IN THE EMPLOYMENT APPEAL TRIBUNAL

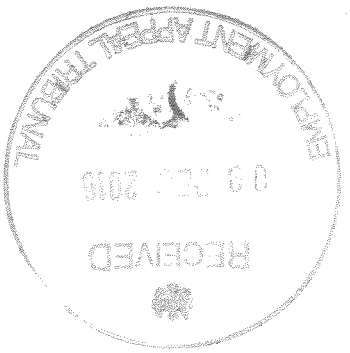
BETWEEN:

(1) UBER B.V.
(2) UBER LONDON LIMITED
(3) UBER BRITANNIA LIMITED

Appellants

(1) YASEEN ASLAM
(2) JAMES FARRAR

Respondents



NOTICE OF APPEAL

1. The Appellants are:

   (1) Uber B.V. of Vijzelstraat 68, 1017 HL Amsterdam ("UBV");

   (2) Uber London Limited of Aldgate Tower, First Floor, 2 Leman Street, London E1 8FA ("ULL");

   (3) Uber Britannia Limited of Aldgate Tower, First Floor, 2 Leman Street, London E1 8FA

   each of whom were Respondents below (the Appellants are referred to collectively as "Uber").

2. Any communication relating to the Appeal may be made to the Appellants care of Adam Hartley, DLA Piper UK LLP, 3 Noble Street, London EC2V 7EE.

3. The Appellants appeal from the Judgment of the Central London Employment Tribunal ("the Tribunal") sent to the parties on 28th October 2016, in case number 2202551/2015 & Others.

4. The parties to the proceedings before the Tribunal, other than Uber were:

   (1) Yaseen Aslam, Claimant, c/o Nigel Mackay, Leigh Day, Priory House, 25 St John's Lane, London, EC1M 4LB; and

   (2) James Farrar, Claimant, c/o Nigel Mackay, Leigh Day, Priory House, 25 St John's Lane, London, EC1M 4LB.

5. Copies of:

   (1) The written record of the Tribunal's judgment and the written reasons (collectively, the "Judgment");

   (2) The Claimants' ET1s;

   (3) The Appellants' Consolidated Grounds of Resistance;

   are attached to this notice of appeal.

6. The Appellants have not made an application for reconsideration of the Tribunal's decision.

7. The Appellants appeal against the following findings of the Tribunal:

   (1) The finding at paragraph (1) of the Judgment that in the circumstances and to the extent explained in the accompanying Reasons, the Claimants were "employed" as "workers" by ULL, within the meaning of section 230(3)(b) of the Employment Rights Act 1996 ("ERA"), regulation 36(1) of the Working Time Regulations 1998 ("WTR"), and section 54(3) of the National Minimum Wage Act ("NMWA") ("finding 1");

   (2) The finding at paragraph (2) of the Judgment that the Claimants' working time is to be calculated in accordance with regulation 2(1) of the WTR, and the accompanying Reasons ("finding 2"); and

   (3) The finding at paragraph (3) of the Judgment that for the purposes of regulation 44 of the NMWR, the Claimants were engaged in "unmeasured work" and their hours of

work are to be reckoned in accordance with regulations 45 and 47 and the accompanying Reasons ("finding 3").

Grounds of appeal

Finding 1

8. The Tribunal concluded at paragraph 86 of the Reasons that any driver who (a) had the Uber Application ("the Uber App") switched on; (b) was within the territory in which he was authorised to work; and (c) was able and willing to accept assignments was "for as long as those conditions are satisfied, working for Uber under a "worker" contract and a contract within each of the extended definitions".

9. In making that finding, the Tribunal erred in law, as set out below.

(1) The Tribunal erred in law in disregarding the written contracts

10. The Tribunal wrongly found that the written contracts entered into between the Claimants, Uber BV ("UBV") and riders, which were inconsistent with the existence of any employment or worker relationship, "did not correspond with the practical reality" (paragraphs 90 and 91), and could accordingly be disregarded in their entirety (paragraph 96).

11. There was no proper lawful basis for such a wholesale rejection of the written contracts. The Tribunal was wrong to conclude that any of the facts or matters on which it relied at paragraphs 87 – 96 were inconsistent with a conclusion that the written contracts, properly construed, reflected the true relationship between the parties.

12. Further, the Tribunal erred in law in concluding at paragraph 89 that Uber was a supplier of transportation services. The reasons given in that paragraph were not rationally capable of supporting the conclusion, and failed to have regard to the contractual position that any transportation service was supplied by the Claimants to the rider, and was not supplied by Uber. In any event, this conclusion was irrelevant to the characterisation of the relationship between Uber and the Claimants as an employment relationship.

13. Further, the Tribunal's analysis at paragraphs 90 - 91 disregarded basic principles of agency law, with which the operation of the written contracts were consistent. The Tribunal

accordingly erred in law in finding "absurd" a number of propositions which were legally orthodox and factually unremarkable.

14. Since there was no inconsistency between the facts found by the Tribunal and the written contracts, the Tribunal erred in law in concluding that the written contracts did not reflect the parties' true agreement, and in failing to analyse the nature of the parties' relationship in the light of their written contracts.

(2) The Tribunal erred in law in relying on regulatory requirements as indicia of an employment relationship

15. The Tribunal erred in law in taking into account as indicia of a relationship of employer and worker a number of factors which were required of ULL as part of its regulatory obligations as the holder of Private Hire Vehicle Operator's Licence, pursuant to the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000 ("the Regulations"), and other legislation.

16. Such factors were legally irrelevant to the characterisation of the contractual relationship between the parties. It was not the intention of the regulatory regime to require private hire operators to enter into an employment relationship with drivers. Features of the relationship derived from regulatory obligations were not relevant to the characterisation of the nature of the parties' agreement.

17. Examples include the following:

    (1) Paragraph 92(1): Uber's "assertion of sole and absolute discretion to accept or decline bookings". This was required of ULL under section 2(1) of the Private Hire Vehicles (London) Act 1998;

    (2) Paragraph 40 and paragraph 92(2): "Uber interviews and recruits drivers", and required them to "present themselves and their documents personally". As a licensed operator, ULL was obliged to ensure that drivers had all necessary documents, including a driver's licence, private hire licence, national insurance number, insurance certificate, vehicle licence and MOT: Regulation 13;

(3) Paragraph 92(3): "Uber controls the key information (in particular, the passenger's surname, contact details and intended destination) and excludes the driver from it". ULL was required to obtain and keep this information pursuant to Regulation 11;

(4) Paragraph 92(6): "the fact that UBV fixes the fare, and the driver cannot agree a higher sum with the passenger". This was required of ULL under Regulation 9(3);

(5) Paragraph 92(12): "The fact that Uber handles complaints by passengers, including complaints about the driver". This was required of ULL under Regulations 9(7) and 14;

(6) The fact that the right to use the App was personal to the driver and not transferable (paragraph 39). This was required of ULL under Regulation 11.

(3) The Tribunal erred in law and made internally inconsistent and perverse findings of fact in concluding that the Claimants were required to work for Uber

18. The Tribunal wrongly held at paragraph 92(4) that when the App is switched on Uber "requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements". The Tribunal's statement at paragraph 92(4) was inconsistent with the findings of fact which had been made by the Tribunal, including at paragraphs 15, 48, 51, 52 and 53 and was not based on any evidence capable of sustaining it.

19. Those paragraphs made it clear that drivers including the Claimants were **not** under any contractual obligation to take trips when logged in to the App. If Uber had had the power under the contract to compel the Claimants to take trips when logged on to the App they would have had no reason to seek to persuade them to do so.

20. The only action which the Tribunal found could be taken by Uber when drivers repeatedly refused to take trips (or repeatedly cancelled them without good reason after they had been confirmed) was to log them off the system for a short period (wrongly recorded by the Tribunal as 10 minutes, rather than two minutes), on the basis that their repeated refusal was an indication that they were unavailable to take trips (as indeed it was). The change from 10 minutes to two minutes took place a number of months before the Tribunal

hearing, but after exchange of witness statements. It was raised by the Appellants before the Tribunal, in the course of cross-examination and in their closing submissions. The point was not engaged with by the Respondents, and the Tribunal erred in failing to reflect it.

21. However, this action was inconsistent with there being any contractual obligation on the Claimants to work, or on Uber to provide them with work, when the Claimants logged on to the App.

22. On the Tribunal's own finding, rather than having any contractual power to require the Claimants to work, Uber's only recourse was to recognise that they were unavailable for a short period. After that period, the Claimants would remain free to log on to the App or not, as they pleased, and to take or refuse trips as they pleased, if logged on. The Tribunal accordingly erred in law in relying on the power to require the Claimants to log off for a short period as the sole reason for its crucial conclusion that there was any requirement on the Claimants to take trips when logged on to the App.

(4) The Tribunal failed to take account of relevant considerations

23. The Tribunal failed to take into account in its analysis at paragraphs 85 – 97 further facts which were inconsistent with the existence of any relationship of employer and worker between ULL and the Claimants, but, rather, strongly indicated that the Claimants were carrying on a business undertaking on their own account. These included the following:

    (1) The Claimants paid a service fee in respect of the use of the App (paragraph 19 and 21)

    (2) The Claimants supplied their own vehicles, and were responsible for all costs incidental to owning and running the vehicles (paragraphs 43 – 45);

    (3) The Claimants were responsible for funding their own private hire licences (paragraph 63);

    (4) The Claimants were under no obligation to undertake any minimum number of trips (paragraph 43);

(5) The Claimants were free to work for or through other organisations, including direct competitors operating through digital platforms (paragraph 61). They were free to do this even when logged on to the Uber App. A driver could accordingly be logged on to a number of delivery or private hire apps simultaneously, including the Uber App, and take trips at will from amongst them, as he chose;

(6) The Claimants treated themselves as self-employed for tax purposes (paragraph 65);

(7) The Claimants were not provided with any uniform, and were discouraged from displaying Uber branding (paragraph 66).

24. Further, the findings of fact made by the Tribunal and set out at paragraphs 23(1) – (5) above were inconsistent with the Tribunal's conclusion at paragraph 92(11) that Uber "accepted the risk of loss which if the drivers were genuinely in business on their own account would fall on them". On the Tribunal's own findings, the drivers accepted the risk of loss.

(5) The Tribunal wrongly applied the extended definition of employment

25. The Tribunal further erred in law at paragraph 99 in concluding (obiter) that if the drivers were supplied by UBV to work for ULL, claims would lie against UBV by virtue of section 34 NMWA, regulation 36(1) WTR and section 43K(1) ERA. That conclusion was based on the erroneous finding that there was no contract between the Claimants and their passengers. On a proper interpretation of the written agreements in the light of the facts as found, there was such an agreement, under which the rider was a customer of the Claimants.

Conclusion on Finding 1

26. Had the Tribunal directed itself properly on the law, and applied the law properly to the facts, it would have been bound to conclude that the Claimants were not workers employed by Uber within s. 230(3)(b) ERA, and the equivalent provisions of NMWA and WTR, but were in business on their own account as private hire drivers, using the Uber App as a means of making contact with riders.

Finding 2

27. The Tribunal erred in law at paragraph 122 in concluding that the Claimants were working at their employer's disposal and carrying out their activity or duties for the purposes of regulation 2(1) WTR (i) when the Claimant was within his territory, had the App switched on, and were ready and willing to work; or (ii) when a trip had been confirmed, and until it was concluded.

28. As set out above, and on the facts found by the Tribunal, the Claimants were at liberty to take on or refuse work as they chose during such times, or to cancel trips already confirmed, and were at liberty to work for others, including direct competitors of Uber. In the circumstances, they were not at Uber's disposal, or working for Uber. Further, in the latter case, the Claimants were providing services to the rider, and not to, or for, Uber.

Finding 3

29. The Tribunal erred in law at paragraphs 125 – 128 in concluding that the Claimants were engaged in "unmeasured work" for the purposes of regulation 30 of the National Minimum Wage Regulations, and that the relevant hours were the hours spent by the Claimants within their territory with the App switched on.

30. This analysis was wrong for the reasons already outlined. Its absurd consequences expose the flaws in the entirety of the Tribunal's approach to this case. On the Tribunal's finding, Uber is liable to pay the national minimum wage to drivers while they are in their territory with the App switched on, even if those drivers refuse all trips offered to them.

Disposal of the appeal

31. The Appellants invite the Appeal Tribunal to set aside the Judgment, and to substitute an order dismissing all the claims on the basis that the Claimants are not workers employed by the Appellants within the meaning of the relevant legislation.

32. Alternatively, the Appellants seek remittal for a rehearing to a differently-constituted tribunal. Given the very strong, adverse and erroneous views expressed by the Tribunal about the status of the Appellants' contracts, remittal to the same Tribunal would be inappropriate.

DINAH ROSE QC

FRASER CAMPBELL

8 December 2016