
A Newsletter on Labour Law and Emerging Trends



Perchstone & Graeys
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THE DILEMMA OF THE UBER DRIVER

- EMPLOYEE OR INDEPENDENT CONTRACTOR?

The *world of work* has evolved, with technological advancements introducing several innovations transforming the traditional structure of the work place. Today, many employees enjoy the flexibility of working remotely; organizations can also engage people to provide services on their behalves with minimal control and supervision. These changes have however created certain complexities, especially with respect to the interpretation of employment relationships; i.e. what constitutes the classification as an ‘employee’ and an ‘independent contractor’. Interestingly, this issue was recently presented to the National Industrial Court (“NIC”/ “Court”) for interpretation in the case of *Oladapo Olatunji & Anor (Representing themselves and other Uber and Taxify Drivers in Nigeria in a Class Action) V. Uber Technologies System Nigeria Limited & 2 Ors*¹.

FACTS

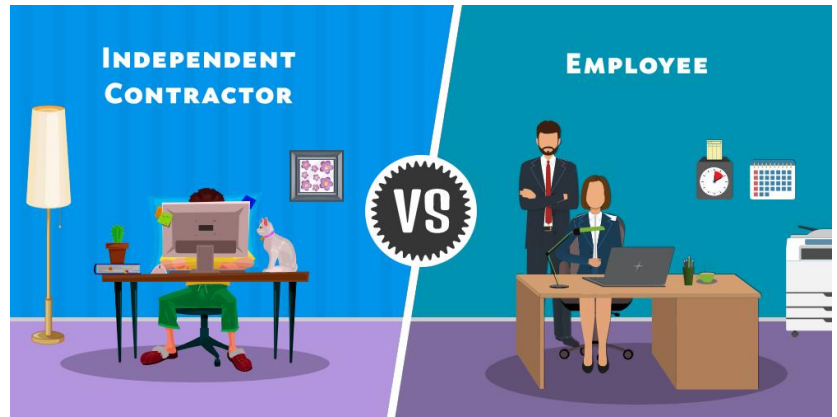
On November 7, 2017, Mr. Oladapo Olatunji and Mr. Daniel John (“*Claimants*”), instituted a class action at the NIC seeking an interpretation of their contractual relationship with Uber Technologies System Nigeria Limited, Uber B. V. and Taxify Technology Nigeria Limited (“*Defendants*”). According to them, they had applied to be engaged as drivers of the Defendants. Following screenings and trainings by the Defendants, they were engaged, subject to certain conditions (vehicle standards and maintenance, charges per trip, code of conduct, speed limits, insurance, etc.). According to the Claimants, the Defendants periodically assigned work to them for which they were paid weekly wages every Tuesday. Payments for trips carried out by the Claimants were made directly to the Defendants who paid the Claimants after making relevant deductions, including taxes. The Claimants discovered that the Defendants never made pension remittances and approached the Defendants to claim for pensions and other benefits as employees. The Defendant denied liability, contending that the Claimants were independent contractors. Thus, the Claimants instituted an action against the Defendants, claiming, amongst other things:

- (1) A declaration that the Claimants and members of their class are employees of the Defendants.
- (2) A declaration that by virtue or nature of the Defendants’ control over the Claimants and members of their class, they are not meant to be classified as independent contractors.
- (3) A declaration that the Defendants are liable for the acts of the Claimants and other members of their class while acting in the course of their employment with the Defendant.
- (4) An order mandating the Defendants to provide all relevant benefits, including but not limited to health insurance, pensions and other benefits to the Claimants and members of their class.
- (5) Perpetual injunction restraining the Defendants, their officers, from further denying liability for the Claimants’ acts done in the course of their employment with the Defendants.

¹ Judgment delivered on December 4, 2018

FINDING/DECISION

After a careful consideration of the evidence before the court, the NIC, in dismissing the suit, considered the following issues:



1. **Interpretation of an employment relationship:** Generally, the determination of the existence of an employment relationship is guided by what was agreed and performed by the parties, and not by the name of the contract. The traditional or orthodox distinctions no longer exist. Consequently, the nature of a relationship is now largely determined based on the facts and the principle of the primacy of facts. In appropriate circumstances, express contractual terms may be ignored if they are inconsistent with the reality of the relationship. In this case however, the Claimants failed to present sufficient facts upon which an inquiry could be conducted by the Court to determine whether the Claimants are employees or independent contractors.
2. **Proof of employment:** An action commenced by Originating Summons presupposes that the matter relates principally to the interpretation of a constitution, enactment, agreements or any other instrument relating to employment, labour and industrial relations. The key issue for determination was whether the Claimants are employees of the Defendants. However, the Claimants failed to frontload or attach to their affidavit in support a contract of employment or any other authenticating documentary evidence. Furthermore, the assertions in the Claimant's affidavit in support were largely vague and speculative and as such, could not sustain the action.
3. **Existence of an agency relationship:** A question before the Court was whether the employment relationship between the parties created an agency relationship. To the Court, the question assumed an existing employment relationship which had not been proved by the Claimants or established by the Court; *even if the Court decides that there is an agency relationship between the parties, there is no basis upon which such declaration would be made.* In any event, agents are specifically excluded in the definition of a worker (employee) under section 91(1) of the Labour Act. The Court held that the question was not only hypothetical but merely academic.
4. **Vicarious liability:** This can only arise where specific wrongful acts are being complained of and affords an injured third-party compensation for the loss suffered due to the negligence or ineptitude of the agent or employee. In this case, no sort of malfeasance was revealed to the Court, and in asking whether the Defendants ought to be vicariously liable, the Claimants were asking the Court to decide the case based on speculation, which the Court does not do; *that notwithstanding, an agent or employee who commits a wrong is not exonerated by his own wrongdoing merely because of the existence of the doctrine of vicarious liability.* The Court held that it cannot hold a principal vicariously liable in advance for a wrong yet to be committed.
5. **Entitlement to employment benefits:** An employee can only be entitled to a claim if he/she can prove such entitlement *by reference to the law that gives it, the agreement from which the entitlement was agreed upon, or the conditions of service governing the relationship.* In this case, the Claimant failed to put before the Court the instrument entitling them to health insurance and pensions; and to disclose what “*all relevant benefits*” and “*other benefits*” entails. Consequently, the claim for entitlements, having not been proved was dismissed.

6. **Restraint from denial of liability:** The Claimants sought for an order of perpetual injunction restraining the Defendant from further denying liability for the Claimants' acts done in the course of their employ. There were no acts done by the Claimants or put before the Court for which the Defendants were denying liability. Flowing from the foregoing, the claim for a perpetual injunction failed; *the Court cannot put something on nothing*.

COMMENTS

The action of the Claimants failed on two main grounds: the mode of commencement of the action; and lack of sufficient facts and evidence upon which the Court could base its decision. Matters of this nature usually contain disputed acts which can only be determined by the Court through plenary proceedings, entailing calling of witness to tender material evidence and cross examination. However, in such a topical case, the Claimants failed to provide sufficient facts and documentary evidence with which the Court could make an informed decision. The Court did hold however that, having regard to Section 91(1) of Labour Act, the determination of the existence of an employment relationship rests on whether it is “*a contract of service (employee) or a contract personally to execute any work or labour (independent contractors)*”. Relying on the Supreme Court's decision in *Shena Security Co. Ltd v. Afropak (Nig.) Ltd & ors*², the Court highlighted parameters for determining the nature of the relationship (contract of service (employment) or contract for service (independent contract)) as thus:

- a. *If payments are made by way of “wages” or “salaries” this is indicative that the contract is one of service. If it is a contract for service, the independent contractor gets his payment by way of “fees”. In like manner, where payment is by way of commission only or on the completion of the job, that indicates that the contract is for service.*
- b. *Where the employer supplies the tools and other capital equipment there is a strong likelihood that the contract is that of employment or of service. But where the person engaged has to invest and provide capital for the work to progress, then it is a contract for service.*
- c. *In a contract of service/employment, it is inconsistent for an employer to delegate his duties under the contract. Thus, where a contract allows a person to delegate his duties there under, it becomes a contract for services.*
- d. *Where the hours of work are not fixed it is not a contract of employment/of service.*
- e. *It is not fatal to the existence of a contract of employment/of service that the work is not carried out on the employer's premises. However, a contract which allows the work to be carried on outside the employer's premises is more likely to be a contract for service.*
- f. *Where an office accommodation and a secretary are provided by the employer, it is a contract of service/of employment.*



In all, it is important for parties to clearly define their relationship and establish their respective status. It is also imperative to note that, should the Court opine that the written terms of a contract do not reflect the reality of the relationship, or the arrangement is ambiguous or purports to conceal the true employer, the Court may disregard the written contract and determine the relationship of the parties based on the facts and evidence before it.

² [2008] 4 – 5 SC (Pt. II) 117



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