Appeal No. UKEAT/0219/18/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 3 September 2019
Judgment handed down 5 December 2019

Before

HER HONOUR JUDGE STACEY

MS G MILLS CBE

MRS C BAELZ

STUART DELIVERY LIMITED APPELLANT

MR WARREN AUGUSTINE RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR BRUCE CARR QC (of Counsel) Instructed by DLA Piper UK LLP 160 Aldersgate Street Barbican, London EC1A 4HT
For the Respondent	MR W AUGUSTINE (Respondent in Person)

SUMMARY

JURISDICTIONAL POINTS – Worker, employee or neither

CONTRACT OF EMPLOYMENT – Whether established

The Tribunal had not erred in concluding that when Mr Augustine, a delivery courier, was undertaking fixed hours "slots" for the Respondent, Stuart Delivery Limited, he was engaged in the capacity of a worker. During the slot the Claimant was under the control of the Respondent, was unable to leave the zone he had agreed to operate in and required to undertake the deliveries offered to him in return for a guaranteed hourly wage. He could not hold himself out as available to other delivery companies during the period (typically 3 hours) of a slot.

The Tribunal had correctly considered the arrangement whereby the Claimant could release a slot he had signed up to back into the pool of approved couriers via the Staffomatic app. Its finding that the Claimant would only be released from the obligation of performing the slot himself if another courier signed up for it and that he had no control over whether, or who, picked up the slot he had released, did not amount to a right of substitution, or not one that was inconsistent with limb (b) worker status, was correct. Although there was some confusion as to why the facts in this case fell within category 5 of the situations identified by the Sir Terence Etherington MR in **Pimlico Plumbers v Smith** CA [2017] IRLR 323, paragraph 84, the overall conclusion was correct. **Pimlico Plumbers v Smith** applied and followed.

The Tribunal's conclusion that the Claimant was not in business on his own account and the Respondent was not a customer of the Claimant's delivery business could not be faulted on their findings of fact. **Jivraj v Hashwani** [2011] UKSC 40 applied and followed.

The Tribunal had correctly found that the Claimant was not employed on a global or umbrella contract as an employee. Although the Tribunal had not addressed the Claimant's alternative argument that he was an employee of the Respondent whilst working on slots for the duration of the slot itself, it was an entirely academic point in this case. On the facts of this case, no additional

benefit would accrue to the Claimant if he were labelled an employee, rather than a worker, on each occasion he undertook a slot. It was therefore unnecessary to refer the matter back to the Tribunal for determination.

The Tribunal's decision that the Claimant had undertaken a number of deliveries on an ad hoc basis was not perverse. The high threshold of perversity was not met (**Yeboah v Crofton** [2002] EWCA Civ 794) and the finding had no relevance to the issues in the case in any event.

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HER HONOUR JUDGE STACEY

1. This is another case about the status of couriers in the delivery industry. The Appellant company (and respondent to the cross-appeal) was the Respondent before the Tribunal and the Respondent (and cross-appellant) was the Claimant below. I shall continue to refer to the parties as they were before the Tribunal.

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2. The case was heard in the regional office of Employment Tribunals sitting at London Central by Employment Judge Angela Stewart sitting alone at an open Preliminary Hearing on 19 and 22 March and 13 April 2018 and a Reserved Judgment and reasons were sent to the parties on 21 May 2018.

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3. The Tribunal found that the Claimant was not an employee of the Respondent within the meaning of s.230(1) **Employment Rights Act 1996** (ERA 1996), but that whilst he was working as a moped delivery rider on pre-allocated slots, as opposed to when he accepted ad hoc delivery jobs, he was a 'worker' of the Respondent within the meaning of s.230(3)(b) **ERA 1996** and other materially identical legislation. The case was adjourned to a Full Merits Hearing to determine the substantive claims predicated on the Claimant's worker status for unauthorised deductions from wages, holiday pay, breaches of the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** and breach of the **National Minimum Wage Act 1998**. Those of his claims which were dependent on employee status were dismissed.

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4. On the Rule 3 sift exercise conducted by HHJ Eady QC (as she then was) the Respondent was given permission to appeal two aspects of the Tribunal's finding that the Claimant was a worker pursuant to s.230(3)(b) **Employment Rights Act 1996** (ERA 1996): whether the Tribunal

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had been correct in its approach to (1) the substitution issue and (2) the question of whether the Claimant was in business on his own account. The matter came back to Judge Eady QC on a Rule 3 sift of the Claimant's proposed cross-appeal of the Tribunal's finding that he was not an employee of the Respondent and the Tribunal's findings of fact about the number of hours he had worked on an ad hoc basis. Judge Eady QC listed the case for an Appellant Only Preliminary Hearing so that the proposed grounds of the cross appeal could be explored more fully. At the Preliminary Hearing HHJ Auerbach permitted the Claimant's cross appeal to proceed to a Full Hearing in both respects. He considered it arguable that the Tribunal had erred by not specifically considering whether the Claimant was an employee for the duration of each slot to which he committed. He also permitted the Claimant to argue that the Tribunal had erred in its findings as to his working hours.

5. I have had the benefit of sitting with lay members both of whom have provided invaluable assistance and contributed to this judgment which is a unanimous decision.

The pleaded case

6. The Claimant's amended ET1 insofar as is relevant to the Preliminary Hearing and this appeal alleged that the Claimant was engaged as an employee or a worker under a contract, or an umbrella contract, or a succession of single engagement contracts pursuant to s.230 **ERA 1996** (and the materially identical definitions in the **National Minimum Wage Act 1998**, the **Working Time Regulations 1998 and the Part-Time Workers (Prevention from Less Favourable Treatment) Regulations 2000)**. The Claimant argued that some of the written terms of the contract were a sham. His argument that some of the clauses were also void and unenforceable pursuant to the **Unfair Contract Terms Act 1977** was not successful as the Tribunal found that

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it had no jurisdiction to strike down unfair contract terms under the **Act** and there is no challenge to that part of the Tribunal's decision.

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7. The Respondent disputed that the Claimant was either an employee or a worker. It averred that the Claimant was an independent contractor on business on his own account. There was no mutuality of obligation, it denied that there was any requirement for personal service, there was insufficient control and a lack of exclusivity. It relied on the practice of payment on completion of specific tasks. It was their position that the couriers were not integrated into the Respondent's business, they provided their own facilities and equipment. The Respondent asserted that each courier ran his or her own courier business, risking their own capital and were personally responsible for any losses arising from their work.

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The relevant factual background.

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8. The Tribunal Judgment takes some close reading as the section headed "The Facts" might more accurately be described as a summary of the evidence, some of which was not accepted by the Tribunal, as was apparent from the "Conclusions" section which is where most of the relevant findings of fact are set out. For ease of reference and since the facts as found are not challenged (apart from ground 3 of the cross appeal which we shall deal with separately) we have therefore combined the findings of fact from both sections of the Tribunal's judgment to set out the relevant findings.

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9. The Respondent is one of 25 subsidiaries of a French company, Stuart SAS, which operates in the field of logistics, delivery and storage. It was formed in 2016 and is responsible for UK operations.

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10. The Respondent describes itself as a technology platform connecting “courier partners”, such as the Claimant, with clients or users in order to facilitate the movement of goods around large urban areas offering couriers maximum freedom and flexibility of work. They described what they were selling as “aggregating supply and demand in a density based model, where the greater the density of demand in a particular zone, the more delivery jobs are available per hour for couriers and efficient despatch of jobs via the platform.” The Tribunal records that Mr Saenz, the Chief Operating Officer of the Respondent, described “the “great balancing act” of optimum density of supply and demand in given zones, which would create the best outcome for clients: rapid access to reliable couriers; for couriers: optimum numbers of jobs, and therefore earnings, per hour); and for the Respondent: building the business in volume and profitability in a tripartite model. However, the Tribunal did not accept the Respondent’s description of its business and found it to be a delivery company requiring a reliable fleet of couriers.

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11. The Claimant applied via the Respondent’s website to become a motorbike courier on 20 November 2016. He had a 10 minute interview and provided the documentation for and details of, his vehicle, address, right to work in the UK, phone and bank account. A background check was undertaken and he attended an “on-boarding” session lasting 90 minutes conducted by Jerome (his surname was not recorded) on behalf of the Respondent and was then taken on as a courier. The Claimant was told that the Respondent offered the “freedom to become your own boss; no minimum shift or working hour requirements – ever” at the on-boarding session. The Tribunal found that this was not an entirely factually accurate description of the relationship between the couriers and the Respondent as set out in more detail below.

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12. The Respondent had relied on General Conditions of Use (GCU) a tripartite written contract between the Respondent, the User client and the Courier to establish the contractual

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terms between the parties. But the Tribunal applied the approach of **Autoclenz Ltd v Belcher & Ors** [2011] UKSC 41 and examined all the realities of the day to day situation alongside the GCU to establish the entire and true nature of the agreement and concluded that the GCU did not accurately reflect the reality of the agreement between the parties.

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13. Couriers could choose what the Respondent described as "Complete freedom: log on anytime, anywhere and get paid for each delivery job completed" (what the Tribunal and we have called "ad hoc deliveries") and/or "Commit to being online in certain places, for certain amounts of time, for a guaranteed minimum payment" referred to as "slots". Couriers could therefore mix and match between slots and ad hoc deliveries as they wished. The appeal is not concerned with the Tribunal's analysis and findings of the Claimant's status whilst undertaking ad hoc deliveries, (the Claimant disputed that he had ever undertaken any ad hoc jobs which is the subject matter of part of the cross-appeal), but solely concerns the Claimant's status on allocated slots that he had signed up for and not been released from.

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14. Slots were released by the Respondent each Thursday for the week ahead via "staffomatic" on the app and covered various zones of highest concentration of user presence at times of projected highest demand. Couriers could sign up for a particular slot in a particular zone that had been released in that way.

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15. The Tribunal records the rationale for the slot allocation system as explained by Mr Saenz. In order to achieve the balancing act of calibrating supply of couriers to the demand of the clients, the Respondent decided to bear the cost of building towards full density

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> **"6. …. to take the financial burden of ensuring that there is equal supply and demand for the client," as Mr Saentz put it, by offering those couriers prepared to sign up to be available for specific shifts in given zones a guaranteed minimum of £9 per hour for the duration of the shift, irrespective of deliveries actually carried out, provided that they remained in the zone for at least 90% of the time and refused no more than 1 delivery…."**

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The slot system was popular with not only the Claimant, but 93% of the 120 couriers working for the Respondent at the material time signing up for shifts, rather than working on an ad hoc delivery basis.

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16. If a courier signed up for a slot, s/he could subsequently send a "Release Notification" which then made it available to other couriers to accept on a first come first served basis. The courier releasing the slot would not know the identity of the courier who had accepted the slot in his or her stead. Slots could only be released vis the Staffomatic app. The Tribunal accepted the Respondent's evidence that between 77% - 90% of active couriers sought to release a slot that they had previously signed up to in any given month.

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17. However, if no-one accepted the re-released slot, the courier who had first signed up for it remained liable for completing the slot him/herself or taking the consequences and potential penalties of missing it. Two missed slots a week made a courier ineligible for delivery rewards (a form of performance related bonus) and detrimentally impacted on the Courier Performance Score. If the courier's score or rating fell below what was considered to be a reasonable average, couriers were given a brief period in which to improve and the Respondent reserved the right at its discretion to suspend his or her access to the services.

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18. The Tribunal found that the consequences of missing a slot were serious. It expressly rejected Mr Saenz' evidence that a courier was not really at such a serious risk of sanction and that "the ultimate sanction of being "off-boarded" was vanishingly remote". Instead it found that

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> **"32. … The entire intention of the Respondent's stick and carrot system of rewards and punishments was to ensure an optimally reliable supply of couriers to meet optimum demand of Users in 'hot zones' at times of highest demand, as predicted by very detailed market research. The whole business model was predicated upon this precise balancing act. If the rewards and penalties were not real, and not perceived to be so by the couriers, it would not work. Couriers would abandon signed-for slots with impunity and the users would not be happy. For example, an instant message sent to a courier on 17 February 2017 said: "Oh-oh! It seems you missed your slot on Thursday 16/02 from 10:00 to 13.30 in East London.**

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Repeatedly missing slots is serious and may limit your ability to register for more slots in the future."

19. Having accepted a slot, the Courier was required to remain within the zone for the entire slot (unless the delivery took him or her beyond the zone). If a courier logged off for more than 6 minutes, or refused more than 1 job during the slot, the slot would not qualify for the minimum hourly payment.

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20. Once a delivery request is accepted, a courier can only cancel a delivery in three specified circumstances: if the goods exceed certain permitted dimensions; if there is no response to the courier's telephone calls to the client in order to execute delivery; or in a case of any Force Majeure event, such as an accident. The algorithm sends a recommended route to the courier once a delivery request has been accepted, but the courier is not obliged to follow it, although there were time pressures on the deliveries.

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21. The Tribunal made the following findings on the central issue between the parties as to the extent of the Claimant's right to substitute another to take over a slot:

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"33.1. There is no reference to a right of substitution in the written contract, the GCU.

33.. Strictly speaking, the Release Notification of an unwanted slot for circulation on Staffomatic among potentially interested other couriers with the same mode of transport, is not the right to send a substitute chosen by oneself, even with the proviso of only being able to send a person with all of the correct vehicle and personal paperwork and an up to date background check.

33.3. Another courier taking up the slot would be unknown to the Claimant and it was not within his right to choose nor put forward a given individual.

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33.4. If no one took up the slot, the Claimant would either have to work it or face the consequences set out above.

33.5. This system cannot reasonable be described as 'an unfettered right to substitution'.

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33.6. If it constitutes a right to substitution at all, it is conditional upon another courier, already on the Respondent's app and with the same mode of transport as the Claimant, willingly volunteering to take over the slot released. The Tribunal accepted the Respondent's evidence that a large proportion of couriers did take advantage of the Release Notification scheme and that the Claimant himself took up some of the slots released by others. However, it was also the Respondent's evidence that there were often 300 to 500 (about 10%) of slot hours per week left unclaimed by anyone and therefore there was far from any guarantee that a courier would get a colleague volunteering to take over any given unwanted slot.

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22. The Tribunal made the following findings on the question of whether the status of the Respondent was that of client or customer of the Claimant’s business or undertaking:

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> **36. On the face of it, it is difficult to see how the Respondent can be described as a client of a business run by the Claimant because the terms of the GCU repeatedly insist that there is a direct contractual relationship for the delivery of goods between the user (as client) and the courier, to which the Respondent is not a party. As to that, the realities of the relationship between the user and the courier was that they only had each other other’s contact details for the duration of the delivery and thereafter these were wiped from the Claimant’s app. The mechanics of that relationship, including the setting of delivery charges and payment, were managed by the Respondent’s app when things went smoothly and by the Respondent as mediator or replacement courier provider when they did not. The Respondent’s rationale is that this provides economies of scale for all parties. If the courier had a puncture he notified the Respondent and the Respondent’s algorithm allocated the delivery to the next nearest member of the fleet of couriers on duty on the app with the same mode of transport. This is helpful to a courier handling a force majeure situation on the street but it is also very much in the interests of the Respondent to ensure that the user is promptly serviced and not let down.**

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> **37. The Respondent pointed out that there were no restrictive covenants; that the Claimant was free to register on any number of other platforms, to work directly for any users with whom he struck up a good relationship, and to switch on an ad hoc basis between the Respondent and any other platform to accept jobs at will when out on the street, although Mr Saentz (sic) accepted that to do so during a slot would be ‘playing with fire’. The Tribunal accepted that this choice of platforms was a real choice, in contrast to the UBER case, because there is a far wider variety of available platforms in the delivery sector. It was common ground, however, that the Respondent’s platform has succeeded in providing the best payment terms, particularly in guaranteeing an hourly rate on slots.**

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> **38. Notwithstanding that the Respondent may seek to characterise itself as the provider of a technology platform, the bottom line is that it is a delivery company, however large a part technological innovation plays in facilitating its role. The clue is in the name: *Stuart Delivery Ltd*. Its model depends on having a reliable fleet of couriers in the right place at the right time to achieve maximum correlation between supply and demand in order to grow the business towards maximum saturation in the inner cities. It decided to pay a higher price in order to achieve this by committing to paying its couriers a guaranteed hourly rate well above the NMW [national minimum wage], if they were prepared to commit to designated time and place slots. To that end, it runs at a loss in the meantime.**

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> **39. In order to guarantee the availability of sufficient numbers of good couriers, the Respondent operated a scheme of rewards and penalties, encouragements to high standards and reliability and warnings against the opposites, for example, refusing more than one delivery request per slot, being absent from the zone for longer than 6 minutes per hour, switching between being ‘available’ and ‘not available’ in an excessive fashion, even for those operating on an ad hoc basis, as well as issuing regular ‘guidance’ and ‘support’ and cheer-leading social team building among the ‘fleet’. Much of this was very different in tone to the ‘freedom’, non-interference and no-liability phraseology which weaves its way through the GCU. The day-to-day structure of the system, the performance evaluation, the communications of blandishments and warnings of sanctions carried conviction and were, quite reasonably, accepted as real by the Claimant. His performance was being monitored for each delivery throughout each shift; his pay, his rewards and ultimately his place on the platform depended on his performance rating and following the rules as they were fed to him by the ops team.**

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> **40. The Tribunal is mindful that any small business can find itself heavily in thrall to its single or dominant client and may feel itself constrained by that client’s requirements. However, this situation went well beyond those normal business realities. The Claimant had no means of negotiating any of his charges for delivery with the user. All fees were contractually set by the Respondent. The Claimant was integrated into the Respondent’s business of ensuring a viable fleet of delivery drivers and accepted to subordinate himself to the Respondent’s entire scheme of charges, slots, controls and rewards in order to be allowed to work on the app.**

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41. These are not badges of a self-employed person working on his own account. Notably, the Claimant carried no business risk whatsoever:

> **41.1 The Respondent insured him and did not recoup the cost of insurance, despite contract terms entitling it to do so.**
>
> **41.2 If a self-employed courier got a puncture, he would complete the delivery (by taxi or getting a friend to help out) in order to look after his client. The Respondent took care of such scenarios by allocating another courier from the fleet to take over the delivery.**

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> **41.3 The Respondent paid a guaranteed £9 per hour, irrespective of how many or how few delivery requests were received during the shift slot. Mr Saentz (sic) told the Tribunal that this, during a quiet slot, often amounted to a courier working for only six minutes per hour.**

42. The Claimant bought into the Respondent's system, was fully integrated into the Respondent's organisation whilst he was working on the slots and it was in the Respondent's own vested interests that this should be the case, since a reliable fleet of sufficient couriers to meet user demand in any given 'hot zone' is a key requirement for the establishment and success of the Respondent group's entire business model and ethos. The contract proclaimed 'freedom to work when you want and be your own boss' is inimical to this key requirement for the success of the Respondent's own professed business model."

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23. The Tribunal found that:

> **"10. …. The Respondent provided a constant stream of 'Stuart Support' guidance and support articles on the app about every aspect of the work and systems for its "Stuwies", financial and other rewards, chat groups and social gatherings, weekly and on other occasions, although the Claimant said that he never attended social occasions. The tone was occasionally paternalistic as in "you made papa angry" and "child's first birthday" and 'The Weekly Stu' magazine fostered team spirit, friendly rivalry and familial belonging….".**

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24. Approximately 80% of the Respondent's couriers are also signed up to other platforms, but they would not generally work for other platforms whilst on a slot for the Respondent for risk of losing the guaranteed hourly rate.

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25. The Respondent's materials refer to "our couriers", "we can deliver", "we have got a fleet of couriers" and suchlike, which Mr Saenz described as marketing material reflecting the final impact of the platform and therefore impliedly being uninformative of the nature of the contractual relationship between a courier and the Respondent.

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26. The Tribunal found that the Claimant worked on the Respondent's platform between 26 November 2016 and 26 February 2017, earning on average £10 per hour and was regarded as a

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good courier. He opted to take the Respondent's branded thermal bag, jacket, phone mount, portable battery and water bottle and his £80 deposit for the equipment was rented by the Respondent when the Claimant returned the kit. He supplied his own unbranded top-box, moped and phone. Couriers were not required to use the Respondent's branded kit, but were not permitted to used branded equipment from any other rival platform.

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The Tribunal's legal analysis: employee status

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27. After setting out the wording of s.230 **ERA 1996** and listing, without comment, the cases that were cited in argument, employee status was considered in one paragraph as follows:

> **"24. Employment. There was insufficient mutuality of obligation, on the part of the Respondent to provide work and on the part of the Claimant to undertake it, for this to be an employment contract (the Ready Mixed Concrete case). The Claimant accepted in evidence that he was free to work when he wished and to take time out for other activities, for example studying for the taxi drivers' 'knowledge'. He worked varying hours each week according to his own wishes. He was free to log on or off the Respondent's app when he wished on an ad hoc basis and sought to sign up for such slots as suited him. In fact he complained before this Tribunal that there were insufficient slots at times and places which suited him. The Respondent could not force him to sign up to those more anti-social hours slots in distant locations which the Respondent was seeking, unsuccessfully to fill each week. This relationship lacked the essential core characteristic of employment."**

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28. There was no mention of the Claimant's argument about either an umbrella contract or succession of single engagements contracts.

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The Tribunal's legal analysis: worker status

29. The Tribunal then embarked on a detailed analysis of the evidence by reference to the case law and the parties' respective arguments in paragraphs 25 to 47, which included the findings of fact recorded above.[1]

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[1] Ideally, the Tribunal's findings of fact should have preceded its judgment on employee status, but neither side objected to the sequence or the structure of the Tribunal's judgment. It is therefore to be assumed that the findings it made which are contained within paragraphs 25 to 47 can be taken to have been considered by the Tribunal in paragraph 24, insofar as they are relevant.

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30. It firstly considered whether the Claimant undertook to do or perform personally any work or services for the Respondent. It noted that each courier had to register personally after a short interview and various background and paperwork checks, but the heart of the discussion was over the nature of the substitution provisions and the findings made at paragraphs 33.1-33.5 of the Judgment set out above.

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31. The Tribunal found that there was no unfettered right of substitution. It then went on to consider which, if any, of the examples of categories identified by the Court of Appeal in **Pimlico Plumbers v Smith** [2017] IRLR 323 might apply. Following on from its finding set out at paragraph 33.6, the Tribunal reached the legal conclusion that if it constituted a right to substitution at all:

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> **33.7. This could be said to fall within the fifth category of the Pimlico case, namely, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent; that other person being one of the Claimant's fellow couriers with the same mode of transport.**
>
> **33.8. It cannot be said to fall within the fourth category of the Pimlico case since the right is not merely limited by the need to show that the substitute is as qualified as the Claimant to do the work, because it is also limited by the willingness of any of the Claimant's equally well-qualified motorbike courier colleagues to volunteer to take his slot.**
>
> **34. Taking all of these factors into account, the Tribunal concluded that, however the slot Release Notification system is defined, it does not fall within the ambit of arrangements which are necessarily inconsistent with the obligation to perform personally. In reality, the Claimant, once having signed up for a slot, was obliged to perform it personally because there was a real risk of negative sanctions for not doing so and his right to release a slot for potential take up by others was not, in reality, sufficient right of substitution to remove from him that personal obligation to perform his work personally for the Respondent."**

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32. On the second disputed limb of the test in s230(3)(b) - whether the Respondent's status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the Claimant – applying its findings as set out at paragraphs 36-42 recited above, the Tribunal found as follows:

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> **43. It follows from the above that the Tribunal concluded that the Claimant was a worker within the meaning of s.230(3)(b) ERA1996 when he was working on slots for the Respondent. This covered all of the Claimant's work over a 3 month period, save for 11 individual deliveries carried out on an ad hoc basis, regarding which there was no specific evidence before the Tribunal. That is sufficient to determine the issue before this Tribunal and the Tribunal makes no findings regarding that tiny proportion of the Claimant's work on ad hoc deliveries."**

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33. We note in passing that the conclusion in the final sentence of paragraph 43 is contentious and is the subject of ground 3 of the cross-appeal and is dealt with below. It is not relevant however for the purposes of the Respondent's challenge to the Tribunal's finding on worker status.

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The Law

34. S.230 **ERA 1996** provides as follows:

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> **(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 the 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) –**

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> > **(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 in not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.**

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> > **….."**

35. There is no shortage of case law seeking to delineate the three classes of people defined in employment law: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and the class described by Lady Hale in **Bates van Winkelhof v Clyde & Co LLP** [2014] IRLR 641 as an intermediate class of workers who are self-employed but do not fall within the second class.

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Employee status

36. As identified by the Tribunal in paragraph 24, the classic definition of a contract of employment was set out in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497:

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> **"A contract of service exists if these three conditions are fulfilled.**

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> **(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.**
>
> **(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.**
>
> **(iii) The other provisions of the contract are consistent with its being a contract of service …"**

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It remains good law. It is common ground between the parties that an unfettered right of substitution is generally fatal to establishing employee status and there must be a sufficient degree of control and mutuality of obligation.

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37. The claimant based his claim that he was an employee under a so-called global or umbrella contract. The term umbrella contract derives from the image the existence of some material that stretches from spoke to spoke of individual engagements or contracts to create an entire, or global, contract. In the alternative, the Claimant had pleaded that if there was no employment contract subsisting between slots, that he was engaged on a succession of single engagement contracts as an employee – in other words, at risk of stretching the image to breaking point, that even if each spoke (slot) could not be joined to the next as there was no fabric to link one spoke/slot to another, he was still an employee for the duration of the slot actually worked: each individual assignment was itself a contract of employment (see, for example, **Cornwall County Council v Prater** [2006] EWCA Civ 102).

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Worker or limb (b) status

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38. In **Bates van Winkelhof** the Supreme Court conducted a thorough review of the case law on the limb (b) definition of a worker. It analysed the many different tests that have been formulated and applied to a wide range of factual situations over the years such as the control test, the integration test, the subordination test, the mutuality of obligation test, the dominant purpose test and the multiple test, ultimately to reject all of them. It endorsed the dicta of Maurice

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Kay LJ in **Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005, [2012] IRLR 834 that there is 'not a single key to unlock the words of the statute in every case.'

39. Per Lady Hale:

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> **"39. I agree with Maurice Kay LJ that there is "not a single key to unlock the words of the statute in every case." There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in *Redcats*, a small business may be genuinely an independent business but be completely dependent upon and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in *Westwood*, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."**

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40. Shortly after **Bates van Winkelhof** the Supreme Court revisited the question of limb (b) worker status in **Pimlico Plumbers v Smith** [2017] SC 0053 upholding the Court of Appeal Judgment at [2017] EWCA Civ 51. The five categories referred to by the Tribunal at paragraphs 33.7 and 33.8 above are a reference to the summary of applicable principles as to the requirement for personal performance set out by Sir Terence Etherton MR at paragraph 84 of Pimlico Plumbers in the Court of Appeal.

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> **"84. In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."**

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41. The issue of whether the status of the Respondent is that of a client or customer of any profession or business undertaking of the Claimant also requires consideration of all the facts and

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circumstances, looking at issues such as degree of control, the contractual obligations on the individual, the degree of control by the other contracting party and the extent of the individual's integration into the other contracting party's business.

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42. As Mr Carr identified, the Supreme Court in **Jivraj v Hashwani** [2011] UKSC 40 summarised the correct approach as follows:

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> **"34. The essential questions in each case are therefore those identified in paras 67 and 68 of *Allonby [2004] ICR 1328*, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties. As I see it, that is what Baroness Hale meant when she said that the essential difference is between the employed and the self-employed. The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case…."**

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43. I accept the approach, although in cases other than this one, some caution may be required since in **Jivraj** the statutory wording under consideration was subtly different to that of the **ERA 1996** limb (b) worker definition as the employment definition in the **Employment Equality (Religion and Belief) Regulations 2003** did not include an express exception for those in business on their own account who work for their clients or customers. The issue was identified by Lady Hale in paragraphs 31 and 32 of **Bates van Winkelhof** where she sets out the alternative route by which a similar qualification of excluding those who are not in a relationship of subordination with the person who receives the services from the definition. It makes no difference however on the facts in this case.

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The Respondent's submissions

Worker status: substitution

44. Mr Carr submitted the Tribunal's approach to the issue of substitution was fatally flawed since the Tribunal became distracted by the irrelevant consideration of whether, in practice, a substitute was available for a released slot in paragraph 33.6. The fact that on a given occasion

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it might be possible to find a substitute did not mean that there was no right to provide a substitute. Instead, the Tribunal should have concluded that the Claimant's situation fell into the fourth category identified by the MR in **Pimlico Plumbers**. The Tribunal became further confused in its logic in paragraph 33.7 and misunderstood that the fifth example in **Pimlico Plumbers** case, since the reference to "another person who has an absolute and unqualified discretion to withhold consent", is not a reference to the consent of the potential substitute to be a substitute, but the consent of the person for whom the work will be performed. The Tribunal has misunderstood the identity of the "another person" referred to and thus erred in concluding the facts in this case came within the fifth category identified in the **Pimlico Plumbers** case, thereby making the Claimant a limb (b) worker. That mistake follows through into the next paragraph, 33.8, Mr Carr submitted, in the Tribunal's rejection of the contention that the fourth of the **Pimlico Plumbers** categories applies in this case, because "it is also limited by the willingness of any of the Claimant's equally well-qualified motorbike courier colleagues to volunteer to take his slot." Mr Carr submitted that the Tribunal had fundamentally misread **Pimlico Plumbers** by misunderstanding whose consent was required in its discussion of which, if any, of the categories of examples applied in this case.

Worker status: in business on own account

45. The Respondent's argument on ground 2 – the Tribunal's approach to whether the Claimant was in business on his own account – was that the Tribunal took into account irrelevant circumstances and disregarded relevant matters to wrongly conclude that the Claimant was a limb (b) worker. It was agreed evidence that the Claimant was free to sign up with other delivery companies' platform, and/or work with any users, and that, unlike in the **Uber** case, there was genuine choice for couriers as the Respondent did not have the dominant market position enjoyed by Uber in the taxi industry. It was accepted by the Tribunal that 80% of the Respondent's

couriers, including the Claimant, were also signed up to other platforms, a fact which Mr Carr argued the Tribunal then wrongly discounted, by reference to the Respondent's payment terms which were higher than those of its competitors when couriers signed up for slots. The level of remuneration provided no pointer to whether an individual was engaged as a worker or in business on his own account.

46. The Tribunal was also criticised for finding that the Respondent's assertion that couriers had "freedom to work when you want and be your own boss" was inaccurate, which, Mr Carr said, was a wholesale misunderstanding of the arrangements the Respondent had put in place. The couriers had freedom to choose whether, where and when to sign up for slots, from the available choices provided by the Respondent every Thursday for the following week, and it was therefore an unsustainable conclusion that the freedom of individuals to decide when and where to work could be entirely discounted from the analysis of whether the Claimant was in business on his own account.

Employee status

47. On the cross appeal on employee status the Respondent relied on the Tribunal's findings in paragraph 24 as set out above, and rightly concluded that the Claimant was not an employee. In any event, it was fanciful to suggest that the Claimant was employed under a series of individual contracts of employment by reference to each occasion on which he worked a slot, which in any event would not confer any additional rights, beyond those conferred to him as a worker.

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Perversity challenge to findings re: hours worked and ad hoc jobs performed

48. In defending the Claimant's challenge to the Tribunal's finding that he worked between 9.5 and 40.3 hours per week and that he had undertaken 11 ad hoc deliveries the Respondent made two general points. The first was that there was evidence before the Tribunal in the form of the Respondent's records entitling it to reach those conclusions. The second was that the findings were immaterial to the issue of worker and employee status. To the extent they would become relevant they could be revisited at the substantive hearing. The Respondent had re-checked their records and revisited their figures in preparing for the appeal in light of the Claimant's representations and revised the number of ad hoc slots undertaken by the Claimant to 7. However, it did not accept the Claimant's contention that he had never undertaken an ad hoc delivery.

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Claimant's submissions

49. The Claimant relied on the Tribunal's findings to resist the Respondent's challenge to the conclusion that he was a worker and not in business on his own account and in particular that he was contractually bound to turn up and work his slots and had no right to send a substitute. He also noted that discussion around category 5 identified in Pimlico Plumbers was a secondary finding which applied if there was a substitution right at all, but the primary finding of the Tribunal was that he had no power to send a substitute. But in any event, he considered the Tribunal had not misunderstood who "another person" was intended to be in the example provided by the Court of Appeal.

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50. The Claimant also submitted that the Tribunal had also approached the question of whether he was in business on his own account correctly. The Tribunal had not based its decision on whether the Respondent paid better terms than some of its competitors, or other irrelevant

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factors. Worker status is not determinable by reference to whether work is available on other platforms, nor whether other platforms treat their couriers as independent contractors. Furthermore, workers are not precluded from simultaneously engaging in employment relationships with other employers. The Tribunal rightly saw the reality behind the Respondent's protestations of total freedom and ability of couriers to be their own bosses.

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51. In his cross-appeal, the Claimant submitted that the Tribunal had failed to address his pleaded case that he was engaged in a series of successive single engagement contracts. He relied on the Tribunal's findings about the level of control and extent of the contractual obligations whilst working on a slot to argue that he was an employee, as well as a worker, for the duration of each slot worked. Each slot worked constituted a separate contract of employment.

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52. In his cross-appeal to the Tribunal's findings about his hours the Claimant was aggrieved about what he perceived to be an inaccuracy in the Tribunal's findings which was important for its own sake. There had been contested disclosure applications preceding the Preliminary Hearing and he had found what he referred to as the Respondent's "ambiguous data" hard to analyse. But having mastered it, he was irked that the Tribunal appeared to have accepted the Respondent's assertions as to its interpretation. He had painstakingly gone through the Respondent's records to uncover internal inconsistencies and contradictions, which the Respondent had now, albeit grudgingly, partially accepted in their concession that four of the jobs they had previously recorded as having been ad hoc jobs, had been completed on slots. The Claimant made very detailed submissions in support of his contention that the Respondent's records were still incorrect and he had wrongly been recorded as having performed any ad hoc jobs, when he had in fact only ever working on slots. The errors around slots undertaken resulted

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in a miscalculation of his hours worked, and the conclusion that the Claimant worked 40.3 hours a week sometimes was also inconsistent with the Respondent's own records.

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Discussion and conclusions

Employee status

53. The Tribunal's succinct paragraph 24 does not appear to address both limbs of the Claimant's argument. There is no dispute that it effectively disposes of the umbrella or global

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contract argument, but has it dealt sufficiently with the argument that for the duration of a slot the Claimant was an employee?

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54. It is perfectly possible for short engagements to amount to individual free standing employment contracts without the covering of an umbrella, which means (usually) that between jobs, or slots or spokes (continuing with the umbrella metaphor) no contract subsists and therefore

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no time served benefits, such as protection from unfair dismissal, accrue. This was exactly the position of the Central Electricity Generating Board tour guides in **Carmichael v National Power plc** [1999] 1WLR 2042 HL who failed to establish a global contract and therefore were not entitled to a s.1 **ERA 1996** statement of terms and conditions. Per Lord Hoffman at C 2051:

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> **Once it is accepted that tribunal's finding as to the lack of mutuality of obligation between the respondents and the C.E.G.B cannot be disturbed, it follows that the engagement of the respondents as guides in 1989 cannot have constituted in itself a contract of employment. It laid down the terms upon which it was expected that they would from time to time work for the C.E.G.B and it may well be that when performing that work, they were being employed. But that would not be enough for the respondents. They could succeed only if the 1989 engagement created an employment relationship which subsisted when they were not working. On the findings of the Tribunal, it did not in itself give rise to any legal obligations at all and the respondents' claim must therefore fail.**

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55. Mr Carr is correct that it is not a point often raised as usually nothing turns on it. Where as in **Cornwall County Council v Prater** the statutory provisions on continuity of employment

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could be prayed in aid to bridge gaps in continuity of employment between contracts (s.212(3) **ERA 1996**, it could be a different matter.

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56. In this case the Claimant could not identify any benefit that would be achieved were he to be defined as an employee, as opposed to a worker, whilst undertaking a slot. If for a 3 hour period his status was that of a worker he would be entitled to the national minimum wage for each hour of the slot. The **Working Time Regulations** would also apply, so too would protection from detriment under the **Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000**, (assuming he could identify an appropriate comparator) and his breach of contract claim is unaffected by the label – as between worker and employee – attached to the description of the relationship. On the facts of this case it is therefore an entirely academic point and for that reason alone is dispositive of the appeal. It was therefore unnecessary to refer the matter back to the Tribunal for determination.

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Worker Status: in business on own account

57. It is important to distinguish in Mr Carr's skilful and carefully woven submissions between the Tribunal's findings of fact, which are for it to make, and matters of law, which are open to close scrutiny. It is for the Tribunal to weigh the evidence, to decide the facts, and in the exercise of applying the correct label to a claimant's status, make its judgment on the evidence, provided it has applied the correct legal tests to the issues before it. Lord Mummery expressed it thus in **Fuller v London Borough of Brent** [2011] EWCA Civ 267:

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> **"30 …. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

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58. The challenge to the Tribunal's analysis of whether the Respondent is a customer of the Claimant's courier business is a challenge to the application of the Tribunal's findings of fact to the law on which it has correctly directed itself by reference to **Jivraj**. The Tribunal took careful note of the Respondent's evidence and found that in relation to the periods when couriers were

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working slots they were not their own bosses and did not have freedom. They could not leave the zone, they could not reject jobs and they could not undertake courier jobs for other delivery companies. There is no flaw in the Tribunal's reasoning or conclusion in that regard. They have not put undue weight on payment terms or been distracted by irrelevant matters.

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59. The criticism of the Tribunal's treatment of the fact that Respondent did not have a comparable market share in the delivery sector to the position occupied by Uber in the minicab passenger travel sector is not well founded for two reasons. Firstly, the weight to be attached to that finding is for the Tribunal to make, alongside all its other findings, in weighing the factors in the balance – some of which assisted the Claimant and other facts which assisted the Respondent. Secondly, paragraph 126 of HHJ Eady QC's judgment in **Uber** does not quite have the meaning contended for by the Respondent. She found:

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> **" ….. If the reality was that Uber's market share in London was such that its drivers were, in practical terms, unable to hold themselves out as available to any other PHV operator, then, as a matter of fact, they were working at ULL's disposal as part of the pool of drivers it required to be available within the territory at any one time. That might indeed seem consistent with Mr Kalanick's description of the original Uber model as a "black car service". If, however, it was genuinely the case that drivers were able to also hold themselves out as at the disposal of other PHV operators when waiting for a trip, the same analysis would not apply."**

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60. Remembering that we are only considering the time the Claimant spent on slots, the ruling supports, rather than undermines, the Tribunal's conclusion. The Claimant could not hold himself out as being at the disposal of other delivery companies whilst he was on a slot. He would be in breach of contract and, in the words of Mr Saenz "playing with fire", because, by doing so, he risked being "off-boarded", in effect sacked. He was working at the Respondent's disposal exclusively during the period of the slot. The **Uber** judgment therefore does not assist the Respondent on this point. It may well have been a very helpful point for the Respondent if they had been required to rule on any ad hoc deliveries however.

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61. On the criticism of the Tribunal's discussion of the favourable payment terms offered by the Respondent as compared to some other delivery companies, we do not read the judgment as putting undue weight on the point, which, we agree with Mr Carr, is not of central importance to understanding whether the Respondent was a customer of the Claimant's business. It is not wholly irrelevant however and the Tribunal was entitled to make findings so as to provide a complete picture.

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Worker status: substitution

62. It is common ground that the Tribunal correctly identified the significance of understanding the extent of the Claimant's powers of substitution in deciding the worker point, and it correctly identified the key passages in **Pimlico Plumbers**. Mr Carr accepts that he cannot challenge the finding that the Claimant did not have an unfettered right of substitution. He is right that the Tribunal has misunderstood the person whose consent is required for the fifth category – it cannot refer to the proposed substitute, but refers to the employer or person for whom the work will be done. The difficulty for the Respondent however is that on the facts as found by the Tribunal the Respondent had an absolute and unfettered right to withhold consent since only the couriers it had accepted onto their pool could use the Staffomatic app to sign up for slots a fellow courier wished to relinquish. The Claimant had no control whatsoever over who, if anyone, would accept a slot he had signed up for and no longer wished to work. The Tribunal's primary finding is correct – it is not a right of substitution at all. It is merely a right to hope that someone else in the pool will relieve you of your obligation. If not, you have to work the slot yourself. You cannot, for example, get your mate to do it for you, even if s/he is well qualified. All you can do is release your slot back into the pool.

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63. The Tribunal have therefore not erred in their primary finding that there was no substitution right, and, in the alternative, that the ability to offer the slot to others fell within the fifth category identified in **Pimlico Plumbers** albeit for different reasons to those identified by the Tribunal. The ground of appeal therefore fails.

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Perversity cross appeal

64. To succeed in a perversity challenge, the Claimant must establish that no reasonable tribunal, properly directed in law, could have reached the decision which the particular tribunal has reached. It will only succeed where an overwhelming case is made out that the Tribunal reached a decision which no reasonable tribunal on a proper appreciation of the evidence and the law would have reached. In other words that it was not a permissible option, for example where a finding of fact is unsupported by any evidence – either direct or by legitimate inference. It is rightly described as a high hurdle (see **Yeboah v Crofton** [2002] EWCA Civ 794).

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65. The difficulty for the Claimant is that Tribunal relied on the figures produced by the Respondent for the hearing to reach both its findings. The records produced for the first instance Tribunal are at pp 63-94 of the Claimant's supplementary bundle. The Claimant submits that this was largely raw and ambiguous data and has pointed to an internal inconsistency and an element of double counting in the data produced by the Respondent before the Tribunal. But it cannot be said that there was no evidence to support the Tribunal's findings, since it was in the data produced by the Respondent. For that reason the appeal must fail as the high test of perversity has not been met.

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66. But the position is now more complex, since the Respondent has revisited its figures and says they were not quite right. In the course of preparation for the appeal, the Respondent has

reviewed its data and considered the specific inconsistencies that the Claimant drew to their attention after the Tribunal hearing. The Respondent now accepts that in one respect there is an anomaly and that the Claimant undertook 7, not 11, ad hoc jobs. The Respondent concedes that the Tribunal Judgment can be amended to the correct figure.

67. There are three difficulties that mean that the Claimant cannot succeed in his cross appeal, notwithstanding the Respondent's concession. Firstly, the important principle of finality in litigation would trump the minor inaccuracy now discovered after judgment has been given by the Tribunal when the later discovered mistake is not germane to the judgment. The Claimant should have identified to the Tribunal the nature of his disagreement with the Respondent's evidence and advanced his evidence to disprove it at the hearing if it was important.

68. Secondly, whether the Claimant undertook zero, 7 or 11 ad hoc jobs, although important to the Claimant for the purposes of factual accuracy and his impressive attention to detail, the Tribunal has not found that it has jurisdiction to determine any complaints concerning any ad hoc deliveries he may or may not have undertaken for the Respondent. It therefore cannot deal with it.

69. Thirdly, it is the Claimant who says he never undertook an ad hoc delivery, so he is not seeking a remedy in respect of ad hoc deliveries that he says did not take place. The substantive hearing of the Claimant's claims has not yet been heard – it was stayed pending this appeal. It will be for the Full Merits Hearing to calculate whether there is a shortfall in the Claimant's wages and to determine any money claims for the slots he worked. If some slots have wrongly been described by the Respondent as ad hoc deliveries, the place to correct any inaccuracies will be at the Full Merits Hearing.

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70. For the above reasons neither the appeal, nor cross appeal is allowed. Both are dismissed.

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