RESERVED

Case Number: 2405561/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr J Nixon

Respondent 1: Vedamain Limited
Respondent 2: Clakim Limited

Heard at: Liverpool (by CVP) **On:** **17 and 18 May 2021**

Before: Employment Judge Shotter (sitting alone)

Representatives
For the claimant: In person
For the first respondent: Mr M Howson, consultant
For the second respondent: Mr M Williams, director

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The claimant was an employee for the purpose of section 230 and any claim brought under the Employment Rights Act 1996 and Regulation 2(1) of Transfer of Undertakings (Protection of Employment) Regulations 2006.

2. The claimant and second respondent participated in an illegal contract which has the consequences of the claimant being unable to pursue claims in the Employment Tribunal in respect of unfair dismissal, automatic unfair dismissal, failure to consult and unpaid accrued holiday pay, and as a consequence the claims are all dismissed.

REASONS

Introduction

1. This was a preliminary hearing to consider three agreed issues, namely;

1.1 Whether the claimant was an employee for the purpose of any claim under the Employment Rights Act 1996 and TUPE related legislation?

1.2 Whether the claimant participated in an illegal contract which has the consequences of him being unable to pursue claims in the Employment Tribunal in respect of unfair dismissal, TUPE transfer etc.

1.3 If the claimant was found to not to be an employee of the second respondent for at least 2-years, was the unfair dismissal complaint was lodged out of time?

2. This has been a remote preliminary hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP video fully remote. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

3. The documents that the Tribunal was referred to are in a bundle of 206 pages together with an additional bundle of 16 pages and 37-Bank statements, the contents of which I have recorded where relevant below, in addition to the claimant's unsigned and dated witness statements, plus eight unsigned witness statements of witnesses giving evidence on behalf of the claimant and four witness statements made on behalf of the respondent and the documents provided by Mr Williams on beheld of the second respondent pasted and attached to the email dated 11 May 2021 listed as follows; "Claimant's Taxi Jobs part 1," "Claimant's Taxi Jobs part 2," second respondent's bank statements, Superpay Overview and "intended sworn affidavit information." Despite clear case management orders, the documents in this case were sent to the Tribunal piecemeal and were not put into an agreed trial bundle, which can be confusing. I have read the documents to which I was taken during the hearing, and have not considered documents that were not referred to in the evidence, including the snapshot showing second respondent's bank balance which cannot be understood out of context.

Case Summary

4. By a claim form received on the 15 May 2020 following ACAS Early Conciliation that took place between 16 March to 16 April 2020, the claimant brings claims of unfair dismissal under section 94 of the Employment Rights Act 19976 as amended ("the ERA"), automatic unfair dismissal under section 7(I) of Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") and failure to inform and consult under Regulation 13 of TUPE.

5. The claimant maintains he was employed as an "Operator" between 1 September 2014 to 31 December 2019 by the second respondent prior to a TUPE transfer to the first respondent on 17 December 2019. The claimant alleges he was advised by the second respondent that his employment would continue and while he was on holiday was asked by Joshua Hughes to work 20 December 2019, which the claimant refused. After that date the claimant was offered no work by the first respondent. In oral submission on time limits the claimant maintained he was on holiday until the 31 December 2019 and was not dismissed by the first or second respondent as he was not issued with a P.45. or a dismissal letter. It is notable the claimant maintains he was transferred as an operator; I found on the evidence before me that he was not working as an operator immediately prior to the transfer, and that his role was

general administrative assistant covering a range of responsibilities and taxi driver.

6. The first respondent maintains the claimant was (a) a self-employed subcontractor and had no standing to bring his claims, and (b) he had not been an employee of the second respondent for some time before the TUPE transfer, at least 2-years, although he was recorded as having worked regularly from November 2019 to the date of the transfer. The respondent did not receive any details about the claimant from the second respondent unlike other employees, for example, his contract, and is suspected this was because the claimant was self-employed at the relevant time. Finally, (c) the first respondent alleges the shifts showing the claimant had worked for the second respondent as an operator were worked by the claimant's partner and that the claimant worked as a self-employed taxi-driver for 15 years but all his details were deleted from the second respondent's system prior to the transfer in breach of the second respondent's legal obligations in an attempt to hide the fact that the claimant was self-employed.

7. In short, the nub of this case is that the first respondent suspects the claimant was paid for employed work he did not carry out as a telephone operator/operator controller when he was working as a self-employed taxi driver. The telephone operator shifts were carried out by the claimant's partner when she and other staff were paid cash in hand without lawful deductions. The claimant was paid for employed work he had not undertaken and this is supported by the call recordings. The first respondent maintains whilst the claimant's contract was legally entered into, it has been performed in an illegal manner participated in by the second respondent, claimant, and his partner, who has brought a separate claim of unfair dismissal consolidated to these proceedings. It is notable that the claimant has not called his partner/ex-partner (case number 2402165/2020) to give evidence at this preliminary hearing, as submitted by Mr Howson who invited the Tribunal to concentrate on the contemporaneous documents as they undermine the claimant's case that his employment continued as an operator immediately below and following the TUPE transfer, and that the contract had not been illegally performed.

8. The claimant maintains the first respondent asked him to work immediately after the TUPE transfer, and he refused because he was on booked holiday. The first respondent denies it asked the claimant to work on the 20 December 2019 and further denies that the claimant informed it he had a period of annual leave booked. It accepts the claimant was not offered shifts, the reason being because the first respondent was unable to contact the claimant and had been advised by staff the claimant had not worked as an employee of the second respondent or worked any shifts in the office for over two years.

Previous preliminary hearings

9. Two previous preliminary hearings have taken place in this case on the 13 January 2021 and 4 May 2021, which has been unable to proceed for a variety of reasons as stated in the Preliminary Hearing summary. There has been an issue with the second respondent complying with case management orders

relating to disclosure of bank accounts showing transfers into the claimant's account. Mark Williams had indicated there were no documents to be disclosed as the second respondent's bank accounts had been closed and it would take time to get them from the bank, fortunately the bank has expedited matters and some records have been provided. In addition, the first respondent was provided with a number of the second respondent's documents, including the "Super Pay system" which includes relevant information undisputed y the first respondent. Mark Williams has provided some bank statements originally limited to the Tribunal, but when it was explained that I cannot consider documents which the other party has not seen, for whatever reason including commercial sensitivity, to do so would give rise to an unfair hearing. Mr Williams disclosed the bank statements to the respondent and we proceeded on that basis. As it transpired, there was no issue between the party that the claimant had received cash transfers into his bank account from the second respondent relating to payment for the taxi work he carried out during the relevant period, and the claimant's representative did not dispute the two titled "Claimant's taxi jobs" part one and part two, which scheduled payments made.

10. A number of documents have also been disclosed by the claimant in addition to the main bundle, including the claimant's building society account statements, wage slips and a second witness statement from Stephanie Wood dealing with the contractual position.

11. At the preliminary hearing held on the 13 January 2021 I warned the parties, particularly the claimant and Mark Williams who appeared on behalf of the second respondent and gave evidence on behalf of the claimant, that they had a right not to answer questions which self-incriminated them. Both understood the seriousness of the allegations put by the first respondent and the possibility that they could attract criminal liability and at the very least an investigation by HMRC. The parties were reminded of that warning on a number of occasions, including at this hearing.

12. At today's hearing there was an issue concerning the redacted disclosure of bank statements from the claimant to the first respondent. The redactions disappeared when the first respondent printed out the statements and in an email sent to the claimant on 7 May 2021 by Mr Howson, the claimant was informed of this and put on notice of the questions intended to be asked on cross-examination as it appeared the claimant was living with his alleged ex-partner and paying rent on her property, with a vehicle owned by the ex-partner registered and insured by the claimant outside the alleged ex-partner's house at all times, in direct contrast to the claimant's assertion that the relationship had broken down. Reference was also made to large cash deposits being paid into the claimant's account which the first respondent suspected was from the claimant's work as a self-employed taxi driver.

13. The claimant objected to first respondent's use of the unredacted information as it went beyond what was ordered by the Tribunal, although he "will happily prove to the judge" and explain his personal bank statements. The claimant set out his objections in an email dated 10 May 2021 which included an allegation that the first respondent had breached data protection and he intended to report

the first respondent to the ICO and SRA. The claimant suggested I should view the unredacted bank statements to the exclusion of the second respondent, which I explained was not possible as both parties required access to the same information in order that a fair hearing could take place. In any event the respondent had already read the bank statements and the claimant was aware of the questions he could be asked and would not be taken by surprise. After some discussion an agreement was reached with the parties that the Tribunal's bundle would include the redacted copies only and the respondent could ask the questions set out in its email dated 7 May 2021 and we proceeded on this basis without issue.

Witness evidence

14. The claimant relies on the witness evidence of eight witnesses plus Mark Williams who appears on behalf of the second respondent and is at the same time a witness giving evidence on behalf of the claimant. On behalf of the claimant oral evidence was heard from Michael Nicholls, Stephanie Wood and Alan Moore, all previous employees of the first respondent. The claimant also relies on the unsigned "witness statements" of the six remaining witnesses which have been put in evidence via emails; The claimant understood that as there are disputes on the evidence it is likely little or no weight will be placed on signed and particularly unsigned witness statements made by people who cannot confirm their evidence is true under oath and the respondent cannot test that evidence under cross-examination. I placed no weight on the contested evidence given in the written statements sent in emails that were unsigned by Keith Thomas, Makala Allman, Patricia Hood and Valarie Main.

15. On behalf of the first respondent I heard from Andrew Swift, contracts manager, Ben Thomas, manager, Joshua Hughes, booking staff manager, and Nigel Thomas.

16. On behalf of the second respondent and claimant I heard from Mark Williams, director.

Credibility of witnesses

17. The credibility of witnesses was a key issue in this application given the contemporaneous documents reflected the claimant was carrying out two different jobs of operator and taxi driver at precisely the same time, which was not physically possible. I found the claimant and Mr Williams gave contradictory evidence that undermined what each was saying and found neither to be credible witnesses on key issues.

18. Mr Williams was ordered to provide an affidavit which he failed to do, providing instead a document titled "designed for an intended affidavit" explaining he did not have the expertise to produce an affidavit despite the fact that in his email sent to the Tribunal on 11 May 2021 copy correspondence from "my solicitors" was attached. I concluded that Mr Williams had no intention of producing an affidavit dealing with the financial position of the second respondent in relation to payments made to the claimant. I did not accept the explanation given by Mr

Williams for non-compliance was credible; his solicitors could have produced the affidavit. As it transpired, it was possible to work around this with the evidence provided and the matter went no further. I note however Mr Williams has been unable to confirm under oath that the claimant was paid cash over and above the amounts traceable from the second respondent's bank account to the claimant's bank account.

19. Mr Williams maintained that account jobs and wages paid by bank transfer were the only methods of payment from the second respondent to the claimant and "all transactions were conducted via the banking system", evidence directly contradicted by the claimant in oral evidence to the effect that when he was carrying out taxi cab duties and the customer paid cash the claimant would keep the fare to pay the taxi car hire agreement and fuel, and if there was any excess the second respondent would account to HMRC for the tax and national insurance. Mr Williams made no reference to this arrangement in his document marked "designed for an intended affidavit" and witness statement set out in an email dated 17 November 2020 confirmed by Mr Williams under affirmation to be true. It is notable that in his witness statement Mr Williams lists the duties carried out by the claimant as "taxi controller and telephonist, PDA repair and installation, PDA driver training, staff training and cover for certain office manager duties whilst office manager was unavailable or on leave" stating "I can assure anyone concerned that these duties were fulfilled efficiently and consistently up until the transfer of the company." Mr Williams does not include the claimant being required to drive a taxi cab, in direct contrast to the claimant's evidence that in or around August 2018 he no longer worked as a taxi controller and his role changed to receiving a flat weekly rate for 36 hours work which entailed assisting with two satellite offices for a number of months, computer training and repairs, staff and driver training, providing office manager cover and driving taxis.

20. In oral evidence on cross-examination Mr Williams stated prior to August 2018 the claimant's duties included other roles, for example, driver tuition as he was part of a team but the operative role was dominant, and the claimant was undertaking other roles as far back as 2017. The claimant on cross-examination, when asked to account for the lengthy periods when he was not recorded on the spreadsheets logged in as an operative, explained he was training Michael Nicholls who had logged on. This evidence was not entirely credible given Mr Williams' contradictory evidence that the claimant was spending time with drivers, other staff and seeing to equipment "all hours of the night."

21. During the periods when the claimant was driving the taxi cab, as evidenced in the spreadsheets, he was also logged in as an operator and Mr Williams gave evidence that it was "possibly" another employee L Edwards who was logged on, in contrast to the claimant's evidence who maintained it was Michael Nicholls who name was not mentioned by Mr Williams.

22. There is also a conflict in the evidence regarding Ms Barron. Mr Williams gave oral evidence on cross-examination Ms Barron worked voluntarily unpaid "if she wanted an hour or two off." The claimant gave evidence that Ms Barron worked

in excess of her contractual hours because she had taken paid time off when her father was ill and was making that time up. Mr Williams made no reference to such an arrangement existing until he came to oral closing submissions.

23. Having resolved the conflict in the evidence, which has not been an easy task, I concluded on the balance of probabilities that (a) the claimant worked for the second respondent carrying out taxi duties, (b) he accepted cash payments from clients which may or may not have been paid into his building society account, (c) no tax records were produced in relation to these cash payments over and above the claimant's set wage, (d) the payments were tax free and the claimant's argument that they extinguished the cost of renting the cab and fuel does not assist him, (e) the claimant's wage slips do not reflect the cash payments made and there is no reference to tax and national insurance being paid by the second respondent on the claimant's behalf as maintained by the claimant and denied by Mr Williams, (f) there is no contemporaneous documentary evidence tax and national insurance was ever paid on these amounts by the claimant, second respondent or Mr Williams as alleged by the claimant in oral evidence, and (g) on the claimant's oral evidence an agreement to treat the cash payments in this way was reached with Mr Williams. Mr Williams made no mention of such an arrangement in any of his evidence, including the so called unsigned statement or the document "designed for an intended affidavit" and it is notable that no documents were produced showing the cash amounts received by the claimant had been accounted to HMRC in order that lawful deductions could be made.

24. Both the claimant and Mr Williams were aware that cash payments received by the claimant was an issue and they were ordered to produce any documents relating to the taxi work undertaken by the claimant from August 2018 to December 2020 and payments made to the claimant in relation to this, whether they be by transfer, cheque or cash. It is noticeable the only contemporaneous document reflecting the position are spreadsheets showing the taxi work carried out by the claimant and whether it was a cash job or not; and the amount received by the claimant together with bank statements.

25. Finally, at the preliminary hearing held on the 4 May 2021 a discussion took place concerning disclosure of records relating to cash statements, and during this discussion the claimant assured me he was never paid by cash and no documents exist concerning this which clearly was not the case given the claimant's oral evidence that when he was sent on taxi jobs as part of his general duties which he had no option over, cash was received and retained by him as part of an agreement reached with the second respondent.

26. The Tribunal has considered the documents to which it was taken in the bundle together with all of the additional documents produced, and oral submissions, which the Tribunal does not intend to repeat and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and it has made the following findings of the relevant facts having resolved the conflicts in the evidence.

Findings of facts relevant only to this application and not to any proceedings brought by other claimants against the first and/or second respondent

27. The second respondent was a taxi firm based in Chester, Broughton and Saltney trading as Abbey Taxis until the second respondent's assets were purchased by the first respondent and staff were transferred under TUPE on the 17 December 2019. The Tribunal was taken to schedule 5 of the Asset Sales Agreement which included a list of employees to be transferred across to the first respondent. The claimant's name was on that list, and he was described as a dispatch controller and telephonist whose employment had commenced on the 16 September 2014. It is uncontroversial that the claimant had not worked in the capacity of a dispatch controller and telephonist since approximately August 2018 and on an irregular basis before that as evidenced by the spreadsheets. The first respondent was informed by staff members who had transferred across the claimant had not worked for the second respondent for a period of two years. The first respondent did not receive contact details for the claimant or an employee file, and it suspected the shifts showing the claimant working as a controller/operative were not worked by the claimant but were worked by the claimant's partner who was employed as the operations controller, and the claimant's log in details were used by staff who were paid cash in hand.

28. The claimant's driver records, driver profile and working history was deleted from the second respondent's system. The first respondent believed the claimant's main role was a self-employed taxi driver and he was paid by the second respondent for work he had not carried out as operator/operations controller and shifts he had not worked. It is apparent the claimant's partner/ex-partner worked much longer hours than those for which she was paid, however, it is not clear to me whether she received payment for the work allocated to the claimant which he had not undertaken. The first respondent believes the objective was in part to defraud HMRC and the benefits system, and I am unable to make any findings in this regard..

The claimant's employment

29. The claimant commenced his employment as an operator on the 1 September 2014 having worked for the second respondent previously from 1996 with breaks in employment. He has or had a partner who worked as a operations controller and they have children together. I am not in a position to set out any findings of facts concerning their personal relationship and whether the claimant lived and continues to live with Yvanna Barron as submitted by Mr Houson without any direct evidence, and nor is there any requirement for me to do so. I am not able to make findings of facts concerning whether the claimant and Yvanna Barron conspired with the second respondent to keep her hours/earnings at a certain level to defraud on benefits; this is an issue best left for other agencies if relevant.

30. In the agreed bundle the Statement of Main Terms and Conditions of Employment relating to Yvanna Barron was produced; the claimant was unable

to disclose his copy as he believes it was lost when he moved from home to home and neither respondents could locate the contract. Yvanna Barron's contract is dated 13 November 2017 and there is no reason to think that the claimant would not have been issued with an employment contract professionally drawn up allegedly by Peninsula around the same time. Mr Houson submitted there was no written contract because the claimant was working as a self-employed taxi driver at the time, and was not employed by the second respondent. He invited the Tribunal to reject Stephanie Wood's evidence that the claimant's contract had been handed to the first respondent on transfer and the claimant had worked continuously by assisting the office manager, Allan Moore, in 2018 to the date of transfer. Three is confusion whether the first respondent was handed the employment contract along with other employee's documents which I am unable to resolve. On the balance of probabilities, I accept Stephanie Wood's evidence that a contract existed and the claimant was an employee of the second respondent during the relevant period.

31. In oral evidence Stephanie Woods confirmed she was responsible for HR matters including the contracts and had provided the claimant with a copy, but not other people whose names were put to her and she did not recognise. These were people who worked in the second respondent's taxi business on a "self-employed basis" paid cash in hand and responsible for their own tax and national insurance. There is an issue whether one or all were paid £6 or £16 per hour as maintained by Allen Moore who gave shifting evidence and could not be relied upon on this matter. I have not taken Mr Houson up on his submission that I should make findings in relation to these employees also on the basis that it was the second respondent's practice to defraud HMRC and Mr Houson argued, it must follow the claimant's contract was also preformed illegality. The allegation concerning other employees is a serious one and it inappropriate for this Tribunal to make findings of facts in relation to other employees/causal workers who are not party to these proceedings. Suffice to record that there or may not be issues is respect of minimum wage, national insurance and tax which are not going to be dealt with in these proceedings.

32. I find it more likely than not the claimant was issued with a statement of terms and conditions of employment taking into account the evidence of Stephanie Wood, and have no means of determining where the copies have done. Nothing hangs on this as it is irrefutable the claimant was working for the respondent in some form or another in 2017 and there is no reason why he would not have been issued with some form of written contract at the same time when other employees were. I also concluded the contract was originally lawful at its inception but what transpired over the years, (including in or around August 2018 onwards) remains opaque as to the inter-relationship between the claimant's work as a taxi driver and working for the respondent either as an operator, according to the claimant, or on a more general basis assisting the manager, according to Mr Williams.

33. In the wage slips produced to the Tribunal the claimant was paid by the second respondent into his bank account the sum of £222.57 from 29 May 2018 with identical deductions or tax and national insurance until the 17 December 2019

wage slips when the claimant was paid 4-weeks holiday taking him to 31 December 2019. For the tax year the claimant's gross payment was £15,069.96 less lawful deductions.

34. In a letter dated 5 May 2021 produced on behalf of the claimant, Riverside Car and Van Services Ltd confirmed the claimant had hired various vehicles from 2018 with the hire ending March 2020. Three car hire agreements dated 1 January 2018, 1 January 2019 and 12 December 2019 were attached, the latter being for 52 weeks. The claimant's evidence was that he originally started accepting taxi fares in or around 2017 which he believed at the time was on a self-employed basis working around his employment with the second respondent when he was carrying out the operator duties and on this basis, he was paid by the customer and unbeknown to the claimant until these proceedings had to account to HMRC for the tax and national insurance due. The claimant continued to be paid by the second respondent the unchanging sum of £222.57 transferred into his account to 31 December 2019.

35. The contemporaneous list of taxi fares generated by the claimant and hours worked was recorded on a spreadsheet the second respondent was legally required to retain. It is this document the first respondent discovered had been deleted from the records, and the document before the Tribunal has been reproduced by it. There are no issues with the contents, which reveal the claimant provided a taxi service from 1 January through to 14 December 2019 as recorded originally by the second respondent, with fares ranging from £198.72 to £2.73 and it is clear the clamant worked on a regular basis carrying out taxi duties. The claimant in oral evidence maintained that the basis on which he worked changed in August 2018, when Michael Nicholls had been trained by him to take over his role as operator. Prior to this date the claimant's evidence was that he was self-employed only as a taxi driver and employed as an operator, and after this date he was an employed taxi driver providing this service as and when required in addition to general administration work, training and information technology and so the Tribunal found was the case, preferring the claimant's evidence supported by wage slips and contemporaneous documents in contrast with the first respondent's suspicions.

36. Michael Nicholls in oral evidence explained when he was being trained to carry out the operator role, the claimant at the time was also carrying out other duties within the team during 2017 to 2018, and by summer 2018 he was fully trained and took over all of the claimant's shifts. Michael Nicholls also confirmed the claimant was not a taxi driver per se, but when the second respondent was short of drivers or there was an account customer the claimant covered the work but "not very often." I found it is difficult to establish with any precision how much taxi work and account work was undertaken by the claimant. For the purposes of this litigation the spreadsheet and bank statements reflect it was regular as opposed to "not very often" and I concluded Michael Nicholls' evidence was not credible in this regard. The contemporaneous list of driving work carried out by the claimant records he was driving often, for example, 16-days in May 2019 and the same number of days in June 2019 with the number of fares and charges varying. Michael Nicholls had left the second respondent's employment around June 2019. It is conceivable the claimant carried out

additional duties for the second respondent in addition to his driving responsibilities, which the claimant maintains became part of his contractual duties as from August 2018, which he could not refuse.

37. The claimant in oral evidence on cross-examination confirmed he worked as an operator until August 2018, and yet the contemporaneous spreadsheet reflects the claimant was logged on from 1 March 2016 at various dates and times throughout until there were gaps for example, 30 March to 23 May 2017, 23 May to 7 June through to the 21 November 2017 and 7 December through to 2 January 2018 when the claimant was not working as an operator evidenced by the fact he was not logged on. The claimant's explanation that he was training Mr Nicholls on his log in did not make sense given the length of time involved. Mr Nicholls gave evidence to the Tribunal that other people sometimes logged into other people's accounts, for example, if passwords were forgotten, and if someone came in on a trial shift, which appeared to be supported by the evidence given the fact that a number of people described by Mr Williams as casual workers were not given log in accounts and it must follow that in order to access the operator system they must have used somebody else's log in details, for example, the claimant's, given the impossibility that the claimant was working as an operator and driver at the same time.

38. What is unclear to the Tribunal is whether Yvanna Barron carried out duties under the claimant's name or not. Reference was made to CCTV footage taken of Yvanna Barron working as an operator on the 17 December 2019 at 02-42-57 with another person. Yvanna Barron's spreadsheet detailing her log in on the day states 18.02 to 06.21 and the last log in detail for the claimant on the operator system before the Tribunal was 16 December 2019 when Yvanna Barron was also logged in on her lap top and second respondent's computer from 15.50 to 16.14 and 18.02 to 05.57. It is not possible to conclude, with any degree of certainty, on the balance of probabilities that the claimant. Yvanna Barron and directors of the second respondent were conspiring to defraud HMRC and/or benefits, taking into account the seriousness of the allegations and the need for Tribunal to tread carefully in such cases.

39. On the balance of probabilities, I found that from August 2018 onwards the claimant no longer worked in operations and he did not return to that role before or after the TUPE transfer. The claimant was responsible for a myriad of tasks ranging from assisting the office manager prior to and after Alan Moore had undergone an operation in December 2018. The claimant resolved computer problems and undertook driver induction/training, assisted in the office and helping to set up the business in Broughton and Saltney, which included according to Mr Williams, the claimant cleaning up after customers had been sick on a number of occasions. Whatever number of hours the claimant was worked, which was usually below the 36 hours contracted, he was paid the same wages as it reflected occasions when the claimant was called out on unsociable hours to deal with issues.

40. I find there was an arrangement between the claimant and Mr Williams on behalf of the second respondent that the claimant carried out taxi driving services as and when required which fell into his general duties, and I preferred

the claimant's evidence in this regard. I did not accept the claimant's evidence that he believed it was lawful for the cash payments and transfers made into his bank account by customers for the taxi service he provided, to be set off against the cost of the vehicle hire, with what little remained being dealt with by the second respondent who accounted to HMRC for tax and national insurance due on those amounts. The claimant received a substantial amount of cash payments, coupled with transfers made into the claimant's account by the second respondent with the authority of Mr Williams representing additional taxi account payments covering contract work from 17 July 2018 through to 26 November 2019 when the claimant was in receipt of moneys which on occasion exceed £200.00 for example, on the 8/1/19 the claimant was paid £223.50, 15/1/19 he was paid £126.70, 12/2/19 £142.50, 3/4/18 £313.60 and so one, with regular payments being made more than twice in one week. On 20 August 2019 the claimant was paid £62.40, 1/10/19 £75.60, 15/10/19 £110.90, 29/10/19 £170.70, 30/10/19 £121.60, 19/11/19 £152.20, 26/11/19 £14.40 and on 26/11/19 £148.00 all paid directly into the claimant's bank account without any reference to his wage slips and with no lawful deductions of tax and national insurance.

41. In oral submissions Mr Williams explained, for the very first time (there was no reference in any of the evidence he had submitted on behalf of the second respondent) to the fact that the taxi payments transferred into the claimant's bank account with the claimant's agreement were gross, and lawful deductions were the responsibility of the claimant and not the second respondent. Mr Williams expressed how "appalled" he felt at the very serious allegations concerning the second respondent failing to meet its obligations to HMRC when the obligation was met "in full." Mr Williams referenced in submissions a 2017/2018 HMRC inspection concerning which the Tribunal had heard no evidence, to prove the second respondent was not defrauding HMRC. In short, contrary to the claimant's evidence that Mr Williams had agreed the respondent would sort out his tax obligations on any excess taken from fares incurred during his employment, minus the cost of car hire and petrol, Mr Williams' evidence was that the payments received from the taxi work was the claimant's responsibility as it was work "outside his employment." Michael Nicholls in direct contrast to the evidence of Mr Williams confirmed the claimant was not a self-employed driver, and would cover driving work when necessary suggesting it was part of the claimant's duties. Alan Moore, the office manager from 2006/2007 until 17 December 2019, confirmed he delegated work to the claimant especially following his accident in December 2018 when on restricted duties. I found Alan Moore's evidence that the claimant's taxi shifts did not take all day, and there were times he was gone for 45 minutes and thus was not carrying out the work of a full-time driver, credible. I concluded on the balance of probabilities the claimant covered taxi fare work when asked to do by Alan Moore, which included "driving work if we were short…I was told if stuck to send [the claimant] out on the road." On the balance of probabilities, I accepted Alan Moore's evidence that he had no knowledge of how and the amounts the claimant was being paid as "I wasn't a director." Alan Moore also confirmed that people would log in under different names, and he had logged in on the system as Mark Williams on Yvanna Barron's log in, and that people can still be logged

in when they are not there and I found this to have been the case in respect of the claimant's log in details.

42. On the balance of probabilities taking into account the documentation relating to the claimant with reference to his irrefutable driving jobs and the less than reliable log in details, I concluded at some unknown point prior to August 2018 an agreement had been reached between the claimant and Mr Williams on behalf of the second respondent that the claimant would receive £225.57 net transferred into his account following lawful deductions, during and after the training of Michael Nicholls was completed supplemented by cash payments from which there were no lawful deductions. It was agreed the claimant would carry out a variable role which included driving as and when required. The claimant could retain cash payments and any payments made by card directly by the customer, for example, a credit card payment, into the claimant's bank account and the claimant would also be paid by the second respondent payments for taxi contract work he covered directly into his bank account without any accounting to HMRC either in a separate statement or the claimant's regular wage slip. On the balance of probabilities, I find the intention of both the claimant and Mr Williams was to minimise the second respondent and claimant's exposure to tax and national insurance contributions. I did not accept the claimant was naïve, and concluded he would have realised at the time the cash payments received over and above the salary set out in the wage slips attracted legal deductions of tax and national insurance. I find on the balance of probabilities, that both the claimant and Mr Williams intentionally failed to declare a substantial part of the claimant's income all relating to taxi cab work carried out at the request of the second respondent.

43. In an email sent on 28 October 2019 sent by Mark Williams to the first respondent the claimant's name was included in the list of staff provided under due diligence. He was described as taxi despatch controller and telephonist when he had not worked in that role since August 2018, and before that date it was sporadic with the claimant covering other duties including a self-employed taxi driver according to the claimant's own description.

44. On the 1 November Mark Williams attached a rota showing the claimant was on the rota working as a despatch controller that week, which was not the case in reality given the claimant's evidence that he did not start working in that role having agreed to do so because he was on allegedly on holiday at the time. The claimant is not claiming he should have transferred across as a taxi cab driver/employee who carried out a whole range of activities including supporting the office manager and training drivers. On the balance of probabilities I do not find it credible that the claimant was in the role of taxi despatch controller/operator immediately before the transfer, and the evidence that he was offered this role due to staff shortages arising from the first respondent's instruction that the second respondent could not employ staff, had no credibility or basis taking into account the claimant's evidence that he was on holiday for a month (as reflected in his wage slip) and had not worked one shift as an operative/despatch controller since, and possibly before, Michael Nicholls had been trained and then taken over the claimant's shifts. It is notable the claimant did not take up the operator role again when Michael Nicholls resigned in June

2019, almost 6-months before the claimant was allegedly offered the role. On the balance of probabilities, I concluded that Mr Williams on behalf of the second respondent and the claimant knowingly and intentionally concocted the version of events whereby the claimant was working as an operative in October 2019 as set out in the emails and schedule, with a view to the claimant being transferred across under TUPE as an operative in the knowledge that he was not employed in this position immediately before the transfer, and the arrangement agreed in relation to cash payments when the claimant used his vehicle to provide a taxi service at the second respondent's request, would not continue with the first respondent who may well have discovered the illegal activity for which there could be consequences for both the claimant and/or Mr Williams and/or /the second respondent in respect of sale warranties given and exposure to HMRC tax liabilities.

45. On the balance of probabilities I find the effective date of termination took place on the 31 December 2019 when the claimant's holiday came to an end and the respondent did not accept that the claimant had transferred across.

The applicable law

46. For cases of illegal performance of an otherwise lawful contract, the starting point is the public policy principle enunciated by Lord Mansfield in *Holman v Johnson 1775 1 Cowp 341, Court of King's Bench*, that 'no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act'. The courts could not be seen to condone or assist an illegal or immoral act, and so, as a general rule, a claim which relied on the claimant's own participation in illegality would be unenforceable.

47. In *Patel v Mirza 2017 AC 467, SC* the Supreme Court held in cases where illegality was an issue, the key question was not whether the contract should be regarded as tainted by illegality but whether, in the circumstances of the case, the relief claimed should be granted. The fact that a contract is 'illegal' does not, by itself, determine whether or not the contract is void or unenforceable. Lord Toulson held is it would be contrary to the public interest to enforce a claim if to do so would harm the integrity of the legal system (or, possibly, certain aspects of public morality). In assessing whether allowing a claim would harm the integrity of the legal system, it would be necessary to consider:

•the underlying purpose of the law that had been breached, and whether that purpose would be enhanced by the claim being refused

•any other relevant public policy which might be affected by the denial of the claim, and

•whether denial of the claim would be a proportionate response to the illegality (bearing in mind that punishment is a matter for the criminal courts).

• its centrality to the contract

• whether it was intentional, and

• whether there was a marked disparity in the parties' respective culpability.

48. The Supreme Court in *Stoffel and Co v Grondona 2020 UKSC 42, SC*, in the context of a negligence claim brought against a firm of solicitors Lord Lloyd-Jones confirmed that, as a result of the change in the law brought about by *Patel v Mirza*, the question whether a claimant must rely on illegal conduct to establish a cause of action is no longer determinative of an illegality defence. He clarified the application of the 'trio of necessary considerations' established in *Patel* – namely, (i) whether the underlying purpose of the illegality would be enhanced by denying the claim; (ii) whether denying the claim might have an impact on other public policies; and(iii) whether denying the claim would be a proportionate response to the illegality. A court should first identify the policy considerations for the first two points at a general level (but not evaluate them) and determine whether enforcing a claim tainted by illegality would be inconsistent with those policies or, where the policies compete, where the overall balance lies. If it concludes that the claim should not be barred by illegality, there is no need to consider proportionality; proportionality should be considered only if the balancing of policies suggests a denial of the claim.

Conclusion: applying the law to the facts

49. On the balance of probabilities I found the claimant and Mr Williams acting on behalf of the second respondent by agreement intentionally failed to account to HMRC for tax or national insurance contributions in respect of cash payments, money transfers into the claimant's personal accounts by clients and gross payments made by the second respondent into the claimant's personal account following contract taxi services provided by the claimant at the second respondent's request via Mr Williams for a considerable period of time at the very latest after August 2018 until the TUPE transfer on the 17 December 2019. The purchase by the first respondent of the second respondent's assets and the transfer of the business on 17 December 2019 put a stop to their scheme and the alleged offer of the role of operator was an attempt by the claimant and Mr Williams to hide their wrongdoing and justify the amount of money that had been paid to the claimant by the second respondent pre-transfer.

50. On the balance of probabilities, I find the second respondent was responsible for deducting tax and national insurance regularly deducted with regards to the claimant's wages as set out in the wage slips issued from the commencement of his employment to the 17 December 2019. Both the claimant and Mr Williams were aware tax and national insurance contributions should have been deducted from the cash and transfers relating to taxi fare income, and the cash amounts received by the claimant accounted for to HMRC. It does not assist the claimant to argue that the cash payments were designed to reimburse him for the hire costs of the vehicle used for taxing, and is noted that the taxi car hire charges included personal use by the claimant, evidenced by the claimant's indication to this Tribunal that the car hire cost was reduced when he limited it to personal use for a period of time.

51. On the evidence before me I took the view the claimant and Mr Williams knowingly made the cash payments without legal deductions to substantially

increase the claimant's income and reduce the second respondent's tax and national insurance liability.

52. Taking into account the range of factors approach set out in *Patel v Mirza* I concluded that:

52.1 the underlying purpose of the tax system had been breached and there was no good reason why the claimant and second respondent should not be subject to the same taxation laws as other employees and limited companies.

52.2 It is important to the integrity of the legal system and to our society that individuals and companies who employ them pay the correct amount of tax on earnings. It is recognised in our society that possible tax fraud is a serious matter that can result in criminal prosecution. It is against public policy for an individual or company to benefit from not paying tax and national insurance legally due.

52.3 Turning to proportionality, there is an issue as to whether the claimant and/or second respondent was responsible for the payment of tax and national insurance contributions with the claimant stating it was; and Mr Williams confirming the responsibility lay with the claimant. It is well recognised that in an employment relationship there exists an unbalanced power with the employer having more power over the employee in most, but not all, employment situations. However, in the claimant's case I took the view both the claimant and Mr Williams acting on behalf of the second respondent, held an equal responsibility; they both failed to declare a substantial part of the claimant's income and it does not assist the claimant now to argue that it was only recently as a result of the illegality issue being raised in these proceedings he had spoken with his accountants and been made aware tax and national insurance was due on all the cash payments received when he was a self-employed taxi driver and then carried out taxi duties as and when requested to on an employed basis. The claimant would have known tax and national insurance was due, and he voluntarily has failed to account for the cash payments to HMRC for a number of years. To be clear, when arriving at this judgment I only took into account the payments received when the claimant was obliged under the contract of employment to carry out the taxi duties, which according to the claimant's admission was August 2018 until the 17 December 2017.

52.4 Given the state of the claimant's knowledge and that of Mr Williams and the agreement they had reached with respect to cash payments, I concluded it would seriously harm the integrity of the legal system if the claimant's claims were allowed to proceed to a liability hearing concluding the contract of employment was void as a result of illegality taking into account the substantial benefit to the claimant and second respondent which resulted from their knowing participation in their failure to account to HMRC for tax and national insurance contributions. To have concluded otherwise, I may appear to be assisting and encouraging employees and employers to commit illegal acts, and if the claimant were to succeed in his claims it would be an affront to the public

conscience to award him damages. It is notable Mr Williams conceded in oral submissions that the second respondent had failed to consult the claimant under TUPE and it is likely had it not been for the illegality point, damages may have been payable.

3. Having found the claimant was employed under a contract of employment for the purpose of section 230 of the ERA and Reg 2(1) of TUPE, illegal performance of the contract was pivotal to its performance, and as the illegality was carried out intentionally with the knowledge and participation of the claimant and his employer with no marked disparity in their respective culpability, there was no requirement for me to deal with time limits given my conclusion that the whole of the employment contract was unenforceable. If I am wrong on this point, briefly, I would have found on the balance of probabilities the claimant was an employee of the second respondent for at least 2-years, the unfair dismissal complaint was received within the statutory time limit and was not out of time with the Tribunal having the jurisdiction to consider the complaint of unfair dismissal brought under section 94 and 98 of the Employment Rights Act 1996.

53. In conclusion, the claimant was an employee for the purpose of section 230 and any claim brought under the Employment Rights Act 1996 and Regulation 2(1) of Transfer of Undertakings (Protection of Employment) Regulations 2008. The claimant and second respondent participated in an illegal contract which has the consequences of him being unable to pursue claims in the Employment Tribunal in respect of unfair dismissal, automatic unfair dismissal, failure to consult and unpaid accrued holiday pay, and as a consequence the claims are all dismissed.

27.5.21

_____

Employment Judge Shotter

JUDGMENT SENT TO THE PARTIES ON

9 June 2021

FOR THE TRIBUNAL OFFICE