

OZE-IGIEHON v Rasier Operations BV - [2016] WADC 174

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JURISDICTION : DISTRICT COURT OF WESTERN AUSTRALIA
IN CIVIL

LOCATION: PERTH

CITATION : OZE-IGIEHON -v- RASIER OPERATIONS BV [2016] WADC 174

CORAM : WAGER DCJ

HEARD : 29-30 SEPTEMBER 2016

DELIVERED : 9 DECEMBER 2016

FILE NO/S : CIV 775 of 2016

BETWEEN : MIKE OZE-IGIEHON
Plaintiff

AND

Catchwords:

Contract - Driver registered with Uber platform - Duty of care - Breach of contract - Material breach

Legislation:

Civil Liability Act 2002 s 5

Result:

Plaintiff's claim dismissed

Representation:

Counsel:

Plaintiff : In person

Defendant : Mr A P Hershowitz

Solicitors:

Plaintiff : Not applicable

Defendant : Brand Partners Commercial Lawyers

Case(s) referred to in judgment(s):

Apache Oil Australia Pty Ltd v Santos Offshore Pty Ltd [2015] WASC 318

Griffiths & Beerens Pty Ltd v Duggan [2008] VSC 201

Schindler Lifts Pty v Debelak (1989) 89 ALR 275

Toll (FGCT) Pty Ltd v Alpha Farm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165

1. **WAGER DCJ:** The plaintiff Mike Oze-Igiehorn (Mr Oze) entered into a transportation service provider (driver) agreement with the defendant Rasier Operations BV, a company registered in the Netherlands. Rasier Operations BV operate a business of providing a telephone application for the provision of peerto-peer passenger transportation services using

the mobile application known as Uber (Uber). The service enables a driver to seek, receive and fulfil requests from a user passenger via Uber's mobile application.

2. Mr Oze applied to the defendant to become a driver registered with the Uber platform on 20 May 2015. Following assessment of him, his motor vehicle and his agreement to the online terms and conditions, he registered an account on the Uber platform on 23 May 2015. Mr Oze used the account to obtain user passengers from 23 May 2015 until 14 November 2015 when Uber suspended his account. The account was permanently deactivated by Uber on 24 November 2015.
3. Mr Oze claims that the defendant wrongfully and unlawfully terminated their contract with him and that he has suffered loss and damage arising from their breach of contract. He claims damages of \$500,000 for breach of contract and for breach of duty of care.
4. The defendant says that the contract was lawfully terminated because Mr Oze was in breach of the terms and conditions of the agreement having acted in such a way that critical safety issues arose that seriously breached the agreement. Uber had received multiple complaints from users of the Uber platform against Mr Oze including a complaint that he was driving fatigued and/or dangerously. Mr Oze was notified about the complaint, however, the defendant claims, Mr Oze was then the subject of a further similar complaint. Because the complaints were breaches asserted to be material breaches, the defendant claims they were entitled to terminate his contact under the terms and conditions of the services agreement. In any event the defendant claims they were entitled to terminate the agreement on seven days' notice. The defendant claims it has acted lawfully throughout.

The pleadings

5. Mr Oze is selfrepresented and has filed six pleadings from 28 February 2016 through to 20 June 2016.
6. In his written indorsement of claim dated 28 February 2016 Mr Oze pleaded:
 1. Damages for negligent against the defendant for breaching its duty of care to the plaintiff in failing to comply with the principles of procedural fairness, defying the cause of Justice and with the sudden termination of the contract of the plaintiff from his work with the defendant on unfounded allegations.
 2. The defendant terminated the account of the plaintiff on allegations of falling asleep while driving Uber riders to their destinations as alleged.
 3. Instead it was the passengers that were drunk and uncontrollable with bottles of beer while the plaintiff in reporting such behaviours to Uber which could result in their account being suspended from Uber database.
 4. The plaintiff had maintained a high rating with the defendant in line with company policies and contract of engagement.
 5. The defendant failed and neglected to conduct proper investigations and did not conduct any training/counselling in relation to his services as per the process of fairness giving the plaintiff sudden termination of contractual relationship with the defendant.

6. It is submitted that this single conduct by the defendant badly affected the image, Spirit and reputation of the plaintiff. The defendant's negligence resulted in the plaintiff being unemployed and suffered depression, damages and lost [sic] of financial capabilities as it manifested seriously on the plaintiff who obtained a loan to purchase a new vehicle to provide services for the defendant business:

- (a) the plaintiff claims therefore damages for breach of contract, breach of duty of care to the plaintiff;
- (b) loss of reputation, income and having made indebted;
- (c) interest on damages at the rate per annum 6% from July 2014;
- (d) cost of action.

7. In his amended reply dated 20 June 2016 Mr Oze pleads:

...

2. ... the plaintiff was never notified of any negative feedbacks or comments in any form by the defendant as the plaintiff has provided emails of performance and conducts from the defendant to the plaintiff after his account was terminated which clearly shows all the comments and feedbacks by riders ... The defendant does not and never offer any training or set up orientation as will be expected from a major company involved in transportation or as in the case ride sharing to the plaintiff before, during and after commencement up until termination of the plaintiff.

...

6. In the amended statement of claim dated 2 June 2016 the plaintiff pleads:

...

3. On May 23rd 2015 the plaintiff joined the defendants and started discharging his duties accordingly and maintained excellent rating throughout the period making a total of over 1500 trips successfully with letters of commendations/excellent feedbacks from the defendant. This was due to the experience the plaintiff had previously driving in Australia for 8 years with adequate history, no accident and very good police traffic record.

4. On 14 November 2015 the defendant deactivated the plaintiff account without notice or reason as expected by a civilised organisations as practiced in Australia to the surprise of the plaintiff who could not identify what he did wrong as his works was full of commendations and 5 days later after deactivation received letter of commendations from the defendant on good performances. So it became difficult to locate what the reason for deactivation was with no opportunity to appeal or address the decision as practiced in Australia contrary to what happens in the Netherland's laws.

5. As a result of this plaintiff suffered depression, loss and discomfort and being made indebted with car loans, insurance and credits debts unpaid, and made unemployment due to the fact that he had invested all he had to advance the business of the defendant. The plaintiff therefore claims from the defendant the sum of \$500,000.

Particulars of plaintiff's symptoms

- (a) loss of appetite;
- (b) inability to sleep;
- (c) having suicidal thoughts;
- (d) hopelessness;
- (e) irritability;
- (f) loss of interest in activities that used to be enjoyable;
- (g) hallucinations.

Particulars of medical treatment

Following the events, the plaintiff attended his GP who referred him to clinical psychologist for treatment as a result of symptoms observed. The treatment is currently ongoing.

Particulars of the plaintiff continuing and permanent disability as a result of the termination of his account with Uber BV

- (a) the plaintiff has suffered loss and severe mental depression and will continue to as a result of being made indebted and unemployed;
- (b) the plaintiff suffers from depression and loss of purpose in life;
- (c) the plaintiff's means of employment, social and household activities has been severely and significantly restricted as a result of the incident. The plaintiff is the sole provider for a wife and two young boys aged 1 to 4.

Special damages

The plaintiff claims the cost of ongoing medical treatment, vehicles purchased and utilised for Uber platforms for ride sharing. All particulars will be provided prior to trial.

Loss of income

As a result of the incident which the plaintiff is now indebted to financial companies, he has been rendered partially incapacitated to earn as much if at all to be able to clear his debts as well as his credit rating has been severely damaged.

8. The defendant pleads that it relies on the contractual terms of the service agreement for the deactivation of Mr Oze's account specifically that:

1. The defendant retains the right, at any time at Uber's sole discretion, to deactivate or otherwise restrict the plaintiff from accessing or using the Driver App or the defendant's services in the event of a violation of the service agreement or any act or omission by the plaintiff that causes harm to Uber's brand, reputation or business as determined by the defendant in its sole discretion.

...
 - (b) the defendant retains the right to deactivate or otherwise restrict the plaintiff from accessing or using the Driver App or the defendant's services for any reason at the sole and reasonable discretion of the defendant (cl 2.4).
9. The defendant relies on the numerous complaints and driver ratings as a basis to exercise its discretion under the provisions of the service agreement.
 10. The defendant pleads that its conduct has not caused the plaintiff psychiatric harm and denies any suggestion that its conduct caused the plaintiff to suffer a loss of earnings and/or damages relating to the lease of a motor vehicle.
 11. The defendant argues that the reliance on Uber's purported failure to conduct proper investigations and to train and counsel the plaintiff in relation to his provision of services and lack of procedural fairness is not demonstrated and does not give rise to a cause of action.
 12. The plaintiff opened his case on a number of issues that were not pleaded including that the defendant engaged in misleading and deceptive conduct, that the plaintiff represented all drivers of African and Middle Eastern background who had been deactivated and that the plaintiff was the victim of targeted xenophobia. Apart from the plaintiff's assertions from the bar table, no evidence was specifically led in relation to these assertions.

The issues

13. The issues for determination are:
 1. Was the defendant's termination of the contractual agreement between the parties lawful?
 2. Did the defendant owe the plaintiff a duty of care?
 3. Did the defendant breach a duty of care?
 4. In the event of any breach of a duty of care or of the agreement, did such a breach cause the plaintiff to suffer any loss and damage?.

The plaintiff's evidence

14. Mr Oze confirmed that to start the registration process with the Uber platform, a potential driver applicant expresses interest online by filling out a form and signing up. Uber then contacts the applicant and invites them to visit the local Partner Support Centre in Subiaco. Once contact is made with the prospective driver an 'on boarding' process

commences. The applicant is required to provide documentation including personal details, a valid F class motor driver's licence, a criminal record clearance, insurance details in respect of the nominated car to be driven and a third party inspection report in respect of the nominated car. The Uber staff then determine whether the applicant is a fit and proper person to be a driver. If the applicant is approved, Uber will then notify them electronically and invite them to log onto the Uber platform. Before access is granted to the applicant they must agree to the terms and conditions of their agreement with Uber. Once agreement is indicated the applicant is able to log on to their account and commence using the platform.

15. The Uber electronic screen sheets that provide an electronic running sheet of a driver's history with Uber show that Mr Oze followed this process and agreed to the transportation service agreement that included the terms and conditions of the agreement on 23 May 2015. Mr Oze further agreed to updated terms and conditions on 4 November 2015.

16. Relevantly, the service agreement account terms and conditions (as of 4 November 2015) include:

2.3 Your relationship with users

You acknowledge and agree that your provision of Transportation Services to Users creates a legal and direct business relationship between you and the User, to which Company is not a party.

...

2. Your relationship with the company

You acknowledge and agree that Company's provision to you of the Driver App and that Uber Services creates a legal and direct business relationship between Company and you. Company does not, and shall not be deemed to direct or control you generally or in your performance under this Agreement specifically, including in connection with your provision of Transportation Services, your acts or omissions, or your operation and maintenance of your Vehicle. You retain the sole right to determine when and for how long you will utilise the Driver App or the Uber Services. You retain the option via the Driver App to attempt to accept or to decline or ignore a User's request for Transportation Services via the Uber Services, or to cancel an accepted request for Transportation Services via the Driver App, subject to Company's then current cancellation policies.

...

Company retains the right to, at any time at Company's sole discretion, deactivate or otherwise restrict you from accessing or using the Driver App or the Uber Services in the event of a violation of this Agreement, your disparagement of Company or any of its Affiliates, your act or omission that causes harm to Company or its affiliates brand, reputation or business as determined by Company in its sole discretion. Company also retains the right to deactivate or otherwise restrict you from accessing or using the Driver App or the Uber Services for any other reason at the sole and reasonable discretion of Company.

2.5 Both the driver and user are prompted to provide ratings and feedback in good faith.

2.5.2 You acknowledge that Company desires that Users have access to highquality services via Uber's mobile application. In order to continue to receive access to the Driver App and the Uber Services, you must maintain an average rating by Users that exceeds the minimum average acceptable rating as averaged by Company for your Territory as may be updated from time to time by Company in its sole discretion ('Minimum Average Rating'). In the event your average rating falls below the Minimum Average Rating, Company will notify you and may provide you in Company's discretion, a limited period of time to raise your average rating above the Minimum Average Rating. If you do not increase your average rating above the minimum Average Rating with the time period allowed (if any), Company reserves the right to deactivate your access to the Driver App and the Uber Services. Additionally, you acknowledge that your repeated failure to accept user request for Transportation Services while you are logged in to the Driver App creates a negative experience for Users of Uber's mobile application. If you do not wish to accept User request for Transportation Services for a period of time, you will log off of the Driver App.

3. You and your vehicle

3.1 Your requirements

You acknowledge and agree that at all times you shall:

...

(c) maintain high standards of professionalism service and courtesy. You acknowledge and agree that you may be subject to certain background and driving record checks from time to time in order to qualify to provide, and remain eligible to provide, transportation services. You acknowledge and agree that Company reserves the right at any time in Company's sole discretion, to deactivate or otherwise restrict you from accessing or using the Driver App or the Uber services if you fail to meet the requirement set forth in this agreement.

...

12.2 Termination

Either party may terminate this agreement:

- (a) Without cause at any time upon seven (7) days prior notice to the other party;
- (b) Immediately without notice for the other party's material breach of this agreement; or
- (c) Immediately, without notice in the event of the insolvency or bankruptcy of the other party or upon the other party's filing or submission of request for suspension of payment (of similar action or event) against the terminating party;

...

13. Relationship of the parties

13.1 Except as otherwise expressly provided herein with respect to company acting as the limited payment collection agent solely for the purpose of collecting payment from users on your behalf, the relationship between the parties under this agreement is solely that of independent contractors. The parties expressly agree that:

- (a) this agreement is not an employment agreement nor does it create an employment relationship (including from a liability or tax law or Social Security law perspective), between Company and you; and
- (b) No joint venture partnership or agency relationship exists between Company and you.

17. Mr Oze acknowledged that he agreed to these terms and conditions in order to start his account on the Uber platform and to remain on the Uber platform. He denied however that he read the terms and conditions before agreeing to them. In opening his case he described the terms and conditions as capricious and he questioned his ability to have understood the terms and conditions in the event that he had read them.
18. Mr Oze is a 40yearold Nigerian man who worked as a journalist prior to migrating to Australia in 2008. He is clearly literate and intelligent. He is married and has two sons aged 2 and 4. He worked for over six years as a PTA transit officer for Wilson Security having the status of a public officer. His ties to Wilson Security ended in mid2015. Although his employment with Wilson Security was initially terminated, Mr Oze commenced legal proceedings that resulted in his resignation and a confidential settlement agreement with Wilson Security. I cannot go behind that agreement, however, there is no suggestion on the evidence that Mr Oze ceased working for Wilson Security because of a decision to take up Uber driving full-time. The relationship with Wilson Security had broken down prior to the confidential settlement agreement being reached.
19. Although Mr Oze was already working fulltime for Wilson Security, when he commenced on the Uber platform he chose to sign up to the account because he was interested in carrying out additional work as a driver that did not require him to commit to particular hours or particular days. His employment at Wilson Security had included having to work on public holidays and he had missed out on opportunities such as taking his family to the Australia Day fireworks display. He understood that working through Uber would give him greater flexibility.
20. Initially when Mr Oze was working for Wilson Security while also registered on the Uber platform, he worked shifts at Wilson Security of 10 to 12 hours. At times he would then make himself accessible to work through the Uber platform on the same day causing him to work up to 14 to 16 hours on some days.
21. Prior to commencing the Uber account, Mr Oze purchased a large Ford Falcon XR6 car because he hoped that Uber would give him the status of providing luxury service through

Uber Black. Upon completion of the assessment process, he was however registered as a regular Uber driver and the XR6 Ford Falcon was noted as the approved vehicle for that service.

22. After Mr Oze started as an Uber driver he found the XR6 Ford Falcon expensive to run. Three months after his account started he purchased a smaller more economical car, a Kia Rio, however he acknowledged that it was less comfortable for passengers than the bigger car and that he could not carry luggage or large bags for passengers in the small car. He determined that the Kia Rio was not suitable for the Uber platform.
23. Mr Oze became aware through a text message forwarded on the Uber platform that drivers could 'go to New Town Toyota' and secure a good deal on a leased vehicle and he understood that this was an offer that was exclusively open to Uber drivers. It was through this information that he ultimately leased the i45 Hyundai vehicle that he registered on the Uber platform and drove from October 2015.
24. Mr Oze described having a good driving record. It is not disputed that he is a person who has worked hard and is of good character.
25. The Uber platform operates a rating system whereby user passengers are able to rate a driver. The rating enables Uber to communicate directly with the user passenger and to provide feedback. It is also a guide to Uber as to the performance of the driver. Compliance with the rating system is a condition of the platform. Mr Oze asserted that his rating was always over 4.5. He understood that a rating of a lower figure would have led to deactivation. Even after he was permanently deactivated in November 2015, he received an email dated 30 November 2015 setting out that he had a lifetime rating of 4.65 and quoting user passenger feedback, the majority of the feedback giving five star ratings and positive comments.
26. Mr White who is the general manager of Uber in Western Australia clarified that, consistent with the terms and conditions of the agreement, the driver rating is not the only measure used by Uber to determine whether a driver's account is deactivated. A driver such as Mr Oze could receive good ratings however still be subject to deactivation because of the driver's conduct. If a driver conducted themselves in such a way that a critical safety issue or a critical issue relevant to the brand and reputation of Uber has been committed by a driver, then that would be seen to be a material breach of the driver's agreement with Uber.
27. In cross-examination Mr Oze denied that he committed any material breaches. He denied that he drove when he was fatigued or tired. He denied that he drove in a manner that was potentially dangerous to the safety of the user passenger. Although he admitted that on occasion he drove a user passenger in a vehicle that was not the vehicle registered with the Uber platform and admitted knowing that the user passenger would be notified of the licence plate and the type of vehicle that they should expect to arrive for their transportation, and that this was to ensure passenger safety and security, he denied that driving the wrong vehicle was a serious breach.
28. Mr Oze admitted that he drove user passengers when his vehicle was subject to a yellow defect sticker because the tyres were bald. He said that he advised Uber about the yellow

sticker. He understood that as long as he complied with the yellow sticker in the relevant time period, the bald tyres were not something that would pose a risk to the safety of a user passenger.

29. Mr Oze asserted that although he was advised on occasion of general concerns Uber had in relation to his performance, he was never advised of the specific details of any complaints received by Uber against him until after the process of permanent deactivation had occurred.
30. Mr Oze said that the first he knew of a temporary deactivation was when he attempted to log in on the Uber platform on 14 November 2015 and was unable to do so. He responded angrily and, in a subsequent meeting with Mr White the general manager of Uber in Western Australia, he said that:

you cannot deactivate my account on every slight allegation that people make. I've got financial liabilities to pay. This vehicle's under finance and you guys are aware of it. I've told you I was going to buy a vehicle (ts 22).

31. Mr Oze wrote emails to Uber after 14 November 2015. He sent emails to Uber companies in other countries asserting that the conduct of Uber towards him was in breach of contract however he was advised that Uber Australia was a separate entity and that other companies could not assist.
32. Following permanent deactivation Mr Oze advised Uber that he would commence legal action against Uber. He stated that it was only after this 'threat' to commence litigation on 24 November 2015 that he received a response setting out the reasons for his deactivation.
33. Since deactivation Mr Oze said that he has been very depressed. He claimed that he was earning \$7,000 a month when working for Wilson Security and, when working for both Wilson Security and through the Uber platform, he was earning up to \$10,000 a month. He described his inability to obtain further employment, his feelings of stress, loss of hope in life and his distrust of people arising from the deactivation of his account.
34. Mr Oze claimed he was \$7,000 in arrears for payments in respect of the XR6 Ford Falcon and that although he was unable to meet his obligations on the lease for the i45 Hyundai vehicle he has now been able to transfer the lease to another driver. Mr Oze stated that he has concerns about his reputation. He asserted that his name is toxic all over the place.
35. Apart from oral evidence, Mr Oze did not lead any evidence in relation to psychiatric, psychological or general physical health nor in respect of his financial position. In cross-examination Mr Oze denied that a medical report sent to the Human Rights Commission in mid-2015 in respect of proceedings against Wilson Security related to anxiety and stress that he claimed had resulted from his dealings with Wilson Security. He asserted in evidence that he had gone to the doctor just to check his blood pressure and said:

I didn't know that he was writing but all I know is I said 'check me if anything is wrong with me', that's what I went for yeah (ts 93).

36. In cross-examination when asked about the report he said:

If you put there 'work related stress' the strong inference is that you told him something about stress at the workplace? – Wilson – at Wilson's.

And that would have been stress in the workplace at Wilson, wasn't it? – I told him about the incident that happened that I'm feeling a bit funny so he should assess me. Yeah, that's what I did. That's okay. It's correct. And I think after that he said I was okay so ... (ts 92).

37. In an email Mr Oze sent to the Human Rights Commission dated 21 August 2015 relating to concerns about the complaint he made against Wilson Security and an employee, Mr Oze complained of systemic discrimination, hate, bias, workplace bullying and unfair targeting and said:

As a result of this I am feeling depressed and afraid for my life and its affecting my physiology on my work performance.

38. He agreed that he was referring to a consequence of what Wilson Security did to him (ts 92).
39. Documents relevant to the lease of vehicles were tendered, being exhibits 1.1 – 1.3 and exhibit D40. The lease documents do not show any link to Uber nor that Mr Oze was contractually obliged to lease a new vehicle in order to register with Uber prior to making the decision to enter into the Hyundai lease.
40. Mr Oze denied receiving any telephone calls from employees of Uber. He specifically denied speaking to Mr Samuel Collins on 1 November 2015 and denied having a discussion with Mr Collins about a complaint received by Uber that he had driven whilst tired.
41. He denied receiving emails that particularised the nature of complaints against him. He denied that there was any onus on him to contact Uber in order to investigate the nature of the complaints in response to Uber's email notifying him about passenger concerns generally.
42. The plaintiff also called evidence from Mr Simon Dawit Tesfatsion. Mr Tesfatsion had been a driver registered on the Uber platform from 25 February 2015 until 8 April 2016. He said that he had an average star rating from user passengers of 4.71. Mr Tesfatsion was personally in a similar position to Mr Oze in that he had a family to support and had also leased a vehicle in order to drive passengers. He asserted that no reason had been given to him and that there was no reason why he was permanently deactivated from the Uber platform. In cross-examination however Mr Tesfatsion confirmed that on the date of permanent deactivation, 8 April 2016, he was stopped by police for speeding. He said that the speed alleged was not correct and that his speed was significantly less than that referred to in cross-examination, however he acknowledged the infringement. Mr Tesfatsion agreed that he was breathalysed by police when he was stopped. He asserted that no action was taken in relation to any alcohol related driving offence. He agreed that he had a passenger at the time of his dealings with police and that the passenger became very angry. This was consistent with a complaint being made to Uber by a user passenger on that date.
43. Although it is regrettable that Mr Tesfatsion's agreement was deactivated, his deactivation occurred many months after Mr Oze's dealings with Uber had ceased and the circumstances of deactivation were very different. The evidence is of little assistance to the plaintiff's case.

The defendant's evidence

44. Given that Mr Oze denied ever falling asleep or suffering fatigue and said that he was experienced in managing fatigue the defendant called Ms Panda Clare Elizabeth Young to give evidence. Ms Young had been employed as a PTA transit officer with Wilson Security, a position she no longer holds, and had worked as a partner with Mr Oze when he carried out transit shifts on the road in the course of his employment with Wilson Security. Ms Young said that Mr Oze had been asleep for most of one shift. She said that he would often take the passenger seat and sleep on the shifts she shared with him. A photograph of Mr Oze wearing a uniform sleeping in a front passenger seat was tendered as exhibit D60S. She said this photograph was taken during a work shift they shared.
45. I accept Ms Young's evidence that the photograph was of Mr Oze asleep and that Mr Oze would, on occasion, sleep in the car. Ms Young was reluctant to attend court and was subpoenaed in order to give her evidence. Mr Oze had written to her following her receipt of the summons to give evidence on behalf of the defendant at this trial and he had indicated to her in the strongest terms that she should not turn up to give evidence. In evidence her demeanour was not shaken and she remained consistent in cross-examination. She no longer works for Wilson Security nor does she presently appear to have a relationship one way or another with Mr Oze.
46. Ms Young's evidence that Mr Oze slept on occasion when employed as a transit officer is not evidence of the truth of the allegations made against him by user passengers, however I accept that it does rebut Mr Oze's assertion that he managed fatigue well.
47. Mr White, general manager of Uber in Western Australia and Mr Collins, operations manager for Uber Perth, gave evidence on behalf of the defendant about Uber's operations, record-keeping and dealings with Mr Oze.
48. In 2015 Uber actively encouraged feedback from user passengers in relation to drivers, however Uber undertook to make sure that the user passengers' privacy, confidentiality and security was protected. For this reason the driver was not advised about the identity of a user passenger who had made a complaint nor was the driver advised of the full content of the complaint. If a serious complaint was received, then the driver was notified about general feedback concerns. This occurred by email, text or by telephone contact between an Uber employee and the driver. Relevantly, the Uber records for Mr Oze set out the following in relation to complaints.
49. On 7th July 2015 the user passenger complained that Mr Oze:

operated the vehicle over the speed limit by more than 10 km on multiple occasions during the trip. The radio was playing loudly; he regularly changed the channels. The driver said he had been working in security for the last five years ... This morning's drive was the first time I have not felt safe in an Uber ride.
50. Uber records showed that on 13 July 2015 an email was sent to Mr Oze advising that his user feedback for the previous week was below what was expected. Mr Oze did not contact Uber to enquire further about the circumstances, however, on 15 July 2015 Mr Oze sent an email to Uber advising of his belief that the low ratings from Uber passengers riders were due to him using the Kia Rio vehicle rather than the Ford Falcon XR6. Mr Oze stated: 'My Ford Falcon

XR6 is not economical for short trips and often not worth the journey'. He stated that he would continue to drive the Rio until he had saved enough money to buy a midsize car. Uber did not respond to this email nor did it advise Mr Oze of the details of the complaint received on 7 July 2015.

51. On 9 August 2015 a user passenger complained to Uber about Mr Oze:

I honestly feared for my safety on this trip. The driver was either falling asleep or drunk, all over the road, crossing onto other lanes. I asked if he was OK and he replied 'I just need to take it slow'. I will not be accepting an Uber from this driver again. Thankfully I made it home safe.

52. There is no record of a representative of Uber advising Mr Oze of this complaint or of the fact that a complaint was received.

53. On 18 August 2015 a user passenger complained to Uber that Mr Oze could not complete the fare because he had to go to work at his other security job. The user passenger advised that the driver dropped him at the wrong airport terminal and left him to catch a cab to the correct terminal. As a result he missed his flight and was out of pocket in excess of \$400 including the loss of a flight fare. The user passenger did not complain immediately. The user passenger stated:

Why did I take so long to complain? I was more concerned about losing my job. And another Uber driver said I should contact you. Please help make this right.

Usually happy customer

54. Uber did not advise Mr Oze of the fact that this serious complaint had been received nor of the nature of the complaint.

55. On 9 September 2015 a user passenger complained to Uber that Mr Oze had 'cut off a public bus while changing lanes, causing the bus behind to heavily brake and sound his horn'.

56. On 10 September 2015 Mr Kennedy, employee of Uber contacted Mr Oze by email in the following terms:

Hi driver/partner

... In the past week we have received a complaint about a serious incident that occurred during one of your trips. Your safety and the safety of your riders is extremely important to us, so we wanted to make sure you were aware of these complaints.

... If riders continue to report serious incidences and/or feel concerned for their safety when they ride with you, we will have to temporarily or permanently deactivate your account.

57. There is no evidence that Mr Oze contacted Uber or responded to this email.

58. Eight days later on 18 September 2015 Mr Oze was sent notification that Uber feedback was below expectations. Mr Oze did not contact Uber to clarify the feedback.

59. On 19 September 2015 Mr Oze requested a copy of the complaint against him, however he did not specify the date of the email from Uber that referred to the complaint. A staff member from Uber, Mr Chapman, replied by email:

I can't seem to locate the email you are referring to. If you could reply to the email you were referring to then I will be able to see it, or alternatively you could copy and paste.

60. Mr Oze did not respond to Mr Chapman's email. He did not make any further inquiries in relation to the nature of the complaint received by Uber and referred to by Mr Kennedy on 10 September 2015.

61. On 14 October 2015 Mr Oze emailed Uber in relation to poor ratings. He said:

In response to this week's performance rating, I wish to state that during the week I had to tell some riders who were disorderly to please take their dirty shoes off my chairs on more than five occasions. Obviously I don't expect such people to rate me well after the trip because they think they can abuse anyone's car the way they like. Uber should make it clear to the riders that there are rules about the treatment of drivers and their cars in particular, I had to spend \$20,000 to get a new car just for Uber so I can't have it trashed over a \$7.00 fare.

62. An Uber employee, Ms Padrique, sent an email to Mr Oze in response dated 14 October 2015 suggesting that Mr Oze could politely ask passengers to use the floor mats. She suggested that he obtain a copy of the receipt for cleaning so that Uber could reimburse him if appropriate. There is no evidence that Mr Oze took any further action.

63. On 1 November 2015 a user passenger complained about Mr Oze in the following terms:

My driver was unsafe or distracted; the driver appeared to be very tired, causing him to cross the centrelines on the freeway on multiple occasions.

64. Although Mr Oze said he was not contacted by Mr Collins, Mr Collins' evidence is that on 1st November 2015 he contacted Mr Oze to discuss the complaint received on that date. Mr Collins said in evidence that very strict rules apply in relation to the recording of details on Uber personal records. He had entered the following on Mr Oze's personal record:

Sam Collins spoke to driver and explained that driving long hours is dangerous. He understood.

65. Mr Collins said he personally entered the note into the Uber portal system. Although he could not remember the details of the call, he noted from his usual practice that by including 'he understood' the note indicated that he was satisfied that Mr Oze understood that driving when tired was dangerous. Mr Collins was a forthright, clear witness. I accept that Uber required staff to follow strict rules in relation to the recording of discussions with drivers. I accept that the records are accurate and, because they form part of the computer generated running sheet, that they were entered on 1 November 2015 as noted by the Uber employee with the identification of Mr Collins. I reject Mr Oze's evidence that he was not contacted on 1 November 2015. It is not clear whether the discussion between Mr Oze and Mr Collins included a history of other complaints received by Uber prior to 1 November 2015, however even if the conversation was limited to that single complaint, Uber's request that a driver not drive long hours because of the danger of fatigue was clear.

66. Two weeks later on 14 November 2015 a user passenger complained to Uber about Mr Oze. The user passenger stated 'When I got out I realised the car had a yellow defect sticker on it, Mike was lovely but he almost fell asleep at the wheel twice'.
67. Mr Collins said that after Uber received this complaint he personally reviewed all of the account history on Mr Oze's personal file. As a result of his assessment he suspended Mr Oze's account with Uber and noted on Mr Oze's personal file 'Investigation pending, partner had a yellow sticker and almost fell asleep at the wheel'.
68. Once Mr Collins had suspended the account he referred the matter to his manager, Mr White, for Mr White to make a final decision in relation to Mr Oze's account.
69. Following suspension of the account Mr Oze attended the Uber office in Subiaco personally and spoke to the general manager, Mr White. Mr White said in evidence that he advised Mr Oze of the general nature of the complaints insofar as they related to fatigued driving and unsafe driving and the threat to safety that user passengers felt when travelling with him. Mr White said to Mr Oze that he would speak to Uber employees, Mr Collins and Mr Kennedy, about the earlier complaints against Mr Oze before making a permanent decision, however, he said that he was leaning quite strongly to permanent deactivation of Mr Oze's account.
70. In light of his concerns about public safety and Uber's reputation if Mr Oze was to be returned to the platform as a driver, he placed a note on Mr Oze's personal file that stated 'Do not reactivate yet without speaking to Tom White'. Mr White said he made this notation because he wanted to minimise the risk of another team member inadvertently or unwittingly activating Mr Oze's account if they spoke to him before Mr White had had a chance to make a final decision in relation to deactivation.
71. On 18 November 2015 Mr Oze sent an email to Uber. Mr Oze said that:

Recently some allegations were raised against me by some riders, they alleged I was driving dangerously and looking tired.
72. Although Mr Oze disputes the words spoken by Mr White at their meeting on 16 November 2015 it is clear from this email that he acknowledged advice in relation to the complaints.
73. On 24 November 2015 Mr White permanently deactivated Mr Oze's account.
74. Mr White confirmed that Mr Oze requested a formal letter from the company stating categorically the reasons for deactivation and full details of the allegations and asked how he had violated in any form the terms and condition guidelines stated by Uber on his initial signup in May 2015.
75. Mr Young, an employee of Uber, sent an email to Mr Oze on 24 November 2015 in reply confirming that the termination had occurred due to multiple complaints about Mr Oze's driving whilst fatigued and/or driving dangerously. He quoted some of the user passengers' words from complaints. I accept that this was the first time that the precise words of the user passenger's complaints were disclosed to Mr Oze. I accept that the general thrust of the complaints had been communicated by Mr White on 16 November 2016.

76. Although he was terminated, Mr Oze received the email setting out his driver ratings on 30 November 2015. Mr White said that Mr Oze had received the email in error. The ratings email was computer generated and the link to Mr Oze's email address should have been deleted when Mr Oze was deactivated.
77. Mr White did not question the accuracy of Mr Oze's ratings as at 30 November 2015 being higher than the point at which deactivation would be considered, but distinguished deactivation as a result of bad user passenger star ratings from deactivation because the driver had committed a serious breach of the agreement. It was because of the serious breach alleged against Mr Oze in relation to the safety of Mr Oze, passengers and other road users that Mr White had deactivated Mr Oze's account.
78. Mr White agreed that on occasion, when a driver's star rating is low the driver may be referred to courses or be given assistance to learn how to improve the service offered to passengers. This programme was informally known as Uber 101. Mr White said that Mr Oze was not considered for Uber 101 because his repeated breaches as reported by user passengers meant that he was totally unsuitable to remain on the Uber platform and therefore training was not relevant because the complaints went beyond matters of customer service.
79. Mr White rejected Mr Oze's assertion that the complaints received from user passengers could have been sent by disgruntled fellow drivers, drunk and difficult passengers or could have been sent maliciously by xenophobic people who were racially motivated to get Mr Oze in trouble. Mr White said that on reviewing Mr Oze's personal records the complaints were received on different dates from people of different backgrounds and sexes who expressed themselves in different ways. Further, in some of the complaints such as the final complaint received on 14 November 2015, a positive comment was also included in relation to Mr Oze. On that date the complaint referred to the yellow defect sticker, and the driver almost falling asleep at the wheel twice however it also referred to the fact that 'Mike was lovely'. Accordingly, Mr White rejected that the complaints were malicious.
80. The dates and content of each complaint is consistent with Mr White's assessment that the complaints were received on different dates and they appear to be from people of different backgrounds and sexes who express themselves in different ways.

Was Uber's termination of the driver's agreement lawful?

81. The construction of a written contract is concerned with ascertaining what a reasonable person would have understood the parties to mean. Consideration should ordinarily be given not only to the language of the document, but also the surrounding circumstances known to the parties, and the apparent purpose and object of the transaction: see *Toll (FGCT) Pty Ltd v Alpha Farm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165. Mr Oze admitted agreeing to the terms and conditions of his contract with Uber on 23 May 2015 and agreeing to the amendment of the terms and conditions on 4 November 2015. He may have chosen not to read the terms and conditions prior to entering into the agreement, however as an intelligent, literate man with a background in journalism he was quite capable of reading and understanding the terms had he chosen to do so because they are written in plain English.

82. Mr Oze had agreed that the company's provision of the driver application created a legal and direct business relationship between him and the defendant. He retained the sole right to determine when and for how long he utilised the driver application or the Uber services (cl 2.4).
83. Mr Oze completed the application process with Uber. He understood that he had the choice whether to use the driver application. Mr Oze was attracted to the Uber platform because it provided a level of flexibility. He could make himself available to drive and remain in full-time employment if he chose to and he had the flexibility to make himself available for family activities on public holidays such as Australia Day if he chose not to log onto the application. This enabled him to enjoy flexibility.
84. Clause 2.4 also sets out that the defendant retained the right to, at its sole discretion, deactivate or otherwise restrict Mr Oze from accessing or using the driver application in the event of a violation of the agreement or of an act or omission that causes harm to the defendant or its affiliates' brand, reputation or business as determined by the company in its sole discretion.
85. The defendant also retained the right to deactivate or otherwise restrict access to the driver's application for any reason at the sole and reasonable discretion of the company.
86. Mr Oze asserted that the contract was capricious. He made this remark in opening the plaintiff's case, however, at no time prior to trial did he plead that the defendant's conduct was unconscionable, misleading or deceptive. Although I am not required to address issues that have not been pleaded, I note that Uber's conduct in carrying out the deactivation process was transparent and was reasonable. Prior to 1 November 2015 Mr Oze had been advised of low ratings and, on one occasion, of a complaint by a user passenger. On 1 November 2015 he was personally advised about the risk of driving long hours, a risk that could impact on his safety and the safety of his passengers and other road users. Although it may not have been stated by Mr Collins at the time of the call, the possible repercussions of driving long hours when tired, such as being involved in an accident, would have impacted on Uber's brand and reputation.
87. Mr Oze was the subject of a further complaint two weeks later in relation to the same concern, that is driving when tired, and it was the subsequent complaint that triggered suspension. It was only after a review of Mr Oze's personal history recorded by Uber and assessment by Mr White that the final decision was made to deactivate Mr Oze's access to the telephone application. Mr White had ruled out the possibility of concoction in relation to the complaints because of the variety of dates, the user passenger details, the language and the expressions used. Once the determination was made, Mr Oze asked for confirmation of the reasons. The defendant promptly complied with this request.
88. Clause 12.2(a) sets out that either party may terminate the agreement without cause at any time upon seven days' prior notice to the other party or immediately without notice for the other party's material breach of the agreement (cl 12.2(b)).
89. In the case of *Apache Oil Australia Pty Ltd v Santos Offshore Pty Ltd* [2015] WASC 318, Chaney J considered the meaning of material breach and said at [199] :

In *Elders Ltd v E J Knight & Co Pty Ltd*, White J accepted counsel's submission that the focus is on the materiality of the breach rather than the materiality of the obligation, citing *Celtech International Ltd v Dalkia Utility Services Plc*. He concluded at [48], in the context of the contract there under consideration, that the reference to a material breach is only to a breach which substantially adversely affects the interests of the other party. That approach was also taken in *Androvitsaneas v Members First Broker Network Pty Ltd* where the Victorian Court of Appeal accepted that the word 'material' is to be attributed the meaning of 'important' and to connote 'significance' at [89]. It is that approach which I propose to take in this case.

90. **Following paragraph cited by:**

GM Fascia and Gutter Pty Ltd v Trailer Trash Franchise Systems Pty Ltd (12 March 2019) (His Honour Judge Macnamara)

277 According to Ms Plain, “breach of an essential term of any contract entitled the innocent party to terminate the contract and sue for damages.” She referred to the speech of Lord Upjohn in *Suisse Atlantique Societe d’Armement Maritime SA v Rotterdamsche Kolen Centrale NV* [1967] 1 AC 361, 422 and *Apache Oil Australia Pty Ltd v Santos Offshore Pty Ltd* [2015] WASC 318 [119]. She said that what constituted reasonable notice to remedy a breach was a question of fact in all the circumstances. She referred to *Mr Whippy Pty Ltd v Oceanwalk Pty Ltd* [2008] NSW CA 8; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41. She said that Hargrave J, as he then was:

“...summarised the relevant legal principles to be applied in determining whether or not a rescission notice is valid, by reference to its terms being *clear and unambiguous*, the test is objective. A reasonable person is not be treated as a stranger to the agreement or to the circumstances which have given rise to the notice: *U108 Pty Ltd v Sing Fan* [2010] VSC 12 [43] – [44]; *Greydae Pty Ltd v Malilane Pty Ltd* [2003] VSCA 27 [31]; *Oze-Igiehon v Rasier Operations BV* [2016] WADC 174 [90].

I adopt the approach taken by Chaney J. Driving whilst tired, potentially risking his safety, passengers and other road users and thereby potentially damaging the brand of Uber was a breach of importance or significance. It was a material breach.

91. Although the defendant did not provide transport services directly, it was implied that it would take reasonable steps to ensure the safety of the user passenger was not at risk. Having received complaints about the quality of Mr Oze's driving, the defendant acted reasonably. Mr Oze has not established that the defendant acted unlawfully in terminating his account.

Did the defendant owe the plaintiff any duty of care as alleged?

92. The relationship between the parties was not an employment agreement. Given Mr Oze entered into the agreement to compliment his employment because of the flexibility the platform offered, Mr Oze never understood it to be an employment agreement. That does not absolve the defendant of all responsibility. It may have been open to the defendant to offer customer service training at an earlier time to Mr Oze but it was also open to Mr Oze to contact Uber and to make further inquiries about the nature of the earlier complaint received. Uber protected drivers insofar as the ratings system provided some information about passengers who the driver was required to collect. Consistent with Mr Oze's email dated 14 October 2015 in relation to objectionable passengers, Uber made suggestions about how Mr Oze could deal with the situation in the future and offered to pay for cleaning if, on further investigation by Uber, that was appropriate.
93. However, once Mr Oze was reported to have driven when tired and once Uber had advised him of the nature of the complaint, Uber acted reasonably. Uber did not have to prove that each complaint received was truthful and accurate, rather Uber had to deal with the complainant reasonably, consistent with the terms and conditions of the contract. Uber assessed that the receipt of a further complaint from a different user passenger relating to a different time period about the same issue enabled Uber to exercise its discretion after reasonable consideration and deactivate the account.

Did the defendant breach the agreement?

94. For the reasons I have outlined, the defendant did not breach the agreement.

In the event of any breach of duty of care or of the agreement, did such breach cause the plaintiff to suffer any loss and damage?

95. Mr Oze asserted that when he was employed by Wilson Security he was earning an income of between \$75,000 to \$100,000 per annum and that he resigned from his employment at Wilson Security in order to further his interests in Uber. Although subject to a confidential agreement, it is clear that Mr Oze initially ceased working for Wilson Security because of the allegation that he was not complying with his contractual obligations. Mr Oze did not lead evidence to satisfy me that the reason he ultimately resigned from Wilson Security was because of his intention to further his career as an Uber driver.
96. Mr Oze also asserted that, as a result of the defendant wrongfully terminating his contract, he has suffered a psychiatric disorder. Mr Oze accepted, however, that the medical report filed with the Human Rights Commission in relation to proceedings against Wilson Security referred to anxiety and stress that he had suffered at the time of his suspension from Wilson Security. Apart from Mr Oze's own testimony there is no evidence that he has suffered from a psychiatric condition brought about by his deactivation from the Uber account.
97. Section 5 of the *Civil Liability Act 2002* states:

Mental harm: duty of care

- (1) A person (the *defendant*) does not owe a duty of care to another person (the *plaintiff*) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
- (2) For the purpose of the application of this section in respect of pure mental harm, the circumstances of the case include the following –
 - (a) whether or not the mental harm was suffered as the result of a sudden shock;
 - (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
 - (c) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) For the purpose of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.
- (4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

98. It was not reasonably foreseeable that Mr Oze would suffer from psychiatric illness as a result of being a driver accessing the Uber application who was subsequently deactivated for a material breach of contract.

99. Mr Oze also asserted that he entered into a lease agreement on a motor vehicle in order to have a suitable car to drive for Uber. I accept that he entered into the lease because he required a suitable vehicle. Uber, however, did not request that he enter into the lease nor is Uber or any of its affiliates a party to the lease. Mr Oze attempted to transfer to an interest free loan in respect of another vehicle however the car dealer would not allow it. Accordingly, he arranged for another driver to take over the financial responsibility for the Hyundai vehicle, the subject of the lease. Mr Oze suffered a financial loss as a result of being bound by the lease agreement however this loss was mitigated and has not been quantified.

100. I accept Mr Oze has a family to care for and that he is finding it very difficult to obtain employment.

101. However it is for the plaintiff to establish a rational foundation for a proper assessment of damages: *Schindler Lifts Pty v Debelak* (1989) 89 ALR 275, 319 (Pincus J); *Griffiths & Beerens Pty Ltd v Duggan* [2008] VSC 201.

102. I accept that as a result of the Hyundai lease agreement that once Mr Oze no longer required a leased vehicle, he suffered a degree of loss. There is no evidence of the quantum nor is there any other evidence of other loss or damage attributable to his deactivation.

103. In any event given my finding that the termination of the contract was lawful and that the defendants did not breach any duty of care owed to Mr Oze, I would not make an order in respect of the loss and damage Mr Oze asserted he suffered.

104. I dismiss the plaintiff's claim.

Cited by:

GM Fascia and Gutter Pty Ltd v Trailer Trash Franchise Systems Pty Ltd [2019] VCC 248 (12 March 2019) (His Honour Judge Macnamara)

277 According to Ms Plain, “breach of an essential term of any contract entitled the innocent party to terminate the contract and sue for damages.” She referred to the speech of Lord Upjohn in *Suisse Atlantique Societe d’Armement Maritime SA v Rotterdamsche Kolen Centrale NV* [1967] 1 AC 361, 422 and *Apache Oil Australia Pty Ltd v Santos Offshore Pty Ltd* [2015] WASC 318 [119]. She said that what constituted reasonable notice to remedy a breach was a question of fact in all the circumstances. She referred to *Mr Whippy Pty Ltd v Oceanwalk Pty Ltd* [2008] NSW CA 8; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41. She said that Hargrave J, as he then was:

“...summarised the relevant legal principles to be applied in determining whether or not a rescission notice is valid, by reference to its terms being *clear and unambiguous*, the test is objective. A reasonable person is not to be treated as a stranger to the agreement or to the circumstances which have given rise to the notice: *U108 Pty Ltd v Sing Fan* [2010] VSC 12 [43] – [44]; *Greyd ae Pty Ltd v Malilane Pty Ltd* [2003] VSCA 27 [31]; *Oze-Igiehon v Rasier Operations BV* [2016] WADC 174 [90].

OZE-IGIEHON v Public Transport Authority Western Australia [2018] WADC 96 (10 August 2018) (Registrar Kingsley)

OzeIgiehon v Raiser Operations [2016] WADC 174.

OZE-IGIEHON v Public Transport Authority Western Australia [2018] WADC 96 (10 August 2018) (Registrar Kingsley)

15. Further, in proceedings brought by the plaintiff against Uber (*OzeIgiehon v Raiser Operations* [2016] WADC 174 (the Uber proceedings)) where the plaintiff denied falling asleep or suffering fatigue Uber called Ms Young as a witness. In the Uber proceedings Wager DCJ accepted Ms Young's evidence of the plaintiff sleeping on the job noting that Ms Young who was reluctant to give evidence had been subpoenaed by Uber. Counsel for the third defendant submits there is no reason to doubt that similar evidence by Claire Young would not also be accepted by the court.

Oze-Igiehon v Rasier Operations BV [2017] WASCA 107 (08 June 2017) (Mitchell JA)

Citation : OZE-IGIEHON -v- RASIER OPERATIONS BV [2016] WADC 174.

