The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber*

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Abstract

A person's entitlement to workplace rights and protections under English law is conditional on their relationship falling within the legal category of employment, by virtue of them having the requisite status. The employment status of individuals performing on-demand work via digital platforms is particularly contentious and has been a focal point for debate in recent years. The Supreme Court decision in *Uber BV v Aslam* represents a ground-breaking judgment on this issue, which has radical implications for the correct approach to determining employment status more generally. It is argued here that, while leaving some important questions unanswered, the purposive and relational approach to employment status developed by the Supreme Court in *Uber* is to be welcomed, and that this new approach has far-reaching consequences for the future of the legal category of employment.

Keywords: Employment status, gig economy, Uber, employee, worker, purposive

Introduction

A person's entitlement to workplace rights and protections under English law is conditional on their demonstrating that their working relationship falls within a legal category of employment by virtue of them having the requisite status, of either 'employee' or 'worker'. While always a question of fundamental importance for employment law, the issue of status has recently become more acute due to the increased fragmentation of workplaces, and growth of atypical working

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Our thanks to the anonymous reviewer, and to the editors of the UK Labour Law Blog where an earlier version of this piece was published.

arrangements.[1] The employment status of individuals performing on-demand work via digital platforms is particularly contentious, and has been a focal point for debate in recent years.[2] The Supreme Court's decision in *Uber BV v Aslam* ('*Uber (SC)*')[3] represents the final chapter in the long-running saga of determining the employment status of drivers who provided trips to passengers through the Uber app. In reaching their conclusion that the drivers must be classed as workers, the Supreme Court gave a ground-breaking judgment which, while leaving some important questions unanswered, has radical implications for the law relating to employment status and the legal category of employment. In this article we explore key aspects of the Supreme Court's judgment, relating to the purposive approach and the role of contract when determining employment status, and identify some important consequences for workers and the future of employment.

Uber in outline

The case concerned Uber drivers who sought to establish 'worker' status for the purposes of s 230(3)(b) Employment Rights Act 1996, the National Minimum Wage Act 1998, and the Working Time Regulations 1998. The relevant provision identifies a worker as:

> "(3) … an individual who has entered into or works under (or, where the employment has ceased, worked under)—
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> (a) a contract of employment, or
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> (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."[4]

[1] See, for example, Judy Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44 Osgoode Hall Law Journal 609; David Weil, *The Fissured Workplace* (Harvard University Press 2014); Valerio de Stefano, 'The rise of the 'just-in-time workforce': On-demand work, crowdwork and labour protection in the 'gig-economy'' (2016) ILO Conditions of Work and Employment Series Working Paper, No 71.
[2] Jeremias Prassl and Martin Risak, 'Uber, TaskRabbit, & Co: Platforms as Employers?' (2016) Oxford Legal Studies Research Paper No. 8/2016; Brishen Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 Harvard Law & Policy Review 479.
[3] [2021] UKSC 5.
[4] s 230(3) ERA. See also s 54(3) NMWA and reg 2(1) WTR.

The drivers were attempting to demonstrate they met the extended definition set out in subsection (b), and the case centred on the question of whether they contracted to perform services for Uber. According to the written documentation, the drivers contracted with Uber BV (a Dutch parent company) on terms which purported to exclude worker status, and had no formal contractual relationship with Uber London Ltd. However, Uber London Ltd held the Private Hire Vehicle Licence to operate in London, and in practice exercised a variety of forms of control over the drivers. As outlined in the *Uber (SC)* judgment,[5] Uber London Ltd exercised significant control over the drivers by, *inter alia*: determining the fares charged to passengers; retaining absolute discretion to accept or decline passenger ride requests; monitoring drivers' cancellation rates; using passengers' ratings of the drivers as an internal performance metric; automatically logging off drivers who did not accept a certain number of rides in a row; and placing restrictions on the communications that drivers could have with the passengers they were purportedly contracting with.

Uber's position was that the relationship was explained by these written contractual arrangements, with Uber London Limited merely acting as a booking agent, such that no 'worker' relationship could exist between the drivers or any Uber entity. By contrast, the drivers successfully argued in the Employment Tribunal ('ET'), Employment Appeal Tribunal ('EAT'), Court of Appeal, and Supreme Court that they were in fact the 'workers' of Uber London Ltd, notwithstanding the supposed absence of any direct contractual relationship between the drivers and Uber London Ltd.

In concluding this, the Supreme Court stressed that the 'modern approach to statutory interpretation is to have regard to the purpose of a particular provision', and to analyse the relevant facts in light of the statutory provision being considered.[6] The general purpose of the employment rights in question was identified as being the protection of workers vulnerable to exploitation due to their position of subordination and dependency, meaning that the statutory definition of worker

[5] *Uber (SC)* [96] – [101].
[6] ibid [70].

status must be interpreted in a manner which provides protection to these individuals.[7] In light of this purposive approach, the Supreme Court also rejected taking the written terms of a work relationship contract as the starting point of determining whether a person falls within s 230(3)(b) ERA 1996, not least due to the fact employers are often in a position to 'dictate such contract terms'.[8] Based on this reasoning, and paying particular attention to the various forms of control that was exercised by Uber London Ltd over the drivers outlined above, the Supreme Court held that the drivers were 'workers'.[9] The Supreme Court also concluded that the Employment Tribunal was entitled find that the drivers were 'workers' while logged into the app in London, rather than only when driving passengers.[10]

Purposive interpretation

Perhaps the most significant aspect of the Supreme Court's decision are the findings relating to the 'purposive' approach that must be applied when determining a claimant's work relationship status. This represents a dramatic shift away from the narrow contract-based analysis of the parties' relationship towards a broad enquiry into the reality of the relationship, and requires the legal category of 'employment', meaning employee and worker status, be constructed in a manner that protects individuals performing work in positions of subordination and dependency.

Prior to *Uber* a 'purposive approach' to determining employment status had begun to be developed in *Autoclenz Ltd v Belcher and Others*,[11] where the Supreme Court found that terms in the parties' written contracts could be disregarded when determining a claimant's employment status where these did not reflect or accord with the 'true agreement'.[12] In reaching this conclusion Lord Clarke stated this 'may be described as a purposive approach … If so, I am content with that description'.[13] In legal scholarship a 'purposive' approach typically refers to the interpretation of texts in a manner

[7] ibid [71].
[8] ibid [76].
[9] ibid [96] *et seq*, and summarised at [101].
[10] ibid [130].
[11] [2011] UKSC 41. See also, in the tax law context, *WT Ramsay Ltd v IRC* [1982] AC 300 (HL); and *UBS AG v Revenue and Customs Comrs* [2016] UKSC 13.
[12] This departed from the classic understanding of 'sham' in English contract law, as only involving terms that both parties have a 'common intention' of giving a misleading appearance of their obligations, see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.
[13] *Autoclenz* (n 11) [35].

that seeks to achieve their underlying goals.[14] However, the treatment of written contractual terms in *Autoclenz* is purposive in a slightly different sense, namely that the protective goals of employment legislation would be frustrated if written employment contracts were taken as conclusively determining the terms of the parties' relationship. Adopting this orthodox approach to written contracts would allow employers to use their superior bargaining power and economic position to deny workers access to statutory rights that were introduced to counteract and safeguard workers against those the very same inequalities.

The meaning and proper application of this purposive approach to determining employment status remained uncertain, however, and clarifying this was a key issue before the Supreme Court in *Uber*. Commenting on the Court of Appeal judgment in *Uber BV v Aslam* ('*Uber (CA)*'),[15] Alan Bogg and Michael Ford QC identified two distinct readings of the purposive approach in *Autoclenz*.[16] First, a 'contractual' reading, where the focus is on identifying the parties' true agreement, and the courts are empowered to disregard documents 'which do not reflect the reality of what is occurring on the ground'.[17] Second, a 'statutory' reading, where the courts are guided by the underlying purposes of the legislation when determining employment status, and the key question is 'whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically'.[18] It was suggested by Bogg and Ford QC that the statutory purposive approach should be preferred by the Supreme Court in *Uber*, with the contractual reading of *Autoclenz*'s purposive approach being circumscribed to cases involving 'more overt cases of contractual manipulation'.[19]

This distinction between contractual and statutory purposive approaches is illuminating, and it seems entirely correct that statutory employment rights should be applied in a manner that seeks to achieve their underlying purposes and goals. Purposive interpretation of this kind is now accepted as part of the UK court's general approach to statutory interpretation,[20] and has been

[14] See for example, A Barak, *Purposive Interpretation in Law* (Princeton University Press 2007).
[15] [2018] EWCA Civ 2748.
[16] Alan Bogg and Michael Ford QC, 'Between statute and contract: who is a worker?' (2019) LQR 347.
[17] *Uber (CA)* [66].
[18] *Collector of Stamp Revenue v Arrowtown* [2003] HKFCA 46 [35].
[19] Bogg and Ford QC (n 16) 353 – 354.
[20] *Attorney-General's Reference (No 5 of 2002)* [2004] UKHL 40 [31].

widely adopted in other contexts.[21] It is a mistake, however, to view the contractual and statutory purposive approaches as mutually exclusive or in tension with each other such that there is a need to choose between them. Rather, they are *mutually supporting* elements of an overarching purposive approach to employment status which are relevant at different stages of the courts' deliberation.

The statutory purposive approach applies at the higher level of abstraction where courts are constructing and defining the boundaries of the legal category of 'employment'. At this stage, the purposes of statutory employment rights and standards are used to shape and identify the types of relationship that fall within the protective scope of the legislation. The vague statutory definitions of employee and worker leave courts with 'broad discretion' as to the specific tests and principles used to determine employment status,[22] and the underlying purposes of the legislation provide the courts with a valuable source of guidance when constructing these categories. By contrast, the 'contractual' approach is relevant at the more concrete level, when courts are deciding whether on the facts of the *specific case* before them the claimant has the type of relationship captured by the categories of employee or worker. At this stage, the protective goals of employment law demand that any written documentation which does not reflect the reality of the parties' relationship and working arrangement be disregarded. It is true that the primary focus in particular cases may well be either the abstract characterisation of employment or the concrete application of this definition to the facts, and that individual decisions may therefore largely turn on either the statutory or contractual purposive approach. But both are necessary to achieve the underlying purposes of employment legislation.

Given this analysis, it is to be welcomed that the Supreme Court in *Uber (SC)* confirmed that both statutory and contractual purposive approaches should be applied when determining employment status. The Court found the statutory purposive approach should be adopted, with the 'ultimate question' when determining if someone is an employee or worker being 'whether the relevant

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[21] See Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (LexisNexis 2019) [12.2] – [12.4].
[22] Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 115.

statutory provisions, construed purposively, were intended to apply to the transaction'.[23] The purpose of statutory employment rights was identified as being to 'protect vulnerable workers' who need these legal safeguards because they perform work in a 'subordinate and dependent' position.[24] The Court further stated that relationships of this kind can be identified by asking whether there is 'control exercised by the employer over their working conditions and remuneration', as this is the 'correlative' of subordination and dependency.[25] In addition to this strong endorsement of the statutory purposive approach, however, the Supreme Court also recognised that the protective goals of employment legislation demand that employers not be able to pre-determine the legal classification of the relationship through written contractual documentation. Taking the 'terms of a written contract as the starting point' would frustrate the purpose of employment statutes, even if only as a 'prima facie' starting point which could be displaced by the reality on the ground.[26] As discussed further below, this extends the contractual purposive approach developed in *Autoclenz* and makes clear that it is the reality of the parties' relationship that matters.

What then, is the effect of the purposive approach to employment status adopted by the Supreme Court? Although purposive statutory interpretation is not novel, and there has long been a 'trend away from the purely literal towards the purposive construction of statutory provisions' in English law,[27] it nevertheless has dramatic implications in the context of employment status. Following *Uber (SC)*, courts and tribunals must seek to interpret the protective scope of statutory employment rights as extending to all individuals whose working relationships are characterised by subordination and/or dependency. Although *Uber* concerned the question of whether one party had contracted to perform work or services for another, this purposive approach must be adopted when interpreting all elements of the statutory definition of worker status.[28] Rather than focussing on any written documentation, courts must undertake a broad enquiry into whether the reality of

[23] *Uber (SC)* [70], citing *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454.
[24] ibid [71], citing *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (EAT) [17].
[25] ibid [75].
[26] *Uber (SC)* [76].
[27] *Carter v Bradbeer* [1975] 1 WLR 1204, 1206–1207.
[28] Contrary to the view expressed by the Court of Appeal in *IWGB v CAC and RooFoods Ltd (t/a Deliveroo)* [2021] EWCA Civ 952 [84], that *Uber* was not relevant to the requirement of personal service set out in the statutory definition.

a claimant's working arrangements and relationship is of the type that the employment statute has the purpose of protecting: namely, subordinate and dependent work. A lack of control over one's working conditions and remuneration was identified by the Supreme Court as the key proxy of subordination and dependency, meaning 'the greater the extent of such control the stronger the case for classifying the individual as a "worker"'.[29] The result of this emphasis on control is to substantially narrow the gap, possibly to vanishing point, between worker status under domestic law and the EU law concept.[30]

The significance of the purposive approach established by *Uber (SC)* is compounded by the fact that it must also be adopted for employee status. It may initially seem less straightforward to apply the statutory purposive approach to identify who should be classed as an employee. Employee status is defined in legislation by reference to the common law category of a 'contract of employment' or 'of service'.[31] The tests and principles used to define the category of 'employee' have therefore been developed entirely by the courts, in contrast to the more detailed statutory provisions governing worker status.[32] Notwithstanding this complication, the reasoning that underpins the purposive approach in *Uber* applies equally to this category. Although employee status is defined using the common law contract of employment the *substantive rights* involved are created by statute, and the Supreme Court in *Uber* identified this statutory nature of the employment rights as the 'critical' reason why legislative purpose must guide their protective scope.[33] Indeed, it would be surprising if the interpretive approach taken in relation to s 230(3)(b) ERA 1996 did not apply to the closely-related definition of employee contained in s 230(1)–(2). That both the statutory and contractual elements of the purposive approach must now be adopted for employee status is further reinforced by the Supreme Court's reference to employees as well as workers when identifying the purpose of employment statutes,[34] as well as in their findings on the

[29] *Uber (SC)* [84].
[30] *Allonby v Accrington & Rossendale College* [2004] IRLR 224 (ECJ).
[31] ERA s 230(1).
[32] Though *cf* the application of the same tests for worker status as applied for employee status; *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (EAT) [17(5)].
[33] *Uber (SC)* [69].
[34] ibid [71], citing *Byrne Bros* (n 32).

role of written contracts.[35] Finally, as Bogg and Ford note,[36] the cases relied on in *Uber* when developing the purposive approach were those involving employee status.[37]

A further critical implication of the statutory purposive approach is that it requires that the current range of legal tests and principles used to define employment status be reassessed to ensure they are rationally connected to the legislation's purpose. Under the approach established by *Uber*, the categories of employee and worker status must be interpreted in a manner that helps achieve the legislation's underlying goal of protecting subordinate and dependent workers. However, the notions of subordination and dependency are in themselves too abstract to be used as the tests for determining who is an employee or worker.[38] Courts and tribunals therefore need to determine employment status by reference to more concrete tests and indicia, which track and identify workers who are in subordinate and dependent positions, and help distinguish them from individuals who can justifiably be 'treated as being able to look after themselves'.[39] Following this, any tests, factors, or principles historically used by the courts that do not help identify relationships of this kind should now be abandoned. Of course, many of the indicia currently used to determine employment status do in fact help to pick out instances of subordinate and dependent work, such as considering whether an individual is integrated into a business or takes the risks of profit and loss.[40] One factor that may be inconsistent with this purposive approach, however, is the denial of status based on a lack of mutuality of obligation, in the sense of ongoing mutual promises to offer and accept work.[41] Workers whose relationships lack this commitment are generally in a more vulnerable position than those whose relationships do have this feature, and it would therefore be odd for this fact to point *away* from them falling within the protective scope of employment legislation.[42]

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[35] ibid [85].
[36] Alan Bogg and Michael Ford QC, 'The death of contract in determining employment status' (2021) LQR 392, 395.
[37] *Autoclenz* (n 11); *Carmichael v National Power* [1999] ICR 1226 (HL).
[38] Davidov, *A Purposive Approach to Labour Law* (n 22) 119.
[39] *Byrne Bros* (n 32) [17(4)].
[40] *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101 (CA); *Hall v Lorimer* [1994] IRLR 171 (CA); *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735.
[41] Davidov, *A Purposive Approach to Labour Law* (n 22) 126 – 7.
[42] Though cited with approval, the purposive approach therefore casts serious doubt over the correctness of the decision of the Court of Appeal in *Secretary of State for Justice v Windle* [2016] EWCA Civ 459. See Hitesh Dhorajiwala, '*Secretary of State for Justice v Windle*: the expanding frontiers of mutuality of obligation' (2017) 46 ILJ 268.

While we view the purposive approach established in *Uber* as a welcome development, there remain some unresolved questions and reasons for caution regarding its conceptualisation and application by the Supreme Court. First, the judgment engages with the statutory purposive approach and the goals of employment law at a high level of generality, and in a relatively brief manner. It is not clear, for instance, how the purpose of employment statutes is identified by the Court: is it Parliament's (actual or presumed) intention that matters,[43] or the Court's own view of the best understanding of the legislation's purpose? In addition, little explanation is given in support of the Court's statement that it is 'not in doubt' that the 'general purpose' of employment legislation is to protect subordinate and dependent workers.[44] Articulating the purpose of employment law in this way also ignores the possibility that different areas of employment law may have diverging goals and purposes.[45] Indeed, the 'contextual' nature of employment law makes it highly likely that the discipline is underpinned by a plurality of values,[46] and that there will be instances of conflict between these various goals.[47] It is not obvious to us, for example, that the purpose of national minimum wage legislation maps perfectly onto the purposes of statutory trade union rights or protections from discrimination.[48] Moreover, while the general purpose of these statutes might be stated as protecting workers who need the relevant rights, it may well be that *different classes* of workers need these various legal protections. That being so, pursuing the purposive approach further may well therefore lead to a fragmentation of the concept of 'employment' and the personal scope of statutory employment rights.

A further area of uncertainty is what it means for an individual to be performing work in a position of subordination and dependency. It is not clear whether the dependency referred to by the Court is purely economic, meaning reliance on the work as their sole or main source of income, or also

[43] As seems to be implied at *Uber (SC)* [76].
[44] ibid [71].
[45] See, for example, the range of goals discussed in Guy Davidov and Brian Langille (eds.), *The Idea of Labour Law* (OUP 2011); Hugh Collins, Virginia Mantouvalou and Gillian Lester (eds.), *Philosophical Foundations of Labour Law* (OUP 2018).
[46] Hugh Collins, 'The Productive Disintegration of Labour Law' (1997) 26 ILJ 295.
[47] Joe Atkinson, 'A purposive approach to Labour law' (2016) 45 ILJ 306.
[48] Indeed, this is in reflected in the recent *Mencap* decision, where the Supreme Court identified the purpose of the National Minimum Wage as being to correct market failures, *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8 [36]. It is not clear how this purpose relates to, or should be integrated with, the goal of protecting workers from exploitation.

includes dependence on the work for other things such as social interaction and relationships, a sense of self-worth, or contribution to society. Although more difficult to identify, it is this broader understanding of dependence, encompassing social and psychological aspects as well as economic, that picks out the type of vulnerability and working relationships that statutory employment rights have the purpose of protecting, and which should therefore be used to guide their personal scope.[49] It is similarly unclear where subordination will exist despite an individual having a high degree of freedom over how they perform their work, and some say over their working conditions. While the Supreme Court viewed control as 'a touchstone' of subordination,[50] it is ultimately the nature of the relationship that matters under the purposive approach. The Court in *Uber* accepted that control is not the only relevant consideration when identifying subordinate work, and that someone may be in a position of dependency and therefore classed as a 'worker' in the absence of this control, for instance due to their integration into the business and inability to market the services to anyone else.[51] However, the extent to which control is *the* touchstone and proxy for subordination and dependency, or merely acts as one of several relevant indicators, remains unclear.

Finally, *Uber* leaves the relationship between employee and worker status in an uncertain state. If a purposive approach must be adopted to both, and the purpose of statutory employment rights is to protect subordinate and dependent workers, then on what basis can/should courts distinguish between these categories? If the answer is simply that the necessary threshold of subordination and dependency, perhaps as evidenced by control, is lower for workers than employees, then it is far from obvious how or where this line should be drawn.

The role of contract after *Uber*

The *Uber* decision also has significant implications for the role of written documentation in determining employment status, and the proper approach to applying the contractual purposive approach developed in *Autoclenz*. This was a key dividing line between the majority and minority

[49] See Davidov, *A Purposive Approach to Labour Law* (n 22) 43 – 48. Cited at *Uber (SC)* [75].
[50] *Uber (SC)* [84].
[51] ibid [74], citing *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32.

positions in the Court of Appeal in *Uber*. Sir Terence Etherton MR and Bean LJ in the majority stated that in applying *Autoclenz*, a court or tribunal must examine the parties' actual agreement by reference to all the circumstances, 'of which the written agreement is only part'.[52] By contrast, Underhill LJ in the minority took the view that written agreements ought to play a much more central role, and may only be disregarded where they are shown to be inconsistent with the true agreement between the parties.[53]

This difference was resolved by the Supreme Court in *Uber*. Lord Leggatt found it to be inconsistent with the purpose of the relevant legislation to allow written contractual terms to characterise an individual's employment status, even as prima facie starting point. This is due to the unequal bargaining power that exists between employers and workers, resulting in a lack of negotiation over the written terms and the employers' ability to dictate the formal terms of the relationship. It follows that giving written agreements a privileged position in the characterisation of the work relationship would seriously undermine the efficacy of the statutory protections.[54] This treatment of the written terms was also supported by reference to the restriction on contracting out contained in the relevant statutes, which should be taken as applying to any provisions which have the 'object' of excluding the statute's operation.[55] Lord Leggatt did go on to clarify that the contents of any written agreement or documentation need not be ignored entirely, as the 'conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other'.[56] This may be more likely, for instance, where the parties have entered into negotiation over the substantive terms of the contract, rather than it being concluded on the employers' standard terms on a take-it-or-leave-it basis. Nevertheless, the key point remains that written contractual documentation can no longer be taken as the starting point for the courts' analysis of employment status.

[52] ibid [73].
[53] ibid [119] – [120].
[54] ibid [76] – [77].
[55] ibid [79] – [80].
[56] ibid [85].

This aspect of the decision in *Uber* extends the contractual purposive approach developed in *Autoclenz* and represents a remarkable shift in the manner courts and tribunals are expected to determine a claimant's employment status. Such an approach does not entirely disregard any written contractual agreements but provides them no privileged role in the purposive analysis articulated by the Supreme Court. They are simply a piece of evidence to be considered in the broader analysis of the true nature of the claimant's relationship. The practical effect of this appears to be switching the burden of proof as it operated in *Autoclenz*; from claimants needing to show written terms do not represent the reality of their relationship and so should be disregarded, to employers now needing to persuade courts that the written documentation should be given weight in their assessment of the reality of the relationship. While courts may sometimes find that the parties' written documentation accurately depicts the reality of their relationship, this is for the employer to establish and there is no assumption that it is the case. This demotion of the role of contractual documentation signals a shift towards a more 'relational' approach to the question of status and personal scope, that denies employers the power to dictate the tenor of how a work relationship is initially characterised.

Indeed, the Court's relegation of the role of formal contracts looks to be akin to the analysis of 'employment' advocated by Mark Freedland and Nicola Kountouris.[57] One of their key proposals was to approach the question of status through a form of 'relational' analysis, which considers the relevant connections between the parties without giving any privileged position to formal individual bilateral relations between parties (e.g. written contractual documentation).[58] Rather, they proposed an analysis based on the concepts of the 'personal work relation' and the 'personal work nexus':[59] the former concerning the taxonomical classification of a large set of personal work relations as a particular *type* of work relationship,[60] and the latter being a relational analysis of the internal structure of relationships falling within that broad classification.[61] Though Freedland and Kountouris propose their model as an analytical tool, there is a striking resemblance to analysis in

[57] Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011).
[58] ibid 320.
[59] ibid 309.
[60] ibid 314.
[61] ibid 316.

Uber. As set out above, the Supreme Court's purposive approach appears to construct the category of employment using the two-stage approach theorised by Freedland and Kountouris. On a 'statutory' level, the broad classificatory aims of the status are identified and used to specify its indicia and core characteristics, but at the 'contractual' level a detailed analysis of the internal structure of a particular relationship is carried out to determine whether it has the relevant features, with this analysis moving away from characterising the relationship by reference to the formal contractual documentation.

Despite emphasising the reality of the parties' relationship, the decision in *Uber* does not remove the need for a contractual relationship as a prerequisite for employment status.[62] It does, however, suggest that the threshold for satisfying this requirement is much more malleable than previously thought. Indeed, on the facts of *Uber* itself the employer was found to be Uber London Ltd, an entity that the drivers appeared to have no contractual relationship with at all, at least according to the written documentation.[63] This indicates that following *Uber*, courts must focus on the reality of the relationship not only when considering the status of the claimant, but also to determine the *identity of the employer*. This is significant because courts and tribunals have historically been reluctant to imply a contract between a worker and putative employer in the presence of express contractual frameworks that appear to adequately explain the parties' relationships, applying the orthodox common law test of necessity for doing so.[64] The Supreme Court's move away from the centrality of contract in characterising the relationship between a worker and employer suggests that the requirement of a contract between the parties for their relationship to be classified as 'employment' must now be approached in a more flexible way. If the reality of the relationship is that work is being performed by an individual in a position of subordination and dependency towards another, then the 'gap' of an absence of a formal written contractual relationship between the parties may be bridged using the purposive approach discussed above.

[62] Unlike recent cases involving the Human Rights Act 1998, see *Gilham v Ministry of Justice* [2019] UKSC 44; *Vining v London Borough of Wandsworth* [2017] EWCA Civ 1092.
[63] For discussion of this point see: *Aslam v Uber BV v Aslam* [2016] 10 WLUK 681 ('*Uber (ET)*') [98].
[64] *James v Greenwich LBC* [2008] EWCA Civ 25.

In short, if a relationship without a formal contractual link is properly characterised as 'employment' under the purposive analysis of the statutory provisions, then it is open to the relevant court or tribunal to make a finding that a contract exists between the parties to satisfy the statutory wording, notwithstanding any written documentation to the contrary. It would be going too far to suggest that such an approach will always be appropriate in cases involving tripartite working arrangements, such as agency and sub-contracted workers. The reality for many such workers is that they are in fact employed by the third-party company rather than the end user company. In some circumstances, however, such as the use of personal service companies,[65] corporate arrangements function, and are often designed, to distort and conceal the reality of the workers' relationship with the end-user company and the identity of their employer. In these cases, the Supreme Court's reasoning opens the door to a more sympathetic approach to satisfying the statutory requirement of a contractual relationship where a purposive analysis suggests that the relationship ought to be classified as employment, notwithstanding the absence of any formal contractual nexus.

This application of the contractual purposive approach may appear radical in its potential to pierce the corporate veil, but it follows logically from the Court's reasoning. If the protective purpose of employment legislation and the prohibition on contracting-out both mean that employers cannot be permitted to (mis)characterise work relationships by dictating *the content* of contracts, then they must equally not be able to characterise the nature of these relationships via written documentation that appears to deny the *very existence* of a contract between the parties, including the use of corporate structures which purport to deny a direct contractual relationship between two parties.

The future of employment

The full implications of the Supreme Court's decision will only emerge as it is applied by courts and tribunals in the years to come. However, some consequences are predictable. The first is that the approach taken by the Supreme Court ought to make it more likely for casual and other atypical

[65] Michael Ford QC, 'The Fissured Worker: Personal Service Companies and Employment Rights (2020) 49 ILJ 35.

workers to succeed in claiming statutory employment rights. For example, courts must seek to ensure that individuals working in positions of subordination and dependency are no longer denied statutory employment rights because their written contracts contain rights of substitution,[66] or denials of any ongoing obligations to offer/accept work.[67] The reasoning in *Uber* will similarly make it more straightforward to classify individuals without a formal contractual link to their putative employer as workers or employees, such as unpaid interns or those delivering services through personal service companies.[68] The Court's recognition that indirect means of exercising control, including nudges and workplace monitoring, can ground a finding of worker status will also have wider ramifications for the employment status of workers who are subject to such 'algorithmic management' practices.[69] Furthermore, the demotion of written documentation, and the voiding of any contractual terms that have the 'object' of avoiding the relationship being classified as employment, effectively disarms the infamous 'armies of lawyers' deployed by employers to draft these contracts.[70] While the onus remains on the workers to bring a claim, and each case will turn on the tribunal's assessment of the reality of their working relationship, *Uber* undoubtedly makes it easier for vulnerable workers to be brought within the protective scope of employment legislation.

In addition, we have seen in *Uber* what we would refer to as a 'third face' for mutuality of obligation. The general understanding of the mutuality of obligation criterion is that it exists as a form of contractual consideration in a single engagement,[71] or as an ongoing obligation to offer and accept.[72] By contrast, *Uber* offers an approach to mutuality which appears to lie somewhere between these conceptions. The ET had found that the drivers were workers where: a) the app was switched on; b) they were in the territory authorised by the app; and c) they were ready and willing

[66] *Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo*, Case Number TUR1/985(2016), 14 November 2017.
[67] *O'Kelly v Trusthouse Forte* [1984] QB 90 (CA).
[68] Ford QC, 'The Fissured Worker' (n 65).
[69] Jeremias Adams-Prassl, 'What if your boss was an algorithm? Economic incentives, legal challenges, and the rise of artificial intelligence at work' (2019) 41 *Comparative Labor Law and Policy Journal* 123.
[70] *Consistent Group Ltd v Kalwak* [2007] IRLR 560 (EAT) [57] (Elias J).
[71] *McMeechan v Secretary of State for Employment* [1997] ICR 549 (CA)*; Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735.
[72] *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 (EAT).

to accept trip,[73] and the Supreme Court concluded that it was entitled to make this finding.[74] The drivers' ability to turn down some work by refusing rides was not incompatible with them having the 'irreducible minimum' needed for worker status; what mattered was that there was an 'obligation to do some amount of work'.[75] Although this finding may, to some extent, be particular to the factual context of *Uber*, it demonstrates that courts and tribunals should be willing to have a more sensitive approach to the question of when mutuality, in the sense of obligations to offer and accept work, actually exists.

The analogy between the mutuality findings in *Uber* and other work on-demand via apps may well be straightforward to draw. But even where the analogy is not neat, as in the case of zero hours contracts where workers have some degree of flexibility to turn work down, the Supreme Court's endorsement of the ET's conclusion on mutuality of obligation means courts and tribunals should feel comfortable moving away from the two orthodox conceptions of mutuality, which sit at the extremes, and consider whether the facts may allow for a conception of the criterion which sits somewhere in between.

Conclusion

Uber has transformed the approach that must be applied by courts and tribunals when determining an individual's employment status. It represents a dramatic shift in focus, replacing a more formalistic contractual approach with a broader 'relational' analysis that engages with the underlying goals and purposes of employment statutes. This approach is equally applicable whether a case involves employee or worker status. Despite some areas of ongoing uncertainty, the Supreme Court's reasoning establishes that courts must seek to interpret the legal concept of 'employment', and the protective scope of statutory employment rights, as extending to all individuals performing work in conditions of subordination and dependency. A further intriguing possibility, which there is unfortunately not space to explore here, is that the Supreme Court's strong endorsement of purposive interpretation in the context of employment legislation, coupled

[73] *Uber (ET)* [100].
[74] *Uber (SC)* [130].
[75] ibid [126] – [129].

with their clear articulation of the protective goals of these statutes, might herald the adoption of a more robust purposive approach across other areas of employment law, and therefore have significant ramifications beyond the question of personal scope. But while the full impacts of *Uber* remain to be worked out, the decision should clearly make it easier for atypical workers to bring themselves within the category of employment in future and to claim statutory employment rights.