REVISITING THE BOUNDARIES BETWEEN EMPLOYEE AND CONTRACTOR STATUS

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A 2017 decision of the United Kingdom Employment Appeals Tribunal ("EAT") has brought the issue of employee and contractor status back into the spotlight. In *Uber B.V. and Others v Mr. Y Aslam and Others,* technology giant Uber was pitted against a group of drivers who claimed to be the Company's employees.

Uber is an international company that markets itself as a "technology service provider". Its online application connects passengers to drivers directly. In the United Kingdom ("UK") alone, Uber has over 40,000 drivers available to service passengers. Of course, Uber has operations throughout North America, including in many major cities in Canada.

Since 2015, Uber and its UK "customers" – the Company's term for its drivers – have been governed by a partner-driver service agreement. Under the agreement, drivers in the UK are labelled as "independent companies" or "independent contractors" who provide transportation services to passengers directly.

The initial decision of the UK Employment Tribunal ("ET") found in favour of the drivers. The ET concluded that any driver with the app switched on in a territory where they were authorized to work, and who was able and willing to accept assignments, was "working" for Uber. In coming to the conclusion that drivers were "workers" of Uber, the Tribunal was guided not by the language of the partner-driver service agreement, but rather by what the Tribunal described as the "reality of the situation" – the real relationship between Uber and its drivers, as evidenced primarily by the degree of control that the Company exercised over drivers. The Tribunal found that a number of considerations pointed to there being an employment relationship, including the following:

- Drivers were required to "onboard" with the Company and, once online, their right to use the app was non-transferable;
- Uber monitored driver performance-ratings, cancellation and acceptance rates;
- Uber imposed rules on drivers. For example, drivers were prohibited from exchanging contact information with passengers;
- Drivers were "encouraged" to follow driving directions set out by the Uber app. The failure to do so could lead to adverse consequences for the driver;
- Uber set out a recommended fare. While it was open to drivers to arrange for a lesser fare with a passenger, this practice was not encouraged and Uber retained the right to have its "Service Fee" calculated on the basis of the recommended amount; and
- Any disputes between drivers and passengers were handled by Uber and Uber was the only party with the discretion to issue a refund.

The Tribunal also focused on the obligation on drivers to accept work. Drivers could log on or off the app at any time. However, when they were online they were expected to be available. Acceptance statistics were recorded and drivers were warned against accepting less than 80% of trip requests. Further, while online, a failure to confirm availability for trips twice in a row resulted in a penalty, in the form of the driver being locked out of the system for 10 minutes.

Uber appealed the ET's decision that found drivers were workers of the Company. On appeal, Uber argued that the ET erred in disregarding the express language of the partner-driver service agreement, which classified drivers as independent contractors. Uber also argued that it was not a transportation service provider, but rather an agent between drivers and customers, meaning that drivers were providing services to their passengers and not to Uber itself. Uber also argued that drivers retained control over their use of the app and the driving experience.

The EAT dismissed the Company's appeal and adopted the reasoning of the lower Tribunal, finding that the correct approach was to focus on the "true agreement" between the parties. This approach considered the real relationship between the parties and was not dictated by the language of any written agreement. The Appeals Tribunal also noted that it was important to take into account the relative bargaining power of the parties when concluding a written agreement. The fact that the Company referred to drivers as independent contractors in the service agreement did not mean that drivers could not avail themselves of statutory employment protections. For that to be the case, drivers must not be employees. That conclusion could only be drawn by examining the true relationship between drivers and the Company.

> [105] In the normal commercial environment […] the starting point will be the written contractual documentation; indeed, unless it is said to be a sham or liable to rectification, the written contract is generally also the end point – the nature of the parties' relationship and respective obligations being governed by its terms. *Here, however, the ET was required to determine the nature of the relationship between ULL and the drivers for the purposes of statutory provisions in the field of employment law; provisions enacted to provide protections to those often disadvantaged in any contractual bargain. The ET's starting point was to determine the true nature of the parties' bargain, having regard to all the circumstances.*

The EAT also focused on Uber's "control" over drivers and, in doing so, acknowledged that the exercise of control over an individual is the primary consideration in determining whether that individual is an employee or independent contractor. In this case, the drivers' lack of control was an indication that they were not entering into contracts with passengers on their own behalf but rather on behalf of Uber. Although the EAT acknowledged that drivers were responsible for providing their own "tools" – their cars – the other factors outlined above pointed away from the drivers being independent contractors.

In conclusion, the Appeals Tribunal found that it was open to the ET to conclude that there was a contract of employment between Uber and its drivers, and that drivers were providing services to customers on behalf of Uber as part of Uber's business of providing transportation services to passengers in the London area.

Reconsidering Status in Canada in the Wake of Bill 148

What bearing does this decision from the United Kingdom have on Canadian law? Although outside our jurisdiction, the principles articulated in *Uber B.V.* are similar to those that were articulated by the Supreme Court of Canada in *671122 Ontario Ltd v Sagaz Industries Canada Inc.*, which remains the leading case on the issue of employment versus independent contractor status in Canada. In other

words, the decision of the UK EAT in *Uber B.V.* should serve as a reminder to employers of the pitfalls associated with improperly characterizing individuals as independent contractors.

Although it is important to document an independent contractor relationship into a written agreement, employers should keep in mind that the written contract will not be determinative of whether an employment or independent contractor relationship exists. The existence of an independent contractor agreement is simply one of many factors that will be examined. Similarly, the fact that the individual knowingly entered into an independent contractor relationship, and may have benefitted from that arrangement for many years, will likewise not be persuasive.

Rather, courts will examine the entirety of the relationship between the parties to determine its true nature. The central issue is whether the person engaged to perform services is performing them as a person in business on their own account, or rather are providing services on behalf of a company other than their own. The primary driving factor will be the degree of control that is (or isn't) exercised by the company over the individual and his or her daily activities. Does the individual dictate his or her own hours of work? Is the individual free to turn down work that is made available to him or her? These are only two questions that bear on the issue of control. Courts will also look at whether the individual provides his or her own equipment or supplies, whether or not the relationship is exclusive in nature, whether the individual is free to hire his or her own helpers, the degree of financial dependency (including billing arrangements), and who bears the opportunity for profit and risk of loss associated with the provision of services.

Improperly characterizing individuals as independent contractors can have serious implications, most commonly upon termination of the relationship. The fact that an individual has knowingly or willingly participated in an "independent contractor" relationship does not preclude the individual from making a successful claim for wrongful dismissal. Similarly, companies that improperly characterize individuals as independent contractors can face penalties and charges from the Canada Revenue Agency for failing to make proper deductions and remittances in respects of earnings.

These considerations have newfound importance in the wake of Bill 148. The *Fair Workplaces, Better Jobs Act, 2017* received Royal Assent on November 27, 2017, and introduced significant amendments to the *Employment Standards Act, 2000* ("*ESA*"). One such amendment is the addition of section 5.1, which prohibits employers from treating a "person who is an employee of the employer as if the person were not an employee". This amendment was enacted for the very purpose of combating precarious employment, including the mischaracterization of individuals as independent contractors. Under the amended *ESA*, employers will bear the onus of demonstrating that individuals who have been characterized as independent contractors are not employees, entitled to the minimum standards available under the *ESA*, and can face penalties under the *ESA* if unsuccessful in this regard. Unlike many other amendments contained in Bill 148, the requirement set out in section 5.1 came into force immediately upon Royal Assent.

In sum, employers in Ontario now face increased vulnerability to penalties, charges and monetary damage awards where employees are improperly misclassified as independent contractors. Employers should review their worker classifications immediately to ensure that all individuals who have been classified as independent contractors are in fact independent and not employees of the corporation. To do this, an in-depth examination of the true relationship between the corporation and the individual needs to occur. If the relationship more closely resembles that of an employment relationship, consideration needs to be given to re-classifying these individuals and documenting that change. Further, whenever engaging contractors in the future, the corporation need to do more than ensure that

a proper independent contractor agreement is in place. Although it is important to ensure that appropriate contracts are executed prior to the commencement of work, employers should consider how the relationship will work on a day-to-day level and ensure they are prepared to meet the onus of proving that the individual is truly an independent contractor.

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Stephanie Jeronimo and Julia Nanos specialize in labour and employment issues facing municipalities, including with respect to Bill 148 and independent contractor and employment agreements. If you have any question about your contracts or any workplace issue, please contact Stephanie at 416-864-7350 or Julia at 416-864-7341.

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