[Crest of the Federative Republic of Brazil]
Judiciary Branch
Labor Courts
Superior Labor Court

CASE No. TST-RR-1000123-89.2017.5.02.0038

DECISION (5th Panel) GMBM/CHS/ggm

INTERLOCUTORY APPEAL IN MOTION TO REVIEW (*AGRAVO DE INSTRUMENTO EM RECURSO DE REVISTA*). DECISION PUBLISHED DURING THE EFFECTIVENESS OF LAW No. 13,015/2014. EMPLOYMENT BOND. DRIVER. UBER. NO SUBORDINATION. Because violation of article 3 of the Consolidated Labor Laws ("CLT") is likely to have occurred, the interlocutory appeal is hereby granted to determine that the motion to review proceed. **Interlocutory Appeal granted. MOTION TO REVIEW. DECISION PUBLISHED DURING THE EFFECTIVENESS OF LAW No. 13,015/2014. EMPLOYMENT BOND. DRIVER. UBER. NO SUBORDINATION. LEGAL TRANSCENDENCE (*TRANSCENDÊNCIA JURÍDICA*) RECOGNIZED.** First of all, it is important to stress that reexamination of the case does not require that the facts and evidence attached to the records be reviewed again. This is so because the transcript of claimant's personal deposition in the appealed decision includes a factual element that makes possible recognition of the confession regarding autonomy in the provision of the services. In fact, claimant expressly admits the possibility of staying "*offline",* for an unlimited period of time, a circumstance that indicates the complete and voluntary absence of the service provision under review, which only occurs in a virtual environment. Such fact translates, in practice, the great flexibility of the claimant when

determining his routine, his working hours, the locations where he wishes to operate and the number of riders he intends to serve per day. Such self-determination is incompatible with recognition of an employment relationship, which has as its prerequisite subordination, the basic element which differentiates employment bond from independent work. In addition to claimant's confession as to his independence when performing his activities, it is an undisputable fact, evidenced in the records, that claimant adhered to the digital intermediation services provided by respondent, using an application which offers an interface between previously registered drivers and users of the service. The terms and conditions related to said services include payment to the driver of an amount between **75% and 80% of the amount paid by the rider**, as stated by the Regional Labor Court ("TRT"). This percentage is higher than that which this Court has been accepting as sufficient to characterize a partnership relation between those involved, since sharing of the service amount, with a high percentage going to one of the parties, evidences a remuneration advantage that is incompatible with an employment bond. Precedents. **Motion to review accepted for judgment and granted.**

The case records of Motion to Review No. **TST-RR-1000123-89.2017.5.02.0038**, in which appellants are **UBER DO BRASIL TECNOLOGIA LTDA. ET AL.** and appellee is **MARCIO VIEIRA JACOB**, have been examined, reported and discussed.

This interlocutory appeal was filed against the decision which denied the motion to review.

In this interlocutory appeal, the appellant argues, in short, that its motion to review is valid.

Counterarguments submitted.

Case records not sent over to the Labor Prosecution Office.

This is the report.

OPINION

INTERLOCUTORY APPEAL

I. COGNIZANCE

The prerequisites of the appeal having been met, **I accept for judgment** the interlocutory appeal.

II. MERIT

COURT RELIEF DENIED

In reliance on article 282, paragraph 2, of the Civil Procedure Code ("CPC"), the preliminary argument in caption will not be reviewed.

EMPLOYMENT BOND. DRIVER. UBER. NO SUBORDINATION. LEGAL TRANSCENDENCE RECOGNIZED.

The dispute revolves around the existence (or not) of an employment bond between claimant, while working as a "driver," and the respondent company, UBER DO BRASIL TECNOLOGIA LTDA.

Review of the case records shows us that TRT reversed the judgment of origin on the grounds that there were elements that characterized an employment relationship between the parties.

However, contrary to the conclusion reached by the TRT decision, the elements attached to the records evidence the absence of an employment bond, in view of the autonomy in the performance of the claimant's activities, which rules out subordination.

Within this context, I recognize the **legal transcendence** of the matter because the specific event addressed in this case has not yet been sufficiently discussed by this Court.

The appealed decision denied the motion to review on the following arguments:

> "(...) **INDIVIDUAL EMPLOYMENT CONTRACT / RECOGNITION OF EMPLOYMENT RELATIONSHIP.**
> Allegation(s): - violation of article 5, LIV and article 5, LV of the Federal Constitution.
> - divergent court decisions.
> - articles 389, 447, paragraph 2, and 489, II, of CPC; - articles 2, 3, 457, 477, 832, of CLT; - articles 5, LIV and LV, 170, IV, of the Federal Constitution; - article 92, of the Civil Code.
> This motion to review seeks reversal of the Decision which recognized the employment bond on the grounds of absence of the elements which typify an employment relationship, according to the

provisions of article 3 of CLT, namely, subordination, remuneration and work performed on a personal and habitual basis.

It argues that there is no subordination between the parties because the driver could remain offline for as long as he liked and turn on or turn off the app whenever he wished to do so, in addition to the fact that there was no direction, coordination and monitoring of provision of the services by appellant, but solely a decision of a commercial nature.

Below is an excerpt of the Decision:

> *'Employment bond*
>
> *The trial court, considering especially the depositions of the parties, cognized the defense argument that there was no employment bond between the parties, concluding that the elements of subordination and work performed on a personal basis were absent, against which claimant protested, as per the lengthy arguments put forth on pp. 1515/1558 of the records.*
>
> *And claimant's arguments are valid. To wit.*
>
> *Respondents, in short, opposed the claimant's arguments on the grounds that they were not transport companies but rather companies whose core business is the commercial development of a technology platform and, from this standpoint, the drivers act as business partners, constituting what today is called sharing economy. They argued that there was no subordination, remuneration and work performed on a personal and habitual basis.*
>
> *However, the pieces of evidence attached to the records, with all due respect for the judgment of origin, run counter to such conclusion.*
>
> *With respect to the corporate purpose of respondents, the argument used is deceptive to the extent that completion of the transport service provided by the driver (called partner) is controlled. If it were a mere electronic tool, respondents would certainly not suggest the price of the transport service to be provided and would establish the percentage of the suggested price to be paid to them.*
>
> *They would also not condition maintaining the driver based on the ratings of users of the transport service. They would simply place the technology platform at the disposal of the interested parties, without interfering in the result of the transport provided, and would charge, for the technology service offered, a fixed price/amount to be paid by the driver for the time he used the app, for instance.*
>
> *Actually, as well noted in the decision rendered by labor judge Dr. Eduardo Rockenbach Pires, in case No. 1001492-33-2016-5-02-0013: 'The defendant offers on the market a main product: the transport of passengers. The application is an instrument, an accessory for good performance of the service. And the consumers of defendant's product are not the drivers but the*

passengers (...) the amount that goes to the company comes from the transport service provided to the consumer/rider. Therefore, because the excess of the capitalist comes from circulation of its product, one can safely conclude that the product with which defendant operates is not the application but rather the transport service." This conclusion is confirmed by respondents' confession that they take out personal accident insurance in favor of their users, that is, those who use the transport, which ultimately shows that they assume responsibility for the physical integrity of the riders (pp. 616/617).

Therefore, it is clear that respondents' core business is the transport of passengers.

The argument that the relationship existing between respondents and claimant is a model of sharing economy is also void. *Such relationship represents essentially the practice of sharing the use of services and products, in a kind of collaborative consumption, but in a horizontal perspective, favored, as a rule, by digital technologies. Therefore, in the field of urban mobility, such practice may be found in the practices of pooling, in which users share the transport through the use of technology platforms. With regard to such practice, specialists do not recognize in the activity developed by respondents the actual existence of sharing, noting that, in actual fact, such companies profit without sharing anything, which also gave rise to creation of the term ridewashing for sharing or pooling in transport.*

(...)

Within this context, it is also impossible to cognize the allegation of respondents that the system managed by them is model of sharing economy.

Therefore, in the case under review, we must analyze the nature of the relationship existing between respondents and claimant.

As mentioned before, respondents deny the existence of subordination, remuneration and work on a habitual and personal basis. However, the pieces of evidence attached to the records point to a different direction.

Work on a habitual basis has been conclusively proved by the documents attached to the records (pp. 230/372) by claimant, indicating that, from July 14, 2015 through June 14, 2016, the driver's work was carried out on a habitual basis.

Likewise, the remuneration is clear, since claimant was paid to carry out the transport service, it being irrelevant the fact that the driver's compensation did not come directly from respondents. The best labor legal writings and court precedents have long recognized that the employee's compensation may be paid by third parties. On this point, it is worth mentioning the teachings of judge Dr. Aluysio Sampaio,

on page 118 of the work 'Contrato Individual do Trabalho em sua vigência' (Editora dos Tribunais - 1982), according to which: 'Salary or remuneration is, therefore, the compensation owed by the employer – whether paid directly by it or by third parties, such as tips.

At first sight, given the current understanding of this concept, such statement may be viewed as strange. However, if one accepts that salary and compensation are synonyms, all doubts are dispelled. It may be said that what is paid by third parties cannot be an obligation of the employer. This could not be more mistaken: what the employer offers to the employee is not strictly payment for the services provided but rather the opportunity to earn money. For instance, quite often waiters receive very low salaries directly from their employers but earn quite large amounts as tips. In certain cases, waiters do not care for the salary amount paid directly by their employer because the substantial part of their compensation is made up by tips paid by third parties.

The essential compensation owed by the employer to the employee is not strictly a direct compensation in cash or fringe benefits, but the actual opportunity to earn money.' In this case, the same documents mentioned above show that, as a rule, respondents concentrated in their possession the amounts paid by users and subsequently passed them on to claimant.

***It is also important to mention that the fact that the amount paid to the driver (75% to 80% of the amount paid by the rider) cannot, in this case, be defined as partnership**, because, as stated in the personal deposition of claimant (pp. 1101/1102), without counterevidence from the companies, claimant paid the following expenses: vehicle rental, vehicle maintenance, fuel, mobile phone and internet provider. These are clearly considerable expenses, particularly if we compare this to the example mentioned in the court decision invoked by respondents concerning manicurists and beauty salons. In a beauty salon the expenses are minimal and, therefore, the fact that they receive percentages above 50% may in fact typify a partnership relation.*

*Work on a personal basis, in turn, is clear and admitted by respondents. **They argue that the same vehicle may be used by several drivers, a fact that, as they see it, rules out the element of work on a personal basis.***

However, they admit and confess that the driver must always be registered, which leads to a totally opposite conclusion, that is, what matters is who is driving the vehicle.

Finally, we now examine the allegation of absence of

subordination. ***Respondents claimed that the driver has total autonomy to perform the work, he may have another professional activity, is not submitted to rules of conduct, may refuse rides and also give discounts to riders.***

However, once again I find that the evidence attached to the records does not reflect this reality.

With respect to the total autonomy of the driver, the deposition of the respondents' representative in court (p. 1102), ***shows that the amount to be charged to the user is "suggested" by the companies and that the driver may offer discounts****. However, if the driver offers a discount, such fact does not change the amount to be paid to the companies, which will still be that calculated on the suggested amount. According to respondents' representative '...the amount to be charged for the trips is suggested by UBER: time x distance; that the percentage fee charged by Uber varies from 20% to 25%, according to the category; that the percentage received does not include the discount given by the driver to the rider...'. Therefore, one cannot argue that there is total autonomy because the service fee cannot be changed.*

Likewise, ***the statement that the driver may remain offline for an unlimited period of time and refuse as many requests as he likes is also not in line with corporate requirements and with the real facts of the company/driver/rider relationship.*** *If such statement were true, the undertaking itself would be doomed, since the companies would run the evident risk of not having one single driver to serve the rider in certain locations and at certain times.*

Moreover, the companies make use of indirect mechanisms to achieve their objective of having maximum availability of drivers to meet the needs of the riders served by them. According to claimant's deposition, without any counterevidence having been submitted by the companies. "...the deponent received an incentive bonus if he served 45 customers per week; that if the driver did not meet such goal he did not receive solely the incentive bonus; he could leave his phone offline; (...) that he could cancel the ride, however he was informed that the cancellation fee was high and that he could be cut; that there was a limit on cancellation, but he did not know what was this limit...' (p. 1101).

The argument that the driver was free to carry out a second professional activity is also invalid because exclusivity is not a requirement for an employment

relationship.

Finally, the allegation that the companies do not impose any rules of conduct on the drivers was not evidenced. Respondents admitted that riders' ratings are decisive for maintaining the driver's registration. In fact, the respondent's representative, heard in court, admitted that claimant was cut precisely because the ratings he got were below average.

"...that she believes claimant was cut because his ratings were below average" (p. 1012).

It is important to stress here that the relationship between respondents and the drivers who serve them ***is not characterized by the classical model of subordination and that, this being so, depending on the actual case under review, no employment bond is typified, particularly when the services are actually provided on a sporadic basis.***

Therefore, lawsuits involving new models of work organization should be reviewed in light of the new concepts of subordinated or quasisubordinated work, especially when one considers the advancement of technology. In fact, the change introduced by Law 12, 551/2011 in article 6 of CLT points clearly in this direction. According to its sole paragraph "Command, control and supervision of third-party work through telematics and information technology are comparable, for the purposes of legal subordination, to command, control and supervision through personal and direct means.' (...) ***Consequently, considering the specific features of the case under review, I accept the claimant's argument and recognize the employment bond between the parties during the period stated in the complaint, namely, from July 14, 2015 through June 14, 2016, in the exact terms of the claim (p. 41).***

Since the document on pp. 45/52 (terms and conditions of the agreement) states UBER DO BRASIL TECNOLOGIA LTDA., I define its responsibility for registering claimant as its employee and making the proper annotations on his work card, including the dates he was admitted and dismissed, his job as a driver, and the average salary, which will be determined in an enforcement suit, taking into account the documents attached to the records. Claimant must be registered within eight (8) days after the decision becomes res judicata, counted from the date the company notifies claimant to attach the document to the case records, on pain of imposition of a daily fine of R$ 100.00, capped at R$ 5,000.00, pursuant to article 536, paragraph 1 of CPC.

(....)

The abstract submitted as divergent court decision was used to

emphasize the factual differences extracted from the pieces of evidence provided in both proceedings, to find what there is in one proceeding and does not exist in the other and, therefore, to reference discovery scenarios that differ by the dynamics by which they were developed. When addressing the issue of subordination, for instance, appellants propose comparing "the allegations backed by the statements of claimant himself" (they refer to the claimant in the decision pointed out as court precedent and not to the claimant in this suit) against the statements of appellants' representative in this proceeding (p. 39 of the appeal). In other words, appellants do not offer an argument of comparison but rather contrast factual and evidentiary scenarios from different procedural realities. In both proceedings (this one and the court precedent pointed out as divergent) subordination is considered indispensable, a fact that may, naturally, show itself to be different, according to the evidentiary scenarios of each discovery reality.

Therefore, appellants are mistaken, in item 104 of the appeal, when they state that there is "divergence of interpretation regarding the elements that typify the existence of subordination in the relationship maintained between the parties," because one cannot measure the divergence of review by comparing the body of evidence in one proceedings with the body of evidence in another proceeding and, from this comparison, conclude that (a) no facts are discussed and that (b) the divergence would be typified and the review would be accepted. No, absolutely not.

More than once the appeal calls the appealed decision an "ideological decision" (see items 101, 105, 136 of the appeal), even with a certain disrespect for the legal work, which is inappropriate in higher debates, to affirm that the decision supposedly "failed to properly analyze the existence of the requirements for recognition of the employment bond" (see item 105 of the appeal), which moves the debate to reexamination of the body of evidence, which is not allowed by Precedent 126 of TST.

The abstract submitted for comparison purposes, originating from TRT-3rd Circuit, also does not allow for comparison of legal stands. In the table presented for comparison on p. 43/44 of the appeal, for instance, appellants compare such abstract with the review of the appealed decision, which emphasizes that appellants established the transport prices based on a clause of the company's bylaws, stating that it was "a technology company, unrelated to the transport sector" (see item 108 of the appeal) and leaving unanswered the fundament of the appealed decision, which states that appellants defined the transport price. It is not explained, in this supposed comparison of legal stands, how a (supposed) "technology" company could define

the prices of urban transport...

The appeal not only fails to fulfill the admissibility requirements for acceptance for judgment but also evidences the impossibility of conciliating the notion of "technology company" with the figure of "partner driver" (see item 118 of the appeal), as if so distant "partnerships" could actually exist.

The appealed decision puts the driver of the transport vehicle as an essential element for the speculative activity of the company because of the object managed thereby and by which it establishes the prices, according to the court decision.

This serves to show how vague and useless are the precedents brought for comparison, by the clear impossibility of comparing the evidence provided in them, and not by the comparison of the legal concepts inherent to the types of conduct involved.

Even in the TRT-3rd Circuit decision, submitted for comparison purposes, appellants propose to compare, as supposed evidence of divergent court precedents, "the deposition of appellants' representative, heard in court on p. 1102" (fragment of this proceeding) with "the absence of subordination was fully evidenced in the records" (fragment of the body of evidence submitted in another proceeding), which clearly does not meet the requirement of divergent legal stands.

To further evidence the failure to fulfill the intrinsic admissibility requirements for filing the appeal, one should look at the chart on p. 47 of the appeal. In such chart, appellants propose comparing the sharp legal review of the appealed decision regarding the time the employee remained offline with the content of the deposition of a witness in another proceeding held to be a court precedent. The appealed decision demonstrates the unlikelihood of a company's operating with employees who remain offline for an unlimited period of time, with the right to refuse calls all the time, with what would have resulted from the testimonial evidence in another proceeding.

With respect to work on a habitual basis, the appeal emphasizes, in the chart on p. 49 of the appeal, the same excerpt it emphasized in the other chart on subordination (p. 47 of the appeal) and, in item 120, argues that "there is no requirement, imposed by 1st appellant, that the platform be used on a habitual basis." This evidently leads to reexamination of the evidence, which once again is not allowed by Precedent 126 of TST.

Although appellants stated that the appeal does not seek reexamination of evidence (see item 127 of the appeal), it became clear that the matters raised by the court precedents submitted for comparison purposes do not represent different legal stands but rather different reviews of the facts according to the circumstantial

reality of each body of evidence, which varies from proceeding to proceeding, rendering it impossible to assume in this proceeding what represented an affirmed fact in the court precedents.

Moreover, in item 128 of the appeal, appellants reaffirm that "the decision rendered by TRT mistakenly concluded that the corporate purpose of 1st appellant was passenger transport," which clearly evidences the dispute about the body of evidence and which would cause the judge to inevitably reexamine the evidence as a necessary prerequisite to reach a conclusion different from that rendered.

This is restated in item 129 of the appeal. Item 130 of the appeal requests that the judging instance read the "signed instrument," that is, the evidentiary document, to conclude, in item 133, that it is the worker who remunerates the company, and not the contrary, as if the stand established by the price of the trip had been established by the driver, and not the opposite. The notion that the 1st appellant had the driver as its "partner" in the business (appeal argument: "partner driver;" see item 118) ends up being cancelled in the appeal itself, invalidating the argument that backed the appeal by stating that "the simple fact that the 1st appellant opted for not keeping in its records drivers who were given poor ratings by riders on its platform, does not evidence the existence of subordination (...), since there is no direction, coordination and monitoring but solely a decision of a commercial nature." The allegations made in the appeal are contradictory because they state that there is a "partnership" relation which turns into a "commercial" relation, explained by the unilaterality of the exclusion of the party initially called "partner," all of which is refuted by the statement that the company was remunerated by the driver (item 133 of the appeal), and not the contrary.

I DENY the motion for review."

In the interlocutory appeal, the appellant party argues that its motion for review should proceed, on pain of violation of article 5, LIV and LV, and article 170, main section and IV, of the Constitution, articles 389 and 447, paragraph 2, and 489, II, of CPC and article 3 of CLT. Appellant submits court decisions to compare legal stands.

Appellant party sustains, in short, that it is an indisputable fact that appellee, when contracting the digital intermediation services of 1st Appellant, agreed with the terms and conditions related to such services, and that 1st Appellant has a uniform relationship with all partner drivers.

It alleges that *"the court precedent demonstrated that the driver may remain offline the time he wishes without incurring any penalties. It further claims that the driver is free to make his own work routine, defining the times and days on which he will provide the services, without any monitoring or interference on the part of Appellants."*

It defends that claimant admitted the possibility of remaining offline, that the mere suggestion of a price by Uber does not give rise to subordination and that the ratings of the services by riders seeks to protect the collectivity, since a good standard of services is essential for the success of an electronic platform, generating trust, quality and consumption.

The appealed decision should be reversed.

First of all, I stress that the party submitted, in the motion to review, the excerpts from the appealed decision that evidence previous review of the matter in controversy in light of federal laws or of the Federal Constitution (*prequestionamento*), thus complying with the provisions of article 896, paragraph 1-A, I, of CLT (pp. 1789/1791 – 1797/1798 – 1801/1802).

Well then.

The TRT has already decided in this regard:

> 'Employment bond
>
> The trial court, considering especially the depositions of the parties, cognized the defense argument that there was no employment bond between the parties, concluding that the elements of subordination and work performed on a personal basis were absent, against which claimant protested, as per the lengthy arguments put forth on pp. 1515/1558 of the records.
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> And claimant's arguments are valid. To wit.
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> Respondents, in short, opposed the claimant's arguments on the grounds that they were not transport companies but rather companies whose core business is the commercial development of a technology platform and, from this standpoint, the drivers act as business partners, constituting what today is called sharing economy. They argued that there was no subordination, remuneration and work performed on a personal and habitual basis.
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> **However, the pieces of evidence attached to the records, with all due respect for the judgment of origin, run counter to such conclusion.**
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> **With respect to the corporate purpose of respondents, the argument used is deceptive to the extent that completion of the transport service provided by the driver (called partner) is controlled. If it were a mere electronic tool, respondents would certainly not suggest the price of the transport service to be provided and would establish the percentage of the suggested price to be paid to them. They would also not condition maintaining the driver based on the ratings of users of the transport service. They would**

simply place the technology platform at the disposal of the interested parties, without interfering in the result of the transport provided, and would charge, for the technology service offered, a fixed price/amount to be paid by the driver for the time he used the app, for instance..

Actually, as well noted in the decision rendered by labor judge Dr. Eduardo Rockenbach Pires, in case No. 1001492-33-2016-5-02-0013: 'The defendant offers on the market a main product: the transport of passengers. The application is an instrument, an accessory for good performance of the service. And the consumers of defendant's product are not the drivers but the passengers (...) the amount that goes to the company comes from the transport service provided to the consumer/rider. Therefore, because the excess of the capitalist comes from circulation of its product, one can safely conclude that the product with which defendant operates is not the application but rather the transport service."

This conclusion is confirmed by respondents' confession that they take out personal accident insurance in favor of their users, that is, those who use the transport, which ultimately shows that they assume responsibility for the physical integrity of the riders (pp. 616/617).

Therefore, it is clear that respondents' core business is the transport of passengers.

The argument that the relationship existing between respondents and claimant is a model of sharing economy is also void. Such relationship represents essentially the practice of sharing the use of services and products, in a kind of collaborative consumption, but in a horizontal perspective, favored, as a rule, by digital technologies. Therefore, in the field of urban mobility, such practice may be found in the practices of pooling, in which users share the transport through the use of technology platforms. With regard to such practice, specialists do not recognize in the activity developed by respondents the actual existence of sharing, noting that, in actual fact, such companies profit without sharing anything, which also gave rise to creation of the term ridewashing for sharing or pooling in transport.

A clear example of this conduct is *Oficina da Mesa*, in São Paulo, where an industrial kitchen is available to individual food entrepreneurs who until then had to cook or sell catered meals at their home kitchens. In consideration for use of the industrial kitchen in point, they pay an hourly rent regardless of the product they sell; the industrial kitchen 'owner' has no say in the

amount charged for the catering services.

Within this context, it is also impossible to cognize the allegation of respondents that the system managed by them is model of sharing economy.

Therefore, in the case under review, we must analyze the nature of the relationship existing between respondents and claimant.

As mentioned before, respondents deny the existence of subordination, remuneration and work on a habitual and personal basis. However, the pieces of evidence attached to the records point to a different direction.

Work on a habitual basis has been conclusively proved by the documents attached to the records (pp. 230/372) by claimant, indicating that, from July 14, 2015 through June 14, 2016, the driver's work was carried out on a habitual basis.

Likewise, the remuneration is clear, since claimant was paid to carry out the transport service, it being irrelevant the fact that the driver's compensation did not come directly from respondents. The best labor legal writings and court precedents have long recognized that the employee's compensation may be paid by third parties. On this point, it is worth mentioning the teachings of judge Dr. Aluysio Sampaio, on page 118 of the work 'Contrato Individual do Trabalho em sua vigência' (Editora dos Tribunais - 1982), according to which:

> *'Salary or remuneration is, therefore, the compensation owed by the employer – whether paid directly by it or by third parties, such as tips.*
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> *At first sight, given the current understanding of this concept, such statement may be viewed as strange. However, if one accepts that salary and compensation are synonyms, all doubts are dispelled. It may be said that what is paid by third parties cannot be an obligation of the employer. This could not be more mistaken: what the employer offers to the employee is not strictly payment for the services provided but rather the opportunity to earn money. For instance, quite often waiters receive very low salaries directly from their employers but earn quite large amounts as tips. In certain cases, waiters do not care for the salary amount paid directly by their employer because the substantial part of their compensation is made up by tips paid by third parties.*
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> *The essential compensation owed by the employer to the employee is not strictly a direct compensation in cash or fringe benefits, but the actual opportunity to earn money.'*

In this case, the same documents mentioned above show that, as a rule, respondents concentrated in their possession the amounts paid by users and subsequently passed them on to

claimant.

It is also important to mention that the fact that the amount paid to the driver (75% to 80% of the amount paid by the rider) cannot, in this case, be defined as partnership, because, as stated in the personal deposition of claimant (pp. 1101/1102), without counterevidence from the companies, claimant paid the following expenses: vehicle rental, vehicle maintenance, fuel, mobile phone and internet provider. These are clearly considerable expenses, particularly if we compare this to the example mentioned in the court decision invoked by respondents concerning manicurists and beauty salons. In a beauty salon the expenses are minimal and, therefore, the fact that they receive percentages above 50% may in fact typify a partnership relation.

Work on a personal basis, in turn, is clear and admitted by respondents. **They argue that the same vehicle may be used by several drivers, a fact that, as they see it, rules out the element of work on a personal basis**. However, they admit and confess that the driver must always be registered, which leads to a totally opposite conclusion, that is, what matters is who is driving the vehicle.

Finally, we now examine the allegation of absence of subordination.

Respondents claimed that the driver has total autonomy to perform the work, he may have another professional activity, is not submitted to rules of conduct, may refuse rides and also give discounts to riders.

However, once again I find that the evidence attached to the records does not reflect this reality.

With respect to the total autonomy of the driver, the deposition of the respondents' representative in court (p. 1102), shows that the amount to be charged to the user is "suggested" by the companies and that the driver may offer discounts. However, if the driver offers a discount, such fact does not change the amount to be paid to the companies, which will still be that calculated on the suggested amount. According to respondents' representative '*...the amount to be charged for the trips is suggested by UBER: time x distance; that the percentage fee charged by Uber varies from 20% to 25%, according to the category; that the percentage received does not include the discount given by the driver to the rider...*'. Therefore, one cannot argue that there is total autonomy because the service fee cannot be changed.

Likewise, the statement that the driver may remain offline for an unlimited period of time and refuse as many

requests as he likes is also not in line with corporate requirements and with the real facts of the company/driver/rider relationship. If such statement were true, the undertaking itself would be doomed, since the companies would run the evident risk of not having one single driver to serve the rider in certain locations and at certain times.

Moreover, the companies make use of indirect mechanisms to achieve their objective of having maximum availability of drivers to meet the needs of the riders served by them. According to claimant's deposition, without any counterevidence having been submitted by the companies. "*...the deponent received an incentive bonus if he served 45 customers per week; that if the driver did not meet such goal he did not receive solely the incentive bonus;* ***that he could leave his phone offline; (...) that he could cancel the ride****, however he was informed that the cancellation fee was high and that he could be cut; that there was a limit on cancellation, but he did not know what was this limit...*' (p.1101).

The argument that the driver was free to carry out a second professional activity is also invalid because exclusivity is not a requirement for an employment relationship.

Finally, the allegation that the companies do not impose any rules of conduct on the drivers was not evidenced. **Respondents admitted that riders' ratings are decisive for maintaining the driver's registration**. In fact, the respondent's representative, heard in court, admitted that claimant was cut precisely because the ratings he got were below average.

> *"...that she believes claimant was cut because his ratings were below average" (p. 1012).*

It is important to stress here that the relationship between respondents and the drivers who serve them is not characterized by the classical model of subordination and that, this being so, depending on the actual case under review, no employment bond is typified, particularly when the services are actually provided on a sporadic basis.

Therefore, lawsuits involving new models of work organization should be reviewed in light of the new concepts of subordinated or quasisubordinated work, especially when one considers the advancement of technology. In fact, the change introduced by Law 12, 551/2011 in article 6 of CLT points clearly in this direction. According to its sole paragraph "*Command, control and supervision of third-party work through telematics and information technology are comparable, for the purposes of legal subordination, to command, control and supervision through personal and*

direct means.' (...)

Consequently, considering the specific features of the case under review, I accept the claimant's argument and recognize the employment bond between the parties during the period stated in the complaint, namely, from July 14, 2015 through June 14, 2016, in the exact terms of the claim (p. 41).

Since the document on pp. 45/52 (terms and conditions of the agreement) states UBER DO BRASIL TECNOLOGIA LTDA., I define its responsibility for registering claimant as its employee and making the proper annotations on his work card, including the dates he was admitted and dismissed, his job as a driver, and the average salary, which will be determined in an enforcement suit, taking into account the documents attached to the records. Claimant must be registered within eight (8) days after the decision becomes res judicata, counted from the date the company notifies claimant to attach the document to the case records, on pain of imposition of a daily fine of R$ 100.00, capped at R$ 5,000.00, pursuant to article 536, paragraph 1 of CPC.

There is no reason to state that the other respondents (UBER INTERNATIONAL HOLDING BV and UBER INTERNATIONAL BV) have no standing to be sued, as they are part of the same economic group alongside first respondent, UBER BRASIL TECNOLOGIA LTDA., as can be inferred from the articles of association on p. 537; hence, they are jointly and severally liable for the award sums.

Since the termination derived from the employer's act without cause, I hereby grant that pay in lieu of prior notice (30 days) is due, plus proportional 13th salary of 2016 (6/12) and of 2017 (6/12), proportional vacation pay (11/12), and proportional 1/3 vacation bonus, and FGTS contributions plus the 40% severance penalty, all of which considering the limits in claimant's complaint.

(...)"

Further, it was also stated in the context of a motion to clarify:

"Movant is only right with regard to the material error that is now corrected as follows: the proportional 13th salary of 2015 (6/12) and of 2016 (6/12) is owed and payable.

As for the other points raised by the respondent, I do not see how they could prevail as adequate relief has already been provided by the court. In fact, the alleged points are clearly intended to only justify the filing of a motion to review so that matters of fact could be

revisited.

At any rate, it should be pointed out that the alleged omissions or contradictions have nothing to do with circumstances that could otherwise justify a motion to clarify. There is no omission regarding the matters raised in the complaint, defense or appeal, and there is no contradiction in the judgment itself. What movants actually seek is a different interpretation over the factual circumstances involved in this case.

However, as movants are showing difficulty in understanding the appellate decision on certain points raised by them, I make the following statement for the sake of clarity: if a fixed amount is charged by respondents, the driver has no leeway to offer the purported discounts or else will have no gains; **the claimant's admitted possibility of staying off-line does not mean that he has autonomy – the more so in light of the indirect mechanisms adopted by respondents to keep such driver available, such as the offering of rewards**; if the claimant's personal deposition produces evidence against him, it also does so in his favor, as such allegations are not challenged by the respondents which, on admitting that services were provided, had the burden of proving so; **the fact that the driver rates a passenger does not rule out the existence of the driver's subordination to the respondent companies, as a negative rating of the driver by a user would be a determining factor for the driver's dismissal, as it happened in the case under scrutiny**; the lack of exclusivity is not a determining factor to rule out the existence of an employment bond, regardless of the field of activity involved; the documents attached to the case records show that the work was performed on a habitual basis in the sense that, during the period at dispute, **claimant rendered services during all the months involved**; **work on a personal basis is not linked to the driver's choice, but rather to the requirement that only the registered driver could render the services, even if the registration is made by a legal entity**; vehicle maintenance expenses are indeed high as compared to those incurred by a manicure, which was the comparator professional chosen by respondents to defend the existence of a business partnership relation, it sufficing to figure out the number of hand nails a manicure could do by using one single enamel glass and, on the other hand, how many passengers a driver could serve by spending one liter of gasoline; as already explained in the appellate decision, the worker's gain can be fully paid by third parties, without ruling out the existence of an employment bond, in that respondents are those actually making the opportunity of gains possible.

Finally, as for the pre-questioning issue raised, I note that it

> would only be justifiable if the appellate decision had taken a stand that defied statutory provisions or binding precedents, but this is not the case here. In this sense: SDI's Guiding Precedent 256 of the TST."

According to the rationale above, the TRT held that the requirements for establishing the existence of an employment bond had been met.

From the very outset, it should be pointed out that the case can be reexamined without revisiting the facts and evidence in the case records; this is so because the transcription of claimant's personal deposition in the attacked appellate decision contains the factual elements necessary for acknowledgment of a confession into being autonomous with regard to the provision of services.

In fact, claimant expressly acknowledges he could stay off-line for as long as he wished; this shows he had full and discretional authority to abstain from providing the services at issue, which is only possible in a virtual environment.

In practice, this fact translates into claimant's great flexibility to determine his routine, working hours, intended places of work, and number of clients to serve per day. This independence is inconsistent with the concept of an employment bond, which basically relies on the concept of work on a subordinated basis – the heart of the matter in drawing a distinction between an employment bond and self-employed work.

Besides claimant's acknowledgment that he had discretional authority to perform his activities, it is an undisputed fact that claimant adhered to respondent's digital intermediation services by resorting to an app that brings together previously registered drivers and service users.

From among the terms and conditions applying to the services in point, the driver receives an amount equivalent to **75% to 80% of the sum paid by users**, as noted by the TRT.

The aforesaid percentage is higher than what this court has used as grounds for characterizing the existence of a business partnership relation, as the sharing of a service value at a higher percentage for one of the parties points to a compensatory advantage that is not consistent with an employment bond.

For illustrative purposes, this court has already rendered the following decisions on entertaining the existing business partnerships within the context of beauty parlors:

> MOTION TO REVIEW. EMPLOYMENT BOND. MANICURE.
> **Earning commissions at a rate of 60% for services is absolutely inconsistent with the concept of employment bond in that it would be impossible for the purported**

employer to profit from the service being rendered by the service provider (the purported employee). On the other hand, the mere fact that an appointment for manicure services can be made through the beauty parlor's receptionist does not mean that legal subordination exists; it should be noted in this specific regard that claimant could manage her appointments as she wished, by choosing her own working time. A business partnership contract is commonplace in this field of services (beauty parlor), by which the owner makes available to professionals (manicures, masseurs, waxing professionals, hairdressers, etc.) not only the physical space itself, but also the client portfolio, furniture and amenities so that such professionals can do their work. That being so, an employment bond does not exist. Motion to review formally accepted for judgment, and granted. (RR - 1315-96.2014.5.03.0185. Judgment Date: December 16, 2015, Reporting Justice Breno Medeiros, 8th Panel, published in DEJT on December 18, 2015)

RESPONDENT'S MOTION TO REVIEW. EMPLOYMENT BOND. BEAUTY PARLOR. HAIRDRESSER. 1. **According to the appellate decision from the Regional Labor Court, the parties entered into a business partnership agreement under which claimant should act as hairdresser using mostly her own materials and the physical structure offered by respondent, receiving in return 50% to 60% of the service fees paid, whereas the remaining sum would serve to cover the expenses related to the business establishment.** 2. Further, it was evidenced that claimant had clients of her own and some leeway in organizing her appointments, which were indeed scheduled by respondent – but claimant was not punished in case of delay and could actually not be available for certain periods, take some days off during the week, and agree with another professional on changing their work days, in which case each such worker would be remunerated for her own services, upon notice to the reception desk for adequate appointment by clients. 3. The appellate decision in point also noted that claimant did not receive orders from the beauty parlor owner and that the badge was only intended to identify the workers for use of the toilets and other premises at the shopping mall where the business establishment was located. 4. **Earning commissions at 50% to 60% of service fees is thoroughly inconsistent with an employment relation** in that it would make it impossible for the purported employer to obtain a profit from the work done

> by the service provider (the purported employee). 5. On the other hand, the mere fact that appointments were organized by the beauty parlor's receptionist does not mean that legal subordination exists; in this regard, it should be noted that claimant had a certain leeway to organize her own appointments (as explained above), and, even though she did not have full autonomy to determine her working hours, it is a fact that some clients belonged to the beauty parlor and, as such, claimant's working hours were linked to the opening time of the business establishment itself. 6. It is worth citing a decision handed down by this Eighth Panel on a similar case (Case No. TST-RR-1315-96.2014.5.03.0185): "*A business partnership contract is commonplace in this field of services (beauty parlor), by which the owner makes available to professionals (manicures, masseurs, waxing professionals, hairdressers, etc.) not only the physical space itself, but also the client portfolio, furniture and amenities so that such professionals can do their work*." This is also the case here. Motion to review formally accepted for judgment, and granted. (ARR - 10319-57.2015.5.03.0110. Judgment Date: April 24, 2019, Reporting Justice Dora Maria da Costa, 8th Panel, published in DEJT on April 26, 2019)

It should also be pointed out that the possibility of having drivers rated by users, and vice versa, is by no means an indicative of subordination – it actually serves as a tool to obtain user feedback on the quality of the driver's services, which is in the interest of all those involved.

Consequently, the use of a rating system by the company as a tool to oust a poorly-rated driver is convenient not only to respondent (as a tool to ensure its survival in the market) but especially to all users, which eventually benefit from the greater reliability and quality of services.

Finally, it should be kept in mind that it is known to all how the relationship between Uber app drivers and said company unfolds, as such is known worldwide and has proved an effective source of work and income in times of growing (formal) unemployment.

In fact, technology developments have changed labor relations dramatically, and the labor courts are expected to remain attentive to preserve and enforce the guiding principles of labor relations, provided that all elements are present.

It must be pointed out that the expected protection of workers should not be at such an extent that stifles the emerging forms of labor, which are grounded on less stringent criteria and on greater autonomy in the performance of such work, at the unfettered discretion of the parties involved – as is the case here.

This being so, the decision handed down by the Regional Labor Court violated article 3 of the

CLT, whereupon I grant the interlocutory appeal and, on converting it into a motion to review, I hereby order that the case shall be redocketed and that a certificate of judgment shall be published so that the litigants and interested parties may be summoned that the motion to review will be heard at the ordinary session immediately occurring after expiration of the period of five business days counted from publication of the aforesaid certificate of judgment (Internal Rules of the Superior Labor Court – RITST, articles 256 and 257, coupled with article 122).

MOTION TO REVIEW

I. COGNIZANCE

Once the general conditions for admissibility have been satisfied, this motion to review is formally accepted for judgment, and I shall now examine its specific elements.

EMPLOYMENT BOND. DRIVER. UBER. NO SUBORDINATION.

In light of the arguments raised in the decision on the interlocutory appeal, the breach of article 3 of the CLT is clear.

Therefore, the motion to review is formally accepted for judgment.

II. MERITS

EMPLOYMENT BOND. DRIVER. UBER. NO SUBORDINATION.

Upon formal acceptance of the appeal for breach of article 3 of the CLT, the logical conclusion is that the motion to review shall be **granted** to re-establish the trial judgment that had denied the existence of an employment bond and dismissed the claims and pleadings in claimant's complaint.

All things considered,

The Justices of the Fifth Panel of the Superior Court of Justice have unanimously **HELD** as follows: a) the interlocutory appeal is formally accepted for judgment and, on the merits, **granted**, wherefore, on being converted into a motion to review, the case shall be redocketed and a certificate of judgment shall be published so that the litigants and interested parties may be summoned that the motion to review will be heard at the ordinary session immediately occurring after expiration of the period of five business days counted from publication of the aforesaid certificate of judgment (Internal Rules of the Superior Labor Court – RITST, articles 256 and 257, coupled with article 122); b) the motion to review is formally accepted for judgment for breach of article 3 of the CLT and, on the merits, **granted** so as to re-establish the trial judgment that had denied the existence of an employment bond and dismissed the claims and pleadings in claimant's complaint.

Brasília, February 5, 2020.

Signed by digital signature (MP 2,200-2 of 2001)

BRENO MEDEIROS
Reporting Justice