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Employee/worker status and the concept of two employers

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Review of United Taxis Ltd v Comolly and anor [2023] EAT 93

The facts

1. United Taxis Ltd ("UT") is a private hire taxi company operating in the Bournemouth area as a co-operative owned by Member Shareholders. Its shareholders were required to pay a monthly subscription fee to access the services provided by the company and operate a licensed taxi under the UT banner. Shareholders could engage others to drive their taxis but anyone doing so had to be a registered driver with UT. As part of the registration process, drivers had to pay a fee to UT and undertake training. UT distributed jobs to drivers via the computerised dispatch system known as iCabbi which drivers logged on to via the app. Declining certain jobs incurred time penalties for drivers. Drivers were expected to comply with UT's byelaws covering matters such as displaying UT signage, dress code, restrictions on other private work or using other Apps, handling of jobs and use of a payment machine. Whilst drivers could be paid cash direct from passengers, card payments were made to UT who forwarded on the full amount to the relevant shareholder who in turn would distribute any sums due to drivers depending on any agreement. Likewise, UT would do the same with fares paid by passengers holding accounts with UT. Rates of UT's account work undertaken by drivers were set by UT.

2. Mr Tidman was a UT shareholder. In 2014 he entered an agreement with Mr Comolly (who had been a registered driver for UT since 6 March 2009 engaged by a different shareholder) in which Mr Comolly was permitted to drive UT's passengers using Mr Tidman's taxi between 6am and 6pm five days per week in return for Mr Comolly paying Mr Tidman 50 per cent of his takings. There was no written contract between them but Mr Comolly had been regarded as self-employed. Later, Mr Tidman unilaterally reduced the hours the taxi was available to Mr Comolly from 6am to 5pm. Mr Tidman allowed others to

use his taxi outside of the times agreed with Mr Comolly. Under the byelaws Mr Comolly was not allowed to work for another shareholder whilst the agreement with Mr Tidman subsisted even if Mr Tidman's taxi was not available.

3. A dispute arose between Mr Tidman and Mr Comolly over whether Mr Comolly had been properly declaring his earnings to Mr Tidman and on 14 March 2020 Mr Tidman summarily terminated the contract with Mr Comolly for alleged gross misconduct. Consequently, Mr Comolly brought a tribunal claim against both Mr Tidman and UT including complaints of unfair dismissal, unlawful deduction from wages, failure to pay holiday pay and age discrimination asserting that he was either an employee or worker of UT or Mr Tidman. The status issue was listed for a preliminary hearing.

The Tribunal's decision

4. The tribunal (EJ Harris sitting alone) determined that Mr Comolly was an employee of Mr Tidman and a worker of UT. With regard to employee status with Mr Tidman, the EJ reasoned that there was *mutuality of obligation* between the two in that Mr Comolly provided his own work and skill in operating Mr Tidman's taxi in return for remuneration paid to him by Mr Tidman (50 per cent of all fares paid). Performance of that work was subject to a material degree to *control* by Mr Tidman in that he defined the hours his taxi was available and expected Mr Comolly to comply with UT's byelaws when operating it. Mr Comolly provided *personal service* and could not provide a substitute driver. Finally, the EJ concluded that Mr Comolly had no opportunity to market his own services or develop his own independent taxi business (finding that the Hackney Carriage work Mr Comolly undertook, independent of work from UT, amounted to no more than circa 5 per cent of his working time because there was far more work to be had via UT's iCabbi App).

5. As for worker status with UT, EJ Harris rejected the primary submission on behalf of UT that there was no contract in existence between the taxi company and Mr Comolly and determined that one could be implied. The terms upon which Mr Comolly operated as a driver were "very much set by" UT through its Manual and byelaws, which Mr Comolly agreed to comply with in return for paying to become a registered driver of UT and agreeing to carry its passengers via the opportunity of reward from one of its shareholders. It was the Manual and byelaws that regulated the implied contract. Furthermore, the EJ found that although UT had no control over when and where Mr Comolly worked, once he was logged on to the iCabbi system (which he had to do the moment he started working) his choice about accepting or rejecting rides was significantly restricted by UT through the information it supplied to him and the time penalties imposed. The EJ also concluded that

UT "exercised a significant degree of control" over the way Mr Comolly carried out his driving services (such as complying with UT's dress code, finding work through UT's shareholders, and ensuring the taxi displayed UT signage). He held it was significant that the collection of fares paid by credit/debit card and UT account holders was managed by UT as well as any complaints by UT passengers against Mr Comolly. From all of this the EJ determined that a contract between UT and Mr Comolly could be implied and that UT did not have the status of a client or customer of Mr Comolly by virtue of that implied contract.

The appeals by the two Respondents

6. Both UT and Mr Tidman appealed. The appeal advanced on behalf of UT was threefold. Firstly, the EJ had erred by finding that Mr Comolly was simultaneously an employee of Mr Tidman and a worker of UT in respect of the same work. Secondly, the EJ erred by implying the existence of a contract between Mr Comolly and UT when it was not necessary to do so in order to: a) give business reality to the arrangements; and b) achieve the employment protection purposes of the legislation. Indeed, in finding that Mr Comolly was an employee of Mr Tidman he had better statutory protection than he had as a worker of UT. Thirdly, the EJ erred by finding that any contract between Mr Comolly and UT created a worker relationship by reaching a perverse decision which failed to take proper account of a number of factual features pointing away from it. Notably, UT did not retain any part of the fares paid by customers and had no financial interest in how much or little work drivers did and no interest in, or control over, the arrangements made between shareholders and drivers.

The appeal outcome for UT

7. UT was successful in its appeal before the EAT (HHJ Auerbach sitting alone). Although HHJ Auerbach concluded that the EJ was right to find that a contract existed between UT's passengers and UT and not with the shareholders or drivers, Mr Tidman was paying Mr Comolly to provide the service to UT of conveying its passengers to their required destination. In other words, the driving services had been subcontracted out to Mr Comolly by Mr Tidman.

8. Turning to the issue of implying a contract, HHJ Auerbach identified two fundamental problems with the EJ's reasoning. Firstly, there was no business need to imply a contract to enable UT to enforce its rules against Mr Comolly because there were methods in place to do this irrespective of whether a contract existed between the two parties or not

(principally through access to the iCabbi App and penalties). Secondly the EJ had overlooked whether the contract was one in which Mr Comolly undertook to provide a driving service to UT at all rather than being a subcontractor. At best, any contract was merely a collateral contract under which Mr Comolly undertook to abide by UT's rules as a condition of being permitted by a shareholder to carry its passengers.

9. Furthermore, HHJ Auerbach likewise concluded that the EJ was wrong to find a contract in existence between UT and Mr Comolly on the basis of the dual employment point. He agreed (from the line of authorities referred to on UT's behalf) that the appellate courts have already found it "problematic" to hold that a person can simultaneously be the employee of two different employers for the same work. Indeed, HHJ Auerbach went further and expressed the view that while the EAT in *Cairns v Visteon UK Limited* [2007] ICR 616 observed that such problems may not be insurmountable, he could not see how they could be overcome. In his view, such problems would arise just as much from dual worker contracts and also dual worker and employee status with two different employers (as arising in this case). Finally, with *Uber BV v Aslam* [2021] UKSC 5 in mind, HHJ Auerbach acknowledged that where an individual is found to be the employee of one party it was not necessary to imply that they were the employee or worker of another party to ensure they were not deprived of employment protection rights to which they should be entitled.

10. In short HHJ Auerbach accepted UT's submissions that, in relation to the work of conveying UT's passengers, there was no contract in existence between UT and Mr Comolly and there was no legal basis for implying one. On the contrary, to do so offended the rule against dual employment. For all these reasons, Mr Comolly was neither an employee or worker of UT.

The appeal outcome for Mr Tidman

11. As for Mr Tidman's appeal and the submissions on his behalf, firstly he too relied upon the prohibition against dual employment. Secondly, it was argued that the EJ was wrong to characterize the contract between him and Mr Comolly as anything other than a hire agreement in respect of Mr Tidman's taxi. Thirdly the EJ had erred in his approach to the issue of control so as to find that the contract was one of employment and should have found that Mr Comolly was in business on his own account (so as not to be either an employee or a worker of Mr Tidman).

12. The EAT rejected the hire agreement submission. It concluded that Mr Comolly was clearly engaged in driving services for Mr Tidman and the EJ was right to hold as such. Nevertheless, HHJ Auerback accepted the submission that the EJ had erred in his approach to control. Whilst Mr Tidman controlled the periods during which Mr Comolly could work, Mr Comolly controlled which jobs he took including as between Hackney Carriage work and UT jobs. As for being in business on his own account, HHJ Auerbach determined that the only tenable conclusion was that Mr Comolly was not because: a) he did not have his own taxi; b) he was not free to obtain work from other taxi or driving Apps; c) he could not offer his services to UT passengers privately; and d) even the Hackney Carriage work income was shared with Mr Tidman. As such, the EAT concluded Mr Comolly was a worker (but not an *employee*) of Mr Tidman.

Comment

13. There is no doubt that *Uber* (rightly) changed the landscape of employment law and the approach to the upholding of employment protection rights. The United Taxis decision, however, is a stark reminder that *Uber* was always highly fact sensitive and never intended to encourage a one size fits all approach. It remains essential for practitioners to continue to carefully analyse and unpick the factual circumstances of each individual case so that a methodical approach can be applied to determining whether each of the necessary ingredients exists to satisfy the necessary status issue. Need it be said, the absence of a contract between UT and Mr Comolly, the inappropriateness of implying a contract and the prohibition of dual employment in respect of same individual and same work were all matters advanced on behalf of UT in support of its case at first instance. Given this case involved a taxi company and the provision of driving services, it is possible that the EJ at first instance may have been distracted by *Uber* and some of the factual parallels that overlapped with the facts in this case. More importantly, this decision develops the dual status prohibition by confirming that the bar to an individual being found to be an employee of two different employers is just as applicable to the concept of being a worker of one party and an employee of another (for the same work).

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