It is regrettable that the Supreme Court in *Henderson* did not adopt Lord Phillips's reservations about the defence where the perpetrator "bears no significant personal responsibility for his crime". To do so would not have brought uncertainty, it is a concept readily understood in criminal and sentencing law, and would bring the law closer to the treatment of unjust enrichment claimants. Closer, but not entirely consistent. Consider the Supreme Court's attitude to Ms. Henderson, "distressed beyond measure" by what she had done when seriously ill with psychosis, revealed in its invocation of the broad public interest "in the public condemnation of unlawful killing and the *punishment of those who behave in that way*" (emphasis added). And compare Lord Sumption in *Patel,* willing to countenance a restitution claim by the client of a contract killer who pockets the money but does not kill the putative victim.

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ONE STEP FORWARDS FOR EMPLOYMENT STATUS, STILL SOME WAY TO GO: THE SUPREME COURT'S DECISION IN *UBER v ASLAM* UNDER SCRUTINY

IN what was perhaps the most anticipated employment law decision of the past decade, the Supreme Court in *Uber v Aslam* [2021] UKSC 5 has confirmed that the claimant drivers for ride-hailing firm Uber are workers for the purposes of the Employment Rights Act (1999) (ERA), the Working Time Regulations (1998) (WTR), and the National Minimum Wage Regulations (1998) (NMWR). While the court also held that, for the purposes of calculating entitlements under the WTR and NMWR, those drivers are deemed to be working not only when actively engaged on a trip, but also, when they are in their cars with the app switched on, waiting to be offered a job by the app, this case note will focus its discussion on the decision as it relates to the question of employment status.

Employment law in the UK divides the category of "worker", those persons within the personal scope of statutory employment law, into two subcategories: the employee, hired under a contract of service or apprenticeship and entitled to the full scope of employment law protections, and the so-called "limb (b)" worker (s. 230(3)(b) ERA), entitled to a subset of such protections, including various working time, minimum wage, anti-discrimination, and health and safety entitlements. To claim limb (b) worker status, it is generally accepted that three requirements must be met: there must be a contract; by which the worker promises to perform personally work or services for the other contracting party; and that other party must not be a client/customer of any profession or business undertaking

carried on by them. The persistent legal issue in recent cases, however, has been the question of whether, and if so, in what circumstances, a court can disregard certain written terms of the parties' agreement, in determining whether these criteria are met.

In *Autoclenz v Belcher* [2011] UKSC 41 the Supreme Court suggested that when determining whether an individual is a worker, the court must ask what is the nature of the "real agreement" between the parties, taking into account their relative bargaining power. This is to be answered by reference to all the circumstances, of which the written agreement is only one. Relying on *Autoclenz*, the majority of the Court of Appeal in *Uber* [2018] EWCA Civ 2748, had disregarded many of the terms of the parties' written agreement, which had attempted to portray the drivers as if they worked directly for passengers rather than for Uber, on the basis that these terms were inconsistent with the reality of the relationship as conducted by the parties. Having already rejected the premise that *Autoclenz* authorises a court to rewrite apparently unfair bargains, Underhill L.J. disagreed with the majority's approach. He held that if it was possible to construe the facts consistently with the way the relationship was represented in the agreement, *Autoclenz* required that the court do so. On this basis, he concluded that the drivers were independent contractors working for the passengers, as Uber contended and the contractual documentation suggested, such that the drivers were not, he argued, entitled to the statutory rights claimed (at [145]).

In *Uber*, the Supreme Court endorsed the majority's approach to *Autoclenz*, explaining that the written agreement ought to be given no more weight when determining the question of status than any of the other circumstances. In so doing, however, it went to great lengths to clarify, and elaborate, "the theoretical justification for this approach", critical to which was the fact that "the rights asserted by the claimants were not contractual rights but were created by legislation" (at [69]).

The Supreme Court argued that *Autoclenz* was not an approach to contractual interpretation justified by the inequality of bargaining power between the parties (at [68]). Rather, the court's reference in *Autoclenz* to inequality of bargaining power formed part of a *statutory* approach to employment status, based on an assessment of the *purpose* of the statute being applied (at [69]). This required the court to ask whether the individual was within the class of persons that the statute was intended to protect. In the realm of employment law generally, and working time and wage regulation in particular, these were persons vulnerable to being paid too little, being required to work excessive hours, or being subjected to other unfair treatment, and who were not, by reason of this inequality of bargaining power, in a position to adequately protect themselves by way of contract (at [75]).

This statutory purpose test will undoubtedly be welcomed by the employment law community, many members of which have been extremely active in their critique of the previously highly contract-centred approach to employment status adopted by the courts. While this note is also broadly supportive of this shift, it seeks to sound a few notes of caution.

First, the court has not actually provided a clear justification for its reliance on this abstract notion of parliamentary intention. Indeed, what this apparently neutral notion of "statutory purpose" seems to conceal is the highly political nature of the exercise in which the court is engaged. This is particularly so given that aims of particular statutes will often conflict, and/or will be liable to change over time, making it extremely important for the courts to be able to justify why some of these conflicting aims have been prioritised over others.

The need for greater transparency with regard to the political nature of the questions addressed in this context is particularly clear in light of the Supreme Court's recent decision in *Royal Mencap* [2021] UKSC 8. Here, the court rejected the argument that the claimant care-workers were entitled to the minimum wage for "sleep in" shifts, on the basis that it was never the purpose of the NMWA to have this effect. The NMWA was never intended to provide workers with a living wage, nor to provide a right to be paid for all time from which employers derived benefit (at [35]). Based on a supposedly objective interpretation of the purpose of the NMWA, the court's conclusion was, in fact, highly political. It would have been perfectly possible for the court to have drawn on changing social values, and/or the cogent and normatively persuasive arguments of the claimants, so as to justify the opposite outcome, which would also have been entirely consistent with the statutory wording, and with some of the other purposes which could legitimately be imputed to the NMWA.

Second, the Supreme Court's decision opens the door to diverging approaches to the meaning of worker and employee in tax, social security, tort and/or employment law, with potentially significant implications for the incentives of the parties when it comes to deciding how working arrangements should be structured. It also calls into question the relevance of the statutory criteria for the limb (b) worker, given that, it seems, everything now comes down to the question of vulnerability.

Finally, it is not clear that the statutory purpose test actually overcomes the problems to which the contractual approach, in a context of inequality of bargaining power, gives rise. The Supreme Court suggests that inequality of bargaining power is problematic because it allows the employer to misrepresent the real nature of the relationship through creative drafting. This means that if employment status was to depend on the terms of the contract, because the employer is in a position to determine those terms, the very

purpose of labour law, to protect against exploitative terms and conditions, would be defeated. This is why the statutory purpose test is so important.

While true as far as it goes, this argument fails to recognise the other, significant, implications of inequality of bargaining power in the context of questions of employment status. The inequality that exists between employers and workers is an expression of the structural inequality that exists between labour and capital in capitalist society. This inequality not only empowers employers to determine the terms of the contract, misrepresenting the reality of the legal relationship concluded; it also empowers employers to dictate the form of contract by which labour power will be contracted, to determine *how* a working relationship will be structured. This means that, if questions of employment status are still dependent on an assessment of the "real" nature of that relationship brought into being *by the parties*, as the Supreme Court suggests it is, inequality of bargaining power will still "defeat" the purposes of employment law.

For the court, individuals are "vulnerable" when they are subordinate and dependent on an entity that exercises control over their work. In this formulation, control *creates* subordination and dependence (at [97]), where control is something that employers are empowered to exercise by reason of the nature of the legal relationship established between them and the putative worker. In capitalism, however, subordination and dependence is not (or not only) a *product* of a legal relationship; it is a pre-contractual state of affairs that has its origins in the systematic exclusion of producers from access to the non-market means of production and subsistence. It is this pre-contractual state of affairs that *empowers* employers to decide not only how to structure and present the written agreement, but also, how to structure and organise the legal relationship through which work is provided. From this perspective, any power of control, arising from the legal relationship to which the parties have agreed, does not *create* subordination and dependence; it is a state of affairs *made possible* by a pre-contractual state of subordination and dependence. That is, it is this pre-contractual state, this *socio-economic* status, that makes possible the exercise and imposition of that control. To suggest otherwise, as the court seems to do, is to overlook the possibility that individuals can be in a position of subordination and dependence to capital *in general,* from which particular employers can derive private benefit, even if contractual rights of control are absent. This is so, for example, with regard to the many persons working in the creative industries whose structural position is such as to prevent them from convincing firms/organisations to employ, and pay them, *during* their creative processes, forcing them to accept the fact that these firms/organisations will pay them for the benefit of their work, only if they have already produced a creative product in which these firms/organisations are willing to invest. These creators are persons highly dependent on certain firms/organisations for subsistence, then, and who, as a result, are liable to

being paid "excessively low" amounts for their work, and/or accepting unfair terms, even if there is no express mechanism for specific firms/organisations to exercise control over them, and their work, during the creative process itself. For such persons, the Supreme Court's new statutory approach as presently conceived, will be unhelpful.

However promising the Supreme Court's decision might seem from the perspective of the many individuals working in the gig-economy, then, and for precariously employed individuals more generally, much work is still to be done to fashion an approach to employment status that is adequately tailored to the real challenges which structural inequality and dependence generates in the context of capitalist work. Until it does so, approaches to employment status will continue to struggle to support, and advance, employment law's "purposes".

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COMMUNICATION TO THE PUBLIC AND TECHNOLOGICAL RESTRICTIONS AGAINST "FRAMING" COPYRIGHT WORKS

IN recent years, the legality of linking to copyright-protected works has been diligently explored in the case law of the Court of Justice of the European Union (CJEU). With its judgment of 9 March 2021 in *VG Bild Kunst* (C-392/19, ECLI:EU:C:2021:181), the court added another stone to the edifice of this case law. The question at issue was whether a copyright owner can require a licensee of a protected work to implement effective technological measures against the use of "framing" by a third party to embed the work on the third party's website – that is, the technique of dividing a web page into separate frames to enable posting within one frame of an element from another site so that the environment from which that element was taken is hidden (see definition at [35]). The answer depended on whether such framing would amount to an act of communication to the public of the work (at [24]), this being an exclusive right of the copyright owner (art. 3(1), Directive 2001/29/EC, OJ 2001 L 167 p.1 (InfoSoc Directive)). If so, the copyright owner may insist on the implementation of the measures, even when otherwise obliged by law to grant the licence (at [14]–[15]).

Previous judgments have established that an act of communication to the public requires two cumulative elements: (1) an "act of communication" and (2) a "public" (*Reha Training*, C-117/15, ECLI:EU:C:2016:379, at [37]). It is moreover necessary that, unless the communication takes place through different technical means than those previously used with