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

Case No. TST-AIRR-10575-88.2019.5.03.0003

INTERLOCUTORY APPEAL IN MOTION TO REVIEW (*AGRAVO DE INSTRUMENTO EM RECURSO DE REVISTA*) FILED BY CLAIMANT. REGIONAL APPELLATE DECISION PUBLISHED DURING THE EFFECTIVENESS OF LAW No. 13,015 OF 2014 AND LAW No. 13,467 OF 2017. SUMMARY JUDGMENT.

EMPLOYMENT RELATIONSHIP. ACKNOWLEDGMENT OF BOND. SELF-EMPLOYED WORKER. DRIVER. APPLICATION. UBER. IMPOSSIBILITY. LEGAL TRANSCENDENCE RECOGNIZED. DISMISSED.

I. This case revolves around the possibility of recognizing an employment relationship between a professional driver who performs his activities using the "Uber" app and its creator, Uber do Brasil Tecnologia Ltda. **II.** From a legal transcendence perspective, this is a new legal issue in that it deals with interpretation of labor legislation (articles 2, 3 and 6 of the Consolidated Labor Laws – CLT) from an angle over which there is still no well-settled stand of the Superior Labor Court (TST) or a binding decision of the Federal Supreme Court (STF). Therefore, the legal transcendence underlying this case is recognized (CLT article 896-A, paragraph 1, IV). **III.** In this specific case, the regional labor court upheld, on its own grounds, the trial judgment recognizing the claimant's status as a self-employed worker. Specifically, the trial judgment acknowledged that the claimant had broad autonomy in providing his services and,

as such, was fully responsible for the business. The trial judgment also noted that the worker was not subordinated to the respondent as 'the claimant was not subject to directive, supervisory and punitive powers on the part of the respondent.' Such assumptions are not to be revisited or amended at this extraordinary appellate level, according to the stance enshrined in TST Court Precedent 126. **IV.** The employment relationship defined by the CLT (1943) relies on the classic work relationship inherent to industrial, trade and service activities. The new forms of work must be regulated by a legal framework of their own and, until the lawmakers do so, the judge cannot apply the standard employment relationship standard indiscriminately. Four determining elements must be present for a contract to be governed by the CLT: personal provision, consideration, habitualness and legal subordination [i.e., services must be personally provided on a habitual basis, under subordination and against compensation]. This scenario stems from the hierarchical power of the company and unfolds into the directive, supervisory, regulatory and disciplinary (punitive) powers it acquires. The existing relationship between the app driver and the corresponding platform must be defined in reliance on the legal system with which it more closely relates, namely, Law No. 11,442 of 2007 which deals with self-employed delivery drivers (*transportador autônomo*), who own the transport vehicle and engage in a commercial activity. The STF has already declared such legal framework for self-employed worker status to be constitutional (ADC 48, Reporting Justice Roberto Barroso, DJE 123 of May 18, 2020), which points to the fact that not every work rendered personally for a consideration should be governed by the CLT. **V.** The work carried out 'through' (and not 'for') a technology platform does not meet the criteria set out in CLT articles 2 and 3, as the user-driver can freely decide if and when his transport services will be made available to user-clients, without any minimum work, minimum number of trips per period, or minimum billing requirements, and without any supervision or punishment for the driver's decisions, as highlighted in the factual assumptions acknowledged by the regional court decision when affirming the trial judgment on its own grounds in summary judgment. **VI.** This being

so, the following stance applies: the work done by using a technology platform that manages the supply of user-drivers and the demand from user-clients is not being carried out for the platform and does not pass the employment bond test set out in CLT articles 2 and 3; hence, there is no employment relationship between the professional driver and the app platform, which in turn does not go against article 1, III and IV of the Federal Constitution. **VII. The interlocutory appeal is formally accepted for judgment and dismissed.**

The case records of this Interlocutory Appeal in Motion to Review (*Agravo de Instrumento em Recurso de Revista*) No. **TST-AIRR-10575-88.2019.5.03.0003**, with **RICARDO RAMOS DE SA** as Appellant and **UBER DO BRASIL TECNOLOGIA LTDA.** as Appellee, were seen, reported on and discussed.

The Chief Justice of the Regional Labor Court, 3rd Circuit denied cognizance of the Claimant's motion to review ('denial decision' on pp. 1300/1301 of E-doc # 98), giving rise to this interlocutory appeal (pp. 1310/1314 of E-doc # 98).

Defense and reply not submitted.

Case records not sent over to the Labor Prosecution Office.

This is the report.

OPINION

1. COGNIZANCE

As the conditions for the appeal have been met, **I accept for judgment** the interlocutory appeal.

2. MERIT

The denial decision is grounded as follows:

“INTRINSIC ASSUMPTIONS
Individual Employment Contract/Recognition of Employment Relationship.

An appeal was lodged in a case subject to SUMMARY JUDGMENT, which would only be possible in light of a potential breach of a TST precedent and/or of the Federal Constitution, or else of a binding precedent of the Federal Supreme Court (STF), pursuant to CLT article 896, paragraph 9 (as amended by Law No. 13,015 of 2014).

It should be pointed out that, in such cases, a motion to review cannot be lodged on grounds of a purported violation of a guiding precedent from the Superior Labor Court (TST), in keeping with TST Precedent No. 442.

After looking in to the grounds for the appellate decision, I hold that the motion to review, in its pleadings and developments, has failed to demonstrate a literal and direct violation of any provision of the Federal Constitution or else a breach of the relevant TST Precedent or STF Binding Precedent, unlike what is required by law.

The alleged breach of constitutional provisions does not exist, as the review of those matters raised on appeal is not limited to the constitutional provisions; statutory provisions must also be construed to that end. For this reason, even if one considered the possibility of an actual breach of the constitutional provisions, this would have been merely circumstantial, thus ruling out the adoption of a motion to review for such purpose, as per repeated decisions of TST’s SBDI-I.

The attacked appellate decision is duly backed by robust evidence. Therefore, the motion to review is not a valid mechanism for revisiting facts and evidence, pursuant to TST Precedent No. 126.

CONCLUSION
Cognizance of the motion to review is hereby DENIED.' (p. 1300 of E-doc # 98)

As can be seen, this interlocutory appeal seeks to revive a motion to review brought against a decision published during the effectiveness of Law No. 13,015 of 2014 and Law No. 13,467 of 2017 (regional appellate decision published on **October 17, 2019** - page 3 of E-doc # 1).

Appellant insists on cognizance of his motion to review, in light of the purported violation of CLT articles 2, 3 and 6, sole paragraph, as well as of article 1, III and IV, article 5, LV, and article 7 of the Federal Constitution.

Appellants alleges "it has been unquestionably demonstrated that, by not recognizing the existence of an employment relationship in this case (but rather a partnership relationship only), the regional appellate decision, on affirming the trial judgment, entailed a direct violation of the very constitutional tenets of our Republic in that it shrugs off a whole set of rights inherent to all dependent and subordinate workers" (page 1307 of E-doc # 98).

It is worth noting from the very outset that the interlocutory appeal cannot be entertained with regard to the claims of purported breach of CLT articles 2, 3 and 6, sole paragraph, as well as of article 1, III and IV, article 5, LV of the Federal Constitution. These claims have been raised only in the interlocutory appeal, which is knowingly unsuitable for submission of new arguments or for supplementing a non-cognized appeal. As for the CLT provisions then invoked, it is also worth noting that the summary judgment in this case leaves no room for the applicability of CLT article 896, paragraph 9.

By the same token, an appeal grounded on an all-too-general allegation of breach of article 7 of the Federal Constitution, without indicating the purportedly violated item, is unacceptable pursuant to CLT article 896, paragraph 1-A, II, coupled with the stand enshrined in TST Precedent No. 221.

Accordingly, I shall entertain the interlocutory appeal focusing only on the alleged violation of article 1, III and IV of the Federal Constitution.

As for the matter in controversy, the regional appellate court affirmed the trial judgment on the same grounds, as follows:

> "Employment Bond. Severance Pay.
> Claimant alleges that he adhered to respondent's terms and conditions and started his activities on July 20, 2016, having been dismissed on March 8, 2018. He alleges his workday was from Monday to Sunday, at an average of 8 to 12 hours a day and earning an average of R$ 400.00 a week. Claimant moves for recognition of an employment relationship with respondent on grounds of the existence of those factual and legal circumstances set out in CLT articles 2 and 3, with the consequent registration of the employment bond on claimant's CTPS and payment of the ensuing labor entitlements.
>
> In brief, respondent answered there is only a business partnership between them, and none of the criteria for existence of an employment relationship have been met.
>
> Respondent emphasizes its sole and exclusive purpose is to provide and maintain a smartphone application designed to bring people together, without running transport services.
>
> In acknowledging that a work was done, the respondent has the burden of proving that such work was done other than under an employment contract (CLT article 818, II; CLT article 818; New Civil Procedure Code article 373, II), as such fact would be purportedly hindering claimant's access to a right.
>
> Well then.
>
> According to the lessons of distinguished Judge Sérgio Pinto Martins: 'The self-employed worker is a person who provides services on a habitual basis, on his or her own account, to one or more persons, assuming the risks of his or her business. By so doing,

the self-employed worker is not subordinate like an employee, and is not subject to the employer's directing powers or to a work time, being thus able to freely to work at his or her own wish and convenience. The major difference between a self-employed worker and an employee is the existence of subordination, *i.e.* receiving orders from the employer. In some cases, however, it is difficult to verify whether this element exists so as to define an employment relationship. In others, it is necessary to check the extent of orders given to workers so as to determine whether they can normally work without any interference from the employer.' (In *Direito do Trabalho*, 2nd edition, Malheiros Editores, p. 134).

As known, in the labor arena, the substance over form doctrine prevails, that is, the factual elements in the relationship between the parties matter more than the formal aspects established by them so that, if the determining factors for characterizing an employment relationship are present, an employment bond is then held to exist.

Under CLT article 3, an employee is an individual who provides services on a personal and habitual basis to an employer, under the latter's subordination and against a consideration.

An employment bond exists when the following five essential elements of an employment contract are present: the provision of work by an individual on a personal, habitual and subordinated basis, against a consideration.

'Personal' stands for the provision of service by the very individual, who cannot be replaced with others (save sporadically upon the employer's consent).

Therefore, it is a personal services contract (*intuitu personae*).

'Habitual' means the requirement to provide services in a non-sporadic way. Contracts for sporadic work, piecework or short-term work do not give rise to characterization of an employment

relationship.

I would like to point out that the habitual status should not be confused with exclusivity, which is not mandatory under labor law.

The consideration must also be present in the existing relationship, since a wage is due and payable under an employment contract.

Finally, subordination is a very important characteristic in that it is the employer's right to command, give orders, control tasks and schedules.

A close reading of the case records shows there is no documentary evidence of the facts alleged by claimant.

Quite the contrary, **claimant's personal deposition revealed he had broad autonomy in the provision of services**, as he could choose the best working hours and days that were most convenient to him, without punishment. In addition, **he had the burden of running the business by defraying fuel and maintenance costs for the vehicle used (and owned by him), being paid only for the trips**.

Let's see: '... **that there was no target number of trips or value to be collected per day; that he provided services via app as from 6:00 a.m.; that there was no preset time to start and end services;** (...) that exclusivity was not required; that the deponent made the registration on-line and came to the central office to clear his registration and have his vehicle checked, which was compulsory at the time; that the deponent was not informed of the reason for his blocking although he sought information about it; that he could not refuse more than one consecutive trip on the day, or else be punished by having trips suspended; that he had already refused more than one trip, not consecutively, on the same day, without being punished, but he did not know whether there was a cap on the number of refused trips; that he had already received a negative rating from passengers, but continued to provide services; that he transferred 25% of

earnings to respondent; that he used his own vehicle and paid for fuel and maintenance costs; that he was aware of the terms of use when he registered; that only individuals could register; that he did an on-line training before starting to provide services; that he had not been interviewed; that all events were handled through the application, not reporting directly to a specific person; that he rated passengers as well; that he earned about R$ 1,400.00/R$ 1,500.00 per month, net; that the app did not allow him to accept a trip and then have it cancelled; that the passenger can choose a route other than that suggested by the app; that he turned the app on and off on the days he wanted, at his discretion; that he never stopped working for too long; that the driver cannot register other drivers in his account; that two or more drivers can register the same vehicle; that he could use a rental car if he had it registered.'

In view of the facts outlined above, I take it that claimant's work was carried out on a non-occasional basis, without preset times for starting trips or a minimum number of trips per day, which enabled him to turn the app on or off on the days he wanted, at his sole discretion, that is, working at his own will and administering his time and labor in pursuit of the more advantageous conditions to him.

As for the consideration, it is well known that a cash payment can be made directly to the driver, and that the wage is paid directly by the employer under an employment relationship.

As for the subordination requirement, it is evident that the claimant was not subject to the respondent's directive, supervisory and punitive power, as he did not have to undergo hiring interviews, daily trip targets and actual time controls.

Furthermore, the claimant acknowledged he used his own vehicle and paid for fuel and maintenance costs, and that the passenger could choose a route other than that suggested by the app.

In fact, the claimant assumes the risks inherent to his business

> **under a clearly civil contract, to which he has adhered freely**. Furthermore, the parties' concerted action to achieve profit-making purposes and the de-registration for non-compliance with the obligation to maintain high standards of reliability and quality of the services provided are common and usual, without entailing a legal subordination.
>
> Accordingly, the recommendations on limiting the year of vehicle manufacture and on controlling driver unavailability for the sake of a fast and safe customer service are fully justifiable.
>
> In view of the above, since the factual and legal elements essential to characterize an employment relationship (CLT article 3) are not present, I dismiss the motion for recognition of an employment bond with the respondent, CTPS annotations and all other pleadings in the claimant's complaint, as they would derive directly from such alleged bond.' (pages 1197/1201 of E-doc # 98)

Pursuant to article 247 of the Internal Rules of the Superior Labor Court (RITST), the preliminary and official examination into the applicability of legal transcendence must be done in light of the motion to review. Therefore, considering whether legal transcendence should apply to this case presupposes the **feasibility of examining** the matters dealt with in the motion to review, so as to establish the corresponding rationale and its economic, political, social or legal implications, to which CLT article 896-A, paragraph 1 refers.

The case in point gravitates around the potential existence of an employment bond between a professional driver who exercises his activities via Uber app and its creator, Uber do Brasil Tecnologia Ltda.

In terms of legal transcendence, this is a novel legal issue in that it refers to interpretation of labor legislation (CLT articles 2, 3 and 6) under a perspective for which there is still no well-settled stand from the Superior Labor Court or a binding decision from the Federal Supreme Court. Therefore, I acknowledge the legal transcendence inherent to the case (CLT article 896-A, paragraph 1, IV).

As noted, the regional appellate court upheld, on the same grounds, the trial judgment that had recognized the claimant's status as a self-employed worker (independent contractor). Specifically, the trial judgment noted that the claimant had broad autonomy in the provision of services and defrayed the costs for his business. It was also noted that the claimant was not subordinate to the respondent in that 'the claimant was not subject to the directive, supervisory and punitive power of the respondent'. Such assumptions cannot be revisited on extraordinary appeal level, as per TST Precedent No. 126.

The employment relationship as defined by the CLT (1943) relies on the classic work relationship inherent to industrial, trade and service activities. The new forms of work must be regulated by a legal framework of their own and, until the lawmakers do so, the judge cannot apply the standard employment relationship standard indiscriminately. Four determining elements must be present for a contract to be governed by the CLT: personal provision, consideration, habitualness and legal subordination [i.e., services must be personally provided on a habitual basis, under subordination and against compensation].

This arises from the hierarchical power of the company and unfolds in the directive, supervisory, regulatory and disciplinary (punitive) powers of the latter.

The existing relationship between the app driver and the corresponding platform must be defined in reliance on the legal system with which it more closely relates, namely, Law No. 11,442 of 2007 which deals with self-employed delivery drivers (*transportador autônomo*), who own the transport vehicle and engage in a commercial activity. The STF has already declared such legal framework for self-employed worker status to be constitutional (ADC 48, Reporting Justice Roberto Barroso, DJE 123 of May 18, 2020), which points to the fact that not every work rendered personally for a consideration should be governed by the CLT:

> Labor Law. Declaratory Action on Constitutionality and Direct Action for Unconstitutionality. Carriage of cargo by road. Law No. 11,442 of 2007, which provided for the outsourcing of core activity. Purely commercial relationship. No employment relationship exists. 1. Law No. 11,442 of 2007 (i) regulated the hiring of self-employed delivery drivers by cargo owners and by cargo transport companies;

(ii) authorized the outsourcing of such core activity by transport companies; and (iii) ruled out the existence of an employment bond in this case. 2. A company's core activities can be legally outsourced. As already decided by the Federal Supreme Court, the Constitution does not impose a single way of structuring one's business. On the contrary, the constitutional principle of free enterprise allows businesspersons to freely choose their business strategies from among those permitted by the current framework (Federal Constitution, article 170). **The constitutional protection of labor does not mean that any and all paid services should be regarded as an employment relationship** (Federal Constitution, article 7). Precedent: ADPF 524, Reporting Justice Luís Roberto Barroso. 3. The one-year limitation period counting from awareness of damage for filing a suit for damages, as per article 18 of Law No. 11,442 of 2007 coupled with article 7, XXIX of the Constitution, is not unconstitutional in that a commercial relationship (not a labor relationship) is into play. 4. The declaratory action for constitutionality is thus held valid, whereas the direct action for unconstitutionality is rejected. Theme: '1 - Law No. 11,442 of 2007 is constitutional in that the Constitution does not prohibit the outsourcing of core or non-core activities. 2 - The limitation period set out in article 18 of Law No. 11,442 of 2007 is valid because it is not a matter of employment-related credits, but rather of credits ensuing from a commercial relationship, whereupon the events set forth in article 7, XXIX of the Federal Constitution are not applicable. 3 – If the requirements set out in Law No. 11,442 of 2007 have been met, a civil commercial relationship will be held to exist, thus ruling out the existence of an employment bond.' (ADC 48, Reporting Justice ROBERTO BARROSO, Full Bench, judgment held on April 4, 2020, E-Case, decision published in the On-line Court Gazette DJe No. 123, released on May 18, 2020 and published on May 19, 2020).

The work carried out 'through' (and not 'for') a technology platform does not meet the criteria set out in CLT articles 2 and 3, as the user-driver can freely decide if and when his transport services will be made available to user-clients,

without any minimum work, minimum number of trips per period, or minimum billing requirements, and without any supervision or punishment for the driver's decisions, as highlighted in the factual assumptions acknowledged by the regional court decision when affirming the trial judgment on its own grounds in summary judgment.

In similar cases, the Superior Labor Court has held that, once the regional labor court has acknowledged that the work of a professional driver using a technology application has not met the requirements set out in CTL articles 2 and 3, this non-recognition of an employment bond entails no breach of article 1, III and IV of the Federal Constitution:

> 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 must 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. (RR-1000123-89.2017.5.02.0038, 5th Panel, Reporting Justice Breno Medeiros, DEJT of February 7, 2020)

INTERLOCUTORY APPEAL IN MOTION TO REVIEW. APP DRIVER. AUTONOMY IN THE PROVISION OF SERVICES. NO EMPLOYMENT BOND. The Regional Court has held that the elements in the case file show that the claimant had autonomy to provide the services, especially due to the lack of robust evidence of legal subordination. Furthermore, the case records have indisputably shown that 'in consideration of the services provided to users, a UBER driver (like the claimant) held 75% of the gross total, while an amount equivalent to 25% was allocated to the respondent (complaint - item 27 - id. 47af69d), in consideration for provision of the app', and as pointed out by the regional court, 'by the criterion adopted for sharing of revenues, the situation is closer to a partnership regime by which the claimant used the digital platform made available by the respondent in exchange for a relevant percentage over the amount effectively earned from the services

> provided.' TST Precedent No. 126 is not to apply. Article 1, III and IV of the Federal Constitution and CLT articles 2, 3 and 6, sole paragraph, have not been breached. Interlocutory appeal formally accepted for judgment, but held groundless.' (AIRR-11199-47.2017.5.03.0185, 8th Panel, Reporting Justice Dora Maria da Costa, DEJT of January 31, 2019)

Therefore, article 1, III and IV of the Federal Constitution have not been breached.

As the claimant's assertions are bereft of grounds in this regard, the motion to review should not be formally accepted for judgment, as well decided by the regional court.

In view of the foregoing, I **dismiss** the interlocutory appeal.

ALL THINGS CONSIDERED

The Justices of the Fourth Panel of the Superior Labor Court have **DECIDED**, by unanimous opinion, to cognize the claimant's interlocutory appeal and, albeit acknowledging the legal transcendence of the case, **reject** it on the merits.

Brasília, September 9, 2020
Reporting Justice ALEXANDRE LUIZ RAMOS [*document digitally signed, pursuant to MP 2,200-2 of 2001*]