EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr M Fadlalla	**v**	The Oxfordshire Taxi Company Limited

PRELIMINARY HEARING

Heard at: Reading **On:** 28 February and 1 March 2018

Before: Employment Judge R Lewis

Appearances
For the Claimant: Ms N Cunningham of Counsel
For the Respondent: Mr M Paulin of Counsel

JUDGMENT

1. The claimant was not an employee of the respondent.

2. The claimant's claims of unfair dismissal and breach of contract (notice pay) are dismissed.

3. The tribunal has no jurisdiction to hear the application for interim relief, which is dismissed.

4. The claimant's application for a costs order is refused.

REASONS

1. This was the hearing listed by Regional Employment Judge Byrne at the second preliminary hearing on 8 February 2018.

2. I recap the procedural history briefly. On 12 January 2018, the claimant presented his claim form, and applied for interim relief. The application was supported by a certificate from Ms Gearing of the GMB.

3. The application was accepted and served by letters from the tribunal dated 19 January. In the same letter, urgent notice was given of a hearing for interim relief, listed for 26 January. That was, in fact, insufficient notice.

4. Mr Singh of the respondent contacted the tribunal by email on 25 January to ask for a postponement of the hearing listed for the following day, stating that

papers had been received from the tribunal on the afternoon of 24 January, and explaining difficulties caused by the lengthy absence of the respondent's director.

5. By letter of 25 January, the hearing the following day was converted to a preliminary hearing, with a direction given that the respondent should attend to explain to the tribunal how instructions would be given, and should be asked to verify the absence of its director.

6. The respondent did not attend on 26 January. The present judge listed the interim relief hearing for two days on 8 and 9 February, in anticipation that the respondent would dispute that the claimant was its employee.

7. By letters dated 2 February and 5 February from Messrs Mayflower solicitors, the respondent applied for a further adjournment, again citing the difficulty in taking instructions, and indicating an intention to call up to seven witnesses.

8. By correspondence dated 5 February, the tribunal notified the parties that the hearing then listed for 8 and 9 February had been converted to a second preliminary hearing, which was conducted by Judge Byrne, whose order was in the bundle. He listed the present hearing.

9. Although Judge Byrne was told that the documentation would be "minimal", there were bundles totalling 500 pages. I permitted minor additions to be made to the bundles, but did not, at the start of the second day, permit the respondent to give supplemental disclosure that morning of its records of the claimant's earnings from the respondent.

10. The witness statement bundle contained six statements. The claimant had provided a lengthy statement, and supplemented it with a statement from a former colleague, Mr Jabed Ali, to which the respondent objected on grounds of late service. Statements had been exchanged on 19 February, and that of Mr Ali served by the claimant's solicitors on the evening of 27 February. I declined to permit the statement to be relied upon. Its relevance seemed to me at best marginal, but of greater importance was that there was no part of its content which could not have been served earlier. The claimant was therefore the only witness on his own behalf. The respondent's witnesses were Mr Aaron Singh, Senior Manager, who was by far the most significant witness; Ms Jordan Greenwood, Education Coordinator, and responsible for management of schools' contracts; and Mr Mark Green, Director. A fourth statement had been served, but the witness was in the event not available.

11. At the start of the hearing, I reminded the parties that the hearing proceeded under the speedy provisions of an interim relief application, and that it was desirable that I be in a position to deliver judgment at the end of the second day, with a view either to saving the time and cost of unnecessary attendance on the third morning, or of enabling both sides to prepare for the interim relief hearing listed for 2 March. I was grateful to both Counsel for their professionalism in adhering to the timetable which was set. There were helpful written closing submissions, which I read before hearing oral submissions. I was referred to a number of authorities, of which I found the most helpful to be Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471; Mingeley v Pennock

[2004] ICR 727; and Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB 497. I drew to Counsels' attention one point in Halawi v World Duty Free 2014 EWCA Civ 1387.

12. After judgment had been given, Ms Cunningham requested written reasons in accordance with rule 62. A costs application was then made on behalf of the claimant, as listed by Judge Byrne. After Ms Cunningham had made the application, I did not call upon Mr Paulin to reply, and I have taken it that the request for written reasons extends to the costs application. In light of the number of variables which then faced the tribunal as to how to proceed, it seemed to me fair to adjourn and list a telephone preliminary hearing a week later, to discuss how matters should proceed.

13. The issue before me was whether at the material time the claimant has shown that he was an employee within the meaning of section 230(1) ERA 1996, namely "An individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment" which is defined in section 230(2) as "a contract of service… whether express or implied, and… whether oral or in writing."

14. I preface my findings with a number of general observations:-

    14.1 I was referred to a wide range of matters, some of them in depth. Where I do not refer to a matter which was mentioned, or where I do so, but not to the depth to which the parties went, that should not be taken as oversight or omission. It is a proper reflection of the extent to which the point was of assistance.

    14.2 While the authorities to which I was referred were of some assistance, I note that they were specific to their own facts. To that extent, their value was limited. The authority which was factually close to this case was Mingeley, which reflects an earlier generation of technology in the same industry.

    14.3 A feature of this hearing was the repeated caution applied to the ordinary use of language, where everyday words might have an impact on the findings of fact. Where in this judgment I refer to service or employment or work, I do so in the sense of those ordinary English words, and in the hope that I make this judgment reasonably easy to follow. Where I use such a word in any technical sense, I say so.

    14.4 I appreciate that in hearing an application for interim relief, the tribunal proceeds with some haste, and that it must work from the material before it. That approach underpinned this hearing, which was a necessary preliminary to interim relief. I do not underestimate the burdens on both sides of preparing in haste, and the following implies no criticism whatsoever of a party or representative. On the contrary, it seemed to me that both parties had done their very best to assist the tribunal in the available time.

    14.5 It had been confirmed to me at the first preliminary hearing that for present purposes, the claimant relied solely on his last two years of

working for the respondent. It was nevertheless a working relationship which went back about 20 years and it would at least have been helpful to understand if the relationship with which I was concerned was to all intents and purposes that which had prevailed for a much longer period of time. I noted that a large number of the documents in the claimant's bundle were unattributed and undated. The absence of authorship and date to a great extent deprived the tribunal of context, which would have been useful in interpreting any document.

14.6 The bundle contained the claimant's contract for services of February 2014 (R119). The respondent asserted that it had reissued such documents in late 2015, but following an office move was unable to find the claimant's. A template in blank would have been of assistance.

14.7 Counsel on both sides invited me to attach weight to the credibility, as they saw it, of their witnesses as opposed to that of the opposing witnesses. Submissions based on credibility often reflect the artificial binary view which parties adopt, and which they frequently ask the tribunal to adopt. I do not find the binary view generally helpful, nor, except in extreme cases, do I find credibility a determinative factor.

14.8 I note that in this case the claimant gave evidence which on occasion was unconvincing; when, for example, he said that he "never" notified the respondent of substitution of a driver, he was plainly wrong. Likewise, Mr Singh and Mr Green did little credit to their case in struggling to describe the respondent's management of the drivers as no more than "guidance". It was plainly a word hit upon to avoid the more obvious language of management, supervision and sanction.

14.9 Reliance was placed in this case on texts, emails, and transcripts of telephone conversations which (entirely properly) had been recorded. I approach all of that material with the caution that every workplace has its own casual language; and that when colleagues communicate with each other, they do not do so in the expectation that their communications will be subject to forensic dissection.

15. I now turn to my findings of fact.

16. The respondent is a family owned company, and part of a group which provides a number of transport-related services and facilities (e.g. car hire following accidents). It has operated for over 50 years under the leadership of the Green family. I was concerned solely with its taxi business, based in Oxford. Mr Green, writing with evident pride, wrote that it operates 24 hours a day every day of the year, and covers up to 30,000 bookings per week. Its operating name is 001 Taxis. It operates in Oxford in an environment which is both regulated and competitive.

17. The claimant, who was born in 1968, has worked as a driver for 001 intermittently since 1997. He mentioned two long gaps in his service, between 2007 and 2011 for study, and between about April and November 2015, when he was engaged with family matters, including spending several months in

Sudan. In this case, I was solely concerned with the position after November 2015.

18. I was therefore concerned with a working relationship which has been in place, on and off, for some 20 years. The relevance of such background is that in returning to work for the respondent in late 2015, the claimant knew and understood its arrangements and systems. He was a university graduate. Any suggestion that the respondent sought in some way to deceive or mislead the claimant was, in my view, misplaced.

19. I cannot make a comprehensive finding about the regulatory systems in place. The work of the claimant and respondent was subject to at least five regulatory regimes, and possibly more. I was told of those applied by the local authorities (City of Oxford being different from those in South Oxfordshire); of the regulation of individual drivers, including the claimant; of the regulation of individual vehicles; and of the requirements of those who contracted with the respondent, such as Oxfordshire County Council (OCC). The regulatory regimes were well known to all those involved in these events. All recognised the importance of adhering strictly to the relevant requirements

20. The claimant had at the material times, i.e. from late 2015 onwards, a Hackney Carriage Vehicle Licence issued by South Oxfordshire District Council (the current version at C172). It named both the claimant and the vehicle to which it applied and, as it said, it authorised him to ply for hire within the district. In other words, a Hackney Licence entitled the holder to take flagdown business within the district which issued it and nowhere else. The claimant could ply for hire with his light on and accept flagdown business anywhere in South Oxfordshire. (The parties understood that Hackney Licences are a rare and valuable commodity in Oxford, and the claimant said that he applied in South Oxfordshire, in part for that reason, and partly because his vehicle did not meet Oxford City requirements.)

21. The Hackney Licence also entitled the claimant to work through any licensed private hire operator in the UK as a private hire. In other words, it entitled him to accept work from the respondent (or any of its competitors) through a system of the type described below. The Hackney Licence also entitled him to accept direct business from the public, not using the flagdown procedure. A member of the public might, for example, telephone the claimant direct on his mobile number to make a booking.

22. Finally, possession of the licence enabled the claimant to apply for other opportunities, such as a permit to use the VIP taxi rank at Henley Royal Regatta (C148). (Henley is within South Oxfordshire District and therefore within the claimant's Hackney district.)

23. The claimant's Hackney licence was linked to a Mercedes minibus, which the claimant acquired in late 2015 for a price of £7,500.00. During his prior work for the respondent, he had not owned his own vehicle, but had driven one leased from a company within the Green family businesses. The 2014 contract to which I was referred related to that period, and to that extent was in place for different circumstances. Ownership of his own vehicle gave the claimant more choice and greater flexibility. As stated, he had the right, within South

Oxfordshire, to ply for business with a light box, and to accept flagdown fares. He made his own arrangements with those fares for payment.

24. The respondent is a private hire operator licensed by Oxford City Council.

25. The working arrangement between the claimant and the respondent was, on my finding, the following so far as material. The working relationship was not set out directly in writing, although aspects of the working systems were in writing. I deal separately with two forms of arrangement, which I call the arrangement for immediate work (my term, which was not used by any party) compared with the school run.

26. When the claimant wanted to work through the respondent for immediate taxi driving opportunities, he had to make himself available by paying the respondent an administration fee of £120.00 per week (called 'rent') and obtain use of the icabbi app, for which he paid £12.00 per week.

27. When the claimant was at work, he logged on to the respondent through the icabbi app, and once he had done so, he was automatically considered to be available to be allocated work. Mr Paulin said that he was then in a "virtual cab rank", although my phrase for the same thing would be an electronic queue. By joining the queue, the claimant declared his availability for hire. Mr Singh, whose knowledge and understanding of the business systems appeared profound, stressed that the system implied a duty on both sides to operate it fairly. The basic rule of fairness on the part of the respondent was that the next available driver would receive the next available job. Fairness on the part of the driver implied that he would accept the next allocated job if available.

28. Once a passenger's request had been passed to the claimant through the respondent, the claimant (or any driver) had the right to reject it, without giving a reason. However, if he did so, he was at risk of sanction. (The debate on whether this was properly called a "penalty," which was the word adopted by the icabbi software, was of no assistance.) The sanction was to be knocked out of the queue for a period between 20 minutes and an hour, depending on circumstances. I accept that this was no more than a practical element of the duty of fairness. If a driver was at the head of a queue and available for a job, but turned it down, that implied that the driver was cherry picking rather than taking first come, first served. As a matter of fairness therefore, he might be sent back down the queue to wait for the next job.

29. The payment arrangements for such jobs were that the payment made by the passenger belonged in its entirety to the claimant. If the passenger paid cash, that was simplest and most straightforward. If the passenger had an account or paid for the booking by credit card, such that the money came to the respondent, the respondent paid it over to the claimant in full.

30. I noted a number of other minor points. The claimant agreed that he was responsible for items of required equipment within the vehicle, e.g. a fire extinguisher. The claimant was responsible for insuring the vehicle, and for keeping it clean and roadworthy. The respondent provided the claimant with detachable badging, and the claimant was required to use only the respondent's badging or logo when working through the respondent. He had

greater freedom on other occasions. The claimant was required to adhere to a dress code while undertaking the school run. When not working for the respondent, the claimant was free to work for any other provider or operator.

31. I accept the evidence of Mr Green and Mr Singh that the above summarises (no doubt in simplified form) the arrangement by which the respondent's drivers have always worked, and which according to both is the common template for the industry. In that context, I note that the above description is very similar to that which applied to Mr Mingeley in Leeds in the years 1997 to 2001 (paragraph 3, page 729).

32. In addition to immediate taxi requests, the respondent had a substantial volume of account-based work. I need go no further for present purposes than consideration of a school run for OCC, which required delivery of a small number of vulnerable pupils with special needs to school every day of the school term, and their collection and return home on the same days. It was a requirement of the respondent's contract with OCC that every journey be undertaken by two members of staff, a driver and an escort. The nature of the work added an additional layer of regulation, which was that drivers and escorts had to be authorised in accordance with safeguarding requirements. Ms Greenwood was employed by the respondent to manage the school run contracts, and I was taken to what appeared to be tendering information submitted by the respondent to OCC when applying for the contract (C85A).

33. I accept the general point made by Ms Greenwood in evidence, which was that she did not offer school contract work to drivers, but that drivers applied for it. I also accept that the same was true of escorts, and that the respondent maintained a list of accredited individuals who wished to undertake escort work, who were offered work as and when it became available.

34. The school run work was undertaken in many respects in the same way as that of immediate task work. The driver was required to log on 30 minutes before the first collection, and logged off after delivery to the school. He was then under no obligation to work for the respondent until he did the afternoon run, but was free to do so if available.

35. The rate of payment for the school run was set by contract between OCC and the respondent, and the respondent paid the entirety of the contract price per run to the driver. It did not deduct a share or overhead or commission. One unusual feature of the system was payment of the escort. The cost of the escort was included in the contract price agreed between OCC and the respondent. The respondent paid the driver a sum which included payment to both driver and escort, and the driver was then responsible for making payment to the escort. I was told that the respondent did not require the driver to pay the full amount of escort payment to the escort.

36. The dispute before me, the school run, focused on a number of central points.

37. One was the commitment given by the respondent to the claimant about the school run work. It was common ground that the contract awarded by OCC to the respondent was for three years. The claimant asserted that he had been guaranteed work on the contract for three years by Ms Greenwood's

predecessor, who was the witness whose statement had been served and who was not available. I make no finding on this point.

38. A second dispute was as to substitution. I was taken in detail to pages R40-47, and accept that those showed that the claimant was unavailable for the school run, and offered substitute drivers (whom he had arranged), on 15 December 2017, 4 July 2016, 12 July 2016, 14 August 2016, 22 November 2016, 9 December 2016 and 18 December 2017. On each occasion, the claimant provided a substitute from the respondent's own pool of drivers. A transcribed telephone conversation of 15 December 2017 between Ms Greenwood and the claimant (R40) was no more than an instance of this**.**

39. I accept that throughout the period of the school run contract, the claimant had the right to withdraw from any particular run and to put forward a substitute. The substitute had to meet the relevant regulatory requirements, as to driving, licensing, and safeguarding. To that extent therefore there was not an unrestricted pool of substitutes (this was a point in Halawi). I accept that while the instances quoted were all instances where the substitute was known to the respondent (and identified by a respondent driver number), that was in fact not a requirement, and that the claimant was free to nominate a substitute, who could demonstrate that he met the requirements, even if he had never worked before for the respondent.

40. I was taken to a volume of evidence about what might happen in the event of the claimant being available to drive but no escort being available. There was dispute as to where responsibility lay to find an escort. I accept Ms Greenwood's evidence that it was the primary responsibility of the driver to find an escort; but that if the driver were unable to do so, and notified the respondent, the respondent would try to find one, and might draw on a pool of awaiting escorts. As with drivers, the pool of escorts was not an open one, and had to be filled by people authorised by the local authority. In preferring Ms Greenwood's evidence on this, I attach considerable weight to transcripts of conversations which she had with the claimant on 7 and 15 September 2017 (132A-C) in which the language used by the claimant seemed to me in keeping with Ms Greenwood's evidence: "I'm still looking around to secure an escort… stuck for tomorrow… by Monday morning I'll have an escort for you… I'm struggling for escort again… I tried to find somebody else but I'm just struggling".

41. A matter which seemed to me important related to Henley Royal Regatta. On 24 June 2017, the claimant sent a message to the respondent "to let you know that I have VIP permits to the Henley Royal Regatta this coming week. I am allowed into the VIP area to drop and pick up. I have left a copy for you at the office. Please sort a good price for this service." (C96-98). It was explained to me that there is significant regulation of vehicle traffic in Henley during the regatta. The claimant as a South Oxfordshire Hackney driver could readily obtain access to VIP parking, but the respondent as an Oxford-based private operator could not. The claimant had obtained the permit without cost and of his own initiative, and could make best (ie potentially most lucrative) use of it through the respondent.

42. I also attached weight to the claimant's tax returns (8-39) for the two years 2015/16 and 2016/17. They showed the claimant having submitted tax returns on the basis of self-employment as a Hackney operator and having paid voluntary class 2 (self-employed) national insurance contributions. In the latter year, he claimed allowances of £9,502.00, including capital allowance for the full cost of his vehicle (R21).

Discussion

43. I approach this matter through the three questions raised in Ready Mix Concrete. My first question was whether, to paraphrase the headnote of that case, the claimant agreed in consideration of a wage to provide his own work and skill in the performance of some service for the respondent.

44. I find that that was not the bargain between the parties. I find that their agreement was that the claimant paid the respondent a sum for administration, and paid for the icabbi app, and in return the respondent placed the claimant in the electronic queue, which it undertook to operate fairly and from which, from time to time, it offered the claimant individual assignments at times when he was logged as available to work. The respondent did not pay the claimant a wage, but accounted to him in full for any fares which were paid to it for such assignments. It did not require the claimant to account to it for any part of any amount paid by the passenger to him. This was the transmission of fees paid by a third party, not remuneration paid by the respondent.

45. Apart from the school run, the claimant was under no obligation to be available at any time, or for any specific time or assignment; and for the assignments of the school run, he had a right to substitute (which he exercised in practice) which was restricted only by the necessity that any substitute was properly accredited.

46. It follows therefore that the claim fails at the first Ready Mix hurdle, namely personal service. Nevertheless, I now deal with the second and third Ready Mix stages.

47. The second question is whether the claimant agreed that in performing the service, he would be subject to the control of the respondent "sufficiently to make him the master". I accept that at the second stage, the respondent had control in the sense of ultimate authority in the performance of the work. In so saying, I note the headnote in Stephenson, which observes that "The significance of control was that it determined whether, if there was a contract in place, it could properly be classified as a contract of service rather than some other kind of contract". I fully accept that the respondent required the work to be performed to its standards, methods, branding, systems, and in accordance with any material obligations which were owed to third parties, including contractors such as OCC, passengers, and regulators. If the matter turned on that limb alone, I would, on the material available at this hearing, find that the control test had been met.

48. The third element in Ready Mix is whether "the other provisions of the contract were consistent with its being a contract of service". I understand that to be more of an overview, and to require me to step back from the detail. I find that

the overall provisions and circumstances overwhelmingly are inconsistent with a contract of employment, and I refer to the following, which are not in priority nor necessarily an exhaustive list:-

48.1 That the claimant was independently and personally licensed as a Hackney driver, which conferred privileges and entitlements wholly unrelated to the respondent;

48.2 That in entering into arrangements with the respondent, the claimant was free to opt out of a whole generic category of work: I accept Ms Greenwood's evidence that drivers who for example did not wish to do hospital work or NHS work were at liberty to decline to do so;

48.3 The unqualified right of the claimant to absent himself from availability for work for any period of time and for any reason, without obligation to explain any reason;

48.4 The ability to substitute, which I find was unqualified (subject only to the substitute being appropriately qualified to undertake the role), and which was exercised in practice;

48.5 The freedom to work for rivals, in a competitive environment, and to do so while at the same time maintaining his working relationship with the respondent;

48.6 While I approach tax matters with hesitation, and in the understanding that different considerations apply, I attach some weight to repeated declarations of self employed status made in writing by the claimant (an educated man); to his payment of voluntary class 2 national insurance; and to his claim for full capital allowance. I note that the claimant had, by late 2015, worked for the respondent for about 14 of the previous 18 years, and I take it that on returning to the respondent, as owner of his own vehicle, he exercised an informed choice about the arrangements within which he wished to work;

48.7 I attach some weight to the Henley Regatta matter because I find that it shows a meeting of arm's length economic interests. The respondent had access to a customer base in Oxford as a private operator. It had no access to the VIP system at the regatta. The claimant had access to VIP parking at the regatta, but apart from driving round the District with his light on, no access to a customer base. The claimant's message to the respondent was an appeal to mutual self interest.

48.8 I find that the claimant has taken an element of economic risk. The risk is that having made his capital investment, obtained his qualification, and invested further in recurrent overheads (such payment of 'rent'), he took the economic risk that his income would generate an income and a living for him. His risk was related to the general volume of passenger business.

49. I find that the claimant was not an employee of the respondent. I was not asked to find if he were a worker.

Costs

50. Ms Cunningham produced a bundle of correspondence between Messrs Leigh Day solicitors, Mr Aaron Singh, Messrs Mayflower solicitors, Mr Paulin and the tribunal. She made an application for the costs thrown away at the second preliminary hearing (8 February) and submitted in the first instance that the respondent had acted unreasonably in failing to attend the first preliminary hearing on 26 January.

51. The papers had been served on 24 January, and the letter from the tribunal of 25 January had stated that its expectation was that the respondent would attend in order to explain the absence of its management, and how it would take instructions to take matters forward.

52. Mr Paulin intervened before being called upon to point out that as the tribunal had accepted that the 26 January hearing had been listed without appropriate statutory notice being given, the hearing was a nullity and therefore costs could not be awarded for a failure to attend. That was a compelling point, but only until the afternoon of 25 January, when the hearing listed for the following day was converted to a preliminary hearing for case management.

53. I indicated to Ms Cunningham, before calling formally upon Mr Paulin, that what concerned me about her application was that I was asked to penalise a then unrepresented party for not attending the tribunal in opposition to a represented party; and that rules 42 and 47 in any event make express provision for what is to be done in the event of non-attendance. I indicated that it seemed to me troubling to penalise a party in costs for doing that for which the tribunal rules made express provision. Ms Cunningham commented that taking a step authorised by the rules was not necessarily reasonable, but then elected not to proceed with the point, and to base her application for costs on Messrs Mayflower's letters to the tribunal of 2 and 5 February.

54. Those were long letters in which Messrs Mayflower set out at length reasons for asking for an adjournment of the interim relief hearing. As Ms Cunningham pointed out, a number of the reasons indicated in the Mayflower letter had in fact not materialised at the hearing before me. She submitted that taken together the letters were an attempt to kick interim relief into the long grass, as well as containing unjustified hyperbole. She submitted that it was unreasonable to delay applying for postponement until 2 February; unreasonable to make the application in the terms in which it had been made, and unreasonable to give inaccurate information about the basis for the application, notably about the date of Mr Green's return.

55. After hearing Ms Cunningham's full submission, I did not call upon Mr Paulin to reply.

56. I could see that there might be matters in the Mayflower letters to criticise, and certainly that parts of them were overpitched. I could not, on the basis of this not untypical litigation correspondence, conclude that there had been

unreasonable conduct of proceedings within the meaning of rule 76. I was concerned not to fall into the trap of assuming that litigation appeared the same when it had begun or was underway as appeared in the light of any conclusions or outcomes. Accordingly, the application for costs was dismissed.

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Employment Judge R Lewis

Date: 8 March 2018

Sent to the parties on: .....