THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

BETWEEN:

MR CHRISTOPHER JOHNSON

Claimant

AND

MYTAXI NETWORK LIMITED

Respondent

ON: **13-16 January 2020**
18 March 2020 (postponed as a result of the COVID-19 lockdown. By agreement, the submissions were dealt with subsequently on the papers)

Appearances:

For the Claimant: Mr Chris Milsom, Counsel
For the Respondent: Mr Peter Linstead, Counsel

RESERVED JUDGMENT ON PRELIMINARY ISSUE

1. The claimant was not a worker of the respondent pursuant to the Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations 1998.

2. All claims are therefore dismissed for want of jurisdiction.

REASONS

1. By a claim form presented on 13 August 2018, the claimant claims protected disclosure detriment; holiday pay; unlawful deduction of wages and failure to pay the national minimum wage. A claim of unfair dismissal was withdrawn and has been dismissed.

2. All of the claims require the claimant to have been a worker of the Respondent. Worker is defined for our purposes at section 230(3) Employment Rights Act 1996 (ERA); section 54(3) National Minimum Wage Act 1998 (NMWA) and Regulation 2(1) Working Time Regulations (WTR). As the definition is identical under all 3 provisions, I shall refer only to 230(3) ERA.

3. The claimant no longer contends that he was an employee of the respondent. His case is that he was a worker pursuant to section 230(1)(b) ERA (a "*Limb b*" worker).

Preliminary Issue

4. The issues that I had to determine at this hearing were:

   i) Whether at the relevant time, the claimant was a *Limb b* worker and if so;
   ii) What counted as working time for the purposes of the WTR and NMWA

Evidence

5. I heard evidence from the claimant. On behalf of the respondent, I heard from Andrew Batty (AB), CEO; James Dow (JD), Senior Operations Manager; Vandana Prashar (VP), Head of Operations and Expansion; Emily Deeks (ED), former Senior Global Operations Manager and David Savage (DS), General Manager.

Documents

6. The parties provided a joint bundle of documents comprising 2 lever arch files. References in square brackets in the judgment are to pages within the bundle. There was also a separate bundle of authorities.

The Law

7. Section 230(3) defines a *Limb b* worker as an individual who has entered into or works under (or where the employment has ceased, worked under)……a contract……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.

Findings of Fact

Introduction

8. The respondent operates a technology platform called "Mytaxi" which is an app that connects licenced Hackney Carriage (Black Cab) drivers and passengers, via a passenger app and driver app. The respondent is part of a larger parent company called Intelligent Apps GMbH who have headquarters in Hamburg. In 2016, the respondent merged with Hailo Network Limited (Hailo). The Mytaxi app (the "App") is used in a number of countries across Europe. In the UK, it operates in a number of number of cities, with its largest presence in London. To date, the respondent has around 12500 black cab drivers signed up to the App.

9. The way the App works is that rather than hailing a Black Cab in the street by sticking their hand out, people can book one via the the App downloaded onto their mobile phones. Taxi-hailing apps have become widely used in the UK, and indeed worldwide, over recent years. The most well-known of these is of course the Uber app, used to book private hire vehicles such as minicabs. The company operating the Uber app in the UK ("*Uber*") has had its own issues over the status of drivers using its app, culminating in litigation at ET, EAT and the Court of Appeal - Uber BV v Aslam [2019] ICR 845 ("Uber").

10. Both parties have quoted Uber extensively, albeit from different standpoints. The claimant contends the present case is on all fours with Uber and should be decided in the same way. The respondent on the other hand contends that there are significant distinguishing features which justify a departure from Uber.

11. As is often said and is well worth repeating; issues of worker status are a mixture of fact and law. Many of the Uber conclusions turned on the specific findings of fact in that case and should therefore not be seen as a panacea for all driver-status questions relating to app based taxi hailing operations. On that point, it was recognised in Uber that *Uber* could have devised a business model that did not involve them employing drivers [*para 97 ET* Uber]

12. Between 2014 and 2016, the claimant worked full time in business on his own account as a black cab driver in London. In February 2017, he downloaded the driver version of the The App onto his mobile phone. Apart from the odd trip in April, the claimant did not start to actively use the app until around the end of July 2017. There were no trips on the app after 18 April 2018, when the claimant was removed from it. Throughout this period, the claimant continued to source work away from the app as a self-employed black cab driver.

13. All London black cab drivers must hold a Hackney Carriage licence and they are regulated by Transport for London (TfL). The following regulations have been highlighted in these proceedings:

    Plying for Hire

    A black cab drivers' licence is granted by TfL for a specific geographical zone and it is

only within that zone that the driver is able to "Ply for Hire" i.e. pick up a passenger hailing a taxi on the street. There is no zonal restriction on where the passenger is dropped off but if the drop off point is outside the driver's licenced zone, the driver cannot pick up a new fare at that point.

The Claimant was a "Green Badge" licenced driver. This covered Greater London, which included central London plus 9 suburban sectors: Harringay; Havering; Bexley; Bromley; Croydon; Sutton; Richmond; Hillingdon and Barnes. A Green Badge holder can Ply for hire in any of these areas. A Yellow Badge licence holder can only Ply for hire in the 9 suburbs identified.

Fares

Under the TfL regulations, the passenger fare must be calculated by the taximeter and it is an offence for the driver to charge more than the metered fare for trips within their licenced zone. However, they are permitted to negotiate the fare for trips outside the zone.

Refusal of Fare

A TfL licenced driver is not allowed to refuse a fare where the destination is within 12 miles or 1 hour (20 miles from Heathrow Airport).

14. There appeared to be some ambiguity, in the claimant's mind at least, as to whether an e-hail via the The App amounted to plying for hire. The claimant repeatedly sought clarification from the respondent on this and the respondent repeatedly told him to seek his own counsel as the onus was on him as the licence holder to ensure that he worked within the terms of his licence [261,264, 270-274, 338].

15. The same question was raised with the London Mayor's office by Caroline Pidgeon, MP on behalf of a constituent (believed to be the claimant) on 17 May 2018. The Mayor's office did not give a definitive answer but instead invited drivers to direct their questions to Tfl. [508]. The claimant did raise the matter with Tfl a number of times and on 18 February 2019 they responded: "***As you will no doubt recognise, this is a complex area of law. Neither "pre-booked" nor "plying for hire" are defined in legislation. This means that the position will rest on the circumstances of each individual case***".

16. It was submitted on behalf of the claimant that I should make a finding on whether or not the Tfl regulations on plying for hire apply to instant journeys on the The App. I disagree. I do not consider this to be within my remit. It is a matter for the regulatory authorities to determine, not the tribunal and as indicated above, Tfl and the Mayor's office have not provided a definitive response. Also, I don't believe it will assist the determination of status in this case.

17. In order to register onto the app, the driver must input their personal information and upload their Hackney Carriage licence and bank details. They must also agree to the respondent's General Terms of Use and Framework Agreement [239-241 & 242-246]. Approval for use of the app is usually received within 48 hours. The approval process at the time the claimant registered to use the app consisted simply of a verification of the driver's details. There was no interview, formal or otherwise. Additional checks have been introduced since August 2018 but they post-date the claimant's use of the app and are not relevant to this case. On approval, the driver receives a confirmatory email along with log in details and various links on how to use the app. They can then start accepting jobs straight away. Although there is a voluntary

induction and an opportunity to take "The Knowledge Plus", these were optional extras, which the claimant did not take up.

18. Passengers wishing to use the app have a separate but similar sign up process and are bound by separate terms of use. [205] Passengers have the option of inputting credit or debit card details but do not have to.

19. A passenger can use the app to pre-book a journey, up to 4 days in advance (Pre-Booked Jobs) or request a cab immediately (Instant Jobs). Only 2 of the claimant's fares were for pre-booked journeys. The rest were Instant Jobs.

20. Once logged onto the app, the claimant was required to indicate his availability by clicking "Busy" or "Go Free". "Busy" indicated that the driver was not available to accept passengers through the app. That may be because, for example, they have picked up a passenger from the street in the traditional way. In that event, the passenger would have nothing to do with the respondent and would be a customer of the Claimant's independent black cab business. If the Claimant clicks "Go Free" on the App, that indicated that he was available to accept jobs. The default position when logging onto the App was "Busy" so the driver had to make a positive choice to change their status. Once a job flashed up on the App, the driver had a 4 second window to accept it before it went to another driver. The driver clicked "Accept" in order to take the job or "Reject" if they did not want it. If the driver did nothing, the job would automatically reject.

21. When a passenger books a job via the app, their name and location (but not necessarily their intended destination) is sent out to a number of drivers who are identified using algorithms which assess their location and how quickly they can get to the pickup. The algorithm is also supposed to identify the drivers' licenced zone but glitches in the system meant that occasionally it did not. These were historic and had largely resolved by July 2017.

22. There was no requirement to accept a minimum number of jobs or indeed any jobs offered. However, once a job was accepted, it was treated as assigned to the driver and they were expected to undertake the passenger journey, subject to the ability to cancel, referred to below. The passenger's phone number was then provided to the driver via the driver app and the passenger was provided with the name, number and photo of the driver via the passenger app. They then communicated with each other directly from that point. Once the claimant had the passenger's details, there was nothing stopping him from subsequently contacting that passenger independently of the app or vice versa. In reality, the circumstances in which such a direct arrangement would be of any benefit to a passenger and driver would be limited to a pre-booking, for example.

23. The cost of the journey was, for the most part, calculated via the taximeter, applying Tfl rates. However, the passenger terms and conditions provide for a minimum fare of £10 (at the time) during core hours and that minimum fare could sometimes be higher than Tfl metered rate. A minimum fare was introduced on the Hailo platform in 2013 and the respondent continued to operate it post merger. Drivers that pick up e-hails are not paid for the journey to the customer pick up point so during busy periods, they are often reluctant to drive long distances to pick up a potentially low value fare, when street hails are available that they can charge straight away. The minimum fare was intended to mitigate against this and to encourage drivers to accept more e-hails.

24. The minimum fare provisions do not appear in the drivers' T&Cs. Indeed, such minimum fare arrangements would appear to breach the Tfl rules referred to at paragraph 13 above, if

applicable. However, a driver can hire his car to a private operator who can pursue its own terms including minimum fare. The claimant refused to charge passengers the minimum fare whenever it was higher than the metered reading as he believed to do so would be in breach of his Tfl licencing conditions. He was never compelled to do so and was told by the respondent that it was up to him whether he charged the minimum fare or not [282].

25. Where the actual fare was less than the minimum fare, the claimant would sometimes ask the respondent for a top-up. This did not happen very often given that the average fare for a trip in London was £17. When the top up was paid by the respondent it was stated to be a goodwill gesture. [454, 472].

26. At the end of the journey the passenger has 3 payment options: payment via the the App using a pre-registered card, payment by card using the driver's own card terminal in the cab (Since January 2017, all Hackney Carriages are required to have a working card terminal) or cash. Payment via the driver's card terminal is treated as a cash payment by the respondent. Around 50% of all fares are paid via the The App. Fares paid by the The App are input into the driver app at the end of the journey and go directly to the respondent. The respondent's case is that the app payments are collected on behalf of the claimant. The respondent pays the app payments to the driver on Wednesdays, for fares received between Saturday and Tuesday, and on Friday for fares received between Wednesday and Thursday, with 10% of the fare being deducted by the respondent as a procurement fee. As the cash payments go directly to the driver, the 10% fee for those payments is deducted from the total fares received via the App. Of the 282 trips carried out by the claimant, 78 were cash payments (Around 28%).

27. A job can be cancelled on the App by the passenger or the driver. This is known as a Scrub. Where the passenger cancels the job 2½ minutes after the driver has accepted it, the driver will automatically receive a Scrub payment from the Respondent of £5. This is also paid if the driver arrives at the location and waits for 2½ minutes and the passenger does not show up On a pre-booked job, the Scrub payment is £10 if the passenger cancels within 30 minutes of the pick-up time. This is not paid automatically; the driver has to put in a claim for it. These provisions are not contained in the drivers T&Cs but in the Scrub Policy found on the App [48G-H].

28. The driver is able to cancel a job by pressing a button on the App and calling the passenger to let them know. No reason needs to be given to the respondent for the cancellation though the respondent keeps a record of jobs cancelled. This is because once a job is accepted, the customer is told when they are likely to be collected and by whom. From a business perspective, cancellations mean dissatisfied customers and potentially, damage to the brand. After 5 driver scrubs or more, the respondent warns the driver that their use of the App may be suspended.

29. On 13 November 2017, the claimant was contacted by email because he had scrubbed 10 jobs the previous week, which the respondent regarded as higher than average. He was also told that he was not following the correct scrub procedure, which required him to phone the passenger before cancelling. He was asked to give feedback but did not respond.

30. On 29 November 2017, the claimant was informed that his use of the App had been suspended for 2 weeks because he had scrubbed 23 jobs since the 13/11/17 and was still not following the correct scrubbing procedure. The claimant was told that he was scrubbing most of his jobs before arriving at the pick-up and without any contact with the passenger. [374N]

31. The respondent keeps general statistics of the total orders accepted by drivers and the

percentage of cancellations. [138K]. Between 1 July 2017 and 30 April 2018, the general statistics for London drivers using the App were:

Acceptance rate of offers – 23.9%
Driver cancellation rate – 7.9%
Passenger cancellation rate – 17.2%

32. The claimant acceptance rate was 24.8%, slightly above the London average, but his cancellation rate was 35.4%, significantly higher than the London average [138H].

33. Between April 17' and April 18', the claimant completed 282 trips via the App at a total value of £4560.48 after commission. [249I] In the same period, the claimant earned £30,472.45 net through other sources. [249H]. The claimant told the tribunal that he worked a 5-day week, 8 hours a day (generally, not just for the respondent). That works out on average at less than 1½ app trips a day.

34. The claimant contended that he signed up to the App as it was the only way to maintain a sustainable income. However, that does not chime with his level of trips overall and his high percentage of cancellations.

Contract Terms

35. It is the respondent's case that the drivers that use the App are subject to its General Terms and Conditions of Use for Taxi Drivers (Driver T&Cs) and its Procurement Framework Agreement for Taxi Drivers (the "Framework Agt"). The claimant's case is that the so-called terms do not reflect the reality of his relationship with the respondent. Some of the key terms relied upon are set out below.

Driver T&Cs

36. In order to use the App, drivers must sign up to the respondent's general terms of use. The preamble to the terms provide that by logging onto the App the driver accepts the said terms. There is no opportunity for negotiation. In addition, it provides that the driver is also bound by any applicable local taxi transportation laws, tariffs and tariff rules relating to transportation by taxi and may accept transport orders insofar as they are compatible with those regulations.

37. Other clauses of note are:

    i. Clause 1.1 – this describes the service provided by the respondent to the driver as procuring potential passengers looking for a taxi via the mytaxi passenger app.

    ii. Clause 2.1 states that the user shall have no claim to the continuous and uninterrupted operability of the Driver App. In other words, there is no obligation upon the respondent to provide the driver with work through the App.

    iii. Clause 2.2 allows the respondent to discontinue the services offered via the app temporarily in whole or part without notice.

    iv. Clause 3.4 provides that drivers are obliged to accept open transport orders assigned to them. It is common ground that transport orders are assigned if they have been accepted by the driver.

v. Clause 7 allows the respondent to block a driver's use of the App if, inter alia, he does not carry out the assigned transport order without any particular reason and without furnishing proof thereof. This needs to be read in conjunction with the driver's right to cancel orders. [239 & 240, 243]

vi. Clause 9 provides that driver agrees to being rated by the passenger and for the respondent to publish the ratings (non anonymised) on its website.

Framework Agreement [195-204]

38. By clause 1.1, the service provided by the respondent is the procurement of potential passengers looking for a taxi via the App for taxi drivers registered with Mytaxi.

39. By clause 22.2, in addition to providing the procurement service, the respondent offers taxi drivers the possibility of collecting fares owed by passengers procured via the App electronically by credit card, debit card or other non-cash payment methods. Where payment is made by this method, the driver agrees to assign the fares due for the taxi journey to the respondent (cl. 3.3) and the respondent assumes the credit risk for any claims so assigned (cl. 3.4).

40. Clause 2.6 sets out the relationship between the driver and the passenger in relation to the taxi transportation service procured through the App and states:

"A legally binding contract of carriage is entered into between the taxi driver and the passenger through the use of "mytaxi" software when the "ACCEPT" button is pressed. The settlement of the taxi trip is solely made between the taxi driver and the passenger in accordance with the contractual and statutory provisions (taxi tariff). For the avoidance of doubt, no contract will entered into between the passenger and mytaxi regarding transportation services".

41. Clause 5.1 provides for payment of a procurement fee by the driver to the respondent for every successful procurement via the App, which at the relevant time was 10% of the fare. The respondent undertakes to pay the balance of the fare for each claim assigned to the driver (cl.5.2).

42. Although clause 4.3 refers to a limited right of substitution for Advance Reservations, the respondent concedes that, in practice, there is in fact no right of substitution for any jobs done via the App and drivers are expected to carry out the transportation service personally.

43. Clause 12.1 provides that the Framework Agreement, the Privacy Policy and the driver general terms of use constitute the whole agreement between the parties.

Passenger Terms and conditions [205-208]

44. Passengers who wish to use the App have to sign up to the respondent's document: General Terms and Conditions for Passengers.

45. Clause 1.1. says that "*mytaxi offers mytaxi services to the passenger*". The service is described as one of procurement of taxi transportation. It states that the taxi transportation services are provided by the taxi driver and that the passenger contracts directly with the driver in relation to those services.

46. Clause 1.3 provides that the taxi driver will charge the passenger directly for the transportation services.

47. Clause 4.1 gives the passenger the option of paying the driver directly in cash or making payment via the App. Whenever the passenger chooses to pay for the trip via mytaxi Payment , the driver is deemed to have assigned their claim to the payment to the respondent. It is further stated that: "*mytaxi is neither a payment services provider of the passenger nor of the taxi driver and collects the taxi fare in its own name and for its own account"*.

Marketing

48. The respondent markets its services to the wider public in a number of ways; on billboards, in its publicity material connected to the app; branding; Twitter. These are some of the statements contained in its marketing material:

"Instant access to London's largest fleet of over 17000 black cabs [70]

"*a seamless technology-enabled fleet of professional taxis with drivers who are proud to offer a superior service and have devoted the equivalent of a degree to their trade"* [280]

"*Boasting a fleet of 17,500 drivers, we are committed to maintaining London taxi traditions while future proofing the service*"
We invest in our drivers through training provided by the mytaxi academy, our dedicated programme aimed at building an educated, loyal and committed community of drivers"
[71D]

"*We know that mytaxi drivers are already best in the class, but we want to help them become even better, introducing the Knowledge +" [71F]*

49. The claimant points to the respondent's marketing of the App as evidence that the drivers are integrated into its business. I do not read it in that way. It is not unusual for businesses to use exaggerated language and, dare I say, hyperbole in their advertising. I see this as no more than the respondent seeking to draw attention to and sell its product.

50. After each journey passengers are able to rate the driver and drivers are able to see their ratings. The claimant contends that this is done in order to monitor performance. The respondent says that it is a quality monitoring tool whose aim is to measure whether the drivers provided the App passengers with a safe, comfortable and pleasant experience. That to me is a distinction without a difference. The purpose of the scoring system was to incentivise the drivers to adopt high standards. The claimant's ratings were good so it was never an issue. More detailed enquiries were made of the claimant towards the end of his use of the App but that was in the context of him posting critical comments about the respondent on social media and the respondent wanting to check that the claimant was not creating a concerning environment for passengers. [498]. In my view, that exercise was a one-off and not indicative of a general policy of performance monitoring.

51. Although the respondent had branded materials such as mytaxi receipt pads, display boards and cabbie code stickers, there was no requirement for drivers to use these [78-79].

Risk

52. The respondent offers various discounts to passengers as incentives to make payments via the app. [48C-F]. When this happens, driver receives the full fare.

53. When the passenger pays for the journey via the app, the respondent bears the risk of any fraud. However, where payment is made through the driver's credit card terminal or by cash, the risk is borne by the driver.

54. The risk of passenger scrubs is a shared risk in that the respondent only bears the risk within the limited parameters identified at paragraph 27 above. Otherwise, the claimant bears the risk of lost income arising from passenger cancellations.

Termination

55. On 18 April 2018, the respondent wrote to the claimant terminating his use of the App with immediate effect [483]. No reasons were given for termination but in any event, that is a matter beyond the scope of this hearing.

Submissions

56. The parties have presented very detailed written submissions and replies running to over 170 pages in total. These speak for themselves and I do not intend to re-produce them here, save for in the briefest of outlines. I have also been provided with a bundle of authorities, which have been reviewed. I do not intend to analyse these in any great detail but references will be made to them, as appropriate. I am very grateful to counsel for these.

Claimant's Submissions

57. It was submitted for the claimant that the written terms of the respondent were at odds with the reality of the relationship between them. From the point that the claimant was assigned to a job on the App, he was a *limb b* worker providing transportation services to the respondent's passengers, on the respondent's behalf. For the purposes of the WTR, the claimant's working time began from the point he accepted a booking on the App and took preparatory steps to reach the passenger's pick-up point. This case is on all fours with Uber.

Respondent's Submissions

58. It was submitted for the respondent that the claimant was not a *limb b* worker and that its contractual documentation reflected the reality of the relationship with the claimant. The respondent acted as agent for the claimant in the procurement of passengers via the App. The claimant contracted directly with the passengers as principal and provided transportation services to them as part of his independent taxi business. There are a number of significant factors distinguishing this case from Uber and it should therefore be departed from. In the alternative, if the claimant is found to be a worker, he was only working for the respondent when he was transporting passengers after accepting a job on the App.

Conclusions

59. The first issue I have to consider is: who was the claimant providing the services for and under what contract. This is important because in order to be a *limb b* worker, the individual must

personally performs the services for another party to the contract (my emphasis). That therefore requires the claimant to be providing the services to the respondent and not a third party.

60. The services we are concerned with here can loosely be described as transportation services – picking up passengers and driving them to their desired destinations. The written contract between the drivers and the respondent and the corresponding one between passengers and the respondent say that the driver contracts with the passenger for the transportation services. If that is right, then the claimant cannot be a *limb b* worker. However, the claimant says the contracts are not right as they do not reflect the reality of the relationship with the respondent. I have to consider therefore whether, in all the circumstances, taking a wordly-wise approach the contract between the drivers and the respondent is reflective of the way the way the relationship operates in practice. Autoclenz v Belcher [2011]ICR 1157 (SC). It is worth noting at this point that just because some of the written terms may not reflect the reality of the contract in practice, it is not a reason to disregard the whole contract as there may be other terms that are consistent with the way the contract operates on the ground.

Agency

61. The respondent's case is that the drivers contracted directly with the passengers in respect of the taxi transportation services provided and acted as the drivers' agent in procuring those passengers.

62. The "agency" argument was one that was deployed in Uber. At paragraph 76 of the CA decision, it was held that there could not have been a contract between the driver and the passenger at the point of acceptance by the driver of the transportation order as vital elements of a contract were missing. The obligation to fulfil the transportation order was therefore to *Uber.* Although the vital contractual elements said to be missing in Uber were present in our case (passenger's details were provided to the driver upfront, including the destination, if known), there is nevertheless no basis to conclude that the driver owed the passenger a contractual obligation to collect him or her on assignment of the order. I'm satisfied that at this point, the obligation was owed to the respondent. That is consistent with clause 3.4 of the drivers' terms and conditions, of which the passenger was not a party [239].

63. The above analysis does not preclude the existence of a separate contract between the driver and the passenger at the point of pick up, with the respondent acting as agent in relation to procurement of the transportation services. However, there are 2 problems with that. Firstly, clause 12.6 of the Framework Agreement makes clear that none of its terms makes a party the agent of the other for any purpose [204]. Secondly, on a proper reading of clause 3.4 of the drivers' terms, the obligation of the driver to the respondent to accept the assigned transportation order is an obligation to carry out the taxi journey. That obligation does not end at the point of passenger pick up and it seems artificial to suppose that the same obligation is owed to the respondent and the passenger simultaneously. Added to this are the facilities provided to the passengers post journey such as driver ratings, dealing with customer complaints. If they were additional agency services provided to the driver, as the respondent contends, they would have been referred to as such in the contractual documentation. They suggest to me an investment in the passengers by the respondent that goes beyond their procurement.

64. The driver contract documentation contains an "entire agreement" clause yet there are some aspects of the relationship that are not included within the written contract e.g. passenger scrub fees, minimum fares and airport parking charges. The respondent bore the risk of these

(certainly in the claimant's case). The respondent says it did so on a "goodwill" basis though I agree with Mr Milsom that that categorisation has no bearing on status. A cynic might think that the respondent left these out of the written contract in order not to dilute the message that the passenger and driver were contracting with each other. One would expect to find them in the contract given that they are a regular feature of the transportation service and their absence has not been explained.

65. Taking all of the above matters into account, I have concluded that the respondent was not the agent of the claimant. The passengers contracted with the respondent for the transportation services and these were delivered by the claimant pursuant to a separate contract with the respondent.

Were the transportation services provided by the claimant to the respondent in its capacity of client or customer of the claimant's business undertaking?

66. In Bates van Winkelhof v Clyde & Co LLP [2014]UKSC 25, 2 types of self-employed people were identified. The first kind carries out a profession or a business undertaking on their own account and enters into contracts with clients or customers to provide work or services for them. The second kind provides their services as part of a profession or business undertaking carried on by someone else. Only the second is a limb (b) worker.

Regulatory regime

67. The drivers that used the App held individual licences to drive black cabs within their designated areas. The claimant was licenced by Tfl to provide a black cab service long before his relationship with the respondent commenced and it was he who was subject to Tfl's regulatory regime and who could be sanctioned or prosecuted for not complying with it. The regulatory regime in this case is a key factor distinguishing it from Uber as in that case, *Uber* was the holder of the licence and the party subject to regulation by Tfl, not the drivers. That makes a difference when it comes to the issue of control as in the present case, much of the control the drivers were subject to was dictated by Tfl rather than the respondent.

68. In his submissions, Mr Milsom identifies a number of factors which he contends are relevant to the issue of status. I address some of these below.

Claimant's mode of appointment

69. This is dealt with at paragraph 17 of my findings and in my view is neutral. If anything, the minimal appointment process suggests a distance between the driver and the respondent less consistent with an integrated working relationship.

The contractual terms

70. The claimant submits that the driver terms and conditions and framework agreement are at odds with the reality of the contractual arrangements. In Autoclenz Ltd v Belcher [2011] ICR 1157 (SC), it was held that the relative bargaining power of the parties had to be taken into account in deciding whether the terms of a written agreement represent the true agreement. The claimant points to the fact that the claimant had to sign up to the respondent's non-negotiable terms as an indicator of the claimant's weaker bargaining position. However, another feature of relative bargaining positions is how dependent a party is on the contract for work. Having signed up to the App in February 2017, the claimant only actively started using it in July 17'. From then until he was removed from the App, the claimant chose not to accept

75% of the trips offered and cancelled 35.4% of the jobs accepted. On average, he carried out 1.5 trips a day via the App. In money terms, this represented less than 15% of his overall income derived from driving his taxi. [paras 29 & 30]. It is clear from these statistics that the respondent was not the claimant's main source of income and that he did not need to sign up to the App in order to work. This was not a dependent work relationship as envisaged in Cotswold Development Construction Ltd v Williams [2006] IRLR 181 at para 53.

Control

71. It is common ground that the claimant was not a worker when the app was switched off. Even when the app was switched on and set to "Go Free" indicating that the claimant was available to accept jobs, he was under no obligation to accept any jobs and was still free to market his services to potential street hail passengers and pick them up in preference to jobs on the App. For the majority of the time, that is exactly what he did.

72. In this case, as in Uber, there was no umbrella contract creating rights and obligations between periods of work as drivers are not obliged to switch on the App. In Windle and anor v Secretary of State for Justice [2016] ICR 721 CA, Lord Justice Underhill, held that although the ultimate issue for the purposes of s.83(2) of the Equality Act 2010 (EqA) is the nature of the relationship during the period when the work is being done, it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. In that case, the Court of Appeal restored the tribunal's decision that the individuals were not employees. Although that case was to do with the extended definition of employment under section 83(2) Equality Act, the reasoning is as applicable to section 230(3)(b) ERA. In Windle the individuals were interpreters who provided services to the Courts and Tribunals Service (HMCTS) on a case-by-case basis. They also worked for other institutions. HMCTS was under no obligation to offer them work, and they were under no obligation to accept it when offered. There are clearly parallels to be drawn with the present case and as in Windle, I consider the absence of mutuality between the various transportation orders suggests a degree of independence that points away from worker status.

73. Although clause 3.4 of the written contract provides that drivers are obliged to accept open transport orders assigned to them, that is the necessary quid pro quo for being allowed to use the App rather than a feature of control. Once a job was accepted, it was still open to the driver to cancel within certain parameters. This was not entirely without consequence as drivers could be suspended from the App for excess cancellations, as happened in the claimant's case. However, I do not consider that sanction to be a significant measure of control when weighed against everything else. The respondent had a vested interest in protecting the reputation of its brand. Cancellations were detrimental to the overall customer experience and discouraging these speaks more to commercial expediency rather than control.

74. The respondent exercised little if any control on how the claimant undertook the transportation services. The way in which the work as done was controlled by Tfl on the one part and the claimant on the other. That the claimant controlled the way he provided the service is not remarkable given that drivers were recruited for their skill and expertise as black cab drivers and would not be expected to be subject to close direction. Nevertheless, this is a point distinguishing this case from Uber, where *Uber* set the default route, fixed the fares and imposed other conditions, such as the choice of vehicle.

75. Unlike Uber, the respondent did not exclude its drivers from receiving key passenger information. Not only were drivers sent the name, contact details and destination (if known) of the prospective passenger, they could also contact the passenger after the trip, something

which was strongly discouraged by *Uber*. Whereas *Uber* fixed the fare charged, the respondent did not. The fare was set by the taximeter in accordance with Tfl regulations. The claimant relies on the minimum £10 fare as evidence of the respondent setting the fare. However as found above, drivers were under no obligation to charge it, and the claimant chose not to as he considered such charge to be in breach of Tfl rules. That approach was consistent with the written contract which provided that transport orders may be accepted only insofar as they are compatible with local regulations and rules the driver is subject to. The onus was on the driver to make that assessment, not the respondent.

76. The claimant relies on the fact that the respondent asks passengers to rate drivers as a form of control. My findings on this are at paragraph 49 above. Performance monitoring is not necessarily the same as performance management. There were no consequences associated with poor ratings and it was a matter for individual drivers as to the steps they took to address them.

77. The fact that the claimant could provide his services as infrequently or as often as he wanted, could dictate the timing of those services and was not subject to control by the respondent in the way in which those services were undertaken indicates a level of independence that is more consistent with an independent contractor in business on his own account than a self-employed person fully integrated into the respondent's business.

78. Taking the above reasons in the round, I find that the claimant and respondent contracted with each other as two independent businesses and that the respondent was a customer of the claimant's taxi business. That the respondent was more powerful (in scale and financial terms) than the claimant is, when weighed against all the other factors, not material.

79. I find that the claimant was not a *limb b* worker.

80. In case I am wrong about that and the claimant is a *limb b* worker, I have gone on to consider what constitutes working time for the purposes of the WTR and NMWR.

81. Regulation 2(1)(a) WTR defines working time as "any period during which a person is working, at his employer's disposal and carrying out his activities or duties. The time the claimant spent transporting passengers to their destination was clearly working time. The question is whether any period before customer pick up also counted. The claimant was not working while driving from home to his territory as this was effectively travel to work, which is not working time. The claimant was also not working by merely switching on the app as he was not at the respondent's disposal at that point.

82. Under the NMWA, there are 4 types of work to which the entitlement to the national minimum wage applies. By process of elimination, the work done by the claimant was unmeasured work (regulation 44). Unmeasured work includes travelling for the purposes of unmeasured work (reg. 47). By that measure, driving to pick up an App passenger (once the driver was in his territory) would be working time.

83. My view therefore is that if the claimant was a worker, his working time commenced upon his acceptance of an App job (assuming it was not cancelled) as at that point, he was working, at his employer's disposal and carrying out his activities or duties.

Judgment

84. The claimant was not a worker of the respondent pursuant to ERA, NMWA and WTR. His claims are therefore dismissed for want of jurisdiction.

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Employment Judge Balogun
Date: 22 July 2020