Appeal No. UKEAT/0037/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 & 22 June 2018
Judgment handed down on 14 November 2018

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR C EDWARDS

MRS M V McARTHUR BA FCIPD

ADDISON LEE LIMITED — APPELLANT

(1) MR M LANGE
(2) MR M OLSZEWSKI
(3) MR M MORAHAN — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER JEANS (One of Her Majesty's Counsel) and MS GEORGINA HIRSCH (of Counsel) Instructed by: Baker & McKenzie LLP 100 New Bridge Street London EC4V 6JA
For the Respondents	MR THOMAS LINDEN (One of Her Majesty's Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St John's Lane London EC1M 4LB

SUMMARY

JURISDICTIONAL POINTS – Worker, employee or neither

WORKING TIME REGULATIONS

The Employment Tribunal did not err in law in finding that the Claimants were limb (b) workers and that the time spent logged on other than break times was "working time".

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. Addison Lee Limited ("the Respondent") carries on business as a professional private hire firm, using about 4,000 drivers to service the needs of both commercial and private customers. It also operates a smaller courier business using motorcycles, cars, vans and bicycles.

2. Mr Michaell Lange, Mr Mark Morahan and Mr Mieczyslaw Olszewski ("the Claimants") were drivers within the private hire business. They have brought claims against the Respondent asserting an entitlement to holiday pay and to the national minimum wage. Such an entitlement will exist only if they were workers for the purposes of the **Working Time Regulations 1998** ("the WTR") and the **National Minimum Wage Act 1998** ("the NMWA").

3. Regulation 2(1) of the **WTR** provides that:

> **" "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**
>
> **and any reference to a worker's contract shall be construed accordingly."**

4. Similar definitions are found in section 54(3) of the **NMWA** and in section 230(3) of the **Employment Rights Act 1996**.

5. In July 2017 these claims came before the Employment Tribunal ("the ET") sitting in London Central (Employment Judge Pearl, Mrs Ihnatowicz and Ms Plummer). By its Judgment

dated 25 September 2017 the ET accepted their case that they were "limb (b) workers" for the purposes of these definitions. The Respondent appeals against that conclusion.

6. The ET also decided, for the purposes of regulation 2(1) of the **WTR**, that time when the drivers were logged on to the Respondent's system, other than break times, was working time. The Respondent appeals against that conclusion.

7. Although other issues had been listed for the ET, the focus of the hearing and the argument of the parties had been on the Claimants' status and the working time issue. The ET concluded that it could not decide other questions without further assistance from the parties.

The System of Work

8. The Respondent provided new drivers with induction, training and documentation which indicated how they should do the job - initially a document called a Driver Operating Guide, later a document called Driver Guidance. There was also a code of conduct and a document entitled Driver Guidelines.

9. Almost invariably the drivers hired a vehicle - typically a Ford Galaxy - from an associated company of the Respondent, Eventech Limited ("Eventech"). Only one of the 4,000 drivers was an owner-driver. The hired vehicle was in the Respondent's livery. Slides used in training told the drivers that they would be representing the Respondent at all times when they were in the vehicle.

10. Every driver was given a hand-held computer known as an XDA. When ready to work the driver would use the XDA to log on to the Respondent's computerised system from the

vehicle. The system would be able to detect the location of the XDA and the vehicle. It would then be in a position, assuming there was work available, to allocate a job to the driver. Allocation of jobs was automatic. The system looked for an available driver close to every job it needed to cover; and it also operated a queuing system for drivers waiting for work in a locality.

11. There was a button on the XDA for the driver to accept a job which the system allocated. The driver was expected to accept it forthwith and move to the pick-up location. The ET made the following important finding about the acceptance of work by drivers (paragraph 17):

> **"17. … 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 … Refusing a job in this way was known as "unallocation". A sanction might follow."**

12. This finding did not derive from any contractual document. There was, however, ample evidence to support it. Mr Kelly, Head of Driver Control, dealt with it in his evidence; and the Respondent's Car Control Manual, used by controllers, described the process. One sanction specifically mentioned in the Car Control Manual was to set the driver status to "logged off' - in other words, to remove him from the system - and refer the driver to a supervisor.

13. While drivers were logged on there were two other buttons they could use. There was a button for taking a break; and so long as the break was less than two hours the driver's place would be maintained in any queue at that locality. There was a button for going home which could be used after a driver had been logged on for four hours; and if it was used the system would look for a job which might fit with his journey home. But drivers were not bound to use either of these buttons; they could log off whenever they wanted so long as they were not actually transporting a customer.

14. As a general rule, drivers received their work while they were logged on and had to accept it immediately. But where a customer had booked a journey in advance there was a facility for a driver to sign up to do the job. Typically a driver would see the job on the system the previous day and sign up for it. The driver would then have to log on through the XDA half an hour before the pick-up time; for this purpose it was necessary to be in the vehicle and away from home. Again, there could be sanctions if a driver was late in arriving at the destination to collect a pre-booked customer.

15. There were two types of customer. Firstly, there were those who had an account with the Respondent. Secondly, there were customers who had no account but were paying by cash or card. In both categories of case it was the Respondent which agreed the fare; and the driver, when accepting the job, had no knowledge of the fare which had been agreed. Unless the journey changed no further negotiation was permitted. If the customer was paying by cash the driver would collect it; if by card, the Respondent would collect the fare.

16. The Respondent did not promise to provide any driver with a specific amount of work or even a minimum amount of work. But drivers were told that the average driver worked for 50-60 hours per week. Indeed, a driver needed to work between 25-30 hours per week to recover the fixed costs of vehicle hire.

The Contract Documents

17. Each driver (save the one who was an owner driver) signed two documents: a Vehicle Hire Agreement and a Driver Contract.

18. The Vehicle Hire Agreement was made with Eventech. A deposit and weekly rental fee were payable; the maximum period of rental was 12 weeks although agreements were renewed. Insurance premiums were also payable unless the driver opted out; but the insurance only operated while the vehicle was in use for the provision of services under the Driver Contract. The livery could not be removed or altered. No other driver could drive the vehicle. The driver agreed that Eventech could make a request to the Respondent to pay sums due under the Vehicle Hire Agreement out of the driver's earnings under the Driver Contract.

19. The Driver Contract was made with the Respondent. Clause 1 was entitled "*Your relationship with Addison Lee*". It provided that the driver agreed he was an independent contractor and that nothing in the agreement rendered him an employee, worker, agent or partner of the Respondent. This was re-iterated in Clause 15.1.

20. In respect of account bookings, Clause 1.1 provided that the driver was a sub-contractor of the Respondent for fulfilling the booking. In respect of non-account bookings, Clause 1.2 provided that the driver made the booking as principal, the Respondent acting as the driver's disclosed agent. Consistently with this approach, Clause 2 required the Respondent to pay a fee to the driver for account bookings; and Clause 3 required the driver to pay a booking fee to the Respondent in respect of non-account bookings.

21. Clause 4 provided that the Respondent would produce a Driver Statement each week and would settle the amounts due weekly. The Respondent was entitled to charge a weekly Driver Service Charge, although depending on the volume and nature of bookings carried out by the driver credits were earned which might extinguish that charge.

22. Clause 5 was of central importance to the argument before the Employment Tribunal and on this appeal. (There were slightly differing versions of Clause 5 in existence; it has not been suggested that the differences were material, and it is sufficient to quote the full version in our papers.)

> **"5. *Provision of Services***
>
> **5.1. Subject to Clause 5.4, you choose the days and times when you wish to offer to provide the Services in accordance with the terms of the Driver Scheme but unless we are informed otherwise, you agree that if you are in possession of and logged into an Addison Lee XDA you shall be deemed to be available and willing to provide Services.**
>
> **5.2. For the avoidance of doubt, there is no obligation on you to provide the Services to Addison Lee or to any Customer at any time or for any minimum number of hours per day/ week/month. Similarly, there is no obligation on Addison Lee to provide you with a minimum amount of, or any, work at all.**
>
> **5.3. You agree to perform promptly each Customer Contract in accordance with its terms and to indemnify us against any claims from Customers for your breach of the Customer Contract which are directed against us as a result either of having acted as your agent in concluding the Customer Contract or as principal where you have fulfilled the Customer Contract as a sub-contractor on our behalf.**
>
> **5.4. By ticking the appropriate box at the start of this Driver Contract you select which of the "Anytime Circuit", the "Night Circuit", or the "Weekend Circuit" you wish to participate in.**
>
> **5.4.1. As a Driver on the Anytime Circuit, you are indicating that, subject to Clause 5.2, you may be available to provide the Services whenever you wish under this Driver Contract at any time.**
>
> **5.4.2. As a Driver on the Night Circuit, you are indicating that, subject to Clause 5.2, you may be available to provide the Services whenever you wish from 1700hrs each day until 0500hrs the following day.**
>
> **5.4.3. As a Driver on the Weekend Circuit, you are indicating that, subject to Clause 5.2, you may be available to provide the Services whenever you wish from 1730hrs each Friday to 1730hrs the following Sunday."**

23. Clause 6 dealt with vehicles. Clause 6.1 provided that the driver was responsible for providing a suitable vehicle - roadworthy, clean, presentable, taxed and insured, bearing the Respondent's logo and branding. But the Clause also envisaged that the driver may have entered into a Vehicle Rental Agreement with Eventech to obtain the vehicle. The driver agreed that the Respondent was agent for making payments due to Eventech and that the Respondent might exchange information with Eventech.

24. Clause 12 required the driver to comply with the Driver Guidance document "*in order to preserve the integrity of our brand and ensure a consistent level of services*". Clause 13 provided that the agreement might be terminated immediately on either side without cause, by giving written notice of termination (Clause 13.1). It also provided that the Driver Contract was to constitute the entire agreement between the parties relating to the services, which were defined to include both the carriage of goods and the transport of customers and such persons as the customer authorised (Clause 16.1).

The ET Proceedings and Reasons

25. The ET heard evidence and argument over the course of a week in July 2017. Mr Thomas Linden QC represented the Claimants; Mr Andrew Burns QC with Ms Georgina Hirsch represented the Respondent.

26. On behalf of the Claimants Mr Linden argued that there was an overarching contract between each driver and the Respondent which satisfied limb (b). The agreement was implicit or could be inferred from the conduct of the parties; and Clause 5.2 should either be read consistently with the reality of the arrangements or should be disregarded in that it did not reflect the true agreement between the parties: see especially **Autoclenz Ltd v Belcher** [2011] ICR 1157. Alternatively, he argued that there was a contract from the moment when a driver booked a job or was allocated a job by the system. For the purpose of working time legislation, he contended that all time which the drivers spent logged on to the system was working time.

27. On behalf of the Respondent Mr Burns argued that there was no mutuality of obligation sufficient to found a limb (b) contract. While a driver might have a financial necessity to do a certain level of work, they could not be required to work even a minimum amount - economic

necessity was not sufficient. There was no irreducible minimum of obligation sufficient to constitute an overarching contract and no worker status when the Claimants chose to do individual jobs. This was his main point. He accepted that the Respondent portrayed drivers to the outside world as part of its organisation, but he submitted that the reality of the relationship was that each Claimant did to some extent run a small business and for that reason also fell outside limb (b).

28. In its Reasons the ET summarised the issues and made findings of fact on which we have already drawn in this Judgment. Its conclusions began at paragraph 29. It set out an overview of the law in paragraphs 29 to 40. In this overview it quoted extensively from leading cases including in particular two Supreme Court decisions: **Bates van Winkelhof v Clyde & Co LLP** [2014] 1 WLR 2047 on the question of worker status, and **Autoclenz Ltd v Belcher** [2011] ICR 1157 on the approach to be taken where provisions of a contractual agreement did not, or might not, reflect the true agreement between the parties.

29. The ET accepted that there was an overarching contract between each Claimant and the Respondent. It said that the Claimants' argument supporting the existence of such a contract could not succeed "*unless it is an inference we consider should be drawn from the facts*" (paragraph 46). It set out its key reasoning in paragraph 47. This is a lengthy paragraph; we have broken it down into three sections for ease of reading and exposition:

> **"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 School. They then sign two agreements and the second, the Hire Agreement, entails a serious financial commitment, as well as subsidiary insurance obligations. By this point it is impossible to say that the drivers are not undertaking to carry out driving work for the Respondent, in the vehicles they are agreeing to hire. We agree with their submission that, at the very least, they are impliedly and necessarily undertaking to do some driving work.**
>
> **The Respondent is correct to say that they are free not to do so and that they can choose when to do it. The commercial reality, however, is that they are undertaking to do work when and as soon as they log on. There is, in our view, a strong implication of an underlying agreement. They remain under Addison Lee's rules between driving jobs. Their use of the vehicle, for**

> **example, is restricted and regulated; and they cannot remove the Addison Lee insignia. The Driver Contract remains in force. It is when it is terminated that the vehicle can be repossessed, in effect, forthwith. Underlying all of this is the ongoing vehicle hire charge that endures from week to week (subject to the free weeks being earned), a significant factor, and the recoupment of the 'service charge' referred to in paragraph 26 above.**
>
> **From an economic standpoint, all this obliges the drivers to log on and drive, so as to cover fixed hire costs. It is perhaps, the central point, because it is the mechanism by which the Respondent can be close to certain that its drivers will log on. Addison Lee needs them to log on; and they need to do so in order to pay the overheads and then start earning money. They know that once they log on, they have to accept the jobs that the Respondent's system offers them. It is a symbiotic relationship, to borrow a word from the scientific world. We conclude that there was an overarching contract."**

30. It is important to note the following further features of the ET's reasoning on the limb (b) question.

31. Firstly, the ET had been asked to rule on the question whether there was an expectation that the Claimants would work. It said (paragraph 48):

> **"48. … 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."**

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

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

33. Thirdly, the ET went on, in paragraphs 51 to 53, to reject Mr Burns' subsidiary argument that Addison Lee was the client or customer of each individual driver for the purpose of the limb (b) definition. We need not set out this part of the ET's reasoning; it is not central to the appeal.

34. Fourthly, the ET confirmed in paragraph 54 that it had reached its conclusion by applying the case law to which it had already referred earlier in its Reasons. It said in particular that it agreed with Mr Linden that "*the contractual provisions, when analysed objectively, do not properly reflect the true agreement between the parties*".

35. The ET then turned to the working time issue. It noted that working time was defined as "*any time during which he [a worker] is working, at his employer's disposal and carrying out his activities or duties*". It reasoned as follows (paragraph 57):

> **"57. … 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."**

Submissions

36. On appeal the Respondent was represented by Mr Christopher Jeans QC, leading Ms Hirsch. The Claimants were again represented by Mr Thomas Linden QC.

37. On behalf of the Respondent Mr Jeans submitted that in paragraph 47 of its Reasons the ET evaded the terms of the Driver Contract by relying on a separate implied overarching agreement whereby drivers undertook to do some work. He argued that there was no room for any such implied agreement. (1) Such an overarching agreement could be implied only if it was necessary to do so; the ET did not apply this test. (2) It could not be necessary to do so when the Driver Contract made full provision for the terms which would be applicable - it was the entire agreement between the parties (Clause 16.1). He relied particularly on **Slack v Cumbria County Council** [2009] ICR 1217 at paragraph 84, **James v London Borough of Greenwich** [2008] ICR 545 at paragraphs 23 and 43 to 44. (3) Moreover the terms of the implied overarching agreement were contrary to the express terms of the Driver Contract; a contract cannot be implied if it is contrary to the express terms agreed between the parties. He relied particularly on **Stevedoring & Haulage Services Ltd v Fuller** [2011] IRLR 627 at paragraphs 13 to 15. (4) The ET implied an agreement that the drivers would do some work because economic forces compelled them to work in order to cover the cost of the vehicles they had hired; but economic forces do not justify the implication of an obligation. He relied particularly on **Hellyer Bros Ltd v McLeod** [1987] ICR 526 at pages 548 to 549; and two cases concerned with private hire arrangements - **Mingeley v Pennock (t/a Amber Cars)** [2004] ICR 727 and **Knight v Fairway & Kenwood Car Service Ltd** [2012] UKEAT/ 0075/12. (5) The ET's conclusion that there was an obligation to work conflicted with its own finding that there was no obligation to log on. There was internal inconsistency within paragraph 47 of the ET's Reasons. The absence of any obligation to log on was fatal to the Claimants' case.

38. Mr Jeans submitted that the ET's more restrictive analysis in paragraphs 49 and 50 was also flawed. Again it ignored the terms of the Driver Contract; under these terms logging on was no more than a signal of willingness or availability, not a commitment to undertake journeys

(Clauses 5.1 and 5.2, read together). Although the ET did not say so, it must again have been relying on economic forces in order to found an obligation to work; this was not permissible. It did not identify any other source of an obligation to undertake journeys merely by logging on.

39. Mr Jeans submitted that the ET did not suggest, and would have had no warrant for suggesting, that the Driver Contract did not represent the true agreement between the parties as for example in **Autoclenz Ltd v Belcher** [2011] ICR 1157.

40. Mr Jeans accepted that when drivers actually accepted journeys they undertook obligations: see Clause 5.3 of the agreement. But he did not accept that the drivers thereby became limb (b) workers; and he pointed out that this was not the way the case for the Claimants had been put below, and not the basis on which the ET decided the case.

41. Turning to the working time issue, Mr Jeans submitted that the ET's conclusions were infected by its finding that the drivers were under an obligation to work merely by logging on. Alternatively, he argued that, even if the drivers were under an obligation to work while logged on, they were not at the disposal of the Respondent by doing so; they were free to log off at any time, and were not actually working. A requirement to be in a particular place was not sufficient to turn a duty to be available into "working time": see **SIMAP** [2001] ICR 1116 at page 1147, especially paragraph 50. The ET was influenced by **Federacion De Servicios v Tyco** [2015] ICR 1159, but this was distinguishable.

42. On behalf of the Claimants Mr Linden submitted that the ET, while taking into account the written terms in the Driver Contract, found that in important respects it did not represent the true agreement between the parties: see paragraph 54 of its Reasons. This was a straightforward

and permissible application of the principles in **Autoclenz**. Granted that this was its approach, the arguments of the Respondent resting on inconsistency between the written terms and the findings of the ET fell away.

43. Mr Linden submitted that the ET was entitled to draw inferences as to the contractual obligations of the parties, applying an objective test. In drawing inferences it was not required to apply a test of necessity, but paragraph 47 shows that it did so. In particular, having regard to its findings of fact about the working relationship between the parties, the ET was entitled to conclude that there was an overarching contract whereby the drivers were necessarily undertaking to do some driving work. The drivers applied to "join" the Respondent; their credentials were checked; they were interviewed; given written tests; inducted; trained; and given a probationary period. There would be no point in entering the Driver Contract and the Vehicle Hire Contract unless the driver was going to work for the Respondent and use the car for that purpose. An overarching agreement was implicit or could be inferred from the conduct of the parties. Underlying commercial expectations were relevant to this question: see **St Ives Plymouth v Haggerty** [2008] UKEAT/0107/08 at paragraphs 19 to 29.

44. Further Mr Linden submitted that on any view the ET was correct to find that, when actually working for the Respondent, the drivers had worker status. The lack of any underlying obligation to work was not fatal to the Claimants' case: see **Windle v Secretary of State for Justice** [2016] ICR 721 at paragraph 23 and **Pimlico Plumbers Ltd v Smith** [2017] ICR 657 CA at paragraph 145. When actually working for the Respondent they were bound to do so personally; and the Respondent was not a client or customer of any business they carried on.

45. On the working time issue, Mr Linden submitted that the ET was correct to find that so long as a driver was logged on he was "*working, at his employer's disposal and carrying out his activities or duties*". Drivers were not permitted to log on at home; they were required to be on the road awaiting the allocation of jobs while they were logged on. The ET was correct to derive support from the decision of the ECJ in **Tyco**; there was a proper analogy to be drawn between the position of drivers required to be on the road between home and customers, and drivers required to be on the road while they awaited the allocation of passengers. Mr Linden derived support from a recent case concerned with broadly similar arrangements: **Uber BV v Aslam** [2018] ICR 453 (see paragraphs 117 to 126).

46. In the course of wide-ranging submissions we were taken to many authorities concerned with limb (b) worker status. We have referred, in summarising the Reasons of the ET and the submissions of the parties, to many of them. We should record that the parties took us to recent decisions of the Supreme Court in **Pimlico Plumbers Ltd v Smith** [2018] UKSC 29 and of the Employment Appeal Tribunal in **Addison Lee Ltd v Gascoigne** [2018] UKEAT/0289/17 and **Hafal Ltd v Lane-Angell** [2018] UKEAT/0107/17. The Supreme Court's decision was concerned with issues (personal performance, client and customer status) which are not central to this appeal; and the Employment Appeal Tribunal decisions appear to us to be illustrative rather than to lay down new propositions of law.

47. We turn to our conclusions.

Limb (b) Worker Status

48. It is convenient to set out limb (b) again:

> **"(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."**

49. In this case the key issue is whether the drivers undertook to do or perform any work or services for the Respondent. This is the issue on which the appeal has concentrated. If the drivers undertook to do or perform work or services, the ET was plainly entitled to conclude (as it did) that they undertook to do so personally; and the ET was also plainly entitled to conclude (as it did) that the Respondent's contractual status was not the client or customer of any profession or business undertaken by the drivers.

50. A person may be a worker by virtue of an overarching contract which governs the whole working relationship with the other party. But a person may also be a worker, even in the absence of such an overarching contract, by virtue of individual contracts for individual pieces of work or periods of duty. Depending on the right the worker is seeking to enforce, contracts of this kind may suffice. In **Pimlico Plumbers** (Court of Appeal) Underhill LJ explained the potential relevance of such individual contracts as follows (paragraph 145):

> **"145. … It is necessary to distinguish two separate circumstances in which the issue of whether a putative employee/worker is engaged on a casual basis might arise. The first is where the substantive claim directly depends on their enjoying employee/worker status in respect of their periods of work (e.g. because the claim concerns their pay or some discriminatory treatment in the workplace). In such a case the question whether the engagement is casual is indeed relevant, but only on the basis that it may shed light on the nature of the relationship while the work in question is being done … But it is not only legal obligations that may shed light of that kind. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work. The second situation is where the claim directly depends on the claimant's status during periods of non-work, either because he or she has to establish continuity of employment or because the claim itself relates to their treatment during that period: in such a case mutuality of legal obligations is essential."**

51. In this case, as we have seen, the ET found that the Claimants were workers by virtue of an overarching contract; but it also found in any event that they were workers when they logged on because they were then undertaking to do work or perform services.

52. In a commercial context parties to a written agreement, especially if they have negotiated at arm's length, can readily be taken to intend the written agreement to set out their legal obligations; and it will generally be appropriate to give effect to an "entire agreement" clause (see the recent discussion in **Rock Advertising Ltd v MWB Business Exchange Centres Ltd** [2018] 2 WLR 1603 at paragraph 14).

53. In the employment field the position may be very different. There is often a dispute as to whether the terms of a written agreement reflect the true agreement. In such cases it is appropriate for the ET to decide whether the terms of a written agreement represent what was agreed; and it is often necessary for the ET to glean the true agreement from all the circumstances of the case. The relative bargaining power of the parties must be taken into account. The Supreme Court in **Autoclenz** confirmed that this was the correct approach: see the Judgment of Lord Clarke at paragraph 35. He approved the following passage in the Judgment of Aikens LJ in the Court of Appeal (paragraph 92):

> **"92. I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept 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. …"**

54. The ET correctly cited **Autoclenz** in its summary of the law; and we have no doubt that when, in paragraph 54, it said that the contractual provisions did not properly reflect the true agreement between the parties, it was applying **Autoclenz** and expressing its conclusion that the Driver Contract did not entirely reflect the true agreement between the parties. We accept the submission of Mr Linden to this effect.

55. Applying **Autoclenz** principles the ET was in our judgment entitled to reach the conclusion, expressed in paragraph 50 of its Reasons, that the drivers, when they logged on, were undertaking to accept the driving jobs allocated to them.

56. The ET's conclusion was consistent with its finding, in paragraph 17 of its Reasons, that a driver had to accept a job allocated in the absence of an acceptable reason; and that if a driver did not do so a sanction could be imposed. There was, as we have explained, ample evidence for this finding. It is not consistent with an unfettered right for a driver to refuse work while logged on.

57. The ET's conclusion was also consistent with the nature of the relationship between the parties. The Respondent accepted bookings prior to allocating them through its computer system to individual drivers. In such a system there will be "swings and roundabouts"; some jobs will suit drivers whereas others will not. If drivers had an unfettered right to refuse bookings which were less favourable, it is difficult to see how the Respondent's business could operate at all; and in truth this would be plain to drivers and to the Respondent alike.

58. Mr Jeans suggested, in reliance on Clause 5.2 of the Driver Contract, that drivers indeed had no obligation to accept a booking. But at this key point in the operation of the Respondent's business model it is fanciful to suppose that the Respondent could or did rely merely on the expectation that drivers would be required by economics or market forces to accept individual bookings; sanctions were required and (as we have seen) were operated. In our judgment the ET was entitled to hold that drivers accepted an obligation to undertake driving jobs allocated to them notwithstanding the apparently general terms of Clause 5.2. Indeed, we see very little point

in Clause 5.1, which deems a driver to be available when logged on, if Clause 5.2 really permitted a driver to make himself unavailable should he be allocated a job which did not suit him.

59. This finding by the ET was of critical importance to its alternative conclusion that, even in the absence of an overarching contract, the drivers were limb (b) workers while they were logged on to the system. We see no error of law in the finding; we think it was plainly correct.

60. This is a convenient moment to deal with the ET's alternative conclusion that the drivers were limb (b) workers even in the absence of an overarching contract. We see no error of law in this conclusion. Once granted that Clause 5.2 does not reflect the true terms of the bargain between the parties, Mr Jeans' argument that the ET could not reach its conclusion by reason of the express terms of the agreement falls away. We do not think the ET fell into the error of inferring or implying an obligation where the conduct of the parties was explicable merely by reason of economic forces; for the reasons we have explained, something more than economic force was required to impose on drivers an obligation to accept individual journeys which it was not in their interests to accept. The ET sufficiently identified the source of the obligation, which rested in the mutual understanding of the parties about the nature of the business, coupled with the referral by the Respondent of such cases to a supervisor and the potential exercise of sanctions. This was indeed the kind of case described by Underhill LJ in **Pimlico Plumbers** - where the regular offer and acceptance of work, so that the drivers worked pretty much continuously, amply justified the conclusion that they had limb (b) worker status.

61. But, as we have seen, the ET did not stop there. We turn now to the ET's conclusion that there was an overarching agreement whereby the drivers were "*impliedly and necessarily undertaking to do some driving work*" (paragraph 47).

62. Once again we have no doubt that the ET reached its conclusion by application of the **Autoclenz** principle. It disregarded some provisions of the Driver Agreement - particularly Clause 5.2 - because it did not consider that these reflected the reality of the bargain made between the parties.

63. It is true that the arrangements between the drivers and the Respondent left the drivers with a great deal of leeway as to the time and place where they logged on to work; but it is difficult to suppose that either side engaged in these arrangements in the belief that the other undertook no obligation at all. No honest driver would put the Respondent to the expense of considering his application to join, checking his credentials, training him and putting him on its system unless he was undertaking to do some work for the Respondent; and the Respondent, as an honest and reputable company, would not encourage drivers to commit very substantial time and money to its training and to the hire of a vehicle if it was not undertaking to put them on its system and give them a fair opportunity of obtaining bookings. These obligations are not spelt out on either side within the Driver Agreement; but it is difficult to believe that they did not exist. We consider that the ET, applying the "realistic and worldly wise" approach mandated by **Autoclenz**, was entitled to reach the conclusion it did.

64. So long as the ET applied the correct principles, as we believe it did, it was entitled to conclude that the agreement between drivers and the Respondent satisfied limb (b). The well-known words of Langstaff J in **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 (paragraph 55) explain the position:

> **"55. We are concerned that Tribunals generally, and this Tribunal in particular, may, however, have misunderstood something further which characterises the application of "mutuality of obligation" in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is *some* obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. Stevenson LJ in *Nethermere* put it as "… an irreducible minimum of obligation …". …"**

65. In **Nethermere (St Neots) Ltd v Taverna & Gardiner** [1984] IRLR 240 the Court of Appeal had been concerned with home workers, who fixed their own hours of work. They were held to be employees because they had been subject to "*an obligation to accept and perform some minimum or at least reasonable, amount of work for the alleged employer*". Dillon LJ said:

> **"60. … the mere facts that the outworkers could fix their own hours of work, could take holidays and time off when they wished and could vary how many garments they were willing to take on any day or even to take none on a particular day, while undoubtedly factors for the Industrial Tribunal to consider in deciding whether or not there was a contract of service, do not as a matter of law negative the existence of such a contract.**
>
> **61. … I find it unreal to suppose that the work in fact done by the applicants for the company over the not inconsiderable periods which I have mentioned was done merely as a result of the pressures of market forces on the applicants and the company and under no contract at all."**

66. Those words resonate in this case. The ET was entitled to conclude that the work done by the drivers was not done merely as a result of the pressure of market forces or commercial imperatives even though, as it found in paragraph 47 of its Reasons, these were in play.

67. The decision in **Nethermere** was discussed and applied by the EAT (Elias P presiding) in **Haggerty**. That case concerned a casual worker in the printing industry. It was common ground that, when working, she worked under a contract of employment. The question was whether an overarching contract existed. The ET found that it did. It was argued that no such overarching contract could be inferred because the conduct of the parties could be wholly explained by their mutual commercial interests. By a majority the EAT dismissed the appeal. Elias P said:

> **"28. … the only issue is whether the Tribunal in this case was entitled to find that there was a proper basis for saying that the explanation for the conduct was the existence of a legal obligation and not simply goodwill and mutual benefit. The majority consider that it is important to note that the test is not whether it is necessary to imply an umbrella contract, or whether business efficacy leads to that conclusion. It is simply whether there is a sufficient factual substratum to support a finding that such a legal obligation has arisen. It is a question of fact, not law. …**
>
> **29. It is in truth a highly artificial exercise for a tribunal, not least because there are no clear criteria for determining when it is the one rather than the other, or indeed both (which we suspect will frequently be the case). However, in the judgment of the majority, there was a sufficient basis here. 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."**

68. Mr Jeans suggested that it would have been impossible to enforce such an alleged obligation by litigation. It is true that the Respondent, having drafted what were in this respect unrealistic terms and conditions, would have found it difficult to articulate what the minimum obligation on its drivers would have been. In practice however, it did not need to do so since its terms and conditions permitted it to terminate the agreement forthwith.

69. We think that the high point of Mr Jeans' argument was the decision of the Court of Appeal in **Mingeley v Pennock (t/a Amber Cars)** [2004] ICR 727. That case concerned a taxi driver who owned his own vehicle and paid the Respondent, the operators of a taxi service, a weekly sum for a radio and (latterly) access to a computer system. The issue was whether the driver was an employee for the purpose of the extended definition within section 78(1) of the **Race Relations Act 1976**. It was held that in the absence of any obligation to work he was not. There are a number of relevant factual distinctions between this case and **Mingeley**, including the fact that the driver supplied his own car free from any collateral arrangement with the taxi service. But the critical distinction in our judgment is that in **Mingeley** the ET found that there was no requirement at all for the driver to accept any of the fares offered by the operators. This was decisive: see paragraphs 5 and 14 (Maurice Kay LJ) and paragraph 22 (Buxton LJ). In this case the ET found that there was an obligation for the driver to accept bookings and an underlying obligation to do some work for the Respondent.

70. We do not accept Mr Jeans' submission that there is any real inconsistency in the findings of the ET in paragraph 47 of its Reasons. The ET specifically said that the drivers were undertaking to carry out driving work for the Respondent; it is true that, like the home worker in **Nethermere** or the casual worker in **Haggerty** they were free not to work on any particular

occasion; but it does not follow that there was no overarching contract. We consider that the ET was entitled to find that such a contract existed.

71. For these reasons we uphold the Judgment of the ET on the limb (b) issue.

Working Time

72. Regulation 2(1)(a) of the **Working Time Regulations 1998** contains the relevant part of the definition of "working time" for the purpose of this case. It means, in relation to a worker, "*any period during which he is working, at his employer's disposal and carrying out his activities or duties*".

73. The ET had already found, in reaching its conclusion that the Respondent's drivers were limb (b) workers, that when they logged on they were obliged to accept bookings. Against this background we consider that the ET was correct in law to find that when drivers were logged on they satisfied the definition of "working time" even though, as must for part of the time have been the case, they were not actually engaged in carrying passengers.

74. We have found helpful a passage in the analysis of the ET in the **Uber** case, cited by Her Honour Judge Eady QC giving judgment in the EAT (paragraph 74). The ET rejected a contention that Uber drivers were undertaking services as "workers" only when actually carrying passengers. The ET (Employment Judge Snelson and members) said:

> **"We do not accept that submission because, in our view, it confuses the service which the passenger desires with the work which Uber requires of its drivers in order to deliver that service. It is essential to Uber's business to maintain a pool of drivers who can be called upon as and when a demand for driving services arises. The excellent 'rider experience' which the organisation seeks to provide depends on its ability to get drivers to passengers as quickly as possible. To be confident of satisfying demand, it must, at any one time, have some of its drivers carrying passengers and some waiting for an opportunity to do so. Being available is an essential part of the service which the driver renders to Uber."**

75. Judge Eady upheld that reasoning: see paragraphs 123 to 125 of her Judgment. In that case there was a potential difficulty arising out of some evidence that the drivers were not obliged to accept all trips: see paragraph 124. That difficulty does not exist in this case, where drivers were obliged to accept trips. We think that being available when logged on was indeed an essential part of the service they rendered to the Respondent.

76. We think that the ET's conclusion is consistent with the decision of the ECJ in **Tyco**. In that case the workers installed and maintained security systems in the homes of customers. They received their tasks by mobile phone, driving from home at the beginning of the day and returning home at the end of the day. The employers argued that the time spent on daily travel from home to first customer and from last customer home was not working time. The ECJ rejected that contention. The journeys were a necessary means of providing the employer's services to the customers; in undertaking them the employees had to be regarded as carrying out their activities and duties. They satisfied the cumulative requirements of the definition of working time: see paragraphs 25 and 29 to 44. Here, as we have said, being available when logged on was an essential part of the service rendered to the Respondent; we think the ET was correct to find that this was working time.

77. For these reasons the appeal will be dismissed.