

Housing, Homelessness and Fair Work Committee

10.00am, Thursday, 4 November 2021

Uber: UK Supreme Court Decision – Response to Motion and Establishment of a Gig Economy Task Force

Executive/routine
Wards
Council Commitments

1. Recommendations

- 1.1 It is recommended that the Housing, Homelessness and Fair Work Committee:
 - 1.1.1 Note the contents of this report;
 - 1.1.2 Note the actions of the Fair Work Action Plan report that was presented to Committee on [2 September 2021](#);
 - 1.1.3 Agree the establishment of a Gig Economy Task Force; and
 - 1.1.4 Discharge the motion from the Council meeting of 11 March 2021.

Paul Lawrence

Executive Director of Place

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Report

Uber: UK Supreme Court Decision – Response to Motion and Establishment of a Gig Economy Task Force

2. Executive Summary

- 2.1 This report responds to a motion proposed by Councillor Watt at Full Council on 11 March 2021 regarding the UK Supreme Court’s decision on the employment status of drivers using the gig economy app, Uber, in a legal case, which is known as *Uber BV and others v Aslam and others*.
- 2.2 The report sets out background to the case, the judges’ unanimous decision on it, and reviews what this means for the gig economy and (i) other sectors and employers, (ii) Edinburgh and its wider economy, and (iii) the City of Edinburgh Council.
- 2.3 In line with the Fair Work Action Plan approved by the Housing, Homelessness and Fair Work Committee on 2 September 2021, this report also proposes the establishment of a short-life Gig Economy Task Force that will seek to understand the real experiences of, and to explore actions that could improve working conditions, rights and quality of employment for, workers in the gig economy. The findings of this work will be reported Committee in Spring 2022.

3. Background

- 3.1 In 2016, a group of 25 Uber drivers including former drivers and co-founders of the App Drivers and Couriers Union, Yaseen Aslam and James Farrar, took Uber to an employment tribunal, arguing they worked for a Dutch incorporated subsidiary of the company, Uber BV.
- 3.2 Uber said its drivers were self-employed and it therefore was not responsible for paying any minimum wage nor holiday pay. However, the Employment Appeal Tribunal dismissed Uber’s appeal in 2018 and the case progressed to the UK Supreme Court for judgement.
- 3.3 On 19 February 2021, the Supreme Court handed down a landmark judgment which confirmed that Uber drivers are workers and not independent contractors in a case, which is known as *Uber BV and others v Aslam and others*.

- 3.4 Following this decision, a motion by Councillor Watt was accepted by the City of Edinburgh Council on 11 March 2021. The motion proposed that the Council: *welcomes the recent Supreme Court Decision confirming that Uber drivers are workers and should be paid the minimum wage and receive holiday pay. Notes the potential impact of this decision for workers in sectors within the Capital. Requests a report within three cycles to the Housing, Homelessness and Fair Work Committee to further explore and update members on any impacts of the Court's decision in relation to fair work.*

4. Main report

The UK Supreme Court's decision on Uber

- 4.1 In UK law, there are three main categories of employment status: “employees”, “workers” and “self-employed”. The statutory rights that are accorded to each category vary as, essentially, “employees” receive the greatest level of protection while the “self-employed” largely do not benefit from employment protection rights. Within these two extremes are “workers”, who are entitled to some employment rights including:
- 4.1.1 National minimum wage;
 - 4.1.2 The right to holiday pay and rest breaks;
 - 4.1.3 Discrimination protection;
 - 4.1.4 Protection from detriment in whistleblowing and, from 31 May 2021, in health and safety cases; and
 - 4.1.5 Pension auto-enrolment.
- 4.2 The *Uber BV and others v Aslam and others* case sets a precedent for how tribunals will decide future cases regarding employment status, particularly around how businesses engage individuals that could be interpreted as “workers”.
- 4.3 In this judgment, the Supreme Court confirmed that Uber drivers are not “self-employed” but are “workers” for the purpose of the Employment Rights Act 1996, the Working Time Regulations 1998 (SI 1998/1833) and the National Minimum Wage Act 1998. The Court also considered the related question of what time counts, if drivers are “workers”, as working time for the purpose of the relevant rights.
- 4.4 The judges’ decision focused on the purpose of UK legislation which protects workers and noted that the drivers were in a position of subordination to Uber, such that:
- 4.4.1 Uber set the fare which meant that they dictated how much drivers could earn;
 - 4.4.2 Uber set the contract terms and drivers had no say in them;

- 4.4.3 Request for rides is constrained by Uber who can penalise drivers if they reject too many rides; and
- 4.4.4 Uber monitors a driver's service through the star rating and has the capacity to terminate the relationship if, after repeated warnings, the rating does not improve.
- 4.5 The Supreme Court also backed the drivers' claims in the Employment Tribunal that set out that working for Uber was not limited (as Uber argued) to periods when they were actually driving passengers to their destinations but included any period when the driver was logged into the Uber app within the territory in which the driver was licensed to operate and was ready and willing to accept trips.
- 4.6 It is important to note that the Supreme Court decision on Uber applies to English law only and that Uber operates as two separate companies in England and Scotland with differing licencing laws applying within the respective jurisdictions. However, despite the decision not being directly tested at the highest courts in Scotland it is considered likely to be persuasive should a similar case be brought to court here.
- 4.7 Following the Supreme Court decision, Uber have published a recognition agreement with the trade union GMB, to work with drivers to ensure they receive the pay and conditions that were being called for in the *Uber BV and others v Aslam and others* decision. This agreement does cover drivers in Scotland and includes guaranteeing the national minimum wage, holiday and sick pay, and providing trade union representation.

Implications for other sectors, employers, and customers

- 4.8 In its appeal, Uber claimed that if they were to lose the case, then HM Revenue and Customs (HMRC) would re-classify the business as a transport provider and the company would be liable to pay 20% VAT on fares. HMRC and Uber are still in dispute around this issue, with some estimates suggesting that the company could be forced to pay £1 billion in taxes plus interest. A cost, which Uber argue will be passed on to passengers using the service in the future.
- 4.9 Overall, it is likely that businesses operating in other parts of the gig economy will be reassessing how they engage with individuals and whether or not similar claims to the Uber case will be made by contractors. It is not clear, however, that the Supreme Court decision will lead to significant changes in other companies or operators, with any decisions resting on the specific circumstances and factors relating to each case.
- 4.10 One example, for instance, includes a group of drivers and riders for the gig economy food delivery company, Deliveroo, who sought to change their status from "self-employed" to "workers" at the Court of Appeal in June 2021. Unlike the *Uber BV and others v Aslam and others* decision, the Court found in Deliveroo's favour as a material factor in this case was that the couriers did not have an obligation to provide services personally.

Implications for Edinburgh and its wider economy

- 4.11 In consultation with the Institute for Employment Studies, the Department for Business, Energy and Industrial Strategy has developed a working definition of the gig economy as:
“The gig economy involves the exchange of labour for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment by task basis.”
- 4.12 Also sometimes called the collaborative economy, it has become synonymous with a very small number of online platforms, however this hides the very long tail of activity on less well-publicised platforms.
- 4.13 Employment in the gig economy can cover a range of skills levels, for example web and software designers (higher skilled); construction workers (medium skilled); and delivery/taxi drivers and personal services (lower skilled).
- 4.14 The availability and flexibility of working in the gig economy mean that some people will access it as their main source of pay while others will use it to ‘top up’ their income.
- 4.15 Anecdotal evidence across the UK suggests that the impact of the Covid-19 pandemic may have pushed more people into pursuing work in the gig economy to maintain or boost their household incomes. Availability of such work has been boosted by consumer demand for home delivery services during coronavirus related restrictions.
- 4.16 There are very few available data sources which provide robust data on the size and scope of the gig economy across the UK, and little available data on the nature of the sector in Edinburgh. One study estimated that 2.8 million people worked in the gig economy across the UK pre-pandemic, representing 4.4% of the total population. On a simple pro-rata basis, this would imply an estimated 22,900 gig economy workers in Edinburgh in the period prior to pandemic.
- 4.17 Within this study, evidence suggested Uber as the most commonly used UK platform, with 18% of gig economy workers having used the platform at least once. As such, the data suggests the potential wide implication of the supreme court decision for a large share of gig economy workers. The data further shows, however, that 41% of gig economy workers used platforms other than Uber, while 42% did not make use of any online platforms to find work.
- 4.18 These findings suggest that more work is needed to understand the scale and scope of the gig economy in Edinburgh, and the wider implications of events such as the supreme court decision. In particular, the review of evidence conducted to date suggests a need for further work to understand the number of Edinburgh workers dependent on the gig economy, work and pay conditions of gig economy workers in the city, and the experiences of such workers.

Implications for the City of Edinburgh Council

- 4.19 The Council as a licensing authority licenses Uber's Scottish operation, Uber Scot Ltd, as a booking office under the Civic Government (Scotland) Act 1982 in the same way it licenses all other booking offices in Edinburgh. The principal purpose of the licensing system is to prevent crime and disorder and to protect public safety. The legislation does not allow licensing authorities to regulate any other aspect of the licence holder's business nor does the Council have any powers which would allow it to regulate employment matters. The Council through its Regulatory Committee has adopted a view that the legislation in relation to licensing of booking offices does not reflect how that industry current operates and that the Scottish Government should bring forward a review of the legislation and consult on proposals to update the legislation to ensure it is fit for purpose.
- 4.20 Council officers have engaged with Uber and obtained confirmation that the recognition agreement mentioned in 4.7 will apply to all Uber companies across the UK, including the entity operating in Scotland. Officers will continue to liaise with Uber to support the implementation of the agreement in Scotland and to encourage further uptake of Fair Work principles.
- 4.21 With regards to wider impact for the Council as an employer, the Council engages with workers by a variety of means in the delivery of a range of services. This includes employees, casual workers, supply staff, tertiary (term-time) workers, self-employed contractors and IR35 workers (who have tax and National Insurance deducted at source but are otherwise treated as self-employed). The type of engagement used depends directly on the needs of the Council in relation to the work to be carried out. The Council ensures that it operates the engagements of all workers in accordance with strict legal requirements.
- 4.22 For self-employed and IR35 workers, the Council complies with its obligations to determine the employment status of the worker with the assistance of the HMRC online assessment tool which, upon completion, identifies the workers as either employed for tax purposes or not. This assessment will underpin how the workers are treated, which contractual documentation is issued to them and what employment / engagement rights will attach to their assignment.
- 4.23 For all staff who are engaged on a casual or supply basis (and who would fall into the category of "workers" like the Uber drivers were held to be by the Supreme Court), the Council already ensures that they are afforded all of the appropriate rights in accordance with their worker status – this means that the Council already provides the benefits that the Uber drivers were seeking to be held to be eligible for, including:
- 4.23.1 The fact that there is no obligation on the worker to accept an engagement offered and no obligation on the Council to offer work. This offers both parties a degree of flexibility and does not create a mutuality of obligation.
- 4.23.2 In accordance with the Council's commitment to provide Fair Work, each worker will receive, as a minimum, at least the Local Authority Living Wage rate.

4.23.3 Each worker will receive an enhancement to their hourly rate at the end of each assignment to ensure that they are adequately remunerated in respect of all holiday pay to which they are entitled under the Working Time Regulations 1998.

4.23.4 All workers will be eligible for Statutory Sick Pay if they satisfy the normal conditions.

4.23.5 All workers will have the right to choose to participate in the appropriate Local Government or Teachers' Pension Scheme by opting in. Full details of the scheme(s) are given at the commencement of the engagement.

4.24 The Council strives to ensure that each category of worker that it engages are afforded the correct rights, in accordance with their employment status. As such, it is not anticipated that the decision handed down by the Supreme Court in respect of Uber will have a direct or immediate impact on the Council.

5. Next Steps

5.1 As outlined in the Fair Work Action Plan that was presented to the Housing, Homelessness and Fair Work Committee on 2 September 2021, the Council will establish a short-term Gig Economy Task Force to make recommendations to the Scottish and UK Governments about how best to support workers in this sector.

5.2 This short-term Task Force will meet between November 2021 and February 2022 to seek to understand the real experiences of gig workers in sessions covering: (i) Rights and Representation, (ii) Pay, Hours, Terms and Conditions, (iii) Working Conditions and Environment, and (iv) Recommendations.

5.3 Membership of the group will include the Conveners and Vice Conveners of the Housing, Homelessness and Fair Work, the Regulatory, and Transport and Environment Committees with officers providing input from Business Growth and Inclusion, Regulatory Services, and Policy and Insight. External invitations to the group will be extended to gig workers with lived experience of this form of work in Edinburgh along with academics at the University of Edinburgh who are leaders in this research field, trade union representatives and policymakers from the Scottish Government.

5.4 Officers will continue to monitor the gig economy in Edinburgh and report back to Committee, as agreed in the Fair Work Action Plan.

6. Financial impact

6.1 Actions in this report can be taken forward within existing agreed budgets. Any additional impacts arising will be considered as part of future reports to the Housing, Homelessness and Fair Work Committee.

7. Stakeholder/Community Impact

- 7.1 Details of stakeholder and community engagement in delivery of a renewed Fair Work Action Plan are outlined in the main report section that was presented to the Housing, Homelessness and Fair Work Committee on 2 September 2021. Any changes will be considered as part of future reports to the Committee.
- 7.2 Potential regulatory implications of the UK Supreme Court's decision will apply to tax, National Insurance and pensions; however, these are already regulated by legislation.
- 7.3 Any potential regulatory implications of the UK Supreme Court's decision are set out in the main report.

8. Background reading/external references

- 8.1 [Fair Work Action Plan and Living Wage Edinburgh](#)
- 8.2 [UK Supreme Court Judgment: *Uber BV and others v Aslam and others*](#)

9. Appendices

- 9.1 Gig Economy Task Force – Outline

Appendix 9.1: Gig Economy Task Force – Outline

Background

- From Fair Work Action Plan –
“Establish a short-term Gig Economy Forum to explore actions that could improve working conditions, rights and quality of employment for workers in this sector and make recommendations to the Scottish and UK Governments.”
- From Living Wage Action Plan –
“Establish a short-term Gig Economy Forum to understand the real experiences of, and to explore actions that could improve working conditions, rights and quality of employment for workers in the gig economy.”

Definition

In consultation with the Institute for Employment Studies, the Department for Business, Energy and Industrial Strategy has developed a working definition –

“The gig economy involves the exchange of labour for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment by task basis.”¹

Membership

Name	Organisation	Position
Cllr Kate Campbell	City of Edinburgh Council	Convener of Housing, Homelessness & Fair Work Committee
Cllr Mandy Watt	City of Edinburgh Council	Vice Convener of Housing, Homelessness & Fair Work Committee
Cllr Catherine Fullerton	City of Edinburgh Council	Convener of Regulatory Committee
Cllr Denis Dixon	City of Edinburgh Council	Vice Convener of Regulatory Committee
Cllr Lesley Macinnes	City of Edinburgh Council	Convener of Transport and Environment Committee
Cllr Karen Doran	City of Edinburgh Council	Vice Convener of Transport and Environment Committee
Andrew Mitchell	City of Edinburgh Council	Regulatory Services Manager
Elin Williamson	City of Edinburgh Council	Business Growth and Inclusion Senior Manager
Workers in Edinburgh with lived experience of working in the gig economy.		
Representative(s) from the Workers' Observatory – a collaboration of gig workers and researchers, supported by the Scottish Trades Union Congress and the University of Edinburgh.		
Representative(s) from STUC / Trades Union.		

A civil servant from the Scottish Government's Fair Work, Employability and Skills Directorate.

* Secretariat support from City Strategies team, City of Edinburgh Council

Remit and Purpose

Establish a formal short-life task force of the above membership and hold four sessions. The group will seek to understand the real experiences of, and to explore actions that could improve working conditions, rights and quality of employment for workers in the gig economy. The findings of this work will be reported Committee in Spring 2022.

Session (suggested dates)	Theme
1 (November)	Rights and Representation <ul style="list-style-type: none">• What currently isn't working / what are the problems gig economy workers face?• What are the solutions?• What change needs to happen to make those solutions possible?• Who can make those changes happen?
2 (December)	Pay, Hours, Terms and Conditions <ul style="list-style-type: none">• What currently isn't working / what are the problems gig economy workers face?• What are the solutions?• What change needs to happen to make those solutions possible?• Who can make those changes happen?
3 (January)	Working Conditions and Environment <ul style="list-style-type: none">• What currently isn't working / what are the problems gig economy workers face?• What are the solutions?• What change needs to happen to make those solutions possible?• Who can make those changes happen?
4 (February)	Recommendations <ul style="list-style-type: none">• What solutions / changes are required to address the sessions' themes?• Recommendations for local, Scottish and UK Governments• Recommendations for any other bodies – public agencies / private sector