Case Number: 2208029/2016
2208030/2016
2208031/2016

THE EMPLOYMENT TRIBUNALS

Claimants: (1) Mr M Lange
(2) Mr M Olszeski
(3) Mr M Morahan

Respondent: Addison Lee Limited

Heard at: London Central **On:** 5, 6, 7, 10 and 11 July 2017
13 & 14 July 2017 (In Chambers)

Before: Employment Judge Pearl

Members: Mrs C I Ihnatowicz
Ms S Plummer

Representation
Claimants: Mr T Linden, QC
Respondent: Mr A Burns, QC with Ms G Hirsch, Counsel.

JUDGMENT

1 The Claimants were workers who satisfy 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.

2 Periods of work for which they should be paid are the periods that they are logged onto the Respondent's internal driver portal system.

REASONS

Introduction

1. These claims are in the nature of a test case and the agreed List of Issues is annexed, marked A. The claims concern holidays under the 1998 Working Time

Regulations 1998 and also claims under the National Minimum Wage Act 1998 and the relevant regulations.

2. The principal issue is whether or not the Claimants were workers for the purposes of section 230(3)(b) Employment Rights Act 1996 and related legislation.

3. In resolving the issues, we heard evidence from Mr Olszeski, Mr Lange and Mr Morahan; and from Mr Kelly, Mr Gavriel, Ms Fairers and Mr Bolt for the Respondent. We have studied two bundles running to over 1100 pages, as well as some documents that were handed in during the hearing.

Overview

4. The Claimants' case is that they worked for the Respondent personally as drivers in accordance with requirements, policies and systems designed by the Respondent; and that the Respondent was not a customer of any business that these drivers ran. They rely upon all the salient features of the Respondent's operations in seeking to make good that contention. The Respondent's case is that although the drivers leased their cars from an associated company of the Respondent, they were free to obtain a vehicle elsewhere. Further, they could choose when to work. They also rely on all the relevant arrangements to argue that the drivers fall outside the definition of worker.

Facts

5. There are few factual disputes between the parties. They differ on various points of detail, but it is disproportionate and unnecessary for the Tribunal to resolve all of these points, some of which are relatively arcane. What follow are the factual findings that are relevant to the issues.

6. Mr Olszeski, who we shall refer to in these reasons as Caesar, for convenience, started driving for the Respondent in June 2014. Mr Lange began in August 2014 and Mr Morahan in June 2015, although he had worked as a part time employee in the Respondent's call centre from early 2010. In all three cases they drove Ford Galaxy vehicles. All witnesses are agreed that of the approximately 4,000 Addison Lee drivers in London, only one drove his own car. It was otherwise invariably the case that drivers would sign both the driver contract and the vehicle hire agreement.

7. The wording in the drivers' contracts changed in May 2015. The original wording for Caesar and Mr Morahan is to be found at page 238(1). Under the first heading Driver Contract, it is provided that:-

> "Drivers who provide their services to Addison Lee are self-employed and contracted to provide services to, and receive services from, Addison Lee on the terms of this

> agreement. Nothing in this agreement, or any aspect of our dealings with a Driver, will create an employer/employee relationship between a Driver and Addison Lee. This agreement shall also govern the relationship between Drivers and Addison Lee, where Addison Lee arranges a booking for a Cash Customer on your behalf, and where you provide those Services as principal to the Cash Customer."

8. Under the heading "Your Relationship with Addison Lee" it is provided that:-

> "You agree that you are an independent contractor and that nothing in this agreement shall render you an employee, worker, agent or partner of Addison Lee and you shall not hold yourself out as such."

9. It is then said that in the case of "Addison Lee Customers" the drivers act as the Respondent's sub-contractor for the purposes of fulfilling the Respondent's contract with the customer. In the case of Cash Customers, it is said that the Respondent acts as the Driver's agent for the purposes of arranging and agreeing bookings; and that each time a Cash Customer is carried, the Driver enters into a contract for private vehicle hire as principal with each customer.

10. Clause 5.1 states:-

> "You choose the days and times when you wish to offer to provide the Services which are the subject of this agreement but unless we are informed otherwise, you agree that if you are in possession of and logged into an Addison Lee XDA [the handheld computer] you shall be deemed to be available and willing to provide Services which are the subject of this agreement."

11. Clause 5.2:-

> "For the avoidance of doubt, there is no obligation on you 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 on Addison Lee to provide you with a minimum amount of work or any work at all."

12. Clause 5.3 obliges drivers promptly to perform each "customer contract" in accordance with the terms of such a contract and also to indemnify the Respondent against claims from customers "for your breach of the customer contract …" A customer contract is defined further on in the agreement as individual agreements with cash or other customers "for the provision of Services on the terms and conditions … notified to the Addison Lee customer by us … copies of which are available on request from our driver liaison department."

13. We also note Clause 12.1 in this older version of the contract. "In order to preserve the integrity of our brand, you agree to comply at all times with the requirements set out in the Driver Operating Guide, the provisions of which form part of this agreement."

14. Under the general provisions in Section 15 it is again reiterated that nothing in the agreement is intended to or shall be deemed to establish, inter alia, an

employment relationship; and that the driver is a self-employed contractor and is responsible for his tax and national insurance and VAT.

15. In May 2015 drivers entered into a new contract and there are changes, some of which we may refer to later. At this point we only note the change under Clause 12.1 and the words "the provisions of which form part of this agreement" which are omitted.

16. There is agreement that the Respondent positions itself at the premium end of the vehicle hire market and stresses high standards of service in its promotional literature. There is no dispute about the course of recruitment, training and induction described by the Claimants. Mr Gavriel is the Driver Recruitment Manager and he refers to the various recruitment stages that need to be passed and "the necessary skill set to be a driver with Addison Lee." These skills can be brought up to standard at the Respondent's Knowledge School. We accept that, as part of the recruitment and training procedure, drivers were not told that they would be required to work 50-60 hours a week, as has been alleged in the proceedings. It is likely that they were told that the average driver works between 50 and 60 hours a week and Mr Gavriel states as much. We also find a consensus that on average a driver might need to work between 25 and 30 hours a week in order to cover the fixed cost of vehicle hire. Precision is not possible in this regard because different drivers, who drive at different times of the day and on different dates, will vary as to the exact number of hours required in any week before their fixed costs are covered.

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.

18. It is convenient here to refer to some of the documents that abundantly evidence the day to day control that was exercised over the drivers. We omit details of the induction and training that the drivers underwent on the basis that it adds little to the essential facts. During those processes the drivers were issued with their XDA and also items such as a branded bag in which they could keep belongings. More materially, Caesar was issued with the operating guide at pages 606 – 631. The evidence from Mr Gavriel, the Recruitment Manager, is that this document has not been issued to drivers since October 2014 and we will

turn presently to the substitute document. The document given to Caesar describes the Respondent as London's premier private hire company. It lays down standards for the drivers to follow and makes suggestions which include asking passengers whether they have any baggage that the driver can carry. There is a suggested short script to use when contacting customers outside their premises. If a driver is told by the customer that the job is cancelled, the driver has to make contact with Control. Client confidentiality is important to the Respondent, states page 615, and drivers should not discuss company business or company policy and they are requested not to play music or the radio in the car unless the passenger requests this. Vehicles had to be serviced every 5,000 miles.

19. In the shorter Driver Guidance, which appears to have superseded this document, there are some further points we note. Customers should not be contacted after a job has been completed. "To avoid misunderstandings and problems, please do not engage in conversations about sex, politics, religion or anything controversial." There is also a driver code of conduct (page 660 I) and this, among other matters, states that drivers should ask customers whether they have a preferred route. We note that new drivers were closely monitored for the first four weeks and, if successful, they were upgraded in status, at which point they were required to enrol on the diploma course run by the Respondent: page 660K.

20. We were taken to some training slides and we briefly refer to some of them. Page 664 states that drivers should remember "you will be representing Addison Lee at all times you are in the vehicle …" Page 672 deals with professional attire and related matters and we find that there was a dress code that drivers had to observe including, in the case of males, wearing a clean shirt and tie and what was described as proper trousers and also no trainers. Page 678 reiterated that drivers must not "pull away" from a job without the consent of Control.

21. The Car Control Manual in its March 2013 edition is also a document we would refer to, as it sets out rules and standards for the Controllers to follow. There are references (e.g. page 639) to the drivers being on shifts. It is noted there that a driver who fails to log on by the correct time in the case of pre-bookings (as to which see below) could potentially be banned for 6 months from taking such bookings. There were numerous situations in which Control might want to contact, or were directed to contact a driver and one of those (page 644) was if the driver's vehicle was noted on the system as being empty for more than 3 hours.

22. Turning to the work undertaken by the drivers, and the systems they used, we begin with the evidence of Caesar. He explained that customers could book journeys by telephone through the Respondent's call centre; via the Respondent's app; online at the website; or by email. The passengers might or might not be account holders and drivers had no knowledge of the fare that had been agreed. The rates charged to account holders varied as between customers. In the case

of other passengers, a payment could be made direct to the Respondent by credit card or by what was known as a cash payment to the driver. In the case of cash payments, the driver would be notified through his XDA of the fare that had been agreed and no further negotiation or alteration was possible. After each trip (of whatever type) had been completed, the Respondent sent details of the job, including the fare to be paid to the driver, to the driver's online portal. In Caesar's case, he estimates that if he was undertaking 50-60 jobs in a week, up to 16 could be cash jobs, up to 16 might be credit card jobs and the remainder were account jobs. The proportions would change over time and would vary from driver to driver in any event. Pre-bookings were journeys that the drivers agreed to accept in advance and, typically, a driver would sign up for a pre-booking the day before and the pre-booking would be early the next morning. As is set out by Caesar, the drivers had to log into the XDA half an hour before the pick up time for these bookings. It was a rule that to log on to the system drivers had to be in the vehicle and away from home. There could be sanctions if a driver was late in arriving at the destination to collect a pre-booked customer.

23. We find that the invariable procedure adopted by these drivers was that when they were ready and able to work, they would log onto the system in their vehicles. The system then allocated a pick up location to the driver and we understand that the system sought to match the approximate location of drivers and their vehicles to that of the customer. Once sent to the drivers, they had to press the accept button more or less forthwith. As is set out in the training slides at page 678: "the allocation of jobs is automatic and is by computer, which will find the closest empty driver to every job it needs to cover. Once allocated a job you must move directly towards the pick up immediately, or the job may be taken from you."

24. We should note two buttons that the drivers could activate. The first was to inform the system that they were taking a break. Provided that the break was under two hours, they would at the conclusion of the break be able to resume their place in the queue of drivers in that locality. The second button was the home button and this would tell the system that they were then heading home, but the system could allocate a further job to them if (in very broad terms) the pick up and destination fitted in with the driver's route back home. Therefore, the driver who wanted to take a break would use the break button. A driver who wanted to go straight home without having to take any further passengers, and who was content to earn no more fares, would simply log off. But a driver who wanted to go home with the opportunity of taking a further fare on the way would use the home button. The button could only be used after the driver had been logged on for 4 hours. Therefore, at most, it could be used twice a day. In many instances, a driver could only use it once in a day.

25. In cross examination, Caesar told us that he was able to use his access to the driver's portal on his tablet to drive to areas where he could see from the information on the portal that there was a demand for drivers. This evidence is wholly rational and it would be surprising if drivers did not use their access to this information in the same way. If, as we infer, the purpose of signing into the system

was to find work and to earn money, it would make little sense for drivers not to seek to maximise their earnings in this way. Once they had arrived in a locale where there was a demand for drivers, the system would automatically know they were available for hire. Mr Lange adopted much of Caesar's witness statement. He pointed out that a delay in getting the vehicle serviced could result in a fine and that had happened once to him. Sanctions, for example for missing a pre-booked job, might be imposed by the Respondent. The company also employs people to carry out spot inspections so as to ensure that drivers are wearing the correct clothing and also that their vehicles are clean. He pointed out that if a driver received a parking ticket or any other fine for a traffic infringement, the Respondent would pay the same from the driver's wages. The driver would not be able to appeal the penalty.

26. Some other points emerged from the evidence. As Mr Morahan confirmed, if he wished to take a holiday from driving he would usually inform the Respondent in advance. He also said that it was known to him (and reinforced during training) that if he was logged off the system for more than 3 or 4 days, without any earlier notification, the Respondent would make contact with the driver to find out why. This also ties in with the agreed position that, after May 2015, unless a certain minimum amount of work was undertaken in any week, worth 45 points in the Respondent's scheme, a service charge of £35 a week was charged to the drivers. The precise details are irrelevant for these purposes, but we note what Ms Fairers told us. She said that the "rationale was to make a margin for the group the same, regardless of whether the driver worked."

27. We should refer briefly to the vehicle hire agreement and we take as an example that signed by Mr Lange with Eventech Limited. The rental fee was incurred weekly. The maximum period of hire was 12 weeks and, as we heard, these contracts were regularly renewed electronically. Although there was an insurance opt-out which allowed drivers to seek alternative insurance arrangements that complied with the agreement, understandably, few if any ever did so. There were restrictions on vehicle use in Clause 5 so that, for example, drivers could not modify the vehicle, allow it to be used for driving tuition, allow smoking at any time or allow any other driver to drive the vehicle unless permission had been granted. The agreement was terminable without cause and would in any event terminate immediately upon termination of the driver contract. In the cases of these Claimants that is exactly what happened (the circumstances in which they were dismissed do not fall to be set out in these reasons.) Branding and logos could not be removed. On the termination of a driver contract, the vehicle was returnable immediately and authority was granted by the agreement to the company to enter into any premises under the control of the driver for the purpose of taking immediate possession of it.

Submissions

28 We are grateful to counsel for their submissions, both written (four in total) and oral. We refer to some of these below.

Conclusions

An overview of the law

29 Section 230 of the Employment Rights Act 1996 provides in subsection (3) that: "In this Act '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 professional business undertaking carried on by the individual …"

30 The definition in regulation 2(1) of the Working Time Regulations 1998 is in identical terms, as is that in section 54(3) of the National Minimum Wage Act 1998.

31 In their opening notes, both Leading Counsel cite Bates van Winkelhof v Clyde & Co [2014] 1 WLR 2047 as a leading case. The Claimant solicitor was an equity partner in the Respondent LLP. The case principally turned on the effect of section 4(4) of the Limited Liability Partnerships Act 2000 but in giving the main judgement, Baroness Hale drew attention to general principles emerging from case law.

> " 24. First, the natural and ordinary meaning of 'employed by' is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.
>
> 25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Haswani v Juraj … were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in Hospital Medical Group Ltd v Westwood … who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a 'worker' within the meaning of section 230(b) of the 1996 Act.
>
> …
>
> 31. As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class …
>
> 33. We are dealing with the more precise wording of section 230(3)(b). English cases in the Employment Appeal Tribunal have attempted to capture the essential distinction in a variety of ways thus, in Byrne Bros (Formwork) Ltd v Baird … Mr Recorder Underhill QC suggested:
>
> "The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in

the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."

34. In Cotswold Developments Construction Ltd v Williams … Langstaff J suggested:
"a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

35. In James v Redcats (Brands) Ltd … Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all. He also accepted, at paragraph 48:
"in a general sense the degree of dependence is in large part what one is seeking to identify - if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached - but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer.
…
39. I agree with Maurice Kay LJ [in Westwood] that there is not 'a single key to unlock the words of the statute in every case'. There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my opinion they are not solved by adding some mystery ingredient of 'subordination' to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in the Redcats case … a small business may be genuinely an independent business but be completely dependent on and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the 'St Michael' brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood's case … One may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition."

32 In Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51 Sir Terence Etherton MR stated at paragraph 66:

"In the context of the legislation relevant to this appeal, a distinction is to be drawn between (1) persons employed under a contract of service; (2) persons who are self-employed, carrying on a professional business undertaking on their own account, and who enter into contracts with clients or customers to provide work or services for them; and (3) persons who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else: cf Lady Hale in the Bates van Winkelhof case at [25] and [31]. The persons in (3) fall within s. 230(3)(b) of the ERA and reg. 2 of the WTR and their employment falls within the definition of 'employment' in s. 83(2)(a) of the EA. I shall for convenience refer to them as 'limb (b) worker'."

33 In paragraph 94 he said:

"In deciding whether a worker is a limb (b) worker or falls within the second category in paragraph 66 above, the ET carries out an evaluative exercise with an intense focus on all the relevant facts: Jivraj v Hishwani … There is no single touchstone, such as whether

> there is a relationship of subordination of one party to another, for resolving the issue: Bates van Winkelhof at [39]. Subordination might, nevertheless, be relevant, as might be such factors as whether there are a number of discrete separate engagements, whether obligations continue during the breaks in work engagements (sometimes called an 'umbrella contract'), and also the extent to which the claimant has been integrated into the respondent's business …"

34 The case law that we have been referred to is all useful and important, provided that it is remembered that each appellate case arises from factual findings of specific facts at first instance. Some of the relevant citations have been included in the case law cited above, notably Bates van Winkelhof, but we would add some further references. In Byrne Bros the Claimant builders worked for the Respondent contractors, under an agreement that included provisions that they were not entitled to holiday or sick pay, that the contractor would incur no liability should he fail to offer assignments to the subcontractor and that the subcontractor had the right to refuse assignments. Having set out that the statute creates an intermediate class of workers between employees and those carrying on a business, Mr Recorder Underhill considered the policy behind the inclusion of limb (b) and his answer was set out at paragraph 33 of Baroness Hale's judgement above. In Cotswold the carpenter, Mr Williams, was engaged to work for a subcontractor that was providing services to London Underground. Langstaff J pointed out in paragraph 47, as had Mr Recorder Underhill in Byrne, that "mutual obligations are necessary for there to be a contract at all. If there is a contract, it is necessary then to determine what type of contract it is."

35 In James v Redcats (Brands) Ltd [2007] ICR 1006 the courier-claimant failed at first instance, partly because there was no mutuality of obligation, as the Respondent gave no guarantee of any volume of work; and the work could be declined by the Claimant. The conclusion that she was conducting a business with the company as a customer was, however, overturned on appeal. Paragraph 48 is set out in Baroness Hale's judgement above. We note paragraphs 49 and 50 as follows.

> "49. What the court must essentially try to do here, it seems to me, is to determine whether the essence of the relationship is that of a worker or somebody who is employed, albeit in a small way, in a business undertaking."

Having cited Cotswold Elias J continued at paragraph 50:

> "I would agree that this will often assist in providing the answer, but the difficult cases are where, as in this case, the putative worker does not in fact market his services at all, nor act for any other customer even though the claimant is not barred by her contract from so doing. In some cases the business is effectively created by the contract."

36 In Autoclenz Ltd v Belcher [2011] ICR 1157 (SC) the claimants valeted cars on behalf of the respondent. Their contracts stated they were sub-contractors and not employees and were not obliged to provide services to the company. It was not obliged to offer work to them. They claimed they were limb (b) workers. The tribunal at first instance found that the contractual provisions did not reflect the true agreement between the parties. For our purposes, the relevance of Lord Clarke's judgment is that, having stated that the tribunal must

ask what was the true agreement between the parties, he went on to endorse elements of Aikens LJ's judgment in the Court of Appeal. He had

> "stressed … the importance of identifying what were the actual legal obligations of the parties … He correctly warned against focusing on the 'true intentions' or 'true expectations' of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added: 'What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties … But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.' I agree. " (Paragraph 32.)

37 Lord Clarke also agreed with the observation of Sedley LJ that "… while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm-length's commercial contract." Lord Clarke then cited the further view of Aikens LJ that:

> "… Frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so."

He continued in paragraph 35:

> "so the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."

38 Windle v Secretary of State for Justice [2016] ICR 721 (CA) was a case concerned with interpreters who provided their services on a case by case basis. The tribunal held they were independent contractors and not employees in the extended sense permitted by the Equality Act. The EAT allowed the appeal because the lack of an overarching contract was not relevant to the limb (b) worker question when looking at the situation when an assignment was being performed. The Court of Appeal disagreed with this proposition but it was, as Mr Linden has submitted, on a limited basis. The facts were that there was no guarantee of work; and no obligation to accept work when offered.

39 In his judgment, Underhill LJ noted that the point on appeal was a narrow one. In his review of the law, he stated that the concept of mutuality of obligation was most lucidly dealt with by Elias LJ in Quashie v Stringfellow Restaurants Ltd 2013 IRLR 99. As what he said is of relevance, we cite extracts from paragraphs 10 to 12 of this latter case.

> "10. … Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract … there are some circumstances where a worker works intermittently for the employer, perhaps as and

> when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed …
>
> 11. Where the employee working on discrete separate engagement needs to establish a particular period of continuous employment … It will usually be necessary to show that the contract of employment continues between engagements …
>
> 12. In order for the contract to remain in force, it is necessary to show that there is at least what has been termed 'an irreducible minimum of obligation', either express or implied, which continues during the breaks … Where this occurs, these contracts are often referred to as 'global' or 'umbrella' contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker from being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than an employee."

40 The issue in the Windle appeal was whether the EAT had been correct to say that in a limb (b) worker case a lack of mutuality between engagements was irrelevant. Underhill LJ held that the EAT was incorrect:

> "23 … it does not follow that the absence of mutuality of obligation outside that period [when the work is being done] may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the employment tribunal so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it in limine runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances ...
>
> 26. … The absence of an umbrella contract is relevant only if and to the extent that it contributes to the conclusion that the Claimant is not in fact in a 'subordinate' relationship characteristic of an employee – in which case he or she will not be in the same position as their comparator. Whether that is so in any particular case will depend on the circumstances of that case."

The limb (b) worker question/mutuality of obligation

41 We agree with Mr Linden that we must ask: (1) Is there a contract?. This may also involve identifying any 'overarching contract'. (2) Does the individual work for the other contracting party? (3) If so, is s/he obliged to perform the work personally? (4) Is the other party a customer of a business undertaking carried out by the putative worker? (5) If not, the individual is a worker.

42 Mr Burns submits that there are two elements which must be present before a person can be said to be a worker. The first is mutuality of obligation which in his words is that "there must be a contractual obligation on the person to work"; and the second is personal performance, so that the person must substantially have to do the work personally.

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: paragraphs 7 to 9, 17, opening note, paragraphs 7, 15 closing submission.

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.[1]

Was there an overarching ('worker') contract?

45 The drivers cannot and do not say there was an overarching contract *of employment*. They maintain that there was an overarching contract, nevertheless. This submission places them in contradistinction to the factual situation of the Windle interpreters, who had no contractual arrangement between assignments, or to the doctor in Westwood. The drivers have to establish an irreducible minimum of obligation. The Respondent, of course, says there was *no* mutuality of obligation and that on the question of an overarching agreement, that is determinative. Mr Linden counters that all there has to be is "some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it." This is the form of words used in Cotswold.

46 The Claimants' argument relies on it being either implicit, or a matter of inference, that there had to have been such an overarching agreement. Mr Linden says the inference is irresistible, but in any event he cannot succeed in this argument unless it is an inference we consider should be drawn from the facts.

47 Those facts 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

[1] For completeness, we also agree that passages in Pimlico Plumbers confirm this conclusion, eg para 145.

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 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 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 Adison 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 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.

Expectation

48 We are asked to rule on whether there was an expectation that the Claimants would work. We understand that this is an alternative submission and that it falls outside the conclusions set out above. We do not consider 'expectations' to be relevant, to any of our conclusions, but we are prepared to hold that the drivers not only expected work to be offered when they logged on, but that the expectation was realistic. Further, the Respondent must have expected the drivers to log on and work in sufficient numbers and for sufficient hours for the business model to be fulfilled. The arrangements between the parties must have been based on these mutual expectations, otherwise they seem to lack a rationale.

Is the limb (b) definition of 'worker' satisfied?

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.

51 This brings us to the words in subsection (b) and the contention that Addison Lee's status was, by virtue of the contract, that of a client or customer of each individual driver. In effect, the submission must envisage the type of conclusion referred to by Elias J in Cotswold when he spoke of the difficult case where the putative worker does not in fact market his services at all, nor act for any other customer even though the claimant is not barred by her contract from so doing, so that the business is effectively created by the contract. Our conclusion is that it is not possible to analyse matters in that way and that it would be wrong to do so. Mr Linden QC, has a notably powerful passage in his closing written submission between paragraphs 24 and 31, inclusive. He points out that these drivers needed to hire a car supplied by the Respondent's associated company to do their work. They could not use the vehicle for other commercial or income-earning purposes. They did not market their services to the world and, even had they set up in business as drivers with some other vehicle, that would not connote that Addison Lee, on these arrangements, was one of their customers or clients. These Claimants derived their whole income from this driving work and that was not uncommon. We also agree that all the arrangements we have described are "entirely inconsistent with the notion that the [Claimants] were entering into arrangements '*between two independent business undertakings*.' " (Paragraph 28 of the submission.) Mr Linden then goes on to list the salient features and we do not repeat them. He notes that these drivers worked "pretty well continuously" for the Respondent, a point made in Pimlico Plumbers.

52 The counter-argument from Mr Burns, QC, is relatively brief, but that probably reflects the slim evidential base upon which such an argument can be founded. He acknowledges that the Respondent portrayed the drivers to the outside world as part of its organisation, as he is bound to. However, he says, the reality of the relationship was that each ran a small business. The difficulty is that this does not mean they were not workers, and in paragraph 17 of the submission Mr Burns has to fall back on their choosing when and where to work and their assumption of some element of economic risk.

53 When set against all the relevant facts, these points are insufficient for the conclusion Mr Burns presses on us. We consider that the drivers were not in any realistic sense contracting with Addison Lee so that the status of the latter was as clients or customers of a business. The contractual documents demonstrate, as much as anything else, the inequality of bargaining power between the respective parties. The drivers were in a subordinate position, which is not surprising, but they cannot sensibly be viewed as contracting with a client of their driving

business. The facts all point the other way and Mr Burns's submission, in our view, defies evidential gravity.

54 We might add that we have come to this conclusion by taking all the facts we have found and applying the legal principles, by addressing the case law in the order in which have set the cases out above. The exercise leads us to the clearest conclusion that the limb (b) exception cannot apply here. It also follows from our analysis that we agree with Mr Linden that the contractual provisions, when analysed objectively, do not properly reflect the true agreement between the parties.

55 These are the conclusions to which the evidence takes us. The Respondent has also argued that there are consequential difficulties posed by an adjudication in the Claimants' favour and that, working backwards, this either demonstrates that Parliament could not have intended them to be workers, or that this is a factor that points to the claims failing. We acknowledge that the consequences of our adjudication could pose problems for the Respondent and that changes in its systems and procedures might be necessary. This is not, however, a good reason from shrinking from the analysis of the evidence that we consider to be correct.

Remaining issues

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.

58 On revisiting the four written submissions and the oral closing arguments, we are not inclined to determine any other issue in relation to holiday pay at this stage. The focus of the hearing has been on the worker issue. The agreed, revised list of issues asks 'how should the Claimants' annual leave entitlement be calculated for the purposes of WTR?', a broad and general question. The Respondent's opening note raises a notification issue under regulation 15. A separate remedies hearing was also said by both parties to be required. The Claimants in closing say we should decide what constitutes pay under section 224 of the ERA 1996, but this appears (paragraph 41 of submission) to shade into the question of deductions for the purposes of calculating the national minimum wage. The Respondent in closing makes submissions on the circumstances (and evidence) given by each driver; raises the notification of holiday defence; submits that there is a time limit of 2 years for the claims; and further refers to car-free weeks. In addition, during the closing oral arguments, the tribunal raised a question about deductions: see below. We are not confident that the parties have engaged properly with each other on these issues or that the tribunal is in a position to resolve any outstanding questions we are asked to determine in advance of the remedy. We would wish to receive more detailed submissions. Clearly, if we have misunderstood or mis-stated the position, we would ask the parties to write to the tribunal, preferably on an agreed basis.

59 The parties agree that for minimum wage purposes, the work is unmeasured work. By regulation 8, remuneration in the pay reference period is defined as the payments made from the employer, as respects the pay reference period, "less reductions determined in accordance with Chapter 2." The pay reference period is agreed to be a week. The deductions are further defined in regulation 13. That regulation seemed to the tribunal to raise a potential difficulty as to whether allowable deductions could take a driver below zero in any pay reference period. We said that we would not decide this at this stage. Again, the Respondent's closing submissions are detailed and have not been met by the Claimant. We have therefore, not without some hesitation, come to the conclusion that we are not in a position to answer further questions at this stage.

60 We would, therefore ask the parties to consider the Judgment to which we have come. In practical terms, there are various possibilities that arise and they may, either individually or by agreement, have a view as to how we should proceed. On questions of calculation under the two sets of regulations, and for the reasons we have given, we consider that we need further assistance from the parties. If a case management hearing is thought to be necessary, perhaps by telephone, this can always be accommodated.

ANNEX A

IN THE EMPLOYMENT TRIBUNALS

Case No. 2208029/2016

BETWEEN:

MICHAELL LANGE

First Claimant

MARK MORAHAN

Second Claimant

MIECZYSLAW OLSZEWSKI

Third Claimant

-AND-

ADDISON LEE LIMITED

Respondent

AGREED REVISED LIST OF ISSUES

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1. **Claims**

The Claimants make the following claims.

1.1 The Claimants have not been able to take any holiday in accordance with Regulations 13 and 13A Working Time Regulations ("WTR") 1998 and / or that they have not been paid for holiday taken and / or that they have not been paid for accrued holiday in accordance with Regulation 14 WTR during their engagements by the Respondent as drivers.

1.2 The Claimants have not been paid the National Minimum Wage contrary to the National Minimum Wage Act ("NMWA") 1998 and the National Minimum Wage Regulations ("NMWR") 2015.

2. Worker status

2.2 Were the Claimants "workers" for the purposes of section 230(3)(b) ERA, Regulation 2(1) WTR and section 54(3)(b) NMWA? For the avoidance of doubt, the Claimants' case is that they were (at least) workers:

2.2.1 Throughout their contracts with the Respondent;

2.2.2 Or alternatively, on each occasion that they worked for the Respondent.

2 Holiday pay

2.1 Did the Claimants have rights to paid annual leave under Regulations 13 and 13A WTR?

2.2 How should the Claimants' annual leave entitlement be calculated for the purposes of WTR?

3 National Minimum Wage

3.1 Did the Claimants have the right to be paid the National Minimum Wage?

3.2 If so, how is their entitlement calculated?

3.3 Do all or any of the following constitute periods of work for which they should be paid:

3.3.1 When they first logged on to Addison Lee's internal driver portal system to when they logged off the system;

3.3.2 When they were allocated a request from the customer until they picked up a customer;

3.3.3 Whilst driving a customer;

3.3.4 Whilst returning from the customer's destination to the area where they again logged in to the system; and

3.3.5 Whilst returning home from the area where they logged in to the driver portal system.

4 Remedy (for separate hearing)

4.1 If the Claimants have received less than the National Minimum Wage for work done for the Respondent in any relevant pay periods, are they entitled to compensation

under sections 23 and 24 ERA 1996 for unauthorised deductions from wages and, if so, how much compensation?

4.2 To what compensation or award are the Claimants entitled in respect of their entitlements to paid annual leave under the WTR?