



**EMPLOYMENT TRIBUNAL**

**BETWEEN**

**CLAIMANT**

**AND**

**RESPONDENT**

**Mr R. Comolly**

**(1) Mr R. Tidman  
(2) United Taxis Limited**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**Held via Cloud Video Platform on the following dates:**

**Friday, the 15<sup>th</sup> January 2021; and  
Friday, the 8<sup>th</sup> October 2021**

**Employment Judge: Mr D. Harris (sitting alone)**

**Representation:**

<b>For the Claimant:</b>	<b>In person</b>
<b>For the First Respondent:</b>	<b>In person</b>
<b>For the Respondent:</b>	<b>Mr Stephen Wyeth (Counsel)</b>

## **JUDGMENT**

- 1. The Tribunal finds that the Claimant was an employee of the First Respondent, within the meaning of section 230(1) of the Employment Rights Act 1996 and section 83(4) of the Equality Act 2010, from July 2014 to the 14<sup>th</sup> March 2020.**
- 2. The Tribunal finds that the Claimant was a worker of the Second Respondent, within the meaning of section 230(3)(b) of the Employment Rights Act 1996, from the 1<sup>st</sup> March 2009 to the 14<sup>th</sup> March 2020 whilst working as the driver of a private hire vehicle for the Second Respondent over that period.**

## **REASONS**

### **The claims**

1. By a Claim Form presented to the Tribunal on the 14<sup>th</sup> April 2020 the Claimant brings claims of unfair dismissal and age discrimination and claims for notice pay, holiday pay, arrears of pay and other payments against the First and Second Respondents.

### **The issues in the claims brought by the Claimant**

2. At a Preliminary Hearing that took place by way of telephone on the 16<sup>th</sup> September 2020, the following issues were identified in the claim:-

*37. The Claimant says he has worked as a taxi driver from the 1 March 2009 to 14 March 2020. There is a preliminary issue to establish if the Claimant was an employee and/or*

*worker for the First and/or Second Respondent and, if so, over what period.*

38. *The Employment Judge notes that the following issues that have so far been agreed between the Claimant and the Second Respondent which are contingent upon the determination of the preliminary issue and final agreement by the Tribunal:*

1. *The Claimant brings the following claims:*
  - a. *Unfair dismissal*
  - b. *Direct age discrimination*
  - c. *Notice pay*
  - d. *Holiday pay*
  - e. *Unauthorised deductions of pay*
  - f. *National Minimum Wage*
  - g. *No written statement of particulars of employment*
  - h. *No written statement of reasons for dismissal.*
  
2. *Preliminary Issues*
  - a. *Was the Claimant an employee of the Second Respondent in accordance with section 230(1) of the Employment Rights Act 1996?*
  - b. *Was the Claimant a worker of the Second Respondent in accordance with section 230(3) of the Employment Rights Act 1996 and/or regulation 2 of the Working Time Regulations Act 1998 and/or section 54(3) of the National Minimum Wage Act 1998.*

*Unfair dismissal*

3. *If the answer to 2a above is yes:*
  - a. *Did the Second Respondent dismiss the Claimant?*
  - b. *If so, what was the reason or principal reason for dismissal?*
  - c. *Was the dismissal fair within section 98(4) ERA 1996? Namely, did the Second Respondent's decision to dismiss the Claimant fall within the range of reasonable responses that an employer*

*in those circumstances in that business might have adopted?*

*Direct age discrimination*

4. *If the answer to 2b above is yes:*
  - a. *The Claimant relies on the alleged dismissal by the Second Respondent as the allegation of direct discrimination.*
  - b. *If the Claimant was dismissed by the Second Respondent, does it amount to less favourable treatment against the Claimant compared to how the Second Respondent treated or would treat others because of the Claimant's age?*
  - c. *The Claimant relies on ... a hypothetical comparator, being a person who had the same characteristics and abilities as the Claimant but was of a different age.*
  - d. *If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude, in the absence of any other explanation, that the difference in treatment was because of his age?*
  - e. *If so, what is the Second Respondent's explanation? Can the Second Respondent show a non-discriminatory reason for any proven treatment?*
  - f. *If the difference in treatment was because of the Claimant's age, can the Second Respondent show that the treatment was a proportionate means of achieving a legitimate aim.*

*Notice Pay*

5. *If the answer to 2a above is yes:*
  - a. *Is the Claimant owed notice pay by the Second Respondent?*

*Holiday Pay*

6. *If the answer to 2b above is yes:*
  - a. *Is the Claimant owed holiday pay by the Second Respondent?*

### Unauthorised Deduction of Wages

7. *If the answer to 2b above is yes:*
  - a. *Did the Second Respondent deduct any wages owed to the Claimant?*
  - b. *If so, was the deduction authorised?*

### National Minimum Wage

8. *If the answer to 2b above is yes:*
  - a. *Did the Second Respondent pay the Claimant the national minimum wage?*

### Written Statement of Particulars of Employment

9. *If the answer to 2a above is yes:*
  - a. *Did the Second Respondent provide the Claimant with a written statement of particulars within two months of the commencement of employment?*
10. *If the answer to 2a above is yes:*
  - a. *Was the Claimant dismissed by the Second Respondent?*
  - b. *If so, did the Second Respondent provide the Claimant with a written statement of the reasons for dismissal?*

### Remedy

11. *What financial loss, if any, has the Claimant suffered as a result of any proven unfair dismissal?*
12. *Has the Second Respondent proved that the Claimant has unreasonably failed to mitigate his loss, or any part of it?*
13. *Should any reductions be made to any compensation to be awarded?*
14. *If the Claimant was discriminated against because of his age, what is the appropriate remedy, including any compensation and injury to feelings?*

15. *If the Claimant succeeds with any of his claims for notice pay, unauthorised deduction of wages, national minimum wage or holiday pay, how much should he be awarded?*
  16. *If the Claimant succeeds with his claims for no written statements of particulars of employment or reasons for dismissal, what, if any, compensation should he be awarded?*
3. The Claimant's case is that he was employed by, or was a worker for, the First Respondent or, in the alternative, the Second Respondent. It follows that the issues identified at the Preliminary Hearing on the 16<sup>th</sup> September 2020 are the same in the claims against the First Respondent as in the claims against the Second Respondent.

**The preliminary issue identified at the Preliminary Hearing on the 16<sup>th</sup> September 2020**

4. At the Preliminary Hearing that took place on the 16<sup>th</sup> September 2020, the Tribunal identified the following preliminary issues to be determined:
- 4.1 Was the Claimant an employee and, if so, of which Respondent within the meaning of section 230 of the Employment Rights Act 1996?
  - 4.2 Was the Claimant an employee and, if so, of which Respondent within the meaning of section 83 of the Equality Act 2010?
  - 4.3 Was the Claimant a worker and, if so, of which Respondent within the meaning of section 230 of the Employment Rights Act 1996?
  - 4.4 What are the remaining issues in the claims after determination of the preliminary issues?

4.5 What further case management is required after determination of the preliminary issues?

5. The above-mentioned preliminary issues were considered by the Tribunal at remote hearings that took place on the 15<sup>th</sup> January 2021 and the 8<sup>th</sup> October 2021. The reason why the second hearing took place was to enable the parties to make oral representations following the decision of the Supreme Court in the case of *Uber BV & others v. Aslam & others* [2021] UKSC 5.

### **The evidence heard at the hearing of the preliminary issues**

6. At the hearing on the 15<sup>th</sup> January 2021, the Tribunal heard oral evidence from the Claimant, the First Respondent and the Second Respondent's witness, Mr Chris Culleton. The Tribunal also read and considered a 156-page hearing bundle.

### **Findings of fact**

7. The Second Respondent is a company that has been licensed by Bournemouth Borough Council to operate private hire vehicles in Bournemouth.
8. The Second Respondent's articles of association (**pages 95 to 127 in the hearing bundle**) make the following provisions as to shares and shareholders:

#### **Classes of Shares**

20. (1) Subject to the articles, but without prejudice to the rights attached to any existing share, the company may issue shares with such rights or restrictions as may be determined by special resolution.
- (2) The Company may issue shares which are to be redeemed, or are liable to be redeemed at the option of the company or the

holder, and the directors may determine the terms, conditions and manner of redemption of any such shares.

(3) The shares in the company shall be divided into "A" shares and "B" shares. The "A" and "B" shares shall rank pari passu in all respects except that:-

(i) the "B" shares shall not be voting shares; and

(ii) each share class may be subject to different rates of subscription, as determined by the byelaws under article 66.

#### **Subscriptions**

22 (1) In accordance with the company's byelaws, shareholders are obliged to pay subscriptions in respect of each share that they hold in the company at such rates in force from time to time.

(2) In the event that a shareholder defaults in paying any subscriptions due on their shares, the company may service notice of intended forfeiture in accordance with article 39.

#### **Number of shares that can be held**

23. Save as provided by article 24 below no shareholder may be the registered holder of more than three sets of "A" shares or "B" shares in the company or claim beneficial ownership in more than three sets of "A" or "B" shares in the company whether in his own name or that of a nominee.

#### **Exception to article 23**

24. The provisions of article 23 above shall not apply to any shareholder who is the holder of more than three shares provided such holding is registered in the Register of Members prior to 1<sup>st</sup> September 1998.

9. The articles of association go on to make provision as to 'byelaws', which set out terms and conditions that shareholders and taxi drivers are required to adhere to. The relevant provisions in the articles of association that relate to the Second Respondent's 'byelaws' are as follows:

#### **Byelaws**

66. There are a number of byelaws in place relating to the company which can be found in the company rule book. The rule book may be amended from time to time by agreement of the directors and each shareholder shall comply with the byelaws in the rule book. The byelaws shall include, for the avoidance of doubt, the current rates of subscription payable by shareholders in respect of the different classes of shares in issue in the company (which may vary between different classes of share).



## **Disciplinary and Grievance Procedure**

**67. (1) Any breach of the byelaws referred to at Article 66 shall amount to a disciplinary offence. Sanctions imposed for such an offence shall be proportionate to the nature of the breach and may range from temporary suspension to permanent exclusion from the United Taxis Radio Circuit. In addition the company shall have the power to impose a fine in addition or as an alternative to any period of suspension provided that the maximum fine shall not exceed £250 unless authorised by an ordinary resolution of the company at a general meeting.**

**(2) On being notified of any alleged disciplinary offence the matter shall be investigated by a director who after an investigation of all of the circumstances shall determine whether in his judgment a disciplinary offence has been committed and if so shall impose such penalty as he considers to be appropriate.**

**(3) The director shall notify the driver or drivers involved of receipt by him of notice of an allegation that a disciplinary offence has been committed and the driver or drivers shall have the opportunity of presenting their case to the director before he makes his determination.**

**(4) The decision of a director shall be notified in writing to the driver or drivers in question within seven days of his being first notified of the alleged disciplinary offence.**

**(5) Any driver aggrieved with the decision shall have a right of appeal to an Appeal Committee comprised of three directors of the company. Such right may be exercised by the driver or drivers by serving written notice of appeal on the company within seven days of their receiving the written determination. The selection of the members of the Committee and its conduct and proceedings shall be at all times conducted in a manner consistent with the principles of natural justice and the driver or drivers shall be notified of the decision of the Appeal Committee in writing within seven days of the date of the Appeal Committee Meeting.**

**(6) Any driver aggrieved with the decision of the Appeal Committee shall be entitled to a further appeal to the company at a general meeting which shall decide by ordinary resolution whether to uphold or reverse the decision of the Appeal Committee.**

**Such further appeal may be exercised by serving written notice of appeal on the Company within seven days of receipt of the written decision of the Appeal Committee. The notice of further appeal must be accompanied by a payment of £100 as security for the cost of covering the general meeting of the Company. In the event that the appeal is successful in whole or in part this payment shall be refunded to the appellant. In the event that the appeal is unsuccessful and the decision of the Appeal Committee is upheld the appellant shall be liable to pay to the company the costs reasonably incurred by the company in convening the general meeting. The company shall be entitled to**

retain the sum of £100 and the appellant shall pay to the company the balance of the company's costs in excess of this sum within 14 days of demand by the company.

10. The Tribunal was not provided with a copy of the Second Respondent's 'company rule book' but the Tribunal was provided with a copy of the Second Respondent's 'byelaws' (**pages 128 to 132 in the hearing bundle**). The following provisions set out in the 'byelaws' are particularly relevant, in the judgment of the Tribunal, to the question of the Claimant's employment status when registered as a taxi driver with the Second Respondent:

**Welcome to United Taxis Ltd, the largest circuit fleet in Bournemouth, in order to further the interests of the Company and to provide an unrivalled service to customers, all drivers are expected to abide by the Company Byelaws.**

- 1. MANAGEMENT STRUCTURE:-  
United Taxis Ltd is a Co-operative owned by Member Shareholders. Management is vested in:-**
  - a. Elected Board of Directors**
  - b. Operational Committees**
  - c. Manager**
  - d. Shift Supervisors**
  - e. Company Trainer**
- 2. All suggestions, problems, queries and disciplinary matters will, at first, be dealt with by the relevant Shift Supervisor.**
- 3. At no time will drivers enter into arguments with the operators and staff nor use any offensive language. All complaints must be routed through your owner, Shift Supervisor or a Director. Drivers who fail to comply will face strict disciplinary action.**
- 4. All drivers must have a current Hackney Carriage or Private Hire Driver's Licence. This licence should be issued at the same Licencing Authority as the vehicle you are driving. When driving, your badge must be worn and visible on the person of the driver.**
- 5. In order for United Taxis to maintain a high fleet standard, new permanent replacement vehicles may not be older than three and a half (3½) years old. No exceptions will be made.**
- ...**
- 7. Drivers must acquaint themselves with all the Hackney Carriage 'Byelaws', conditions and other statutory provisions as published and obtainable from the Licencing Department at which your Drivers Licence and Vehicle Licence is issued. Our local Licencing Authorities employ Private Detectives/inspectors to enforce these regulations. Breaches of these could render you liable to suspension or even the revocation of your licence. They**

- have the power, as do the Police, to immediately suspend the operation of any un-roadworthy car.
8. Directors and Supervisors have the authority to take 'off the air' any un-roadworthy or dirty car. Regular spot checks will be carried out.
  9. All Hackney vehicles must display an approved United Taxis Group roof sign and signage.
  10. All Private Hire vehicles must display all applicable signage. Regardless of which borough they have been licensed in.
  11. Dress Code:- All drivers will adhere to the Company's Code: The driver of a Hackney Carriage/Private Hire Vehicle shall wear a reasonable standard of dress. The wearing of shorts/jeans is forbidden. In addition to this, the Company insists on the following:-
    - a. No denim, this includes jeans, jackets, shirts and shoes.
    - b. No 'training type' footwear.
    - c. The wearing of the Company tie between the 1<sup>st</sup> October and 31<sup>st</sup> March each year. The Company badge must be worn at all times, winter and summer.
    - d. Shirts must be either light blue or white and totally plain (no checks, however small and no stripes however thin).
    - e. Between 1<sup>st</sup> April and 30<sup>th</sup> September, Company tie is optional but company badge must be worn.
    - f. Any trousers that give the impression of being jean denims etc., are not permitted.
    - g. In the case of jumpers, a 'V' necked navy blue or black must be worn so that the Company Logo on the tie is visible to the customer.
    - h. Trousers must be smart, plain & conservative in style. Black, Dark Grey or Dark Blue are the only acceptable colours.
    - i. Jackets must be plain Navy blue or Black with no markings or logo's. Company logo only.
    - j. Headwear is only allowed to be worn whilst you do not have a passenger on board and must be plain in style and may only be Black or Dark Blue.
    - k. Female drivers do not have to wear a tie but must wear the same as above but also allowed skirts.
  12. All drivers are expected to be polite to all customers at all times, exercise restraint where necessary and always conduct 'on board' disputes in a business-like manner. Third party assistance requirements (Police/other drivers) can be obtained through the Operator. Drivers are expected always to maintain and further the best interests of the Company.
  13. No driver can drive for United Taxis if he or she is on strike from his or her normal employment or if in receipt of any unemployment benefit or social security benefit because he or she is unemployed.

14. **United Taxis share no responsibility for any financial arrangement or contract between the owner and driver, save that in the case of disciplinary matters when a driver can be deregistered by the Board.**
15. **Any full/part time driver wishing to leave one owner for another without reasonable explanation or good cause and not for financial gain must give one month's notice unless by mutual agreement with the current owner.**
- ...
19. **Drivers operating any car registered with United Taxis must always be logged on to the system and ready for work. The only exception to this will be cars on suspension.**
20. **The level of subscription is set by the board of directors and may be subject to change giving one month's notice in writing. The current level of subscription is as of the 1<sup>st</sup> January 2019 "A" Shares £550.00 including development fund. Grandfather rights "B" and "N" Shares £650.00 including development fund. Circuit turns £750.00 exempt from development fund.**
21. **Drivers registered with United Taxis may work for any company within the United Group of Companies but must not work for any other Taxi Company (including independents); anyone caught driving for another company (including independents) will be de-registered.**
22. **United owner drivers/shareholders agree not to solicit or engage the services of each other's drivers ...**
- ...
25. **United Taxis use the iCabbi computerised data dispatching system. It will always be the responsibility of the driver to operate the car and 'PDA' within the operating instructions as published and updated by the Board.**
26. **No driver will undertake any private work whatsoever with or for any known United customer. N.B. whilst working on the United Taxis circuit all vehicles operate under the Company's Operator's licence and so cannot service pre-booked work other than through United Taxis.**
27. **United Taxis operates their own mobile Apps. Drivers are not permitted to use or promote any other Taxi or Private Hire App (e.g. CabApp, Uber, Hailo, Gett Taxi or any other similar app). Failure to comply with this will result in de-registration from the United Taxis Group and United Taxis reserve the right to inform third parties of the decision.**
28. **Drivers are expected to proceed directly to a job as indicated on their PDA, to follow the instructions so given & to arrive in time for indicated pick-up whenever possible.**
29. **Hackney drivers may recover jobs already allocated by following laid down operating procedures unless the Operator has indicated to the contrary. Failure to comply may render the driver suspended until the end of the shift, or liable to penalties as may be decided by the Board. The Operator is in control at all times.**
- ...

31. When finishing a shift all drivers must log off correctly. When logging on to the circuit drivers must use their own PIN number, any driver using another driver's PIN may result in suspension.
32. Every car must be equipped with a PDA and a Sat Nav as a backup. Every car must have only one PDA no driver to have their own.
33. The computer recognises that you are POB (*passenger on board*) when the meter is engaged or switched off, at no time will meters be engaged or switched off while plying for hire.
34. All claims of overcharging are investigated. If a claim is proved, the driver is responsible for reimbursement to all parties deemed to have a right by the Board of United Taxis. Repeated offences will result in disciplinary action.
- ...
42. Any driver not having driven for United Taxis for three consecutive months or not having taken up a driving position for three months after the initial application will be suspended via the iCabbi system and must re-apply to the Company for re-admission.
- ...
44. No driver may work consecutively on two cars. E.g. Day work on one car and at night on a second car in any one 24-hour period. When finishing a shift, a minimum of 8 hours must elapse before the driver starts the next shift.
45. No driver may exceed 12 hours' work and must take an eight-hour break before the next shift. In addition, drivers will be expected to take reasonable breaks within their shift.
- ...
48. Whilst working on the circuit the vehicle must have a working Chip & PIN machine. Any faults with this equipment are to be reported to the operator immediately and it is the driver's responsibility to organise a repair or replacement unit.
49. All drivers should carry the United ID card issued by the Company at all times and present the card if so requested by any Director, Customer or Shift Supervisor.
50. Any action by the driver that is deemed by the Board to bring the Company into disrepute will be dealt with directly by the Board. The driver will automatically be suspended until the Board can be convened.
- ...
55. **DISHONESTY:-** the board will investigate all claims of dishonesty. This includes any and all claims of cheating or tampering with the iCabbi system, using the telephone system or App services to gain an unfair advantage. Any driver or shareholder proven to have been dishonest by the board will face disciplinary action.
56. If United Taxis has to refund any customers due to a driver error or oversight, the driver will be held liable for the sum refunded to the customer.

**57. United Taxis investigates all complaints received. If a driver has been proven to have acted in contravention of these byelaws, United Taxis reserves the right to charge the driver involved a fee to cover the costs of investigating the matter.**

11. Having described the nature of the Second Respondent's business as a private hire vehicle operator, I turn to consider the roles of the Claimant and the First Respondent.

12. The First Respondent was a shareholder in the Second Respondent's business. He was a Class "A" shareholder, which meant that he paid the Second Respondent a subscription of £550.00 per month. In return for that payment he gained access to the taxi work made available by the Second Respondent in its capacity as an operator of private hire vehicles. To make use of the service provided by the Second Respondent, the First Respondent could drive a taxi himself and, in addition, if he so wished, engage other drivers to drive taxis that he provided. Such drivers would have to be registered with the Second Respondent in order for them to be able to access the taxi work provided by the Second Respondent. There did not appear to be any limit on the number of taxis that a shareholder of the Second Respondent could operate at any one time as part of the Second Respondent's business as a private hire vehicle operator. If a shareholder did engage other drivers, the Second Respondent had no involvement as to the basis upon which the drivers were engaged by the shareholder. In particular, the Second Respondent had no involvement as to how drivers, engaged by shareholders, would be remunerated.

13. The Claimant became licenced to drive a private hire vehicle in 2007 and he subsequently became licensed to drive a hackney carriage. He became licenced to drive a private hire vehicle in 2007 in response to an advert that he had seen in a local newspaper that had been placed by the Second Respondent. The Tribunal was not shown a copy of the advert but at pages 65 to 66 in the hearing bundle there was a document that showed how the Second Defendant currently advertises for taxi drivers on its website. The information provided by

the Second Respondent on its website as to how to become one of its drivers is as follows:

**Become a Driver**

**Looking to work with Bournemouth's largest Taxi and Private Hire fleet?**

- **We offer full in house training for all our new and existing drivers**
- **Professional fully trained office staff**
- **State of the art booking system**
- **Flexible shifts, working hours that suit you**

**If you have any query's regarding the Taxi licence process or require any further information please email us at [training@556677.com](mailto:training@556677.com).**

**Once you have your taxi licence and are ready to join us please Email: [training@556677.com](mailto:training@556677.com) to start your driver training.**

The Tribunal was satisfied, on the balance of probability, that the advert that the Claimant had seen from the Second Respondent in a local newspaper in 2007 would have been in similar wording to the information set out on the Second Defendant's webpage as to how to become one of its drivers.

14. The Claimant was initially interested in becoming a shareholder with the Second Respondent but he was not taken on by the Second Respondent in that capacity. In March 2009 he applied to the Second Respondent to become one of its registered drivers. He underwent two interviews with managers employed by the Second Respondent and underwent training that the Second Respondent provided. He became registered as a driver with the Second Respondent on the 6<sup>th</sup> March 2009. The registration process involved him paying a fee to the Second Respondent of £90.00. By that stage he was licenced to drive a hackney carriage as well as a private hire vehicle.
15. Having becoming registered as a driver with the Second Respondent, the Claimant was then put in touch, by the Second Respondent, with one of its shareholders (a man by the name of Mr Parkinson). It was by means of the shareholder that the Claimant was provided with a licenced taxi, and thereby the means of working as a taxi driver registered with the Second Respondent.

16. The terms upon which the Claimant worked as a taxi driver for Mr Parkinson were not given in evidence. As a consequence, no findings of fact about those terms could be made.
  
17. In July 2014, the Claimant ceased working for Mr Parkinson and began work as a taxi driver with the First Respondent. No evidence was given as to the circumstances in which the Claimant ceased working for Mr Parkinson and began working with the First Respondent and no evidence was given as to the process by which the Claimant was introduced to the First Respondent as a shareholder of the Second Respondent. What was clear to the Tribunal, however, is that, unless he became a shareholder of the Second Respondent himself, the only way that the Claimant would be able to work as a registered driver for the Second Respondent was through a shareholder or by paying a monthly circuit fee to the Second Respondent. Though the Second Defendant advertises for drivers for its business, thereby creating the impression that it engages drivers directly, it is only through the offices of a shareholder of the Second Respondent that a driver registered with the Second Respondent can access the taxi work provided by the Second Respondent without the driver, himself or herself, having to pay a monthly circuit fee to the Second Respondent (as provided for in clause 20 of the Second Respondent's 'byelaws'). I shall return a little later in this judgment to my findings as to the basis upon which the Claimant worked with the First Respondent.
  
18. I turn now to say a little more about the way in which the Second Respondent conducted its business as the operator of a fleet of private hire vehicles. At the heart of its business was a computerised taxi dispatch system known as iCabbi. The system operated in the following way. Each driver registered with the Second Respondent had a PDA ('personal digital assistance') device or a smartphone on which the iCabbi App had been downloaded. The driver would log on to the system via the PDA or smartphone App using their ID and PIN (both issued by the Second Respondent). Once logged onto the system, jobs would be sent to the driver by the Second Respondent. There were two types of job: namely, 'blue' jobs and 'green' jobs. A blue job would be passed to the driver because it appeared to the Second Respondent that the driver was the first available taxi



capable of doing the job. The driver could accept the blue job or reject the blue job. According to the iCabbi user instructions (**pages 79 to 94 in the hearing bundle**), the driver would receive a 5 minute penalty for declining a blue job. A green job was a job that drivers could bid for. If declined, according to the iCabbi user instructions, there was no penalty for the driver. Once a job had been accepted, details of the job would come up on the screen of the PDA or smartphone: i.e. where to pick up the passenger, where the passenger was going and whether the fare was to be at a meter rate or a fixed price. Prior to accepting a blue job, the driver had no details of the job that he or she was accepting. When the driver arrived at the pick-up point, they would press “arrive” on their PDA or smartphone and a text message would be sent to the passenger that their taxi was ready for them. When the passenger boarded the taxi, the driver would press “POB”, which stands for passenger on board. The meter would then start. At the end of the journey, the driver would press “stop” and “finish” on the PDA or smartphone and the passenger would pay the fare to the driver (if it had been a metered fare) either in cash or by a debit or credit card using a Chip & PIN machine in the taxi. In addition to blue and green jobs, there was account work that was provided by the Second Respondent. For example, social service work, hospital work and hotel work. In the case of account work, the agreed rate for the fare (agreed between the Second Respondent and the customer) would be paid directly to the Second Respondent.

19. The Tribunal concluded that the operation of the Second Respondent’s iCabbi system involved the Second Respondent contracting as principal with passengers to carry out the booking of a taxi or private hire vehicle as requested by the passenger. The Second Respondent was also the principal contracting party in respect of the account work that it undertook. It was the Second Respondent who, as the operator of a fleet of private hire vehicles, entered into contractual obligations with passengers and who relied upon shareholders and drivers to perform driving services for it. Without its shareholders and drivers, the Second Respondent would have no obvious means of performing its contractual obligations to passengers.

20. In addition to its 'byelaws', the Second Respondent provided its registered drivers with a Driver's Training Manual (**pages 67-78 in the hearing bundle**). It is set out in the Manual that a penalty will be imposed upon a driver in the event of the driver returning a job via the iCabbi. The Manual states as follows:-

**Penalties**

**(Recover) return a job.**

**When you return a job you will automatically receive a 30 minute penalty. If you are returning a job because you have a walk up please use pre-defined message to inform op who will then release penalty. The operator will track that you have moved, in the event that you do not move, the penalty will not be released (*You have 2 mins 30 seconds from receiving the job to send it back*).**

21. Notwithstanding what the Driver's Training Manual has to say about penalties for drivers, the Tribunal found, based upon the Claimant's oral evidence, that the reality was different. The Tribunal accepted the Claimant's evidence (which was not challenged on this point), that failure to accept a blue job resulted in a 30 minute penalty (i.e. no access to other jobs for the next 30 minutes) and a 1 hour penalty in the case of account work. Rejecting a blue job, following acceptance of the job, resulted in a 1 hour penalty for non-account work and a 2 hour penalty for account work.
22. The Driver's Training Manual also included detailed instructions on how to operate a Chip & PIN machine for those passengers who wanted to pay the fare by means of a debit or credit card.
23. The Driver's Training Manual also included disciplinary procedures in respect of complaints made against registered drivers. A system of penalty points for 'misdemeanours' was set out in the Manual. The system was described as follows:

**Penalty Points**

**Between 1 to 12 penalty points can be given depending on the severity of the misdemeanour. In all cases it must be a proven offence. This can be appealed against if the alleged offender feels aggrieved by the decision.**

**On reaching 6 points in the 12 month period you could have certain flags taken away from you. Accumulating 12 points over a period of 12 months will mean an automatic suspension. However, in certain circumstances this could change to being deregistered from the company.**

**An accumulation of penalty points could prejudice your future ability to purchase shares within the company.**

The Manual also set out a table in which prescribed penalty points would be given for specified misdemeanours. For example, if a driver is rude to one of the Second Respondent's operators or a member of staff, that would attract 3-6 penalty points.

24. I turn now to my findings of fact as to the circumstances in which the Claimant worked with the First Respondent. I find as follows:
- 24.1 The relationship between the Claimant and the First Respondent was labelled by both parties as one in which the Claimant was self-employed.
  - 24.2 There was no written contract between the Claimant and the First Respondent.
  - 24.3 The First Respondent was the owner of the taxi that the Claimant drove.
  - 24.4 The taxi provided by the First Respondent to the Claimant was insured and maintained by the First Respondent though the Claimant was required to accommodate, within his working day, scheduled maintenance of the vehicle and he had to pay a contribution to the First Respondent in the sum of £150 for the insurance of the vehicle.
  - 24.5 It was agreed between the Claimant and the First Respondent that the Claimant worked 5 days per week, from Tuesday to Saturday.
  - 24.6 It was originally agreed between the Claimant and the First Respondent that the First Respondent would make his taxi available to the Claimant from 6:00am to 6:00pm on the days that the Claimant worked.

- 24.7 In 2017, the First Respondent unilaterally reduced the hours that he made the taxi available to the Claimant to 6:00am to 5:00pm. The Claimant had no say in that reduction.
- 24.8 Prior to the reduction in time that the taxi was available to the Claimant, he worked shifts from Tuesday to Saturday each week, which commenced at 7:00am and finished at 6:00pm.
- 24.9 Following the reduction in time that the taxi was available to the Claimant, he changed his shift hours so that he worked from 6:00am to 5:00pm so as to compensate for the reduced time that the taxi was available that was imposed upon him by the First Respondent.
- 24.10 If the First Respondent's taxi was unavailable for some reason, clause 22 of the Second Respondent's byelaws prevented another shareholder from engaging the services of the Claimant.
- 24.11 The Claimant took no regular breaks during his shifts of work. Breaks had to be taken on an ad hoc basis whilst waiting for jobs via the Second Respondent's iCabbi system. The iCabbi system was equipped with a "break button" but the Tribunal accepted the Claimant's unchallenged evidence that that facility had been disconnected by the Second Respondent.
- 24.12 There was no agreement between the Claimant and the First Respondent as to annual leave. The Claimant would inform the First Respondent when he wanted to take time off, which was seldom. The Claimant did not receive paid annual leave when he took time off work.
- 24.13 Though the Claimant was able to accept hackney carriage work during the course of his working day, the reality was that the bulk of his time was spent on carrying passengers referred to him by the Second Respondent's iCabbi system. The Tribunal accepted the Claimant's unchallenged evidence that only 5% of his working time was spent on hackney carriage work. The Tribunal accepted the Claimant's evidence that that there was far more work to be had via the Second Respondent's iCabbi work than there

was to be had as a hackney carriage. The Tribunal also found that there was no express agreement between the Claimant and the First Respondent as to how the Claimant's time should be divided between hackney carriage work and work via the Second Respondent's iCabbi system. It was left to the Claimant as to when he would ply for hire.

- 24.14 Whilst driving the taxi, the Claimant adhered to the dress code that was enforced by the Second Respondent.
- 24.15 The taxi that the Claimant drove displayed the Second Respondent's signage. To members of the public, it would have appeared that this was a taxi owned or operated by the Second Respondent.
- 24.16 The agreement between the Claimant and the First Respondent as to remuneration of the Claimant was as follows. The fares were split between the Claimant and the First Respondent on a 50:50 basis plus ad hoc payments to the Claimant as and when agreed with the First Respondent. The Claimant described his share of the fares as a commission payment by the First Respondent. The Claimant's unchallenged evidence as to the method of payment was as follows. Payslips were produced every working day (showing all fares, howsoever paid, and account work). The payslips were given to the night driver of the First Respondent's taxi (the Claimant being the day driver) at the end of the working week on Saturday. The payslips were then given to the First Respondent for checking and approval. Once checked and approved, the First Respondent would pay the Claimant, usually on a Monday by means of a BACS payment. Fares that had been paid by means of the Chip & PIN machine and fares for account work were recouped by the First Respondent from the Second Respondent so that they formed part of the weekly payment made by the First Respondent to the Claimant.
- 24.17 The rates of the account work undertaken by the Claimant were set by the Second Respondent.

- 24.18 The meter fares in the taxi operated by the Claimant were set by the local licensing authority. Though the Claimant had the ability to reduce a particular hackney carriage fair, if he so wished, it could scarcely be said to be in his interests, or that of the First Respondent, to do so.
- 24.19 It was agreed, by necessary implication, between the Claimant and the First Respondent that the Claimant would comply with the Second Respondent's 'byelaws' when operating the taxi provided to the Claimant by the First Respondent.
25. In summary, it is clear from the above that there were four parties to the work that the Claimant did as a taxi driver: namely-
- 25.1 The Second Respondent, whose role included:
- 25.1.1 the recruitment and training of drivers;
  - 25.1.2 referring recruited and trained drivers to shareholders to enable the drivers to access the taxi work provided by the Second Respondent;
  - 25.1.3 the operation of the iCabbi taxi dispatch system;
  - 25.1.4 the enforcement of the Second Respondent's 'byelaws' against drivers, including the Claimant;
  - 25.1.5 the regulation and management of disciplinary matters concerning registered drivers, including the Claimant;
  - 25.1.6 managing shareholders, through the Second Respondent's articles of association, who paid a monthly subscription to the Second Respondent and who were responsible for providing registered drivers with the means of access to the taxi work provided by the Second Respondent;
  - 25.1.7 protecting, building and developing its brand as the largest taxi and private hire fleet in Bournemouth.

- 25.2 The shareholders of the Second Respondent, whose role included:
- 25.2.1 funding the activities of the Second Respondent through payment of monthly subscriptions;
  - 25.2.2 engaging drivers who were referred to them by the Second Respondent (those drivers having been recruited, trained and registered by the Second Respondent);
  - 25.2.3 agreeing with drivers the terms upon which the drivers worked for the shareholders.
- 25.3 The registered drivers of the Second Respondent.
- 25.4 The passengers who engaged directly with the Second Respondent (by telephone or the internet or attendance at the Second Respondent's office) when seeking a taxi or private hire vehicle.

### **Directions on the law**

26. The Tribunal directed itself on the law as follows.
27. Section 230(1) of the Employment Rights Act 1996 defines an 'employee' as *'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'*. Section 230(2) of the 1996 Act provides that a 'contract of employment' means *'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'*.
28. The definitions of 'employee' and 'contract of employment' used in the Employment Rights Act 1996 are replicated in the Working Time Regulations 1998, the National Minimum Wage Act 1998

29. Section 83(2) of the Equality Act 2010 defines 'employment' as employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.
30. Section 83(4) of the Equality Act 2010 provides that reference to an 'employee' in Part 5 of the 2010 Act is to be read with subsections 83(2) of the 2010 Act.
31. In *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 1 All ER 433, QBD, MacKenna J. stated:
- 'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'**
32. In *Nethermere (St Neots) Ltd v. Gardiner and anor* [1984] ICR 612, CA, Stephenson LJ said '*there must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service*'. He doubted this could be reduced any lower than MacKenna J's test set out in *Ready Mixed Concrete*. MacKenna J's test was also described as the classic description of a contract of employment by Lord Clarke in the case of *Autoclenz Ltd v. Belcher & others* [2011] ICR 1157, SC.
33. Turning to consider the term "worker", that term is defined by section 230(3) of the Employment Rights Act 1996 to mean:-
- 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.
34. As observed by Baroness Hale in *Bates van Winkelhof v. Clyde & Co LLP* [2014] ICR 730, the effect of the statutory definitions of 'employee' and 'worker' is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business of their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else.
35. As to how the statutory provisions relating to the definitions of 'employee' and 'worker' should be interpreted, the Tribunal reminded itself of the following passage from the *Uber* case:
68. The judgment of this court in the *Autoclenz* case [2011] ICR 1157 made it clear that whether a contract is a 'worker's contract' within the meaning of the legislation designed to protect employees and other 'workers' is not to be determined by applying ordinary principles of contract law such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake ... It was emphasised that in an employment context the parties are frequently of very unequal bargaining power ...
69. Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of 'worker' in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

70. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose ...
71. The general purpose of the employment legislation invoked by the claimants in the *Autoclenz* case and by the claimants in the present case, is not in doubt. It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment ...
76. ... it can ... be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'. To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place ...
83. If, as I conclude, the way in which the relevant relationships are characterised in the written agreements is not the appropriate starting point in applying the statutory definition of a 'worker', how is the definition to be applied?
84. In the *Autoclenz* case it was said (at para 35) that "the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part" ...
87. In determining whether an individual is a 'worker', there can, as Baroness Hale DPSC said in the *Bates van Winkelhof* case, "be no substitute for applying the words of the statute to the facts of the individual case". At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a 'worker' who is employed under a 'worker's contract'.

## **The parties' respective cases**

36. The Claimant contends that he was an employee, or, in the alternative, a worker of the First and/or Second Respondent.
  
37. The First Respondent contends that at all material times the Claimant was self-employed and that he was not an employee or worker of the First Respondent.
  
38. The Second Respondent contends that at no stage was the Claimant an employee or worker of the Second Respondent. The Second Respondent's position on the question was helpfully set out in skeleton arguments dated the 14<sup>th</sup> January 2021 and the 6<sup>th</sup> October 2021 by counsel for the Second Respondent, Mr Stephen Wyeth. The Second Respondent submits that the Claimant has failed to show the existence of a contract between himself and the Second Respondent. The Second Respondent submits that there was only ever a contract between the Second Respondent and the First Respondent and a further separate contract between the First Respondent and the Claimant.

## **Decision**

39. The Tribunal approaches the preliminary issue as to the employment status of the Claimant on the basis that it must apply the statutory definitions of 'employee' and 'worker' to the facts of the case, whilst keeping in mind, when applying the statutory language, that it is necessary to view the facts of the case realistically and to keep in mind the purpose of the legislation that the Claimant has invoked in the claims that he has brought against the Respondents.

40. Turning first of all to the position as between the Claimant and the Respondent. The Tribunal was satisfied that the Claimant was an employee of the First Respondent for the period from July 2014 to the 14<sup>th</sup> March 2020. The reason for that conclusion is as follows:
- 40.1 The First Respondent paid the Claimant, on a weekly basis by means of BACS payments, 50% of the fares paid by passengers carried by the Claimant in the taxi provided by the First Respondent to the Claimant.
- 40.2 In return for the remuneration paid to him by the First Respondent, the Claimant provided his own work and skill in operating the taxi provided to him by the First Respondent. There was accordingly mutuality of obligation as between the Claimant and the First Respondent.
- 40.3 The performance of the service that the Claimant provided to the First Respondent, by driving the First Respondent's taxi in return for the remuneration paid by the First Respondent, was subject, to a material degree, to control by the First Respondent. The First Respondent controlled, to a material degree, the hours that the Claimant was able to work as a taxi driver by defining the hours when his taxi was available for the Claimant to use. The First Defendant owned and controlled the taxi that the Claimant used when working as a taxi driver. There was an expectation on the part of the First Respondent that the Claimant would comply with the Second Respondent's 'byelaws' when operating the taxi provided to him by the First Respondent. The service that the Claimant provided was personal to him. He was not able to substitute another driver to carry out a shift of work for the First Respondent. There was also no opportunity for the Claimant to market his own services to the passengers that he carried in the First Respondent's taxi and no opportunity for him to develop his own independent taxi business.
- 40.4 The Tribunal was also satisfied that the other provisions of the agreement between the Claimant and the First Respondent, as the Tribunal found them to be, were consistent with the contract between the Claimant and the First Respondent being a contract of service.

41. As to the position between the Claimant and the Second Respondent, the Tribunal was satisfied that the Claimant was a 'worker' of the Second Respondent from the 1<sup>st</sup> March 2009 to the 14<sup>th</sup> March 2020 on those occasions, which amounted to approximately 95% of the Claimant's working hours, when he was carrying private hire passengers that had been referred to him through the Second Respondent's iCabbi system or through the account work that the Second Respondent undertook. The Tribunal rejected the Second Respondent's contention that there was no contractual relationship between the Claimant and the Second Respondent. In the judgment of the Tribunal, it was plain that there was an implied contract between the Claimant and the Second Respondent that was regulated by the Second Respondent's Driver's Training Manual and the Second Respondent's 'byelaws'. In return for paying to become a registered driver for the Second Respondent and thereafter agreeing to carry passengers for the opportunity of reward from one of the Second Respondent's shareholders, the Claimant agreed to comply with the terms and conditions set down by the Second Respondent in its Manual and its 'byelaws'. The terms upon which the Claimant worked as the driver of a private hire vehicle were very much set by the Second Respondent through its Manual and 'byelaws'. Although the Second Respondent had no control over when and where the Claimant worked, once he was logged onto the iCabbi system, which he had to do the moment he began a shift of work, his choice about whether or not to accept private hire rides was significantly constrained by the Second Respondent through its control of the information provided to the Claimant in respect of blue jobs and the system of time penalties operated by the Second Respondent. Further control was exercised over the Claimant through the Second Respondent's disciplinary procedures. The Second Respondent also exercised a significant degree of control over the way in which the Claimant delivered his driving services. He had to comply with the Second Respondent's dress code, he had to find work through one of the Second Respondent's shareholders (if he wished to avoid paying a significant monthly circuit fee to the Second Respondent), he had to use a taxi provided to him by one of the Second Respondent's shareholders and he had to ensure that the taxi displayed the Second Respondent's signage. The collection of fares paid by debit or credit card was managed by the Second Respondent as was the payment of fares for account work. The handling of any complaints against by passengers against the Claimant was managed by the Second Respondent.

42. Taking these factors together, the Tribunal was satisfied that the private hire transportation service performed by the Claimant, and offered to passengers by the Second Respondent, was very tightly defined and controlled by the Second Respondent. In conclusion, the Tribunal was satisfied, adopting the approach set out in the passages cited from *Uber* above, that the Claimant was a worker of the Second Respondent within the meaning of section 230(3)(b) of the Employment Rights Act 1996 over the period from the 1<sup>st</sup> March 2009 to the 14<sup>th</sup> March 2020 when providing private hire transportation services for the Second Respondent. The Tribunal was satisfied that there was an implied contract between the Claimant and the Second Respondent whereby the Claimant undertook to do or perform personally work or services for the Second Respondent and that the Second Respondent did not have the status, by virtue of that implied contract, of a client or customer of the Claimant.
41. Having found that the Claimant was an 'employee' of the First Respondent and a 'worker' of the Second Respondent, the case shall now be listed for a further Preliminary Hearing, by telephone, for the purposes of identifying the remaining issues in the case and the case management directions that are necessary in preparation for a final hearing.

**Employment Judge David Harris**

Dated: 6 December 2021

Judgment sent to parties: 21 December 2021

FOR THE TRIBUNAL OFFICE

### **Online publication of judgments and reasons**

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