EMPLOYMENT TRIBUNALS

Heard at: Plymouth Magistrates Court **On:** 9 August 2022

Claimant: Mr Edward Hockin

Respondent: Mr Steven Barnes trading as Bernie Taxi Services

Before: Employment Judge E Fowell

Representation:

Claimant In Person

Respondent Mr Tidy of Croner Group Limited

JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant was employed by the respondent (and was a worker) in his capacity as a school delivery driver. As such, he was paid £200 per week.
2. The claimant also did work for the respondent as a taxi driver. In that capacity he was a worker but not an employee.
3. The various claims shall be determined at a further hearing to be held on 3 January 2023.

REASONS

1. These written reasons are provided at the request of the respondent following oral reasons given earlier today.
2. Mr Hockin worked for the company as a driver until his dismissal on 20 July 2021. The company say that this was on grounds of gross misconduct, for handing out the company's business cards with his own business's phone number on the back.
3. The complaints presented are as follows:
   a) unfair dismissal;
   b) breach of contract in relation to notice pay;

c) breach of contract / breach of the Working Time Regulations 1998 in relation to outstanding holiday pay.

Procedure and evidence

4. This preliminary hearing is to decide whether Mr Hockin was either a worker or an employee during his time working for Mr Barnes, who owns Bernie Taxi Services. I heard evidence from Mr Hockin and a supporting witness, Ms Wendy Norman, as well as from Mr Barnes. There was also a bundle of 39 pages, most of comprising Tribunal paperwork. There is little disagreement about the basic facts which are as follows.

Findings of Fact

5. Bernie's is a taxi company based in Tavistock. It has about half a dozen drivers who provide taxi services for members of the public. They are allowed to pick up customers who flag them down at the curbside, but mainly they collect those who ring the office to book a taxi. Each such job is then passed to an individual driver by radio on a first-come, first-served basis.

6. Mr Barnes also has a number of contracts with Devon County Council to take children to school. That is a very different line of work. The company has a number of mini buses and runs about seven of these contracts. In each case the driver will pick up each child from their home address and take them to school before returning in the afternoon to collect them all.

7. Before he joined Bernie Taxi Services, Mr Hockin worked as a bus driver. In that role, he was an employee with regular hours, duties and pay. He joined Bernie taxi services on 1 March 2019 to do one of these school runs. He was not licensed to work as a taxi driver but he was able to drive the 18-seater minibus needed for this contract. The work took about four hours a day, two hours to take them to school and two hours to bring them home. He was paid a flat weekly wage of £200, together with £40 for the fuel, which was all paid in cash in an envelope on a Friday. He was also, from the outset, given the use of one of the company's taxis to get him to and from the minibus every day. All of the costs associated with the vehicle including tax and insurance were paid by the company.

8. In addition to providing a driver, as part and parcel of the contract the company also had to provide one or more escorts for children with special needs on each trip. Unlike the driver they were expressly regarded as employees.

9. For the driver, there was no written contract of any sort, let alone a contract of employment. No pay slips were provided. No tax or national insurance was deducted. From the outset, Mr Hockin was regarded as self-employed and expected to account to HMRC for his earnings, although in fact at that level of earnings there would have been no income tax to pay.

10. After about three months the arrangement changed. Mr Hockin got a taxi license and began to do taxi driving as well, using the car he had been supplied with. He worked in between school runs, and also in the evenings. This was a normal arrangement, and most of the other drivers also did a school run.

11. Mr Hockin says that from this point on Mr Barnes used to deduct £100 a week from his wages for the cost of the vehicle. Mr Barnes disputed that. There are no records to resolve the point. However, Mr Barnes' witness statement makes no mention of the amount that was paid to Mr Hockin, and Mr Hockin was not challenged on this point, so I accept that that was the case. It is also difficult to see what benefit there was to the taxi company otherwise. They would simply be lending out vehicles to taxi drivers for them to use to make a profit.

12. That shift to taxi driving was a significant change to the overall working arrangement. It meant that Mr Hockin would need to earn considerably more than £100 a week to make it worthwhile. If he only earned £100 from taxi-driving he would be no better off, and in fact would be doing extra work without any extra pay. He told me that he mainly worked in the evenings. It was less busy then, so easier to pick up work. And at weekends he could earn £60 or £70 pounds a day

13. The evening work was slightly different. Jobs would not be radioed over to the driver. Instead, one of the drivers had the company mobile phone. Calls from the main number would be diverted to the mobile phone, and the driver would either do the job himself or, if he or she was busy, give it to someone else. Mr Hockin tended to work on a Thursday evening, but each of the drivers took a turn.

14. The arrangement for Ms Norman was very much the same. She did a school run in a minibus as well as running a taxi service during the day or out of hours. Although she was a supporting witness for Mr Hockin, she regarded herself firmly as self-employed. The difference, she said, was that she was there when Mr Hawking was recruited and he was offered an employed contract just to do a school delivery. The difficulty with that is that Mr Hockin made no mention of it in his statement. Nor did he suggest to Mr Barnes that that was their agreement. Hence, I cannot find on balance that that was ever agreed.

15. So, there were two very different types of work - the school delivery runs and the taxi work. They were in two different vehicles. The school delivery work was for regular hours. Although no fixed times were set, the obligation was on Mr Hockin to arrange things so that he was able to collect all of the students and get them to school on time. He also had to be ready to collect them for the return journey. There were no occasions when he failed to turn up or refused to do the job. (His evidence was that he had to do it even if he was ill.) The company's position is that there was unfettered right to provide a substitute, but of course there is nothing in writing to that effect and no evidence was given that that was ever said. In practice it is difficult to see how that could have worked. Mr Barnes said in his evidence that they could cover the routes with other drivers if need be, and with

difficulty, but that simply indicates that in the event of illness or holiday they could manage at a push.

16. The payment of £200 per week (subject to the deduction of £100 for the taxi) continued during school holidays. It even continued during lockdown. Mr Hockin also continued the taxi service because most of the drivers made themselves unavailable.

17. The taxi driving on the other hand was a very much looser arrangement. Mr Hockin could work when he pleased, for as long as he pleased. He worked directly for the customer and kept the fare. There is no reason why, during his chosen hours of work, he would refuse a fare, and there is no evidence on either side that this ever happened.

Employment Status – self employed

18. Turning to the applicable law, section 230(1) ERA defines an employee simply as an individual working under a contract of employment. Section 230(2) defines a contract of employment as:

> "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

19. The question of whether someone is a worker or not is a broader question. All employees are workers, but not all workers are employees. As recently determined by the Supreme Court (in **Uber BV v Aslam** [2021] UKSC 5) Uber drivers may have a self-employed contract but they still count as workers and enjoy a range of statutory rights such as a maximum working week and national minimum wage. I will start with that issue here.

Workers

20. The definition of a worker in the Working Time Regulations is the same as in the Employment Rights Act 1996. It is set out in Regulation 2, the interpretation section. Among the various definitions there it states:

> "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

21. So, employees are in limb (a) of this definition and workers are at limb (b). The two key elements here are:

    a. whether Mr Hockin was undertaking to do work personally; and

    b. whether the respondent was his client or the customer of a business he

was carrying on.

22. It was recently confirmed by the Court of Appeal in **Nursing and Midwifery Council v Somerville** [2022] EWCA Civ 229 that there is no extra requirement, as for employees, of some mutuality of obligation – i.e. some obligation on the "employer" to provide work and on the "employee" to accept it. It is just these two factors.

Conclusions – Worker status

Personal service

23. The starting point here is that there are two very different types of work undertaken by Mr Hockin, the school delivery work for a regular payment, supplemented by the taxi work.

24. There is nothing in law to prevent different conclusions about different types of work. A teacher may be employed in a school during the day teaching a class of students and in the evening may work is a private tutor, being paid directly by parents. The only real connexion between the two types of work here is that Mr Hockin had one of the company taxis throughout, although for the first three months he was only using it to get to the minibus.

25. Starting with the school delivery work, it is clear that this was personal service by Mr Hockin. He was expected to do it. He had a licence to do it. It would have been difficult for the company to cover his work if on any given day he did not attend. Often in such cases the only issue over personal service is whether or not the individual had the right to provide a substitute who might turn up on any given day and do the work for him. That might be so if there was a written contract which allowed for this possibility but there is no written contract here. There is no need therefore for me to address the guidance on such clauses, recently summarised and confirmed in **Pimlico Plumbers Ltd v Smith** [2017] IRLR 323.

26. The statement from Mr Barnes says that he could provide a substitute taxi driver, but there is nothing to indicate that he could provide a substitute school delivery driver, or that that was ever discussed let alone acted on. I therefore find that this was a contract for personal service.

27. What then was the position during his time as a taxi driver? Clearly when he was engaged in taking a customer to their destination he was providing his services personally. Could he provide a substitute? It makes little sense in practise that he would want to do so. Having chosen to work he would presumably want to accept any jobs which were assigned to him, and not tell the taxi company over the radio that he had changed his mind and would get someone else to cover that fare. It would make much more sense for him to simply call it a day and leave the other drivers to do the work.

28. The arrangement was slightly different on Thursday evening when he was covering the phone himself. The idea was that he would take the jobs himself as

they came in, but if there are too many of them, or he did not want to do it for any reason, he could get another driver to cover it. Even that is not quite the same thing as providing a substitute. A substitute is required when an individual has work assigned to them which they are unwilling or unable to do for any reason, and so they arrange for someone else to do it. These Thursday fares were never assigned to Mr Hockin, he just had the first opportunity to take them, as did other drivers on other evenings. Again, there is no evidence that he ever did provide a substitute all that he was ever told that he could, and so I conclude that both the school delivery work and the taxi work involved an obligation to do the work personally.

Was he in business on his own account so that the respondent was a client or customer?

29. The second question is whether he was in business on his own account so that the respondent was a client or customer of his, or whether on the other hand he was working for them. And again, both types of work have to be considered.

30. With regard to the school delivery work there was really nothing to suggest that Mr Hockin was in work on his own account. He was being paid by the company for regular work. The work was intrinsic to their business. He had no other potential clients or customers for whom he was carrying out such work. He did have to account to HMRC for his own tax and National Insurance but in the context of worker status that is a neutral factor. Uber drivers have to do the same, and yet are regarded as workers. To repeat, the only question is whether or not he was providing work personally and if so whether the company paying him was a client or customer. There is simply no reason to regard Bernie Taxi Services in that light, so I have to conclude that in carrying out his school delivery work he was a worker.

31. The position of taxi drivers was considered extensively in the case of **Uber BV v Aslam** [2021] UKSC 5. The traditional position of a black cab driver is that they are self-employed and independent contractors, dealing directly with their customers. There are regulatory requirements imposed by a local authority and a licence fee, but nothing approaching a contract of employment with local authority or anything to suggest that the taxi driver is working for them rather than for themselves.

32. The introduction of new technology however has changed that traditional pattern with the possibility, as in the Uber case, of drivers being tightly controlled about their work. That is a very different arrangement to the sort of taxi service in question here, and the main features in that case were that:

    a) all questions of remuneration were fixed by Uber; the only way the drivers could increase their pay was by working more hours on those fixed amounts;

    b) all other contractual terms were drafted and imposed by Uber;

c) drivers could choose when to turn on the app, but once logged on the choice of work was subject to constraints by Uber, including disciplinary penalties for too few fares;

d) although the drivers provided the cars, these were subject to conditions by Uber, who provided all the technology and operated their own rating system for drivers and customers; and

e) Uber not only collected all the fares, but also deliberately limited a driver's contact with the customer.

33. In the present case:

a) No evidence was put forward on either side about the arrangements for charging customers, although presumably this was on a metre, with a fixed scale of charges.

b) There were no written contractual terms of any sort.

c) That was the same flexible arrangement here about when a driver could work, and no suggestion of any disciplinary penalties for inefficiency.

d) The vehicle here was provided by the taxi company.

e) There was nothing particularly here to limit a drivers contract with the customer although on the respondent's case his contract was terminated after they discovered that he was putting his own phone number on the back of business cards and hence contacting customers directly.

34. So, on the one hand there were none of the express restrictions imposed by the use of the Uber app and the many obligations imposed in that written contract; on the other hand, unlike the Uber drivers, the vehicle was provided by the company. That is a significant feature. The car is obviously the main tool of the job, and the fact that the company provided it for him makes it far more difficult to see them as simply a client or customer of his.

35. It is not necessary to carry out a point by point comparison between the position of Mr Hockin and that of Uber drivers. Having concluded already that he was providing his work personally for the company, the significance of these points is simply whether or not the company was a client to customer of his. I am not at this stage addressing the question of whether or not he was an employee. However, the broad position is that he needed to work in order to recoup the £100 a week deducted from his wages, that was in practice quite a sufficient incentive. He did have more freedom than Uber drivers over such matters as the routes he took, but those small daily restrictions are in my view outweighed by the fact that the company provided the vehicle for him. That leads me to the same conclusion, as with Uber drivers, that he was a worker.

36. Another recent case concerning taxi drivers was **Johnson v Transopco UK Ltd** EA-2020-000780-AT. That involved a black cab driver in London. Mr. Johnson fully accepted that he was self-employed for most of the time but for some of the

time he worked via the Mytaxi App, which imposed arrange publications of the same sort as imposed on Uber drivers. The employment tribunal accepted that he was providing work personally through this App, but only about 15% of his time was logged on and using the app rather than simply carrying out his normal taxi work, basis it was concluded that the company was just a client or customer of his. As the EAT noted at para. 70:

> "It is clear from these statistics that the respondent was not the claimant's main source of income and that he did not need to sign up to the App in order to work. This was not a dependent work relationship as envisaged in Cotswold Development Construction Ltd v Williams [2006] IRLR 181 at para 53."

37. The position is very different here. Mr Hockin's time was split between his school delivery work and his taxi work, but 100% of his time was working for the same company. It was in my view very much a dependent work relationship, and that reinforces my view that the second limb of this test is met for the taxi work as well.

38. It therefore follows, applying the recent authority of **Smith v Pimlico Plumbers** [2022] EWCA Civ 70 that no time limit or other issues arises to prevent Mr Hockin being awarded his holiday pay for the duration of his service.

Employment Status

39. The next question is whether Mr Hockin was an employee. Guidance on the approach to this question has been provided by the higher courts on a number of occasions. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 1 All ER 433 QBD the court set out the following three questions:

    a) Did the worker agreed to provide his own work and skill in return for remuneration?

    b) Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of [using the language of the day] master and servant?

    c) Were the other provisions of the contract consistent with its being a contract of service?

40. Further guidance was given in **Hall (Inspector of Taxes) v Lorimer 1994** ICR 218, in which the Court of Appeal upheld the view of Mr Justice Mummery in the High Court that:

> "This is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, positive appreciation of the whole. It is a matter of evaluation of the overall effect of the detail… Not all details are of equal weight or importance in any given situation."

41. The House of Lords subsequently endorsed the view in **Carmichael v National Power plc** 1999 ICR 1226 that certain elements formed part of an irreducible minimum – control, mutuality of obligation and personal performance.

42. The first test here is the same as that for a worker, i.e. the question of personal service and that has already been resolved in Mr Hockin's favour.

43. The main next question is about the degree of control. Once again there are two different types of work to consider, the school delivery work and the taxi work. Starting with the school delivery work, my first observation is that there is nothing to prevent the driver being an employee in these circumstances. It could easily have been arranged on that basis from the outset. That is the position of the escorts who had contract of employment. The involvement of these escorts underlines the fact that the delivery arrangements were not in any sense haphazard or subject to the whim or preference of the driver. It was part of a specified service being delivered by the company for the local authority.

44. Clearly there is no one sitting with Mr Hockin as he carried out the work, and it is well recognised that this "control" test is not very well suited to individuals who work on their own. But that does not mean that individuals who are not supervised on a regular basis, such as a gas engineer carrying out domestic repairs is not also an employee. Another approach is to consider whether he was integrated into the business. This is part of a core function of the company, with several of these routes being operated on behalf of the local authority, so satisfactory service delivery was clearly very important. This is a transport company and he was the driver. No doubt on that basis alone he would have seemed to the parents of the children or the school staff who met the minibus, to be one of the staff from Bernie Taxi Services. They might be surprised to be told that he was self-employed.

45. On the other hand, he did not have to wear a uniform, or carry any particular ID. At least there was no evidence to that effect. Nor it seems did he have to have any CRB checks for working with children in this role. And he was not regarded as an employee. He was required to account for his own tax and National Insurance, and received no pay slips or contract et cetera, and that reflected the preference of the company that he not be treated as an employee. That was the way in which things operated in practise.

46. But the way in which an employer chooses to regard an individual cannot be decisive. Apart from that insistence that he account for his own tax and National Insurance there is little here to suggest that he was in fact self-employed. Again, he was not working for anyone else. The work was only for four hours a day but it was a regular pattern of work. What does seem to be decisive here is that the payment continued during the school holidays. It even continued during lockdown. There are understandable reasons for that payment. Otherwise, Mr Hockin would simply not have been able to manage and would have had to get a job elsewhere. Mr Barnes would have been left in the position of sourcing a driver

for each term as it came around. But that sort of long term commitment to an individual is only really consistent with an employment relationship. If Mr Hockin had simply been a contractor he could have been hired in on a daily or weekly rate as required. No doubt that rate would have been higher but that reflects the pros and cons of having employees to provide a company's core services.

47. The third question is about the terms of the contract and whether that contract is compatible with being an employee. In practise that usually involves asking whether there was a substitution clause in the contract, which is something I have already considered. Although the agreement here was purely oral, there was nothing discussed about providing a substitute.

48. The existence of payments during the school holidays also demonstrates that there was mutuality of obligation here, i.e. or at least an obligation by the company to provide work too Mr Hockin. I have already concluded that he has an obligation to carry out the work that was assigned to him home the school runs.

49. The position however is different for the taxi work. As already mentioned this is traditionally regarded as a self-employed occupation. The key fact here is that the driver is contracting directly with members of the public and is being paid by them. At no point was Mr Hockin being paid by Bernie Taxi Services for that work. In practise, he was paying them £100 a week for the use of their vehicle.

50. Although it has not been suggested I have given some thought to the question of whether the two types of work are part and parcel of the same arrangement and so have to be assessed in the round rather than separately, i.e. whether Mr Hockin was only given the school delivery work on the basis that he agreed to carry out taxi work in due course. It seems in practise that that was always the intention, answer from Mr Hockin's point of view, he had to wait for three months before he could increase his earnings by doing taxi work instead. However the company's position is that no deductions were ever made from his wages for the school delivery work and so there was no connection between the two. It is not clear what would have happened if Mr Hockin had said, at the end of three months, that he didn't want to any taxi work. There is no basis for me to conclude that that would have resulted in his dismissal from his school delivery work, although he may have lost the use of his taxi to get him to and fro each morning. Both types of work seem roughly equally well paid. There is nothing to indicate that one is subsidising the other. Consequently I conclude that it is appropriate and inevitable to separate the two of them. In my view, Mr Hockin met all the requirements for employment in connexion with the school delivery work, but not in respect of the taxi work. He met the requirements for a worker in both cases.

51. It follows that he is allowed to pursue:

    a) his complaint of unfair dismissal in respect of that school delivery work,

    b) is claim for notice pay in respect of that school delivery work

c) any unpaid wages or holiday pay in connection with that work or his work as a taxi driver.

52. To that extent the preliminary issue is decided in his favour.

Footnote

53. You can appeal to the Employment Appeal Tribunal if you think this decision involves a legal mistake. There is more information here https//www.gov.uk/appeal-employment-appeal-tribunal. Any appeal must be made within 42 days of the date you were sent the decision / these written reasons.

54. There is also a right to have the decision reconsidered if that would be in the interests of justice. An application for reconsideration should be made within 14 days of the date you were sent the decision / these written reasons.

55. A decision may be reconsidered where there has been some serious problem with the process, such as where an administrative error has resulted in a wrong decision, where one side did not receive notice of the hearing, where the decision was made in the absence of one of the parties, or where new evidence has since become available. It is not an opportunity to argue the same points again, or even to raise points which could have been raised earlier but which were overlooked.

Employment Judge Fowell

Date 09 August 2022

Reasons sent to the parties: 14 December 2022

FOR THE TRIBUNAL OFFICE