Case Number: 2300419/2017

JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr W Augustine		**Data Cars Limited**

Held at Croydon (By video) **On 10 January 2022**

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: **In person**

For the Respondent: **Mr H Skudra, Counsel**

RESERVED JUDGMENT ON CLAIM UNDER PART-TIME WORKERS (PREVENTION OF LESS FAVOURABLE TREATMENT) REGULATIONS 2000

The decision of the tribunal is that the claim that the Claimant was treated less favourably than a comparable full-time worker under regulation 5 does not succeed and is dismissed.

REASONS

The Issues

1. The Claimant has brought a number of claims relating to his period working as a driver for the Respondent. In earlier judgments I have found that he was an employee of the Respondent and that he was entitled to payments including a shortfall in the National Minimum Wage and notice pay.

2. The Claimant also brought a claim under section 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('the Regulations'). For ease of reference, I set out the key parts of regulation 5 here:

> ***Less favourable treatment of part-time workers***
>
> ***5.***—*(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—*
>
> *(a)as regards the terms of his contract; or*
>
> *(b)by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.*
>
> *(2) The right conferred by paragraph (1) applies only if—*
>
> *(a)the treatment is on the ground that the worker is a part-time worker, and*
>
> *(b)the treatment is not justified on objective grounds.*
>
> *(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.*

3. I heard evidence from the Claimant, from Mr Les Chapman who is a director of the Respondent and from Mr Edward Townson who is a director of Carlton Motors Limited, a private hire operator in London.

4. The treatment that the Claimant complains about is the charging of a 'circuit fee' by the Respondent for all its drivers. At an earlier case management hearing I identified that the issues were:

    a. Was the Claimant a part time worker during his engagement with the Respondent?
    b. Who are his comparators and were other drivers at the Respondent working considerably more hours than him?
    c. Did the charging of the circuit fee amount to less favourable treatment of the Claimant as regards the terms of his contract?
    d. If so can that treatment be justified on objective grounds?

5. In discussing the issues at the start of the hearing today, Mr Skudra indicated that if I were to find that the Claimant had been less favourably treated on the ground that he was a part-time worker, the Respondent would not argue that the treatment was justified. They would accept on that basis that a reduced

circuit fee should have been charged in accordance with the 'pro rata' principle set out at regulation 5(3). Item (d) above is therefore not relevant to the issues before me today.

6. At the remedy hearing that took place on 3 November 2021 I drew the parties attention to the recent case of **Forth Valley Health Board v Campbell** [UKEATS/0003/21] where a part-time worker claimed that it was less favourable treatment not to give him a 15 minute break during a four hour shift, a benefit available to anyone who worked a six hour shift. Applying regulation 5(2)(a) the EAT found that the *reason* for the treatment was the length of the shift, and *not* the fact that the employee worked part-time. The claim therefore failed.

7. The **Forth** case applied the test set out in **McMenemy v Capita Business Services Limited** [2007] IRLR 400. In **McMenemy,** a part time worker who worked from Wednesday to Friday argued that he was less favourably treated as he received fewer holidays than an employee who worked on Mondays and received the benefit of all the bank holidays that fell on that day. I am setting out the following key passages in full as they will assist in determining the outcome in the present case:

> *'[13] We have already set out the relevant legislation and discussed its proper interpretation. It was not in dispute that the appropriate comparators were the full-time workers in the appellant's team, who worked from Mondays to Fridays, and that by comparison with them the appellant received less favourable treatment, because by working part-time on Wednesdays, Thursdays and Fridays he did not receive the benefit of statutory holidays which fell on Mondays (though he did receive the benefit of any statutory holiday which, in a particular year, fell on a Wednesday, a Thursday or a Friday). It is at this stage, in considering whether there has been less favourable treatment, that the pro rata principle is applicable: if the appellant had received a pro rata amount of time off in lieu of Monday statutory holidays, he would not be less favourably treated.*
>
> *[14] The next question is whether this less favourable treatment was solely because the appellant was a part-time worker. This, as we have*

discussed, requires examination of the respondents' intention: did they intend to treat him less favourably for the sole reason that he was a part-time worker? It is clear to us that the Employment Tribunal and the Employment Appeal Tribunal gave the correct answer to this question. On examination of the facts, the reason why the appellant received less favourable treatment than did a comparable full-time worker was through the accident of his having agreed with the respondents that he would not work for them on Mondays or Tuesdays. It is at this point that it becomes legitimate to consider hypothetical situations, in order to test the true intention of the respondents. It is clear on the evidence that, in accordance with the respondents' policy on public holidays, if a full-time member of the appellant's team worked a fixed shift from Tuesday to Saturday, he would not receive the benefit of statutory holidays which fell on Mondays. Likewise, if the appellant, or any other part-time member of his team, worked on Mondays, they would receive the benefit of statutory Monday holidays in exactly the same way as full-time employees would do. We can therefore see no reason to fault the reasoning of the Employment Tribunal or the Employment Appeal Tribunal, especially the latter, in the passages quoted above. This is sufficient to dispose of the appeal.'

Application for Amendment

8. On the morning of the hearing of this claim the Claimant provided an addendum to his skeleton argument which argued that in addition the business model operated by the Respondent amounted to discrimination on grounds of race and/or sex because the vast majority (over 78%) of drivers were of black or minority ethnic heritage. He alleged differential treatment with the Respondent's office staff who were treated as employees rather than self-employed.

9. I pointed out to the Claimant that this hearing had been convened to consider his claim that he had been less favourably treated as a part-time worker under the Regulations. There was no claim of race discrimination before the tribunal. If he wished the tribunal to consider such a claim he would have to apply for an amendment.

10. At the start of the hearing the Claimant indicated that he would not seek leave to amend his claim in light of the fact that the Respondent was not arguing that any less favourable treatment was 'justified'. However once all the evidence had been completed the Claimant applied to amend his claim to include a claim under the Equality Act 2010. When asked why he had not sought to raise a claim earlier, he stated that it was only as all the evidence had come out that he realised this was another aspect to his claims. The Respondent objected to the application.

11. I considered the application in accordance with the principles set out in the case of **Selkent Bus Co Ltd v Moore** [1996] ICR 836. The Claimant ceased working for the Respondent in September 2016. His claims were therefore around five years out of time. The application to amend would not amount to a 're-labelling' of existing allegations; it raised a wholly new matter under a different piece of legislation. There have already been a number of hearings of the claims brought by the Claimant. This was the fourth hearing that I had conducted. Extensive evidence has been heard, including evidence at this hearing from three witnesses which had now been completed. Certain aspects of this case have also been considered by the EAT. At no point during any of these hearings had the Claimant sought to raise the possibility that either the imposition of the circuit fee or other aspects of the way in which the Respondents conducted their business were discriminatory. I took the view that if I allowed the amendment a further hearing would have to be listed. Additional evidence would be required if the Claimant were to argue that the Respondent's actions were directly or indirectly discriminatory. The Claimant was seeking to introduce statistical evidence, for example, which the Respondent had not the chance to consider or respond to. It would not have been reasonable to proceed with the discrimination claim at the hearing on 10 January 2021. Given the length of time proceedings had already taken and the fact that an allegation of discrimination had not been raised previously, I considered that allowing the discrimination claim to proceed and listing it for hearing would be disproportionate. The matter had been raised too late, and it was not in the interests of justice to permit the amendment. I refused the application.

The Facts

12. I have described the operation of the circuit fee arrangement in my earlier judgments. At paragraph 14 of my Judgment and Reasons dated 17 February 2020 I found that: 'It is not in dispute that the Claimant was required to pay fees totalling £160 a week to the Respondent: a 'circuit fee' of £148 and a fee for renting equipment of £12 a week. This gave him the equipment to be fitted in his car and access to the Data Cars circuit, or booking dispatch system'. At paragraph 17 I found: 'The circuit fee, equipment rental fee and equipment deposit fee had to be paid before the Claimant was able to access the Respondent's booking system'. Once logged in, the Claimant would be given jobs and would collect fares direct from the customer (except for account jobs – see below).
13. Mr Les Chapman sets out the rationale for charging the circuit fee at paragraph 2 of his witness statement where he says: 'Data Cars Limited was established in 1999 to act as an intermediary for self-employed private hire drivers to access bookings, of which they were entitled to keep all of the fares they earned. In return for our intermediary services Data Cars charged drivers a 'circuit fee/driver rent': this could be called a weekly service fee. This is what Data Cars made its income from the self-employed drivers for its services'. (I should point out that in my first judgment on this claim I found that the Claimant was not self-employed but was in fact an employee).
14. The circuit fee could be covered in one of two ways: first, it could be paid by the Claimant to the Respondent by a specified time at the start of the week. Alternatively, if the Claimant carried out 'account work' for the Respondent (where the Respondent collected the fares from the customer rather than the driver being paid direct) the account payments earned would be set off against the circuit fee. At paragraph 16 of my judgment given on 19 July 2019 relating to the Claimant's status as a worker and employee I noted that 'if the value of account jobs exceeded £148, no fee was due'.
15. The parties agree that the Respondent's revenue was 'generated by receipt of the circuit fee from its drivers' (see Claimant's witness statement prepared for this hearing at paragraph 3 and Mr Chapman's witness statement at paragraph 2, quoted above). The model operated by the Respondent is that drivers paid

them the circuit fee to access the booking system and the drivers earned their revenue by collecting fares from customers. This system can be compared with the model operated by Uber (for example) where the company collects fares through its booking system and deducts an amount based on a percentage of the fares. Under that system, the amount retained by the company is obviously not fixed and will vary according to the hours and jobs completed by the driver.

16. It is worth noting that the Claimant worked for Uber before he started working for the Respondent. He moved because the Respondent offered a better rate per mile.
17. The Respondent's evidence was that the Claimant worked 34.8 hours per week on average. This compared with an overall driver average of 43.17 hours weekly. These figures were not challenged by the Claimant.
18. I have considered the spreadsheet provided by the Respondent following the hearing on 3 November 2021 for the purposes of calculating the NMW shortfall. I am aware that the Claimant has raised concerns about some aspects of that spreadsheet since my remedy judgment dated 3 November 2021 was sent out, but he has not queried the record of the hours that he worked each week which are found in column D. I have noted that his weekly hours varied significantly with the lowest number being 18.9 hours and the highest being 57.6 hours.
19. The Respondent also produced evidence from the Office for National Statistics showing that the average part-time worker worked 16.1 hours per week during the claim period.
20. It was Mr Chapman's evidence that the drivers he engages tend to work 'anything between 30-60 hours per week'. He agreed that not many drivers worked below 30 hours a week.
21. It was put to Mr Chapman that drivers would have to work a fairly significant number of hours each week to ensure that they earned enough to be able to pay the circuit fee before they worked the following week. The Claimant's position is that a person being paid the national minimum wage would have to work 22 hours per week to cover the circuit fee alone. Mr Chapman responded that the number of hours required would depend upon the type of jobs that the driver did. For example if a driver did two runs to Luton airport, the fee would

be covered. He also said that drivers who worked on the daily 'hospital run' (an account job where the fares were paid to the Respondent by the NHS) would earn £80 per day. A driver who did the hospital run for two days would have covered the circuit fee. Mr Chapman agreed however that drivers had no choice over the jobs offered to them, although they could decline a job. (For the implications of this, see my judgment dated 9 July 2019).

22. Mr Chapman was asked why the Respondent did not work on a commission model like Uber. He replied that the key difference between the Uber model and his business is that Uber collects all the fares from customers in advance through its booking system. When Uber started operations in the UK around 2009, this was very different from the traditional way in which private hire vehicle companies operated. He pointed out that Uber introduced a very advanced software system which allowed them to operate on this basis. He did not believe that it was possible for the Respondent to operate in this way due to the limitations of the 'icabbi' software that they were using. However he told us that since the pandemic started and the number of jobs reduced, they have now moved to a commission-based system.
23. Mr Townson operates a private hire cab company, Carlton Motors Limited, which is a local competitor to the Respondent. The business was established in 1984. He says that he has known Mr Chapman for a long time as a working colleague and that they occasionally socialise.
24. Mr Townson provided evidence about how his business developed, which I accept. Initially he operated as a 'one-man band'. Over time, other drivers joined on the basis that they paid a fixed amount of what he described as 'rent' in order to be given driving jobs through his company. This arrangement continued right up until the start of the pandemic in 2020. As the amount of work reduced, Mr Townson's company too moved to a commission-based arrangement. Like the Respondent, Mr Townson's business engages drivers on a self-employed basis.
25. In his witness statement Mr Townson says that 'the £160 circuit fee Data Cars charged was representative of the London private hire market during the claim period'. His company charges a figure for 'rent' of £155 per week.

26. Mr Townson's evidence was that his drivers tended to work 30-50 hours per week. He tells his drivers that they should expect to work at least 30 hours a week to cover the rental fee and earn enough money in addition to that.
27. I now turn to the issues identified in my case management order, which I will deal with in turn.

Decision

Was the Claimant a part-time worker for the purposes of the Regulations?

28. The definition of a part-time worker is contained in Regulation 2(2).
29. Mr Skudra concedes that the Claimant was 'paid wholly or in part by reference to the time that he works' thus satisfying the first limb of the definition. However he argues that the second limb is not met: 'having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker'.
30. It was clear from the evidence of Mr Chapman that drivers worked a wide variety of hours. The Respondent did not require their drivers to work a fixed number of hours and drivers could log on and off the app whenever they wanted. It was my initial view that the Claimant had little prospect of establishing that he had a claim under the Part-time Worker Regulations and I made this claim the subject of a deposit order on 9 July 2019.
31. Subsequent to that the Claimant brought a successful appeal to the EAT in a claim brought against another private hire company: **Augustine v Econnect Cars Limited** [UKEAT/0231/18]. The EAT found that despite the fact that the numbers of hours worked by drivers for this private hire company varied considerably, the Claimant was a part-time worker in accordance with regulation 2(2).
32. At paragraphs 79 and 80 the EAT dealt with the issue in this way:

> '*79.I do not agree with Mr Murray that a remission is needed to determine whether the claimant is or is not "identifiable as a full-time worker" (the second limb of regulation 2(2)). Mr Murray suggested it might not be possible to identify any full-time workers because they worked such varied hours. However, the performance report includes several drivers who worked an average week of 50 hours or more per week over the relevant six week period. The claimant's hours averaged about 20 per week over the same period.*

> *80. That is ample to compel the conclusion that he meets the definition of a part-time worker in the 2000 Regulations. He is not identifiable as a full-time worker. He was paid in part by reference to the amount of his working time. There is no need for any remission of that issue back to the tribunal. I will substitute a finding that the claimant was a part-time worker within the 2000 Regulations…'*

33. After the Claimant drew this decision to my attention, I reconsidered my decision and revoked the deposit order in relation to the claim under Regulations.
34. Mr Skudra argues that the EAT's reasoning in the **Econnect** decision is not comparable to the situation here. He relies upon the ONS data showing that part-time workers work an average of 16 hours per week. I find this statistical evidence to be of limited value given that regulation 2(2) makes it clear that the question of whether someone is a part-time worker must be considered 'having regard to the custom and practice of *the* employer in relation to workers employed by the employer' (my emphasis).
35. Mr Skudra points to the fact that in the **Econnect** case there was a wide discrepancy between the Claimant's average working hours of 20 hours a week and other driver's average hours of 50 per week. Here the difference is an average of 34.8 hours a week and 43.17 hours a week. However Mr Chapman's evidence was that the range of hours worked by most of his drivers falls between 30 and 60 hours per week. This was consistent with Mr Townson's evidence of a range of 30 to 50 hours. If we look at the pattern of hours worked by different drivers it is clear that the Claimant's working hours were towards the lower end of the range, albeit it that they varied considerably.
36. What the Respondent's figures reveal is that the Claimant's working hours were *below average* in relation to other drivers. The **Econnect** decision suggests that there may be fairly low bar to establishing that a person is a part-time worker, even where typically the hours of different drivers vary greatly.
37. I take into account the fact that in many sectors a person working over 30 hours a week would be considered to be working full-time. Nevertheless regulation 2(2) requires me to consider the custom and practice operating within this employer. The evidence shows that drivers were working over 43 hours a week on average and some were working 60 or more hours. In this context I

reach the conclusion, albeit cautiously, that the Claimant is not identifiable as a full-time worker of the Respondent.

38. On that basis I find that the Claimant was a part-time worker.

Who are his comparators and were other drivers at the Respondent working considerably more hours than him?

39. During the hearing the Claimant indicated that his chosen comparator is the driver (identified under number X427110) who had worked the *most* hours according to figures provided by the Respondent. It was noted that this particular driver had worked 1583 hours over a seventeen-week period (an average of over 90 hours per week).
40. Mr Skudra argued that this person was not an appropriate comparator as he or she represented the extreme end of the 'range' of hours. The Respondent also argued that the figure of 1583 may have represented the number of hours that this driver was logged into the app but that did not necessarily mean that they were available for work or working for the Respondent. I was not able to resolve this issue in the absence of specific evidence concerning the individual.
41. I took the view that it was for the Claimant to identify his comparator for the purposes of his claim. I do not find that his selection of this comparator was inappropriate. This is consistent with my finding that the Claimant was working below the average number of hours worked by other drivers; and towards the bottom end of the 'range' of hours worked.

Did the charging of the circuit fee amount to less favourable treatment of the Claimant as regards the terms of his contract?

42. This is the key question in relation to this claim.
43. I start from the position that all drivers were in exactly the same position as the Claimant. All of them would have to work a certain number of hours and complete a certain number of jobs to cover the circuit fee. That number of hours and jobs would vary according to the type of work carried out.
44. It is not the Claimant's case that he was unable to cover the circuit fee (and so unable to work for the Respondent) because of the number of hours that he worked. It was his own evidence that a driver would have to work around 22

hours per week to cover the circuit fee at NMW rates. Of course it would not make sense for a driver to earn only enough to cover his circuit fee for the following week: he would have to earn enough to live on as well. Mr Townson's evidence is that in his business a driver would really have to work around 30 hours per week to make it worthwhile. Whilst noting Mr Chapman's argument about how the circuit fee could be covered with a couple of profitable jobs, I find that it is more likely than not that *in general* a driver working for the Respondent would probably have to work a similar number of hours to make the job viable. This is indicated by the typical range of hours worked from 30-60, and his acknowledgement that very few drivers worked under 30 hours per week. The Claimant however was not in this category. He worked an average of over 34 hours a week. He was able to pay the circuit fee each week until the end of his employment with the Respondent, when he had a period of absence due to illness. (For the facts that led to the termination of his engagement, see my judgment dated 9 July 2019).

45. From this perspective, there was no differential treatment between the Claimant and driver X427110 whom he compares himself with.

46. The cases of **Campbell** and **McMenemy** both concern claims where a part-time worker was being denied a benefit. In the **Campbell** case, it was a rest break. In the **McMenemy** case, it was payment in lieu of a bank holiday.

47. That is different from the present case in which the Claimant is being treated in exactly the same way as all the other drivers. All of them had to work a certain number of hours before the circuit fee was covered. This might be achieved in different ways and in different periods of time depending upon the jobs obtained. On average the Claimant worked enough hours to cover the circuit fee.

48. The Claimant argues that the effect of the fixed circuit fee is that drivers would be discouraged or precluded from working part-time and that this would be contrary to the European framework directive upon which the Regulations are based. I can certainly see that the effect of the circuit fee is that it would not be viable for drivers to work less than around 30 hours a week; but that was not the Claimant's situation. This does not establish that he personally had suffered less favourable treatment which is a requirement of the Regulations.

49. I therefore find that the Claimant and driver X427110 were treated in exactly the same way. Each of them had to work around 30 hours a week at least to ensure that the job was worthwhile and that they could pay the circuit fee the following week. Both of them did so. I find that the Claimant has not established that he was treated less favourably.
50. In case I am wrong on that conclusion, and taking the Claimant's case at its highest, I go on to consider a further argument put forward by the Claimant. I remind myself that for less favourable treatment to be established, it must be shown that there was a difference in treatment that is more than minor or trivial.
51. The Claimant argues that the circuit fee represented a much greater proportion of his earnings than those of driver X427110. I do not have details of the earnings of this driver but I will assume that it is correct that drivers who worked on average more hours than the Claimant were taking home more money, and a greater proportion of the fares, than the Claimant.
52. One could answer this point by arguing that there was nothing to stop the Claimant from working more hours. He was not confined to working around 34 hours per week, although he has explained on previous occasions that he wished to work part-time so that he could study at the same time. I accept that he did not wish to work more hours.
53. Regulation 5(3) requires me to take into account the 'pro rata' principle in deciding whether there was less favourable treatment, unless it is inappropriate.
54. Mr Skudra suggests that this factor only becomes relevant when considering whether the treatment is 'justified' under regulation 5(2)(b). I have noted that the case of **Mcnemeny** deals with the pro rata principle in a slightly different way (see paragraph 13 of that judgment which I have quoted above). In that case the court considered the application of the holiday rules and took into account the pro rata principle at this point, concluding that 'if the appellant had received a pro rata amount of time off in lieu of Monday statutory holidays, he would not be less favourably treated'.
55. Following that approach, and by way of alternative, I apply the same principle to the circuit fee: if the amount of the fee had been reduced pro rata to reflect

the hours worked by any individual driver, the Claimant would not be less favourably treated.

56. If I am wrong in my conclusion that the requirement to pay the circuit fee did not amount to less favourable treatment as all drivers were charged the same amount, and if I have applied the pro rata principle correctly, I would find that the fee amounted to less favourable treatment of the Claimant. The circuit fee would represent a greater proportion of fares earned by a driver who was working 30 hours a week than by a driver who was working 60 hours a week or more.

57. I should note here that the effect upon the Claimant varied according to how many hours he worked each week. In a week where he worked around 20 hours, the circuit fee would of course have represented a much greater proportion of his earnings than during a week where he worked 50 hours or more.

58. It is then necessary for me to decide whether such treatment is *on the ground* that he was a part-time worker.

59. The evidence of Mr Chapman and Mr Townson demonstrates that the model whereby private hire vehicle companies charged drivers a 'circuit fee' or 'rent' in order to access bookings is well-established. I accept that it is likely that many private hire companies operated in this way until the arrival of Uber introduced a different, commission-based model based upon a sophisticated software booking system. It was the way in which these companies earned their revenue.

60. In accordance with the **McMenemy** case I consider the intentions of the Respondent and the reasons why the Claimant was charged the full circuit fee.

61. The Claimant's case is that the Respondent along with other private hire companies operating a similar model, was acting 'unlawfully'. He is referring to the fact that these companies treated their driver workforce as self-employed. He points to the fact that in his case, and others, it has been established that drivers working under this model were at the very least workers and sometimes (as in his case) sometimes employees. He relies upon the finding that he was not being paid the National Minimum Wage during the period when he worked

for the Respondent. He argued that the Respondent could have operated on a basis that was less discriminatory such as a commission arrangement.

62. The Claimant has already established at earlier hearings that it was not correct to treat him as self-employed; he was in reality an employee. He was not being paid the National Minimum Wage. However these factors on their own do not establish that he was less favourably treated *on the ground* that he was a part-time worker.

63. The reason why the Claimant was charged a circuit fee is because this was the way in which private hire companies such as the Respondent were operating. It is the way in which the Respondent earned a revenue from the business. Unlike newer businesses such as Uber, the Respondent did not collect the fares from its cash customers. These were paid direct to the drivers. The circuit fee gave the drivers access to the Respondent's booking system. Whereas I might go so far as accepting that the Claimant was charged a circuit fee because he was treated as self-employed, (treatment that has been found to be incorrect) that in itself does not establish causation under the Regulations: because it does not show that he was charged the fee *because* he was working fewer hours than his fellow drivers. All the Respondent's drivers were treated as self-employed and were charged a circuit fee however many hours they worked.

64. I have considered the Claimant's argument that the Respondent could have operated a commission-type model where the sum charged varied according to the hours worked by the driver. I note that the Claimant moved from Uber because he wanted to earn a higher rate per mile. The commission arrangement therefore was something he had already tried and rejected. I accept however that there was a crucial difference between the way in which Uber operated: namely that under their system the company collects all the fares. When the Claimant was working for the Respondent all cash fares were paid directly to him by customers. The Respondent had to have some way of earning money from the arrangement and their chosen and established method was to charge a circuit fee. This was in line with other similar businesses. I also accept that at the time when the Claimant was engaged the Respondent may not have had access to the type of software operated by Uber which

allowed for a commission type arrangement, and that they have only been able to move to that system since the onset of the pandemic. I find however that even if the Respondent could have operated on a different basis, that too does not establish that he was charged a full circuit fee *because* he worked fewer hours than other drivers.

65. In the **Campbell** case, the employment tribunal had found that the only difference between Mr Campbell and his comparators was that he worked fewer hours; in particular when he worked a four hour shift rather than a six hour shift. As he was not paid for a rest break when working a four hour shift, the tribunal concluded that there was less favourable treatment. The EAT rejected this argument. It was decided that the tribunal had not properly applied the causation test in accordance with **McMenemy.** It was accepted that a part-time worker would inevitably work fewer hours than a full-time comparator. However the tribunal could not properly conclude that there was any causal connection between Mr Campbell's part-time status and the length of his shifts. There was no basis upon which the tribunal could conclude that the difference in treatment was 'on the ground' that he was a part-time worker, far less that his part-time status was the *sole* ground for such difference in treatment.

66. Applying that approach to this case, it is correct that the Claimant was working fewer hours than his comparator. The result was that in some weeks he took home a lower proportion of his pay, after accounting for the circuit fee. However I find that this does not establish that the charging of the full circuit fee was on the sole ground that he was a part-time worker. The circuit fee was the means by which the Respondent obtained a revenue from its business. All drivers were treated in exactly the same way. The **McMenemy** decision, quoted above, makes it clear that the question of causation 'requires examination of the Respondents' intention: did they intend to treat him less favourably for the sole reason that he was a part-time worker?' Based upon the evidence presented I find that this claim is not made out. The Claimant was charged a circuit fee in return for which he was granted access to the Respondent's cab booking system. It was the means by which the Respondent derived earnings from its business. It was applied to all drivers in exactly the

same way. The fact that the Claimant has established that he should not have been treated as self-employed does not lead to a conclusion that the circuit fee amounts to a breach of the Regulations. The Claimant was not charged the full circuit fee simply because he worked fewer hours than other drivers: the reason why he was charged the fee was so that he could obtain access to bookings through the Respondent's systems in the same way as any other driver. There has been no evidence to suggest that the hours a driver was likely to work had any impact upon the Respondent's requirement that the fee be paid: it was simply the condition they imposed before taking any driver on, and the means by which they made money out of the arrangement.

67. In conclusion, my decision is as follows. I find that the Claimant has not established that he was treated less favourably than a comparable full-time worker such as driver X427110 as they were both treated in exactly the same way. If I am wrong on that and if the Claimant can establish less favourable treatment on the basis that he was taking home a lower proportion of his salary, I find that in any event the charging of the circuit fee was not on the sole ground that he was a part-time worker. The claim under regulation 5 therefore fails.

Employment Judge Siddall
Date: 18 January 2022.