Neutral Citation Number: [2023] EAT 93

Case Nos: EA-2022-000044-OO

EA-2022-000057-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 June 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

UNITED TAXIS LIMITED v (1) MR R COMOLLY (2) MR R TIDMAN
- AND -
MR R TIDMAN V (1) UNITED TAXIS LIMITED V (2) MR R COMOLLY

- -
- -

Stephen Wyeth (instructed by Frettens LLP) for the **First Appellant**
Louise Quigley (instructed under the auspices of Advocate) for the **Second Appellant**
Mr Comolly, The **Respondent** in person

Hearing date: 28 March 2023

- -

JUDGMENT

SUMMARY

EMPLOYEE, WORKER OR SELF-EMPLOYED

Mr Comolly is a taxi driver. He registered with United Taxis and then did work driving United Taxis' passengers, through one of its shareholders, Mr Parkinson, using his taxi. After that relationship came to an end he did work driving United Taxis' passengers, through another shareholder, Mr Tidman, using his taxi. After that relationship ended he brought various complaints to the employment tribunal asserting that he was either an employee or a worker of United Taxis or Mr Tidman.

The tribunal determined as preliminary issues that Mr Comolly was a worker of United Taxis and an employee of Mr Tidman.

On the facts found the tribunal properly concluded that United Taxis' passengers' contracts were, and were solely, with United Taxis. It also properly concluded that, under Mr Comolly's contract with Mr Tidman, Mr Comolly provided services to him in exchange for payment. United Taxis contracted out the task of conveying its passengers to Mr Tidman, who in turn sub-contracted it to Mr Comolly. However, the tribunal erred in finding that Mr Tidman had a contract with United Taxis under which he also did work for it. There was no necessity to imply such a contract, whether from the fact that he registered with United Taxis, and was required to comply with its rules and byelaws as a condition of being permitted to convey its passengers, or otherwise. The tribunal could also not properly find that he was simultaneously an employee or worker of two employers in respect of the same work.

The tribunal also erred in finding that Mr Comolly's contract with Mr Tidman was a contract of employment, in particular in its approach to the question of control. Drawing on its findings of fact, a finding was substituted that Mr Comolly was a worker of Mr Tidman.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as Mr Comolly, United Taxis and Mr Tidman. Mr Comolly presented a claim to which Mr Tidman and United Taxis were the first and second respondents. The complaints raised included unfair dismissal, wrongful dismissal, unlawful deduction from wages, failure to pay holiday pay, and a complaint of age discrimination.

2. In a reserved decision arising from a preliminary hearing at Bristol (held by CVP) the employment tribunal (Employment Judge D Harris) gave judgment in the following terms:

> "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 14th 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 1st March 2009 to the 14th March 2020 whilst working as the driver of a private hire vehicle for the Second Respondent over that period."

3. The preliminary hearing took place over two separate days. Mr Comolly and Mr Tidman appeared in person. United Taxis was represented by Mr Wyeth of counsel. The second hearing day was arranged to enable the parties to make further submissions following the decision of the Supreme Court in **Uber BV v Aslam** [2021] UKSC 5; [2021] ICR 657.

4. I heard together the appeals of both United Taxis and Mr Tidman from that decision. Messrs Comolly and Tidman were litigants in person in the EAT. At the hearing of the appeal Mr Comolly appeared in person. Mr Tidman was represented by Ms Quigley of counsel through the auspices of Advocate. Mr Wyeth of counsel, as before the tribunal, appeared for United Taxis.

The Facts

5. The relevant facts found by the tribunal were, in summary, as follows.

6. United Taxis is a limited company which is licensed by Bournemouth Council to operate

private hire vehicles. The tribunal set out extracts from its Articles of Association, including a requirement for shareholders to pay subscriptions. The Articles provide for byelaws, from which the tribunal also cited extracts. These state that drivers registered with United Taxis are expected to abide by the byelaws. They describe the company as a co-operative owned by member-shareholders. The extensive extracts cited by the tribunal covered such matters as display of United Taxis signage, dress code, restrictions on doing private work for United Taxis customers, or using other Apps, while registered with United Taxis, handling of jobs, use of a Chip & PIN machine and so forth.

7. In the following passage the tribunal considered the roles of Mr Tidman and Mr Comolly.

> "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. Once you have your taxi licence and are ready to join us please Email: 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 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 becom
> ing 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."

8. The tribunal described the computerised despatch system operated by United Taxis, called iCabbi, and the iCabbi App to which drivers would log on. Through the App drivers would be sent blue jobs, where they appeared to be the first available taxi, which they could refuse, subject to a time penalty; or green jobs, for which they could compete. Metered fares were paid by the passenger to the driver in cash or using the Chip & PIN machine in the taxi, causing payment to go to United Taxis. For account work the agreed fare was paid by the passenger directly to United Taxis.

9. At [19] the tribunal said this.

> "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."

10. The tribunal went on to discuss provisions contained in the United Taxis Driver's Training Manual, including in relation to time penalties for not accepting a blue job, or rejecting it following acceptance (though it accepted from Mr Comolly that the practice as to the length of time penalties differed from what the Manual provided), and a penalty points system in respect of complaints, that could lead to a driver being suspended or deregistered. The tribunal then continued as follows.

> "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."

The Tribunal's Decision

11. The tribunal began its self-direction as to 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."

12. The tribunal then stated that, as to how these statutory provisions should be interpreted, it reminded itself of the decision in **Uber**, and set out extracts from the discussion in that decision.

13. The tribunal summarised Mr Comolly's case as being that he was an employee or, if not, a worker, of Mr Tidman and/or United Taxis, Mr Tidman's case as being that Mr Comolly was self-employed and not his employee or worker, and United Taxis' case as being that Mr Comolly was not its employee or worker and that no contract had existed between him and it at all.

14. Under the heading "Decision" the tribunal wrote.

> "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 14th 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 1st March 2009 to the 14th 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 1st March 2009 to the 14th 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."

The Appeals

15. In overview United Taxis' appeal raised three grounds of challenge.

16. First, the tribunal had erred by finding that Mr Comolly was simultaneously an employee of Mr Tidman and a worker of United Taxis in respect of the same work. That outcome, entailing what might be called dual employment, was not legally possible. For that reason alone, submitted Mr Wyeth, at least one of the two appeals must succeed.

17. Secondly, the tribunal had in any event erred, by implying the existence of a contract between Mr Comolly and United Taxis when it was not necessary to do so in order to give business reality to the arrangements, nor to achieve the employment protection purposes of the legislation. Mr Wyeth relied on the discussion of this point in particular by the EAT, then approved by the Court of Appeal, in **James v Greenwich LBC** [2007] ICR 577; [2008] EWCA Civ 35; [2008] ICR 545.

18. Thirdly, and in any event, the tribunal erred by finding that any contract between Mr Comolly and United Taxis created a worker relationship, by reaching a perverse decision which failed to take proper account of a number of factual features pointing away from it. Mr Wyeth emphasised in particular the factual features that United Taxis did not retain any part of the fares paid by customers, hence had no financial interest in how much or little work drivers did, and had no interest in, or control over, the arrangements made between shareholders and drivers who worked with them. He also stressed that, while the claimant in fact only spent a small part of his time picking up work by

plying for hire as a Hackney Carriage, that was his choice. He was free to do as much or as little Hackney Carriage work and as much or as little private United Taxis work as he wanted.

19. In overview Mr Tidman's grounds of appeal raised the following main points of challenge.

20. First, he too relied on the dual employment point. Ms Quigley submitted that the tribunal's error in this regard meant that the whole decision was fundamentally flawed.

21. Secondly, in any event, the tribunal erred by misanalysing the factual and legal nature of the contract between Mr Tidman and Mr Comolly. The contract was not one by which Mr Comolly provided services for which Mr Tidman paid him, but one by which Mr Comolly hired Mr Tidman's taxi, for which he paid Mr Tidman a hire fee of 50% of the income he derived from using it.

22. Thirdly, even if it did not err by finding that Mr Comolly provided services to Mr Tidman, the tribunal had erred in finding that the contract between them was one of employment. In particular it had erred in its approach to control, by failing to recognise that Mr Tidman only controlled the time period during which his taxi was available to Mr Comolly, not what Mr Comolly did during that time, and by relying on features which actually related to Mr Comolly's relationship with United Taxis. It also failed to identify what other factors it found to be consistent with employment.

23. Both Mr Wyeth and Ms Quigley also contended that the tribunal should have found that Mr Comolly was in business on his own account.

24. Mr Comolly, in summary, contended that the tribunal had reached a permissible analysis, and one which reflected the factual realities of the working relationships. Points that he emphasised included the length of his overall relationship with United Taxis, including prior to his involvement with Mr Tidman, the economic reality that he could not earn his living through Hackney Carriage work, and the degree of control in fact exercised over him. On the dual employment point, he

contended that the tribunal had reached a conclusion which was not contrary to the authorities.

Discussion and Conclusions

25. The tribunal's self-direction as to the law was not, as such, criticised by any party before me. It was correct, as far as it went, and provides a starting point in relation to the law. I will say more about some particular aspects of the law in the discussion to follow.

26. As to the substantive decision, I start with the tribunal's finding at [19]. There it found that, in respect of each ride booked with United Taxis and carried out by Mr Comolly, the passenger's contract was with United Taxis. It did not find United Taxis to be acting as the agent of anyone else *viz a viz* the passenger. Mr Wyeth (though not Ms Quigley) submitted that the tribunal erred in [19], in particular when it said that United Taxis "relied upon shareholders and drivers to perform driving services for it". He said that this failed to take account of the fact that United Taxis is a driver-owned co-operative, which exists for the benefit of its shareholders, and passes on 100% of the income received from passengers. He said that it was the shareholders that relied on, or used, United Taxis.

27. I do not agree, however, that these factual features demonstrate that the tribunal erred in this part of its analysis. As Mr Comolly pointed out, United Taxis is a limited company. It plainly, both in law and practical reality, has a separate existence from its shareholders and the other drivers. Nor did the tribunal err for any other reason in finding that the contract made by each passenger was (and, plainly it found, was only) with United Taxis.

28. Next, it follows from this starting point of the analysis that, pursuant to the contract between them, as a matter of fact and law, United Taxis provided to each passenger the service of driving them to where they wanted to go, and the passenger paid United Taxis the fare for doing so. Both of these were so, notwithstanding that United Taxis engaged someone else to deliver the service on its behalf; and notwithstanding the different mechanisms by which payment was made.

29. Plainly the actual conveying of United Taxis' passengers was done by Mr Comolly. That was a service that he was providing to someone else, in some capacity, and for which that someone else was paying him. There were only two possibilities. Either he was providing the service to Mr Tidman and Mr Tidman was paying him for it; or Mr Comolly was providing the service to United Taxis and United Taxis was paying him for it. If it was the former, then the other link completing the chain, was that Mr Tidman was providing the service to United Taxis – which task he had sub-contracted to Mr Comolly to fulfil on his behalf – and United Taxis was paying Mr Tidman for doing so.

30. It appears to me to be clear that the tribunal found that the first of those two analyses applied in this case. At [12] it found that Mr Tidman could "drive a taxi himself" and/or "engage other drivers to drive". If a shareholder did engage other drivers, United Taxis had "no involvement as to the basis on which the drivers were engaged by the shareholder". At [16] it referred to not knowing the terms on which the claimant "worked as a taxi driver" for Mr Parkinson. At [17] it found that he "ceased working for Mr Parkinson and began work as a taxi driver with the First Respondent." Crucially, the tribunal found (also at [17]) that the only way that the claimant could work as a registered driver for United Taxis was "through" a shareholder or by paying a monthly circuit fee. Though he was initially interested in becoming a shareholder, he did not do so [14]. Plainly he did not go the circuit-fee route either. That this was the tribunal's analysis is further clear from its discussion of the respective roles of the four parties, at [25], in particular, at [25.2.2] holding that the role of shareholders included "engaging drivers" who were referred to them by United Taxis.

31. I do not agree with Ms Quigley that the tribunal erred by not finding that the contractual relationship between Mr Tidman and Mr Comolly was, and was solely, one in which Mr Comolly hired Mr Tidman's taxi in return for which Mr Comolly paid him a hire fee. It was not bound so to find. Its actual findings point to its analysis (consistently with the other findings to which I have referred) being that Mr Tidman was paying Mr Comolly for doing the driving work. At [24.16] it

described the fares as being "split" between them and the claimant having described "his share of the fares as a commission payment". Ms Quigley made the point, correctly as such, that the route which the money takes is not necessarily a reliable or determinative guide to the correct analysis of the contractual obligations. But these findings again signify that the tribunal considered – consistently with its findings elsewhere – that Mr Comolly was engaged as a driver for Mr Tidman, and that the substance of the transaction was that Mr Tidman paid Mr Comolly for doing driving work.

32. Nor do I think that the fact that Mr Tidman provided the taxi means that the tribunal was bound to conclude that the entire nature of the contract between them was simply that Mr Comolly was paying to hire the taxi from Mr Tidman. Other potentially possible analyses were that, in order to enable Mr Comolly to provide the sub-contracted driving services to him, Mr Tidman provided Mr Comolly with the use of the taxi without making any separate charge-back for its use, distinct from the payment which he was otherwise paying to Mr Comolly for those services; or that Mr Comolly was providing sub-contracted driving services to Mr Tidman in exchange for payment for that service, but was *also* paying Mr Tidman something for the use of the taxi.

33. It appears to me that, of these possibilities, the tribunal concluded that there was, simply, an agreement that Mr Tidman would provide the taxi and Mr Comolly would drive the passengers and receive 50% of the overall income. There is no finding that there was any separate payment or adjustment for taxi hire in [24.16] or anywhere else. There is no reason why the tribunal could not have concluded that this was the commercial bargain which was genuinely agreed. But in any event, I conclude that it did not err by not finding that this was purely and wholly a contract of vehicle hire.

34. Pausing there, it appears to me that the tribunal properly concluded, analysing the facts found, that there was a contract between Mr Tidman and Mr Comolly pursuant to which Mr Comolly provided the service of driving passengers of United Taxis, and Mr Tidman paid Mr Comolly for that service. I will return to the question of whether the tribunal erred by also finding that the contract

under which Mr Comolly provided driving services to Mr Tidman was a contract of employment.

35. Before that I turn next to consider whether the tribunal erred in reaching the conclusion that Mr Comolly also had a contract with United Taxis pursuant to which he was a worker of United Taxis. I conclude that it did so err. That is for two overarching reasons.

36. First, the chain of reasoning in the lengthy paragraph [41] requires a little unpacking. The starting point is that the reason why the tribunal rejected United Taxis' contention that there was no contractual relationship between it and Mr Comolly, was because it held that it was plain that there was an implied contract between them that was regulated by United Taxis' Driver's Training Manual and bye-laws, pursuant to which, in return for paying to become a registered driver and thereafter agreeing to carry its passengers for the opportunity of reward from Mr Tidman, Mr Comolly agreed to comply with the Manual and byelaws. Then, in the second half of the paragraph the tribunal set out various conclusions about the nature and degree of control which United Taxis exercised, leading to the conclusion at [42] that the service was "very tightly defined and controlled" by United Taxis.

37. The first potential difficulty with this reasoning is that, if by this passage the tribunal meant that it was necessary to imply the existence of a contract between United Taxis and Mr Comolly as a matter of business necessity, in order to enable United Taxis to enforce and police its Manual and bye-laws, that takes no account of its findings that United Taxis had the *de facto* power to control his ability to use App to get work, whether by the imposition of temporary or partial exclusion by way of short time penalties, longer periods of suspension, or permanent deregistration. I note also that, elsewhere (at [24.19]) the tribunal also said that it was agreed "by necessary implication" between Mr Comolly *and Mr Tidman* that Mr Comolly would comply with United Taxis' bye-laws (although later, at [40.3], it described this as an "expectation" on the part of Mr Tidman).

38. All of that said, I can see that the tribunal's broader point was that, realistically, one way or

another, given the fact of registration, the payment of the registration fee, and the detailed and prescriptive contents of the byelaws and Drivers Manual, which addressed themselves to all drivers, and not just shareholders, Mr Comolly was, by implication from his conduct in registering, making a legally binding commitment to United Taxis, that, in exchange for being given access, or continued or uninterrupted access to this sort of work, he would abide by these requirements in relation to it.

39. However, the second, and more fundamental, difficulty, is that the tribunal failed to consider whether that contract was a contract pursuant to which Mr Comolly undertook to provide a driving service to United Taxis. Even if he impliedly agreed to abide by United Taxis' Manual and byelaws when carrying its passengers, as a condition of being permitted, or continuing to be permitted, to do so, that did not necessarily point to the conclusion that he was agreeing to provide that service direct to United Taxis. It would be equally compatible with the conclusion (which, as I have said, it appears to me that the tribunal in fact reached) that he was permitted to access the work through the route of being a sub-contractor retained by a shareholder; and that United Taxis was able to enforce that arrangement, because it would only permit a shareholder to give the work to a driver who had registered with it, and promised to abide by its rules and byelaws.

40. Mr Comolly relied upon the fact that he had already been driving United Taxis' passengers before Mr Tidman became involved and his overall extremely long relationship with United Taxis. He referred to two cases involving agencies, but in which the tribunal was held by the EAT to have properly found that there was a contract of employment with the end user of the claimant's services: **Harlow District Council v O'Mahoney** UKEAT/0144/07 and **National Grid Electricity Transmission plc v Wood**, UKEAT/0432/07. But each case turns on its own facts, and neither of these involved any gloss upon, or refinement of, the **James v Greenwich** approach.

41. In the present case, the tribunal found that there were only three ways to access the United Taxis' work: by becoming a shareholder, paying a monthly circuit fee, or working for a shareholder.

The tribunal found that, throughout, Mr Comolly took the last of these routes. After registering with United Taxis he was put in touch with a shareholder, Mr Parkinson, for whom he did driving work. In 2014 he stopped working for Mr Parkinson and began working for another shareholder, Mr Tidman. This was not a case where he was found to have initially had a contract with United Taxis under which he directly worked for it, and in relation to which Mr Tidman was later artificially interposed in a sham arrangement, or anything similar.

42. That is the first reason why the tribunal erred in concluding that Mr Comolly had a contract with United Taxis under which he provided driving services to it as a worker. It wrongly concluded that it was necessary to imply such a contract to give the arrangements business efficacy, overlooking the possibility that any contract between them was merely a collateral contract under which he undertook to abide by United Taxis' rules and byelaws as a condition of being permitted to carry its passengers as a sub-contractor for a shareholder.

43. The second reason arises from the dual employment point. The jurisprudence can be traced back to the nineteenth century; but the point has been considered in the present century more than once by the Court of Appeal and EAT. In the following passage in **Cairns v Visteon UK Limited** [2007] ICR 616 the EAT reviewed the pertinent authorities up to that point, including **Brook Street Bureau (UK) Limited v Dacas** [2004] EWCA Civ 217; [2004] ICR 1437 and **Cable & Wireless plc v Muscat** [2006] EWCA Civ 220; [2006] ICR 975:

> "7. Before considering the facts of this case we should return to the general question as to whether there can be two contracts of service between a worker and two employers. We think that the answer to that question depends upon the context in which it is posed. Until the Court of Appeal decision in **Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd** [2005] IRLR 983 it was generally assumed that, for the purposes of establishing vicarious liability for the negligent act of a workman in circumstances where he could be said to have been both a general employer and a temporary employer, to whom the workman had been loaned or hired, that liability must rest with one or the other employer but not both. That assumption appears to have been made in the seminal House of

Lords decision in the Mersey Docks case (**Mersey Docks & Harbour Board v Coggins** [1947] AC 1).

8. However, having reviewed the authorities, the Court of Appeal in **Viasystems** allowed of the possibility and indeed found that such dual vicarious liability could, and in fact did, arise on the facts of that case. Control was shared between the general and temporary employers of the negligent workmen. That principle was accepted as a matter of law by the Court of Appeal in the later case of **Horley v Luminar Leisure Ltd** [2006] IRLR 817, although on the particular facts dual responsibility was there found not to exist.

9. The contract of employment line of cases, including **Franks** and **Dacas**, are not referred to in the Judgments of May and Rix LJJ, the members of the Court in **Viasystems**. However, we think that the observations of Rix LJ at paragraph 76 are pertinent for present purposes. At paragraph 76, His Lordship said:

'In my judgment there is no doubt that there has been a long-standing assumption that dual vicarious liability is not possible, and in such a situation it is necessary to pause carefully to consider the weight of that tradition. However, in truth the issue has never been properly considered. There appears to be a number of possible strands to the assumption. Two are mentioned by Littledale J [in Lather v Pointer [1826] 5B & C 547]**: the formal principle that a servant cannot have two masters; and the policy against multiplicity of actions. As for the first, even if it be granted that an employee cannot have contracts of employment with two separate employers at the same time and for the same period and purposes – and yet it seems plain that a person can (a) have two jobs with separate employers at the same time, provided they are compatible with one another; or (b) be employed by a consortium of several employers acting jointly – nevertheless that does not prevent the employee of a general employer being lent to a temporary employer. As was so clearly exposed in Denham** [Denham v Midland Employers Mutual Assurance Ltd [1955] 2QB437 (CA)]**, it is an inaccurate metaphor to say that the employment or the employee has been transferred: it is rather that the services of the employee have been lent or hired out, or borrowed or bought in, in circumstances where the temporary employee becomes responsible, under the doctrine of vicarious liability (respondeat superior) for the employee's negligence, and does so even though the formal contract or relationship of employment has not been transferred. That demonstrates that the doctrine of vicarious liability may properly be invoked against an employer who is not really, in law, the employee's employer; and that the use of the expression "transfer" is potentially misleading.'**

10. We confess to being attracted by Rix LJ's analysis of the different approach to be taken to the question of vicarious liability owed to a third party in tort and the concept of employment, based on the contract of employment, for the purposes of unfair dismissal protection under part 10 of the **Employment Rights Act 1996**, with which we are directly concerned in the present case.

11. However, the matter does not end there. It was unnecessary to decide the latter question in **Viasystems**. Equally it seems to us the point did not arise directly for decision in **Dacas**. There the Claimant's services as a cleaner were supplied by the Respondent agency, Brook Street, to Wandsworth Borough Council. For some five or six years she worked a regular five day week at a hostel run by the Council in Streatham. Her engagement, to use a neutral word, having been terminated, she brought a claim for unfair dismissal against both Brook Street and the Council. An Employment Tribunal dismissed that claim on the basis that she was employed by neither Respondent. The EAT took a difference view, finding that she was employed by Brook Street. On appeal to the Court of Appeal, Mrs Dacas did not argue that the Council was her employer, but sought to uphold the EAT's decision. The Court of Appeal restored the Tribunal finding that she was not employed by Brook Street but, having of its own motion joined the Council as Respondent in the Court of Appeal, would have remitted the question of whether the Council was her employer to a fresh Tribunal for re-hearing. But, since there was no appeal by the Claimant against the Tribunal's finding that she was not so employed, the original Tribunal decision stood.

12. What is of interest in the present case are the observations made by Mummery LJ (paragraphs 19 and 20), endorsed by Sedley LJ (paragraph 78), as to the possibility of a contract of service between the worker and both the employment agency and end-user. Mummery LJ thought that "more problematical" than a contract of service between the worker and (a) the end-user by implication or (b) the agency.

13. It may be premature to rule out that possibility for all future cases (paragraph 20). It remains for consideration (per Sedley LJ, paragraph 78). What is clear from both Judgments of the majority in **Dacas** (Munby J dissenting on this aspect) is that whilst in a case such as that, where there is no contract of employment between worker and agency, a contract of service may be implied between worker and end-user as a matter of necessity: see **Muscat**, per Smith LJ (paragraph 43), explaining **Dacas** (paragraph 16, per Mummery LJ), and applying the Court of Appeal approach the **Aramis** [1989] 1 Lloyd's Report 213. The further possibility of dual contracts of service in respect of the same work done by the worker remains, to use Mummery LJ's word, problematic.

14. The potential problems we see in deciding the point raised directly in the present appeal are three-fold. First the policy considerations. Where a third party Claimant is injured by the casual negligence of a workman, who has both a general and temporary employer, there is no difficulty in holding both employers jointly and severally liable in tort to compensate the Claimant for the damage cased by that negligence. Liability can be apportioned as between both tortfeasors. The Claimant will recover the whole of his damages against either or both of them. Sedley LJ referred to the tortious liability of the Council for any negligent act by Mrs Dacas vis-à-vis a visitor to the hostel at which she worked, who, for example, suffered injury as a result of falling over cleaning materials carelessly left by her in a position of danger: see paragraph 72.

15. However the policy consideration in such cases is the protection of injured third parties. It is unnecessary for that purpose on the authorities to find that the negligent workman is employed under a contract of service by both the general and temporary employer, as Rix LJ explained in **Viasystems**, paragraph 76. We find a similar approach in the Judgment of Arden LJ in **Interlink Ltd v Night Truckers** [2001] RTR 338, paragraph 51.

16. The policy considerations behind the protection under part 10 **ERA** against unfair dismissal seem to us to be rather different. That protects the right of an employee not to be unfairly dismissed by his employer (section 94(1) **ERA**). It regulates relations between employer and employee as defined by section 230.

17. What, it seems to us, concerned the Court of Appeal, particularly Sedley LJ (see paragraph 78 in **Dacas**) was the possibility that Mrs Dacas had no employer for statutory unfair dismissal protection purposes, and this defied common sense. In these circumstances we fully understand the policy considerations arising. Where the contract between worker and agency is one for services then it may be possible to imply a contract of service between worker and end-user so as to provide protection under part 10 **ERA**. However, where it is common ground that she is employed by the agency, and thus is protected under part 10, we can see no good policy reason for extending that protection to a second and parallel employer. If the only reason is, as appears to be the argument for the Claimant in the present case, that she would have a better prospect of establishing unfair dismissal against the end-user rather than the agency, then we can see no basis for departing from what has been the common understanding from at least of the Judgment of Littledale J in **Lather v Pointer** in 1826. A servant cannot have two masters. That of course does not prevent him from having different employers on different jobs or, as in the case for example of **Land v West Yorkshire County Council** [1981] ICR 334 (CA), severable parts of the same contract of employment with one employer.

18. Secondly the requirement of necessity before implying a contract of service as recognised by Mummery LJ in **Dacas**: see the passage in the Judgment of Smith LJ in **Muscat**, paragraph 43. We cannot immediately see any business necessity for implying a contract of service with the end-user in a triangular relationship where the Claimant, it is accepted, has entered into a contract of service with the employment agency; a point to which we shall return on the facts of the present case.

19. Thirdly we have considered the nature of the statutory protection under part 10 **ERA** and its ramifications if there are two employers. The statutory language envisages, we think, one employer. If there are two employers must both, or if one which one, make the decision to dismiss before the employee is dismissed within the meaning of section 95(1) **ERA**? Which employer, or must both employers, engage in the statutory grievance procedure or dismissal and disciplinary procedures under the **Employment Act 2002** and the **2004 Dispute Resolution Regulations**? These problems are not insuperable, as Mrs Kurji has submitted, but they do require further consideration."

44. I highlight two particular points emerging from that discussion. The first is that the Court of Appeal and the EAT have both considered that to hold that a person was, simultaneously, the employee of two different employers in respect of the same work would be, for reasons explained, "problematic". The second is that, where the individual has been found to be the employee of one party, it cannot be necessary to imply that they are also the employee of another party in order to secure that they are not deprived of employment protection rights to which they should be entitled.

45. These authorities, and the problems to which dual employment would be liable to give rise, have been discussed again more recently by the EAT in **Patel v Specsavers Optical Group Limited** [2019] UKEAT 0286/18 and **McTear Contracts Limited v Bennett** [2021] UKEAT 0023/19.

46. In my judgment many, if not all, of the same difficulties or conundrums, discussed in the authorities, to which dual employment under two contracts of employments with two different employers would arise, would equally arise from dual worker contracts with two different employers, having regard to the fact in particular that both entail a wage-work bargain. The same would be true, therefore, of dual employment with one employer as a worker and the other as an employee. While the EAT in **Cairns** observed that the problems may not be insuperable, I have not been referred to any authority which discusses how they could be overcome or holds that dual employment is legally possible. I cannot for my part see how they could be overcome.

47. Mr Comolly relied upon the passage in **Viasystems v Thermal Transfer** (cited in the foregoing passage from **Cairns** at [9]) in which Rix LJ contemplated that a person could have two jobs at the same time with separate employers provided they are compatible with one another, or be employed by joint employers. But in this passage Rix LJ *contrasted* these scenarios with the proposition that an employee cannot have contracts of employment with two separate employers at the same time and for the same period and purposes. Similarly, secondment, or lending of an

employee or worker, from one party to another, is another permissible, but different, scenario.

48. In this case, however, the tribunal reached the conclusion that, when carrying out a job conveying a United Taxis customer, Mr Comolly was both an employee of Mr Tidman (which it appears to have found he also was continuously throughout their relationship) *and* a worker of United Taxis. It found that he was both things in respect of the same work at the same time. It erred in failing to grapple with the dual employment issue; nor, in the light of the authorities, can I see any basis on which it could properly have found that Mr Comolly was, in respect of the same work at the same time a worker (whether or not also an employee) of both United Taxis and Mr Tidman.

49. Before leaving this aspect, I observe that I do think that the issue of whether it was necessary to imply a worker relationship with United Taxis in order to ensure that Mr Comolly was not deprived of employment protection rights that Parliament intended him to have adds anything material in this case. If he ought to have been entitled to such rights, applying the guidance in **Uber**, then they would be secured by the conclusion that he was a worker (if not also an employee) of Mr Tidman.

50. For these reasons I conclude that the tribunal erred in concluding that Mr Comolly was a worker of United Taxis, and I conclude that this was not a legally tenable analysis of the facts found.

51. I turn then to the question of whether the tribunal erred in concluding that the contract under which it permissibly found that Mr Comolly provided the service to Mr Tidman of driving passengers of United Taxis, was a contract of employment. Ms Quigley submitted that the tribunal erred in particular in relation to its approach to the questions of control and mutuality of obligations. Further, she contended, it could not properly have found that Mr Comolly was even a worker of Mr Tidman when doing a United Taxis job. The facts were bound to lead to the conclusion that he was running his own business, of which Mr Tidman was a customer. He was, she submitted, like Mr Johnson in **Johnson v Transopco UK Limited** [2022] EAT 6; [2022] ICR 691.

52. My conclusions on this issue are these. The tribunal at [40.2] to [40.4] addressed the **Ready Mixed Concrete** questions, plainly drawing on its earlier factual findings, including those at [24] as to what it there called the circumstances in which the claimant worked for Mr Tidman. I do not think it erred in concluding at [40.2] and in the course of [40.3] that there was an obligation of personal service. It properly found that it was not open to Mr Comolly to substitute another driver. Its finding at [40.2] that there was "accordingly mutuality of obligation" does not, however, address the question of the periods during which such mutuality existed. It is not clear how it came to the conclusion that the answer was that there was uninterrupted mutuality of obligation in the relevant respect during the period from when Mr Comolly's relationship with Mr Tidman first began to when it ended.

53. As to control, the tribunal relied specifically, at [40.3], on the fact that Mr Tidman controlled the times when Mr Comolly had the use of the taxi, which belonged to Mr Tidman, and hence was able to work, the "expectation" on the part of Mr Tidman that he would comply with United Taxis' byelaws, and the conclusion that he had "no opportunity" to market his own services to the passengers and "no opportunity to develop his own personal taxi business". These last two appear to me to have been a linked pair, and drew, I infer, on the United Taxis byelaws (which the tribunal had extracted at [10]) containing a prohibition on drivers undertaking private work for their customers and using or promoting other taxi or private-hire Apps, on pain of deregistration, and the finding at [24.10] that the byelaws prohibited Mr Comolly from working for another shareholder when working for Mr Tidman. That in turn appears to be a reference to the bye-law (set out in the extract at [10]) stipulating that drivers and shareholders "agree not to solicit or engage the services of each other's drivers."

54. Ms Quigley submitted that the tribunal erred because it failed to take into account that, while Mr Tidman controlled the time windows during which Mr Comolly was able to work, he did not control what Mr Tidman did during those time windows. In particular, he had no control over how much time Mr Comolly spent on United Taxis work and how much on Hackney Carriage work.

Further, other features relied upon by the tribunal were dictated not by Mr Tidman, but by United Taxis. The tribunal also failed to take into account other things that United Taxis dictated, such as the rates charged to is passengers, and matters covered by its bye-laws such as dress code and signage.

55. In my judgment the tribunal erred in this regard. It failed to consider, or sufficiently to explain, how it arrived at the conclusion that the nature and degree of control exercised by Mr Tidman pointed not merely to a worker relationship, but to an employee relationship. The application of the distinction between a so-called limb-(a) worker who is an employee and a limb-(b) worker who is not, is a subtle and fact-sensitive task for the appreciation of the tribunal. As both types of worker must be under a sufficient obligation to do or perform work or services personally, which side of the boundary between the two the given case lies is liable to emerge from a consideration of the degree, nature and source of the control exercised over the putative employee, together with a consideration of whether the other provisions of the contract are consistent with it being one of employment.

56. In this case the tribunal failed to consider the distinction between aspects of how Mr Comolly worked and what he could or could not do – in particular the times at which Mr Tidman's taxi was available – that were autonomously determined by Mr Tidman, and aspects that were dictated and determined by United Taxis, but also required by Mr Tidman. The latter were not irrelevant to Mr Comolly's status *viz-a-viz* Mr Tidman. But the difference between the two needed to be taken into account in assessing their significance for the overall status issue. United Taxis' prohibitions on Mr Comolly working for other shareholders or other Apps, or privately for United Taxis' customers, were also potentially relevant to the proper categorisation of his status.

57. So, even if it could properly conclude that he was not in business on his own account, the tribunal needed also specifically to engage with the question of whether Mr Comolly was a mere worker or an employee, and the significance which the source, nature and extent of the control exercised or exerted by Mr Tidman had for that question. This was particularly important in this case

given the role of United Taxis and indeed the tribunal's later finding at [42] that the transportation service provided by the claimant was "very tightly defined and controlled" by it. Relatedly, I also agree with Ms Quigley that the tribunal erred by simply stating at [40.4] without elaboration that the other provisions of the contract were consistent with it being one of service. Bearing in mind that there was no written contract between them, I agree with her that it must have had in mind some, if not all, of the matters listed at [24]. But it failed to identify which of these it had in mind, and failed to address what it made of those which might be said to point away from that conclusion.

58. I conclude that the tribunal erred in respect of its finding that Mr Comolly was an employee of Mr Tidman. It did not sufficiently engage with the foregoing features, particularly in relation to the different factual aspects of the nature, extent and source of the control exerted by Mr Tidman upon Mr Comolly, or explain its reasoning in relation to them.

Outcome

59. It follows from all my conclusions that I allow the appeals of both United Taxis and Mr Tidman. In relation to United Taxis the tribunal could not, applying the law to its factual findings, properly have concluded that Mr Comolly had a worker contract with it, and so there is no need to remit. Instead, I will substitute a finding that he was neither a worker nor an employee of United Taxis. In relation to Mr Tidman, Ms Quigley invited me, in the event that I allowed his appeal, to substitute my own decision that Mr Comolly was in business on his own account, which she said was the only proper conclusion from the facts found. Mr Comolly indicated that he would be content for me to substitute my own decision drawing on the facts found, if I felt able to do so, whatever it may be. It appears to me that all of the essential facts have been found by the tribunal, so that I am in a position to determine Mr Comolly's status *viz-a-viz* Mr Tidman, drawing on those facts. It also appears to me that, realistically, there is only one permissible correct legal analysis of those facts.

60. Ms Quigley, as noted, contended that the only correct conclusion on the facts found was that

Mr Comolly was carrying on his own business undertaking. She relied *inter alia* on the fact that, while he in fact only spent 5% of his time on Hackney Carriage work, he still had the freedom to decide how much of his working time he devoted to such work and how much to United Taxis' work.

61. Which side a given case lies of the boundary between a worker relationship and one in which personal services are being provided by someone to a customer or client of their own profession or business undertaking is a nuanced question. The EAT's discussion in **Byrne Brothers (Formwork) Limited v Baird** [2002] ICR 667 at [17] (to which the Supreme Court referred in **Uber**) remains invaluable, and I set out the core part of it.

> "(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. (Possibly this explains the use of the rather odd formulation "business undertaking" rather than "business" *tout court*; but if so, the hint from the draftsman is distinctly subtle.) It is sometimes said that the effect of the exception is that the Regulations do not extend to "the genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuine" self-employment is to be defined.
>
> (3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in sense intended by the Regulations – given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship – see below – but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.
>
> (4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the **Employment Rights Act 1996** or the **National Minimum Wage Act 1998**, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

> (5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.
>
> (6) What we are concerned with is the rights and obligations of the parties under the contract - not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see **Carmichael** (above), esp. per Lord Hoffmann at pp 1234-5."

62. See also the discussion of other, more recent, pertinent authorities, in **Johnson v Transopco**.

63. In the present case, I do not think that the tribunal's findings in relation to Hackney Carriage work point to the conclusion that Mr Tidman purchased Mr Comolly's driving services as a customer of a business undertaking carried on by him. At [24.13] the tribunal, while finding that there was no express agreement as to how Mr Comolly would divide his time, also found that the "reality" was that he spent the "bulk of his time" carrying United Taxis passengers and that it accepted that there was far more work to be had via the United Taxis App. It also found that the iCabbi "break button" was disabled and, once he began a shift, and logged on, his choice about whether to accept private hire rides was influenced by the United Taxis penalty system [41]. As I have observed, weight should also be attached to the fact that United Taxis required, as a condition of being permitted to do its work, that he not do certain other kinds of driving work.

64. In my judgment, the tribunal did not err by failing to find that Mr Comolly was carrying on his own business undertaking, as such. Drawing on its found facts the only tenable conclusion was that he was not. He did not have his own taxi. He was not free to obtain work from other taxi or driving Apps. Nor could he offer his services to United Taxis' passengers privately. Although he was able to do Hackney Carriage work, that income was also shared with Mr Tidman. The tribunal accepted that, factually, the available Hackney Carriage work was very limited, as reflected in the

low proportion of such work undertaken by Mr Comolly. He did not use the United Taxis App as just one among multiple Apps or sources of work for his own business.

65. It is also clear, in light of the tribunal's findings, that Mr Comolly undertook to perform his driving services personally. It would not have been an option for him to retain a substitute driver.

66. As to control, the tribunal found that Mr Tidman controlled the periods during which Mr Comolly could work, but Mr Comolly controlled which jobs he took, including as between Hackney Carriage work and United Taxis' jobs. But the tribunal also found that the limited availability of Hackney Carriage work meant that he was significantly dependent on the United Taxis' work. Mr Tidman did not set the fares or make the United Taxis rules and bye-laws. However, he did expect Mr Comolly to abide by them. Weighing up these different factual aspects, it appears to me that the nature, extent, and source, of control exerted by Mr Tidman could not be properly viewed as consistent with employee status, some features pointing away from it; but it did point to worker status. Finally, in light of all the tribunal's findings of fact, in particular in relation to the overall financial arrangement, and the expectation that Mr Comolly would work throughout the periods when the taxi was available to him, I conclude that there was mutuality of obligation during each of those periods.

67. I will therefore substitute a finding that Mr Comolly was a worker of Mr Tidman (and also an employee for **Equality Act** purposes) throughout the periods when he was driving Mr Tidman's taxi.