Appeal No. UKEAT/0289/17/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 24 April 2018
Judgment handed down on 11 May 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

MRS C BAELZ

MS P TATLOW

ADDISON LEE LTD APPELLANT

MR C GASCOIGNE RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR RICHARD LEIPER (One of Her Majesty's Counsel) Instructed by: Baker & McKenzie LLP 100 New Bridge Street London EC4V 6JA
For the Respondent	MR PETER OLDHAM (One of Her Majesty's Counsel) and MS TAMAR BURTON (of Counsel) Instructed by: IWGB 12-20 Baron Street London N1 9LL

SUMMARY

WORKING TIME REGULATIONS - Worker

WORKING TIME REGULATIONS - Holiday pay

The Claimant was a cycle courier with the Respondent. The ET upheld his claim that he was a 'limb (b) worker' within the meaning of Regulation 2 of the **Working Time Regulations** ("WTR"); and in consequence entitled to holiday pay thereunder. In doing so it held that the written terms of contract between the parties, describing G as an 'independent contractor', did not reflect the reality of the relationship; and that, during the period when G was 'logged on' to the Respondent's app, there was a contract with mutual obligations for 'jobs' to be offered and accepted.

The Respondent appealed on two grounds.

First, that on the facts as found by the ET, there was no basis to conclude that G was under any legal obligation to work, i.e. to accept jobs offered to him when logged on. His decision whether or not to do so (as with his entitlement to log on or off at will) was a matter for his whim and fancy. Accordingly the claim must fail for lack of the necessary mutuality of obligation.

Further or alternatively, that the ET's 'multi-factorial assessment' that G had the status of a 'limb (b) worker' was vitiated by factual error and should be remitted to another Tribunal.

The EAT rejected both grounds of appeal.

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THE HONOURABLE MR JUSTICE SOOLE

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1. This is an appeal by the Respondent ("AL") against the decision of the Central London Employment Tribunal (Employment Judge Wade) sent to the parties on 2 August 2017 whereby it was held that the Claimant cycle courier ("G") was a worker within the meaning of Regulation 2 of the **Working Time Regulations** ("WTR") and in consequence was entitled to holiday pay for the period 1-16 March 2016. In reaching that conclusion the Tribunal in particular held that the written contract between AL and G which purported to identify G as self-employed did not reflect the reality of their legal relationship; and that their true contractual relationship contained the necessary element of mutuality of obligation.

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2. AL appeals on two grounds. First, that the Tribunal erred in law in its conclusion that G had an obligation to perform work for AL. Secondly, that even if he had a minimum obligation to do so, the Tribunal's 'multi-factorial assessment' that he was a 'worker' was perverse.

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3. Regulation 2 of the **WTR** provides that:

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> **" "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under) -**
>
> > **(a) a contract of employment; or**
> >
> > **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;**
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> **and any reference to a worker's contract shall be construed accordingly."**

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4. G contends that his contract with AL fell within 'limb (b)' of this definition. As with any contract, a necessary ingredient of a 'limb (b) contract' is mutuality of obligation : see e.g. **Quashie v Stringfellow Restaurants Ltd** [2013] IRLR 99 per Elias LJ at paragraphs 10-12; **Windle v Secretary of State for Justice** [2016] IRLR 628 per Underhill LJ at paragraph 14.

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AL contends that this is a case of a true 'zero hours contract' where there is no such obligation, i.e. no obligation for it to offer any work to G; and no obligation on G to accept any such offer. As HH Judge Eady QC observed in the **Uber** decision handed down after the Tribunal's judgment in the present case "*In most instances of assignment-specific work (sometimes referred to as "zero-hours" work), there will simply be no mutuality of obligation between assignments: no obligation for work to be offered and no obligation for any offer of work to be accepted*": **Uber B.V. v Aslam** [2018] IRLR 97 at paragraph 121. The question on the first ground of appeal is whether the Tribunal was right to find that there was mutuality of obligation in the present case.

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5. On the second ground, there is no dispute as to the relevant law which looks to the reality of the relationship: **Autoclenz Ltd v Belcher** [2011] ICR 1157 SC. The question is whether the Tribunal's conclusion of fact was perverse.

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6. We start with the facts found by the Tribunal. AL's business includes the provision of private-hire taxis to businesses and individuals, working with around 4000 drivers, and a small courier business with around 500 couriers using motorcycles, cars, vans and bicycles. The number of such 'cycle'/'pushbike' couriers is 30-40. They operate within a relatively small geographical area within Central London where pedal power is more likely to get a letter or parcel delivered quickly. The service provides speedy delivery, usually within an hour, to the customers. As the Tribunal found "*This means that its couriers need to be responsive and work quickly during a tightly controlled working day*" (paragraph 7).

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7. Controllers carry out the "*tricky task*" of allocating jobs to couriers, tracking their progress by radio and GPS and dealing with queries. Each courier has an allocated call sign.

As to equipment, the courier is supplied with a radio and palm top computer/XDA and latterly an app; also a GPS tracker. The courier is provided with other company materials such as a book of receipts and a branded bag and T-shirt. Their use was not enforced, but G as a minimum carried his Addison Lee ID. AL provided insurance against loss or damage to parcels and he paid for this via a small weekly charge which was levied whether he was working or not. It was open for a courier to obtain his own insurance but "*In practice this claimant would not have sourced alternative insurance for himself, or certainly not at such a good rate, and it was in both his interests and Addison Lee's that it was in place*" (paragraph 21). G provided and maintained his own bicycle which did not display a company logo.

8. The written contracts between G and AL were changed a number of times and latterly were re-signed every 3 months. As G rarely went to the office, driver liaison would usually sign it for him with an electronic signature. The relevant contract dated 20 October 2015 included the provision 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*" (clause 1).

9. Clause 5, headed "*Provision of Services*", included:

> **"5.1. … you choose the days and times when you wish to offer to provide the Services [in accordance with the terms of the Driver Scheme[1]] 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 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, or any, work at all."**

10. The system of work was that, when wishing to do so, G would contact the controller on duty by radio or phone and log on to the system. From then on they were constantly in touch

[1] The contract was also used for drivers of taxis, so this part did not apply to cycle couriers.

and the controller could see his whereabouts via the GPS tracker. Contrary to the statement in his ET1 claim form, G did not work Monday-Friday 10-6, nor was he expected to work from 10am. The evidence showed a very variable work pattern. From October 2015, he often started work after 10am and regularly worked a short day and a short week. The Tribunal concluded that "*It cannot be said that at the material time the claimant was expected to log on at a particular time*" (paragraph 27).

11. As to acceptance of a job offered to him, the Tribunal stated:

> **"32. Once a job had been sent through to him electronically the claimant contacted the controller to refuse it in exceptional circumstances only, for example if the parcel was too heavy to carry or he had a puncture. The expectation on both sides was that if he was given a job he would do it. There was no "decline" button on the computer and Mr Valentine [AL's 'Head of Couriers'] said that if a job was not picked up as expected, and the courier went silent, the controller would ring to find out what was going on. No doubt, when under pressure, some controllers could be quite demanding if the courier did not do as expected."**

If the parcel could not be delivered, because for example there was nobody in at the delivery address, the controller would tell the Claimant what to do.

12. The Tribunal accepted G's evidence that, when logged on, he generally completed 15-20 jobs a day. The order in which jobs are done was decided by the controller but the route he took was "*largely*" up to him. In between jobs he was on 'standby' and kept in touch with his controller by radio, phone and app.

13. The Tribunal summed up the evidence on the work pattern as follows:

> **"35. It is difficult to assess the significance of some of these points, for example the claimant might always accept a job because he wanted the money not because he was obliged to do so. As Mr Valentine agreed, there was a perception among couriers that they would be refused future work if they did not do as they were told and also couriers wanted to keep their controller sweet by being cooperative, so the extent of the control exercised over them was rarely if ever tested. Suffice to say that from the time the claimant logged in, room for manoeuvre was, literally, limited and both sides expected that he was available for work, would be provided with it and that he would carry it out as directed by the controller."**

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14. As to pay, G and his colleagues were paid weekly for the jobs done at a piece rate of around £3.25 per job. AL deducted an 'admin fee' which was a percentage of the total and a payment of £2.58 for insurance. He was also paid waiting time if kept waiting by an AL client, at £8 an hour for account customers and £20 an hour for non-account customers. If the job was cancelled, or the customer did not pay, he would usually still get the job payment. If the customer paid in cash he gave them a receipt from the AL receipt book. He was not aware that he was entitled, as AL said he was, to use his own receipts. Each week a 'Combined Invoice/ Statement' was provided to him by AL. The Tribunal described this as akin to a payslip. He paid his own tax and National Insurance and was registered with HMRC as self-employed.

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15. As to holidays, the Tribunal stated that:

> **"29. … there is evidence that the claimant would pre-book holiday, as required in earlier contracts, and to make sure that there was always a job to return to. If, as was sometimes the case, he did not tell a controller of his absence, there would however be no formal consequences. This was partly because cycle courier work would be picked up by motorbike riders or taxi drivers if there was a surplus. Far from the claimant letting his customer down, the efficient Addison Lee team would make sure there was no drop in the level of service provided. This was the same whether the claimant was theoretically a subcontractor for the respondent or the respondent was his agent."**

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16. AL's website advised customers of "*Our dedicated fleet*". The sole point of contact for customers was its call centre. The section for couriers included "*we … want people on our team who reflect … values of outstanding service and utmost reliability … to join our growing fleet. We offer excellent pay rates, outstanding work conditions and the chance to be part of London's premier courier service. We are proud of our couriers - we'd love you to be part of that*". The Tribunal considered that this was at odds with the arms-length relationship emphasised by the contract. The website material was seeking to attract people to work for a company and to be directed by it. It rejected AL's contention that the website language should be distinguished as mere advertising puff.

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17. The Tribunal concluded that the true relationship was closer to the wording of the website in that:

> **"45. …**
>
> > **a. The respondent and the claimant worked together in a team and under a contract whereby the claimant was expected to carry out work for the respondent, under its direction, when logged into the system.**
> >
> > **b. He performed the work personally, and not because Addison Lee was his client or customer.**
>
> **Applying *Autoclenz*, I do not consider that the contract of October 2015 portrays the relationship correctly and it is just one source of many to be taken into account."**

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18. Turning to 'limb (b)', The Tribunal considered this in two stages. First, was there a contract whereby G undertook to do any work or services for AL? The central issue here was mutuality of obligation. The Tribunal noted that G did not argue that there was an 'umbrella' contract, i.e. a contract imposing mutual obligations whether or not he was logged on. G's contention was that there was a contract imposing mutual obligations from the moment he logged on and until he logged off. G did not present an alternative case that there was such a contract from the moment of accepting a job until its completion. AL contended that there was no such contract during the log-on period, because at every stage G had the choice whether or not to work; and in particular whether or not to accept a job which was offered to him.

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19. The Judge preferred G's contention. Its reasons in paragraph 53 need to be considered in full, but we set out those which have attracted particular debate in this appeal:

> **"53.1. One of the few parts of the contract of October 2015 which does ring true is the final phrase of clause 5.1 which says "*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*". That was indeed how the claimant and his controllers operated. His willingness had to be more than theoretical because, if he had logged in when not actually available, his whereabouts would have shown up on the GPS tracker and, if he was not in central London, he would have taken longer to do the job and therefore earned less per hour.**
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> **…**
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> **53.6. The claimant was put under pressure, albeit gentle pressure, from his controller if he did not pick up a job when logged on and he was not expected to decline it; his XDA had no "decline" button. When he declined the job this was akin to him saying "this is not in my job description" although not in an obstructive way because if a parcel was**

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too heavy it was not safe for him to carry it. No one can seriously argue that if the claimant had a puncture and told the controller he could not carry out the job, this was evidence of there being no contract.

53.7. Once the claimant had accepted the job there was no way that he would not complete it unless, again, circumstances such as a puncture got in the way. He was subject to a classic wage/work bargain.

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53.8. The claimant was not running his own business, see below, and had no contracts with the Addison Lee customers he was working for. Since he was under an obligation to work it must have been that he was obliged to the respondent, it would be odd indeed if he was not working under a contract. This last point is another example of how the test is one of interconnected elements."

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20. The second stage of the Tribunal's consideration of the 'limb (b) test' is headed "*The claimant was under the direction of another and was not running his own business*". Its essential reasons for that conclusion (paragraph 54) included: the lack of negotiation of the contract and G's ignorance of its terms; the lack of any distinction between account and non-account customers; the role of the controller in providing support and assistance in "*the difficult planning decisions that needed to be made when travelling around various customers in central London*"; the provision of full accounts backup including help with tax returns; the provision of statements that were payslips in all but name; a pay structure which showed no sign that G was in business on his own account; and the terms of the website material. The final factor (paragraph 54.7) was that:

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"The claimant worked flexibly, sometimes to the point of being erratic, but because he was not running his own business this did not affect his income while at work and nor did it affect Addison Lee's because they could fill in for him with other couriers. Erratic behaviour from an employee could lead to dismissal and from a small business would jeopardise sales."

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The Tribunal also recorded AL's admission that, due to the need for DBS clearance, personal performance was required.

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21. The Tribunal then stated that the "*small contra-indications such as the fact that he supplied his own bicycle and paid for insurance at the rate of £2.58 per week are relatively insignificant*" (paragraph 55).

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22. In concluding that G was a 'limb (b) worker', the Tribunal stated:

> **"57. … This was a working arrangement which did not lend itself to the interpretation which the armies of lawyers tried to promote. The claimant was part of a homogenous fleet and a homogenous operation which promoted Addison Lee to customers and looked after its own. There is nothing wrong or bad about that, it simply does not fit with the employment status for which the respondent contends."**

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Ground 1

23. On behalf of AL, Mr Richard Leiper QC submits that the Tribunal's findings of fact provide no basis for its conclusion that G was a 'limb (b) worker'; and in particular for its necessary ingredient that there was a contract involving mutual obligations throughout each log-on period. He first points to **James v Redcats (Brands) Ltd** [2007] ICR 1006, where Elias P accepted the proposition that "*… if the individual is free to work or not at his own whim or fancy, then that would be inconsistent with his being a worker at all*": paragraph 33 and to the observations of HH Judge Eady QC in **Uber** which are cited above.

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24. The Tribunal's finding was that there was no expectation as to when he would log on or off. He was free to do so at any time; the choice was entirely a matter for him. His working pattern was very variable and flexible, sometimes to the point of being "*erratic*". Furthermore, when logged on there was no obligation on him to accept a job. At most there was what the Tribunal described as "*gentle pressure*" to do so. There was no evidence of any adverse consequences from not accepting an offered job. The offer was declined by not pressing the 'accept' button. In any event he could simply log out of the app. Thus he was under no legal obligation to log on, to accept jobs when logged on or to stay logged on. This was the very freedom to work or not at his own whim or fancy which precluded the **WTR** status of 'worker'.

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25. Whilst making no concession on the point, Mr Leiper evidently saw the force of the suggestion that mutual obligations arose once an individual job was accepted and until it was

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completed, i.e. the wage/work bargain referred to by the Tribunal (paragraph 53.7); but that was not the case presented by G to the Tribunal.

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26. Turning to the factors relied on by the Tribunal (paragraph 53), its reliance on clause 5.1 of the contract was misplaced. That sub-clause had to be read in conjunction with clause 5.2, whose opening words "*For the avoidance of doubt*" demonstrated that the overriding position was that neither party was under any obligation in respect of the provision of work.

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27. As to the Tribunal's references to the expectations of the parties (paragraph 53.6; also paragraphs 31, 32, 35 and 45(a)), this was not the same as a legal obligation. The present case

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was to be contrasted with those where the contract entitled the individual to refuse work but was subject to an irreducible minimum obligation on each side: e.g. home piece-workers **Nethermere (St Neots) Ltd v Gardiner** [1984] ICR 612, 623G; a bank of casual workers employed for particular shifts, as and when required: **St Ives Plymouth Ltd v Haggerty**

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UKEAT/0107/08/MAA; see also **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 per Langstaff J at paragraphs 54-55.

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28. As to the one passage in which the Tribunal referred to G's obligation to work (paragraph 53.8), this must be a reference to the 'wage/work bargain', i.e. the period from the courier's acceptance of a particular job until its completion, as considered in the immediately

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preceding sub-paragraph (53.7). There was no such obligation, on either party, when G was merely logged on.

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29. As to the EAT decision in **Uber**, Mr Leiper did not challenge the correctness of its conclusion that the ET had been right to hold that the drivers were 'workers'; and in particular

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that there was the requisite mutuality of obligation when drivers were in between assignments. However that decision was be to be distinguished on the facts. In **Uber** HH Judge Eady QC upheld the ET's decision on the basis of its findings that (i) once a driver is in the territory and has switched on the app, Uber will offer him a trip if he is the nearest driver, and (ii) Uber in reality requires drivers to accept such offers, by means of a requirement that they should accept at least 80% of trip requests in order to retain their account status: see paragraphs 26, 70, 121-124. Thus the refusal of jobs could have adverse consequences. By contrast, there was no such finding of adverse consequences in the present case.

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30. For the reasons essentially advanced by Mr Peter Oldham QC on behalf of G, we are not persuaded by this ground of appeal.

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31. As a starting point, the question is one of fact not law; namely whether there is a sufficient factual substratum to support the finding that a legal obligation has arisen: **St Ives Plymouth** per Elias P at paragraph 28. Accordingly the question is whether the conclusion was perverse. Furthermore there is, rightly, no challenge to the Tribunal's conclusion that the written contract did not reflect the reality of the relationship.

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32. As to that reality, the Tribunal reached clear findings as to the mutual expectations of the parties. This is summarised in the final sentence of paragraph 35 ("*Suffice to say that from the time the claimant logged in, room for manoeuvre was, literally, limited and both sides expected that he was available for work, would be provided with it and that he would carry it out as directed by the controller*") and has similar expression in the cited passages from paragraphs 32, 45(a) and 53.6.

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33. In our judgment these findings clearly and sufficiently support the conclusion that, during the log on period, there was a contractual relationship with the identified obligations to offer work, provided G was in the approved area; and for the offer to be accepted, subject to the entitlement to decline, or to withdraw acceptance, if it transpired that the parcel was too heavy. We do not accept that G's entitlement to log off at any time is at odds with the obligation to accept work offered when he was logged on. Although the challenge on this ground of appeal is only to the obligation on G, we also note the statement of Stephenson LJ in **Nethermere** that "*... on the authority of* ***Devonald v Rosser & Sons*** *[1906] 2 KB 728, the obligation to accept piecework would imply an obligation to offer it*" (page 626D).

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34. As to the distinction between mutual expectations and mutual legal obligations, we consider that the Tribunal's conclusion is supported by the principles discussed in **St Ives Plymouth**. Having considered the judgments of the majority in **Nethermere** and the decision of the House of Lords in **Carmichael v National Power** [1999] ICR 1226, the majority in **St Ives Plymouth** stated that "*... a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided*" and that "*We recognise that in part it may be said that the Tribunal's reasoning is finding the legal obligation arising out of the practical commercial consequences of not providing work on the one hand or performing it on the other. But we do not see why such commercial imperatives may not over time crystallise into legal obligations*" (paragraphs 26 and 29). This reflected the observations in **Nethermere**, e.g. "*I cannot see why well founded expectations of continuing homework should not be hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more, and why outworkers should not thereby become employees under contracts of service like those doing similar work at the same rate in the factory*": per Stephenson LJ at page 627A.

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In this way the EAT in **St Ives Plymouth** rejected the employer's contention that the ET had confused the expectation of the parties with binding legal obligations.

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35. We do not consider that those observations are confined to cases where there is an admitted irreducible minimum legal obligation on both parties and the question is whether there is an overarching contract of employment in the periods when work is not being offered or performed. In our judgment they provide equal support to the present case of a 'limb (b)' contract with mutual legal obligations founded on the established practice and expectations of the parties. We do not accept that the absence of evidence of an express sanction of the type found in **Uber** provides any material distinction. The requisite mutuality of obligation was established by the Tribunal's findings as to the established practice and expectations of the parties.

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36. Whilst this conclusion does not depend on whether or not the Tribunal used the word 'obligation', we add that in our judgment its use in paragraph 53.8 was not confined to the period between acceptance and completion of a job. The Tribunal's use of that word reflected a case which was presented and accepted on the basis of mutual legal obligations throughout the log-on period.

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37. As to the written terms of contract, the Tribunal was fully entitled to take account of clause 5.1 and its provision that, once logged on, G was "*deemed to be available and willing to provide Services*". The Tribunal considered that this was one of the few parts of the contract which reflected the reality of G's obligation. We do not accept that clause 5.2 qualified that effect of clause 5.1, but in any event the Tribunal concluded that its terms did not reflect the reality.

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38. In our judgment the Tribunal reached an unimpeachable conclusion that there was a contract during the log-on periods with the requisite mutual obligations. This ground of appeal is accordingly dismissed.

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Ground 2

39. Mr Leiper then submits that the Tribunal's multi-factorial assessment of whether the mutual obligations falling on the parties are such as to amount to the individual being a worker was so 'suffused with factual error' that it should be remitted to a differently constituted Tribunal. He pointed to nine findings of fact.

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40. The first concerned insurance for the courier against loss and damage to parcels. The Tribunal relied on the fact of AL's provision of such insurance to G, for a small weekly charge levied whether he was working or not. It continued: "*In practice this claimant would not have sourced alternative insurance for himself, or certainly not at such a good rate, …*" (paragraph 21). Mr Leiper submitted that there was no evidence for either of these conclusions. He pointed to G's acceptance in cross-examination that there might be some couriers who did not opt-in to AL's insurance scheme; and his answer "*guess so*" to the question "*So if they opt out they are either accepting the risk for the package or need to arrange their own*".

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41. We accept Mr Oldham's submission that the Tribunal was fully entitled to reach this conclusion of fact. The first part concerned what G would have done and was sufficiently supported by the evidence in his witness statement (paragraph 7). The Tribunal, as industrial jury drawing on its experience, could readily conclude that the rates for group insurance, such as that arranged by AL under its scheme, would be less than those obtainable by a courier acting on his own account.

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42. The second objection is to the finding, based on G's witness statement, that "*When the claimant was logged into the Alison Lee system he generally completed 15-20 jobs a day*" (paragraph 30). Mr Leiper submitted that G's evidence must be read in the context of his assertion in the same document that he worked from around 10-6 Monday to Friday and an average total of around 40 hours per week. In the light of his cross-examination and the evidence of Mr Valentine, the Tribunal had rejected that evidence of regularity in his working hours and concluded that his working patterns were irregular and flexible "*sometimes to the point of being erratic*" (paragraph 54.7); and had noted, by way of example, that from October 2015 he often started work after 10 and regularly worked a short day and a short week. That conclusion necessarily undermined his evidence as to the number of jobs generally completed.

43. We again disagree. There was no necessary link between his evidence of his work pattern and of the number of jobs generally completed in a day. Thus e.g. in cross-examination he said "*I've sometimes come in late and done more jobs than I would have done in a whole day. You can't tell what a day will be like*". This was a classic factual matter for overall assessment by the Tribunal and no error is disclosed.

44. The third objection is to the finding that "*When on standby he was expected to be in an area approved by the controller, usually near to the last drop off, so the next assignment could be plotted*" (paragraph 31). This was at odds with his acceptance in evidence that it was in his own interests to wait where the controller suggested, as he was more likely to get a job that way. The short answer is that there is no inconsistency between the Tribunal's findings as to the control exercised by the controllers in a "*tightly controlled working day*" and the worker's self-interest in complying with that control. As Mr Oldham observed, that is what most people in work acknowledge every day.

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45. The fourth to sixth sub-grounds are interrelated and concern the decision-making as to the routes taken and the order in which the jobs are carried out. AL challenges the findings that: "... *the route he took was largely up to him*" (paragraph 30); and that "... *having a controller was a benefit to the claimant and his colleagues. The*[y] *wanted to be supported and assisted in the difficult planning decisions that needed to be made when travelling around various customers in central London*" (paragraph 54.2). This conflicted with his unqualified evidence in cross-examination that he decided the route to be taken; and with Mr Valentine's evidence that couriers were under no obligation to deliver packages in any specific order; and that there were no adverse consequences for them if they did not agree to deliver packages in the order requested.

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46. We again disagree with these objections, which involved a minute dissection of the evidence heard by the Tribunal. The order in which jobs are carried out and the route taken are interwoven questions. There was ample evidence to support the conclusions of the Tribunal.

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47. The seventh objection is that the Tribunal confused the processes of (i) acceptance of a job by the courier and (ii) his subsequent entitlement to decline the job, in particular if he found that the package was too heavy. This depended on a contrast between the language of paragraphs 32 and 53.6 of the Judgment. In our judgment this is semantics and raises no point of substance. As the evidence demonstrated, the question of the weight of the package would only arise at the point when the courier arrived at the customer's premises. The Tribunal was evidently not intending to suggest that G would be entitled to refuse the job at a stage when he had not seen the package.

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48. The eighth objection is to the Tribunal's conclusion that "*No doubt, when under pressure, some controllers could be quite demanding if the courier did not do as expected*" (paragraph 32). It was submitted that there was no evidence for that conclusion, which was in conflict with Mr Valentine's evidence that AL had "*... very actively relaxed the operation since [2014] so that pushbike couriers have complete freedom to choose when, where and how they provide their services to us*". The Tribunal had not said that it disbelieved this evidence.

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49. In our judgment there was ample evidence for the Tribunal's conclusion, which reflected its correct focus on the reality of the situation. In cross-examination G said that you have to accept the job "*otherwise you get in a tricky situation*"; and that if you do not press the accept button "*the controller will say 'why aren't you accepting the job?'*". This had not been said to him because he always accepted the job, but he had heard it "*over the radio*".

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50. The final objection concerns paragraph 54.7 of the Judgment which is said to be incomprehensible in part and to support AL's case that G was running his own business. We agree that its language is somewhat delphic, but do not accept that it provides any support for AL's case nor otherwise undermines its conclusion in favour of G's status as a worker.

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51. All in all, we consider that these objections individually and collectively are of the type abjured by Mummery LJ in **Fuller v London Borough of Brent** [2011] ICR 806:

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> **"30. … The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

H

52. There is rightly no challenge to the Tribunal's conclusion that the written terms of contract did not reflect the reality of the situation. In our judgment there is no basis to

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challenge the Tribunal's assessment of that reality nor its consequential conclusion that G was a 'limb (b)' worker.

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53. For all these reasons the appeal must be dismissed.

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