



EMPLOYMENT TRIBUNALS

Claimant: Mr C Johnson

Respondent: GT Gettaxi (UK) Ltd

Heard via CVP (London Central) On: 18 February 2021

Before: Employment Judge Davidson

Representation

Claimant: Mr L Bronze, Counsel

Respondent: Mr E Kemp, Counsel

RESERVED JUDGMENT

1. The claimant is not a worker for the purposes of section 230(3)(b) (“limb(b)”) of the Employment Rights Act 1996 (“ERA”).
2. The claimant therefore does not have jurisdiction to pursue his claims.

Employment Judge Davidson

Date 11 March 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS

REASONS

The hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.
2. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. Members of the public attended the hearing accordingly.
3. The parties and members of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.
4. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.
5. The participants were told that it was an offence to record the proceedings.
6. Evidence was heard from the claimant on his own behalf and from Tyson Niemeyer (Managing Director) and Eleanor Bedwell (Head of Marketplace Operations) on behalf of the respondent.
7. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

Issues

8. By claim form presented on 22 May 2020, the claimant brought claims of disability discrimination, detriment for making disclosures, detriment for trade union activity and unlawful blacklisting. The respondent resisted the claims on the grounds that the tribunal did not have jurisdiction because the claimant was in business on his own account as a taxi driver and did not have any status to bring the claims.
9. The issues for determination at this Preliminary Hearing are identified at paragraph 3 of the Case Management Summary of Employment Judge Goodman dated 27 October 2020:
 - a. Was the Claimant a worker for s.230(3)(b) (“limb(b)”) of the Employment Rights Act 1996 (“ERA”)?
 - b. Was the Claimant a worker under the extended definition in section 43K ERA?
 - c. Was the Claimant an employee as defined in section 39 of the Equality Act 2010 (“EqA”)?

d. Was the Claimant a job applicant as defined in section 39 of the Equality Act?

e. Was the Claimant a contract worker within the meaning of section 41 of the Equality Act?

f. Was the Claimant employed under a contract of employment for the purposes of section 143 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”)?

10. The focus of the parties’ evidence and submissions was the ‘limb (b) worker’ under section 230 of ERA and I will deal with that issue primarily.

Law

11. The relevant statutory provision is contained in section 230 of the Employment Rights Act 1996 relating to ‘limb b’ workers:

230 Employees, workers etc.

...

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

...

(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;

12. There is a significant body of case law which has developed in relation to this issue. In submissions, both parties extensively referred to *Uber BV v Aslam* [2018] EWCA Civ 2748. The day after the hearing, the Supreme Court published its decision on appeal from the Court of Appeal in the *Uber* case. I invited the parties to make further submissions to take into account any particular points from the Supreme Court decision in *Uber* as it is highly relevant to the issue for determination in this case and a case which is binding on me to the extent that it decides the issues I must decide.

13. By way of summary, the Supreme Court in *Uber* found that the drivers in *Uber* were workers. The Supreme Court focussed on the protections which the statutory provisions were designed to confer as a starting point, rather than taking the contract terms as a starting point, although the terms of any written agreement are relevant. The claimant submits that this case is ‘on all fours’ with *Uber*; the respondent submits that there are significant distinguishing features which mean that the *Uber* decision does not apply to this case.

14. Five main factors were identified as follows:

a (of major importance) Uber sets the fare and drivers are not permitted to charge more than the fare calculated by the Uber app. It is therefore Uber which dictates how much drivers are paid for the work that they do;

- b. the contract terms on which drivers perform their services are imposed by Uber and drivers have no say in them;
- c. once a driver has logged onto the Uber app, the driver's choice about whether to accept requests for rides is constrained by Uber. One way in which this is done is by monitoring the driver's rate of acceptance (and cancellation) of trip requests and imposing what amounts to a penalty if too many trip requests are declined or cancelled by automatically logging the driver off the Uber app for ten minutes, thereby preventing the driver from working until allowed to log back on;
- d. Uber also exercises significant control over the way in which drivers deliver their services. One of several methods mentioned in the judgment is the use of a ratings system whereby passengers are asked to rate the driver on a scale of 1 to 5 after each trip. Any driver who fails to maintain a required average rating will receive a series of warnings and, if their average rating does not improve, eventually have their relationship with Uber terminated;
- e. (a significant factor) Uber restricts communications between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride.

17. I have also had regard to the Supreme Court decision in *Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41 and have looked at the relationship between the respondent and the drivers as it operates in reality and not simply as it is set out in the written contract. The claimant submits that the written documentation does not reflect the reality of the relationship; the respondent submits that the written documentation does largely reflect the relationship.

18. The parties also referred me to a first instance employment tribunal decision in London South from 2020 which dealt with many of the issues in this case, not least because the claimant was the claimant in that case, *Johnson v Mytaxi Network Ltd* Case no 2303018/2018. This case was of persuasive authority only.

Facts

19. I will set out the facts with particular reference to the reasoning in *Uber* and how those factors apply to this situation.

General

20. The respondent operates a mobile application platform through which members of the public can order a black cab through the customer application (Customer App) rather than hailing one on the street. Licenced black cab drivers can sign up on the driver application (Driver App) and can accept rides offered to them by the respondent through the Driver App. The drivers are at liberty to 'ply for hire' as black cabs or to register with other similar taxi apps at the same time as being on the Driver App. Drivers are free to use the platform

for as long as they want or as little as they want and they have total control over when they choose to use it. The platform can only be used by black cab drivers.

21. The claimant is a qualified black cab driver and has had his licence since April 2014. He worked for the respondent between April 2015 and 2017, during which time he carried out 171 rides. His earnings from the respondent amounted to about 5% of his total earnings.
22. He applied to rejoin the Driver App in 2020 and this was refused, giving rise to this claim. He has not used the Driver App since 2017. Although he is able to give evidence as to how the platform operated in 2017, he has no direct experience of how it operated at the relevant time in 2020.

Hackney Carriage Regulations

23. Transport for London (TfL) regulates black cab drivers in London. These regulations include regulations of fares by way of a meter and it is an offence to charge more than the metered fare within the regulated zone. A black cab driver is not allowed to refuse a fare where the destination is within 12 miles or 1 hour.
24. Black cab drivers must complete 'The Knowledge' through which they learn the best routes to take for journeys in London.
25. TfL also regulates certain aspects of the relationship between driver and passenger, including rules as to conduct and the obligation to complete a journey once started.

Contractual terms

26. There are two sets of written terms and conditions operated by the respondent: the Driver terms and conditions (Driver Terms) and the Customer terms and conditions (Customer Terms). The Driver terms are set by the respondent and cannot be individually negotiated by the drivers. They are updated regularly and changes are notified to the drivers through an update on the app.
27. The key provisions of the written contracts are as follows.

Paragraph 9.4 of the Customer Terms provides:

“9.4 Gett shall not be liable to the Customer for the actions or omissions of any Driver or in connection with the Transportation Services. Your contract for the Transportation Services is with the Driver directly and therefore any claim you have in relation to the Transportation Services should be directed at the Driver. If you are unclear as to who provided you with the Transportation Services, you can contact us at customercare.uk@gett.com and ask us to provide you with the Driver details.”

Clause 2.1 of the Driver Terms provide:

“2.1 The App provides a means to enable Customers who seek

transportation to certain destinations to be connected with Drivers. Gett does not provide transportation services, rather we are a technological service provider that uses an electronic platform to provide the Services.”

Paragraph 2.2 of the Customer Terms provides:

“2.2 The App provides a means to enable Customers who seek transportation to certain destinations to be connected with Drivers. Gett do not provide transportation services, rather we are a technological service provider who uses an electronic platform to provide the Services.”

Paragraphs 3.1 and 3.3 of the Driver Terms provide

“3.1 You shall be solely responsible for determining the most effective, efficient and safe manner to perform each Order. As an independent contractor in business on your own account, you shall be responsible for furnishing at your own expense any necessary equipment, tools and materials unless otherwise noted herein.

...

3.3 You acknowledge that you will be responsible for making your own decision as to the accuracy and suitability of a Customer and as to whether you will accept or decline to provide them with Transportation Services. If you provide Transportation Services to someone who is not a customer or is not the Customer via the App for you to provide Transportation Services to, you agree that you will not be paid for these Transportation Services. Further, you will not be paid (other than directly by a customer) for any Transportation Services you provide to a Customer once you have completed the ride in the App and any further transportation services you provide to a Customer are at your own risk.”

Signing up to the App

28. Drivers apply to join the driver app by completing a form either by downloading the app and using that, going on the website or visiting the Driver Office in Farringdon Street. There are a number of criteria for acceptance and the applicants must confirm that they hold a Hackney Carriage licence. The respondent does not hold this licence itself. The drivers must also accept the respondent’s terms and conditions. They are not open for negotiation. Once the driver has completed the application, the respondent’s Driver Team will check it to ensure the documentation and information is correct. If the driver has an existing profile, the respondent will check if there are any comments in the ‘Notes’ section of that profile, for example if conduct has previously been noted as poor.
29. If a driver is accepted, they will have a ‘welcome call’ from a member of the Driver Team. They will also be sent video links to show how to use the platform, notifying them of promotions and tips on how to interact successfully with customers.
30. Once accepted, if a driver is available for work, he indicates that on the driver app and he will be offered jobs, which he is then free to accept or reject. If he is not available to accept rides he is asked to indicate this by showing

'Busy' on the app. There is nothing to stop the driver plying for hire while he is available for work on the app and he can be available for work on another app at the same time.

31. Customers sign up to the app by downloading it and inputting their personal information to create an account. They request a ride through the app, which will find a driver for them. The fare will be taken from their bank account, details of which are stored by the app. At the end of the ride, the customer has the option to give the driver a rating.

Setting of fares

32. The drivers are using black cabs and, as far as B2C (private individual) fares are concerned, the drivers are governed by TfL Regulations and must charge the customer according to the metered fare. Approximately 75% of fares are B2C. There are some B2B (business accounts) rides which are done by fixed fare but the majority of these rides are also charged 'on the meter'.
33. The respondent takes its service commission on any fares from rides through the app and will collect the payment from the customer and pass the driver's portion to the driver. There is no interaction between driver and customer at the end of the ride regarding the fare.

Obligation to accept a request

34. The drivers are subject to TfL regulations within the regulated area and must accept rides in accordance with their regulatory obligations. Once they have accepted a ride, they are under an obligation to complete the ride according to TfL regulations. These are not set by the respondent but by TfL. There is no evidence that the respondent currently imposes a minimum acceptance rate, minimum order rate or customer evaluation rating. It is accepted that some such controls were in place in 2017 when the claimant last used the app but these were changed in 2018 and are no longer in place.
35. There is a 'Going Home' function which allows a driver to indicate that he is going home and will accept fares which take him in the direction of home. This can only be used once every six hours.

Monitoring of acceptance and cancellation rates

36. The respondent's evidence is that drivers can reject as many jobs as they want and this is not monitored. Once they accept a job, they can then cancel before the ride starts but, if they cancel more than six times in a day, they are asked to go through the administration department rather than just cancelling on the app. This is because cancellations lead to a negative customer experience and the respondent wants to impose a disincentive to cancel repeatedly, although it is always the driver's choice whether or not to cancel.
37. Some rides are booked in advance (FO rides) and drivers can select these from a list of available rides. They can then cancel at any time up to 30 minutes before the scheduled time. After that time, they must call the respondent in order to cancel. Repeated unjustified cancellations will lead to

a temporary block of the driver (on an increasing scale) from FO rides but they can still access the immediate order rides (ASAP rides) through the app.

Excluding access to the Driver App

38. The respondent retains the discretion to prevent a driver from accessing or using the driver app but this is in cases where there has been incorrect documentation supplied or if the driver's conduct has raised concerns. It is not used as a penalty for poor customer ratings.
39. Customer evaluations have no impact on B2C rides but if a driver's rating is very low, this may affect the driver's access to B2B rides.

Communications between driver and passenger

40. The driver is provided with the advanced information regarding the passenger and the passenger is provided with the driver's details. The driver and passenger can communicate with each other, for example to arrange a pick-up location, and the respondent does not attempt to prevent the driver and passenger from having a conversation. The driver is still free to ply his trade as a black taxi driver.

Branding

41. Drivers are offered the option of advertising the respondent on their vehicles but this is not compulsory.

Conclusions

42. The key issue for determination, following *Uber*, is the degree of control that the respondent had over the drivers. Applying the factors identified in *Uber* as being the most important, my conclusions are set out below. However, my final decision will be taken on the basis of all these factors taken together 'in the round'.
43. Having reached a conclusion in relation to the respondent's relationship with its drivers, I will then consider if there are any additional matters to be taken into account as regards this particular claimant.

Setting fares

44. I find that this case can be distinguished from *Uber* on the grounds that the drivers using the respondent's app plying their trade from their black cabs and accepting fares from the respondent's app is an additional extra to their main business of operating a London black cab. It is acknowledged that black taxi drivers are in business on their own account when plying for hire.
45. Drivers who accept fares through the app are still branded as black taxis and are obliged to comply with the specific regulations which apply to black cabs, imposed by TfL, including setting of fares and the obligation to complete a ride once accepted.

46. Although there are a small number of fixed fares for B2B customers, these were very much the minority of the respondent's business and do not, in my view, change the underlying reality that the driver's fares are predominately set by TfL, not the respondent.

Terms and conditions

47. I find that the Driver terms are imposed by the respondent and the drivers have no opportunity to negotiate these. This is the same as in *Uber*.

Choice to accept rides

48. There are controls on accepting rides which are imposed by TfL on black taxi drivers. In relation to the accepting rides offered through the app, I do not find that there are any penalties imposed by the respondent for rejections of rides offered. There are no penalties imposed for cancellations of accepted rides although repeated cancellations are discouraged but cannot, ultimately, be prevented. I therefore find that this aspect of the respondent's model can be distinguished from *Uber*.

Control of how to deliver the service

49. I find that drivers, all of whom have 'The Knowledge' are free to follow the routes they consider best and there is no penalty for not following the GPS route (unlike in *Uber*). Aspects of how the driver delivers the service is governed and controlled by TfL which distinguishes this case from *Uber*.

Communications between driver and passenger

50. I find that the drivers are given limited customer details when they accept a fare. Given that the drivers are in business on their own account as black taxi drivers, they can presumably make an arrangement for other trips without involving the respondent, although I heard no direct evidence on this and there is no evidence that this is prohibited or discouraged. Drivers are able to increase their earnings by plying for hire in the traditional way or by signing up to other apps. This distinguishes the respondent's drivers from *Uber* drivers, who cannot ply for hire in the same way as a black taxi can.

Driver status conclusion

51. I find that, taking all these factors in the round, the respondent's drivers are not limb (b) workers. They are in business on their own account as black taxi drivers and use of the respondent's app is a way to increase their business. However, they are not subservient to the respondent and the relationship can be distinguished from the *Uber* drivers in the ways set out above.

The claimant's own position

52. The claimant has not been a driver on the respondent's app since 2017. He has continued to ply his trade as a black taxi driver. When he did use the app, this was on an occasional basis and his earnings through the app constituted a small proportion of his total earnings from taxi driving. Although

this factor is not, of itself, conclusive, it is something I am able to take into account.

53. I find, therefore, that he could not be said to have been dependent or subordinate to the respondent.
54. I find that the claimant is not a worker for the purposes of the claims he wishes to pursue. The tribunal does not have jurisdiction to hear his claims and they are therefore dismissed.

Employment Judge Davidson

Date 11 March 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
11/03/2021..

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FOR EMPLOYMENT TRIBUNALS