



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107716/2019

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Held in Glasgow on 25 September 2019 and 20 January 2020

Employment Judge: R King

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Mr R Mitchell

**Claimant
Represented by:
Ms C Thomson -
Solicitor**

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A.D.Taxis Ltd

**Respondent
Represented by:
Mr W Haines –
Solicitor (Day 1)
Mr Gunnion
Solicitor (Day 2)**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant worked for the respondent as a self-employed contractor.

REASONS

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1. The claimant has presented a claim alleging that the respondent unfairly dismissed him, made unauthorised deductions from his wages, failed to provide him with a written statement of terms and conditions of employment, failed to pay him holiday pay and failed to provide him with rest breaks. The respondent asserts that the claimant was at all times a self-employed contractor and has no entitlement to bring any of these claims against it.

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2. In the circumstances, a Preliminary Hearing has been arranged to determine the claimant's employment status.

3. In the course of the Preliminary Hearing the claimant gave evidence on his own behalf and the respondent led evidence from its sole employee Aaltj-Mary Pollock. Each party lodged its own separate bundle of documents.

Findings in fact

- 5 4. The claimant worked for the respondent as a taxi driver between 5 December 2016 and 16 April 2019. There was no written contract governing the relationship between the parties.
- 10 5. The claimant's mother, Pamela Miller, is also a taxi driver with the respondent and it was she who introduced the claimant to the respondent's former employee Andy Hughes in October 2016. During their meeting Mr Hughes offered the claimant a position as a taxi driver with the respondent, subject to the claimant successfully obtaining his South Lanarkshire Council Taxi driver's licence for the Clydesdale Zone, in which the respondent operates its business.
- 15 6. The claimant also subsequently met and spoke to the respondent's Aaltj-Mary Pollock who repeated the respondent's offer of a position as a taxi driver, subject to the claimant obtaining his Taxi driver's licence.
- 20 7. In due course, the claimant obtained his Taxi driver's licence for the Clydesdale Zone. The claimant met the entire cost of the licence application as well as the associated costs of obtaining a basic criminal disclosure check and attending a disability awareness course.

Agreement on employment status

- 25 8. Once the claimant had obtained his Taxi driver's licence, he met again with Mrs Pollock. This meeting was not a job interview but was principally a discussion about the terms of engagement between the parties and the day-to-day working arrangements that would be put in place.
- 30 9. During the meeting Mrs Pollock informed the claimant that he would be engaged as a self-employed contractor and that he would therefore require to deal personally with his tax affairs. She also made it clear that he would not

be paid holiday pay or sick pay. The claimant accepted these terms and the parties did not depart from them at all during the currency of their relationship whenever the claimant was sick or took a holiday. These same arrangements apply between the respondent and all of its taxi drivers.

5 **Shift arrangements**

10. Mrs Pollock informed the claimant that his usual weekly shift pattern would be Friday and Saturday - 6am to 5pm and Sunday to Tuesday - 5pm to 6am, with Wednesday and Thursday each week as his rest days.
11. The claimant felt that he was obliged to accept these shifts and therefore he did. On certain occasions, he was asked to change his shifts at short notice, which he always agreed to do. He did not feel in any position to refuse shifts or to refuse to change a shift at the last minute.
12. However, the respondent was not required to provide the claimant with a set amount of work and the claimant was not required to carry out a particular number of hires.

15 **Calculation of pay**

13. The taxi fares charged by the respondent were those set by South Lanarkshire Council, which were never departed from. The parties agreed that the claimant's income would be calculated by deducting fuel costs from the amount of his total fares each week and the balance shared equally between them. The claimant's income was therefore directly related to the number of hires he completed.
14. The respondent required the claimant to produce time sheets for each shift, which recorded the hires he had completed and the fares he had taken. An accurate record of the hires and fares taken was necessary in order that the parties could divide the takings equally in terms of the agreement they had made.
15. To facilitate this arrangement, the claimant met with Mrs Pollock on a Monday, Wednesday or Friday each week and produced his timesheets and details of

his fuel costs so that the overall takings could be divided between them. The claimant was always paid in cash and never received or requested any payslips.

16. As is common in the taxi business, the claimant also regularly received tips
5 from customers, the amounts of which he was under no obligation to share with, or even disclose to, the respondent.

17. At all times during his relationship with the respondent, the claimant completed his own tax returns and dealt personally with his tax payments and national insurance contributions. To that end HMRC allocated him a Unique
10 Tax Reference (UTR), which identified him for tax purposes as self-employed.

Day to day operational arrangements

18. During the claimant's engagement with the respondent, he had little day-to-day contact with Mrs Pollock other than those meetings when he handed in
15 his timesheets. She did not arrange team meetings and she was unaware of the total hours worked by the claimant or any of the other drivers until they delivered their timesheets. She was also unconcerned and often unaware as to whether the claimant or his mother were covering his allocated shifts, until either he or his mother attended with the timesheets and takings for the day.

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19. The respondent owns three taxis and normally has two drivers on shift at any one time. While on shift the drivers will share the respondent's 'control phone', which is linked to its advertised business telephone number. During his engagement with the respondent it was common for the claimant to hold
25 the control phone and allocate calls between himself and the other driver.

20. In order to attract as much business as possible from foot traffic, the claimant would also routinely sit in his vehicle at the local taxi rank, the train station or outside local bars. The respondent did not instruct him to locate himself at these places. Doing so was simply a matter of commercial common sense
30 as these were the locations at which he would most likely pick up hires. The

claimant was also permitted to take calls on his own personal mobile phone for hires.

21. The limits of the geographical area in which the claimant was permitted to take hires were not fixed by the respondent but by the limits of his South Lanarkshire Council/Clydesdale Taxi licence.
22. During his working day, the general rule was that the claimant was required to answer all calls and to complete all hires. However, he was permitted to refuse to take a fare if he had a legitimate reason to do so. He was also permitted to finish his shift early if business was quiet and on such occasions he would simply inform Mrs Pollock that he had done so.
23. The respondent was unconcerned about whether its drivers took breaks during the day and imposed no rules in relation to the length or frequency of breaks. No dress code was imposed, its only requirement being that its drivers were presentable.
24. Although the respondent did not require the claimant to take the respondent's vehicles for routine maintenance, he routinely chose to do so, sometimes at times when he was not himself on shift. He was not paid for his time when he did this.

Substitute drivers

25. On occasions such as holidays when the claimant would arrange another driver to cover his shift, he would routinely do that without reference to Mrs Pollock. On such occasions she would only learn of the change when she received the timesheets for that day or if she telephoned the control phone and someone else other than the claimant answered. The claimant always arranged for either his mother or another of the respondent's drivers to cover his shift, although the respondent's only requirement was that a substitute driver had a valid South Lanarkshire Council Taxi driver's licence for the Clydesdale area.

The claimant's agreement with Muirpark Taxis

26. Within the Carluke and Wishaw area, there also operates a taxi firm called Muirpark Taxis. During his time working for the respondent, the claimant had a personal agreement with the owner of Muirpark Taxis that if its taxis were off the road while he was working, its business phone would be diverted to the respondent's control phone and the claimant would take those hires - subject always to the claimant's assurance that he would not otherwise approach Muirpark Taxi customers.
27. On such occasions any hires would be recorded on the claimant's timesheet without any indication that it was a 'Muirpark' hire and the fare shared in line with the usual arrangement. Although it earned 50% of such fares the respondent had no involvement in setting up of that arrangement.

Financial risk

28. The respondent owns all three cars in its fleet and pays for all of their maintenance and for the fleet insurance. The respondent also provides the control phone and the car radios. During his time with the respondent, the claimant provided his own cleaning equipment, brushes, baby wipes, air fresheners and his Bluetooth earpiece.

Complaints

29. On three occasions during the claimant's engagement with the respondent, Mrs Pollock received complaints from customers about the claimant having used inappropriate innuendo towards them. On each occasion, she informed the complainers that the claimant was self-employed and that if they had any complaint about him they should contact the licencing authority, South Lanarkshire Council. The respondent took no disciplinary action at all against the claimant on any of these occasions.

'Team' events.

30. On two occasions, the respondent arranged and paid for meals for all of the taxi drivers when a driver was retiring, which the claimant and the other taxi drivers were invited to attend.

31. Since these proceedings were raised, the respondent has now issued all of its taxi drivers with written contracts confirming their self employed status. The business currently has six self-employed drivers.

Submissions

5 *Claimant*

32. On the claimant's behalf, Miss Thomson submitted that he was an employee within the respondent's business or that, alternatively, he was a worker. Reference was made to the statutory provisions set out in section 230 of the Employment Rights Act 1996 and to the elements of the "irreducible minimum" required to establish an employment contract, which were:

- Personal service
- Control
- Mutuality of obligation.

33. She submitted that all of these elements existed in the claimant's relationship with the respondent and that the tribunal should also take into account the following additional factors:

- (i) Was the claimant integrated within the company?
- (ii) Was the claimant in business on his own account?
- (iii) Was the claimant responsible for paying his own tax?

34. In respect of control, Miss Thomson submitted that the respondent had determined the rate of pay and the arrangements for calculating the parties' respective share of the days' takings. The claimant had had no control over the amount that he was paid, which was consistent with his being an employee as opposed to his being a self-employed contractor who would generally set the amount of pay or the fee for his services.

35. Miss Thomson submitted that the claimant had been engaged personally to perform the contract and that if he was required to find a replacement to cover

an absence he was only ever permitted to select one of the respondent's drivers. His right to provide a substitute was therefore not unfettered. If he were truly self-employed, he would have been permitted to provide a replacement of his own choosing, regardless of skill or qualifications.

5 36. Miss Thomson submitted that the fact that the claimant worked a regular shift pattern of the respondent's choosing was a further indication of the respondent's control over his pattern of work, particularly where there had been no negotiation over that pattern.

10 37. A further element of the control exercised by the respondent was the respondent's requirement that outside his regular shift pattern the claimant had to assist other drivers to maintain their vehicles, take the vehicles for MOT testing and clean the vehicles.

15 38. The claimant also had little autonomy. For example, he was required to wait at certain locations chosen by the respondent in order to attract most business.

20 39. The claimant's inability to finish early without the respondent's permission was another indication of its control over him, as was its refusal to allow him to work for other businesses within the taxi industry. While it was accepted that on occasion he had taken calls for Muirpark Taxis, he was not their employee on those occasions but simply took their diverted calls. Muirpark did not benefit at all financially from that agreement and any hires were shared between the claimant and respondent in accordance with the usual arrangement between them.

25 40. The claimant had accepted the work he was given. He had attended for the shifts he was allocated, attended at the designated locations, carried out his work as a taxi driver and also answered phone calls on behalf of the respondent on the occasions when he worked from home.

41. In Miss Thomson's submission, the test for mutuality of obligation was met by the arrangements between the parties, which amounted to a relationship of

master and servant. The respondent had an obligation to the claimant to provide him with work and the claimant was under an obligation to accept it.

42. The claimant was personally responsible for performing the service to the respondent. Although there was no written contract governing the parties
5 relationship, the reality was that if the claimant was unable to work, he would need to delegate his work to another individual within the respondent's company and if unable to find an available member of staff would have to make himself available to work. He was unable to hire an individual outwith the respondent's company to substitute for him, which was consistent with his
10 being at the very least a worker, if not an employee.

43. Miss Thomson submitted that the claimant was also integrated within the company by virtue of his being required to assist other drivers with the maintenance of their vehicles and because it paid for the vehicles and equipment that he used and for his taxi's insurance. He had also been invited
15 to retirement events for staff members. Additionally, the claimant had assisted the respondent in coming to an agreement with Muirpark Taxis which inevitably increased the respondent's income. This showed he was an integral member of the respondent's company and had furthered its business interests.

20 44. Miss Thomson submitted that the claimant was not in business of his own account. He had been hired as an individual rather than a company and he had been provided with the tools of his trade. His rate of pay was fixed by the respondent without negotiation and he had no control over what percentage he kept. While there was some financial risk for the claimant, this was limited
25 because the respondent owned and paid for all of the equipment.

45. While the claimant was required to pay tax on his own behalf, this was not conclusive evidence that he was a self-employed contractor. Indeed, the claimant was required to produce a record of all his fares to the respondent in order to be paid.

46. In the alternative, if the claimant was not an employee, Miss Thomson submitted that he met the statutory test in terms of section 230 (3) (b) of the Employment Rights Act 1996 and that he was a worker.
47. Even if he was not an employee the claimant was nevertheless required to provide personal service, which was a key component of the statutory definition of a worker. While he was permitted to delegate or substitute his work, it was a limited right and only applied to other members of staff within the respondent's company.
48. The fact that the claimant was hired as an individual and not as a business undertaking also supported the claimant's alternative submission that he was a worker. The economic reality was that the claimant carried out duties for the respondent on a full time basis at the rate of pay set by it and he did not offer his services to any other company.
49. The claimant's position was analogous to that of the claimants in the case of **Uber BV v Aslam 2018 EWCA 2748** where the Court of Appeal held that Uber drivers were in fact workers because, amongst other things, they were required to work set shifts and be available during set shift periods during which they were personally required to undertake work for Uber while being subject to a degree of control over their conduct and their performance.
50. Miss Thomson submitted that there were certain characteristics that were consistent with self employment status such as:
- a. the ability to choose how to carry out the work and their own hours;
 - b. the ability to choose whether to accept or reject work;
 - c. the ability to set a fee or price;
 - d. the ability to market services freely;
 - e. the ability to freely provide a substitute; and
 - f. the freedom to use their own equipment.

51. In her submission, none of these elements were present in the relationship between the parties. The claimant was not a self-employed contractor but was rather an employee, failing which he was a worker.

Respondent's submissions

5 52. On the respondent's behalf, Mr Gunnion submitted that at all times the claimant was neither a worker nor an employee of the respondent. While there was no written agreement, there was no requirement for one to be in existence and that the fact of agreement was clear from the outset, namely that the claimant was self-employed.

10 53. The claimant's self employed status was evidenced by the fact that he submitted his own tax returns and dealt with his own national insurance. He had a genuine right of substitution and was not required to work personally. Indeed, he would often swap shifts with his mother or with a colleague and the respondent would be unaware until the timesheets were submitted.

15 54. The claimant was entitled to substitute any other taxi driver who was licenced to work within the South Lanarkshire Council licensing area and therefore any restriction was not imposed by the respondent but by the local authority licensing board.

20 55. Nor did the respondent have any control over the claimant's activity during his shift. He was not required by the respondent to be in any location for any particular time. The reality is that the locations he would sit at, namely the taxi rank, railway station or other high demand locations were dictated by common sense and not by the respondent. Geographically, he was also restricted not by the respondent but by the limits of his taxi licence issued by
25 the licencing authority.

56. The claimant was entitled to refuse work and if necessary for no one to cover his shift. He submitted that was not uncommon and also consistent with the relationship that the claimant had arranged with Muirpark to cover its calls.

30 57. There was clear financial risk and reward for the claimant. While he had to share his fares with the respondent because it owned the car and the

equipment, he was entitled to keep his own tips, which could be substantial. The claimant operated as a business on his own account and he was able to earn substantial money through tips which he did not have to account to the respondent about.

5 58. The claimant was aware of the financial risk at the start. He knew that there was no holiday pay or sick pay available and he did not question that at all during the two and a half year relationship he had with the respondent during which he had taken holidays and had also been off sick. He was happy being self-employed. It was only following a disagreement with the respondent that
10 he had claimed to be an employee.

59. The fact that the claimant could provide customers with his private number and also enter arrangements such that he had with Muirpark were entirely consistent with his self employment status.

15 60. The respondent acknowledged that it had given the claimant a car and provided the control phone but he had used that to enhance his own business. It was not to the benefit of his business if people did not get picked up and he therefore utilised the respondent's phone and shared calls from the control phone with the other drivers in order that they could all enhance their own businesses.

20 61. The respondent did not deal with complaints that it had received from customers about the claimant's behaviour. The respondent told anyone who had complained that they should report the claimant to the licensing authority who would have had jurisdiction over him.

25 62. While the claimant had claimed to be worried that he would be in trouble if he had missed any calls or did not finish his shift, the reality was that the respondent was not concerned about that and no disciplinary sanction had ever been imposed against the claimant. In reality he could decide when he finished his shift and he was entitled to do that without any recourse to the respondent.

63. The respondent denied that the claimant was integrated into its business. The claimant had been under no instruction to become involved in vehicle maintenance but had likely only done so in the interests of his own business because he did not want the car to be off the road. His assisting with the maintenance of the vehicle was therefore consistent with his being self-employed. The respondent had provided pool cars for everyone's use and had no interest which driver was using the car. However, there was a financial risk for the claimant whenever the car was off the road and therefore it was plainly in his interest to ensure that it remained off the road for as short a time as possible.
64. The fact that the claimant had been on one or two leaving nights with the respondent and other taxi drivers did not indicate that he was integrated into the business to the extent that he was an employee. This was simply an example of the respondent saying 'thank you' to trusted service providers who were leaving the business.
65. In respect of the issue of personal service, Mr Gunnion referred to ***Yorkshire Window Company v Parks UKEAT/0484/09*** which had established that the key issue is whether there is a contractual obligation to provide personal service, not simply if the individual *does* provide personal service. He submitted that no such obligation existed between the claimant and the respondent.
66. The Tribunal was also referred to ***Community Dental Centres Limited v Sultan-Darmon UKEAT/0532/09*** in which the EAT held that an unfettered right to appoint a substitute is fatal to an individual claimant asserting that that he or she is a worker. The claimant's right to appoint a substitute was fettered only by the requirement to appoint as a substitute someone acceptable to the South Lanarkshire Council licencing authority. Therefore, any driver with a qualifying licence would be permissible by the respondent, which pointed towards the claimant being truly self employed.
67. The claimant's situation was distinguishable from the plumbers in ***Pimlico Plumbers Limited v Smith [2018] UKSC 29*** who were found to be workers

because they only limited availability to substitute in practice because they could only agree swap arrangements with other Pimlico plumbers.

68. Mr Gunnion submitted that the claimant had sufficient autonomy consistent with self-employment. He was able to choose how he operated and from where, subject only to the limits of his taxi licence. He could turn down passengers and could take breaks whenever he wanted.

69. The claimant's situation could also be distinguished from the claimants in **Uber v Aslam [2018] EWCA Civ 2748** because Uber's degree of control was based on their assignment of territories to their drivers, which were restrictive. In the claimant's case, the respondent did not restrict the claimant at all and any restriction was imposed by the local authority. The reality was at all times, the claimant operated as a small company.

70. The claimant paid his own tax and national insurance on a self employed basis. He was only paid for work done, including the work he carried out under the arrangement he had negotiated with Muirpark Taxis.

71. Mr Gunnion accepted there was a fine line between a worker and self employed contractor, as highlighted in the case of **Clarkson v Pensher Security Doors UKEAT 0107/09** but that in all the circumstances of this claim, the claimant was truly self employed.

20 The Law

72. The Issue before this Tribunal is whether the claimant, worked for the respondent as an employee, as a worker or as a self-employed contractor. Section 203 of the Employment Rights Act 1996 provides: -

“(1) In this Act “employee” means an individual who has entered into or works under a contract of employment.

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

73. The classic description of a contract of employment is set out in the judgment of McKenna J in **Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 10 ER 433, QBD** in which he stated:-

- 5 “A contract of service exists if three conditions are fulfilled.
- i. The servant agrees that, in consideration of a wage or other remuneration, he will provide his own working skill in the performance of some service for his master.
- ii. He agrees, expressly or impliedly, that in the performance of that
10 service he will be subject to the other’s control to a sufficient degree to make that other master.
- iii. The other provisions of the contract are consistent with its being a contract of service... Freedom to do a job either by one’s own hands or by another’s is inconsistent with a contract of service,
15 though a limited or occasional power of delegation may not be.

74. The Supreme Court underlined the continuing relevance of this passage in **Autoclenz Ltd v Belcher and Others [2011] ICR 1157, SC**, where Lord Clark referred to it as the “*classic description of a contract of employment*”.

75. Following **Ready Mixed Concrete** the courts have established that there is
20 an ‘irreducible minimum’ without which it will be all but impossible for a contract of employment to exist and it is now widely recognised that this entails three elements:

- Control
- Personal Performance
- 25 • Mutuality of obligation and control

76. In **Autoclenz** the Supreme Court also set out three further propositions, which were considered non contentious. Firstly, that there must be an minimum of obligation on each side to create a contract of service (**Nethermere (St Neots) Ltd v Gardiner 1984 ICR 623**). Secondly, if a genuine right of

substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status (***Express and Echo Publications Ltd v Tanton 1999 ICR 693***). Thirdly, if a contractual right, for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement.

77. 'Worker' status on the other hand reflects the fact that some individuals, while not enjoying the range of protections afforded to full-blown employees are nevertheless entitled to certain protections.

78. A worker is defined under section 230(3) of the Employment Rights Act 1996 as:

'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"

79. Following ***Windle v Secretary of State for Justice [2016] EWCA Civ 459***, it is now established that the necessary elements required to establish 'worker status' in terms of section 230(3) are that -

There must be a contract between the worker and the putative employer;

The contract must require personal service;

The other party to the contract must not be the customer or client of any business undertaking or profession carried on by the individual;

There must be mutuality of obligation between the parties.

Discussion and decision

80. In the absence of any written agreement, the Tribunal must consider the reality of the arrangements between the parties based on the evidence that it heard.

5 **Control**

81. The claimant's position was that he was subject to significant control by the respondent in respect of the allocation of his shifts and the arrangements for his daily work. The Tribunal accepted that the respondent exercised a level of control in relation to the allocation of the claimant's shifts but did not accept that there was sufficient control to make the relationship one of employer and employee.

82. The fact that the claimant agreed to work a particular shift pattern that was fixed by the respondent was simply a matter of practical necessity. The respondent owned all of the taxis in its fleet and therefore the claimant could not pick and choose his shifts. His shifts were at times that the respondent was willing and able to provide him with its vehicle in line with the overall arrangements it had with its pool of drivers.

83. So far as the geographical limits of his work were concerned, in that respect he was subject not to the respondent's control but to the limits of the terms of his South Lanarkshire Council Taxi Driver's licence.

84. It was also clear to the Tribunal that the respondent did not dictate where its drivers would sit in their taxis in order to attract fares. It is self-evident that the local taxi rank, train station, market square or public houses would be the locations from where business would most likely be obtained. It was therefore a matter of commercial common sense that the claimant should wait at these locations. In all the circumstances it could not be said that the claimant was subject to a level of control by the respondent consistent with there being a contract of employment.

Personal service

85. In ***Pimlico Plumbers Ltd and Mullins v Smith [2018] UKSC29***, the individual had a limited ability to offer a substitute in practice because he could only send another Pimlico operative (essentially, swapping assignments).
5 Here the Supreme Court framed the relevant question as ‘*Was Mr Smith’s right to substitute another Pimlico operative inconsistent with an obligation of personal performance?*’, and in answering that question considered whether the dominant feature of the contract remained personal performance on his part.
- 10 86. On the facts of the present case, as the claimant would on occasion send a substitute to cover his shift without informing the respondent, far less obtaining her permission, the Tribunal does not find that his personal performance was the dominant feature.
- 15 87. Prior to Pimlico Plumbers reaching the Supreme Court, the Court of Appeal (***[2017] EQCA Civ 51***) had reviewed the previous authorities in relation to personal service and had found that a conditional right to provide a substitute may or may not be inconsistent with personal performance, depending on the precise contractual terms and the degree to which the right was limited or occasional.
- 20 88. By way of example, and subject to any exceptional facts, the Court found that a right to substitute:
- Only when the contractor is unable to carry out the work, is consistent with personal performance
 - Only with the consent of another person who has an absolute and
25 unqualified discretion to withhold consent, is consistent with personal performance
 - 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, is inconsistent with personal performance.

89. While there was no evidence that the claimant had ever arranged a substitute other than his mother or one of his fellow drivers, the tribunal accepted the respondent's evidence that on such occasions when he did send a substitute he did so without reference to the respondent who would only find out he had provided a substitute when it received the relevant timesheets or when Mrs Pollock tried to call the claimant and his substitute answered the phone.

90. The Tribunal also accepted that the claimant was genuinely permitted to send any substitute driver who was licensed by South Lanarkshire Council. Therefore, while the claimant did not have an entirely unfettered right to send a substitute, the limits on that were dictated only by the licensing authority and not by the respondent. Such arrangements were therefore inconsistent with personal performance.

Mutuality of obligation

91. While the respondent generally made work available to the claimant through its control phone and by providing him with a vehicle and the claimant usually accepted work when it was available, the Tribunal did not accept that mutuality of obligation truly existed. It accepted the respondent's evidence that the claimant was free to finish his shift early on occasion, as opposed to being bound to accept calls during set hours. The tribunal also found that the respondent was not required to provide a set number of hires and the claimant was not required to carry out any amount of work. He was also permitted to decline to take a hire if he had good reason.

92. Although as a matter of commercial common sense, it was in the respondent's interests to provide the claimant with a vehicle and with access to the company phone and it was in the claimant's interests to take as many hires as possible, the Tribunal found that in all the circumstances there was no legal obligation on either side that was sufficiently clearly legally enforceable to amount to a mutuality of obligation.

The other provisions of the contract

Financial arrangements

93. The Tribunal accepted the respondent's undisputed evidence that it did not set the fares it charged, which were in fact set by South Lanarkshire Council.
- 5 The agreement in relation to pay was that the fares taken by the claimant would be shared equally with the respondent after deduction of fuel costs. The claimant was only paid for work done. He was therefore entirely responsible for the amount of income he made each week and accepted the financial risk associated with there being no guaranteed level of income.
- 10 94. There was no dispute that the claimant was never paid holiday pay or sick pay during his engagement or that he only ever asked for holiday pay or sick pay after the parties' relationship ended. The claimant never received or asked for pay slips. He also dealt personally with his own tax affairs and paid tax as a self-employed contractor. In addition to fares taken he also earned
- 15 tips that he was not required to declare to the respondent and retained in full. In relation to his application for his taxi licence, the claimant paid the cost of the licence application as well as the associated training costs.
95. Such arrangements in relation to payment, holiday pay and sick pay and payment of the taxi licence application, while not conclusive, do however point
- 20 strongly to self-employed status.
96. While the respondent paid for the vehicle fleet insurance and maintenance, that was not unsurprising in circumstances where it owned the vehicles, which were subject to a fleet insurance policy.
97. The Tribunal also found it significant that the claimant was free to enter into
- 25 commercial arrangements such as he did with Muirpark, whereby he arranged to have their calls directed to the respondent's company phone when Muirpark had no cars on the road. The claimant personally negotiated that arrangement with Muirpark without input from the respondent. That was consistent with his being in business on his own account and securing an
- 30 additional source of business that both he and the respondent as the owner of the vehicle could benefit from.

98. In relation to the team events relied on by the claimant, the Tribunal attached no particular significance to his attending such social events.

Complaints

5 99. The Tribunal accepted that the respondent had received complaints about the claimant's allegedly inappropriate use of innuendo and had not dealt with the claimant under any disciplinary procedure but instead had directed the complainers to the licensing authority. That was plainly consistent with the claimant being a self-employed contractor and not an employee of the respondent who would, naturally, have taken appropriate action had the
10 claimant been its employee.

100. The Tribunal accepted that the claimant may have "felt" like an employee because he was often allocated the company phone and allocated calls to other drivers from it and also because on occasion he would become involved in taking cars to be maintained or have tyres changed. However, the reality
15 of that situation was that his own business benefited from having the cars on the road at all times and therefore he had a financial interest in their being properly maintained and returned to the road as soon as possible.

20 101. In all the circumstances the Tribunal was satisfied that the claimant was not an employee. The key characteristics of a contract of employment were absent from the relationship because there was no mutual obligation to offer or accept work, there was insufficient control by the respondent over the claimant and the claimant was under no obligation to provide personal service. Furthermore, the majority of the working arrangements and financial
25 arrangements between the parties were inconsistent with there being a contract of service.

30 102. In respect of the alternative case that the claimant had worker status, the Tribunal accepted that there was a contract between the parties and that the respondent was not a customer or client of any business undertaking or profession carried on by the claimant. However, the absence of the

necessary elements of mutuality of obligation and of personal service are fatal to the claimant's alternative case that if he was not an employee he nevertheless still had 'worker' status.

- 5 103. For the above reasons, the Tribunal finds that the claimant was a self-employed contractor.

Employment Judge:

R King

Date of Judgement:

13 March 2020

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Entered in Register,

Copied to Parties:

16 March 2020

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