Licensing Uber:
Better the devil you know?

The legal controversy surrounding Uber continues to be global in scale. This article offers a short summary of the three decided cases in this jurisdiction, and a fourth upcoming case in the European Court of Justice, which indicate that the degree of control that Uber retains over the service provided through its platform means that its business model is one of a PHV operator under the 1976 Act. We conclude by identifying some likely areas of future controversy.

(1) Does Uber use taximeters?

It is a crime for a PHV to be equipped with a taximeter: s.11(2) Private Hire Vehicles (London) Act 1998. In Transport for London v Uber London Ltd [2015] EWHC 2918 (Admin), the High Court ruled that—

(a) the driver's smartphone app was not a "taximeter" for the purposes of section 11 of the 1998 Act; and

(b) Uber vehicles are not 'equipped' with the driver's smartphone.

Ouseley J was persuaded that it was not essential to confine the definition of 'taximeter' to that prescribed for fitting in a black cab: reg. 2(1) of SI 2006/2304 a taximeter as a device working with a signal generator to calculate distance, calculating and displaying the fare based on distance and/or duration. This meant that it did not matter whether the smartphone app had the all the same features or components as a black cab taximeter: rather, Ouseley J was concerned to give the prohibition an "always speaking" meaning, in order to cover changes in technology, ruling that the prohibition "is intended to catch all devices used for the calculation of fares" (at [32]).

Nevertheless, the court went on to find that although the driver's app provides time and distance data essential for the calculation of the fare, that calculation was in fact

carried out by an Uber server, and not by the driver's smartphone. To hold otherwise, the court found (at [21]), would risk bringing the odometer and clock within the definition of taximeter, with absurd consequences. This meant that the smartphone (even with the driver's app) was not a prohibited taximeter.

Furthermore, the court found (at [45]) that it is the driver, not the vehicle, that is 'equipped with' the smartphone, given its portability, meaning that there was no breach of section 11 in either case.

(2) Are Uber drivers employed or self-employed?

In October 2016, the Employment Tribunal found that Uber drivers were employees: Aslam and others v Uber B.V. and others (Case No. 2202550/2015). This meant that they were entitled to various protections, including payment of the minimum wage, sick pay, and paid holidays. Uber is understood to be pursuing an appeal.

The Employment Tribunal criticised what it called "*fictions*" and "*twisted language*" deployed by Uber in support of its case – in particular, the reference in its then Terms to drivers as 'customers' of the Uber platform. Uber's terms sought to express the possibility of 'control' exerted over arrangements made through its platform between drivers and riders, despite the fact that section 56 of the 1976 Act deems that contracts for the hire of a PHV are made with the licensed operator that accepted the booking, whether or not he himself provided the vehicle. By contrast, the Tribunal found that the terms and service levels are set by Uber, which sets a default route, imposes conditions on drivers and their vehicles, fixes the fare, and exclusively handles passenger complaints. This degree of control led the Tribunal to conclude that the "*true relationship*" between Uber and its drivers is one of employer and employee.

Uber has run a similar argument in a Spanish case awaiting judgment before the European Court of Justice: Asociación Profesional Elite Taxi v Uber Systems Spain, SL (C-434/15). This relates to the controversial UberPOP service in Barcelona, marketed as a ride-sharing platform said to be outside the licensing system altogether. Uber sought the protections of EU law to argue that a requirement to

obtain a licence was an undue restriction on its right to provide 'IT services' through its platform. Although the CJEU has yet to give its ruling, the opinion of the Advocate General reflects the resounding criticism made by the Employment Tribunal above: Uber does not offer merely an IT platform for connecting riders and drivers, but "*amounts to the organisation and management of a comprehensive system for on-demand urban transport*", having regard to the level of control that Uber exerts over the transportation service provided. Consequently, it is not unlawful for EU states to require Uber to obtain a licence, as it provides transportation services and not merely IT services. A formal ruling is expected later this year.

At least in England and Wales Uber appears to acknowledge that it requires an operator's licence before it can put vehicles on the road!

(3) The English language test

The case of R (Uber London Ltd) v Transport for London (Administrative Court, unreported, 3 March 2017) concerned three requirements imposed by TfL upon PHV drivers, operators and vehicles respectively: (1) all drivers must demonstrate that they can read and write in English to a minimum prescribed level; (2) all PHV operators must provide a round-the-clock telephone service; and (3) all PHVs must be continuously insured for hire and reward.

The headline-grabbing finding was that the English language requirement was proportionate: as well as needing to be able to communicate with passengers about their requirements, explain safety issues, and discuss a route or fare, drivers also needed to understand regulatory requirements and other communications with TfL. In the absence of a specific language test catering to the taxi industry, TfL was entitled to rely on the generic test that it had adopted. An appeal by Uber is understood to be outstanding.

As to the second requirement, this was held to go beyond what was necessary to achieve the aim of passenger protection, the court noting that the Uber app already had an impressive customer contact facility, which allowed staff to speak with passengers where necessary, typically in an emergency.

TfL conceded the challenge to the third requirement, as it had wrongly assumed that passengers injured in circumstances of no insurance would not be protected but for this blanket requirement, whereas in fact there was a legal requirement that either the insurer or the Motor Insurance Bureau would step in: see Bristol Alliance Partnership v Williams [2013] RTR 9.

Future areas of controversy

Cross-border hiring

It has long been established that it is lawful for a licensed PHV operator to accept bookings that start and end outside the operator's licensing district, and that a PHV driver can undertake journeys starting anywhere in England and Wales: Adur District Council v Fry [1997] RTR 257.

However, Uber being an increasingly national phenomenon, authorities that do not licence Uber in their area are now seeing a huge influx of drivers carrying out Uber bookings under their noses without the power to enforce licensing standards against them, because the driver and operator are regulated by a different authority.

In January 2017, two drivers whose licences had been revoked by Southend-on-Sea Borough Council were found to be driving in Southend, using Uber, under licences issued by TfL. Nasser Hussain and Nisar Abbas had been convicted of 10 counts of perverting the course of justice, by operating an illicit penalty points sharing scheme. They were each jailed for 12 months.

There is no indication that legislation to address this loophole is being contemplated.

'Greyballing'

In March 2017, the New York Times reported that Uber was using 'greyball' software in some locations which at least in part appeared to be designed to frustrate local regulation. The software would 'greyball' certain users identified as linked to law enforcement or local authorities, manipulating the app on users' smartphones to the effect that no (or only 'ghost') cars appeared to be available. There are no reports yet

that this software has been deployed in the UK, though authorities would be wise to be vigilant to this possibility, perhaps through the use of conditions.

Plying for hire

A further area of controversy could lie in the rather fuzzy definition of 'plying for hire' at common law: see Cogley v Sherwood [1959] 2 QB 311. If users are able to see real-time locations of Uber vehicles available for immediate bookings, is this materially different to the 'for hire' roof light on a Hackney carriage? Does it matter that a driver can refuse to accept a booking offered to him by the Uber platform, rather than observing the 'cab rank rule'? There has yet to be a decided case on this point in relation to Uber.

Conclusion

The disruptive effects of Uber on the licensed hire marketplace are far from resolved, posing ongoing challenges for licensing practitioners. Authorities should keep an open mind about a business model that stretches the scope of established regulatory models, taking care not to confuse innovation with unlawfulness, and thereby lose an opportunity to bring a new phenomenon within the scope of regulation for the ultimate benefit of the travelling public. After all, the global demand for Uber's services is undeniable: the travelling public seem to love it.

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