
PRESENTATION

This thematic briefing analyzes the decision of the UK Supreme Court, which classified Uber drivers operating in the United Kingdom as workers for the purposes of local legislation, which guarantees them certain legal rights and benefits. Seeking to understand the repercussions of this decision in the regulatory debate around working on digital platforms, the arguments of the decision were analyzed in order to identify whether they were aspects of the British legal system or whether they were general aspects of organizing Uber's business activities, with potential impact on the business model of other platforms. Enjoy your reading!

Key findings

- 1) The main argument used by the UK Supreme Court was based on Uber's organizational model, especially under the aspect related to control / subordination;
- 2) The decision, issued in the context of an individual action, is restricted in scope to British jurisdiction and to the parties to the proceedings, with immediate repercussions only for drivers registered on Uber's rider transportation platform, not covering other services offered by the company;
- 3) The British decision considers that the control aspects are consistent with the elements of subordination provided for in the worker's contract, an intermediate legal category (between self-employed and employee) and specific to the British legal system;
- 4) Considering that the arguments of the British decision were mainly based on aspects of Uber's organization, this argument could support decisions in other legal systems, including the Brazilian one. However, said application needs to take into account the legal aspects of each location.

OVERVIEW

The **discussion about the nature of the link between service providers and digital platforms** within the gig economy context has taken on new facets in recent months. At the European level, we can take as an example, countries such as Germany, France, Spain, Italy and the United Kingdom, in which there are already important judicial decisions on the relationship between service providers and digital platforms. Among these, the most recent decision with great **media and economic repercussions was taken by the United Kingdom Supreme Court**, on February 19, 2021, which will be the subject of analysis of this thematic briefing

The lawsuit was originally filed by two drivers against the company Uber in 2016, in which they sought recognition of the existence of an employment contract between them and the company, claiming the relevant rights. At the time, **the London Labor Court classified the drivers as “workers” (an intermediate legal category between self-employed workers**

and employees), dismissing the company's argument that they would be “independent contractors”, a hypothesis in which they would be under a civil relationship. so that they would not be entitled to labor rights. After successive appeal defeats, Uber appealed to the Supreme Court, which reiterated the understanding of previous instances.

As a result of this process, although the decision was granted in the context of an individual action, Uber will reclassify all drivers operating in the UK, which will have an immediate impact on approximately 70 thousand drivers registered on the platform¹. These drivers will enjoy rights and benefits guaranteed to *workers*, being entitled to the payment of hourly minimum wages, paid vacations and social security contributions. The company has not officially taken a position on the impact of the decision on its budget. However, according to estimates by the investment bank Morgan Stanley, the value can reach 300 million dollars in one year (PITAS; BELLON, 2021).

METHODOLOGY

The option to analyze the recent decision of the United Kingdom Supreme Court on the reclassification of Uber drivers occurred due to its great relevance and international repercussion. The decision was not only rendered definitively, but also has an immediate impact on all drivers who operate for Uber in the United Kingdom (estimated at around 70,000 drivers), which has important consequences

for the debate about working in the gig economy. In addition to the direct impacts, the decision rekindles the regulatory debate and can influence policy makers. In this sense, analysts believe that the European Commission, which launched a new consultation on workers' rights on digital platforms, should take into account the recent UK decision as a

¹ The new terms of service apply only to Uber drivers operating in the UK. They are not valid for other company services, such as UberEats, nor do they extend to other locations.

relevant milestone in the debate (EXPRESSO PT, 2021).

In order to thoroughly investigate the arguments presented in the decision, as well as its practical implications, the researchers performed a systematic reading of the decision (Uber v. Aslam), a case study (IWGB v.

Deliveroo), for review literature on the topic and mapping of news, institutional communications and related opinion articles that echoed the judgment. In addition, the labor system in force in the United Kingdom was analyzed in order to understand the legal systems that exist for the different categories of workers.

CASE SUMMARY - UBER VS. ASLAM²

Plaintiffs Yaseen Aslam and James Farrar, both Uber drivers, filed a lawsuit against the platform in the London Labor Court in 2016, claiming that their relationship with the platform would be of work and not merely commercial; asking for recognition of the existence of an employment contract between them and the company; and claiming the right to the minimum wage, paid holidays, retirement, among others. The plaintiffs were successful in the lower courts until the case reached the Supreme Court.

In its defense, Uber claimed that it acts only as an intermediary between the driver (service provider) and the rider (consumer), connecting supply and demand, in the face of what drivers would be mere independent contractors in relation to the platform.

In this regard, the Court was asked to answer two questions: (i) whether the relationship between drivers and Uber would be governed by an employment contract, so that they would be entitled to the rights guaranteed to workers³; and (ii) in the alternative, what would be the duration of this work, for the purposes of the applicable rights and benefits.

The decision, which no longer appeals, was judged in favor of the plaintiffs, concluding that the drivers work under a work contract (and not an employment contract), so that the claimed labor rights apply. The Court also considered that, in terms of the duration of the work, the entire period in which the drivers are connected (that is, with an active account or "logged in") on the platform should be considered and not just the time of the ride.

² Uber BV v. Aslam, [2021] UKSC 5. Available at: <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf> (last accessed on: April 13, 2021)

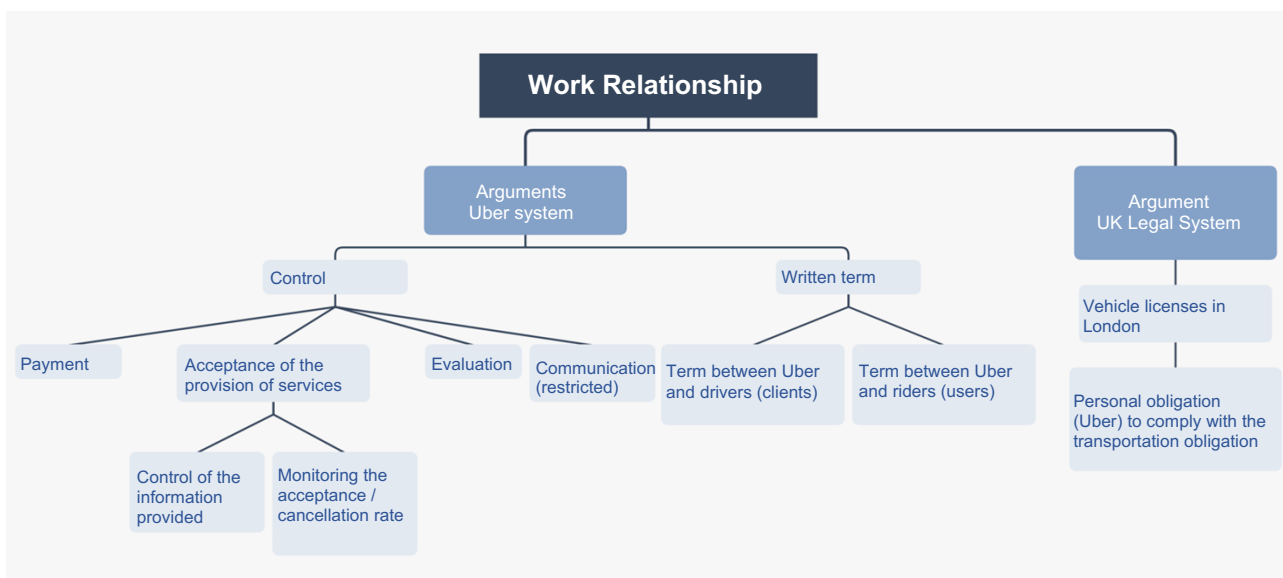
³ The thesis supported by the plaintiffs was that of a work relationship and not of employment. In this regard, it is noteworthy that *workers* are not to be confused with *employees* in the British legal system.

FUNDAMENTALS OF THE SUPREME COURT DECISION

In the judgment of the case, **the Supreme Court concluded that there were elements that indicated the subordination of drivers to Uber**, which would be sufficient to characterize the work relationship, thus avoiding the hypothesis of a merely civil or commercial relationship.

The fundamentals of the decision can be grouped into two categories: those that dealt with Uber's organizational system and those that referred to the British legal system. Figure 01, below, indicates this analysis of arguments:

Figure 01: Work relationship according to the decision of the United Kingdom Supreme Court



Source: own preparation

Notes on the UK labor legal system

In the UK labor legal system there are three categories of workers: employees, self-employed and an intermediate category called workers. According to the report on the classification of workers in the gig economy (PWC, 2019, p.31), five main and cumulative factors have to be considered to determine the status of a worker within that context:

(i) Mutual obligations: is the entity obliged to offer and the individual obliged to accept some work?

- (ii) Personal assistance: is the individual obliged to perform the services in person or has an unlimited right to provide a substitute?
- (iii) Control: what level of control does the contracting party have over the performance of services?
- (iv) Level of financial risk assumed by the worker when accepting the job.
- (v) Degree to which the worker is inserted in the organization of the contracting party.

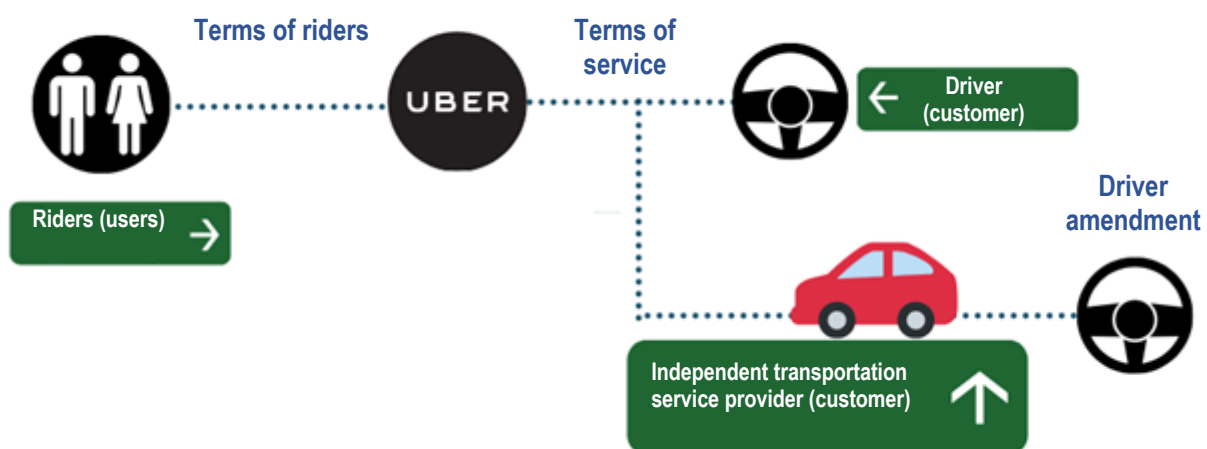
Contract of adhesion

Uber signs two types of contracts of adhesion:

(i) Terms of service: which can be signed directly with drivers (called 'customers' in that context) or with independent transportation

service providers; (ii) Terms of rider: signed with users. In **figure 02** we list the elements that enable the provision of services.

Figure 02: Relationship between terms and actors in transportation by application in the United Kingdom



Source: own preparation

The Terms of Service stated that the driver agreed that Uber did not provide transportation services and that when driver received a transportation service request from the Uber app, driver was committed to providing that

service, creating a legal and direct business relationship with the rider. It also provided that Uber and its affiliates within the territory are not part of that business relationship (Clause 2.3). Recalling that, acceptance of the

Terms of Service is mandatory in order to be able to access the application or stay connected to the platform.

Vehicle licenses

This organizational structure of Uber, signed through the contracts of adhesion, was highlighted by the decision when analyzing the requirements for vehicle licenses in London.

The operation of private rental vehicles in London is regulated by the Private Hire Vehicles (London) Act 1998 ("PHV"). Under this normative act, the car can only be used for private rent if the vehicle and the driver are both licensed by the responsible authority, which is Transport for London. This license is also required for companies operating in the area of rental of private passenger transportation vehicles. Uber London maintained this private car rental license for London.

The court considered that Uber's intermediation of transportation would not be covered by PHV, since drivers did not have the license

required by law. According to the decision, the acceptance of the passenger transportation reservation, carried out by Uber, would have a connotation of fulfillment of the main contractual obligation (transportation). Thus, Uber would be responsible for the central obligation of the contract, that is, the transportation of riders and, as a way of fulfilling this obligation, it executes contracts with the transportation providers (either an individual driver or a company, see figure 02).

The decision also mentions that the only contracts signed with drivers were part of Uber BV (Dutch subsidiary). Uber London, therefore, did not have a direct connection with drivers that would allow the intermediation of transportation. Thus, Uber London's claim that it acted as a driver's agent would not have proceeded even if the court had not considered the personal connotation of compliance with the obligation, given the inexistence of a contract of adhesion between Uber London and drivers.

Remuneration established by Uber

According to the court, the most important aspect that would demonstrate the control of Uber in the transportation activity performed is establishing the remuneration amount. Unlike taxi fares, the amount of fares for private rental vehicles is not defined by the legislature. In the case of Uber, the amounts are defined by the company and drivers cannot

charge more than the calculated fare. Uber also establishes the amount of its service fee, which is deducted from the amount paid to the driver. This control over remuneration extends to the right to decide, in its sole discretion, on full or partial reimbursement in cases of rider complaints regarding the services provided.

Acceptance for the provision of services

According to the Supreme Court Lords, although drivers can define when and where

they work, from the moment they are connected to the app, Uber restricts the right to

choose whether or not to accept travel requests. For them, even if the freedom of choice in whether to provide the service is provided for in the terms involving Uber, the company would control acceptance in two ways: restricting the information provided to the driver and monitoring the rate of acceptance (cancellation) of requests.

The first of these forms of control would be characterized, for example, by not informing the driver of the rider's destination until rider is in the vehicle, which would make it impossible to refuse service if the driver did not want to drive to a specific location. Another

example would be the failure to provide the rider rating, which would make it impossible for the driver to refuse to provide services to users with a low rating on the platform.

The second form of control would, according to the Court, relate to the monitoring of cancellation rates. Judges pointed out that when the driver's cancellation rate reached a certain level, Uber would forward some warning messages. If performance did not improve, the driver would be disconnected from the application, unable to connect again for ten minutes. This measure would show the control by the application.

Assessment system

Another form of control exercised by Uber, according to the Court, is the driver assessment system, through which users must assess the conduct and performance of drivers at the end of each ride. To remain active on the platform, drivers should maintain an average rating; and failure to meet this criterion would imply termination.

Although this mechanism is used as a resource for quality measurement by other digital platforms, it usually serves as a reference for choosing a product or service, which

would represent an incentive to the supplier / provider. In the case of Uber, however, the consumer-user does not have this option of choice - as the call is directed to the driver closest to the departure point - likewise, the driver does not have the expectation of attracting customers and / or earning greater gains by increasing his/her ranking. In this regard, the Court concluded that the evaluation system adopted by Uber serves only to manage the performance of drivers, which would constitute an indirect form of subordination.

Restrictions to communication between drivers and users

According to the Court, the fifth and last factor that would characterize an indirect form of subordination of drivers to Uber would be the restriction of communication between riders and drivers, allowed only during the

call, limited to the information of the ride and channeled by the application itself. Likewise, the collection of fees, payment for the service and the handling of any complaints are managed exclusively by the platform.

Court Conclusions

Uber drivers are “workers”

Considering the set of these elements (penalties for refusing trips, setting remuneration, forms of assessment, restrictions on communication, etc.), the Court concluded that Uber exercises control over the provision of the transportation service provided by drivers, forcing recognition of the work relationship and dismissing the company's claim that it would be a mere intermediary.

Still according to the decision, the main purpose of this management is to standardize the service for the benefit, almost exclusively, of the company's own reputation with users-consumers, since drivers are unable to offer a differentiated service or define their services own prices.

When are drivers “working” for Uber?

Having concluded that there is a work relationship between drivers and Uber, the Court faced a remaining question: what, then, would be the working time to be considered to calculate the rights and benefits due?

For Uber, only the duration of the rides should

be considered, since the simple fact that the driver is “logged in” on the platform does not mean that he will assume the obligation to accept the calls. In that regard, it upheld the freedom that drivers would have to reject rides and brought up other arguments, such as the possibility that they would be logged in to more than one application at the same time, circumstances that would escape the company's control.

The Court rejected these arguments, reinforcing evidence of restrictions imposed by the platform on drivers' freedom to accept or refuse ride requests. In addition, it admitted that the provisions of the Working Time Regulations 1998 would apply, from which it is derived that **“working time” consists of “any period during which he [the worker] is working, at the disposal of his employer and in performance of their activity or duties ”** (extracted from paragraph 132). In this regard, the English Lords concluded that the duration of the work includes the time that the drivers would be available for the platform, waiting for new rides, so that this “dead work” must also be paid.

Reactions and developments

Uber issued a statement on February 19, 2021⁴ commenting on the decision. In that statement, it stressed that the classification applied by the UK Supreme Court (worker) is a specific legal classification of the United Kingdom. It also reinforces that the decision does not discuss an employment relationship, as that was not the subject matter of the complaint filed by the plaintiffs, who supported the thesis, since the beginning of the process, that there would be a work relationship and not an employment relationship. The statement reiterates the ideas of independence and flexibility that would guide the relationship between Uber and drivers.

On March 16, 2021, the company announced new measures to comply with the UK Supreme Court decision (BBC, 2021):

- Minimum wage / hour payment, after deductions made by the company;
- Vacations based on 12.07% of earned earnings, paid biweekly;
- Automatic enrollment of all drivers in a private pension plan, with mixed contributions (partly collected by Uber and partly collected by drivers);
- Maintenance of existing benefits (sickness insurance, accident insurance and maternity / paternity leave);
- All drivers will be completely free to choose whether to drive, when and where.

At first, these rights and benefits would only apply to drivers who operate for Uber in the United Kingdom.

With the decision, however, some controversial issues surfaced. Among them, the following stand out:

- Basis for calculating rights and benefits: Uber kept as a calculation basis only the start and end times of the rides and, in return, started to offer full freedom for drivers to either accept or refuse trips. Union entities question the company's interpretation, prompting yet another discussion around the deduction base. According to them, this should be the subject of collective bargaining and not unilateral decisions by Uber;
- Third way: there are those who challenge the inclusion in an intermediate category (worker), which is less protective than the employment regime and less flexible than the British self-employed regime;
- Competition and barriers to entry: the UK Supreme Court decision will require policy reviews by other companies in the sector and related segments, generating costs that may represent barriers to the entry of new entrants, in addition to compromising the situation of other platforms that do not have the same economic power as Uber, which is the market leader.

It is important to note that the Supreme Court decision was rendered within the context of an individual action filed by Uber drivers operating in the United Kingdom. Bearing in mind that the judgment was based on the analysis of the facts presented by the plaintiffs, which

⁴Available at: <https://www.uber.com/en-GB/blog/supreme-court-verdict/>. (last accessed on: April 12, 2021)

relate exclusively to the operational model of the defendant's transportation application, it is clear that the decision has legal effects limited to British parties and jurisdiction. In this regard, it does not apply to other services of-

fered by Uber, such as the UberEats delivery service. However, a precedent has been set that could lead to other similar judgments, so that many companies will be able to adapt their policies in a preventive way.

IWGB vs. Deliveroo: the case of delivery drivers

Another action, filed by representatives of Deliveroo platform delivery drivers in 2016, deserves attention within the scope of this debate. It is a Class Action, filed by the Independent Workers' Union of Great Britain, which alleges the existence of an employment bond between the delivery drivers and the Deliveroo platform, and based on which it requires the recognition of rights owed to these workers, including that of union representation.

In a decision dated 14 November 2017⁵, the Central Arbitration Committee of the United Kingdom dismissed the request, based on the lack of personal nature in the relationship between the delivery drivers and Deliveroo, considering that in the contract signed between the parties there is the possibility for the delivery driver to send a substitute to answer the delivery call. In a more recent decision, dated December 5, 2018⁶, the Superior Court upheld the decision of the Arbitral Committee and rejected the union's requests, also denying its legitimacy to represent the delivery drivers in collective bargaining.

The Court also pointed out that the judgment was based on the analysis of the facts presented in the case, so that it would not necessarily be applicable to other cases of the gig economy, in view of the diversity of business models.

The plaintiffs await judgment of the appeal.

⁵ Independent Workers' Union of Great Britain (IWGB) v. RooFoods Ltd. T/A Deliveroo. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf (last accessed on: April 12, 2021)

⁶ Available at: <https://www.ilawnetwork.com/wp-content/uploads/2020/12/CO8102018-R-IWUGB-v-Deliveroo-05122018-APPROVED-004.pdf> (last accessed on: April 12, 2021)

FINAL COMMENTS

- The UK Supreme Court decision, which classifies Uber drivers as workers, is based on an atypical and intermediate category (between self-employed and employee), specific to the local legal system;
- Workers are not to be confused, therefore, with employees, as they do not have all the rights guaranteed to the latter (such as the right to notice in case of dismissal, the right to union representation, etc.);
- Most of the decision's arguments were based on Uber's organization system, with relevance to the control aspects. This control, which extended to payment elements, acceptance of the provision of services, evaluation and communication, was considered sufficient to characterize the subordination existing in the intermediate category of worker;
- The decision is restricted in scope to the British jurisdiction and to the parties to the proceedings, with immediate repercussions only for drivers registered on Uber's rider transportation platform, not covering other services offered by the company;
- We consider that the arguments regarding the organization of the Uber model can be taken to other countries and other contexts, because they depend on the architecture of the platform. Other grounds, however, are specific to British jurisdiction and should be transported carefully and adapted accordingly; and
- In the Brazilian legal system, there is no intermediate category corresponding to the "worker", although some atypical figures, such as the loose and intermittent worker, have some similarities.

SCHEDULE - THREE MAIN CATEGORIES OF WORK

Type of contract	Definition	Assured rights
Self-employed	Workers who manage their companies on their own and take the risks of the activity, without being subordinate to third parties. (GOV, 2021c)	Labor law does not cover self-employed workers in most cases, because they are their own bosses. However, they are ensured to have: - CT: health and safety; - their rights and responsibilities are defined by the terms of the contract signed with the client. (GOV, 2021c)
Worker (intermediate category)	The following are classified as workers (GOV, 2021b): - Workers who have contracts or agreements to provide services in person for a consideration (contract does not need to be in writing); - The consideration is paid in cash or in kind; - You have the limited right to send someone else to do the job for you (no personal nature); - The contracting party must provide work for the duration of the contract; - They do not carry out the work as part of their own company, where the "employer" is actually a consumer or a customer.	- Protection against discrimination; - Protection against illegal deductions from wages; - Right to the minimum wage; - Proportional paid vacation; - Working hours limited to 48h / week, which can be negotiated; - Minimum duration and rest breaks; - Protection for complaints (irregularities in the workplace). (GOV, 2021b)
Employee	Works under the terms of an employment contract. The contract can be expressly agreed (in writing or orally) or implied by the nature of the relationship, characterized by: (DFA LAW, 2021) - <u>Personality</u> (the worker cannot be replaced by another in carrying out the work); - <u>Control</u> : the employer needs to have some control over the way the employee does the job; and - <u>Mutual obligations</u> : the employer is obliged to provide work and the employee is obliged to accept the work.	All rights granted to workers, in addition to the following: - Sickness allowance; - Maternity / paternity / adoption / shared custody leave; - Prior notice; - Protection against unfair dismissal; - Time off in case of emergency. (GOV, 2021a)

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