Global Workplace Law & Policy

# Template Innovation

David Mangan (Maynooth University (Ireland)) · Monday, December 21st, 2020

**Are exploitative contracts part of innovation?**

2020 has not only been a year of pandemic. The year has also provided additions to the growing tome of 'gig economy' litigation; case law that has largely (though not exclusively) centred around Uber. Employment status has been the focal point of this discussion. Attention should be drawn to a larger issue: how app-based work opportunities expose the vagueness of the neighbouring boundary between labour and commercial law. With this ambiguity, forms of contract law redress for 'exploitative contracts' come into consideration. Is this situation simply template innovation as opposed to something more significant or 'disruptive'?

**Uber in the courts**

There have been a number of decisions in which Uber's business template of engaging 'independent contractors' has been challenged. On 4 March 2020, the Court of Cassation (Labour Chamber) ruled on Uber drivers' employment status. It found in favour of Mr. X. (It should be noted that, in January 2019, the Paris Court of Appeal found for Mr. X, ruling that he held a fictitious status as an independent worker.) The Court of Cassation determined that being called a 'partner' of Uber was a misleading term. Partnership obliged Mr. X to file with the Trade Register as an independent contractor and to follow an organisational structure completely established and monitored by Uber. Moreover, this form of partnership precluded Mr. X from setting his own fares (which are, pursuant to the contract between the parties, determined by Uber's algorithm) or setting his own terms and conditions for conducting the business. The court interpreted art. 2.4 of the agreement as being coercive towards drivers, leading them to remain connected in the hope of obtaining a fare. The court found this to be at variance with the freedoms associated with an independent driver.

Among other courts, the English Court of Appeal, in *Uber v Aslam* [2018] EWCA Civ 2748, ruled that drivers were in an employment relationship with Uber; falling under the 'worker' classification pursuant to s.230 of the Employment Rights Act 1996. (The fit between the UK's 'worker' status and EU labour law was discussed in *B v Yodel Delivery* Case C?692/19, *B v Yodel Delivery* (CJEU, Judgment 22 April 2020).) We still await the UK Supreme Court's decision in *Uber v Aslam*.

**California's Proposition 22**

The US State of California passed a law in force as of 1 January 2020 that classified 'gig' workers

as employees of the platforms engaging their services 'unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is customarily engaged in an independently established trade, occupation, or business.' This law has been the subject of criticism. A coalition argued the law ignored the growing trend and choice of Californians to work independently. Business press contributed its own critique, focusing on the outdated nature of the law coupled with the commensurate economic lag it will produce.

In the 3 November 2020 American elections, Proposition 22 was on the ballot. in California. It sought support for classifying app-based drivers (such as Uber drivers) as independent contractors and therefore outside of the scope of the aforementioned law. Uber, Lyft and similar companies launched a campaign of support for the proposition which turned out to cost over USD 188 million. The money spent in opposition to Proposition 22 came in at just under USD 16 million. Proposition 22 was supported by a majority of those responding to it. For an outline of the proposition, see the State of California's voter website. There is also a Wikipedia page.

**Labour and Commercial Law – Bordering Neighbours?**

While the Uber litigation has been the focal point in discussions regarding regulation of a vulnerable cohort in the digital economy, these court proceedings point to more expansive employment questions. Uber, as a representation of the digital economy, draws attention to the relatively uncharted border between commercial and labour law.

If subordination forms a foundation for analysis, as it did in the Court of Cassation's Uber decision, how can we distinguish, in law, forms of redress for the Uber driver from those for a self-employed person/micro-enterprise? There is a remarkable gap between these two identities when it comes to legal redress. And yet, both may be viewed as vulnerable to larger entities; whether they are an employer or a large firm contracting with a small business. The difficulty laid out here should not be viewed as a gateway to seeing all small commercial entities as warranting employment protections. Rather, the digital economy challenges the idea of vulnerability as a premise for differing regulatory approaches. The time has come to engage with this under-determined distinction.

**Does common law contract law provide an effective means of redress?**

The Canadian Supreme Court's decision in *Heller v Uber Technologies* 2020 SCC 16 has been a more recent addition to this discussion. The Court had not been tasked with resolving the employment status issue in *Heller* because Uber brought a preliminary motion arguing that the matter must be heard in Amsterdam and not in a Canadian court. The contract between Uber and its drivers based in the Canadian Province of Ontario contained a dispute resolution clause that also pertained to jurisdiction. It applied Dutch Law and required mediation and arbitration to be held in Amsterdam. The agreement was also subject to International Commercial Court Rules (for mediation and arbitration). Heller (the lead litigant) earned in the range of CAD 400 and CAD 600 per week based upon weekly work hours totalling between 40 to 50. Annually, Heller grossed CAD 20,800 to CAD 31,200. The process would have cost Heller about USD 14,500. This situation clearly implicated access to a venue for contractual redress.

*Heller* brought out an important question in the *Uber* litigation: if we accept Uber's argument that

these drivers are their own commercial entities, is this an instance of a larger entity taking advantage of a smaller and more vulnerable one? If Uber drivers are self-employed, are there private law tools available which provide a means to contest a clause such as in *Heller*? Recall that the Court of Cassation interpreted art. 2.4 of the agreement as being coercive towards drivers.

The majority decision of the Canadian Supreme Court deployed the common law contract concept of unconscionability to find that the dispute resolution/jurisdiction clause was invalid. (Arguably, the majority used the common law concept in an unhelpful manner if one were to seek coherence. The minority opinion of Mister Justice Brown focusing on public policy would seem to be sounder.) Unfortunately, the decision suggested that the Court ruled in this way based upon a presumption of an employment relationship between the parties; again a matter that was not decided upon in this case.

*Heller* affirms the treatment of all commercial entities as a homogenous group. Protection for Uber drivers could only come by viewing drivers as falling under employment regulation. Conversely, classification as self-employed (a commercial entity in some form) precluded legal protections from this dispute resolution clause. And yet, the 'unconscionability' of such a clause does not differ for a driver, whether she is an employee or self-employed.

**Are data breaches a common ground?**

Again in the context of Uber litigation, there have been steps taken to use data protection for the purpose of grounding employment rights claims. This has arisen, most notably, in relation to the Uber litigation in the UK which has been undertaken by the Independent Workers' Union of Great Britain (IWGB). When the claim was announced it was written: '[The applicant] is seeking all his GPS data to calculate the distance he travelled and the costs he incurred, as well as information about when he logged in and out of Uber's platform. So far, Uber has disclosed only partial data, such as one month's worth of GPS data. These proceedings have now moved to a Dutch Court which says it will decide the matter 11 February 2021. It is wondered whether being classified as a 'data subject' under data protection regulation places independent contractors and workers into one large group that permits some form of redress? Is the concept of information asymmetry more effective than common law contract?

This entry was posted on Monday, December 21st, 2020 at 7:00 am and is filed under Canada, Case Law, Data protection, EU Law, Labor Law, Regulating, UK
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.