



Are Collaborative Workers Employees?

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This article discusses how new forms of working relationships, in particular the type introduced by the phenomenon of internet based work-sharing, might be categorised. The issue has come to the forefront with the proliferation of innovative work-sharing methods forming what has become known as the collaborative economy.¹

The preferred method of operation of these internet-based platforms has led to conflicting decisions on the status of the workers involved. In *Berwick v Uber*,² a California Labour Commissioner held a worker who had offered her services to an operator of a work-sharing platform to be an employee of the platform operators. In contrast to this holding, in a recent Communication, the European Commission expressed the opinion that the workers in the collaborative economy would only be employees of the platform operators in very specific circumstances.³

The question addressed in this article is how such workers would be classified under the current approach within a specific European state, for example, Ireland. Although varied methods are used to determine employee status throughout the EU member states, the focus on Ireland is an example, since the factors considered by the Irish courts are typical of those considered in most Member States.⁴

Although the collaborative economy is naturally heterogeneous, the system for work-sharing used by Uber has recently been the focus of particular attention by both policy makers and the judiciary. Therefore, the relationship between Uber and the drivers it coordinates is worthy of examination. This relationship is usually based upon a written contract. The first point to note is that, although the contract specifically describes the drivers as independent contractors, most courts have noted that the

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¹ Kostakis V. and Bauwens M.: *Network Society and Future Scenarios for a Collaborative Economy*. Basingstoke, Palgrave Macmillan, 2014.

² *Barbara Berwick v Uber Technologies, Inc., A Delaware Corporation*, case no.11-46739 EK.

³ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: A European Agenda for the Collaborative Economy, COM (2016) 356 Final.

⁴ See *Regulating the employment relationship in Europe: a guide to Recommendation No. 198*. Geneva, International Labour Office, Governance and Tripartism Department, 2013. 28 et seq.

parties' description of the relationship is but a single factor to be considered. In the words of Murphy J in the Irish High Court case of *Denny & Sons Limited v. Minister for Social Welfare*, the status of the worker is based upon "the totality of the contractual relationship express or implied between [the parties] and not upon any statement as to the consequence of the bargain".⁵ Therefore, it is necessary to examine this totality of the contractual relationship in order to determine the potential status of Uber drivers.

This article begins by outlining the terms of the relationship between Uber and the drivers it coordinates and how these terms influenced the decision made in Southern California and potentially might be viewed by the European Commission. Thereafter, the Irish provisions for categorising workers are detailed and applied to the situation of the Uber drivers. The conclusion highlights the differences in approaches in the California and Irish jurisdictions and the problems arising from such differences.

1. The Uber Terms and Conditions

For those who are not familiar with the Uber method of operation, Uber describes itself as a technological platform that provides support to both passengers and drivers by matching them, in real time, according to their needs. The UK High Court provided a useful summary of the system in the recent case of *Transport for London v Uber and Others*.⁶ After vetting them and their vehicles, Uber registers the drivers, who are then allowed to carry out bookings referred to them by Uber. The referrals process is done entirely through smartphone applications controlled by Uber. A prospective passenger uses a smartphone application, as downloaded from Uber, to request a vehicle. The request is then processed by Uber's servers to identify the nearest registered vehicle of the type requested by the customer. A message is then sent to the relevant driver's smartphone application to offer him or her the opportunity to transport the passenger. The driver is allowed fifteen seconds to decide whether or not to accept the offer. If the driver does not respond within this time, the offer is withdrawn and passed to the next nearest vehicle matching the needs of the passenger. If that driver accepts the offer, he will pick up the passenger and continues with the service in the same way as would any other transportation service. The only difference is that, unless the vehicle contains a taximeter, the fare is calculated by Uber's servers. The customer will be sent a fare receipt by email within seconds of the end of the trip, providing a breakdown of the fare showing the costs of the trip, the base fare, distance and time. This fare is automatically charged by Uber to the credit or debit card of the customer with payment (less an agreed percentage) being passed on to the driver by Uber.

⁵ [1998] 1 IR 34, 52.

⁶ [2015] EWHC 2918 (Admin.).

It is to be noted that this method of operation does not automatically mean that the driver is an employee of Uber, in the same way that a worker matched to an end user by an agency would not automatically be an employee of the agency. Therefore, it is necessary to examine the specific terms and conditions in the contract between the drivers and Uber. While specific contracts can vary from the boilerplate model, the contract between Uber and Barbara Berwick will be used as an example of the typical Uber agreement.⁷ Following are the key points of interest in this contract:

- The drivers can, without sanction, reject any or all offers of work provided through the Uber smartphone application. If all offers are refused for a period of eighteen months, the smartphone application is withdrawn.
- Once an offer is accepted, the driver must perform the duties in accordance with Uber's requirements.
- Drivers cannot force a passenger to share a vehicle without the passenger's consent.
- A driver must provide his own vehicle, which vehicle must have been approved by Uber. Any replacement vehicle must also be approved by Uber.
- Payment for the service provided to the passenger is made by Uber. Drivers may not receive tips from a passenger, nor can they expect a tip to be added to the payment from Uber.
- Drivers cannot share the Uber smartphone application or share requests for service.
- Drivers cannot delegate their duties to another person unless Uber has approved of such delegatee.
- Uber can cancel the contract 'by default or otherwise'.
- Uber monitors the driver's satisfaction ratings and can withdraw the smartphone application from a driver whose rating falls below 4.6 out of 5.

2. The Californian Approach

On examining these points, the California Labour Commissioner held that the driver was an employee. Noting an earlier decision of the California Supreme Court, *Borello & Sons v Dept. of Industrial Relations*,⁸ the Commissioner found:

1. In matching the passengers with the drivers, Uber exercised sufficient control over the operation of the service as to be considered as exercising control over the drivers.
2. The drivers and their vehicles are vetted by Uber, and the drivers cannot use the Uber smartphone application unless they have passed the vetting process
3. Uber control the tools that the drivers use in that the car provided by the driver must meet Uber's requirements

⁷ *Barbara Berwick v Uber Technologies*, n. 2.

⁸ (1989) 48 Cal.3d 341.

4. The drivers are an integral part of Uber's business, since, without the drivers, Uber would not be able to meet its customers' demands
5. The driver earns a set fee per trip, as determined by Uber. If a passenger cancels a request after the driver has accepted, it is within the sole authority of Uber to determine whether a cancellation fee will be paid to the driver.
6. While the driver provides the vehicle, the crucial piece of equipment for the operation to work is the smartphone application, which is provided by Uber.
7. Other than providing a suitable vehicle and personal labour, the driver does not use any managerial skill to affect their profit or loss from the venture.

The cumulative effects of these factors, when weighed against the criteria provided by the relevant state case-law, persuaded the California Labour Commissioner that the driver was an employee of Uber.⁹ As an administrative decision, it is not automatically binding on another American state court, but it does display a line of thinking that might be persuasive.

Having explained the Californian approach to the classification of Uber drivers, it is instructive to predict how the European Commission likely would determine this issue.

3. The European Commission Approach

At the European level, there is a recognition that each Member State is free to utilise its own criteria for determining whether or not a worker is an employee. However, in a recent Communication, the European Commission emphasized that the cumulative effect of examining the following criteria could be considered in making such determination:

- Subordination – *i.e.* “the service provider must act under the direction of the collaborative platform, the latter determining the choice of the activity, remuneration and working conditions. In other words, the provider of the underlying service is not free to choose which services it will provide and how. A collaborative platform that simply processes the payment deposited by a user and passes it on to the provider of the underlying service does not imply that the collaborative platform is determining the remuneration. The existence of subordination is not necessarily dependent on the actual exercise of management or supervision on a continuous basis.”¹⁰
- Nature of the work – “the provider of the underlying service must pursue an activity of economic value that is effective and genuine, excluding services on such a small scale as to be regarded as purely marginal and accessory. In the context of the collaborative economy, where persons

⁹ The Labour Commissioner specifically cited *Borello & Sons v Dept of Industrial Relations* (1989) 48 Cal.3d 341; *Yellow Cab Cooperative v Workers Compensation Appeals Board* (1991) 226 Cal.App.3d 1288; *Toyota Motor Sales v Superior Court*, 220 Cal.App.3d 864 (1990).

¹⁰ Communication from the Commission to the European Parliament *et al*, n.3.

actually provide purely marginal and accessory services through collaborative platforms, this is an indication that such persons would not qualify as workers, although short duration, limited working hours, discontinuous work or low productivity cannot in themselves exclude an employment relationship.”¹¹

- Remuneration – the provider of the underlying service must be doing so for payment as distinct from volunteering their services.

When these three criteria are applied to the Uber/driver relationship, it is clear that the Californian decision is not likely to be followed at European level. In the opinion of the European Commission, a worker is not subordinate if they have the right to decide when and where they work. Consequently, the drivers’ freedom to decline a request for services would be instrumental in classifying them as independent contractors. The subordination criterion also specifically notes that processing a payment on behalf of a passenger would not amount to controlling the remuneration of the driver, suggesting that an Uber driver would not be classified as an employee. The other two criteria, the nature of the work and remuneration, are somewhat neutral in relation to Uber drivers. While the drivers would have the characteristics required by both criteria, so would many independent contractors. Therefore, it is suggested that the cumulative effect of all three criteria is that Uber drivers would be considered not to be employees at the European level.

Having identified the European Commission approach to classifying drivers, it is now time to turn to approach taken in Ireland.

4. The Irish Approach

In Ireland there aren’t any statutory provisions for determining when a worker is an employee. Although many statutes describe an employee as a holder of a contract of service, identifying when a contract is one of service is a matter that is left to the courts. To deal with this complex question, the Irish courts have created a template in the form of a series of tests for defining work relationships. As with the Californian Supreme Court and the European Commission, much weight is placed on the concept of subordination to the hirer. However, unlike the Californian Supreme Court, the Irish courts have placed specific emphasis on the existence of mutual obligations between the parties. In this section, how the specific terms of the Uber/driver relationship would be defined when these criteria are applied will be analyzed.

The two streams of tests will be discussed separately. First to be addressed is the method of classifying workers as employees or independent contractors according to the subordination of the

¹¹ Ibid.

worker. Subsequently viewed is the method that requires mutuality of obligation between the parties as a necessary component in either case.

5. Subordination of the worker

The attribute of subordination is the strongest legacy of the master and servant model that prevailed in Ireland and the UK until the late nineteenth century.¹² Under the master and servant model, the servant owed an absolute duty of obedience to the master, creating a hierarchal model of service.¹³ Without evidence of this subordination, the judicial view of the relationship was that it was more akin to equal contracting parties. Consequently, the worker would be deemed to be independent of the hirer or, put another way, an independent contractor. The concept of subordination of the worker can be found by examining specific aspects of the relationship between the worker and the hirer. These factors include in particular the amount of control the hirer can exercise over the worker, how integral the worker is to the enterprise, and what is often called the ‘economic reality’ of the relationship.¹⁴

6. The Control Test

The ‘control test’ reflects the belief that the servant is an assistant to the master in pursuance of the master’s duties. Thus, the master had the power to direct the employee regarding what to do, and how to do it. As Walsh J stated in the Irish Supreme Court case of *Patrick Roche v Patrick Kelly and Co Ltd*, when outlining the ingredients of an employment relationship, “...the determining one, is the fact of the master’s right to direct the servant not merely as to what is to be done but how it is to be done”.¹⁵ The point is that, if the worker had an element of choice in how or when to do the work, then the worker would be more akin to an independent contractor than an employee. However, this test has its limitations, especially where the work is performed by specialists with skills not held by the employer, such as doctors or in-house legal experts, or where the skills required for the job do not require direction, such as drivers or cleaners. In light of these limitations, the Irish courts sought to identify other means of distinguishing employees from independent contractors.

¹² S. DEAKIN – F. WILKINSON: *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution*. Oxford, Oxford University Press, 2005. 74.

¹³ Ibid. 61–62.

¹⁴ See Kahn-Freund’s discussion of the *Cassidy v Ministry of Health* [1951] 1 All ER 574 in ‘Servants and Independent Contractors’, (1951) 14 M.L.R. 504.

¹⁵ [1969] IR 100.

7. The Integration Test

The leading Irish example of the use of this test comes in the High Court case of *Re Sunday Tribune Ltd.*¹⁶ Carroll J, in noting that the control test was unsuitable in assessing the status of some of the journalists involved, referred to the English case of *Beloff v Pressdam*, where Ungood J determined the workers status by examining “whether ... his work is an integral part of the business, or whether his work is not integrated into the business but is only an accessory to it”.¹⁷ Although this is a difficult concept to specify, the level of integration of a worker could be assessed by determining whether that particular worker was central to the operation of the enterprise. Unfortunately, this test also has its limitations. When one considers that maintenance crews in manufacturing industries are quite frequently independent contractors, yet their work is at the very core of production, the weakness of this test is exposed.

Thus, the suitability of this test is limited to particular circumstances, such as journalism, where distinctions can be made between freelance workers by examining their interaction with the enterprise. Consequently, where the integration test is not appropriate, the Irish courts have focused on different aspects of the work relationship.

8. The Economic Reality Test

Sometimes known as the entrepreneurial test, its essence was described by Keane J in the Supreme Court case of *Denny & Sons Limited v. Minister for Social Welfare* where he described an entrepreneur as a person working on his own account as distinct from someone else's.¹⁸ One of the serious problems with this test is how to determine in fact that a person is working on his own account. It might be argued that all workers who receive pay are working for their own benefit. Consequently, something more is required to achieve entrepreneur status.

Keane J. noted that some indicators of entrepreneurship include “where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her”. These indicators produce three basic questions:

1. Does the worker invest in providing equipment for the venture, or does he supply labour only?
2. Can the worker delegate his duties, or is personal service obligatory?

¹⁶ [1984] IR 505.

¹⁷ [1973] 1 All ER 241.

¹⁸ [1998] 1 IR 34.

3. Can the worker determine his profit through more efficient performance, or is their profit margin predetermined irrespective of performance?

Although it is the cumulative effect of these three questions that would guide a court in determining the worker's status, the heavier emphasis is placed upon the opportunity given to the worker to increase his profits through more efficient management of his efforts and/or the potential for risk of loss borne by the worker. Where a worker was exposed to risk of loss, or had opportunity to maximise profits, he more likely would be an independent contractor. In the courts' initial application of this test, it was viewed as having superseded the other tests. Issues such as control and integration were viewed as factors in determining entrepreneur status.¹⁹ However, in the subsequent Irish High Court case of *The Minister for Agriculture and Food v Barry & Ors*, Edwards J held that each relationship must be determined on its own particular facts and that the economic reality test was just one of many of the guides that should be used.²⁰

In this light, the Irish approach seems to be that all of these tests must be applied. Moreover, there is no weighting provided as to which test is more persuasive. Even when considering these different tests, the conclusion is not a simple matter of ticking boxes on a checklist. In reality, the courts will have to examine the degree or element of independence of the worker and the degree of entrepreneurship and to determine whether either is of sufficient degree to decide the matter.

In applying the tests for subordination of the worker to Uber drivers, we see that a decision similar to the Californian Labour Commissioner's approach is possible.

8.1. Control

The drivers are controlled to the extent that they can only transport Uber's customers when requested to do so by Uber. Although the drivers can refuse a request, they cannot instigate one. Therefore they do not have complete control over when they do their work. They are also supervised to an extent, through the customer ratings mechanism and the GPS system on their smartphones that are used for billing purposes. Although they are not instructed regarding how to drive the car, that skill is so fundamental to the task as not to require instruction from an employer.

¹⁹ See in particular the decision of the Supreme Court in *Castleisland Cattle Breeders Society v Minister for Social, Community and Family Affairs* [2004] 4 IR 150.

²⁰ [2009] 1 IR 215.

8.2. Integration

As the Californian Labour Commissioner pointed out, without the drivers, Uber would not have any means of satisfying their customers' requests. However, this is a somewhat simplistic view, since Uber could legitimately outsource its driver requirements to another enterprise of which the drivers may or may not be employees. Therefore, as with the maintenance crews mentioned above, the fact that their role is central to the operation of the enterprise does not lead to the conclusion that they, as individuals, are sufficiently integrated to be employees. The ambiguity of the concept of integration, in situations other than journalism, means that this criterion can be difficult to apply with certainty.

8.3. Economic Reality

As noted above, the economic reality test can be determined by answering three questions:

1. *Does the worker invest in providing the essential equipment for the venture, or does he supply labour only?*

There are two key pieces of equipment involved here; the vehicle, and the smartphone application through which the entire operation is organised. Even though the vehicle is provided by the driver, the smartphone application is at all times the property of Uber. Therefore, a vital piece of equipment is supplied by Uber.

2. *Can the worker delegate his duties, or is personal service obligatory?*

Although personal service is not technically obligatory, a driver can nominate a replacement for approval by Uber, but he cannot delegate his duties without such prior approval. This is somewhat similar to the situations in the Irish cases of *Denny & Sons Limited v. Minister for Social Welfare*²¹ and *ESB v Minister for Social Community and Family Affairs & Ors*²² where both courts held the workers to be employees, citing *inter alia* the principal's imposed restriction on the delegation of duties.

3. *Can the worker determine his profit through more efficient performance or is the profit margin predetermined irrespective of performance?*

Since the drivers cannot generate their own passengers, they are reliant upon Uber for offers of work. The total fare for a journey is, unless a taximeter is fitted to the vehicle, calculated by Uber and paid, less a commission, by Uber to the driver. Uber's advertising makes it clear that neither are passengers expected to tip the drivers, nor will Uber pay any bonus for higher customer ratings. Even when a

²¹ [1998] IIR 34.

²² [2006] IEHC 59.

request is cancelled, it is entirely at Uber's discretion as to whether or not a cancellation fee will be paid to the driver. Consequently, once a driver accepts a request for services, he is not in a position to determine their own profit levels.

The cumulative effect of applying all of these tests to the situation of Uber drivers is that, in Ireland, Uber drivers may well be determined as subordinate to Uber and consequently, they would be regarded as employees under the subordination elements of the tests.

However, there is an important point to note on the use of the subordination test. A contract imposing obligations on both parties must be in existence before the test of subordination will be applied. The element of subordination is then deduced from the terms of that contract. Consequently, in the absence of a contractual relationship imposing obligations on both parties, the subordination inquiry cannot occur. In the words of Edwards J in *The Minister for Agriculture and Food v Barry*, "If there is no mutuality of obligation it is not necessary to go further. Whatever the relationship is, it cannot amount to a contract of service."²³

9. The Concept of Mutuality of Obligation

This requirement is based upon the judicial understanding that a contract of service is somewhat of a relational contract.²⁴ Relational contracts involve long-term, complex relationships that see exchanges of more than items of monetary value. In relational contracts, trust, solidarity and loyalty are fundamental terms. Informal cooperation, coordination, and collaboration are typical.²⁵ Whether an employment contract can be viewed as relational depends upon the confluence of two factors. First is the desire of the judiciary to retain the importance placed upon loyalty, trust and confidence during the master and servant era. This has led to the exclusion of many workers from the contemporary definition of servant.²⁶

The second factor is the development of the workmen's compensation and social insurance legislation.²⁷ Each of these comprehensive legislative packages has imposed the social risk of occupational injury or unemployment upon both the hirer and the worker through payments by the employer and contributions of workers from their earnings to a state administered fund. Since employers were in the best position to act as revenue collectors for this fund, the tasks not only of collecting this revenue but also contributing to it has imposed an additional duty on employers that is beyond the usual obligation to pay wages for services rendered. An additional duty is borne by

²³ [2009] 1 I.R. 215, 230. See also the dicta of Longmore LJ in *Montgomery v Johnson Underwood* [2001] 1 ICR 819, 831.

²⁴ See the dicta of Lord Steyn in *Johnson v Unisys* [2003] 1 AC 518, 532.

²⁵ For a full discussion on the concept of a relational contract see I Macneil, *The New Social Contract* (Yale University Press, New Haven, 1980).

²⁶ For examples of this exclusion see *Hardy v Ryle* (1829) 9 B & C 603; *Thrupp v Collett* (1858) 26 Beavan 147.

²⁷ Deakin S and Wilkinson F, n.12, 15.

workers who must contribute to planning for potential future upheavals in their working lives. The closeness of the cooperation in this planning for the future has made it easier for the courts to view the employment agreement as a relational contract between the parties.

The unfortunate ramification for some workers of the judicial adoption of this concept was the courts' application of this view of the employment contract as a test that identifies the relationship as a contract of service. Consequently, in the absence of a mutual commitment between the parties, the contract could not be a contract of service.

10. How Mutual Obligation is identified

The test for mutual obligation was described by Edwards J in *Minister for Agriculture and Food v Barry* as,

“[the requirement of] there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service.”²⁸

The key point here is that in the eyes of the Court, an employee cannot refuse an offer of work from his employer without fear of sanction. To the contrary, an independent contractor is free to choose whether or not to supply his services at any given time. When applying this criterion to the Uber drivers, it is clear that the freedom not to respond within the fifteen seconds permitted for a period of eighteen months, without sanction, would suggest that the drivers would be more akin to independent contractors.

The result is the classification of Uber drivers as employees under the subordination test, but independent contractors under the mutuality of obligation test. In such a situation, the ‘running order’ of the tests is vital. As mentioned above, if mutuality of obligation is not present, then the Court will not examine the relationship for elements of subordination.

With regard to Irish courts, although the Irish Employment Appeals Tribunal has been somewhat more benevolent,²⁹ mutuality of obligation is the pre-requisite for any finding of employment status.

11. Conclusions on the status of collaborative workers

Perhaps the most startling point to be drawn from an analysis of the various tests is the different determinations that might be made in those jurisdictions that adhere to the concept of a binary

²⁸ [2009] 1 I.R. 215, 230.

²⁹ See in particular the determinations in *Byrne v Gartan* RP1048/83, and *An Employee v An Employer*, UD634/2007.

employee/independent contractor division of workers. These different classifications arise from subtle differences in approaches inspired more by policy than legal theory, creating what Kahn-Freund describes as “a maze of casuistry without much principle”³⁰. While the State of California uses the criterion of subordination alone to arrive at a determination, the Irish courts apply a pre-requisite test of mutuality of obligation before investigating subordination. The European Commission, on the other hand, seem to put more emphasis on the worker’s capacity to refuse offers of work as creating its own version of subordination. To this might be added the ‘nature of the work’ criterion that examines the frequency of service provision, a point that is not considered either in Ireland or in the American state of California.

It would seem that, despite many attempts to clarify matters, Lord Wedderburn’s elephant has not gone away. That is, the contract of employment is “an animal too difficult to define, but easy to recognise when you see it”³¹. However, such an ambiguous situation leaves both the drivers who are contracted to provide services to Uber and the company with plans to operate globally in a very unenviable situation.

³⁰ O. KAHN-FREUND: Servants and Independent Contractors. *M.L.R.*, 14, (1951) 504, 507.

³¹ Kenneth William WEDDERBURN of Charlton: *The Worker and the Law*. 3rd ed. Harmondsworth, Penguin, 1986. 116.