EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Stuart Tennyson	v	M1 Executive Travel Limited

Heard at: Watford **On**: 25 February 2021

Before: Employment Judge de Silva

Appearances

For the Claimant: In person

For the Respondent: Brenda Moore, Director

PRELIMINARY HEARING JUDGMENT

1. The Claimant was a worker of the Respondent pursuant to section 230(3)(b) of the Employment Rights Act 1996 and accordingly the Tribunal has jurisdiction to hear his claims for unpaid wages and holiday pay.

REASONS

The Proceedings

1. By a Claim Form presented on 22 April 2020, the Claimant claims holiday pay, arrears of pay and other payments (box 8). He claims the following sums for the prior two years: £3,600 for 2 years' holiday, £3,000 for unpaid wages when he was available to work for the Respondent and £2,500 for pension contributions (box 9.2).

2. By letter dated 9 October 2020, the Tribunal listed a Preliminary Hearing to decide whether the Claimant was an employee or worker of the Respondent.

3. I heard evidence from the Claimant who provided a written statement and gave oral evidence. He was cross-examined by Mrs Moore. I also heard evidence from Mrs Moore who was cross-examined by the Claimant.

Findings of Fact

4. I make the following findings of fact. The Respondent is a licensed operating taxi service specialising in airport and corporate work.

5. The Claimant provided services to the Respondent as a driver from February 2012. There was no written contract between the two Parties. He was told that he would be self-employed for tax purposes. I do not accept that he was told that he would be an employee of the Respondent. However, it is agreed that he was told that he would be working full-time for the Respondent. This meant in practice that he would be available 24 hours a day from Monday to Friday; however, the Respondent would take into account his start and finish times when allocating work. This arrangement reflected the fact that pick-ups could be any time of day from early morning into the night.

6. For brevity, I will use masculine pronouns when referring to a driver in the singular, as the Claimant is male. Each driver rented a car from one of the owners of the Respondent, i.e. Mr or Mrs Moore, at a rental cost of £200 per week (referred to as the car usage fee). Although a driver could in theory use their own vehicle, none of them did so and they would not realistically have been in a position to as they were required to use luxury vehicles, specifically Mercedes.

7. Payment from passengers was generally taken by card and made directly to the Respondent. Passengers would pay in cash only on rare occasions. As well as the care usage fee, a commission was deducted by the Respondent on the fares earned. This was 15% from 20 February 2020. Prior to the calculation of the commission, the Respondent deducted from the passenger income an administration and credit card fee which it kept. The Respondent made a weekly payment to the drivers, after these deductions. The passenger fares and the amounts deducted by the Respondent were set by the Respondent. Much of its business came from of clients who had corporate accounts with it.

8. If the driver did not work a week or part of a week, an adjustment to the driver costs payable to the Respondent was made. This was at the discretion of the Respondent. Petrol was paid for by the drivers, in effect out of their share of the earnings from passengers. There was no agreement that drivers be paid other than as set out above, for example there was no hourly rate agreed.

9. The Respondent gave directions to drivers as to how they worked. On 16 December 2019, drivers were told that the Respondent would like them to be at pick-up addresses 15 minutes before the pick-up time so that there was *"no chance we are late"*. Drivers were required to dress smartly, including wearing a tie. At airport pick-ups, they carried an "M1" branded white board with the name of the passenger. They had to do the work themselves and could not substitute another driver to do the job. If they could not do a job, the Respondent would arrange for another driver to do it. So far as the passenger was concerned, the drivers would be working for the Respondent.

10. The Claimant was required to have a private hire driver's licence which was issued by Luton Borough Council. Clause 18 of the Luton Borough Council standard conditions provided that he must ensure that he was employed or otherwise engaged as a Private Hire Driver by an Operator who held a current valid Operator's Licence. The Respondent held such a licence and the Claimant only carried out driving for the Respondent. I accept the evidence of the Claimant that he was told that he should not drive for any other Operator. This is consistent with the fact that the vehicle he used was rented out to him by the owners of the Respondent.

11. On occasion, the Claimant did pick-ups for friends and family using the car. These had to be booked through the Respondent in light of the Luton Borough Council requirement referred to above.

12. Jobs were allocated to drivers by the Respondent by text or phone. If a job could not be done by the Claimant, they would be reallocated by the Respondent's controller.

13. The Claimant was generally entitled not to work on any particular day so long as he gave notice in advance. It would not have been acceptable to the Respondent that he simply did not make himself available on the day in question without notice.

14. I have been referred to text exchanges between the Claimant and the Respondent's controller on occasions when the Claimant did not do a job or make himself available for work. For example:

    a. On 8 June 2018, he said that he was not working the following day and that this *"should be in the diary"*;

    b. On 10 November 2018, he apologised for needing to be off the following morning and said that on a further day he was doing a private job for a friend;

    c. On 12 February 2019, he apologised for not having done a job that evening as he had something important to do;

    d. On 25 November 2019, he said he had fallen asleep but would be good for work the following day (in response to which he was told that he needed to ring Mrs Moore);

    e. On 10 December 2019, he was asked to email his time-off required over the Christmas period.

15. So far as weekends were concerned, the drivers would indicate prior to the coming weekend when they were available over that weekend to carry out work. This was in part to ensure that the Respondent was aware of what capacity there was to take on jobs.

16. The Claimant was responsible for his own tax arrangements.

Relevant Law

17. Under section 23 of the Employment Rights Act 1996 (**"the Act"**), a worker may present a complaint to an Employment Tribunal that his employer has made a deduction from his wages in contravention of section 13 of the Act which contains the right not to suffer unauthorised deduction from wages.

18. In order for the Tribunal to have jurisdiction to hear such a claim, it is necessary for the claimant to be an employee or worker of the respondent. Section 230 of the Employment Rights Act (**"the Act"**) states:

"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

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

(3) In 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)—

(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; …"

19. Under regulation 2 of the Deduction from Wages (Limitation) Regulations 2014, the Employment Tribunal is not to consider so much of the complaint brought under section 23 of the Act as relates to a deduction prior two years before presentation of the complaint. It appears that this is the basis on which the Claimant limits his claim to the period of two years prior to the issue of the claim (i.e. the period from 22 April 2018).

20. In ***Uber BV and Others v Aslam and Others*** [2021] UKSC 5, the Supreme Court gave guidance on the test of whether an individual is a worker. It observed that the modern approach to statutory construction is to look at the purpose of a provision and interpret its language, so far as possible, in a way which gives best effect to that purpose and that this approach requires the facts to be examined in light of the statutory provision in question. It quoted ***Collector of Stamp Revenue v Arrowtown Assets Limited*** (2003) ITLR 454, in which Ribeiro PJ stated: *"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically"* (paragraph 70).

21. It made the point that the purpose of the Act is to protect vulnerable workers who have little say over their pay and conditions because they are in a subordinate and dependent position in relation to a party which exercises control over their work (paragraphs 71-72).

22. In that case, as here, there was no written contract between the parties, therefore the precise nature of any obligations had to be determined from the conduct of the parties (paragraph 45-46).

23. In finding that the claimants were workers, the Supreme Court relied on the following facts:

    a. The remuneration paid to drivers for the work they do was fixed by the company and the drivers had no say in it other than by choosing when and how much to work. This was said to be a factor of major importance (paragraph 94);

    b. The contractual terms were imposed by the company and the drivers had no say in them (paragraph 95);

    c. Once a driver had logged into the app, the driver's choice about whether to accept bookings was constrained by the company (paragraph 96);

    d. The company also exercised control over the way in which drivers delivered their services, for example by a ratings system (paragraphs 98 to 99);

    e. The company restricted communications between passengers to the minimum necessary to complete a particular trip and prevented drivers from establishing a relationship with the passenger (paragraph 100)

24. It concluded that the transport services provided by the drivers through the Uber app were tightly defined and controlled by the company. It further concluded that the drivers were in a position of subordination and dependency such that they had no professional or entrepreneurial skills and that the only way that they could increase their earnings is by working longer hours while meeting the company's performance measures.

Submissions

25. Mrs Moore submitted on behalf of the Respondent that it did not have an app which was a central feature of the ***Uber*** case.

26. The Claimant submitted that the Supreme Court in ***Uber*** had found that the drivers were workers on similar facts. He was required to be available for work and had no say in his remuneration.

Conclusions

27. The Claimant's claims, though not specifically identified as such, are made as claims for unlawful deductions from wages claims under sections 13 and 23 of the Act. These require him to establish that he was a worker for the purposes of section 230 of the Act. Although there is reference to employment in the claim form (and the notice of preliminary hearing), it is not necessary for him to establish that he was an 'employee' in order to bring these claims and I was not in any event addressed on employment status (for example the only authority relied on was ***Uber*** which deals with worker status). Had it been necessary to decide whether he was an employee, I would not have found that he was, for example, mutuality of obligation was not established in that it was not shown that the Respondent was obliged to provide any level of work to the Claimant.

28. In this case, the arrangements between the parties, viewed realistically, included an obligation on the Claimant to accept jobs when he had made himself available for work. It is apparent from those occasions on which he turned down work that he needed a reason to do so and did not have an unfettered right to do so. This is also apparent from the fact that the owners of the Respondent rented luxury cars to the Claimant to carry out his services. The reality of the situation is that this was done with the intention of requiring the Claimant to be available to take jobs. It made little or no economic sense to do this without this requirement.

29. One weekdays, he was required to be available 24 hours a day, although the Respondent would take into account his start and finish times when allocating work (that is to say that it was recognised that he would not have to be available for the full 24 hours of any day). On weekends, he was required to be available for those periods when he had told the Respondent that he would be available for work. Although there was a slightly greater degree of flexibility on weekend about accepting jobs, in that it was understood that the driver might not be able to do a job if he was engaged on personal matters such as shopping, there was still a fundamental underlying obligation to accept jobs during the times that he had indicated he would be available, subject only to a limited right to turn down bookings when there was good reason for this.

30. Therefore, although there was no app as in ***Uber***, once the Claimant made himself available for work, his choice about whether to accept bookings was

constrained by the Respondent. This applied to times on weekends when he had made himself available, as well as weekdays, as set out in the previous paragraph above.

31. Further, the Claimant undertook to perform personally any work or services for the Respondent. He could not substitute another driver to do the job. If he could not do a job, the Respondent would arrange for another of its drivers to do it. Equally, save for work for family and friends, which was also performed under the Respondent's operator licence, he was not in reality permitted to work for other operators.

32. As in the ***Uber*** case, where it was stated to be a factor of major importance, remuneration paid to the Claimant for the work he did was determined by the company and he had no say in it other than by choosing when and how much to work. The conditions on which the work was done generally were imposed by the Respondent and he had no say in them.

33. As with Uber, the Respondent also exercised control over the way in which drivers deliver their services, e.g. when they turned up for a job, what they wore and importantly which car they drove.

34. It is also relevant that it was the Respondent who had the relationship with the passenger (e.g. much of their work was from companies who have accounts with them). This is similar to the position in the ***Uber*** case.

35. Although no app was used, the transport services provided by the drivers were tightly defined and controlled by the Respondent and the Claimant was in a position of subordination and dependency such that he had no professional or entrepreneurial skills and the only way that he could increase his earnings was by working longer hours while meeting the Respondent's requirements as to how the services were provided.

36. For these reasons, I find that the Claimant was a worker of the Respondent.

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Employment Judge de Silva

7 April 2021

Date: ……..

21 April 2021
Sent to the parties on: .....

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For the Tribunal Office

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