

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS**

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE
WEST OF ENGLAND (Mr. Kevin Rooney)**

Dated: 7 September 2018

Before:

Marion Caldwell QC	Judge of the Upper Tribunal
Mr. George Inch	Member of the Upper Tribunal
Mr. John Robinson	Member of the Upper Tribunal

Appellant:

ABUS LIMITED

Attendance:

For the Appellant: Nicholas Cotter, Barrister; instructed by Stone King, Solicitors.

Heard at: Field House, Breams Buildings, London EC4A 1DZ.
Date of Hearing: 15 February 2019
Date of Decision: 12 April 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed.

Subject Matter

The meaning of “operator” and “works” in terms of section 81(1)(b)(ii) of the Public Passenger Vehicles Act 1981

Cases referred to:

Autoclenz v Belcher [2011] UKSC 41
EA Scaffolding and Systems Ltd 2004/377 and *EA Contract Services Ltd* 2004/426
James v Greenwich London Borough Council [2008] EWCA Civ 35; [2008] ICR 545
Smith v Carillion v [2015] EWCA Civ 209
Tilson v Alstom Transport [2010] EWCA Civ 169; [2010] IRLR 169
Uber BV & Ors v Aslam & Ors [2018] EWCA Civ 2748

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the West of England, made on 7 September 2018, that there had been a material change of circumstances in terms of section 17(3)(e) of the Public Passenger Vehicles Act 1981. In summary, the Traffic Commissioner found that the drivers of the vehicles were controlled by another company, L C Munden and Sons Ltd, and that in terms of section 81(1)(b)(ii) of the 1981 Act that made their employer the “operator” of the vehicles rather than the appellant, Abus Ltd.
2. The Traffic Commissioner suspended the licence with effect from 23.59h on 31 January 2019. An application for a stay pending this appeal was granted on 8 October 2018. Other orders made by the Traffic Commissioner have not been appealed.

The Relevant Legislative Provisions

3. Section 12(1) of the 1981 Act provides that a public service vehicle shall not be used on a road for carrying passengers for hire or reward except under a PSV operator’s licence granted in accordance with the provisions of the 1981 Act.
4. Section 17(2) of the 1981 Act provides that a traffic commissioner may revoke or suspend a licence on any of the grounds in section 17(3). The ground in section 17(3)(e) is that there has been since the licence was granted or varied a material change in any of the circumstances of the holder of the licence which were relevant to the grant or variation of his licence.
5. Section 81 of the 1981 Act is headed “*Interpretation of references to the operator of a vehicle or service*” and provides as follows:-

(1) For the purposes of this Act—

(a) regulations may make provision as to the person who is to be regarded as the operator of a vehicle which is made available by one holder of a PSV operator’s licence to another under a hiring arrangement; and

(b) where regulations under paragraph (a) above do not apply, the operator of a vehicle is—

(i) the driver, if he owns the vehicle; and

(ii) in any other case, the person for whom the driver works (whether under a contract of employment or any other description of contract personally to do work).

Background

6. Mr Alan Peters started business as a sole trader, owner-driver, in 1991. He holds a licence (PH0005662) as a sole trader.
7. Abus Ltd ("Abus") was incorporated on 24 June 2002. The sole director is Mr Peters. In March 2010 the company was granted a standard international PSV operator's licence (PH1094121) authorising the use of 25 vehicles. The operating centres are 6 Freestone Road, Bristol and Kingsland Road Railway Yard, Bristol. Mr. Peters is the transport manager. The maintenance provider is L C Munden and Sons Ltd ("Mundens") of 6-7 Freestone Road, Bristol.
8. The business of Abus is operating registered services and local authority contracts. Abus owns the vehicles. The drivers are employed by Mundens and provided to Abus.
9. Abus was the subject of a maintenance investigation in 2014 and again in 2018. Both investigations were marked as unsatisfactory because on each occasion deficiencies with maintenance and driver safety inspections were identified. In 2018, the vehicle examiner was concerned about the relationship between Abus and Mundens because the two businesses were located at the same premises and the vehicles were maintained by Mundens who employed the drivers. The matter was reported to the traffic commissioner who called the operator to a public inquiry to consider the maintenance and driver safety inspections, to investigate the relationship between the two companies and to investigate which entity was operating the vehicles. Mundens were invited to attend the public inquiry.
10. This appeal is concerned only with the issue of the operating entity.

The Public Inquiry

11. The public inquiry was held on 20 August 2018. Mr Peters attended and was represented by a solicitor (Mr Woodhouse). Mr Peters gave oral and written evidence. Mr Simon Munden, a director of Mundens, and Mundens' general manager, Mr Tim Loughlin, were also in attendance. Mr. Munden gave evidence.
12. The traffic commissioner made the following findings in fact:-

17. The facts do not appear to be contested and I summarise them here:

- 1. An arrangement was made at some time around 2009 or 2010 for all the work undertaken by Mundens' vehicles to be transferred to Abus Ltd because it was easier for financial standing to be shown by that entity*
- 2. This licence was granted in 2010.*
- 3. Abus owns the vehicles.*
- 4. Mundens employs all the drivers.*

5. *The drivers are full-time employees, on a normal employment contract with Mundens deducting tax and national insurance payments.*
 6. *Mundens does not supply drivers to any other operator.*
 7. *Vehicles are maintained by Mundens under a maintenance contract.*
 8. *The businesses are co-located.*
 9. *Simon Munden takes a personal responsibility in the maintenance of the fleet, referred to by Mr Peters as his “engineering manager”.*
13. Mr Peters and Mr Munden gave evidence that all the work was contracted through Abus. Mr. Peters gave evidence that Abus gave drivers an induction on commencement, paid for driver CPC training (page 82) and allocated the drivers their duties (page 166). Mr Munden gave evidence of the commercial arrangement between Abus and Mundens; Abus paid Mundens a set amount each month; there was then an annual reconciliation based on actual hours worked and maintenance conducted; Mundens added a management fee to the drivers’ hourly rate. While the traffic commissioner made no specific finding of fact about these matters, they appear to have been accepted by him.

The Traffic Commissioners’ decision and reasoning

14. The traffic commissioner identified the issue he had to decide as, “*Who was the ‘operator’ of the vehicles?*” He examined the arrangements between Abus, Mundens and Mundens’ drivers, considered the statutory provisions and concluded that the “operator” was Mundens and not the licence holder.
15. The traffic commissioner examined section 81 and concluded that the purpose of section 81(1)(b)(ii) was to establish control of the driver by the operator. He reasoned as follows:-
- 19. I agree with Mr Woodhouse that the drafting of s.81(1)(b)(ii) does not require a written contract of employment between the driver and the operator. But what does it require? In answering that, it is necessary to understand the purpose of the Section. First, in defining the operator in circumstances where the driver does not own the vehicle, the draftsman makes no further reference to vehicles, or vehicle maintenance, or any other ownership or compliance characteristic. The focus is purely on the driver. In the case where the driver owns the vehicle and **is** the operator, it is clear that the operator has full control of the driver; they are one and the same [q.v. s. 81(1)(b)(i)]. It follows that the purpose of sub-paragraph (ii) is to establish **control of the driver by the operator.***
16. He then considered the arrangements between Abus and Mundens and concluded that it was Mundens who had control of the drivers, for the following reasons:-
21. *At pages 19, 20 and 21 are a number of “All Drivers” notices. They are all issued by Tim Loughlin, General Manager of Mundens. The notice at page 21 refers to the “DVSA Examiner, who visited 3rd May 2018”. The notice is clearly written by*

someone who is in control of the drivers and who appears to refer to the vehicles as his own (excepting the reference to Abus on page 20).

22. *The driver contract is at page 39. It is with Mundens. The sample is dated March 2013. At 2, it identifies the principal duty as “to drive our buses and those of associated companies & any other vehicle”. Mundens surrendered its licence in June 2012 so should not have been operating vehicles in March 2013. Drivers are “responsible for maintaining the cleanliness of company vehicles”, which appears to refer to Munden vehicles. It goes on “You must also comply with the obligations placed on you as part of the conditions of the company holding an Operators Licence”.*
23. *Paragraph 5 of the contract deals with hours of work. It states “You will normally work a minimum of 40 hours per week. You will be required to work at any time, for any duty or service **we operate** or casual work that comes in” (emphasis added). There is no specific reference to Abus at any point of the contract. There is no suggestion that drivers will be controlled by anyone other than Mundens.*
24. *Pages 46 to 56 are sample disciplinary letters. A number of points arise:*
 - *The right of appeal is to Alan Peters. It is not clear in what capacity.*
 - *The example at page 50 deals with a driver who appears to be contracted to Abus and sub-contracted to First West of England Ltd. It appears from this example that Abus want to dispense with the driver altogether but are persuaded by Mundens not to do so. This is a clear example of Abus not having the necessary control as a direct result of the method of employment.*
 - *The example at page 56 requires the driver “to operate all **our** routes from start to finish as per the registered timetable” (emphasis added). Again, there is reference to the routes being operated by Mundens, not Abus.*
 - *A number of letters carry a signature block “L C Munden & Sons t/a Crown Coaches, working in partnership with Abus Ltd”.*
25. *I return to the purpose of s.81 of the 1981 Act. It is to establish control between the operator and the driver. In doing so, it defines the operator as the person who has control over the driver. I find that, whilst Abus has influence over the drivers, it is Mundens who have control. It follows that the vehicles are operated by Mundens, not Abus. That is a material change from the terms on which the licence was granted, albeit, in practice, I accept that nothing has changed. Section 17(3)(e) is made out.*
17. *The traffic commissioner found that, in reality the two businesses ran as a single entity with all parties working together to deliver the service. In making these findings, the traffic commissioner made clear that the position as he found it had not been arrived at with any ill-intent and Mr Peters and Mr Munden had been fully open and frank with him. He stated that he made no adverse findings in relation to the good repute of any party and no adverse finding against Mr Peters as transport manager.*
18. *He found that there had been a material change of circumstances under section 17(1)(e) and suspended the licence.*

The appeal to the Upper Tribunal

19. The grounds of appeal are at pages 225 to 228; these were developed by Mr. Cotter for the appellant at the appeal hearing.
20. Mr. Cotter submitted that the traffic commissioner was plainly wrong and misdirected himself when he made a finding that section 81 provided that the operator was the person who had control over the driver; this misdirection led to a plainly wrong decision.
21. Mr. Cotter noticed that the heading for section 81 was "*Interpretation of references to the operator of a vehicle or service*". The purpose of section 81 was not to determine the criteria for being an operator but was an interpretive provision only. He submitted that the traffic commissioner's conclusion that section 81(1)(b)(i) assisted in defining the requirements of the entirety of section 81 was flawed; section 81(1)(b)(i) was drafted to cover operators who were driver owners; to assign a further interpretative stage of "control" was to go beyond the purpose of the section. He said section 81 was deliberately drafted broadly to capture the varying categories of operator who may fall under the requirements of the 1981 Act. Section 81(1)(a) deals with hiring arrangements; section 81(1)(b)(i) covers owner-drivers and (ii) defines an operator as "*the person for whom the driver works*". A person could provide work to another without having control over that person. He submitted that the appellants fell within the direct statutory definition of "*the person for whom the driver works*" in that they provide the vehicles, the routes and the paid benefit of the work to the drivers. In those circumstances, there had been no material change in terms of section 17(1)(e) since the licence had been granted.
22. The Secretary of State for Transport provided the Upper Tribunal with a written submission on the appeal. The Secretary of State did not wish to be joined in the appeal and had no interest in the outcome of the case.
23. The Secretary of State submitted that the traffic commissioner had applied the wrong test when deciding whether the appellant was an operator under section 81(1)(b)(ii) of the 1981 Act. The question was "*For whom do these drivers work?*"
24. The Secretary of State submitted that in deciding for the purposes of section 81(1)(b)(ii) for whom the drivers worked, the traffic commissioner should have drawn on the prevailing principles of employment law; this is what the Traffic Tribunal did when interpreting the similar provisions of section 58(2) of the Goods Vehicle (Licensing of Operators) Act 1995 in *EA Scaffolding and Systems Ltd 2004/377* and *EA Contract Services Ltd 2004/426*. He submitted that the focus of section 81(1)(b)(ii) is not on control but on the identity of the person for whom the drivers work (whether as employee or as worker).
25. As regards the traffic commissioner's interpretation of the drivers' employment contracts and other documentation, the Secretary of State submitted that the prevailing test is now to see if the contractual documents reflect the true agreement between the parties and, if not, to go on to find what the true agreement actually was even if this involves ignoring the written terms of the contract. The focus should be on any difference between what is actually happening "on the ground" and what one would expect should be happening based on the written terms. One has to look at the reality of the situation as opposed to the formal contractual position. He relied on the

decisions of the Supreme Court in *Autoclenz v Belcher* [2011] UKSC 41, and of the Court of Appeal in *Uber BV & Ors v Aslam & Ors* [2018] EWCA Civ 2748 and *Smith v Carillion v* [2015] EWCA Civ 209 at § 21 for these propositions.

26. In *Smith*, which dealt with the triangular situation of a worker employed by an agency and working for an end-user company, the Court set out the principles to be applied in deciding whether the person works for the employer-agency or the end-user with the focus being on the reality of the situation, as opposed to the formal contractual position:

“21 The question arises whether and in what circumstances a contract between the worker and the contractor to whom he is providing his services can be implied. This question has been considered by the Court of Appeal on a number of occasions. In submissions before us counsel focused on two authorities in particular, namely James v Greenwich London Borough Council [2008] EWCA Civ 35; [2008] ICR 545 and Tilson v Alstom Transport [2010] EWCA Civ 169; [2010] IRLR 169 . It is not necessary to analyse these cases in any detail since the principles they espouse were not disputed. For the purposes of this case they may be summarised as follows:.....

...(2) A contract can be implied only if it is necessary to do so. This is as true when considering whether or not to imply a contract between worker and end user in an agency context as it is in other areas of contract law. This principle was reiterated most recently in a judgment of the Court of Appeal in James which considered two earlier decisions on agency workers in this court, Dacas v Brook Street Bureau (UK) Ltd [2004] ICR 1437 and Cable and Wireless plc v Muscat [2006] ICR 975 . It is sufficient to quote the following passage from the judgment of Mummery LJ, with whose judgment Thomas and Lloyd LJJ agreed (para. 23). Mummery LJ stated that the EAT in that case had:

“... correctly pointed out, at para 35, that, in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end-user, the test being that laid down by Bingham LJ in The Aramis [1989] 1 Lloyd’s Rep 213 , 224:

“necessary ... in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.”

(3) The application of that test means, as Mummery LJ pointed out in James (para.24), that no implication is warranted simply because the conduct of the parties “was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract.”

(4) It is, however, important to focus on the facts of each case. As Mummery LJ observed in James (para.51): “there is a wide spectrum of factual possibilities. Labels are not a substitute for a legal analysis of the evidence.” The question a Tribunal needs to ask is whether it is necessary, having regard to the way in which the parties have conducted themselves, to imply a contract between worker and end user

(5) Accordingly, if the arrangements which actually operate between the worker and the end user no longer reflect how the agency arrangements were intended to operate, it may be appropriate to infer that they are only consistent with a separate contract between worker and contractor. This may be because the agency arrangement was always intended to be a sham and to conceal the true relationship between the worker and the contractor. But it may also be simply because the relationship alters over time and can no longer be explained by the dual agency contracts alone. However, the mere passage of time cannot be enough to justify the implication of a contract on necessity grounds: James para.31 per Mummery LJ.

27. Paraphrasing the Court of Appeal in *Smith* (at paragraph 21(4) and (5)), the Secretary of State submitted that the traffic commissioner should have considered “*whether it is necessary, having regard to the way in which the parties have conducted themselves, to imply a contract between drivers and Abus because the arrangements which actually operate no longer reflect how the agency arrangements were intended to operate such that the traffic commissioner could then infer that they are only consistent with a separate contract between driver and Abus.*”
28. While Mr. Cotter agreed with what the Secretary of State had submitted about the traffic commissioner misconstruing section 81(1)(b)(ii), which was consistent with his own submissions, he did not agree that it was necessary to go any further than that. He therefore did not adopt the remainder of the Secretary of State’s argument.

Discussion

29. Section 81(1)(b)(ii) is widely drawn. If it had been the intention of Parliament to restrict “operator” to the employer of the driver under a contract of employment (oral or written) then this could have been clearly and easily stated. That is not what section 81(1)(b)(ii) provides. Instead, it provides that the operator is the person for whom the driver “works” either under a contract of employment or any other description of contract personally to do work. We therefore agree with the submissions for the appellant and the Secretary of State, that the focus of section 81(1)(b)(ii) is not on control but on the identity of the person for whom the driver works.
30. “Works” is not further defined in the 1981 Act and should be given its natural and ordinary meaning. A person can do work for someone without necessarily being employed by that person under an express or implied contract of employment. As noticed in the previous paragraph, section 81(1)(b)(ii) does not make a contract of employment mandatory, nor does it require that the contract under which the driver works must be with the “operator”.
31. We agree that in deciding for whom the drivers “work”, the tribunal must look at the reality of the situation and analyse what was happening on the ground. The driver notices, sample contract of employment (dated 2013) and correspondence examined by the traffic commissioner did not accurately reflect what the actual working arrangements were between Abus, Mundens and Mundens’ drivers. Indeed, the sample contract was probably inaccurate even in 2013 as the current arrangements were already in place by then. As the traffic commissioner found, the work was contracted through Abus, Abus owned the buses, Mundens employed the drivers and

supplied them to Abus to perform driving jobs for Abus, Abus provided the drivers with training and Abus allocated each driver his/her duties. Abus paid Mundens for the drivers plus an agency commission and Mundens paid the drivers and looked after payroll responsibilities. Despite the inaccurate wording in the sample contract and other documents, Abus and Mundens were in no doubt about what the actual contract between them was and what was happening in reality. The traffic commissioner accepted that this was a genuine arrangement between Abus and Mundens. Drawing on the principles summarised by the court in *Smith* and looking at what was happening in reality: the drivers had a contract with Mundens and Mundens had a contract with Abus. The drivers were working for Abus in terms of their contracts of employment with Mundens and in pursuance of the agreement between Abus and Mundens. As such, the drivers were “working” for Abus in terms of section 81(1)(b)(ii). It is not necessary, in addition, to imply a contract of employment between Abus and the drivers because what the drivers were doing is adequately explained by the arrangements between Abus and Mundens. (see *James* at paragraphs 30 and 42).

32. Accordingly, as the drivers were “working” for Abus, Abus was the operator of the vehicles driven by the Mundens’ drivers. There has not been a material change of circumstances in terms of section 17(3)(e) of the 1981 Act.
33. We agree that the traffic commissioner erred by holding that the purpose of section 81 was to establish control between the operator and the driver, by focussing on the question of control and by relying on the terms of the written material. This led to an erroneous result which must be set aside.

Decision

34. The appeal is allowed.

MARION CALDWELL QC
Judge of the Upper Tribunal
Date: 12 April 2019