EMPLOYMENT TRIBUNALS

Claimant: Mr Constantin Ristea

Respondent: Apple Central Taxis Ltd

Heard at: **Exeter** **On: 14 September 2018**

Before: **Employment Judge Fowell**

Representation:

Claimant: In person

Respondent: Mr Z Malik of Peninsula Business Services Limited

JUDGMENT

1. The claimant was self-employed and so is not entitled to pursue complaints of disability discrimination under the Equality Act 2010, in respect of annual leave under the Working Time Regulations, or in respect of notice pay under the Employment Rights Act 1996.

2. Accordingly, each of the claimant's complaints is dismissed.

REASONS

Introduction

1. The claimant, Mr Ristea, has brought complaints of disability discrimination, holiday and notice pay arising out of his work as a taxi driver for the respondent, Apple Central Taxis Ltd (Apple). This preliminary hearing was listed to decide whether he is entitled to pursue any of these claims or whether he was in fact self-employed.

2. There was no signed contract of any sort so the only basis on which he could be entitled to notice pay is if he qualified for the statutory right to minimum notice under the Employment Rights Act 1996, and he confirmed at the outset that he was not pursuing any claim to be such an employee, or for any 'other payments', despite ticking that box on the claim form. The remaining question therefore is whether he qualifies to bring claims of discrimination under the Equality Act 2010 and for annual leave under the Working Time Regulations 1998.

Legal background

3. The definition of a worker in the Working Time Regulations is the same as in the Employment Rights Act 1996. It is set out in Regulation 2, the interpretation section. Among the various definitions there it states:

> "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, *whereby the individual undertakes to do or perform personally any work or services for another party to the contract* whose status is not by virtue of the contract that of a client or customer or any profession or business undertaking carried on by the individual."

4. The focus here is on the second limb of the test, the essence of which is whether Mr Ristea was contracted to do work personally, other than for a business client or customer.

5. For the purposes of his discrimination claim, the Equality Act 2010 protects those "in employment", but employment is defined very broadly. By section 83(2) employment means:

> "employment under a contract of employment, a contract of apprenticeship *or a contract personally to do work*"

6. Hence "employment" for discrimination purposes is the same as in the second limb of the previous definition – a contract personally to do work.

7. The question of worker status has been the subject of many recent decisions. In the case of *Byrne Brothers Ltd v Baird & others [2002] IRLR 96 (EAT)* Mr Recorder Underhill (as he then was) gave the following guidance on the position of such workers:

> "The intention behind the regulation is plainly to create an intermediate class of protected worker who, on the one hand, is not an employee but, on the other hand cannot in some narrower sense be regarded as carrying on a business. The policy behind the inclusion of limb (b) can only have been to extend the protection accorded by the Working Time Regulations to workers who are in the same need of that type of protection as employees in the strict sense – workers, that is, while viewed as liable, whatever their employment status, to be required to work excessive hours. The reason why employees were thought to need protection is that they are in a subordinate and dependent position vis-à-vis their employees. The purpose of regulation 2(1)(b) is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

Findings of Fact

8. In applying this guidance to the present case I heard evidence from Mr

Ristea and from Mr Creech, Apple's Managing Director. The main points to emerge from the evidence in favour of worker status were these:

a. His services were integral to the business of the company.

b. He received some of his pay direct from the company. This was for fares collected from account customers such as Exeter Airport, who paid Apple directly. His share was paid weekly with a credit sheet rather like a payslip setting out his entitlement.

c. He was provided with an electronic device called a PDA by the company which he used to log on and log off at the start and end of his shift. Through this device his position was monitored, and the company's software allocated customers to him based on a calculation of who was nearest and who had been waiting longest. The device also recorded to the minute his time on shift each day and earnings.

d. He was expected to wear a uniform - black shoes, black trousers, a tie and a plain shirt. The tie was required by Exeter Airport but drivers were expected to wear it at all times, and although this was hard to monitor drivers were exhorted in occasional meetings or by memo to wear it and might be temporarily suspended if they did not.

e. Drivers were organised into one of three shifts (early, middle and late) to ensure a reasonable spread of vehicles to meet demand across a 24-hour period. Mr Ristea had a mid-shift from noon to midnight.

f. He had to display a magnetic sign showing he was an Apple driver, together with his own private vehicle taxi licence on the back of the car.

g. If a driver refused to take a customer without good reason he or she would be suspended from the system for eight minutes. Whether it was a good reason was decided by the controller.

h. Any disputes or refunds would be dealt with by the controller too, without necessarily any recourse by the driver.

i. There was a form to fill in for the 'holiday' period, although drivers could just phone or text their requests.

9. Those features which indicated self-employed status were as follows:

a. He regarded himself as self-employed and paid tax on a self-employed basis.

b. He provided his own car, of his choice, and was responsible for all running costs.

c. He had to obtain his own private vehicle hire licence.

d. He paid a flat weekly fee of £140, in return for which he had the opportunity to work. The risk was therefore his.

e. If he was ill and unable to work that was his own loss too, although for those with a long-term illness or needed hospital treatment Mr Screech would in practice waive or discount the fee.

f. There were four weeks a year he could book off, but there was no holiday pay. For those four weeks he did not have to pay the weekly fee. Drivers who wanted to be away for longer could in practice return the PDA and stop the arrangement for however long they liked.

g. During his allotted shift hours he could log on or off when he wished. Although encouraged to log on near the start of their shift, many did not and there was no real sanction. Often he could stay on later but might be told to log off if they were straying into another shift and there were more cars than needed at that time.

h. Although his whereabouts were monitored, drivers could choose their own route, and were free to park up or drive around during waiting periods as they chose in the hope of being in the right spot for passengers.

i. Apart from the tie, the driver had to provide their own items of uniform.

j. The recruitment process was minimal. New drivers would be seen briefly, given a short induction and taken for a test drive. After that they would be shown how the PDA worked and allowed to start work.

k. There were no procedures for disciplinary action and no requirement or expectation of notice.

10. Some of these features cut both ways or require more elaboration, in particular the possibility of providing a substitute. The evidence on this point was that some drivers could and did do so, but they needed to have arranged in advance an alternative named driver to drive their car, who was known to Apple, and there had to be insurance and a licence in place for them to drive that car. A small proportion of the 250 or so drivers had put this in place so if they were not available their car could still be earning money, but there was an additional cost involved for the licence and the insurance. The claimant was not one of them.

11. Another key issue was whether drivers could work for other companies or for themselves. (To work for themselves they had to have an operator's licence.) This was allowed by the company, and many did regular school runs for example, but not while they were logged on for Apple. If a driver took a fare for another operator while on shift, that might result in a lengthy suspension or the cancellation of the contract.

12. There was also a Drivers Handbook. This was produced by Mr Screech in the course of his evidence. It had not been disclosed prior to the hearing

and had never been shown to the claimant, so its value was limited. It set out a code of conduct, standards of customer service, advice on how to deal with difficult customers, some guidance on equality and diversity, the dress code, vehicle standards – including such tips as to polish the vehicle regularly, to keep it clean and use an air freshener – special arrangements for the airport, breakdowns, charging and 'Holiday Entitlement'. Overall it shows at attempt by the company to impose a degree of uniformity and professionalism on the drivers and hence a degree of control.

13. Before considering that balance of factors in light of the guidance set out above, there has been some more specific guidance recently from the Employment Appeal Tribunal in the context of the taxi industry.

The Uber Case

14. The main case is that of *Uber BV & Others v Aslam & Others UKEAT/0056/17/DA (unreported)*, which held that the Uber drivers in question were workers, and not self-employed. Her Honour Judge Eady QC held that the Employment Tribunal had been entitled to disregard what was said in Uber's written terms and conditions, and to look at the reality of the working arrangements, which can be summarised as follows:

    a. Uber drivers were signed up online with little scrutiny. They had a short induction and were then given access to the Uber driver's App.

    b. They were given a welcome pack indicating the sort of service standards expected and how to behave towards customers.

    c. The driver provided their own vehicle and was responsible for all running costs.

    d. Access to the app was personal and there was no scope at all for providing a substitute.

    e. In the past there had been a guaranteed income scheme for new drivers.

    f. Once a customer summoned an uber cab the software contacted the nearest driver automatically and they had 10 seconds to accept it. The driver was then told the name of the customer and had to follow the route on the satnav.

    g. Drivers were given a share of the fare, paid weekly.

    h. Disputes or refunds were sorted out by Uber, without necessarily involving the driver.

    i. Uber sometimes contributed to the cost of cleaning a car soiled by a passenger, whether or not they got the cost from the customer.

    j. Although drivers were free to reject calls, acceptance rates were monitored against an 80% target.

k. Drivers who declined three trips in a row were logged off the system for ten minutes. This could also apply if they cancelled a trip after accepting it, without good reason.

l. Passengers rated the driver via the App and these statistics also showed a degree of control over the driver.

15. On the other hand:

a. drivers could work for other organisations;

b. they met all their own expenses and running costs;

c. they paid for their own taxi licences;

d. they could choose which type of Uber 'product' to operate;

e. they were self-employed for tax purposes; and

f. they were not provided with a uniform and were discouraged from displaying Uber branding.

16. It was also part of Uber's case that many of the factors relied on by the claimants were the result of the regulatory regime for taxis, including personal service by a licenced driver, but the Employment Appeal Tribunal held that this this did not affect the weight to be given to such points.

17. Many of these features are therefore similar to those in the present case. Uber is a far larger operation, with about 30,000 drivers and more sophisticated IT. The main differences between the two cases appear to be that:

a. Uber had extensive documentation reinforcing its claim to be merely a technology platform and that the drivers were all self-employed.

b. Uber drivers received 100% of their income from the company;

c. Uber monitored its drivers more closely, including over the route to be followed, their performance statistics and customer satisfaction through feedback.

d. Apple on the other hand had some provision for providing a substitute.

e. Apple drivers had to pay the significant weekly fee of £140, regardless of earnings.

18. Apart from the first of these points, which does not apply here, each of these indicate a higher degree of control on the part of Uber than with Apple, so the same result cannot simply be read across.

19. The Employment Appeal Tribunal held that that there was in practice a contract between Uber and its drivers whereby the drivers personally undertook to do work for them. This applied for drivers who had the app

switched on, who were within their authorised territory and who were willing and able to accept assignments – not just when they were actually driving a customer.

Addison Lee case

20. I was also referred, by means of a Guardian article in the bundle, to an Employment Tribunal decision in which drivers for Addison Lee were classed as workers. Decisions of other Tribunals are not binding authorities. There was however a recent Employment Appeal Tribunal case involving Addison Lee's fleet of cycle couriers, who operate on a similar basis to their drivers. It was a decision of Mr Justice Soole in *Gascoigne v Addison Lee Ltd, UKEAT/0289/17/LA (unreported).*

21. The Tribunal upheld Mr Gascoigne's claim that he was a worker, at least when logged on to their app, and again concluded that the contract, describing him as an independent contractor, did not reflect the reality of the matter.

22. The basic facts were similar. Each courier was tracked on GPS. He or she had a radio and electronic device supplied by the company, plus a book of receipts and a branded shirt and bag. The company also arranged insurance. While logged on Mr Gascoigne was constantly tracked via GPS but he was not expected to start at any particular time. He had little option about taking a job since there was no 'decline' button on the App, and if there was a problem, such as a very heavy package or a puncture, the controller would ring to chase him up. The route was largely up to him. There was a perception that he would be refused work in future if he did not accept jobs and in reality, once logged on, he had 'limited room for manoeuvre' – he was expected to work as directed by the controller. As to pay, he was paid weekly on a piece rate for each job, whether or not the customer paid, and there was a small admin fee deducted to cover the cost of insurance. Each driver was self-employed for tax purposes. On the other hand holidays could be booked and the company boasted of the 'outstanding work conditions' on its website.

23. This case came after the Uber case, and the main ground of appeal for the company was that, unlike Uber, where in reality drivers were expected to accept jobs allocated to them, this was not the case for Mr Gascoigne. That argument was rejected given the 'limited room for manoevre' noted above.

24. Secondly there was an argument that there was no 'mutuality of obligation' and hence no underlying contract at all. The Employment Appeal Tribunal rejected this too, relying mainly (at paragraph 34) on the decision of Mr Justice Elias P. in *St Ives Plymouth Ltd v Haggerty UKEAT/0107/08/MAA* that

> "… a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided"

and that

> "We recognise that in part it may be said that the Tribunal's reasoning is

> finding the legal obligation arising out of the practical commercial consequences of not providing work on the one hand or performing it on the other. But we do not see why such commercial imperatives may not over time crystallise into legal obligations"

25. That facts of that case therefore corresponded closely with the Uber decision. Couriers were monitored closely in reality and expected to comply or face the consequences.

Conclusions

26. These two recent decisions represent a departure from the traditional view of the taxi driver as a self-employed person. It is a line of business long recognised as self-employed by the Inland Revenue, and fits very well with the usual model of such undertakings, in which an individual provides a service for a fee to the public and is responsible for their own outgoings. There is a balance of income and expenditure to be reckoned up, with tax due on the proceeds; a very different arrangement from, say, an employed arrangement, in which all of the overheads are met by the employer. No legal barrier prevents taxi drivers being retained on that sort of basis, with the company providing the vehicle, a uniform, a contract of employment, setting the hours of work, performance targets and so forth, but it can immediately be seen that an arrangement of that sort is wholly different to Mr Ristea's situation.

27. It is perhaps no coincidence that the two more recent cases in which drivers have been found to be workers arose with larger employers, making use of more modern and sophisticated technology. This has the advantage for the firm of allowing more monitoring of drivers, and as a result it can ensure that customers are picked up more quickly, in greater numbers, and so the firm can be more competitive. It allows for more standardisation in many ways, and also the operation of corporate accounts where no money changes hands with the driver. All this encroaches on the independence of the driver, and runs the risk that self-employed status may be lost.

28. At its heart however, this remains a solo activity, requiring a driver and a vehicle. The driver has to have a personal licence. He has to provide the car and meet all of the running costs, which are considerable. This will involve fuel, servicing, insurance, MOT, new tyres and occasional repairs, items which may fall due at different times of the year, making steep inroads into the driver's earnings in any given month. This is the daily reality for the driver and a major factor in assessing the nature of the arrangement.

29. There is no contractual paperwork to consider here, but it is accepted that while Mr Ristea was an Apple driver he regarded himself as self-employed, as did they. The label the parties attach to the arrangement is not determinative, but it remains relevant. Although the case presented by Mr Ristea is of an accumulation of controls or pressures leading to worker status, there is no obvious reason why the parties should not have had this view of the matter at the time, representing the traditional outlook and what are perhaps the fundamentals of the role. Whether the inroads of technology have made a change to the legal status, there is nothing obviously contrived about this view, as reflected in the self-employed tax arrangements.

30. The payment of the weekly fee of £140 is also a significant factor, not present in the Uber or Addison Lee cases. It is a very considerable amount. Even with four weeks' grace a year it is nearly £7000 per year and therefore a heavy exaction by the company. The practical effect is that it severely limits the driver's freedom to work for other companies. If he has to fund £140 per week to pay Apple, there is no point doing it occasionally or for just a day or two a week. That would not even cover the cost. So in practice Mr Ristea was an Apple driver, albeit with the possibility of picking up some other work elsewhere.

31. Mr Screech gave evidence that some drivers had up to three such arrangements, working on their own account, for another operator or, say, a local authority school run. This is not something that Mr Ristea chose to avail of but is still relevant in considering his work status. He had the opportunity. The weekly fee meant that it made more sense to work for Apple as much as possible, but the available hours were limited. A particularly hard-working driver with one shift available with Apple might still want to supplement his income elsewhere, and that is what some chose to do.

32. In the same way, some choose to have a substitute driver available, incurring the necessary cost in advance. The use of a substitute is a key point is assessing whether this was a contract to provide work personally. As first established in *Express and Echo Publications Ltd v Tanton 1999 ICR 693*, the right or obligation to provide a substitute is incompatible with such a personal obligation, leading to many such clauses being placed in contracts to avoid any finding of worker or employee status, but here there is no such contract or clause. The only barriers to providing a substitute are economic and practical, but I accept that several drivers, whom Mr Screech named, did do so in practice and Apple had no objection to his arrangement. Given the relative ease with which a driver can be taken on by them there is no reason why they would object, providing the driver and vehicle were known to them and there was no legal obstacle such as insurance. Applying *Tanton*, that finding is therefore incompatible with there being a contract of *personal* service, and so is fatal to the claimant's case.

33. Returning to the other factors however, much was made of the holiday point and that the fact that drivers were allowed four weeks off a year, although this does not seem to be such an important factor given the lack of pay during these four weeks. On a common sense basis, no one can or should work continuously without a break from one year to the next, so not to give a four week payment holiday would seem to be an unfair arrangement. Even with that modest concession the driver has 48 weeks of the year to fill with work, regardless of the effects or normal or intermittent illness, for which he simply has to accept the risk of being unable to work. Although Mr Ristea stressed the unfairness of this, it is another indication that he was contracting on his own account.

34. The last main difference with the other cases above is the fact that Mr Ristea received most of his earnings directly from the customer, which also strikes me as a very significant factor. The Uber driver or Addison Lee courier is essentially doing as instructed and receiving a pay packet each week, whereas Mr Ristea received only some money weekly – usually

offset against his fee – and pocketed the bulk of the fares directly. In the process it was his responsibility to account for them to the Revenue. Again, that is much more suggestive of a self-employed arrangement, as is the fact that his movements were not in any way monitored or controlled, whether before or during each trip.

35. I accept that there were some restrictions on his activities. He was encouraged to start for his shift promptly but this was not policed in any way and he began and ended, in rough conformity with his permitted hours, when he pleased. On a day to day level that allows considerable autonomy. There was also the tie and other uniform items. Although this was a requirement of Exeter airport, it was nevertheless an imposition. But it was also in the interests of the driver, who would otherwise not be able to take such calls, and is of a piece with the other pieces of advice or exhortation, such as to keep the car clean and tidy. These points helped the firm and they helped the driver. The uniform requirement may have been monitored more closely but is not in my view in any way fundamental to the working arrangement.

36. The same can be said for the other restrictions: the expectation that the driver will take the call without good reason, the risk of an eight minute suspension if he fails to do so, and the fact that the controller has the authority to deal with any disputes without any recourse to the driver. These may be frustrations, and impinge to some extent on the autonomy of the driver, but do not fundamentally alter the nature of the arrangement. In the same way, the prohibition on working for other operators *during a shift* seems no more than necessary, since the diversion will interrupt their service and the driver will be displaying the Apple livery.

37. Overall therefore, the close degree of dependence and scrutiny apparent in the Uber and Addison Lee cases appear to me to have been absent here, or at least not present to anything like the same degree, and the ability to provide a substitute, however infrequent and problematical in practice, is simply inconsistent with the claim to be a worker. Accordingly, and for all the above reasons, none of the complaints can succeed and must be dismissed.

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Employment Judge Fowell

Date 15 September 2018