therefore beside the point for Underhill LJ to argue for caution lest "the Courts seek to fashion a common law route to affording protection to Uber drivers and others in the same position'" and to propose that this is "a classic area for legislative intervention" (at [164]-[166]). Arden LJ's rejoinder in *Bankway* to similar concerns about the appropriate constitutional limits of adjudication is equally powerful in *Uber*. Parliament has *already* intervened, through the limb (b) category and statutory employment rights, and it is the constitutional duty of the court to apply the words of the statute purposively and realistically to work arrangements in favour of inclusion. This fits with the constitutional duty of the court to support Parliament by ensuring that statutory employment rights are enforced effectively (*UNISON v Lord Chancellor* [2017] UKSC 51; [2017] 3 W.L.R. 409). In applying limb (b) to work arrangements, this should not be done in a formalistic way. The limb (b) definition should be applied as a composite formula, determining whether Parliament intended these work arrangements, characterised by a high degree of control and integration, to be included within the protective category. That is precisely what the ET did.

Autoclenz is now at a crossroads. ACL Davies has argued that it would be better to "acknowledge the role being played by the statutory regime of protection for employees and workers" in *Autoclenz* (A.C.L. Davies, 'Employment Law' in E. Simpson and M. Stewart, *Sham Transactions* (2013) at p.187). *Uber* provides an opportunity to take this step. This purposive approach is particularly apt for limb (b) workers. To accept the written characterisation of the relationship unless it contradicted by practice detracts from the protective and inclusionary purpose of the statute. A focus on the statutory purpose avoids the tricky metaphysics of hunting for the 'true' or 'real' agreement in hard cases like *Uber*. This would leave *Snook* and 'contractual' *Autoclenz* to be used in more overt cases of contract manipulation, where the language of 'sham' and 'pretence' is more apposite. 'Statutory' *Autoclenz* can then be directed at the difficult boundary problems in multipartite cases like *Uber*, where there is no obvious discrepancy between the written contracts and the facts on the ground. *Uber* thus offers an important opportunity for the UKSC to clarify the distinctive ambits of 'contractual' and 'statutory' *Autoclenz*, and to give the purposive 'statutory' dimension of *Autoclenz* a more prominent role.