Neutral Citation Number: [2021] EWCA Civ 594

Case No: A2/2018/3054

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
UKEAT/037/18/BA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/04/2021

Before :

LORD JUSTICE BEAN

- -

Between :

ADDISON LEE LIMITED	**Appellant**
- and -	
(1) MR M LANGE	
(2) MR M OLSZEWSKI	
(3) MR M MORAHAN	**Respondents**

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Christopher Jeans QC and **Georgina Hirsch** (instructed by **Baker McKenzie**) for the **Appellant**
Oliver Segal QC (instructed by **Leigh Day)** made written submissions for the **Respondents**

Hearing date: 16 April 2021

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Approved Judgment

Lord Justice Bean :

1. On 25 September 2017 an employment tribunal chaired by EJ Pearl gave its decision that the Claimant drivers, Mr Lange, Mr Olszewski and Mr Morahan, were "workers" satisfying the definition set out in section 230(3)(b) of the Employment Rights Act 1996 and the related provisions of the Working Time Regulations 1998 and the National Minimum Wage Act 1998 ("limb (b) workers"); and also that the periods of work for which they should be paid were the periods during which they were logged on to Addison Lee's internal driver portal system. The company appealed to the Employment Appeal Tribunal which handed down a judgment on 14 November 2018 (sealed on 21 November 2018) dismissing the appeal. Addison Lee applied to this court for permission to appeal.

2. That application came before me on the papers on 19 March 2019. By that time this court (Sir Terence Etherton MR, Underhill LJ and myself) had decided the case of *Uber BV & others v Aslam* [2019] ICR 845, finding by a majority that Uber drivers were limb (b) workers, but had granted Uber permission to appeal to the Supreme Court. I gave permission to appeal to Addison Lee, writing:-

> "If the appeal to the Supreme Court in *Uber v Aslam* is successful it may call into question the decisions of the ET and EAT in the present case. This appeal should not be listed until after judgment is given in *Uber v Aslam* although it should then be expedited."

3. Nearly two years later, on 19 February 2021 the Supreme Court handed down its judgment in *Uber v Aslam*. Uber's appeal was unanimously dismissed on all points. It seemed to me that the terms of the judgment called into question whether Addison Lee's appeal to this court should be allowed to proceed. I therefore made an order under CPR 52.18(1)(b) setting aside my original grant of permission and directing that an oral hearing be held of Addison Lee's application for permission to appeal. It is in my view a compelling reason to set aside the grant of permission to appeal to this court if a subsequent decision of the Supreme Court shows that the proposed appeal does not have a real prospect of success.

4. The main issue decided by the ET in the present case was that the Claimants were "limb (b) workers". They did so on two alternative bases. The first was that there was an overarching contract between each claimant and Addison Lee. The alternative basis was that each time a driver logged on he was undertaking to accept the driving jobs allocated to him and to perform driving services personally. The EAT upheld both conclusions.

5. The Driver Contract between each Claimant and Addison Lee included (in the version dated 14 May 2015) the following paragraphs:

> "5. Provision of Services
>
> 5.1. Subject to Clause 5.4, you choose the days and times when you wish to offer to provide the Services in accordance with the terms of the Driver Scheme but unless we are informed otherwise, you agree that if you are in possession of and logged

> into an Addison Lee XDA you shall be deemed to be available and willing to provide Services.
>
> 5.2. For the avoidance of doubt, there is no obligation on you to provide the Services to Addison Lee or to any Customer at any time or for any minimum number of hours per day/ week/month. Similarly, there is no obligation on Addison Lee to provide you with a minimum amount of, or any, work at all."

6. The ET made the following significant findings of fact:

> "17. Drivers could use their hired vehicles, which all had Addison Lee livery, for private purposes. Without descending to detail, the Respondent's computerised system was able to keep a check on the "excess" mileage that was being driven for these personal purposes. Their predominant use, however, was for the transporting of customers. This is a business that is driven by technology and each driver was given the handheld XDA, without which customers could not be transported. When a driver is ready to work, he/she logs on to the system via the handheld computer. The system knows the location of both the vehicle and the XDA itself. When a job was notified to the driver s/he had to accept it forthwith. If they did not do so they had to give an acceptable reason. If the Controller deemed the reason to be unacceptable, the matter was then referred to a supervisor. This was made clear at page 646. Refusing a job in this way was known as "unallocation". A sanction might follow."

7. At paragraphs 43 and 44 they set out competing submissions of Andrew Burns QC for the company and Thomas Linden QC (as he then was) for the Claimants:-

> "43. Our approach in deciding the issue is, first, to remind ourselves that we must not gloss the words of the statute. We have to ask, in the light of all our findings, whether these Claimants entered into or worked under a contract that complies with the definition of a limb (b) worker. However, we need, at the outset, to address Mr Burns's contention that the absence of any contractual obligation that obliged the drivers to drive is a sufficient basis for saying they cannot be workers in law. The Respondent might ask them or encourage them to log in, but it could never oblige them to log in, either at any specific time, or for a specific period. Hence, their claims to be workers must fail…….
>
> 44. Mr Linden robustly argues to contrary effect. He maintains there was an overarching contract – see below – but if there was not, this is not a decisive factor. The reason he gives is that when the drivers were logged on and driving there has to have been a contractual agreement in force with the Respondent on each occasion, regardless of the fact that they chose when they wanted to log on. He relies, in particular, on the passages in Windle for

> the proposition that the absence of mutuality of obligation between driving assignments is not decisive, but merely a factor to be taken into account. We consider that he is correct in this submission and that the lack of an obligation at any particular time to offer driving services, by logging on, is not inherently or necessarily fatal to the Claimants' contentions."

8. The heart of the ET's decision is paragraphs 47 to 50. (I will, as the EAT did, divide up the long paragraph 47 into three sections). They saud:

> "47. Those facts [from which Mr Linden argued that an inference should be drawn that there was an overarching agreement] begin with the arrangements that bring the drivers into the Respondent's business model. Plainly, they have to apply to be drivers and Addison Lee has to carry out certain checks. The drivers will need the relevant licence. They are interviewed for suitability. They are tested about their knowledge of London. They experience induction. They can attend Knowledge School. They then sign two agreements and the second, the Hire Agreement, entails a serious financial commitment, as well as subsidiary insurance obligations. By this point it is impossible to say that the drivers are not undertaking to carry out driving work for the Respondent, in the vehicles they are agreeing to hire. We agree with their submission that, at the very least, they are impliedly and necessarily undertaking to do some driving work.
>
> The Respondent is correct to say that they are free not to do so and that they can choose when to do it. The commercial reality, however, is that they are undertaking to do work when and as soon as they log on. There is, in our view, a strong implication of an underlying agreement. They remain under Addison Lee's rules between driving jobs. Their use of the vehicle, for example, is restricted and regulated; and they cannot remove the Addison Lee insignia. The Driver Contract remains in force. It is when it is terminated that the vehicle can be repossessed, in effect, forthwith. Underlying all of this is the ongoing vehicle hire charge that endures from week to week (subject to the free weeks being earned), a significant factor, and the recoupment of the 'service charge' referred to in paragraph 26 above.
>
> From an economic standpoint, all this obliges the drivers to log on and drive, so as to cover fixed hire costs. It is perhaps, the central point, because it is the mechanism by which the Respondent can be close to certain that its drivers will log on. Addison Lee needs them to log on; and they need to do so in order to pay the overheads and then start earning money. They know that once they log on, they have to accept the jobs that the Respondent's system offers them. It is a symbiotic relationship, to borrow a word from the scientific world. We conclude that there was an overarching contract."

9. Although the ET accepted the argument that there was an overarching contract, it did not base its conclusion that the Claimants were limb (b) workers only on that finding. It went on to say:

> "49. Regardless of our conclusion concerning the overarching contract, we have come to the view that the Claimants were workers as defined; and that this is the correct decision, even if we were wrong on the overarching contract question. We have already dealt with the contention that they could not have been workers because they were under no obligation to drive. We accept Mr Linden's submission that the statutory definition of worker does not mean that the Respondent is obliged to offer work. We agree with him that there must be a contractual obligation by the drivers to provide services. The statutory wording is that there must be a contract "whereby the individual undertakes to do or perform personally any work or services" for the other party.
>
> 50. This was clearly the case here whenever each driver logged on. The test is an objective one and we need to ask what a reasonable observer, in possession of the material facts, would say the parties had agreed. Ignoring the period between 'log ons', the drivers, when they logged on, were undertaking to accept the driving jobs allocated to them. They were undertaking to perform driving services personally. No other conclusion is possible."

The Limb b worker issue

10. Mr Jeans distinguishes Uber on the basis that in that case there was no written contract between Uber London Ltd and the drivers. There was a much more elaborate series of documents which purported to show that Uber London Ltd had no contract with the drivers and was no more than the local agent of the Dutch parent company, Uber BV, which licensed tens of thousands of self-employed businessmen (the drivers) to use the Uber app. The ET, EAT, a majority in this court and the unanimous Supreme Court all held that this did not reflect reality and that there plainly was a contractual relationship between Uber London Ltd and each driver.

11. Here, as Mr Jeans submits, there is no doubt that a contract existed between each Claimant driver and Addison Lee. Clause 5.2 of that contract provides that “there is no obligation on you [the driver] to provide your services to Addison Lee at any time or for a minimum number of hours per day/week/month. Similarly there is no obligation for Addison Lee to provide you with a minimum amount of work or any work at all.” That, Mr Jeans argues, reflects reality, and the ET were wrong to hold otherwise.

12. The Supreme Court in *Uber* followed its previous decision in *Autoclenz v Belcher* [2011] ICR 1157. It held that in determining whether a claimant such as a minicab driver is a limb b worker the court is interpreting a statute rather than interpreting a contract, and where the provisions of the contract are at variance with the reality of the facts they should be disregarded. In the present case, the ET found that clause 5.2 of the Driver Contract did not reflect reality and that the drivers, when they were logged

on, were undertaking to accept the trips or jobs offered to them. They also found (paragraph 17, quoted above) that a driver had to accept each job that was offered and that sanctions were imposed if a driver turned down a job without good reason. They also observed that if Clause 5.2 really did allow a driver to refuse any job which he would rather not do despite being logged on, that would contradict Clause 5.1 which provided that each driver was deemed to be available for work when he was logged on.

13. Mr Jeans notes that the Supreme Court held in Uber that "the right to refuse is not critical, provided that there is at least an obligation to do some work". Again relying on Clause 5.2, Mr Jeans submits that the express terms of the contract provided that there was no obligation on any driver to do any work and indeed the ET found that the drivers were "free not to work". He contrasts this with the finding in *Uber* at paragraph 128 of the judgment that Uber drivers were "required to be generally willing and available to take trips". I do not think that it is reasonably arguable that in the sentence just quoted Lord Leggatt was saying that there was an obligation on Uber drivers to do a minimum number of hours of work: indeed Mr Jeans accepted in oral argument that Lord Leggatt was referring only to times when each Uber driver was logged on.

14. It was absolutely central to the Uber arrangements that (paragraph 96 of the Supreme Court judgment) "drivers have the freedom to choose when and where (within the area covered by their PHV licence) to work." There was nothing in the Uber welcome pack or any other provision in the more elaborate documentation in that case which imposed a minimum number of hours. Addison Lee drivers are no different. There are no set or even minimum hours. If that were the simple answer to the case, the hearing in Uber, or the hearing in the present case, would have been very short indeed, and all the other points would be irrelevant. However, the ET's finding at paragraph 44 is plainly correct. Each time one of the Claimants logged on there was a contractual agreement in force between him and Addison Lee.

15. Mr Jeans submits that, although it is well established that economic necessity is not enough to create mutuality of obligation, the reference in paragraph 47 of the ET decision to "the commercial reality" indicates that the ET fell into the trap of finding an underlying or overarching contract from the economic pressures on the drivers. However, even assuming – without deciding – that this is an arguable flaw in the ET's reasoning, it only applies to the overarching contract argument. The alternative argument, accepted by the ET at paragraphs 49-50 quoted above, is not affected. Paragraph 50 of the ET's decision is in my view an unappealable finding of fact which was properly open to the ET on the evidence before them.

16. There is no arguable error in the finding of the ET, upheld by the EAT, that in the present case the Claimants were limb (b) workers. Now that the Supreme Court in *Uber* has emphatically reaffirmed the *Autoclenz* principle. there is no longer a reasonable prospect of success in overturning that finding in the present case and there is no compelling reason why this appeal should proceed further.

The working time issue

17. Mr Jeans submits that although Uber's appeal to the Supreme Court was dismissed on the working time issue as well as the limb (b) worker issue, the working time decision now has to be viewed in the light of the judgment of the CJEU in the Slovenian Radio and Television case (*DJ v Radio Televizija Slovenija*), given on 9 March 2021, that is

to say after the Supreme Court decision in *Uber v Aslam*. The claimants worked at a distant outpost of Slovenian Radio and TV, far from their homes. They worked 12 hour shifts but also had to be on "standby" for a further six hours a day, during which they had to be available for work at an hour's notice. Standby time was paid at only 20% of working time rates. The CJEU, after referring to their previous decisions including *SIMAP* [2001] ICR 1116 and *Federacion de Servicios Privados v Tyco Integrated Security* [2015] ICR 1159, held that:

> "Article 2(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as meaning that a period of stand-by time according to a stand-by system, during which the worker is required only to be contactable by telephone and able to return to his or her workplace, if necessary, within a time limit of one hour, while being able to stay in service accommodation made available to him or her by his or her employer at that workplace, without being required to remain there, does not constitute, in its entirety, working time within the meaning of that provision, unless an overall assessment of all the facts of the case, including the consequences of that time limit and, if appropriate, the average frequency of activity during that period, establishes that the constraints imposed on that worker during that period are such as to affect, objectively and very significantly, the latter's ability freely to manage, during the same period, the time during which his or her professional services are not required and to devote that time to his or her own interests. The limited nature of the opportunities to pursue leisure activities within the immediate vicinity of the place concerned is irrelevant for the purposes of that assessment."

18. With respect to Mr Jeans, I do not consider it arguable that this ruling is innovative, or that it might have led the Supreme Court to a different conclusion on the working time issue in *Uber*. The ET in the present case made findings on the working time issue at paragraphs 56 and 57:

> "56. Reg. 2(1) of the Working Time Regulations defines working time as ("a) any time during which he [a worker] is working, at his employer's disposal and carrying out his activities or duties …"
>
> 57, The parties disagree about whether the determining of questions of holiday pay or national minimum wage, that may involve considering this definition, is something that is 'workable.' Mr Linden says that time logged on satisfies the definition. Mr Burns considers that this is simplistic, because in evidence drivers told us that they may be resting up in the car while logged on, in a virtual taxi rank within a fixed distance of Heathrow, commuting to home, or even (as put in argument, as an illustration) writing a play or novel. We do not consider these points to be persuasive. Logging on undoubtedly put the drivers

> at the Respondent's disposal and during logging on periods the drivers would not always be transporting a passenger. That is inherent in the work. If the driver chose to park in a vehicle and remain logged on, s/he was no less at the disposal of Addison Lee. The same was true if the driver was heading home (not having logged off); or parked up and penning a work of literature or writing an email. However, the break times are different in character and it seems to us that during these break periods the driver satisfies no part of the tripartite definition. As far as we can judge, our approach is one that can be calculated and is, therefore, 'workable'. Our conclusions here are also consistent with the ECJ decision in *Federacion de Servicios Privados* [2015] ICR 1159. We note, in passing, that the employers in that case voiced a fear that employees would "carry on their personal business" during the journeys at either end of the day. This did not weigh with the Advocate General or the Court and the former observed that monitoring procedures could be put in place by the employer. In this case (where a similar point has been raised) monitoring procedures already exist."

19. Like the EAT, I consider that these findings of fact supported the conclusion of the ET that when the drivers were logged on and had not notified the company through the App that they were on break time, they were working at the company's disposal and carrying out their activities or duties for the purposes of the Working Time Regulations (as the ET in the Uber case had likewise held). Nothing in the Slovenian Radio and Television case throws any doubt on that finding.

Conclusion

20. I therefore refuse Addison Lee permission to appeal to this court from the decision of the EAT dismissing their appeal against the decision of the ET in the Claimants' favour. As the case is of some general significance I give permission for this judgment to be cited.