EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Cristian Dumitrescu	AND	Apple Central Taxis Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 6 August 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mr A Famitumi, Peninsula

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. This is the judgment following a preliminary hearing to determine the employment status of the claimant. In this case the claimant Mr Cristian Dumitrescu has brought claims alleging discrimination on the grounds of his race, and for accrued but unpaid holiday pay. The claims are denied by the respondent. This tribunal's jurisdiction to hear these various claims turns on the claimant's employment or worker status.
2. I have heard from the claimant, and I have heard from Mr Steve Screech, the respondent's General Manager, on behalf of the respondent. I was also referred to three short unsigned statements from each of Mr Ben Evans, Mr John Comer, and Mr Nigel Clift. Ordinarily the tribunal would only attach limited weight to these because they were not present to be questioned, but the claimant did not dispute their evidence.

3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent Apple Central Taxis Ltd is a taxi company based in Exeter. It has a small number of employees, including a Team leader, an Office Manager, and an Office Supervisor, as well as Mr Screech the General Manager. Otherwise it has approximately 250 drivers all of whom are engaged on a self-employed basis.
5. The respondent's systems and working practices are these. It markets and advertises its business as a taxi company, and to a lesser degree the hire of more luxury cars for events such as weddings. It engages drivers on a self-employed basis by inviting them to pay a weekly fee in exchange for allowing them onto the respondent's computer system which then allocates them introductions and bookings. The weekly fee is referred to as the "circuit fee". The respondent has a computerised system to which drivers are given access in exchange for the weekly fee by means of a smart phone app, referred to as the driver's PDA. The driver can choose to download the PDA on his or her personal smart phone, or a second smartphone obtained for that purpose. The driver would use the PDA to log on and log off at the start and end of each shift. The company's software allows the driver's position to be monitored, so that customers can be allocated to the driver based on who was nearest and/or who had been waiting for a taxi the longest. The respondent does not dictate the required route to any driver, and the determination of the route is up to the driver and his or her customer.
6. The respondent does not object to its drivers working for other companies. It is not normally necessary for the respondent's drivers to look for work elsewhere because the respondent is the busiest taxi company in Exeter and work is constantly available. However, some of the drivers do have regular school runs and other regular contract work for other third parties to which the respondent does not object. Each of Mr Evans, Mr Comer and Mr Clift confirmed in their short statements that they regularly do driving work for others, particularly a daily school run and for Dartline coaches.
7. The weekly fee of £140, referred to as a "circuit fee", entitles the driver to be on line for six shifts of up to 12 hours. The respondent would generally allocate drivers into one of three shifts (early, middle and late) to ensure that it could meet demand across a 24-hour period.
8. Each car is allocated a number on the system, and as most drivers only have one car it is easy to track each driver against that car. However, some drivers have more than one car, in which case the different cars are given a different number. In addition, some drivers occasionally wish to let substitutes or replacements drive their car (for instance when they are on holiday) in which case the normal practice is to ensure that the replacement driver has a separate PDA app on his or her smartphone.
9. The respondent takes no money other than the weekly circuit fee which is £140 per car inclusive of VAT. All cash takings are retained by the driver. Where the respondent has arranged "contract jobs", that is to say specifically priced jobs such as executive or airport transfers, the full cost of that job is paid to the driver through the PDA app.
10. As explained further below the claimant had two cars. He has argued that there was no right of substitution because his PDA was personal to him on his personal smart phone, with his personal bank details and so on, which meant that he could not pass it to a relief or substitute driver. That may have made it inconvenient for the claimant to seek to delegate the driving on one of his two cars, but I accept the respondent's evidence that other drivers who wish to delegate duties to another driver generally set up another PDA on a separate smartphone. This is exactly what one driver namely Mr Paul Tuck repeatedly does. He generally takes three months off every year but makes a personal arrangement with a substitute relief driver to use his car during his absence, and that driver does so in Mr Tuck's car but using his own separate PDA. Mr Tuck remains responsible for paying the circuit fee £140 per week, and any contract jobs are paid to Mr Tuck's bank account, but the relief driver retains the cash and they make their own arrangements with regard to the hire of Mr Tuck's car and any contract jobs. The respondent remains content with this

arrangement provided that the necessary regulatory requirements are met, because it wishes to have as many cars available for its customers to maintain its service.

11. Each driver is personally responsible for all costs in connection with owning and running his car or cars. This includes purchasing the car, insuring it, paying the fuel, paying the road tax, paying for MOT tests and certificates, and paying for tyres and other running expenses. In addition, each driver has to obtain and maintain his or her private hire licence and in that respect deals directly with the local Council. The respondent checks that each of the drivers owns and insures the relevant car or cars, or is otherwise authorised to drive, and has a private hire licence in place, and the respondent does not object to any driver delegating or substituting the driving duties provided these regulatory requirements are met.
12. In addition, the respondent has certain requirements of its drivers contained in a Drivers' Handbook. There are 11 sections to this, the first of which is the Code of Conduct, and the preamble states: "The following has been put in place to promote the image of our business and to improve the level of service we provide - serious breaches of this code will be subject to investigation." This includes requirements to behave in a civil, orderly and non-discriminatory manner; not to work any shifts in excess of 12 hours; to attend jobs punctually; to maintain vehicles in safe and satisfactory condition, and so on. The handbook also included sections on Customer Service; Equality and Disability Awareness; Dress Code; Vehicle Standards; Airport and Station pickup; Weekly Rent; Charging; Breakdown, Accidents and Emergencies; Office and general information; and Holiday Entitlement.
13. The Dress Code requirements are to be clean, and neat and tidy. Although the respondent has available ties with its logo on, and the Dress Code requires a collared shirt and the wearing of the respondent's tie, not all drivers comply with this requirement and it is difficult to enforce. Where drivers are undertaking an executive transfer, they are required to dress smartly in a suit, but not necessarily with the company tie.
14. The Holiday Entitlement suggests that its drivers are allowed to leave the company system and are allowed four weeks per year without having to pay the respondent's weekly circuit fee, on arrangement with the office.
15. The respondent also has a requirement for each driver to display two magnetic signs, one on each side of the car, so that customers would know that it was a taxi supplied through the respondent's business. These were provided by the respondent.
16. There was no disciplinary procedure in the Drivers' Handbook, but the respondent did disapprove of drivers refusing allocated jobs. Drivers could refuse jobs if they were out of their area, but otherwise if they were on line they had to accept the job. Failure to do so initially might result in them being taken off-line for up to 10 minutes, with the threat that the self-employed relationship might be terminated for repeat offenders.
17. That is the relevant background to the respondent's normal relationship with its drivers. In the specific case of the claimant, he joined the respondent in 2017. He accepts that he did not sign their standard terms and conditions of employment, and the claimant does not assert at any stage that he was an employee of the respondent. He was given the usual short induction by Mr Screech, which included the respondent's required standards of performance and dress code in the Drivers' Handbook. The necessary arrangements were made for the claimant's PDA app on his smartphone. It was specifically agreed between Mr Screech and the claimant that he would be self-employed and responsible for all of his tax and National Insurance payments as a self-employed driver. That was how the relationship continued, with the claimant paying his tax and National Insurance on a self-employed basis without reference to the respondent.
18. The claimant paid his £140 weekly circuit fee, and through his PDA app was allocated the usual customer driving jobs for cash. He retained the cash from these payments. He was also one of the respondent's executive drivers, and undertook contract work. These jobs are paid to the respondent, but were then paid in their entirety on to the claimant. The claimant chose when he wanted to work and repeatedly tried to work more than a 12 hour shift, at which stage the respondent would log him off the system because of driver and

customer safety requirements. The claimant did not wear a company tie, but did wear a smart suit and his own tie when he was undertaking executive jobs.

19. The claimant provided his own car and equipment and maintained and ran the car at his own expense. The only equipment provided by the respondent was the magnetic signs. The claimant originally had just a BMW 5 series car, which was registered to the respondent's system through his PDA. He subsequently purchased another car, namely a white Maserati, which was a luxury car which was available for specific contracts including weddings. The claimant originally did some work for an independent third-party namely Star Cars, who promoted the hire of his Maserati on their website, and he occasionally undertook work for them. The respondent had been advertising the Maserati on its website as well, but Mr Screech decided to stop doing this because it was of no benefit to the respondent company. In addition, the respondent was unable to ensure whether the Maserati had been booked out by Star Cars or anyone else when it was offering the car on its own website. The claimant asserts that Mr Screech instructed him that he was unable to work for any third-party and that he had to remain effectively under the respondent's control. Mr Screech's evidence is that he told the claimant that the respondent could no longer advertise potential wedding contracts using the Maserati on the respondent's website if the same was happening for Star Cars for fear of leading to double bookings. I accept Mr Screech's evidence as being the more probable version of events, particularly as some 15 to 20 of the respondent's drivers regularly do work for independent third parties, as confirmed by Mr Evans, Mr Comer and Mr Clift.
20. One of the claimant's friends and fellow drivers was Mr C Ristea. He terminated his engagement with the respondent, and issued Employment Tribunal proceedings for unfair dismissal. A preliminary hearing took place on 14 September 2018 to determine his employment status. At about that time the claimant had been threatening to leave the respondent, and did so shortly afterwards. He started driving for a competitor namely Exe Cars, but when they proved less busy than the respondent the claimant asked Mr Screech if he could return to the respondent's system, but Mr Screech declined. The claimant then issued these proceedings against the respondent alleging race discrimination and failure to pay accrued holiday pay on 29 November 2018.
21. Having established the above facts, I now apply the law.
22. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.
23. Part 5 of the EqA is limited to those in "employment" by reason of section 83 EqA, which defines employment under section 83(2)(a) as "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."
24. The claimant's claim for accrued but unpaid holiday pay is brought under regulation 14 of the Working Time Regulations 1998 ("the Regulations"). The Regulations apply to workers, rather than just employees. The definition of "worker" for the purposes of the Regulations is in Regulation 2. A 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. (This is effectively also the test in section 230(3)(b) of the Employment Rights Act 1996, and a worker who satisfies this test is usually referred to as a "limb (b) worker").
25. I have considered the following cases: Autoclenz Ltd v Belcher and Others [2010] IRLR 70 CA and [2011] UKSC 41; Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497; Pimlico Plumbers Ltd & anor v Smith [2017] EWCA Civ 51; Uber BV and Others v Aslam and Others EWCA 2018; Addison Lee Ltd v Lange and Others UKEAT/0037/18/BA; Nethermere (St Neots) Limited v Gardiner [1984]

ICR 612; Express and Echo Publications Ltd v Tanton [1999] IRLR 367; and Hospital Medical Group Ltd v Westwood [2012] IRLR 834 CA.

26. I have also considered the judgment of Employment Judge Fowell in the case of Mr C Ristea v Apple Central Taxis Ltd (the same respondent as in this case) under Employment Tribunal reference case number 1401371/2018. I am not bound by that decision which is one of first instance. Nonetheless it is worth noting that Employment Judge Fowell determined that the claimant's friend Mr Ristea, who was also a taxi driver engaged by this respondent, was genuinely self-employed, and was not an employee for the purposes of his unfair dismissal claim, and was not a worker for the purposes of his other claims.
27. The claimant does not assert that he was ever an employee under a contract of service with the respondent. Rather the claimant asserts that although he was genuinely self-employed, he was "in employment" for the purposes of the EqA, and a "worker" for the purposes of his accrued holiday pay claim.
28. I am aware that there have been a number of recent authorities dealing with the "gig economy", which includes cases involving taxi drivers. In my judgment these cases are not on all fours with this current case involving the claimant, simply because the claimant had the right to delegate and to appoint a substitute to drive on his behalf. It was not an entirely unfettered right, because the respondent needed to check that the substitute was authorised to drive and had a private hire licence, and access to the respondent's software system through a PDA would be required. Provided these important but otherwise minimal regulatory requirements were met, and the claimant continued to pay the circuit fee, the claimant was entirely free to appoint a substitute and to make his own financial arrangements by agreement with the substitute on how that substitute would be paid. Bearing in mind the reality of this situation, and the Tanton case, it cannot be said that the claimant worked under a contract personally to do work, or a contract whereby the individual undertakes to do or perform personally any work or services.
29. I have considered the case of Pimlico Plumbers Ltd and Anor v Smith [2018] IRLR 872 SC in which the Supreme Court agreed that the Employment Tribunal was entitled to conclude that a plumber who worked under a contract describing him as an independent contractor was a worker as defined in section 230(3)(b) ERA and WTR and in employment for the purposes of the EqA. The Supreme Court upheld the previous findings that the claimant's only right of substitution was that of another PP operative. Thus, the substitute had to come from the ranks of those already bound to PP by an identical suite of heavy obligations. This was the converse of a situation in which the employer is uninterested in the identity of the substitute, provided only that the work gets done. The ET was therefore entitled to conclude that this limited right of substitution was not inconsistent with an obligation to perform service personally. The claimant was therefore a limb (b) worker unless it could be said that PP's status was, by virtue of the contract, that of a client or customer of the claimant's.
30. In my judgment that case can be distinguished from this current case because the claimant had a right to delegate the driving of his cars, and a clear right of substitution, which was unfettered, save for the respondent checking that regulatory requirements were complied with. It was not dependent upon the substitute already being a fellow worker of the respondent's, or someone also complying with an identical suite of heavy obligations. I do not accept the claimant's argument that there was no right of substitution because his PDA was personal and it was therefore impossible to allow another driver to log on to the system through the PDA. Other drivers appointed substitutes by arranging for them to have the PDA app on a different smart phone.
31. I have also considered the case of Addison Lee Ltd v Lange and Others in which the EAT upheld the Employment Tribunal's decision that private hire drivers were workers and so were entitled to be paid annual leave and the national minimum wage. Although the contractual documentation stated that the drivers were under no obligation to accept work, and that Addison Lee was under no obligation to offer it, the tribunal was entitled to adopt a "realistic and worldly wise" approach and find that this did not reflect the reality of the working arrangements. The ET was entitled to ignore the contrary contractual provisions under the principle established in Autoclenz.

32. In my judgment that case can be distinguished from this current case, again because the claimant had the right to delegate and to appoint a substitute. This current case is not one which turns on the point of mutual obligation and whether the claimant was entitled at any stage to refuse work.
33. Finally, I have also considered the recent judgment of the Court of Appeal in Uber BV and Others v Aslam and Others. Again, in my judgment that case can be distinguished from this current case because the claimant had the right to delegate and to appoint a substitute. In addition, in this case it cannot really be said that when the claimant was driving a customer, he was therefore working for the respondent. Rather, the position was that in each case he was working for the relevant customer, who paid the claimant directly in cash. On the less frequent occasions he drove a customer on a contract job, the contractual position was that the customer paid the respondent direct, but the then repaid the claimant in full. The claimant was clearly working for himself. All of the money earned by him, whether in cash or a contract job, was retained or recovered by him without any deduction from the respondent. On payment of the weekly circuit fee he took a risk as to whether he would ever make a profit, which depended on him recovering fees in excess of the circuit fee and the running expenses of the car. He was genuinely self-employed with a clear right of substitution.
34. Put another way, I apply the test approved by the Supreme Court which has upheld the Court of Appeal in the Autoclenz decision. The approach to be adopted where there is a dispute (as in this case) as to an individual's status is as follows. In short, the four questions to be asked are: first, what are the terms of the contract between the individual and the other party? Secondly, is the individual contractually obliged to carry out work or perform services himself (that is to say personally)? Thirdly, if the individual is required to carry out work or perform services himself, is this work done for the other party in the capacity of client or customer? And fourthly if the individual is required to carry out work or perform services himself, and does not do so for the other party in the capacity of client or customer, is the claimant a “limb (b) worker” or an employee?
35. I adopt and apply this test in that order. First, as to the terms of the contract, these are set out in the findings of fact above. The contractual terms or factors which point to employment status include these: the claimant received some of his pay at least direct from the respondent; he was required to engage with the respondent through his PDA app; he was expected to wear smart uniform; he was expected to take the jobs he was allocated, and if he refused to take a customer for good reason he could be suspended; and he was required to liaise with the office with regard to his holiday periods.
36. The contractual terms or factors which point to self-employed status as an independent contractor on the other hand include these: he regarded himself as self-employed and paid tax and National Insurance on a self-employed basis; he provided his own cars of his own choice and was responsible for all of the running costs in connection with these; he had to obtain and maintain his own private vehicle hire licence; he paid a flat weekly circuit fee of £140 in return for which he had the opportunity to work, and the risk of recovering this was entirely his; if he was ill and unable to work then he would be unable to recover the circuit fee; although he was able to book off the system for up to four weeks holiday every year, he did not receive any holiday pay; he could long on and off during his shift if he wished; he was free to choose his own route for each customer; there were no procedures for disciplinary action, and there was no requirement or expectation of any notice provisions.
37. As to the second limb of the Autoclenz test, I find that the claimant was not contractually obliged to carry out services personally. There was no "irreducible minimum" of employment status. There was an unqualified right to appoint a substitute at his own expense, even though the claimant had not chosen to do so. On balance I find that there was no "irreducible minimum": there was no mutuality of obligation; no requirement for personal service; insufficient direct control; and other factors inconsistent with a contract of service.
38. In addition, having found that the claimant was not contractually obliged to carry out services personally, the third and fourth limbs of the Autoclenz test are no longer relevant. Where the claimant had the right to delegate and to appoint a substitute, for this reason

there was no contract "personally to do work" for the purposes of section 83 EqA, and no contract "whereby the individual undertakes to do or perform personally any work or services for another party" for the purposes of Regulation 2 WTR or section 230(3)(b) of the Act. I therefore find that the claimant was not "in employment" for the purposes of his race discrimination claim, and was not a limb (b) worker for the purposes of his accrued holiday pay claim.

39. For the purposes of rule 30(6) of the Employment Tribunals Rules of Procedure, the issues which the tribunal identified as being relevant to the claim are at paragraph 1; all of these issues were determined; the findings of fact relevant to these issues are at paragraphs 4 to 20; a concise statement of the applicable law is at paragraphs 21 to 26; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 27 to 38.

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Employment Judge N J Roper

Dated 7 August 2019