COUR DE CASSATION

SOC. LG

COURT OF CASSATION

Public hearings held on 4 March 2020

Reversal

Mr. CATHALA, President

Ruling n° 374 FP-P+B+R+I

Appeal no. S 19-13.316

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

RULING BY THE LABOUR CHAMBER OF THE COURT OF CASSATION ON 4 MARCH 2020

1°/ The company Uber France, a French simplified single shareholder company with its headquarters in ……..,

2°/ The company Uber BV, a company under foreign law with its headquarters in ……. (The Netherlands),

Have lodged appeal n° S 19-13.316 against the ruling handed down on 10 January 2019 by the Paris Court of Appeal (Pôle 6, Chamber 2) in the dispute between the foregoing companies and Mr. A… X…, domiciled at …, defendant in these appellate proceedings,

Voluntary Intervention: the trade union *Confédération générale du travail-Force ouvrière (CGT-FO),* headquartered at ….

In support of their appeal, the appellants cite the sole ground of appeal appended to this ruling.

The case was communicated to the Public Prosecutor.

Based on the report by Ms. Valéry, Referendary Counselor, the written observations submitted by SCP Célice, Texidor, Périer, attorney representing the companies Uber France and Uber BV, by SCP Ortscheidt, attorney representing Mr. X..., by Me Haas, attorney representing CGT-FO, the pleadings by Mes Célice, Ortscheidt and the pleadings by Me Haas, as well as the opinion presented by Ms. Courcol-Bouchard, First Public Prosecutor, after public hearings on 13 February 2020 in the presence of Mr. Cathala, President, Ms. Valéry, Referendary Counselor Rapporteur, Mr. Huglo, Senior Magistrate, Ms. Farthouat-Danon, Mr. Schamber, Ms. Leprieur, Mr. Maron, Ms. Aubert-Monpeyssen, Mrs. Rinuy, Pion, Ricour, Pietton, Mses. Cavrois, Pécaut-Rivolier, trial judges, Ms. Depelley, Mr. David, Ms. Chamley-Coulet, Referendary Counselors, Ms. Courcol-Bouchard, First Advocate General, and Ms. Piquot, Clerk.

In compliance with article R. 431-5 of the French Judiciary Organisation Code The Labour Chamber of the Court of Cassation composed of the President and Trial Judges mentioned above, handed down this ruling after deliberations in accordance with the law.

Facts and Procedure

1. According to the ruling under appeal (Paris, 10 January 2019), Mr. X…, bound by contract to the Dutch company Uber BV pursuant to signing a partnership registration form, has worked as a driver using Uber's digital platform since 12 October 2016, after leasing a vehicle from a Uber partner and filing with the SIRENE registry as an independent contractor, listed under the activity passenger transport by taxi.

2. Uber BV permanently deactivated his account on the platform as of April 2017.

3. Mr. X… petitioned the industrial tribunal with a request to reclassify his contractual relations with Uber as an employment contract, and lodged claims for retroactive salary payments and termination indemnities.

Reviewing the Admissibility of Voluntary Intervention by the Trade Union *Confédération générale du travail-Force ouvrière*

4. In accordance with articles 327 and 330 of the French Code of Civil Procedure, voluntary interventions are only admitted before the Court of Cassation if they are requested incidentally, in support of a party's claims, and are admissible only if the applicant has an interest in supporting said party so as to safeguard its rights.

5. In view of the fact that the trade union *Confédération générale du travail-Force ouvrière* adduces no evidence of having any such interest in these litigations, its voluntary intervention is inadmissible.

Reviewing the Ground

Statement of ground

6. Uber France and Uber BV submit that the ruling whereby the contract binding Mr. X... to Uber BV is an employment contract, whereas:

"1°/ An employment contract implies that a natural person undertakes to work for the account of another natural person or legal entity against compensation and in a relationship of legal subordination. The agreement entered into by a ride-hailing driver with a digital platform bearing on the provision of an electronic application for establishing relations with potential clients in exchange for payment of service fees does not constitute an employment contract, in cases where said agreement entails no obligation for the driver to work for the digital platform or to remain at its disposal and entails no undertaking liable to force said driver to use the application to conduct his business. In the case at hand, Uber BV claimed that the driver entering into a partnership agreement remains entirely free to connect to the application or not, to choose the location and the time he/she intends to connect, without informing the platform thereof in advance, and to put an end to the connection at any moment. Uber BV also argued that when the driver chooses to connect to the application, the driver is free to accept, to decline or not to reply to rides proposed thereto through the application and that, although several consecutive refusals may lead to a disconnection from the Application for operational reasons linked to the algorithm's modus operandi, the driver has the possibility of reconnecting at any moment and such temporary disconnection has no impact on the contractual relations between the driver and Uber BV. Uber BV further claimed that the platform is paid for exclusively based on the collection of fees on rides actually made via the application, so that the driver is not obligated by any financial commitment to the platform that might force the driver to use the application. Lastly, Uber BV argued that the partnership agreement and the utilization of the application do not entail any exclusivity obligation for the driver who is free to use other applications simultaneously for establishing relations with the clientele built up through other competing platforms and/or conduct his/her business as a ride-hailing driver and develop a clientele through other means. On this basis, Uber BV arrived at the conclusion that the signing and performance of the contract by Mr. X... did certainly not give rise to any obligation for the latter to work for the platform, and thus the contractual relationship cannot be characterised as an employment contract. Nevertheless, by deeming that the contract binding Mr. X... to Uber BV is an employment contract, without seeking, as it was invited to do, to determine whether the signing and performance of this contract entailed an obligation upon the driver to work for the platform or to stand at the disposal of said platform to perform a job, the Court of Appeal deprived its decisions of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code.

2°/ Pursuant to article L. 8221-6 of the French Labour Code, the presumption of non-salaried status in order to conduct a business necessitating registration with the employment repertoire is excluded only once it has been established that the registered person provides services to a principal under such terms and conditions that said person is placed in a relationship of permanent legal subordination to the principal. The relationship of subordination is characterised by the performance of a job under the authority of an employer who has the power to give orders and instructions, to supervise performance, and to sanction the subordinate for any shortcomings. Working within an organised service cannot indicate a relationship of subordination unless the employer unilaterally determines the terms and conditions for performing the job. There can be no relationship of permanent legal subordination resulting out of the agreement signed by and between a digital platform and a ride-hailing driver, in cases where the agreement does not entail any authority given to the platform to require that the driver must perform a job for the platform or even that the driver must remain at its disposal for a given period, however long that period might be, or any undertaking likely to obligate the driver to use the application developed by the platform. In the case at hand, there can be no doubt that Mr. X..., who was filed with the employment repertoire as a driver, came within the scope of application of article L. 8221-6 of the French Labour Code. Uber BV argued that the driver who signs a partnership agreement remains entirely free to connect to the application or not, to choose the time and location when and where to connect, without being in any manner obligated to inform the platform thereof in advance, and to disconnect at any moment. Uber BV further contended that when the driver chooses to connect to the application, the driver is free to accept, to decline, or not to reply to proposals for rides made to the driver via the application and that, although several consecutive refusals may lead to a temporary disconnection from the application so as to enable the algorithm to operate smoothly (since requests for rides are proposed to drivers connected sequentially, with preference given to the nearest driver to the passenger), the driver may reconnect at any moment merely by clicking on the application. Uber BV furthermore argued that the signing of a partnership agreement and the utilization of the application do not give rise to any royalty, or to any financial commitment by the driver with regards to Uber BV, which would as such obligate the driver to use the application, and that compensation for the platform is exclusively ensured by collecting fees on rides actually made via the application. Lastly, Uber BV argued that the agreement for the provision of electronic service and utilization of the application did not generate any exclusivity obligation for the driver who was entirely free to simultaneously use other applications for establishing relations with the clientele built up through competing platforms and/or conduct his/her business as a ride-hailing driver and to develop a clientele through other means; by merely stating that "the fact of being able to choose places and hours of work does not exclude a relationship of subordinated work per se", without seeking to determine whether or not these overall factors, leading not to a mere freedom for Mr. X... to choose his hours of work (such as might exist for certain salaried employees), but a total freedom to use the application or not, to connect at the places and times chosen at his full discretion, not to accept rides proposed via the application, and to be free to organise his operations without the application, did not exclude the existence of a relationship of permanent subordination with Uber BV, the Court of appeal deprived its decision of a legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code.

3°/ The Court cannot determine the existence or not of a relationship of legal subordination without taking into consideration all the elements pertaining to the terms and condition of conducting the business as presented by the parties. In the case at hand, Uber BV claimed, without being contradicted, that the driver was not under any obligation or subject to any form of oversight regarding his connections and operations, and the partnership agreement bearing on the utilization of the application did not entail any exclusivity obligation and even expressly recalled that the driver was free to connect and utilise applications for establishing relations with the clientele built up through competing platforms and/or carry out his business as a ride-hailing driver through sources other than the Uber application. By considering that there was a sufficient body of evidence to characterise the existence of a relationship of subordination, without taking into account these decisive factors that may establish that the driver enjoys a freedom in conducting his business – including via the Uber platform - that is incompatible with the existence of a permanent relationship of legal subordination, the Court of Appeal did not put the Court of Cassation in a position to exercise its control and deprived its decision of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code.

4°/ The performance of a partnership agreement bearing on the utilization by a ride-hailing driver of an electronic application for establishing relations with clients implies a possibility for the platform to ensure that the application runs smoothly, that the driver abides by applicable regulations, and to ensure the safety of persons and the quality of the transportation service provided. The possibility for a digital platform to terminate the agreement unilaterally in the event of the driver's serious and repeated breaches of the obligations ensuing from the partnership agreement does not characterise a disciplinary power. In the case at hand, Uber BV claimed that the requirement that the driver should not too frequently cancel rides proposed by the application after accepting these rides is not intended to restrict nor does it lead to restricting the driver's freedom to choose if, when and where the driver gets connected, and to decline rides proposed, but this is necessary so as to guarantee the system's reliability by ensuring a smooth equilibrium between supply and demand. Moreover, Uber BV notes that drivers using the Uber application do not receive any orders or any personalised instructions and that the "fundamental rules" derived from the contractual documents constitute elementary requirements as regards politeness and soft skills, compliance with regulations and to ensure the safety of persons, these rules being inherent to the business conducted by a ride-hailing driver. Under these circumstances, the possibility of terminating the partnership agreement in the event that these obligations are disregarded does by no means entail any disciplinary power, but reflects the possibility for any contractor to terminate a business partnership whenever the terms and conditions thereof are breached by the co-contractor. In considering that Uber BV had the power to impose sanctions upon drivers and this characterises an employment contract, by merely pointing out that a cancelation rate that was too high or that passenger reports of a problematic behaviour by the driver could lead to loss of access to the account, without explaining in what way the requirements imposed for using the application are distinct from requirements that are inherent to the very nature of the business carried out by a ride-hailing driver and inherent to the use of a digital platform for establishing relations, the Court of Appeal deprived its decision of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code, together with articles L. 3221-1 et al. of the French Transportation Code, and articles 1103 and 1226 of the French Civil Code, as amended by the ordinance of 10 February 2016.

5°/ The mere existence of a possibility stipulated in the agreement for the platform to deactivate or to restrict access to the application cannot in itself characterise supervision over drivers' operations since there is no evidence indicating that any such prerogative would be used to force drivers to connect and to accept the rides proposed to them. By merely asserting that the stipulation in article 2.4 of the agreement, whereby Uber retains the right to deactivate the application or to restrict its use would "lead to inciting drivers to remain connected in the hope of obtaining a ride and thus to remain constantly at the disposal of Uber BV throughout the duration of the connection", whereas, on the one hand, the agreement elsewhere expressly recalls that the driver was free to use the application whenever he wished and to accept or decline the rides proposed and, on the other hand, there is nothing to indicate the existence of any deactivation whatsoever or of any restriction of using the application when a driver does not connect or declines rides, the Court of Appeal deprived its decision of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code.

6°/ Article 4.4 of the agreement for the provision of services stipulates in particular that "the client and its drivers exclusively retain their individual right to determine when and how long to use the driver application or Uber services" and that "the client and its drivers retain the possibility, through the driver application, to attempt to accept, decline or disregard a request for transportation services via Uber services, or to cancel a request for transportation services accepted via the driver application, subject to Uber's cancelation policies in force at that time". By truncating article 2.4 in the agreement to determine that this stipulation would "lead to inciting drivers to remain connected in the hope of obtaining a ride and thus to remain constantly at the disposal of Uber BV throughout the duration of the connection", without taking into consideration the clear and precise terms of this stipulation pertaining to the driver's freedom to connect and to decline rides proposed, the Court of Appeal has distorted this contractual stipulation by omission, in violation of articles 1103 and 1192 of the French Civil Code, as amended by the ordinance of 10 February 2016.

7°/ The fact of honouring the client's order, which was accepted by the ride-hailing driver, cannot constitute an indication of the existence of a relationship of subordination between the driver and the digital platform that established relations between the driver and the client. Thus, the fact that a ride-hailing driver who agreed to carry out an exclusive transportation service booked by a client honours the terms of the service booked and cannot carry other passengers as long as the transportation service is still ongoing cannot constitute an indication of subordination with respect to a digital platform. By considering that the prohibition for the driver to carry other passengers while performing a ride booked through the Uber application "negates an essential attribute of the status of a self-employed service-provider", the Court of Appeal relied on an erroneous ground and has violated articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code, together with article 1103 of the French Civil Code, as amended by the ordinance of 10 February 2016.

8°/ In accordance with the Uber Community Charter, "acts threatening the safety of drivers and passengers" are prohibited, such as "the fact of coming into contact with passengers after a ride without their consent. For instance: the fact of texting, calling or paying a visit to any person present in the vehicle after the ride has ended without that person's consent". In light of this contractual document introduced during the hearings, on the one hand, the prohibition of contacting clients after the ride, so as to uphold safety requirements, does not apply in cases where the client has agreed to be contacted by the driver and, on the other hand, it is by no means forbidden for the driver to give his/her contact details to clients so as to allow them to book a ride with him/her directly without going through the platform. Nevertheless, in considering that by forbidding the driver to contact passengers and to keep passengers' personal data after a ride, Uber BV deprived drivers of "the possibility for a passenger consenting to give his/her contact details to the driver so as to book a future ride outside of the Uber application", the Court of Appeal has distorted the clear and precise terms of the contractual documents introduced during the course of the hearings, in violation of articles 1103, 1189 and 1192 of the French Civil Code, as amended by the ordinance of 10 February 2016.

9°/ Uber BV argued that the provisions laid down in the French Consumer Code prohibit a ride-hailing driver from refusing to perform a ride without legitimate grounds, so that the lack of precise knowledge of the destination might not call the driver's independence into question. In stating that the lack of knowledge of the destination criterion by the driver when called upon to reply to an offer made through the Uber platform prevents the driver from "freely choosing the ride that befits him or not as a self-employed driver would do,", without seeking to determine, as it was called upon to do, whether or not the legal provisions pertaining to refusals to provide services do not prohibit professional drivers from declining rides out of pure convenience, the Court of Appeal deprived its decision of any legal ground in view of articles L. 121-11 and R. 121-13 of the French Consumer Code, together with article L. 8221-6 of the French Labour Code.

10°/ The geo-tracking system inherent to running a digital platform for establishing relations between ride-hailing drivers and potential clients does not characterise a relationship of legal subordination between the drivers and the platform insofar as this system is not intended to oversee drivers' activities and is used merely to put drivers into contact with the nearest client, to ensure the safety of passengers transported and to set the price of the service. By asserting that the geo-tracking system used by the Uber platform is sufficient to establish the existence of supervision over the drivers, "irrespective of the motivations put forward by Uber BV for this geo-tracking", the Court of Appeal deprived its decision of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221–6 of the French Labour Code.

11°/ The fact that a platform for establishing relations via electronic means sets the price of services provided thereby cannot be characterised as an indication of the existence of an employment contract. The mere fact that fares for a transportation service are calculated based on number of kilometres per hour and that the price of the services may be readjusted in the event of passenger claims - if the route chosen by the driver is unduly long and therefore inappropriate - does not constitute an order or an instruction for the performance of the job. By opining the opposite in ruling against it, the Court of Appeal has violated articles L. 1221-1, L. 1411-1 and L. 7341-1 of the French Labour Code, together with articles 1164 and 1165 of the French Civil Code as amended by the ordinance of 10 February 2016.

12°/ Any commitments made to third parties by an independent driver in order to conduct his/her business cannot be construed as indications of a relationship of legal subordination between the driver and a digital platform. By pointing out the fact that while awaiting his registration with the ride-hailing drivers register obtained on 7 December 2016, Mr. X... had conducted his business using the license held by the company Hinter France, a partner of Uber BV, obliging him to generate revenue by connecting to the Uber platform, the Court of Appeal relied on an improper ground to characterise the existence of a relationship of legal subordination with Uber BV, in violation of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code, together with article 1199 of the French Civil Code, as amended by the ordinance of 10 February 2016.

Response by the Court

7. In accordance with article L.8221-6 of the French Labour Code, natural persons, when conducting operations necessitating a filing in the registers or repertoires listed in this article, are presumed not to be bound to the principal by an employment contract. Nevertheless, the existence of an employment contract may be established in cases where said persons provide services under terms and conditions placing them in a relationship of permanent legal subordination with regard to the principal.

8. In accordance with the established case law of the Court (Soc., 13 nov. 1996, n° 94-13187, Bull. V n° 386, Société générale), the relationship of legal subordination is characterised by the performance of a job under the authority of an employer who has the power to give orders and instructions, to oversee performance thereof, and to sanction the subordinate for any breaches.

9. In accordance with the aforementioned case law, working within an organised service may constitute an indication of subordination in cases where the employer unilaterally determines the terms and conditions of performing the job.

10. In this respect, the Court of Appeal has ruled that in order to become a *"partner"* of Uber BV and its eponymous application, Mr. X... was obliged to file with the Trade Register ("*Registre des Métiers*"). Far from freely deciding on the organisation of his operations, seeking out a clientele, or choosing his suppliers, he thus joined a transportation service set up and entirely organised by Uber BV and which exists only through this platform. The use of this transportation service did not lead to the obtainment of a proprietary client base for Mr. X... who is not free to set his fares or to determine the terms and conditions for conducting his transportation service business which are entirely governed by Uber BV.

11. With regard to the freedom to connect and the freedom to choose working hours, the Court of Appeal held that the fact of being able to choose one's working days and working hours does not exclude *per se* a subordinated working relationship, insofar as whenever a driver connects to the Uber platform said driver joins a service organised by Uber BV.

12. With regard to fares, the Court of Appeal has noted that fares are set contractually based on Uber platform's algorithms using a predictive mechanism. This mechanism imposes a particular route on the driver who has no freedom of choice in this respect, since article 4.3 of the agreement stipulates a possibility of fares adjustments by Uber, notably if the driver chose an *"inefficient route"*. Mr. X... presented several fares adjustments applied to him by Uber BV and translating the fact that Uber BV gave him instructions and supervised the application.

13. Regarding the terms and conditions for conducting the transportation service business, the Court of Appeal acknowledged that the Uber application oversees the acceptance of ride since Mr. X... asserts – without this assertion being denied - that after three refusals of proposals the message *"Are you still there*" was sent to him. The Charter invites drivers who do not wish to accept rides to *"purely and simply"* disconnect. This invitation must be viewed in light of the stipulations under article 2.4 of the agreement, whereby: *"Uber also retains the right to deactivate or otherwise restrict access to or the utilisation of the Driver Application or of Uber services by the Client or any of its drivers or for any other reason at Uber's reasonable discretion"*. These stipulations incite drivers to remain connected in the hope of performing a ride and thus to constantly remain at the disposal of Uber BV throughout the duration of the connection, without being able to be actually free to choose the ride that befits them or not as would an independent driver. This is particularly the case as article 2.2 of the agreement stipulates that the driver *"shall obtain the user's destination, either in person at the time of pickup, or from the Driver Application if the user chooses to input the destination via Uber's mobile Application"*. This implies that the destination criterion, which may render acceptance of a ride conditional, is sometimes unknown to the driver when replying to a request made by the Uber platform. This is confirmed in the bailiff's report drawn up on 13 March 2017 and stating that the driver has only eight seconds to accept the ride proposed thereto.

14. With regards to the power to sanction, in addition to the temporary disconnection as of three ride refusals which Uber recognises, and the fares adjustments applied if the driver chose an *"inefficient route"*, the Court of Appeal held that order cancelation rates set by Uber BV, and which vary *for "each city"* according to the Uber Community Charter, could be applied to M. X.... Such cancelation rates could lead to loss of access to the account or permanent loss of access to the Uber application in the event of user reports of *"problematic behaviour*", irrespective of whether or not the allegations were ascertained or their sanctions proportionate to the deed.

15. From all the information outlined above, the Court of Appeal has therefore arrived at the conclusions that Mr. X... held a fictitious status as an independent worker and that Uber BV sent him instructions, supervised performance and exercised the power to sanction, without distorting the terms and conditions of the agreement, and without The Court of Appeal vitiating the ruling in the manner alleged in the pleadings, inoperative in its seventh, ninth, and twelfth branches and has justified its decision according to law.

ON THESE GROUNDS, the Court:

RULES inadmissible the voluntary intervention by the trade union *Confédération générale du travail-Force ouvrière;*

DISMISSES the appeal;

Sentences the companies Uber France and Uber BV to pay legal costs;

In application of article 700 of the French Code of Civil Procedure, sentences the companies Uber France and Uber BV to pay to Mr. X... the amount of three thousand euros (3000 euros); dismisses the other petitions;

Thus decided and judged by the Court of Cassation, Labour Chamber, and pronounced by the President in public hearings on the fourth day of March, in the year two thousand and twenty.