# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr G Palmer**

**Respondent:** **Promotive Chauffeurs of London Ltd (1)**
**Prefferred (2)**

**Heard at:** London Central **On:** **7 & 8 November 2018**

**Before Judge:** Employment Judge Henderson

**Representation**

Claimant: Ms L Taft (Solicitor)

Respondent: Ms C Rayner (Counsel)

# RESERVED JUDGMENT ON A PRELIMINARY HEARING

1. **The claimant is not an employee, but is a worker under section 230 of the Employment Rights Act 1996. The claim for unfair dismissal cannot proceed but the claim for holiday pay and unlawful deduction of wages can proceed to a full hearing.**

2. **The respondent's application to amend the ET3 to allege illegality of the contract is refused.**

3. **The Tribunal will list a date for a Full Merits Hearing of the remaining claims to be heard by an Employment Judge sitting alone to be listed for one day.**

# RESERVED REASONS

**Background of the claim and Issues**

1. The claimant brought (in an ET1 lodged on 21 March 2018) complaints for unfair dismissal; holiday pay and unlawful deduction of wages. This was a preliminary hearing (listed for 2 days) to deal with the following issues:

-The employment status of the claimant (was he an employee; a worker (as defined in section 230 of the Employment Rights Act 1996 (ERA)) or self-employed?). The claimant says that he was required to submit invoices and was paid on the basis that he was self-employed but he was in all other respects treated as an employee. The respondent disputes this, saying the claimant was self-employed at all times;
- the illegality of the contract between the claimant and the respondent, was raised at a later stage by the respondent in application to amend the ET3.

## Conduct of the Hearing

2. Due to duplication in the Tribunal's listing process the Employment Judge was unable to commence the case until 2pm on 7 November. It was agreed with the parties that the claimant's evidence and that of the respondent's witnesses (namely Graham Horne (Director of the respondent businesses) who is referred to in this Judgment as Graham H; Giles Horne (Office Manager of the respondents) who is referred to in this Judgment as Giles H and Ljubo Grbovic (Chauffeur) could be heard in the remaining time along with submissions. The judgment would be reserved.

*3.* The witnesses all had written statements which were taken as their evidence in chief. In fact, the evidence and cross-examination of witnesses did not conclude until 5.10 pm on 8 November. The parties submitted written submissions and replies (totalling 52 pages) plus authorities, which have been considered in reaching this decision.

*4.* The parties had agreed the content of two bundles: a main bundle (AB) of 280 pages and a supplemental bundle of invoices (SB) of 150 pages; page references in this Judgment are to those bundles (unless otherwise specified.

## Findings of Fact

5. I shall only make such findings of fact as are relevant to determine the issues set out above.

<u>Background</u>

6. Both Respondents are chauffeur businesses run by Graham Horne (set up in 1995) which provide cars predominantly to clients in the recording industry. The first respondent became a limited company (registered number 8095567) on 7 June 2012.The second business, Prefferred (intentionally misspelt) was set up to allow for charging on a daily rate (which was being demanded by a specific customer), but whilst still maintaining the Promotive brand and charging practices for other customers. Clients are regular account holders; any ad hoc work is only

undertaken upon referral by an existing client. Clients are charged direct by the respondents, who set the relevant rates.

7. All the vehicles are owned by Promotive, but can be used by either respondent; these vehicles are then provided to the drivers (see below for details). Both respondents also share administrative staff, who are employed by Promotive.

8. There are 12 drivers currently working for both respondents: they submit invoices to the relevant respondent for work undertaken and are paid by the relevant respondent using separate accounts. The respondents say they are all self-employed. The drivers are responsible for accounting to HMRC for their income tax, which was accepted by the claimant.

9. The claimant says that he worked for both businesses from 2004 to 2006 and then again from 14 September 2009 to 2 February 2018. This is not disputed. In between these periods the claimant was employed by another car company as a Chauffeur from 2007 to 2009. There were copies of his employment contract (pages 184-193) in the bundle and the claimant said that he was familiar with the provisions of such employment contracts and understood the differences between the practicalities of employment/self-employment. The claimant is not a licensed operator (he had a private hire licence – pages 268-9) so is not permitted to drive on his own account, but only through a licensed company (such as the respondent).

Equipment

10. The respondent owned the vehicle which was provided to the claimant and was responsible for its insurance and general maintenance/servicing, but the claimant was responsible any parking fines; any specific damage/wear and tear and fuel. The claimant said that he took the vehicle to the garage for servicing every six months, but was always told where to go and the respondent paid the bills. This was not disputed. The respondent also accepted in cross-examination that the claimant was paid for the time which he spent in taking the car for maintenance.

11. The claimant generally kept the car at his home and was allowed to use it for reasonable personal use within the M25. Giles H accepted in his evidence that the respondents tracked the vehicles and the claimant had been asked on occasion to explain his movements. If the claimant was unable to carry out a particular job, other drivers would be allocated to carry out the job and could use the car allocated to the claimant if necessary. They would note any minor damage (e.g. scratches etc) to the vehicle before it was handed over. This did happen but not very often.

12. If there were no drivers available for a particular job the respondent did have arrangements to use sub-contractors. The sub-contractors owned

their own vehicles and their rates meant that the respondents would make less profit. As a result, the sub-contractor route was regarded as something of a "last resort".

The Contractual position

13. Both parties accepted that there the contract/arrangement between them was never expressly set out in writing at any time. As a result, there were several disputes as to what had been orally agreed between the parties with regard to the various terms of the contract, which are set out in this Judgment where they are relevant to the Issues.

14. I was referred on several occasions to a document which was described as the "Driver Rules" set out at page 197 AB. This document was dated 17 March 2004 and listed specific requirements for drivers when chauffeuring clients: specific magazines and bottled water brands were required to be supplied in the vehicle as well as the general cleanliness and appearance of the vehicle. Drivers were told to ensure they contacted clients before collection and also to be punctual. Confidentiality with regard to clients was also stressed.

15. Dress code is specified as "suit and tie at all times turtle neck or roll neck are acceptable polo shirts are not. Festivals or similar would be an exception." However, in his oral evidence Graham H explained that things had changed considerably since the document was written in 2009, but the respondents expected drivers to dress appropriately for the relevant client and occasion.

*16.* Paragraph 4 of this document stated, "*Time off outside your weekend off i.e. doctors etc must be booked through the office first come first served basis only one driver to be off at one time*". Paragraph 8 said, "*The driver is only paid when we are paid (ideally within 30 days but not always) if you leave or your employment is terminated this rule still applies."*

17. The respondent said that this was by way of guidelines only, but the evidence of both parties suggested that it was more than that and the specific paragraphs 4 and 8 are clearly more in the nature of contractual terms than guidelines as such.

18. The claimant said that he had signed a copy of the "Driver Rules" when he joined in 2004, but did not recall being shown a further copy when he returned to the respondents in 2009. He was referred to the top left-hand corner of the document which contained a box with his name and a signature and the date 14 September 2009. The respondent said that this indicated that he had been given the document as at that date. The claimant accepted that the signature looked like his, but was adamant that

he would not have signed a document dated March 2004 in 2009. He said he believed that the signature may have been falsified.

19. However, the claimant accepted that he had been given much of the information contained in that document verbally. He accepted that the rules were clear that drivers would be "dismissed" if they did not do what they were told by Graham Horne, who, the claimant said, "controlled" them. The claimant also pointed out (which was confirmed by Graham H) that paragraph 8 was not accurate as regards his own arrangement with the respondent. Where paragraph 8 applied (i.e. drivers were only paid when the respondents were paid by the client) the split of the money received was 50/50 between the respondent and the driver. However, due to the claimant's financial problems Graham H had agreed that he would be paid before the client had paid the respondent, but the relevant split to the claimant was 60% to the respondent and 40% to the claimant, to allow for the cash-flow disadvantage to the respondent. This arrangement was unique to the claimant.

Control – Booking System- Mutuality of Obligations

20. Graham H said in his witness statement that bookings were made in advance by email; via the website or by telephone. The requests (called "dockets" – examples at pages 235b-h) are inputted to the booking system and allocated to drivers who are available by email. Drivers confirm receipt of the job and acceptance of the assignment. There is as much relevant information as possible on the job sheets provided to a driver. The respondents said they attempted to allocate the work as fairly as possible, subject to specific client requests etc. If the driver refuses the job it is reallocated. The respondents said that drivers choose when they are available and let the respondents know in advance. This was disputed by the claimant.

21. The claimant said that he had to be available (which he described as being "on-call") to drive 24/7 other than every third weekend off. This was confirmed by Mr Grbovic. The claimant made much in his evidence of how he had to be available for 24 hours a day and even had to call the respondent to say that he was planning to go the cinema (page 247). However, it was accepted by the claimant that there was no guarantee of pay or work to the drivers during this availability period. I note that whilst the claimant's evidence may be accurate about calling to say he was going out etc, this would be because he would not wish to miss a potential call about the offer of work, which may be offered to another driver if he did not accept it.

22. Drivers can work elsewhere if they wish to, which was confirmed by Mr Grbovic who uses his own vehicle and works with Uber. The claimant did not choose to work elsewhere. It was also accepted that there was no right of substitution for individual drivers. If a driver did not accept a job, it was

up to the respondent as to whether another of their drivers would be used, or possibly a sub-contractor.

23. The respondent said that the claimant often refused jobs and that there was no obligation or penalty against a driver for such a refusal – other than the loss of an opportunity to earn money. The claimant said that he had no choice and was expected to do all jobs which were allocated to him. However, the documentary evidence of the dockets and emails from drivers responding to those dockets, does not support the claimant's assertion. Further, the claimant accepted in his own evidence that the respondents would reallocate work if he said he did not want to do a job; but he did maintain that if no one else was available he would be made to do the work.

24. Mr Grbovic said that it was open to a driver not to accept work offered but if he accepted then the driver was expected to do the job, unless he was ill or there was an emergency. The respondent said that much of this was due to business efficacy, as they would have made allocations for other drivers and so may not have other drivers available if a driver decided not to do the job at the last minute. I accept the respondent's evidence on this point.

25. Both Graham H and Giles H accepted that they may have attempted to "persuade" the claimant on several occasions to take on specific jobs as he may have been requested by the client or because they were short of drivers and did not want to use a more expensive sub-contractor. They also accepted that this could have been perceived by the claimant as being put under pressure, but both denied ever making any threats or forcing the claimant to take on work when he did not wish to. The claimant said in his oral evidence that Giles H had threatened him with dismissal saying that he would take the claimant's keys back if he did not take on work.

26. This allegation was put to Giles H in cross-examination, who said that if he had that (which he could not recall) he would have meant that if the claimant could not do the particular job, he would have to allocate another driver and so needed the claimant's car. He said that sub-contractors' vehicles were not always of the same quality as the respondent's fleet of cars. He also said that in any event he would not deal with terminating drivers' contracts so he would have made such comments to the claimant.

27. As there is a dispute in the parties' evidence, I need to decide whose evidence is preferred. Based on the context of all the evidence I have heard as regards the working arrangements, I find on a balance of probabilities, that Giles H's evidence is preferred and that the claimant was not threatened with dismissal.

Invoices

28. Clients are charged by the company via their accounts, which could include extra expenses for parking; water etc. The drivers then invoice Promotive or Prefferred for their fees. They invoice for the agreed amount less a percentage for administration charges. The invoices are checked by the respondents and paid by BACS.

29. There was detailed evidence presented with regard to numerous invoices submitted by the claimant, upon which I do not intend to make findings of fact. The claimant accepted that generally the invoices indicated which days he had worked, though he also accepted that he often made mistakes and had to amend his invoices as advised by the respondent. The respondents' administration staff helped the drivers and support them. The claimant's invoices had to be checked frequently as he made mistakes on the amounts; dates; invoice numbers.

30. However, the respondent also accepted that Graham H's evidence (at paragraph 26 of his witness statement) as to dates on which the claimant did not work was not accurate (other than the period from 2 December 2017 to 22 January 2018).

Holidays

31. The claimant said that he had been told orally when he commenced work in 2009 that he had four weeks' holiday a year. The respondent denied this saying that there was no specified limit for drivers' holiday. Mr Grbovic (one of the respondent's witnesses) accepted in his oral evidence that his holiday was 4 weeks a year. I find that the respondent did limit the drivers to 4 weeks' holiday per year.

32. The claimant said he had to book holiday in advance and it was refused if it was a busy time. This was also confirmed by Mr Grbovic, though he said that the respondents had been flexible about the dates for his holidays because of his family commitments. This assertion by the claimant is also supported by the "Drivers' Rules" document, which says that time off (outside of the weekend off) must "be booked" and is given on a "first come first served basis only one driver to be off at one time".

33. Graham H said in his evidence that drivers were encouraged to take breaks during the quiet periods of the year as work can be seasonal. I was also referred to documents about drivers' holidays over the 2016/17 Christmas and New Year period (page 234) which provided a rota allocating time off either over Christmas and Boxing Day or on 1 and 2 January. This was set by the respondent. There was also an email at page 236 from the respondent which cancelled weekends off for specified periods in 2017 (namely for key music events/festivals).

34. Based on this evidence I prefer the claimant's evidence and find that the respondent did set a limit on holidays to be taken and that these had to be agreed in advance.

Rates of Pay

35. The respondents set the pay rates and told the claimant what to claim in his invoices. For Promotive – he was paid a fixed rate for airport jobs but otherwise an hourly rate (including excess time on an airport job). For Preferred – he was paid a fixed price airport job or a daily rate but with a further hourly rate if the job lasted over 12 hours.

Integration

36. It was accepted by both parties that drivers sometimes worked in teams and the claimant had acted as a "lead driver": the drivers were given contact details so they could communicate; they had "Promotive" email addresses and carried out a co-ordinating role between the drivers and the client. Graham H said that the claimant had been an excellent lead driver. Mr Grbovic also referred to the drivers and the respondents acting as a team with reference to the allocation of time off for matters such as medical appointments/ school visits etc.

37. I do not intend to make findings of fact with regard to the Christmas card or the invitation to social events.

Tax

38. The claimant accepted that he was responsible for accounting to HMRC for his tax and confirmed that he has not filed any tax returns since 2011. The claimant also accepted that due to financial problems and other family matters (his marriage had broken down; his brother was ill and his father had died) he had "buried his head in the sand". He had also been suffering from depression. He said that he was not avoiding his tax liability, which he knew he had to pay. The claimant had been visited by HMRC in 2016. They had said that they would follow up with a return visit, which they had not done. He had not contacted them himself. He had spoken to an accountant about a month ago and was waiting for HMRC to contact him. He said that he was worried about the amount of tax he may owe and he also feared a possible prison sentence. I noted that the claimant became aggressive and hostile when the subject of his tax liability was addressed.

**Conclusions**

The relevant law

39. The relevant statutory provision is section 230 ERA. This provides the material definition of employee and worker for the purposes of that Act:

*(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

*(3) In this Act "worker" (except in the phrases "shop worker" and "betting 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 of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.*

*(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*

*(5) In this Act "employment"— (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and (b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.*

40. I was also referred by the parties' representatives to the following relevant case law:

- **Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497**
- **Autoclenz v Belcher (Supreme Court) [2011] ICR 1157**
- **Pimlico Plumbers v Smith [2018] ICR 1511**
- **Uber v Aslam [2018] ICR 453**
- **Addison Lee Ltd v Lange and others UKEAT/0037/18/BA**

41. Despite the extensive case law on this question of employment/worker status, it is recognised that such cases are fact sensitive and I summarise below the key finding of facts.

Summary of facts

42. There is no documentation evidencing the relationship between the parties in this case, unlike much of the case law on this topic. The only relevant document is the "Drivers Rules" dated March 2004, which the claimant acknowledged being aware of (though he denied signing it in 2009) and which Graham H acknowledged was extremely out of date. Therefore, the terms of the agreement between the parties must be ascertained from the oral evidence of the witnesses and other documentary evidence where available.

43. I am also mindful when carrying out this exercise of ascertaining the terms of the agreement between the parties from the circumstances of the case, of the purposive approach set out in **Autoclenz.** To this extent the intention of the parties is relevant and I find (on the evidence before me) that the parties did not intend to create a contract of employment.

44. The Drivers' Rules set out specific (often practical and common sense) standards for the provision of cars and services to clients, to that extent they indicate a reasonably high level of control by the respondent in the way the drivers' carried out their work. However, they can also be read as a list of standards/requirements which the respondents insist on providing for their clients and which any service-provider must meet. I do not find that these "Rules" are sufficient to establish control to the extent required for the purposes of an employment relationship.

45. Based on the evidence presented to the Tribunal, I have found (as set out above) that whilst the car used by the claimant was owned by the respondent, he was offered specific jobs by them which he could (and did on several occasions) refuse. I have found that he was available for work (other than every third weekend) and could be called in theory at any time: "24/7" as he described it. However, I do not accept the claimant's description of being "on call". These were periods when if work came up he would be offered it and would generally be expected to accept it – but could not be forced to do so. I have also found that if he had accepted the work the respondent would (not unreasonably) expect him to do that work, unless there was a good reason or emergency. This is for understandable business efficacy reasons.

46. If the claimant did not accept the work, the respondent would allocate it to another driver, or if there was no availability could use a sub-contractor. This was not the preferred option as it was more expensive for the respondents. The respondent could require the claimant to "swap" cars with other drivers if necessary. The claimant could not choose a substitute to carry out the job.

47. It was understood by both parties that the claimant would be responsible for accounting to HMRC for his income tax. This was accepted by both parties. The claimant had due to his own personal and financial problems last paid tax in 2011. He accepted that he had committed offences and may be liable to penalties and other consequences.

48. The respondent limited the amount of holiday allowed to their drivers to 4 weeks per year and required drivers to agree that holiday in advance with the respondents so as to ensure adequate availability of drivers. During busy periods such as music festivals etc holiday and weekends off were cancelled, with advance notice being given to the drivers.

49. The drivers were considered and were treated as a team in terms of their availability to do the work but they rarely met or communicated as a group and were not based in a specific location.

Is the claimant an employee?

50. There was no written contract between the parties at any time. The claimant said in his oral evidence that he believed he was an employee as far back as 2012, but he did not say anything to the respondents to indicate this view. Further, he had been an employee with another company from 2007 to 2009 and was aware how this worked and how an employment contract looked. The claimant was also fully aware of the difference in tax status between an employee and someone who was self-employed and never sought to challenge or alter this arrangement with the respondent.

51. I have considered the requirements set out in **Ready Mixed Concrete** for an employment relationship; namely the provision of work for a wage; a sufficient degree of control and all other provisions being consistent with a contract of employment. The claimant would be paid for the work he did, but I have not found (see above) that the was under a sufficient degree of control to fall within the **Ready Mixed Concrete** test. As regards the third limb of the test I do not find that other provisions were consistent with a contract of employment. For example, I heard no evidence about Disciplinary/Grievance processes or any appraisal mechanism. The fact that although he was available to take work, he could and did refuse jobs does not sit with the concept of mutuality of obligation for an employment contract. Also the level of integration of the drivers generally was not so as to suggest an employment contract.

52. As stated above, I do not find that the parties intended to create an employment relationship. I find that the claimant is not an employee within section 230 ERA.

Is the claimant a worker?

53. Based on the findings of fact, in this case there was a contract (oral) whereby the claimant did agree to perform personally driving services for the respondents. There was no right of substitution and there was no evidence presented to me that the claimant was carrying out a business in the sense that he was carrying out that work for the respondent as a client or customer. He did submit invoices, but this was a mechanism agreed with the respondent and the claimant was frequently advised by the respondent about the content of his invoices. The evidence showed that he did no work for any other organisations. In this regard, he differed from Mr Grbovic who also worked for Uber.

54. I have also found that the claimant was not obliged to accept the work offered to him but once accepted he was expected to carry it out. I have also found that the claimant was required to agree his holiday dates with the respondent in advance and was also limited to 4 weeks' holiday per year. The Working Time Regulations 1998 relating to holiday are applicable to workers as well as employees.

55. I was referred by both parties' representatives to the recent **Uber** and **Addison Lee** cases. Other than the fact that both those cases involved drivers, the factual matrix of those cases is very different from the case before me, not least as both those case involved detailed express contractual provisions which were construed by the Tribunal and found not to reflect the parties' relationship.

56. I was also referred to **Pimlico Plumbers**, (which had more factual similarities with the current case). The claimant was required to keep himself available for work and to book holiday in advance; he had to comply with various "Rules" and a dress code and failure to do so could lead to termination of the arrangement and it was understood that he would account for his income tax to HMRC direct.

57. In considering **Pimlico Plumbers** the respondent submitted that the right to substitute (or not) is not relevant in this case when assessing the test set out in section 230 "to do the work personally". I disagree. I find that the claimant was expected on the basis of the oral contract terms and those terms established by the conduct of the parties, to do the work himself. This was accepted by the respondents' witnesses. If he could not do the work, they would find another driver or subcontractor of their choice to carry it out. This indicates a requirement to do the work personally.

58. On the basis of the factual evidence before me, I find that the claimant has satisfied (on the balance of probabilities) the test set out for a worker in section 230 ERA.

Illegality

59. As pointed out in both parties' submissions this is an area which is fraught with difficulty and which recent cases have done nothing to resolve with any certainty.

60. In the case of **Hall v Woolston Hall [2001] ICR 99**, which would appear to remain the main authority on employment matters (though it involved a discrimination case), the key factors for a contract to be illegal were:
    -The contract was entered into with the intention of committing an illegal act;
    -The contract is expressly or implicitly prohibited by statute;
    -A contract lawful when made, is illegally performed and the party knowingly participated in that illegal performance.

61. On the facts in this case, I do not see that any of those factors are present. The first and second factors are clearly not relevant here. The parties' intention was always that the claimant would account to the Revenue for his tax liability. He did not do so, arguably for understandable personal reasons. His conduct in failing to do so was and is, an offence and he may well face penalties for his failure to do so, but that does not mean that the performance of the contract was rendered illegal. The respondent's application to amend the ET3 to allege illegality is refused.

Employment Judge Henderson

Date 10 December 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

12 Dec. 18

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FOR THE TRIBUNAL OFFICE