The Employment Status of Uber Drivers
A Comparative Report Prepared for the Social Law Project,
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EXECUTIVE SUMMARY

I. INTRODUCTION

1. OPBP has been asked to prepare a comparative report on the status of Uber drivers in various jurisdictions. The need for this research arises from proceedings in the Labour Court in South Africa, between Uber South Africa Technology Services (SATS) and seven respondent former Uber drivers, who were subject to ‘deactivation’ by Uber. Uber did not give reasons for the deactivation, nor did it provide the respondents with a hearing. The respondents argue that Uber is bound by South African employment law; Uber disagrees. Two principal issues arise for coverage in this report.

2. The first is, who might the putative employer be? Of course, this question is subject to the second question below: if Uber drivers are employees, at least one entity must be their employer. ‘Uber’ is a group of companies, and on the instant facts, an issue arises as to whether the drivers would be employees of Uber BV, registered in Amsterdam, or Uber SATS. The former owns and licences the app; the latter essentially manages the practicalities of Uber’s business in South Africa.

3. The second issue is whether Uber drivers are employees, or whether they are independent contractors, not subject to the protections of labour law. Given the growth of the gig economy and casual, internet-mediated work, this is a question of huge contemporary importance.

II. THE RESEARCH QUESTIONS

4. To assist in this case, OPBP has undertaken research to establish the legal position in jurisdictions around the world with regard to both of the issues set out above. Our research addresses several questions under the two main issues, as follows:

**Question 1: Respondents and Jurisdiction**

   a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?
b. How did the court analyse the relationship between the subsidiary and Uber BV?

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

**Question 2: Employment Rights**

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

b. What duties, very briefly, would this status impose on the employer?

c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some status, such as worker? What was the outcome and reasoning?

5. The comparative perspective which this report provides draws on the following jurisdictions:

1) The United Kingdom
2) Ireland
3) Switzerland
4) France
5) Belgium
6) The Netherlands
7) Italy
8) The European Union
9) United States Federal Law
10) Texas State Law
11) Alaska State Law
12) New York State Law
13) California State Law
14) Canada (Common Law Jurisdictions)
15) Quebec Provincial Law

6. These jurisdictions appeared, from preliminary scoping research, to reflect the most useful jurisdictions, where there had been the greatest progress in
answering these (still very new) questions. They reflect a mixture of civil and common law jurisdictions, with varying degrees of commitment to worker protection.

III. SUMMARY CONCLUSIONS

7. This section is a summary of our main findings for each of the questions considered.

**Question 1: Respondents and Jurisdiction**

8. The dominant trend in revealed by the research is a lack of proper engagement by courts and agencies with the question of jurisdiction and the determination of the correct respondent. Often, it is taken as read, or no point is raised.

*If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?*

9. The clearest, best reasoned answer in the employment context is from the UK, where the Employment Tribunal held that the drivers were workers employed by Uber’s UK subsidiary. A similar result was reached by the Swiss social security agency and in one case in California. Conversely, in New York, the Unemployment Insurance Appeals Board held that the parent, Uber Technologies, Inc, (based in San Francisco) was the employer, but no subsidiary which could be the employer is mentioned in the judgment, and the question is not given any analysis. A similar result was reached in one other Californian case.

10. Where Uber has specifically tried to use its multiple corporate personalities to secure a favourable outcome in court, in employment, competition or administrative law, these arguments have generally been rejected, as in the UK, France, Quebec, the Netherlands and Belgium. From the research, only one decision, in Belgium, concerning competition law, indicates the success of this strategy.
11. Also instructive is US Federal Law, where, in spite of a relatively large amount of litigation, this point remains without definitive answer. In US federal cases, the parent company has always been listed as a respondent, and sometimes a subsidiary has been joined. As the driver must sign similar contracts with both parent and subsidiary, most litigation (much of which has concerned the validity of arbitration clauses) has been resolved without the need to formally decide who the employer is. No case was found where a subsidiary was sued alone. It has not therefore been necessary for there to be a comprehensive analysis of this question.

12. In many jurisdictions, there have been administrative or regulatory proceedings which have joined both parent and subsidiary: for example, regarding tax in Quebec, and competition proceedings in Belgium and Italy. In the Netherlands, an attempt by the parent to evade an administrative decision by arguing that the correct addressee was the subsidiary was rejected, although without full reasoning.

13. In conclusion, a reading of the reports gives the impression that courts have not been greatly concerned with Uber’s multiple corporate personality – either because parent and subsidiary sign the same contracts with drivers, or because both are named and no issue is taken, or, seemingly more rarely, because courts explicitly reject Uber’s attempts to evade obligations.

How did the court analyse the relationship between the subsidiary and Uber BV?

14. Generally speaking, where this question has been addressed, courts have reached fairly consistent conclusions. Courts and agencies in the UK, Switzerland, France and Italy have recognised that the parent and subsidiary belong to the same group, and that the local subsidiary is responsible for practical operations, dealing with drivers, recruitment, complaints and the general management of the service, while the parent protected legal rights associated with the App and processed payments. The need for this division of operations arises partly from local regulatory laws which govern the provision of transport services: Uber often needs a local
subsidiary in order to lawfully operate. This may account for the flexibility courts have demonstrated.

15. In the other jurisdictions considered, the question does not seem to have been addressed. Certainly, no competing interpretation of the division of functions between parent and subsidiary emerges from the research.

If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

16. The question of jurisdiction has generally not been argued, outside of the context of arbitration agreements. In the UK, France, the Netherlands, Texas and New York, the jurisdiction of the court has been assumed. Specifically in the context of parent companies, in US cases where Uber Technologies, Inc (a parent company) has been named as sole respondent, no point seems to have been raised regarding the court’s jurisdiction (perhaps unsurprisingly, as Uber Technologies is based in San Francisco).

17. However, the jurisdiction of the court has been raised in the context of arbitration agreements. In the US federal and some state systems, the research has shown that a large amount of Uber litigation has concerned the validity of arbitration clauses. Once such clauses are shown to be valid, courts tend to deny themselves jurisdiction to hear cases covered by the arbitration agreement. Given that the drivers’ contracts are with both parent and subsidiary, and both contain similar clauses, this jurisdictional litigation has not led to the legal determination of jurisdiction over parents vis-à-vis jurisdiction over subsidiaries.
**Question 2: Employment Rights**

*In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.*

18. There is, naturally, significant variation in the exact language used in the test for an employee. However, several key concepts can be drawn from the research.

19. Firstly, many jurisdictions do not have one single test to distinguish employees from independent contractors. This may be because that analysis is to be undertaken ‘in the round’, as in the UK, or because there are more precise definitions which vary depending upon the statute under consideration, such as in Switzerland or the EU.

20. Secondly, in most cases, the obligation on an employer to pay a wage is a necessary condition for classification as an ‘employee’.

21. Thirdly, most jurisdictions explicitly require some form of subordination to the employer. This will often not be subject to *a priori* determination, but rather, a test which looks to the practical realities of the relationship. Typical lists of factors which go to test subordination can be found in the Swiss and US federal law reports.

22. Fourthly, the terms of the contract are rarely determinative, and parties cannot label their relationship as being that of independent contractors if, as a matter of fact, it can be shown to be more akin to an employer-employee relationship. Indeed, for some purposes in some jurisdictions, for example Switzerland, a contract is not even necessary for some of the protective provisions of employment or social security law to apply.

23. It is finally worthy of note that statutory provisions in Texas and Alaska explicitly exclude drivers for services like Uber from characterisation as an employee under certain circumstances.
What duties, very briefly, would this status impose on the employer?

24. A sample of typical duties might include:
   - Payment of wage, and in some cases, a minimum wage
   - Working time rules
   - Leave
   - Holiday pay
   - Flexible working
   - Non-discrimination
   - Health and safety at work
   - Minimum wage
   - Tax and social security obligations
   - Maternity, paternity and parental leave
   - Protection from unfair dismissal
   - Rules regarding the transfer of undertakings
   - Collective labour law obligations: recognition of trades union, permitting strike action etc.

25. It is useful to note the variation in generosity to employees: from very generous systems like Switzerland and Italy, to less generous ones like Texas. This variation does not necessarily correlate with how wide the definition of employee is.

Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

26. In New York, the Unemployment Insurance Appeal Board has determined Uber drivers to be employees for the purposes of employer contributions to unemployment benefits.

27. In Switzerland, the Suva social security agency has reached a similar determination. In both cases, the adjudicator looked to the actual control which Uber enjoyed over its drivers, and concluded that this, coupled with the relative
absence of indicia that they were independent contractors, meant that they were employees.

28. In France, the situation is more complex, but still looks promising for Uber drivers: one case was rejected for procedural reasons, and drivers for a French service very similar to Uber have been held to be employees.

29. In the US, a case which looks likely to determine the status of Uber drivers is working its way through the federal courts. A motion for summary judgment by Uber has been struck out, and it has been held that Uber drivers have, by providing a service to Uber, raised a presumption that they are employees.

30. In the EU, whilst judgment upon this particular point is awaited, the Advocate-General of the Court of Justice has given an opinion which could be read in a way favourable to Uber drivers arguing for employee status: but the case did not deal explicitly with that point, and the Advocate-General’s opinions are not binding law.

31. In Belgium, the matter is in the hands of the Labour Prosecutor, who is currently in the process of deciding whether to bring charges against Uber for falsifying employment status. In a press release, the Prosecutor has stated that Uber drivers are employees.

32. In California, the results (from various courts and administrative bodies) have been inconsistent for Uber drivers: one decision found that they were employees, but other decisions have found that they are independent contractors.

Have drivers sought to argue that Uber owes them duties under employment law by virtue of some status, such as worker? What was the outcome and reasoning?

33. Of the jurisdictions considered in this report, this question has only been litigated in the UK. In Aslam, the drivers argued that they were ‘workers’. A worker has some but not all of the protections to which an ‘employee’ is entitled. In UK law, a worker can be employed under a contract for services provided the contract is to provide personal services and the other party is not a client or a customer.
This is wider than the legal category of ‘employee’ which requires a contract of service. The ET ultimately ruled that: (1) Any driver who (i) had the Uber App switched on; (ii) was within the territory in which he was authorised to work; and (iii) was able and willing to accept assignments, was, for so long as those conditions were satisfied, a ‘worker’. This conclusion was based on an assessment of the practical reality of the control Uber exercised. *Aslam* is currently under appeal, and has been heard by the Employment Appeals Tribunal.
UNITED KINGDOM

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

34. Uber was the subject of an employment claim brought in the Employment Tribunal (‘ET’) by current and former Uber drivers in Aslam and others v Uber BV and others.¹ Three parties were named as respondents: (i) Uber BV – the Dutch corporation; (ii) Uber London Ltd. (‘ULL’) – a UK subsidiary of Uber BV which holds a Private Hire Vehicle (‘PHV’) Operator’s License for London and whose functions include making provision for the invitation and acceptance of private hire vehicle bookings and accepting such bookings;² and (iii) Uber Britannia Ltd. (‘UBN’) – a UK subsidiary of Uber BV which holds and/or manages PHV Operator’s Licenses issued by various district councils outside London.³

35. While the ET did not expressly consider whether the respondents had been properly named as such by the claimants when bringing the action, it is implicit in the ET’s findings that the local subsidiaries were the proper respondents.

36. In particular, the ET ultimately found that, for the purposes of UK employment law, the London-based claimants⁴ were ‘employed’ as ‘workers’ by the London subsidiary. In arriving at this conclusion, the ET rejected Uber’s alternative argument that its drivers were employed by Uber BV, as opposed to the local subsidiary (and therefore that the proper respondent was in fact Uber BV). In rejecting this argument, the ET referred to the fact that ULL was a UK company and it was this local subsidiary – rather than Uber BV – who (i) ran the PHV operation in London; (ii) acted as drivers’ point of contact; (iii) recruited, instructed, controlled, disciplined and dismissed drivers; and (iv) determined

¹ 2015 ET 2202551.
² Ibid., para 4.
³ Ibid., para 5.
⁴ The claim was determined using two London-based ‘test claimants’, with the result that the ET focussed solely on ULL in its judgment/reasons.
disputes affecting driver’s interest. As such, the local subsidiary was the proper respondent.

b. How did the court analyse the relationship between the subsidiary and Uber BV?

37. In rejecting that Uber BV was the employer of the drivers, the ET rejected the respondents’ characterisation of the relationship between Uber BV and ULL as one wherein the former supplied drivers employed by it – as agent – to the latter. Rather the ET found the parent and subsidiary carried out differing functions: Uber BV exercised and protected legal rights associated with the Uber App and processed payments, while ULL was concerned with the matters set out above.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

38. The ET did not expressly deal with the question of jurisdiction, as the respondents accepted the ET’s jurisdiction to adjudicate the claims against all of the respondents, including Uber BV.

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

39. There is no single test for determining when someone will amount to an employee for the purposes of English employment law. In every case it is necessary to weigh all the factors in the particular case and ask whether it is appropriate to call the individual an 'employee'.

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5 Aslam v Uber BV (n 1), paras 98-99.
6 Ibid.
7 Ibid., para 12.
8 Ian Smith and others, Harvey on Industrial Relations and Employment Law (first published 1991, LNUK 2017), Division AI, 1(B)(4)(e).
40. Historically, the most common approach has been to apply the ‘multiple test’ set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance.* In that case it was held that a person will amount to an employee where there is a ‘contract of service’, which will exist if three conditions are fulfilled: (i) the ‘servant’ agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his ‘master;’ (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control to a sufficient degree to make them master; (iii) the other provisions of the contract are consistent with there being a contract of service.  

41. The first requirement in *Ready Mixed* goes beyond the mere obligation on the employer to pay for work done; there must generally be an obligation on the employer to provide work and the employee to do the work: a mutuality of obligation. As the Court of Appeal stated in *Nethermere v Gardiner,* ‘there is one *sine qua non* which can firmly be identified as an essential of the existence of a contract of service and that is that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer’.  

42. The position in relation to ‘worker’ as opposed to ‘employee’ status under the Employment Rights Act 1996 is less clear and currently subject to appeal in *Pimlico Plumbers Ltd v Smith* [2017]. However, the current position of the law set out in *Windle v Secretary of State for Justice* is that mutuality of obligation is also relevant to the consideration of ‘worker’.

**b. What duties, very briefly, would this status impose on the employer?**

43. The general duties imposed on an employer include the duty: (i) to pay wages or other remuneration at common law; (ii) to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees under

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9 [1968] 2 QB 497.
10 Ibid., 515C-D.
14 Ibid.
the Health and Safety at Work etc. Act 1974; (iii) to pay the ‘minimum wage’ under the National Minimum Wage Act (‘NMWA’) 1998; (iv) to provide holiday leave and pay under the Working Time Regulations (‘WTR’) 1998 SI 1998/1833; (v) to refrain from unfairly dismissing an employee and to provide redundancy payments, maternity leave and pay, and flexible working under the Employment Rights Act 1996 (‘ERA’); and (vi) to not discriminate against existing or prospective employees under the Equality Act 2010.

c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

44. The research did not turn up any case where drivers claimed employee status.

d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some status, such as worker? What was the outcome and reasoning?

45. In Aslam, the drivers argued that they were workers under the ‘core definition’ of worker found in the largely identical section 230 of the ERA, section 54 (3) of the NMWA and Regulation 2(1) of the WTR. Section 230 of the ERA provides:

“Employees, workers etc.’

‘(3) In this Act ‘worker’ (except in the phrases ‘shop worker’ and ‘betting worker’) means an individual who has entered into or works under (or, where the employment has ceased, worked under)

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker’s contract shall be construed accordingly.’

46. In addition, the drivers argued they also fell under the similarly identical ‘extended definitions’ of worker the NMWA and WTR. Section 34 NMWA provides:

“Agency workers who are not otherwise ‘workers’

(1) This section applies in any case where an individual (‘the agency worker’) –
(a) is supplied by a person ('the agent') to do work for another ('the principal') under a contract or other arrangements made between the agent and the principal; but
(b) is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal; and
(c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.'

47. Finally, the drivers relied on the Section 43K definition of workers under the ERA pertaining to whistleblowing protection, which provides:

"Extension of meaning of 'worker' etc. for Part IVA'

(1) For the purposes of this Part 'worker' includes an individual who is not a worker as defined by section 230(3) but who –

(a) works or worked for a person in circumstances in which –

(i) he is or was introduced or supplied to do that work by a third person, and
(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for 'personally' in that provision there were substituted '(whether personally or otherwise)' …'

48. The ET ultimately ruled that: (1) Any driver who (i) had the Uber App switched on; (ii) was within the territory in which he was authorised to work; and (iii) was able and willing to accept assignments, was, for so long as those conditions were satisfied, working for Uber under a 'worker' contract and a contract within the meaning of both the core and extended definitions. This included time spent waiting for the opportunity to take passengers but not when the App was switched off.\(^\text{15}\)

49. In arriving at this conclusion, the ET looked beyond Uber's contractual documents, which it found to be artificial and failing to reflect the practical reality. Rather, the ET placed significant emphasis on the fact that Uber: (i) through ULL, retains 'sole and absolute discretion' to accept or decline bookings;

\(^{15}\) *Aslam v Uber BV* (n 1), paras 85-99.
(ii) interviews and recruits the drivers; (iii) controls key information (in particular regarding passengers’ surname, contact details and intended destination) and excludes the driver from it; (iv) determines the default route, from which the driver may only depart at his or her peril; (v) fixes the upper limit of the fare; (vi) instructs drivers how to do their work and exercises substantial control of how they perform their duties; (vii) subjects drivers through its rating system to what is effectively a performance management/disciplinary procedure; (viii) determines issues about rebates; (ix) previously offered a guaranteed earnings scheme for drivers; (x) accepts certain risks of loss, such as fraud, which would fall on the drivers had they truly been in business on their own account; (xi) handles complaints; (xii) reserves power to unilaterally amend the drivers’ terms.  

50. In addition, the ET rejected the authorities relied upon by Uber, including those pertaining to mutuality of obligations, as they (i) did not turn on the meaning of a contract for personal service; (ii) they were concerned wholly or very largely with whether there was an ‘umbrella’ contract between the claimants and the respondents as opposed to considering whether, in performing individual services (here driving trips), a claimant is working ‘for’ the putative employer pursuant to a contract; (iii) were otherwise distinguishable on the facts.

51. Aslam is currently under appeal, and has been heard by the Employment Appeals Tribunal. A useful idea of Uber’s litigation strategy could be gleaned from the skeleton argument Uber put forward in the EAT. A summary of the arguments forwarded by Uber is helpfully included at paragraph 4 of that skeleton.

52. In particular, Uber has sought to challenge the ET’s decision on the basis that the ET (i) erred in law in interpreting the written contracts, and failed to direct itself properly as to basic principles of agency law; (2) as a result of its errors of law, wrongly concluded that the written contracts did not reflect the reality of the relationship between the parties, and wrongly concluded that they should be disregarded in their entirety; (3) reached a perverse conclusion that ‘Uber requires drivers to accept trips and/or not to cancel trips’, despite having found as a fact

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16 Ibid, para 92.
17 Ibid para 95.
that drivers who are logged on to the App are at liberty to ignore all notified trips; (4) wrongly took into account, as supporting its finding that the true contractual relationship was that the drivers were workers for Uber, matters which reflected the statutory regulatory requirements on ULL, which were irrelevant to that question; and (5) wrongly ignored binding authority on both the nature of the relationship between private hire drivers and private hire operators, and the need for a minimum mutuality of obligation between employers and workers.
IRELAND

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

53. Research suggests that Uber has not been the subject of employment litigation in Irish courts.

b. How did the court analyse the relationship between the subsidiary and Uber BV?

54. No such litigation could be found.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

55. No such litigation could be found.

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

56. There is no universal statutory definition of an ‘employee’ in Irish law. In respect of unfair dismissal, s1 of the Unfair Dismissals Act 1977 defines an employee as ‘an individual who has entered into or works under … a contract of employment’. This Act specifies that the contract must be one of service. While the test is largely based on the circumstances of each contract, the Irish Courts do examine the reality of the relationship to determine whether an individual is an employee or self-employed contractor. 19 Although the contract itself need not be writing, the employer must provide written terms of employment within two months. 20

b. What duties, very briefly, would this status impose on the employer?

57. Employee status is relatively onerous on employers, particularly in respect of unfair dismissal. Provided that an employee has at least ‘one year’s continuous service with the employer’, that employee may not be dismissed unless there are ‘substantial grounds justifying the dismissal’.\textsuperscript{21} The dismissal must be rooted in the conduct, capabilities or redundancy of the employee as opposed to other grounds unrelated to competency, such as trade union membership, ongoing legal proceedings against that employee, or religious belief.\textsuperscript{22} In addition, any dismissal must be in accordance with fair procedures.

58. Other duties which employers are obliged to respect relate to equal treatment, payment of minimum wage, and adherence to minimum notice periods for termination. It also extends to providing regular rest breaks and holiday pay. There are also tax implications as the employer is liable for certain pay-related taxes.

\textit{c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?}

59. Whilst there has been no litigation concerning Uber in the Irish courts, Uber’s Irish operations are distinct from other jurisdictions. Pursuant to a determination of the National Transport Authority, Uber may only connect existing taxis and limousines, rather than private cars, to users of the App.\textsuperscript{23} In essence, the scope of the operation is limited to the regulated taxi industry. The Irish courts will examine the substance of the relationship between putative employer and employee; for example in \textit{Henry Denny (Ireland) Ltd t/a Kerry Foods v Minister for Social Welfare}, the complainant had been classed as an independent contractor by her employer but this was refuted by the Supreme Court who deemed her to be an employee because she was ‘performing those services for another person and

\begin{itemize}
\item \textsuperscript{21} Unfair Dismissals Act 1977-2015, s 2 & 6.
\item \textsuperscript{22} Unfair Dismissals Act 1977-2015, s 6(2).
\end{itemize}
not for ... herself’. In essence, the courts are prepared to look beyond the formal classification to examine how the relationship operates in reality.

60. It is likely that future litigation pertaining to gig-economy employment will give rise to a reanalysis of the term ‘employee’. Whelan has suggested that ‘mutuality of obligation, control and the ability to make a profit are particularly important factors’ in such re-evaluation.

61. Mutuality of obligation provides that there ‘must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer’.

62. The element of control criterion takes into account the fact that the relationship is one of subordination; namely that the employer exercises control over the employee. The precise degree of control exercised by the employer is no longer wholly decisive. More critical is whether the service is being performed by the individual for herself or himself (rendering them an independent contractor) or on behalf of another (rendering them an employee).

63. Linked to this is the ability to make a profit. Work is more likely to be classed as self-employment if there is a dependence between the profit the individual derives and the efficiency of the work of that individual. That is, if the individual generates more profit the longer and more efficiently he or she works, the work is more likely to constitute self-employment. Similarly, the provision of necessary equipment by the contracting entity, e.g. Uber, is an additional indicator that a relationship is one of employment. In essence, the degree of control, or indeed

26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.
independence of the worker, must be examined in light of the extent of entrepreneurship.\textsuperscript{30}

64. Although Uber’s Irish operations are limited to the regulated taxi industry, Uber retains a significant degree of control over the drivers; for example, Uber supplies the App which links drivers to customers and determines the fare (and by extension, profit-making ability of the driver).\textsuperscript{31} Fulfilment of the mutuality of obligations element is less clear, as although Uber provides drivers with some degree of freedom to turn down work, excessive refusal of jobs can lead to termination.

d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

65. To successfully claim unfair dismissal, a claimant must fall within the scope of term ‘employee’, because protection against unfair dismissal does not extend to independent contractors.\textsuperscript{32} It has not yet been considered whether persons working in gig-economy roles can derive employment rights from ancillary statuses in Ireland.

66. The worker status was introduced into Irish law by s3 of the Protected Disclosures Act 2014 and encompasses atypical workers, including independent contractors. Thus, even if Uber drivers were classed as independent contractors, they may still be able to derive rights as ‘workers’. The rights granted by the Act are limited to whistleblowing and prohibit unfair dismissal related to protected disclosures. However, protection against unfair dismissal more generally is not granted to workers.

\textsuperscript{31} Ibid., 86-88.
Another potential development is that of the false self-employed worker and the fully dependent self-employed worker, both creations of the Competition (Amendment) Act 2017. At present, these categories exist only for collective bargaining purposes. As ‘false self-employment’ may well reflect the nature of relationship between Uber and the drivers, its scope will be given some consideration.

False self-employed persons are defined by fulfilling the following six characteristics:

(a) perform[ing] for a person (‘other person’), under a contract (whether express or implied and if express, whether orally or in writing), the same activity or service as an employee of the other person,
(b) ha[ving] a relationship of subordination in relation to the other person for the duration of the contractual relationship,
(c) …[being] required to follow the instructions of the other person regarding the time, place and content of his or her work,
(d) … not shar[ing] in the other person’s commercial risk,
(e) ha[ving] no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her, and
(f) for the duration of the contractual relationship, form[ing] an integral part of the other person’s undertaking.\(^{33}\)

These six components reflect the reality that certain so-called independent contractors have a relationship akin to that of an employee. It acknowledges that whilst the flexibility afforded to an individual can give the appearance of a contract for service, it often remains the reality that there is a power imbalance where the other party, Uber in this instance, dictates the terms of work. The extension of this status would acknowledge that an Uber driver does not fall within the scope of a traditional employee but is not a wholly independent contractor either.

\(^{33}\) Competition (Amendment) Act 2017, s 2.
SWITZERLAND

QUESTION 1: RESPONDENTS AND JURISDICTION

a. *If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?*

70. Uber does not seem to have been the subject of employment proceedings before a court in Switzerland. However, the Swiss compulsory workplace insurance agency, Suva, has been required to determine whether Uber’s drivers in Switzerland are employees for the purposes of the obligation to pay a mandatory accident insurance premium, and has set out its conclusion in a letter to Uber Switzerland.34 This is worthy of attention because in Switzerland, administrative agencies such as Suva are bound to a general law of administrative procedure,35 and are required to set out their conclusions legally.36 The function is quasi-judicial in nature.

71. Suva made an initial determination that an individual driver was an employee for those purposes, following which Uber appealed to Suva against this decision, in accordance with the ATSG.37 In the appeal, Uber Switzerland submitted that no entity of the Uber Group was liable to pay the premium.38 Suva therefore produced a legal analysis of the employment status of Uber drivers for the purposes of the social security premium obligation.39

72. The question of correct ‘respondent’ arose in a rather roundabout way. Suva had to satisfy itself that, as the local subsidiary, Uber Switzerland was entitled to complain about the earlier determination. According to Art 34. ATSG, ‘parties’

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35 Such challenges (Einsprache) are governed by the general part of social security law (Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts, (‘ATSG’) 830.1).
36 For example: ATSG Arts. 42, 44, 49
37 See n35
39 Letter
for the purposes of complaints concerning social security payments are those who have a right or obligation arising from them.\textsuperscript{40} The obligation to make these payments is an obligation borne by the employer.\textsuperscript{41}

73. Suva answered the question briefly, in a single paragraph. It distinguished between the Uber group (‘\textit{Uber-Gruppe}’) and the Swiss subsidiary, Uber Switzerland GmbH. It turned to the Register of Companies, from which it gleaned that Uber Switzerland had as its business goal supporting the Uber Group in offering transport services and performing associated services. Suva held that the affected business for these purposes was the business which bore responsibility for the provision or transport services for the Uber Group in Switzerland.

74. Suva employed a mode of reasoning that looked at the manner in which Uber Switzerland appeared to an outsider. In its determination, it held that Uber Switzerland was the entity offering the transport services. No reasons are given for this conclusion. Suva held that it was therefore an affected business, and could legitimately bring its complaint.\textsuperscript{42} There are two possible interpretations of this conclusion: either that implicit in this determination is the view that the ‘employer’, for these purposes at least, is Uber Switzerland rather than any other entity in the Uber Group; or that, as a subsidiary which existed to support Uber and took responsibility for its operations in Switzerland, it was entitled to bring a complaint in support of Uber’s operations.\textsuperscript{43}

\textbf{b. How did the court analyse the relationship between the subsidiary and Uber BV?}

75. As set out above, there was no detailed legal analysis of the relationship. The only (sometimes implicit) conclusions were that (a) for these purposes there was a difference between subsidiary and parent and (b) the subsidiary appeared to be the entity offering the service, and so could legitimately raise a complaint for these purposes.

\textsuperscript{40} Art. 34 ATSG
\textsuperscript{41} Art. 91 \textit{Bundesgesetz über die Unfallversicherung} 832.20
\textsuperscript{42} Letter, 2
\textsuperscript{43} The latter interpretation is less likely, but Suva uses the term ‘\textit{mitbetroffener}’, suggesting that there could be some other affected entity.
c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

76. This question has no application to the Suva determination.

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

77. In Switzerland, there is no single definition of employee. Private law and public law are strictly divided in Switzerland,44 and labour law sits across them both. In addition, individual statutes dealing with various aspects of employment have their own tests for employee.

78. In private law, an employee is someone who is bound to another by a contract of labour.45 A contract of labour is defined in Art 319 OR as a contract by which the employee agrees to performance in the service of the employer, for a wage, for a limited or unlimited time. A contract of labour will therefore exist where:

(a) A private law contract has come into effect;
(b) there is a promise of performance of work (Arbeitsleistung)46;
(c) the contract must be for a defined or undefined period of time;
(d) the contract must provide for the payment of salary;
(e) the work must take place in the service of the employer. This is marked out by a relationship of dependency (Abhängigkeitsverhältnis). This is assessed by reference not only to the underlying terms, but also to the practical implementation of the contract.

79. In addition to the comprehensive power to control and direct work, there are a number of indicators of employment (Indizien), including: limited freedom to organise the work; defined working hours; a set workplace; not bearing business

44 Berenstein, Mahon and Dunand, Labour Law in Switzerland (Wolters Kluwer 2010), 38
45 10. Titel, Obligationenrecht I (OR)
46 Work is defined as any regular performance of physical or mental labour geared towards the satisfaction of certain requirements. The promise is of work and not the outcome of that work, which would be a contract for services (Werkvertrag).
risk; whether materials are provided or must be self-resourced; whether holidays can be claimed; subordination in the workplace; prohibitions on competition; regular salary payments; and probationary periods. Of lesser relevance is whether public employment law (and in particular social security law, which was in issue in the Suva determination) define the relationship as one of employment.  

80. In public law, an employee is every person in an enterprise except the employer.  
Swiss law defines an enterprise as existing where an employer permanently or temporarily employs one or more workers. There is no need for a private law contract of labour to exist for public labour law to apply.

b. What duties, very briefly, would this status impose on the employer?

81. The employer’s duties in private law include but are not limited to the following general duties: to protect and respect the person and individuality of the employee (this clause is applied widely by courts), including not to discriminate; to provide the tools and materials for work; the provision of a certificate stating the length and nature of work; duties to protect health and safety (which also form part of public law, in nearly identical terms); and protection from ‘abuse of the right to terminate the contract’ (essentially, unfair dismissal).

82. In public law, employers have obligations concerning working time, social security, and non-discrimination. Public law employment rights can be enforced against the employer by way of the Rezeptsklausel, Art. 342 OR.

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47 Rehbinder, Schweizerisches Arbeitsrecht (Stämpfli Verlag AG Bern 1999), 39
48 Berenstein, Mahon and Dunand, n44, 84
49 Art. 1 Arbeitge setz
50 Berenstein, Mahon and Dunand, n44, 84
51 Art. 328 OR
52 Berenstein, Mahon and Dunand, n44, 112
54 Art. 327 OR
55 Art. 330 OR
56 Art. 328 OR
57 Berenstein, Mahon and Dunand, n44, 115
58 Berenstein, Mahon and Dunand, n44, 150
59 Rehbinder, n47, 192
60 See, generally, Gächter and Tremp, Social Security Law in Switzerland (Wolters Kluwer 2014)
61 Rehbinder, n47, 199
62 Rehbinder, n47, 186
c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

83. The only matter in which the question has arisen is the Suva determination set out above. In resolving the appeal against the initial determination, it fell to Suva to determine whether Uber had to pay the mandatory employment premium for its drivers. According to Art. 91 Bundesgesetz über die Unfallversicherung, this obligation would arise if Uber drivers were employees (engaged in "unselbständiger Erwerbstätigkeit"), not independent contractors (engaged in "selbständiger Erwerbstätigkeit"). This does not depend on the legal nature of the contract, but the factual and economic circumstances, in particular whether business risk had been adopted by the drivers (through establishment, investment, and exposure to liabilities), and whether they were regularly under direct instruction.

84. Uber first sought to persuade Suva, in its objection to the initial determination, that it was not analogous to traditional taxi companies, the drivers of which are generally considered employees. Uber sought to argue that it had none of the usual infrastructure, such as parking places, a taxi depot, or personnel to organise the taxi service.

85. Suva rejected this argument, and held that taxi companies could take many forms. The manner in which orders for taxi services were received (through an App, for instance), would not affect any existing facts related to the provision of transport or the social security status of the drivers. Uber, much like a traditional taxi company, brings together supply and demand, connecting driver and passenger. Physical indicators, such as those on which Uber sought to rely in their argument, were not determinative. However, recognising that the general rule regarding taxi companies might have exceptions, Suva proceeded to test the relationship between Uber and its drivers, as set out in the Partner Conditions (Partnerbedingungen) and Contract for Service (Dienstleistungsvertrag), in accordance

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63 See Art. 10 ATSG, which sets out that an employee for the purposes of social security law is a person in a dependent ("unselbständiger") position at work, which they do in exchange for a salary.
64 Letter, 2
65 Letter, 3 ff
with the two core criteria for employment set out in case law: lack of organisational independence, and lack of business risk.

**Relationship of Dependency**

86. On the question of whether there was a relationship of dependency, Suva considered three factors: subordination; whether the duty was personal; and the prohibition on competition and obligation to be present.

**Subordination**

87. Uber submitted that drivers do not take direction from Uber, and are free to arrange their work as they see fit. Suva did not agree, identifying a number of aspects of the contracts which indicated the subordinate position of the drivers:

- Uber has a general reservation of all rights not explicitly granted to the driver.
- Uber decides which details about the driver the rider sees.
- Uber decides what reviews and comments about the driver are made public (whereas in a self-employed enterprise, this would be the self-employed person’s decision).
- Uber has a right to hand over information about drivers to riders or authorities in the event of a complaint.
- The drivers promise not to say negative things about Uber publicly.
- Uber sets the price.
- Uber requires payment through its own mechanism by credit card, so the driver and rider cannot agree on a different mode of payment.
- Uber takes commission on every ride.
- Uber imposes requirements on the upkeep and state of the rider’s car, and quality requirements on both the car and driver.
- Uber tracks the driver through GPS, and it is for Uber to decide what it does with that data, not the driver.
- Drivers are required to wait ten minutes for riders, and may not use their details for any purpose except the provision of the service.
- They may not stop or pick up any other passengers.
- Uber runs an appraisal system to ensure drivers are making enough money.
• Uber controls geographic information about the driver.
• The driver is subject to requirements of professionalism, service and politeness, as well as training requirements set by Uber.
• The driver must send important documents like a copy of their licence to Uber.
• Uber has sole power to waive the cost of journeys.
• Uber determines its own service charges and removes them from the driver’s pay before it is passed on to the driver.
• Uber imposes delay fees on riders, so the driver cannot decide for themselves what to do in such a situation.
• Uber provides and determines the content and presentation of the receipt.
• The app, services and data are all Uber’s property.
• The drivers sign a confidentiality agreement.
• Uber requires drivers to sign up to certain insurance policies and supply them with copies of the certificates.
• Uber has control over changes to terms, information and documents which Uber might require of the drivers.
• Uber has control over when work may be subcontracted.

88. In short, Suva concluded that Uber exercised control over every step of the process, and was in charge of grievance redressal: comprehensive (umfassende) control over the driver. Suva also pointed out that Uber could enforce these directions by the unilateral termination of a driver’s account with the App, and thus control the flow of business.

Personal Duty
89. Uber also submitted that drivers could sub-contract their business and employ their own personnel, bringing them outside the definition of employee. However, Suva noted that Uber sets out under exactly what conditions a third party can be engaged to provide the work. It also pointed out that such a question cannot be answered in advance by reference to the terms of the contract, and that in reality drivers do not subcontract and must therefore perform the work themselves.
Prohibition on Competition/ Duty of Attendance

90. Suva noted that drivers were prohibited by contract from working for any similar company or providing any similar product. It was not persuaded by Uber’s suggestion that the fact this prohibition did not extend to all forms of taxi service was sufficient to amount to independence.

91. As regards the duty of attendance, Suva was not persuaded by Uber’s submission that the freedom of drivers to turn down work amounted to independence, comparing it to on-call work: the duty to attend only arises once a call is received. Suva also pointed out that Uber expected regular, not merely sporadic, use of the App by drivers, who would otherwise be subject to sanction.

92. On the basis of these three factors, Suva concluded that the indicators of employment were all present in the case of Uber drivers.

Business Risk

93. Suva considered whether Uber drivers bore the hallmarks of independent contractors: taking on liability for expenses and investments, risking loss, and dealing in their own name.

Expenses and Investment

94. Suva considered that, in this case, the question of independence mattered more than business risk, simply because the levels of required investment to participate were low. Suva was not persuaded that the purchase of a car amount to investment for these purposes: the private use of a car was reason enough to buy one, without it counting as an investment for these purposes. The same applies to smartphones, vehicle maintenance and drivers’ licences.

Risk of Loss

95. Suva was not impressed by Uber’s submission that drivers bore the risk of damage to their cars, rejecting that such loss would amount to business loss in the relevant sense. Suva looked to Uber’s control over the way in which money was taken: through a credit card system, through Uber. A contractor would surely, according to Suva, be able to set their own price and method of payment.
Dealing in Own Name

96. Suva also pointed out that it was Uber’s name, and not the name of the driver, which won business: Uber operated a system for connecting riders not with individual drivers but with a pool of drivers. Uber is clearly the service provider from the customer’s perspective. Uber is responsible for marketing and advertising and therefore winning new customers.

97. On the basis of the above factors, Suva concluded that none of the indicators of business risk, which would have indicated that drivers were independent contractors, were present.

98. Therefore, in conclusion, both because of the specific rules concerning taxis and the application of the more general test, Suva concluded that Uber drivers were employees, and rejected Uber’s appeal against the original determination.

d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

99. This question is not applicable to the Swiss context.
FRANCE

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

100. So far, there do not seem to be publicly available rulings on the status of Uber drivers in France. Several judgments have been issued on administrative law matters. In most of these cases, both local subsidiary Uber France SAS and Uber BV were named as respondent.66 However, two cases do not follow this pattern.

101. In January 2017, the Court of Cassation confirmed a Court of Appeal judgment that held Uber France SAS guilty of misleading commercial practices.67 Uber France SAS was the sole respondent. The Court considered that the misleading advertisements in question had been distributed in the name and on behalf of Uber France SAS. It only referred to Uber BV as the crucial entity for the transport activities themselves, and not the practice of advertising.

102. In March 2017, the Paris Court of Appeal ruled on the legality of searches of Uber France SAS premises. This case was brought in the context of fraud investigations against Uber BV.68 Uber argued that the searches were illegal, as the local subsidiary’s role was limited to mere tasks of support, marketing and assistance. The Court did not accept this argument. It concluded from the involvement of Uber France SAS in the recruitment and contracting process that in practice the local subsidiary’s tasks surpassed those foreseen in its articles of incorporation.

b. How did the court analyse the relationship between the subsidiary and Uber BV?

103. The judgments did not extensively cover the relationship between Uber France SAS and Uber BV, apart from the fact that both entities are part of the same Uber group. The 2017 judgment of the Paris Court of Appeal did however mention the existence of a service contract between Uber France SAS and Uber BV.\(^69\)

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

104. In the cases reviewed, generally the jurisdiction of the court was implicitly assumed rather than questioned. However, in the judgment of the Court of Appeal mentioned above, the Court stated that several findings lead to the presumption that Uber BV carried out a commercial activity in France.\(^70\) Those findings mainly related to activities of local subsidiary Uber France SAS. Thus, it seems that the strong link between Uber BV and Uber France SAS provided the basis for the Court’s jurisdiction over Uber BV.

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

105. According to the main doctrine, an employee is a person undertaking work for remuneration for another person (employer) in a relation of subordination.\(^71\) The French Labour Code does not include a definition of an employment contract.

\(^69\) Judgment of the Paris Court of Appeal, 8 March 2017, n° 027/2017.
\(^70\) Ibid.
b. **What duties, very briefly, would this status impose on the employer?**

106. Employers must respect employee rights, such as weekly rests and maximum duration of working hours, paid vacation and holiday leave, guarantees of wage payment and minimum wage, medical leave, leave for family, union membership and period of notice or compensation in case of dismissal.

c. **Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?**

107. Two separate proceedings are especially relevant in this regard. First, social security and criminal claims were filed by the URSSAF (the French organization for the collection of social security and family benefit contributions). Second, the Labour Court in Paris addressed the status of a contract between a driver and Voxtur SAS, the company behind the LeCab app.

108. First, in May 2016, the URSSAF initiated proceedings to obtain employee status for Uber drivers. The URSSAF filed a claim under social security law (by analogy applicable to employment law) with the Tribunal for Social Security Affairs and a criminal claim (for abuse of status) with the Public Prosecutor in Paris. 72

109. In order to succeed in its claim that the Uber contracts were contracts of employment, the URSSAF had to prove a relationship of subordination between Uber and its drivers. In the past, the French Court of Cassation had already recognised such a relationship in the context of taxi drivers subjected to strict and numerous obligations and instructions imposed by the taxi company. 73

110. According to the URSSAF, this link of subordination is sufficiently clear. Uber recruits and trains drivers and claims a fixed percentage of every commission paid for a transport service. Drivers are not free to determine their transport routes and are held to account by Uber. 74

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111. So far, the claims filed by URSSAF have not been successful. The outcome of the criminal proceedings remains unclear. The social security claim was dismissed by the Tribunal for Social Security Affairs. However, it is crucial to note that the Tribunal did not reject the case on its merits. Rather, the dismissal was based on the failure of the URSSAF to share crucial evidence with Uber, that led to a breach of defendant rights. It is expected that the URSSAF will file a new complaint shortly.

112. Second, in December 2016, the Labour Court in Paris re-classified a series of contracts of a driver using the App LeCab with Voxtur SAS, a French company operating a very similar service to Uber. The driver was considered to be an employee subject to an employment contract, because he did not have the freedom to acquire his own customer base or to engage with third parties. Moreover, if the driver insufficiently used the app, Voxtur SAS could sanction him by terminating the contract. The principal question has now become whether this ruling will successfully be relied upon by Uber drivers in future court cases or not.

   d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

113. This question is not applicable to French law.

BELGIUM

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

114. Research has not identified any court cases so far where Uber was the subject of employment court proceedings in Belgium. However, taxi companies have instigated injunction proceedings on unfair competition grounds. The determination of the respondent by the court in these cases could be applied by analogy to employment litigation. Two seemingly contradictory judgments of the Brussels Court of Commerce are also relevant and mentioned below.

115. On the one hand, in an interlocutory judgement, the Brussels Court of Commerce ruled that Uber, as a matter of fact, offers taxi services and is thus subject to the same rules that govern taxi services. The judgment referred to Raiser Operations BV, Uber International BV, Uber BV and Uber Belgium BVBA as respondents, jointly addressed as Uber BV et al.. Despite remarking that the local subsidiary merely offered supportive services of a commercial nature, the court did not exclude Uber Belgium BVBA from the defending parties. The judgment briefly noted that local subsidiary Uber Belgium BVBA is part of the larger Uber group.

116. On the other hand, the same Commercial Court in Brussels ruled that an unfair competition claim by a taxi company against Uber Belgium BVBA was unfounded for the reason that the plaintiff failed to prove that the local subsidiary was actively involved in the allocation of ride requests. The court decided that the mere fact that Uber BV and its local subsidiary shared a common trade name and managers was insufficient to conclude that Uber BVBA was actively involved in

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78 Judgment of the Dutch Chamber of the Brussels Commercial Court, 23 September 2015, A/14/52859.
this allocation. The plaintiff’s claim against Uber BV, contrarily, was upheld by the court.

b. How did the court analyse the relationship between the subsidiary and Uber BV?

117. In neither of the cases described above did the court thoroughly analyse the relationship between local subsidiary Uber Belgium BVBA and Uber BV. The judgments merely mention that both entities are part of an international Uber group.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

118. In both cases, the territorial jurisdiction of the court was implicitly assumed and went unchallenged.

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

119. Under Belgian labour law, an employee is a person who, for remuneration, undertakes to work for another person (employer) under his authority. The requirement of employer authority or subordination constitutes the main difference between an employment contract and a contract for services on a self-employment basis.

b. What duties, very briefly, would this status impose on the employer?

120. Under social security law, employers are required to pay social security contributions on behalf of their employees.

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Moreover, employers have to respect the labour law provisions granting special rights to employees. These rights include restrictions on working hours and time, minimum wage and wage payment protection, sick leave, holiday entitlements, statutory rights for parents and caretakers, notice period or compensation in case of dismissal, etc.

c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

Currently, only one employment law complaint has been filed in Belgium and it is uncertain whether it will be heard by a judge. National transport trade union Union Belge des Ouvriers du Transport (UBOT) filed a criminal complaint with the Labour Prosecutor in June 2015. The Labour Prosecutor has discretionary powers to decide whether or not to initiate criminal proceedings. The claim accuses Uber of relying on a false self-employment status. According to an UBOT press statement, Uber drivers receive remuneration and are therefore employees. It is likely that the formal complaint thoroughly addresses the question of subordination, considering that this is the crucial criterion in the distinction between employment and self-employment. However, the text is not public.

Theoretically, arguments under both Belgian labour and social security law could support a claim that Uber drivers are employees of Uber for the purposes of employment law.

First, it is plausible that the social security scheme for employees also applies to Uber drivers regardless of the question whether they are to be considered as employees under labour law. This scheme is applicable to employees and to certain categories of persons who undertake work under conditions similar to those of a genuine employment contract. One of these categories consists of

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81 Article 2 § 1° of the Law of 27 June 1969 on Social Security for Employees.
persons supported by undertaking services carrying out passenger transport.\textsuperscript{82} Uber drivers could arguably be covered by this description.

125. However, the assimilation of persons engaged in passenger transport with employees is excluded for taxi drivers in possession of a taxi operating license.\textsuperscript{83} Considering that the Brussels Commercial Court ruled that Uber services \textit{de facto} constitute taxi services, the same operating license requirement would apply to Uber drivers, thus also excluding the application of art. 3, 5\textsuperscript{°}bis of the implementing Royal decree on Social Security.\textsuperscript{84}

126. Moreover, the Federal Public Service for Social Security conducted a legal review at the request of the Federal Secretary of State for Social Fraud and concluded that Uber drivers are self-employed rather than employees under social security law. The review has not been published and it is unclear on what grounds the conclusion was reached.

127. Secondly and more importantly, several arguments support the position that Uber drivers are employees under labour law itself (and therefore automatically under social security law as well). Uber refuses to refer to its drivers as employees. However, the Court of Cassation has consistently held that the fact that the parties have purported to classify their agreement as one between independent contractors does not establish a legal presumption that the contract concerned is not an employment contract.\textsuperscript{85} The decisive factor is the presence or absence of a relationship of subordination. Does the presumed employer have the power to exert authority over the presumed employee? If so, the self-employment contract is in reality an employment contract and will be duly reclassified as such in court.

128. The Labour Relations Act of 27 December 2006 introduced general criteria to determine this subordination: party intent; freedom to organise work(time); and

\textsuperscript{82} Article 3 5\textsuperscript{°}bis of the Royal decree of 28 November 1969 implementing the Social Security for Employees Act of 27 June 1969.

\textsuperscript{83} Article 3 5\textsuperscript{°}ter of the Royal decree of 28 November 1969 implementing the Social Security for Employees Act of 27 June 1969.

\textsuperscript{84} Interlocutory Judgment of the Dutch Chamber of the Brussels Commercial Court, 9 June 2016, A/15/03011 – A/15/03239.

\textsuperscript{85} Judgment of the Belgian Court of Cassation, 5 February 2007, A.R. S.06.0024.N.
the possibility of hierarchical control. Uber imposes sanctions for non-compliance with instructions (e.g., in the situation where a user requests a reimbursement and the driver concerned is unable to explain why he did not follow the indicated route). Uber drivers are not allowed to subcontract their assignments. Uber deactivates the accounts of poorly rated drivers. Uber collects an enormous amount of data. These elements might indicate that Uber drivers are not at liberty to freely organise their work and that Uber does exercise hierarchical control, or at least has the possibility to do so.

Moreover, for certain categories the same Labour Relations Act introduces a presumption of subordination and employment when five or more out of nine specific criteria have been fulfilled. This was especially done to address the problem of false self-employment arrangements. The rule applies to specific sectors, including passenger transport. Thus, Uber divers claiming employee status could prove either the existence of a relationship of subordination with Uber or the fulfilment of at least five of the specific criteria to reverse the burden of proof.

d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

130. This question is not applicable to Belgian law.

86 Article 333 §1 of the Labour Relations Act of 27 December 2006.
87 Article 337/1 3° J° 337/2 §1 of the Labour Relations Act of 27 December 2006; Article 3 of the Royal decree implementing article 337/2 §3 of the Labour Relations Act of 27 December 2006.
88 These criteria are:
- Absence of financial or economical risk;
- Absence of responsibility or decision power with regard to the financial means of the undertaking;
- Absence of decision power with regard to the undertaking’s procurement;
- Absence of decision power with regard to the undertaking’s price policy;
- Absence of a performance obligation with regard to the agreed work;
- Guaranteed fixed remuneration;
- Absence of employer status;
- Absence of appearance of undertaking;
- Work environment unconnected to personal sphere or provided by contract party (with regard to certain taxi drivers, work environment is to read as vehicle).
ITALY

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

131. In Italy, Uber has only been subject to competition proceedings thus far. However, in all of these proceedings defendants were jointly Uber International BV, Uber International Holding BV, Uber BV and Uber Italy SRL (the local Uber subsidiary).  

b. How did the court analyse the relationship between the subsidiary and Uber BV?

132. Judges have stated that Uber Italy SRL appears to be directly involved in the development and promotion of the service Uber POP on national territory. This can be detected from both the assistance Uber Italy SRL provides to drivers and from public declarations made by Uber Italy SRL’s general manager.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

133. No relevant litigation was discovered.

89 Tribunal of Milan, n. 16612, 25 May 2015, and Tribunal of Rome - 7 April 2017
QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

134. Art 2094 of the Civil Code defines an employee as a person who is obligated to collaborate in a business for a salary, by offering intellectual work or manual labour under the authority and direction of an employer.

135. The primary element to determine whether a certain relationship can be subsumed under the above definition is the hetero-determination of the performance, i.e. another person determines the nature of the work and organises it.

136. However, judges have developed a number of subsidiary indicia, such as inclusion of the person in the business organisation, time constraints, exercise of disciplinary authority by one of the parties, exclusivity of the relationship, work intensity, relevance of the performance to the production cycle, and whether there is a fixed salary.

b. What duties, very briefly, would this status impose on the employer?

137. The employer is obliged: to pay remuneration proportionate to the quantity and quality of the job and sufficient to allow the employee and his/her family a free and respectable life; to guarantee working time does not exceed that required by law; to guarantee workplace safety and the mental and physical health of employees; to guarantee a weekly rest period of at least 24 consecutive hours; to guarantee the minimum annual leave required by law; to allow student employees special dispensation to study; in the event of disease or work related injury, to save the employee’s position for the time required by law; to assure 15 days paid leave in case of the employee’s marriage; not to terminate the employment contract from the moment of the beginning of gestation to the end of the first year of an employee’s child; to assure the maternity paid leave guaranteed by law; to respect union activities conducted by employees; to respect employees’ right to strike; and to guarantee equality between men and women.
c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

138. No such case could be found.

d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

139. This question is not applicable to the Italian context.
THE NETHERLANDS

QUESTION 1: RESPONDENTS AND JURISDICTION

a. *If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?*

140. So far, litigation against Uber in the Netherlands has been limited to the sphere of administrative law. The Dutch Trade and Industry Appeals Tribunal (CBb) has twice ruled on the legality of administrative sanctions imposed after alleged violations of the Act on Passenger Transport. It is important to note that Uber BV is integral to many of the group’s operations in Europe and beyond, and so is likely to have been named in quite a few different lawsuits around the world.

141. In 2014, the Tribunal rejected a request for preliminary measures by Uber International BV.90 Uber International was the only respondent and argued, among other things, that the sanctions concerned had been imposed erroneously on Uber International BV. The Tribunal rejected this claim. It held that, even though the infringement was committed by the international Uber group, Uber International BV had the power to prevent it. Local subsidiaries were not mentioned as potential respondents.

142. In 2017, the Tribunal ruled on sanctions imposed on both Uber International BV and Uber BV (separately).91 Both entities were joined as respondents. It was once again argued that the administrative decision concerning Uber International BV was directed at the wrong legal person. The Tribunal rejected this claim. The judgment does not extensively state the reasoning behind this rejection and merely refers to the Uber International BV and Uber BV’s general conditions.

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90 Judgment of the Dutch Trade and Industry Appeals Tribunal, 8 December 2014, AWB 14/726.
b. How did the court analyse the relationship between the subsidiary and Uber BV?

143. In neither of the cases described above did the court thoroughly analyse the relationship between Uber International BV and Uber BV. The judgments mention that both entities are part of a larger Uber group and that Uber International BV is Uber BV’s sole shareholder.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

144. In both cases, the jurisdiction of the court was implicitly assumed rather than questioned. The 2017 judgment mentions that both respondents have their registered office in Amsterdam.

**QUESTION 2: EMPLOYMENT RIGHTS**

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

145. Under Dutch labour law, an employee is a person who undertakes to perform work for remuneration in the service of another person (employer) during a given period.\(^\text{92}\) This requires a relation of subordination. This definition broadly applies under labour law, social security law, and tax law.

b. What duties, very briefly, would this status impose on the employer?

146. An employer must comply with several employee rights. These include wage payment rights (minimum wage, payment modalities), payed holidays, (paid) family and medical leave and notice period or compensation in case of dismissal.

\(^{92}\) Article 7:610 of the Dutch Civil Code.
c. *Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?*

147. No case specifically on this point seems to have been initiated in the Netherlands yet. However, recent case law and statutory provisions may indicate an affirmative answer to this question in the future.

148. A service contract can be reclassified as an employment contract if this reflects the actual relationship between the parties concerned. The party invoking the employment relationship carries the burden of proof. In practice, the main issue to be determined is whether the alleged employee finds himself in the service of the alleged employer: in other words, is there a relationship of subordination? Courts base their assessment on all the circumstances of the particular case. Party intentions are important, but not decisive, and can be overruled when the practical execution of the agreement leads to a different result. Among other things, the possibility of binding instructions and sanctions, the absence of freedom to determine one’s own working conditions and the requirement of permission for certain tasks are important indicators of subordination.

149. The recent judgment of the Trade and Industry Appeals Tribunal discussed under the first question might be of relevance here. The question arose whether Uber International BV and Uber BV could, alongside four UberPOP drivers caught in the act, be sanctioned as accessory to a violation of taxi legislation. The Tribunal considered that they could. It found that Uber makes a substantial material and intellectual contribution and is not a mere technological facilitator. In this regard, the judgment mentions several points. Drivers and cars must fulfil Uber requirements and Uber itself verifies this. Uber grants access to a special App and occasionally even provides drivers with an iPhone. Uber interferes with demand and supply and rate setting. The agreement between driver and user is determined by Uber. Fares are paid to and partially kept by Uber.

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94 *Judgment of the Dutch Central Board of Appeal*, 13 April 2016, 14/5268 WW.
150. However, the Tribunal did not explicitly hold that Uber is to be considered as an employer and drivers as its employees, which was beyond the scope of the specific case. These statements could nevertheless be interpreted as indications of subordination in other proceedings.

151. Thus, Uber drivers claiming employee status could potentially use the 2017 judgment to construct an argument in favour of a link of subordination. The elements stated by the Tribunal could support the position that Uber issues binding directives and leaves drivers no freedom to determine their own work conditions.

152. In some cases, the Civil Code introduces a legal presumption of an employment contract. An important presumption serves to protect flexible workers. A person undertaking remunerated work in the service of another person and working during a subsequent period of three months either one or more hours a week or at least twenty hours monthly, is presumed to be an employee. The other party can rebut this, but carries the burden of proof. In practice, it is highly likely that many Uber drivers fulfil this condition. As a counterargument, Uber might argue that drivers’ contracts do not state such a minimum working time. However, the law looks to the practical reality of the situation: the clauses in the contract are not determinative. The text of the law suggests that it is sufficient for the Uber driver to have in practice undertaken the required amount of work during the three-month period.

153. One can conclude that, although the Dutch courts have not ruled on the possible employee status of Uber drivers, an affirmative judgment might follow in the future. Claimants could bring forward arguments under Dutch labour law amounting to sufficient proof of the existence an employment contract. In some cases, moreover, the employment relationship could be legally presumed.

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96 Article 7:610a of the Dutch Civil Code.
d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

154. This is not applicable to the Dutch context.
THE EUROPEAN UNION

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

155. There have only been two cases at Union level concerning Uber,97 neither of which concern specific employment proceedings against Uber at EU level to date. However, employment matters were alluded to in the opinion of the Advocate General in Asociación Profesional Elite Taxi v Uber Systems Spain SL,98 in which Uber sought to argue (in essence) that EU law precluded the imposition of sanctions for running a taxi service without a licence, an argument premised on Uber’s repeated assertion that it merely provides a digital introduction service, as opposed to transportation services.

b. How did the court analyse the relationship between the subsidiary and Uber BV?

156. In Asociación Profesional Elite Taxi v Uber Systems Spain99 the Advocate General did not analyse the relationship between Uber BV and the subsidiary directly. Uber System Spain argued that it is Uber BV that runs the Uber App in the European Union and therefore the sanctions in question should be addressed against Uber BV. The Advocate General considered that the question of who should be the addressee of possible injunctions is ‘a question of fact’ and therefore for the national court to decide.100 For the purposes of his opinion, the Advocate General ‘assumes’ that the ‘company Uber BV operates the Uber application in the European Union’.101

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98 C-434/15
99 C-434/15
100 C-434/15 [17]-[18]
101 C-434/15 [18]
c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

157. Uber BV was not a respondent in either of the cases.

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

158. For the purposes of Union law, an ‘employee’ is a specific formulation of the wider EU concept of ‘worker’. Though there is a large body of EU law that regulates labour law and industrial relations there is no overarching single definition of ‘employee’ or ‘worker’ in EU law. The definition of ‘employee’ in directives is frequently, though not exclusively, left to the domestic law of the member state. The effect of this is that the protection accorded to ‘employees’ in European law is not absolutely uniform, but depends on the oscillation between the domestic law definition, specific definitions within certain directives, and the emerging (and increasingly uniform) notion of ‘worker’ at Union level that exists separately from national law definitions.

159. For example, the Acquired Rights Directive (as consolidated by Directive 2001/23) relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses defines as ‘employee’ as: any person who, in the Member State concerned, is protected as an employee under national employment law.'

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102 https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/employee
103 https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/employee
104 such as the Working Time Directive 2008/88/EC
105 See paragraphs 154 to 160 of this report for an overview of the jurisprudence regarding a more uniform definition of ‘worker’ at EU level. Where a directive does not define, or does not explicitly define, ‘worker’ the more uniform approach of the Court has more traction. See Nicola Kountouris, The Concept of Worker in European Union Labour Law: Fragmentation, Autonomy and Scope, Industrial Law Journal 2017 (https://doi.org/10.1093/indlaw/dwx014)

161. This reliance on domestic law reflects the EU’s role of harmonising rather than unifying labour law in the Union. However, the reliance on the law of the Member States is not absolute. Where the definition of ‘worker’ in national law is too narrow to implement the directive, it may be invalid. This has recently been expressed in the terms that a directive that refers to the national law definition of ‘worker’ cannot be interpreted as a ‘waiver on the part of the EU legislature of its power itself to determine the scope of that concept’ for the purposes of that directive. Whatever discretion is given to the member state in relation to the definition of ‘worker’, it is not unlimited and cannot be taken so far as to ‘jeopardise the achievement of the objectives pursued by the directive.’ Furthermore, where employment rights are accorded to the self-employed by EU law, this in effect overrides the national definition.

162. EU-wide definitions of ‘worker’ exist for the purposes Article 45 TFEU (free movement of workers) and Article 157 TFEU (equal pay for men and women). In contrast with the area of free movement, the traditional view of the Court was that national law predominantly defines ‘worker’ for the purposes of labour law directives.

163. The Court has insisted from the outset that there is an EU definition of ‘worker’ that is independent of national law, in matter of free movement to ensure consistent application of these fundamental EU principles. It is important to highlight that ‘worker’ has been defined by the Court rather than in the Treaties because the Court uses different terminology depending on the treaty provision.
under consideration,\textsuperscript{115} so there are different definitions of ‘worker’ for different contexts and different parts of EU law.\textsuperscript{116} A full exposition of every such context is beyond the scope of this note.

164. In \textit{Lawrie-Blum}\textsuperscript{117} the Court held that the ‘essential feature of an employment relationship that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’\textsuperscript{118} It is immaterial whether the employment is full time or not\textsuperscript{119} but it only applies to ‘effective and genuine’ activity, and not something that could be considered ‘marginal and ancillary’.\textsuperscript{120} A person who pursues these economic activities is to be treated as a ‘worker’.\textsuperscript{121} The \textit{motive} for pursuing these economic activities is rarely relevant.\textsuperscript{122}

165. The economic activity will qualify as ‘employment’ for the purposes of article 45 TFEU (and not self-employment under article 49 TFEU) if there is a relationship of ‘\textit{subordination}\textsuperscript{123}’ between the worker and the employer.

166. For the purposes the right secured by Article 157 TFEU (equal pay for men and women), the Court has held that a worker is a person who ‘performs services for and under the direction of another person in return for which he receives remuneration.’ (\textit{Allonby} para 67). This does not extend to the self-employed – those who are not in a relationship of ‘\textit{subordination}’ with their employer.\textsuperscript{1} Nevertheless, the Court in \textit{Allonby} held that the formal classification under national law did not necessarily mean that a person was not a worker within the meaning of the equal pay provisions in the Treaty. In assessing whether a person was genuinely independent, the Court pointed to several markers, including whether there was any limitation on their freedom to choose their timetable and the place and content of their work. The Court stressed that ‘the fact that no

\begin{footnotesize}
\begin{enumerate}
\item C-85/96 \textit{Martinez Sala v Freistaat Bayern} [1998] ECR – I-2691 [31]
\item C 256/01 \textit{Allonby v Accrington} and \textit{Rossendale College} [2004] ECR I-873
\item C – 66/85 \textit{Lawrie –Blum v Land Baden-Wurttemberg} [1986] ECR 2121 [17]
\item \textit{ibid}
\item C 53/81 \textit{Levin v Staatssecretaris van Justitie} [1982] ECR 1035 [16]
\item C344/87 \textit{Betray v Staatssecretaris van Justitie} [1982] ECR 1035 [16] – in the case the claimant was working with drug addicts as part of a recovery programme which was not meeting any real economic need
\item C - 337/97 \textit{Meeuwen v Hoofddirectie} [1999] ECR I - 3289
\item C413/01 \textit{Ninni-Oraische v Bundesminister} [2003] ECR I 13187
\item C - 268/99 \textit{Jany v Staatssecretaris van Justitie} [2001] ECR I 8615
\end{enumerate}
\end{footnotesize}
obligation is imposed on them to accept an assignment is of no consequence in that context’ (Allonby para 65).

167. The traditional position in Danmols\textsuperscript{124} has been significantly departed from in the context of EU labour law. In Union Syndicale Solidaires Isère\textsuperscript{125} the Court said that ‘worker’ has an autonomous EU meaning for the purposes of the Working Time Directive and this is defined in accordance with paragraphs 16 and 17 of Lawrie-Brum.\textsuperscript{126}

168. Similarly, when interpreting the Collective Redundancy Directive 98/59, which does not explicitly leave the definition of worker to national law, the Court held in Commission v Italy\textsuperscript{127} that exclusion of people working for a not-for-profit employer from the definition of ‘worker’ is an incomplete transposition of the Directive.

169. More recently, in Betriebsrat der Ruhrlandklinik\textsuperscript{128} the Court considered that the concept of ‘workers’ for the purposes of Directive 2008/104 is not limited to people who have a contract of employment\textsuperscript{129} and the reference to the national definition is not to be construed as a ‘waiver on the part of the EU legislature of its power to itself determine the scope of that concept’\textsuperscript{130} but merely to clarify that the Member State is free to determine the meaning of ‘worker’ for the ‘purposes of national law.’\textsuperscript{131} Thus, the reference to national definitions within labour law directives do not determine the issue, but it cannot be said that the approach in Betriebsrat is ‘deployed consistently across all directives that reserve the scope of the definition to Member States’.\textsuperscript{132} Fragmentation of the definition of ‘worker’, though that definition is becoming more uniform, remains.\textsuperscript{133}

\textsuperscript{124}C- 105/84
\textsuperscript{125} C-428/09
\textsuperscript{126} Union Syndicale Solidaires Isère [28]
\textsuperscript{127}C-32/02
\textsuperscript{128} C216/15
\textsuperscript{129} C216/15 [28-29]
\textsuperscript{130} ibid [32]
\textsuperscript{131} ibid [31]

\textsuperscript{133} ibid, if a Charter right is also replicated in a Directive the Court may extend the definition of ‘worker’ considerably (see C-316/13 Fenol). For further information on the relationship between EU labour law and national labour law
b. What duties, very briefly, would this status impose on the employer?

170. This section is not exhaustive because the definition of ‘employee’ and the corresponding duties of the employer and the State depend on the specific Directive being applied, whether the situation raises the question of fundamental rights, and other matters. This section thus outlines some important instruments that affect workers’ rights and impose obligations on the employer, the state or both.

171. The principle of non-discrimination is one of the fundamental principles of EU law that applies to employment rights. One of the fundamental articles is Article 141 (previously Article 119) of the Treaty of Rome which states that: 'each Member State shall ... maintain the principle that men and women shall receive equal pay for equal work.' After Defrenne No 3, Article 141 is directly effective horizontally and vertically: meaning that an employee may claim against the employer regardless of whether the employer is a private company or a state actor. This principle was developed by the Equal Pay Directive 75/117/EEC and the Equal Treatment Directive. The Equal Pay Directive defines the scope of Article 141 and stresses that where a job classification system is used to determine pay, the same criteria should be applied between men and women. The Equal Treatment Directive 76/207/EEC aimed to achieve equality between men and women in the workplace more generally by stipulating that there should be no difference in access to employment, promotion opportunities and working conditions between men and women.
172. A notable extension of equality law can be observed in relation to the rights of the self-employed where the Court has ‘de-emphasized the boundary between employment and self-employment by considering that the Self-Employment Directive\(^{139}\) comes within the general ambit of equal treatment’.\(^{140}\) The Self-Employment Directive\(^ {141}\) defines the self-employed in Article 2 as ‘persons pursuing a gainful activity for their own account and their spouses and life partners, if they are not business partners or employees, but participate in the activities of the self-employed worker.’ Article 4 stipulates that direct and indirect discrimination, harassment and sexual harassment against self-employed workers is prohibited. Article 8 outlines that states are to ensure that self-employed women are to have at least 14 weeks of maternity leave allowance, though it is up to the member state to determine whether the allowance is mandatory or voluntary.\(^ {142}\) This is allied with the provisions of the State Social Security Directive 79/7\(^ {143}\) which applies to the ‘working population’ which includes workers, the self-employed and those seeking employment. Applying this directive, the Court held that a person quitting work because of her mother’s invalidity is still a ‘worker’ for the purposes of EU law\(^ {144}\) and a person with a low wage and in ‘minor work’ according to national law is still part of the ‘working population’\(^ {145}\).

173. A range of individual employment rights stem from article 136-137 TFEU.\(^ {146}\) For example the Acquired Rights Directive\(^ {147}\) protects rights on transfers of undertakings and the Insolvency Directive\(^ {148}\) guarantees some debts at state level if the employer becomes insolvent.

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139 Directive 2010/41/EU
141 Directive 2010/41/EU
142 Fredman ft.140
143 ibid
144 Case 150/85 Drake v Chief Adjudication Officer [1986] ECR 1995
146 Sweet and Maxwell’s Encyclopedia of Employment Law [8A – 1.19]
147 EC/77/187, later amended by EC/2001/23
148 EC/80/987, as amended by EC 2002/74.
174. On an individual level, the Employment Information Directive\(^{149}\) requires the employer to provide information on certain terms in a contract while the Working Time Directive\(^{150}\) introduces further protection in relation to working hours.

175. Similarly, the part-time work Directive 97/81/EC requires that a part-time worker\(^{151}\) should not be discriminated against for working part time and a worker’s refusal to work full time cannot be a reason for dismissal.\(^{152}\)

176. Directive 2008/104/EC offers equal treatment to temporary agency workers.\(^{153}\) A ‘temporary agency worker’ means a ‘worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction.’\(^{154}\) In this context, the meaning of ‘worker’ depends on national law\(^{155}\) and there is no obligation to treat an agency worker as an employee. Therefore, in a country where the relationship between the agency worker and the agency would be characterised as ‘self-employment’ the directive may be ineffective.\(^{156}\) Furthermore, derogations from equal treatment of agency workers are made acceptable by article 5(3) as long as ‘the overall protection of temporary agency workers’ is respected.

177. Finally, there are requirements requiring workplace consultation from employers. Both the Collective Redundancies Directive\(^{157}\) and the Acquired Rights Directive\(^{158}\) require collective consultation on mass redundancies and transfers of undertaking. Furthermore, the European Works Council Directive requires

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\(^{149}\) EC/91/533 see also Hardarson v Askar [2013] I.R.L.R. 475


\(^{151}\) Directive 97/81/EC 3(1) The term ‘part-time worker’ refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker

\(^{152}\) Directive 97/81/EC 5(2)

\(^{153}\) Directive 2008/104/EC article 5(1)

\(^{154}\) Directive 2008/104/EC article 3(1)

\(^{155}\) Directive 2008/104/EC article 3(1)

\(^{156}\) ACL Davies p.195-197

\(^{157}\) EEC/1975/129 as amended in EEC/92/56 and replaced by 98/59

\(^{158}\) EC/77/187, later amended by EC/2001/23
employers to consult employee’s bodies on the general conduct of their business.\textsuperscript{159}

c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

178. There have only been two cases at Union level concerning Uber\textsuperscript{160} and in neither have drivers argued this. Both judgements are still outstanding, but the non-binding opinions of the Advocate General are available. This report considers the Case 434/15 because the Advocate General briefly discusses employment rights in an indirect way.\textsuperscript{161}

179. In Asociación Profesional Elite Taxi v Uber Systems Spain SL, Advocate General Szpunar considered that while Uber has ‘thrown up questions concerning […] employment law’\textsuperscript{162} the subject matter of the case was simply its status within EU law.

180. The main issue was whether Uber is an ‘information society service’ or a transport service and whether Uber can claim the benefit of the freedom to provide services.\textsuperscript{163} The Advocate General held that Uber is a transport service and cannot claim the benefit of the freedom to provide services.

181. The Advocate General found that Uber does ‘more than match supply to demand’ – it ‘creates the supply itself’ and while it does not exert any ‘formal constraints’ on drivers it ‘exerts control’ over the quality of service provided by drivers\textsuperscript{164}, effectively sets the fare\textsuperscript{165} and exerts control over all relevant aspects of the Uber transport service.\textsuperscript{166}

\textsuperscript{159} recast as Directive EU/2009/38
\textsuperscript{161} This note does not discuss C-320/16 Uber France SAS because employment rights are not discussed.
\textsuperscript{162} [1]-[2]
\textsuperscript{163} [2]
\textsuperscript{164} [43], [47]-[48]
\textsuperscript{165} [50]
\textsuperscript{166} [51]
182. The Advocate General goes on to note:

‘While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.’\(^{167}\)

183. On this reasoning, the Advocate General concludes that Uber’s activity ‘comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, by Uber or on its behalf’.\(^{168}\) This conclusion is further strengthened since Uber gives no real choice to the consumer between competing drivers.\(^{169}\)

184. However, this ‘does not mean that Uber’s drivers must necessarily be regarded as its employees’\(^{170}\) and the judgments in other Member States as to the status of Uber drivers are regarded by the Advocate General as ‘wholly unrelated’ to the question in the case. However, despite the ‘wholly unrelated’ line of reasoning, the Advocate General does explicitly rely on one such judgement, namely the UK judgement of Aslam and others v Uber BV and others\(^{171}\) to reach his conclusions.

d. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

185. There are no judgements or opinions of the Advocate General showing that this has yet been argued at EU level.

\(^{167}\)[52] italics added
\(^{168}\)[53]
\(^{169}\)[59]-[61]
\(^{170}\)[54]
\(^{171}\)2015 ET 2202551.
UNITED STATES FEDERAL LAW

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

Appellate level

186. In every instance of federal-level appellate litigation in the US concerning the company, Uber Technologies, Inc (the national (and international) parent organisation\(^{172}\)) has been the respondent. On occasion, such as in the litigation in Mohamed\(^{173}\) and Rimel\(^{174}\) (see below), they have been joined by their wholly-owned subsidiary Rasier LLC, and, in Mohamed, by Hirease LLC.

187. It should be noted that litigation has been relatively sparse, partly due to delays in cases passing through the state and federal apparatus to higher levels, partly due to various out of court settlements\(^{175}\), and partly due to the prevalence of Uber’s arbitration clauses within their contracts with drivers, leading to most disputes needing to be resolved by arbitration, as will be seen below.

188. In Mohamed v Uber Technologies, Inc, decided on 7th September 2016 in the United States Court of Appeals, Ninth Circuit, Uber Technologies, Inc were the respondents. This was a case where Gillette, one of the plaintiffs, alleged that he was misclassified as an independent contractor rather than an employee. But the court denied itself jurisdiction. ‘Arbitrability’ was a question delegated (according to the valid contract) to the arbitrator themselves. There was therefore no authority to decide whether the parties’ arbitration agreements were enforceable.

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\(^{173}\) Mohamed v Uber Technologies, Inc [2016] US Case No. 15-16178


189. Critically, in relation to subsidiary bodies, Gillette signed a similar agreement with Rasier, the subsidiary provider, and as such, the court denied itself jurisdiction in relation to both parties. It therefore did not need to consider which defendant it was concerned with, or adduce reasons as to why it would be concerned with one over the other.

190. Similarly, in *Waymo LLC v Uber Technologies, Inc et al*\(^\text{176}\), decided 13th September 2017 in the Federal Circuit Court of Appeals, Uber Technologies, Inc were the sole respondents. The *Waymo* case was a patent infringement case, wherein Uber were the defendants and respondents to an appeal. A company called Waymo LLP alleged that their former employee (Mr. Levandowski) had ‘improperly downloaded thousands of documents related to Waymo’s driverless vehicle technology and then left Waymo to found Ottomotto, [a company] which Uber subsequently acquired’. They therefore initiated patent infringement proceedings against Uber, alleging violations of federal and state secrecy laws. Mr Levandowski, a former employee of Waymo and current employee of Ottomotto, was joined as an intervenor.

191. Before Uber had acquired Ottomotto, they conducted a report which investigated previous Ottomotto employees, and Waymo sought discovery of this report. This was the subject of the litigation, which the Court decided in favour of Waymo. Mr Levandowski sought an order to quash this decision, but the Court denied itself jurisdiction (see below). Therefore, the reason why Uber Technologies, Inc was chosen over a local Uber subsidiary was that it was the parent body which had been engaged in the acquisition which was the subject of the litigation. The report had been undertaken by them, and, as such, it was they who were the appropriate respondents.

**District Court Level**

192. Even at the relatively localised District level, Uber Technologies, Inc (the parent company) is listed as the respondent in all cases discovered. For example, they were listed as such in the application for summary judgment case of *O’Connor v.*

\(^{176}\) *Waymo LLC v Uber Technologies, Inc et al* [2017] US Case No. 2017–2235, 1
Uber Technologies Ltd. decided in the United States District Court, Northern District of California on 11th March 2015. The plaintiffs claim that they are employees of Uber, as opposed to its independent contractors, and thus are eligible for various statutory protections for employees codified in the California Labor Code, such as a requirement that an employer pass on the entire amount of any gratuity ‘that is paid, given to, or left for an employee by a patron.’

This case involved a motion tabled by Uber for summary judgment that the employees are independent contractors as a matter of law. Since the definitional issue of whether the individuals concerned are employees or contractors was held to involve questions of both fact and law, elements of which remained in dispute, the summary judgment was struck out.

It should be noted that the O’Connor litigation is ongoing, and the hearings were stayed as recently as 22nd September 2017. It appears to be the furthest advanced piece of litigation of its kind, and as such, the outcome of the case will likely have significant implications for the legal classifications of Uber drivers in the US.

In all of Jallow v Uber Technologies, Inc (in the United States District Court, Eastern District of New York on 11th May 2016), Rimel v Uber Technologies, Inc (United States District Court, Middle District of Florida, Orlando Division, 31st March 2017) and Search v. Uber Techs., Inc., Uber Technologies, Inc were the sole respondent to the claim. As in Meyer and Mohamed, the in Rimel action was dismissed by operation of the arbitration clause, which was found to be clear, unmistakeable, and thereby not unconscionable within Florida law. In Search, Uber were made joint respondent in an action for damages relating to an Uber driver stabbing the complainant.

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178 Ibid., 1
180 See here: https://arstechnica.co.uk/tech-policy/2017/09/uber-gig-economy-employees/
186 Ibid., 14
b. *How did the court analyse the relationship between the subsidiary and Uber BV?*

196. Within all the above cases, it appears that no US appeal federal court has analysed such a relationship. No subsidiary bodies of Uber Technologies, Inc have seen sole litigation at the federal level, and have only ever been joined as respondents by Uber Technologies, Inc, which the courts seem to regard as unproblematic.

c. *If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?*

197. In each of the above cases, the ‘parent’ company (Uber Technologies, Inc, analogous in this instance to Uber BV) was named as a respondent. None of the cases found discussed any specific jurisdictional issues surrounding parents and subsidiaries both acting as defendants or respondents. It will be seen that the main jurisdictional issues which have been litigated are procedural, in particular concerning the validity of Uber’s arbitration clauses.

198. None of the determinations in the following cases pertain particularly to issues surrounding subsidiaries and parent companies, or geographical jurisdiction. However, several amongst them include issues of jurisdiction in employment disputes, in particular cases concerning the employee/contractor divide.

199. In *Waymo LLC v Uber Technologies, Inc et al*, the Court (the Federal Circuit Court of Appeals) considered its jurisdiction to receive and decide the petition for compulsion of handing over the report that Uber had produced when looking into Ottomotto. In this case, Mr. Levandowski sought to intervene in the case in order to quash the order of made. The court considered whether it had jurisdiction to consider Mr. Levandowski’s claim, which it held that it did not. Mr. Levandowski failed to satisfy his burden to demonstrate entitlement to a writ of mandamus. He failed to satisfy the ‘Cheney’ requisites (derived from *Cheney v. U.S. Dist. Court for D.C.*[^187]), namely that the ‘party seeking issuance of the writ must have no other adequate means to attain the relief he desires’, and that ‘the petitioner must satisfy

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the burden of showing that his right to issuance of the writ is clear and indisputable’. As such, the court decided it had no jurisdiction to hear the claim.

200. Moreover, in *Meyer v. Uber Technologies, Inc*, the court found that it did not have jurisdiction by virtue of its acceptance of a motion to compel arbitration. It was held that the claimant did indeed have sufficient notice of the arbitration clause contained within Uber’s ‘terms and conditions’. There was no actual notice, but there was constructive (i.e. inferred, held to a standard of what a reasonably prudent smartphone user would have noticed) notice, since the text ‘by clicking on the hyperlink ['Register'] you agree to the Terms and Conditions’ was both clearly ‘conditional’ and appeared on an uncluttered screen. In light of this notice, Meyer’s clicking of ‘register’ manifested his assent. As such, the court denied itself jurisdiction to hear the case. This, however, is not an employment case, so its utility is limited.

201. In *Mobamed v Uber Technologies, Inc*, the court once more denied itself jurisdiction. ‘Arbitrability’ was a question delegated (according to the valid contract) to the arbitrator themselves. There was therefore no authority to decide whether the parties’ arbitration agreements were enforceable. The Court overturned the District Court’s holding that the agreement to delegate the question of arbitrability to the arbitrator was unconscionable. The default position of judicial arbitration was supervened by unmistakable proof of contrariwise intent. The delegation provisions were sufficiently clear and unmistakeable. Unconscionability was held not to void the agreement, since there was a lack of oppressiveness and no overly harsh result, noting nonetheless the heavy fees shared equally between Uber and the drivers seeking to enter arbitration. The opportunity of ‘opt-out’ was sufficient to offset this conclusion.

202. Finally, at district court level in *Artur Zawada and Nashat Farha v. Uber Technologies*188 in the United States District Court, Eastern District of Michigan, Southern Division, Rasier were joined as another defendant, in a case similar to *Mobamed* wherein the ‘delegated arbitrability’ clause led to the court denying itself jurisdiction. In these cases, the structure of the contractual framework involves

188 *Artur Zawada and Nashat Farha v. Uber Technologies* [2017] US Case No. 17-1092
the driver signing contracts with both Uber and Rasier\textsuperscript{189}, both agreements of which contain ‘similar’ arbitration clauses.

203. The validity of arbitrability clauses like this is to be considered by the Supreme Court this term, in \textit{Epic Systems Corp v Lewis}\textsuperscript{190}.

\textbf{QUESTION 2: EMPLOYMENT RIGHTS}

\textit{a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.}

204. The US Department of Labour has advanced the ‘economic realities’ test that has to be applied when a court assesses whether an individual is an employee. This test is frequently used by courts in order to determine whether ‘employment’ exists in a particular case.\textsuperscript{191} This six part test comprises the following:

- Is the work performed an integral part of the employer’s business? If so, then this is indicative of an employee.
- Does the worker’s managerial skill affect the worker’s opportunity for profit or loss? If a worker exercises managerial skill that affects her profit and loss, then that is indicative of an independent contractor.
- How does the worker’s relative investment compare to the employer’s investment? If the worker’s investment is relatively minor (e.g., supplies), that suggests that the worker and the employer are not on similar footings and that the worker may be economically dependent on her employer – and thus an employee.
- Does the work performed require special skill and initiative? A worker’s business skills, judgment, and initiative, not her technical skills, will aid in determining whether the worker is economically independent.
- Is the relationship permanent or indefinite? Permanence or indefiniteness are indicative of an employee as compared to an independent contractor, who typically works one project for an

\textsuperscript{189} See \textit{Mohamed}, 7-8.
\textsuperscript{190} Docket no 16-285
\textsuperscript{191} See \textit{S.G. Borello & Son, Inc. v. Dept of Indus. Relations (Borello)} [1989] 48 Cal. 3d 341, below

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employer and does not necessarily work continuously or repeatedly for an employer.

- What is the nature and degree of the employer’s control? An independent contractor must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting her own business.  

205. The Borello case is the instructive case in this area, which ‘enumerated a number of key indicia of an employment relationship’. The ‘most significant consideration’ is the putative employer’s ‘right to control work details’. This right of control need not extend to every possible detail of the work. Rather, the relevant question is whether the entity retains ‘all necessary control’ over the worker’s performance. ‘[T]he fact that a certain amount of freedom is allowed or is inherent in the nature of the work involved’. Further, the ‘right to discharge at will, without cause’ is ‘strong evidence in support of an employment relationship’.

206. The very recent case of Saleem et al. v CTG provides an example in the context of the transport industry. The plaintiffs, who were black-car drivers in New York City, under franchise from CTG, and were held to be independent contractors for the purposes of the federal Fair Labour Standards Act and the New York State Labour Law. The Second Circuit Court of Appeals applied the economic reality test to reach its conclusion, considering that drivers made significant decisions with regard to their own small businesses, with a connection to the profitability of those businesses, the entrepreneurial opportunities the drivers had, the nexus between investment and return for the drivers, and the flexibility they had in maintaining their schedule.

193 S.G. Borrello & Sons, Inc. v. Dep’t of Indus. Relations (Borello) [1989] 48 Cal. 3d 341
195 S.G. Borrello & Sons, Inc. v. Dep’t of Indus. Relations (Borello) [1989] 48 Cal. 3d 341, 350
196 S.G. Borrello & Sons, Inc. v. Dep’t of Indus. Relations (Borello) [1989] 48 Cal. 3d 341
197 Saleem v. Corporate Transportation Group, Ltd., No. 15-88 (2d Cir. 2017)
b. **What duties, very briefly, would this status impose on the employer?**

207. The duties imposed on employers include the provision of ‘pension, health, and group-term life insurance benefits’\(^{198}\). Further, the right to collectively bargain and have benefits such as minimum wage, overtime and workers' compensation protection is reserved for employees under federal labour law\(^{199}\). These sit alongside protection that might exist at state level, for example, in the California Labor Code, there is a requirement that an employer pass on the entire amount of any gratuity that is paid, given to, or left for an employee by a patron’,\(^{200}\) a question that much of the litigation in this area has concerned.

c. **Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?**

208. The critical and most illuminating case here is *O’Connor v. Uber Technologies Ltd.*, which was an application for summary judgment decided in the United States District Court, Northern District of California on 11th March 2015. The plaintiffs were a group of Uber drivers, claiming that they were employees of Uber, as opposed to its independent contractors, and were thus entitled to certain benefits under the California Labor Code. Uber sought a summary judgment declaring that the individuals in question were independent contractors, not employees, as a matter of law. This was rejected, since the Plaintiffs had established that they were *presumptively* employees, and that the enquiry as to whether that presumption was rebutted was a mixed question of fact and law, leaving key elements of the case to be determined by a jury, and not by summary judgment.

209. As to the law, if the ‘plaintiffs can establish that they provide a service to Uber, then a rebuttable presumption arises that they are Uber’s employees’.\(^{201}\) At this point, as discussed above in relation to the *Borello* and *Ayala* cases, the indicia of

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\(^{198}\) US Inland Revenue Service Joint Committee on Taxation, *Present Law and Background Relating to Worker Classification for Federal Tax Purposes* (2007)


\(^{200}\) *O’Connor v. Uber Technologies Ltd* [2015] US Case No. C-13-3826 EMC

\(^{201}\) *Ibid.*, 9, emphasis added
the employment relationship are used to determine if this presumption has been rebutted. As seen above, these indicia are manifold, and straddle factual and legal issues, meaning that a presumption of employment makes applications for summary judgment like Uber’s difficult to sustain.

210. What is interesting for the purposes of this report is the reasoning used by the court in establishing the presumptive employer/employee relationship, that is, in determining that the drivers did provide a ‘service’ to Uber. The District Court stated that ‘the case law [concerning whether an individual is an ‘employee’ or an ‘independent contractor’] makes abundantly clear that the drivers are Uber’s presumptive employees’.

211. Uber purported to frame themselves not as a transportation company, but as a technology company. The technology they produce (namely, the App) is then purchased by the drivers who use it in order to generate business for themselves. Uber thus, they argued, receive no ‘service’ from their drivers; whether or not the drivers receive any business makes no difference to them. This argumentation was rejected for narrowly focusing on the mechanics rather than the reality of their App. Uber sells rides, not software, otherwise yellow cab driver companies would equally be technology companies too. They therefore are a transportation company, indicating that those who perform that transportation function provide them with a service. Further, ‘Uber simply would not be a viable business entity without its drivers’, receiving their income not from ‘selling’ their App to drivers, but from receiving a percentage fee from each fare. Moreover, Uber control the fares charged by the drivers individually for each ride, without the possibility of there being any unilateral override by a driver, indicating a relationship resembling employment. Similarly, ‘Uber exercises substantial control over the qualification and selection of its drivers’, for example through its application process and background checks. It ‘strains credulity’ to argue that Uber is not a ‘transportation company’ when the payment of the fare is strictly conditional upon the transportation of the customer from one place to another. As such, it

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202 Ibid., 13
203 Ibid., 11
204 Ibid., 12
205 Ibid., 13
follows that the drivers do perform a service for Uber. They therefore are presumptive employees.

212. The burden thus shifts to Uber to ‘disprove an employment relationship’\(^{206}\). This enquiry, involving the *Borello* indicia, is a question of ‘mixed law and fact’\(^{207}\), which should be resolved by a jury.\(^{208}\) Therefore, the application for summary judgment was not granted: ‘material facts remain in dispute, and a reasonable inference of an employment relationship may be drawn’\(^{209}\). For example, the factual question of whether Uber could fire its drivers at will (one of the critical *Borello* indicia) was in dispute.

*d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?*

213. In the US, there is currently no recognised status outside of the employee/independent contractor dichotomy\(^{210}\). As such, none of the cases that are available have involved an Uber driver arguing that there was some further categorisation available to them.

\(^{206}\) Ibid., 16
\(^{207}\) Ibid., 16
\(^{208}\) Ibid., 19
\(^{209}\) Ibid., 20
TEXAS STATE LAW

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

The Texan courts have not yet handed down a judgment in employment proceedings involving Uber drivers which determines who should be named as respondent in such proceedings. All litigation that has taken place has proceeded to arbitration or has involved satellite issues.

b. How did the court analyse the relationship between the subsidiary and Uber BV?

The courts have recognized the existence of the local Texas Uber subsidiary, ‘Rasier’, in the context of unfair competition litigation, and in adjudicating on the application of an arbitration clause. However, the courts have merely described the relationship between drivers, Uber, and the local subsidiary: ‘Uber is a technology company that, along with its Rasier subsidiaries, provides a platform to connect riders seeking transportation with available drivers’. In finding the arbitration clause valid and enforceable, the court was content to refer to both simultaneously: ‘The June 2014 Agreement contains an arbitration agreement in which driver and Uber/Rasier agree to arbitrate all disputes arising out of their relationship with Uber’.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

This point has not been addressed in the case law.

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QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

217. In Texas, employee status is determined by various tests developed in the common law and statutory schemes.

218. The common law has developed a multifactorial approach in order to draw the distinction between employee and independent contractor. The relevant tests consider levels of behavioural and financial control, and the nature of the relationship between the parties. Notably, the ‘at-will’ rule applies, whereby both employer and employee can terminate their agreement at any time, and for any reason, providing it is not illegal. If this rule characterizes the relationship of the parties, it points strongly towards employee status.

219. In applying statutory schemes, such as the federal Fair Labor Standards Act (FLSA), courts apply an ‘economic reality test’ in determining whether someone amounts to an employee. This not only considers control, but also the worker’s dependence on the employer. This wider test has been used in applying other statutes relevant to workers’ protection, including discrimination, minimum wages and overtime, retirement benefits, family and medical leave, and insurance.

220. For Uber drivers in Texas, these tests have ceased to be of direct relevance. On 29th May 2017, the Texan state legislature passed into law a bill that lays down a new framework for regulating ride-sharing companies across the state. Companies such as Uber are called ‘transportation network companies’ (TNCs), and are defined as entities using a digital network to connect a rider to a driver.

218 Juino v Livingston Parish Fire Dist. No.5, 717 F.3d 431 (5th Cir. 2013).
to provide prearranged rides. The law specifically states that drivers are independent contractors so long as: (a) the TNC cannot prescribe specific hours that the driver is logged into the digital network; (b) drivers are permitted to work for other ride-sharing services; (c) drivers can engage in any other occupation or business; (d) the TNC does not limit the territory used by the driver. Uber drivers are highly likely to satisfy these conditions, with the result that this new bill has carved out a specific exception for drivers in the gig economy.\textsuperscript{220}

\textit{b. What duties, very briefly, would this status impose on the employer?}

\textsuperscript{221}As discussed above, this question is likely to be hypothetical given the recent legislation that aims to determine the employment status of drivers for TNCs as that of independent contractors.

\textsuperscript{222}However, were Uber drivers to be granted employee status, the employer would have to pay the Texas minimum wage,\textsuperscript{221} comply with a range of laws prohibiting discrimination,\textsuperscript{222} and adhere to health and safety standards.\textsuperscript{223} The federal Fair Labor Standards Act would also impose a duty to pay the minimum wage, overtime and other wage and hour protections.\textsuperscript{224}


c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

223. In *Micheletti v Uber Technologies, Inc.*, Uber driver Mr Micheletti brought a putative class action, alleging that Uber did not pay drivers a living wage and was therefore in violation of the Texas Labor Code. He alleged that Uber ‘misrepresents the status and compensation of drivers for their own benefit’. This argument was superseded by the existence of an arbitration provision between Mr Micheletti and Uber. The court ruled that this was valid and enforceable, with the result that the issue of employee status was not litigated.

224. A very similar claim was brought earlier this year in *Zorilla v Uber Technologies, Inc.* Mr Zorilla alleged, amongst other claims, failure to reimburse expenses and misclassification of employment. Although Mr Zorilla argued that Californian law applied, the court held that there was a valid and enforceable arbitration agreement, to which Texan law applied.

225. Uber drivers in Texas have not brought further claims regarding their employment status. However, Uber has been involved in litigation in other areas that could have implications for drivers’ employment status. In *Ramos v Uber Technologies, Inc. and Lyft Inc.*, several mobility-impaired individuals brought a claim against Uber, and related ride-sharing company, Lyft, arguing that by not providing a service for wheelchair users, they violated the Americans with Disabilities Act. Uber argued that it ‘merely provide[s] a platform for people with particular skills or assets to connect with other people looking to pay for those skills or assets’. The court did not accept Uber’s argument, and granted the Plaintiff’s motion to file a further Amended Complaint. No further hearings have been reported.

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d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

226. No cases could be found on this point.
ALASKA STATE LAW

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

227. Uber has not been the subject of employment proceedings brought by drivers in Alaska. However, the Municipality of Anchorage (‘MOA’) has previously successfully applied for a temporary restraining order and preliminary injunction against Uber in Anchorage Superior Court arising from an alleged violation of Title 11 ‘Transportation’, of the Anchorage Municipal Code 230; in these proceedings against Uber, both Uber Technologies Inc. and its subsidiary Rasier, LLC. were named as respondents. 231

b. How did the court analyse the relationship between the subsidiary and Uber BV?

228. No analysis was made, possibly as both parent company and subsidiary operating in Alaska were named as respondents.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

229. No relevant analysis was made as to this question (see answer above).

230 Anchorage Municipal Code, Title 11 ‘Transportation’
QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

230. Workers in Alaska are automatically considered employees unless they are (a) ‘free from control and direction’ in connection with the performance in fact; (b) the service is performed ‘outside the usual course of business’ for which the service is performed; and (c) the individual is engaged in an ‘independently established’ profession from the service performed. All three prongs of the ABC test must be satisfied in order for someone to be classified as an independent contractor.

b. What duties, very briefly, would this status impose on the employer?

231. Title 23 ‘Labour and Workers’ Compensation’ of the Alaskan Statutes covers the duties that an employer owes to an employee. These duties would include, but are not limited to, protection against discrimination, unpaid family and medical leave, wage protection such as minimum wage, and workers’ compensation for injury while working and insurance for such workers’ compensation.

c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

232. There has been no case brought by drivers against Uber in Alaska. The above-mentioned injunction proceedings concerned the legality of Uber’s operation vis-à-vis Alaska’s ‘Transportation’ Ordinance.

233. However, in October 2014, the Alaskan Department of Labor and Workforce Development (Workers’ Compensation Division) (‘the Department’) began

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232 Alaska Stat. §23.20.525(a)(8)(A-C)
234 Alaska Stat. §23
235 Anchorage Municipal Code (n 1)
investigating Uber for fraudulently misclassifying Uber drivers as independent contractors as opposed to employees, in contravention of the Alaska Workers’ Compensation Act. No hearing was ever held as Uber pulled out of Alaska in March 2015. On August 25, 2015, Uber settled with the Department. The settlement admitted no wrongdoing, but Uber paid $77,925 and agreed not to operate in Alaska unless it classified drivers as employees or otherwise complies with state law.

234. As of today, Alaskan State Senate has passed a bill which excludes Uber drivers and similar ridesharing App drivers (e.g. Lyft) from being classified as employees. The bill explicitly classifies such drivers as independent contractors.

\[ \text{d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?} \]

235. This question is not applicable to Alaska.

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236 Alaska Stat. §23.30
239 AK HB132 ‘the Transportation Network Companies Act’, Sec. 28.23.180(4) (AK HB 132)
240 AK HB132, Sec. 28.23.080(a)
NEW YORK STATE LAW

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

236. In no cases has this been raised as an issue. In the unemployment matter referred to below, Uber Technologies, Inc was listed as employer. No point was taken on whether this was appropriate.

b. How did the court analyse the relationship between the subsidiary and Uber BV?

237. The research did not uncover any such analysis.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

238. This question is not applicable.

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

239. Under New York law, ’employment’ means:

(a) any service under any contract of employment for hire, express or implied, written, or oral and (b) any service by a person for an employer (1) as an agent-driver or commission-driver engaged in distributing meat, vegetable, fruit, or bakery products; beverages other than milk; or laundry or dry-cleaning services; or (1-a) as a professional musician or a person otherwise engaged in the performing arts, and performing services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar
establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter.\footnote{New York Consolidated Laws, Labor Law - LAB § 511}

240. There is a ‘12-part test\footnote{Although this is lifted from the ‘Fair Play Act’, which mainly concerns the construction industry, the titling and language of the bill as introduced in state senate (A5237B) also provides that it is valid for defining employee status in all commercial transportation.} to determine if a contractor is a ‘separate business entity’ from the services provided. The test includes that a worker must, to be labelled as an independent contractor: (1) be performing the service free from the direction or control over the means and manner of providing the service subject only to the right of the contractor to specify the desired result; (2) not be subject to cancellation when its work with the contractor ends; (3) have a substantial investment of capital in the entity beyond ordinary tools and equipment and a personal vehicle; (4) own the capital goods and gain the profits and bear the losses of the entity; (5) make its services available to the general public or business community on a regular basis; (6) include the services provided on a federal income tax schedule as an independent business; (7) perform the services under the entity’s name; (8) obtain and pay for any required license or permit in the entity’s name; (9) furnish the tools and equipment necessary to provide the service; (10) hire its own employees without contractor approval, pay the employees without reimbursement from the contractor and report the employees’ income to the Internal Revenue Service; (11) have the right to perform similar services for others on whatever basis and whenever it chooses; and (12) the contractor does not represent the entity or the employees of the entity as its own employees to its customers. The entity must meet all 12 criteria to be considered a separate business entity.

\[b.\text{ What duties, very briefly, would this status impose on the employer?}\]

241. New York state law provides that employers must pay wages, adhere to the minimum wage laws and laws concerning working hours, secure workers’ compensation, and, for certain employers, to provide for leave. In addition, New York State has human rights laws that offer greater protections than federal labour law, and afford employees more protections over medical record privacy,
for example. The New York Labor Law governs ‘any person employed for hire by an employer in any employment’. Employers with more than four workers are subject to the New York State Human Rights Law and the New York City Human Rights Law, except that from January 19 2016 all employers, regardless of size, will be subject to the New York State Human Rights Law’s prohibitions on sexual harassment.

243. It has in the past been ruled that Uber drivers are employees for unemployment purposes in New York, and can collect unemployment benefits. This determination took place only after federal court litigation to compel assessment of the employment status of drivers: that litigation was dismissed as New York undertook the assessment requested, determining that Uber drivers were employees. Uber appealed to the Administrative Law Judge Section of the New York Unemployment Insurance Appeal Board.

244. The Board affirmed that Uber drivers are employees, adopting the following reasoning. The Board first of all held that the determination of the drivers as independent contractors in the contracts themselves was not determinative. The Board was not impressed by the argument that Uber was not a transportation company but a technology company: the Board noted that Uber held itself out as a transportation company, and, quite simply, was one. The Board pointed to the significant control which Uber exercised over its employees, distinguishing it from the arm’s length interaction which would normally characterise an independent contractor’s work. The following factors were of particular relevance:

- That Uber did not reveal, prior to the driver picking up the passenger, what the destination was.

245 N.Y. Labor Law § 190
248 AIJ Case No. 016-23858
• That Uber had rules about which vehicle drivers could use, and operated an arrangement (in the case of two of the claimants) whereby the cars were leased from a third party, and Uber withdrew lease payments from the drivers’ payment before it was given over.

• That the drivers were a crucial aspect of Uber’s business model. In addition, it had a pool of drivers on which it could call, so it would be not negatively affected by an individual driver turning down work.

• That Uber took steps to monitor and modify the behaviour of the drivers in question, through a code of conduct, backed up by the sanction of deactivation. It insisted on a ten-minute wait for passengers, and had absolute discretion as to whether a late fee would be charged.

• That Uber was solely responsible for setting the fares, and prohibited the use of cash for payment, insisting instead that payment was effected by credit card through its system.

• That Uber’s fees were not up for negotiation with drivers, and were deducted before money was transferred to the drivers.

• That only Uber had the power to determine charge damage fees to users, and to waive journey costs.

d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

244. This question is not applicable to New York law.
QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

245. There are conflicting California administrative law decisions on the issue of whether drivers are employees of Uber Technologies, Inc (the main US Uber corporation, analogous to Uber BV) for the purpose of California employment legislation.

246. In Berwick v Uber,\(^{247}\) the named respondents were two U.S. corporations, incorporated in the State of Delaware. One of the corporations was Uber Technologies Inc. There was no issue of jurisdiction over the defendants. The issue was whether there was any form of employment relationship between Uber and the Uber driver, Berwick, since, formally, the employment agreement was between Berwick and the second defendant Raiser-CA LLC. The California Labor Commissioner held that both defendants were Berwick's employer. In Rashid Alatraqchi v Uber Technologies Inc.,\(^{248}\) which came to a different conclusion on the question of employee status, Uber Technologies Inc was the only named respondent.

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\(^{247}\) Labor Commissioner, State of California, Department of Industrial Relations, Case No. 11-46739, June 3, 2015 http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical. The decision is under appeal.

b. How did the court analyse the relationship between the subsidiary and Uber BV?

247. The research did not uncover any such analysis.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

248. The research does not offer an answer to the question. California courts are unlikely to take in personam jurisdiction over Uber BV – called ‘long arm jurisdiction’ as Uber BV seems to have no involvement in the operation of the Uber business in the US. The California law on jurisdiction over foreign entities is accurately set out in cases such as F Hoffman-La Roche, Ltd v The Superior Court of Santa Clara County,249 applying the ‘minimum contacts’ requirement established by the US Supreme Court’s decision in World-Wide Volkswagen Corp v Woodson.250

‘Minimum contacts exist where the defendant’s conduct in the forum state is such that he should reasonably anticipate being subject to suit there, and it is reasonable and fair to force him to do so.’ In order to satisfy due process requirements, the defendant must have minimum contacts with the forum state such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice.’ (See F Hoffmann-La Roche at 416-17; internal quotation marks omitted.)

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

249. The leading decision is S G Borello & Sons Inc v Department Of Industrial Relations.251

According to Borello, The most important or significant consideration is whether the employer has sufficient control over the worker’s activities.

250 (1980) 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490
‘[T]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired’... However, the courts have long recognized that the ‘control’ test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the most important or most significant consideration, the authorities also endorse several secondary indicia of the nature of a service relationship’ (Borello at p 350, internal quotation marks omitted)

250. Additional factors may include: ‘the right to discharge at will, without cause’; and (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.\(^{252}\)

251. Where the issue is the interpretation and application of state legislation:

‘[T]he control-of-work-details test for determining whether a person rendering service to another is an ‘employee’ or an excluded ‘independent contractor’ must be applied, with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the history and fundamental purposes of the statute.’ (Borello at p. 353-54, internal quotation marks omitted, see generally p 350-54)

\(^{252}\) Ibid., 350-51
b. What duties, very briefly, would this status impose on the employer?

252. If there is the employee status, the employee may have a right to sue for unfair dismissal. Whether the employee does depends on the express or implied terms of the particular contract. Under California labour law, the default rule is that the employment contract may be terminated at will by either party on notice to the other. The parties may agree otherwise – that termination requires cause, for example, or on the notice period - by express agreement or implied terms. The duties of the employer to the employee, in addition to any assumed duties, are set out in the California Labour Code, Division 3 Employment Relations, Article 2. Obligations of Employer and Article 4, Termination.

c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

253. In Berwick, the Labour Commissioner applied a 1991 California Court of Appeal decision dealing with taxi drivers: Yellow Cab Cooperative v Workers Compensation Appeal Board\(^{254}\) in the context of California law, see S.G. Borello & Sons, Inc v Department Of Industrial Relations.\(^{255}\) The Labour Commissioner held that the defendants had sufficient control over the manner in which Berwick performed her activities as a Uber driver as to be an employee: see Berwick at pp 8-9 of reasons. For example, the Labour Commissioner wrote at 8:

‘The minimal degree of control that the employer exercised over the details of the work was not considered dispositive because the work did not require a high degree of skill and it was an integral part of the employer's business. The employer was thus determined to be exercising all necessary control over the operation as a whole.’

And, at 9:

‘Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation. The reality, however, is that Defendants are involved in every aspect of the operation. Defendants vet prospective drivers, who must provide to Defendants the personal banking

\(^{252}\) California Labor Code s.2922
\(^{253}\) (1991) 226 Cal.App.3d 1228
\(^{254}\) 769 P.2d 399, 256 Cal. Rptr. 543, 48 Cal.3d 341 (1989)
and residence information, as well as their Social Security Number. Drivers cannot use Defendants' application unless they pass Defendants' background and DMV checks.

Defendants control the tools the drivers use …

While Defendants permit their drivers to hire people, no one other than the Defendants’ approved and registered drivers are allowed to use their intellectual property.

…

Plaintiff’s car and her labor were her only assets. Plaintiff’s work did not entail any ‘managerial’ skills that could affect profit or loss. Aside from her car, Plaintiff had no investment in the business. Defendants provided the iPhone application, which was essential to the work. But for Defendants’ intellectual property, Plaintiff would not have been able to perform the work’

254. Accordingly, Berwick was an employee of both defendants.

255. However, Berwick aside, decisions in California have tended to favour the view that drivers are independent contractors: In substance there are no decisions of California courts affording Uber drivers employee (or analogous) status for the purpose of wrongful dismissal claims; however, there are decisions denying that status. 256

256. Newspaper and online news reports indicate that Uber (US) has been settling or attempting to settle US actions to avoid decisions on the classification issue. 257 At least one such proposed settlement has been rejected as too low.

\[d. \text{ Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?}\]

257. This question is not applicable to Californian law.

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CANADA (COMMON LAW PROVINCES)

QUESTION 1: RESPONDENTS AND JURISDICTION

a. If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?

258. There have been no reported court proceedings against Uber in Canadian common law.

b. How did the court analyse the relationship between the subsidiary and Uber BV?

259. This question is therefore not applicable.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

260. This question can be answered only by reference to the general law in Canada, as no case against Uber has been decided yet. There are two regimes, in the Canadian common law jurisdictions, for deciding the question of jurisdiction where a litigant seeks to sue a foreign party, meaning a party who doesn’t have any form of domicile in the jurisdiction where the action is commenced.

261. Some of the common law jurisdictions have legislation that sets out the requirements that must be established by the claimant.

262. If there is no legislation, the common law applies. In brief, absent voluntary attornment, the Uber driver will have to show a ‘real and substantial connection’ between the driver and Uber BV.\(^\text{258}\)

263. It is submitted that the mere fact that Uber BV owns the intellectual property will not be enough to establish that jurisdiction. There will have be evidence of

\(^{258}\text{Club Resorts Ltd v Van Breda, [2012] 1 SCR 572, 2012 SCC 17} \)
Uber BV’s involvement in the day to day operation of the local business or other evidence that Uber BV is, in some relevant sense, carrying on business in the Canadian jurisdiction.

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

264. There is no legislation in Canada that deals specifically with Uber BV’s status in relation to the employee or non-employee (contractor) status of Uber drivers.

265. In the common law jurisdictions, the traditional tests - four-fold test [(1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss] also known as the ‘entrepreneur test’; the ‘organization test’ or the ‘integration test’ - no longer govern. Instead, ‘the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account.’ ‘[W]hat must always occur is a search for the total relationship of the parties.’

266. There is a non-exhaustive list of factors relevant to the classification of the status of the relationship: the factors include: ‘the level of control the employer has over the worker’s activities … whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks.’ The relative weight of each will depend on the particular facts and circumstances of the case.

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260 Ibid, [46-48]
b. What duties, very briefly, would this status impose on the employer?

267. In the context of employment termination, if the termination is not for valid cause, the employer has to give the appropriate notice of the work period to termination or pay the employee the equivalent amount. The employer would also have to pay whatever taxes the jurisdiction requires an employer pay in relation to the employment of the particular employee. The employer will also be vicariously liable for the torts of the employee, where those torts fall within the scope of vicarious liability.

268. The Canadian Charter of Rights and Freedoms does not bind private employers.261

c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

269. There have been no such reported cases.

d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

270. There have been no reported cases involving Uber drivers. There does however exist in a number of Canadian jurisdictions, at least in the context of claims for wrongful dismissal, an intermediate category of relationship where the employment status as categorized as ‘dependent contractor’.

271. A dependant contractor, though not an employee, is entitled to reasonable notice of termination where the grounds for termination are not cause.262 In McKee, at [30], the court described this category as one whose central feature is ‘economic dependency … demonstrated by complete or near complete exclusivity’.

261 Retail, Wholesale and Department Store Union, Local 580, Al Peterson and Donna Alexander v Dolphin Delivery Limited [1986] 2 S.C.R. 573

262 McKee v. Reid’s Heritage Homes Ltd 2009 ONCA 916 at [24] and following.
272. The dependant contractor analysis has been applied to self-employed truckers. In *Mancino v. Nelson Aggregate Co.*,\(^\text{263}\) at paras. 9-13, the trial judge held that self-employed truckers were entitled to ‘reasonable notice [of termination] where the work relationship was permanent and exclusive in nature, such that the plaintiff was in a position of economic dependence’ (See *McKee* at para 27, internal quotation marks omitted).

273. This analysis may well be applicable to Uber drivers. In *A1603524*, the British Columbia Workers’ Compensation Appeal Tribunal, an administrative tribunal, wrote at [23-24]

‘[23] In that analytic framework, there is a recognition of what is sometimes labelled a dependent contractor status. It is neither of the traditional positions, but rather has some features of each.

[24] Significantly, that finding has been made in cases involving persons who are basically self-employed but, like the plaintiff, provide trucking services to transport companies on a long-term and regular basis, pursuant to a contract between the parties: *Mancino v. Nelson Aggregate Co.* (1994), 49 A.C.W.S. (3d) 47, [1994] O.J. No. 1559 (Gen Div); and *Fasslane Delivery v. Purolator Courier Ltd.*, 2007 BCSC 1879 (CanLII). In *Mancino*, Mr. Justice Lederman stated the following at paras. 9-10:

Although the plaintiff in fact ran his own business, an examination of the relationship between the parties shows that there was a dependency which was mutual and permanent in nature. This dependency is demonstrated in the fact that the truckers attended at the defendant’s Rouge Valley Yard each day and divided up the available work. The defendant expected the truckers to be there on a daily basis to fill the orders if and when they were made. If a trucker was going to be away on holiday or indeed was ill, he would call into the yard to advise of his non-attendance...

There is no doubt that the plaintiff, to use the words in the *Labour Relations Act*, was in ‘a position of economic dependence’ upon the defendant which ‘more closely [resembled] the relationship of an employee than that of an independent contractor’. The fact of dependency continued even after the plaintiff’s change of status from a ‘dependent contractor’ to a broker. In either capacity the plaintiff’s arrangement had all the hallmarks of an employment relationship with the defendant. This relationship was of a permanent and exclusive nature implicit in

which was the understanding that it would be terminated only on the giving of reasonable notice.

[Citation omitted]

[25] In the present case, I am satisfied that is the appropriate characterization of the relationship between the plaintiff and the defendant. It is my conclusion that the legal consequences which flow from the relationship, for the purpose of the present case, include a requirement that reasonable notice must be given where services are to be terminated without cause. [emphasis added]"
QUESTION 1: RESPONDENTS AND JURISDICTION

a. *If Uber has been the subject of employment proceedings, who did the court determine should be named as respondent – the local Uber subsidiary or Uber BV? Why?*

274. Uber has not been subject of employment proceedings in the province of Quebec. Quebec court cases involving Uber relate to Uber’s tax obligations in Quebec, or the legality of Uber’s services offered in Quebec.

275. In some of these cases, Uber Canada Inc., Uber’s subsidiary in Canada, argued that the Agence du Revenu Québec (‘ARQ’)’s allegations must be rejected because its service was limited to providing support and marketing services in Canada to its parent company Uber BV.\(^{264}\) Uber Canada Inc. further argued that in any case, Uber BV, was only an intermediary between users and independent drivers.\(^{265}\) Uber claimed that therefore, none of the Uber’s entities were involved in the service contracts concluded between the users and the drivers.

276. Quebec courts have rejected this argument without detailed discussion, and did not provide any analysis relating to the relationship between Uber Canada Inc. and Uber BV. Rather, courts generally accepted that Uber BV could be named as a respondent without any explanation.\(^{266}\) As such, none of the Quebec cases rendered to this date provides a detailed insight on why the courts decided that Uber BV could be named as respondent, or why the court considered it had jurisdiction to hear the case.

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\(^{264}\) *Uber Canada Inc. c. Agence du revenu du Québec*, 2015 QCCS 3453.  
\(^{265}\) Ibid.  
\(^{266}\) *Jean-Paul c. Uber Technologies Inc.*, 2017 QCCS 164.
b. How did the court analyse the relationship between the subsidiary and Uber BV?

277. Such analysis as there has been is set out above.

c. If the court decided that Uber BV could be named as a respondent, did the court have jurisdiction to determine the claim? Why (not)?

278. This question is not applicable to Quebec.

QUESTION 2: EMPLOYMENT RIGHTS

a. In your jurisdiction, when will someone amount to an employee for the purposes of employment law? Please provide only a brief definition.

279. Sections 2085 and 2086 of the Civil Code of Quebec (‘CCQ’) provide the criteria to determine whether someone amount to an employee for the purposes of employment law:

2085. A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.

2086. A contract of employment is for a fixed term or an indeterminate term.267

280. The CCQ distinguishes the notion of ‘employee’ from the contractor or the entrepreneur – only an employee may conclude an employment contract with an employer. The individual will not be considered an employee if they retain the free choice of means to perform the contract without being subordinated to the direction or control of another person.

b. What duties, very briefly, would this status impose on the employer?

281. Employers owe many duties to their employees under Quebec’s protectionist labour standards. The main obligations can be summarized as follows. Employers must give their employees a place to work and make sure they have access to it. They must give them the tools, equipment and other things they need to do their

work. Employers must pay their employees the salary and benefits they agreed to, including vacation, paid holidays and other types of holidays. Employers must make sure their employees’ working conditions are safe. In some cases, employers must give their employees written notice that their contracts are ending or that they are being laid off. Note that employers can pay employees a sum of money instead of giving the notice. Employers must treat their employees with respect. They must make sure their employees are not harassed or discriminated against.

c. Have drivers sought to argue that they are employees of Uber for the purposes of employment law? What was the outcome and reasoning?

282. Drivers have not sought to argue that Uber owes them duties under Quebec’s employment law.

d. Have drivers sought to argue that Uber owes them duties under employment law by virtue of some other status, such as worker? What was the outcome and reasoning?

283. This question is not applicable to Quebec.

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