Neutral Citation Number: [2024] EAT 162

Case No: EA-2021-001484-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 August 2024

Before :

HIS HONOUR JUDGE TAYLER

- -

Between:

MR C JOHNSON

Appellant

- and –

GT GETTAXI (UK) LTD

Respondent

- -
- -

Lee Bronze (instructed by Thompsons Solicitors) for the **Appellant**
Edward Kemp and **Katy Sheridan** (instructed by DLA Piper UK LLP) for the **Respondent**

Hearing date: 28 August 2024

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JUDGMENT

SUMMARY

EMPLOYEE, WORKER OR SELF EMPLOYED

The Employment Tribunal did not err in law in holding that a driver using a black cab app was not a worker for the respondent.

HIS HONOUR JUDGE TAYLER:

1. This is an appeal from the judgment of an Employment Tribunal sitting at London Central on 18 February 2021, Employment Judge Davidson. The judgment was sent to the parties on 11 March 2021. The Employment Tribunal held that the claimant was not a worker for the respondent.

2. I take the facts from the findings of the Employment Tribunal. The respondent operates a mobile application platform through which members of the public can order a black cab using a customer application, rather than hailing a black cab on the street. Licensed black cab drivers can sign up to the driver application. Drivers are free to ply for hire while signed up to the app and can register with other similar taxi apps at the same time as using the driver app.

3. The claimant is a qualified black cab driver who has held a licence since April 2014. The claimant used the respondent's app between April 2015 and 2017, undertaking 171 rides with his earnings for work obtained on the app during that period representing about 5% of his total earnings.

4. The claimant applied to rejoin the driver app in 2020 but was not allowed to do so. The claimant contended that this was because he had made protected disclosures.

5. The Employment Tribunal noted that the claimant had experience of using the app between 2015 and 2017 but had no direct experience at the relevant period in 2020.

6. The Employment Tribunal set out what it considered to be the relevant features of the Hackney Carriage Regulations at paragraphs 23-25, particularly that there is a requirement when plying for hire as a black cab driver to charge no more than the metered fare and it is not permissible to refuse to take a passenger who wishes to undertake a journey if the destination is within 12 miles or the journey time is no more than one hour. The Employment Tribunal referred to the requirement for drivers to undertake the "knowledge" and noted other requirements in the regulations. The Employment Tribunal considered the terms in the contracts between the respondent and drivers, and

the respondent and customers, at paragraphs 26-31 of the decision. The Tribunal noted specifically that the terms for the drivers were set by the respondent and there was no opportunity for drivers to negotiate.

7. The Employment Tribunal considered how fares are set at paragraphs 32-33:

> 32. The drivers are using black cabs and, as far as B2C (private individual) fares are concerned, the drivers are governed by TfL Regulations and must charge the customer according to the metered fare. Approximately 75% of fares are B2C. There are some B2B (business accounts) rides which are done by fixed fare but the majority of these rides are also charged 'on the meter'.
>
> 33. The respondent takes its service commission on any fares from rides through the app and will collect the payment from the customer and pass the driver's portion to the driver. There is no interaction between driver and customer at the end of the ride regarding the fare.

8. The obligation to accept a request was considered at paragraphs 34-35:

> 34. The drivers are subject to TfL regulations within the regulated area and must accept rides in accordance with their regulatory obligations. Once they have accepted a ride, they are under an obligation to complete the ride according to TfL regulations. These are not set by the respondent but by TfL. There is no evidence that the respondent currently imposes a minimum acceptance rate, minimum order rate or customer evaluation rating. It is accepted that some such controls were in place in 2017 when the claimant last used the app but these were changed in 2018 and are no longer in place.
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> 35. There is a 'Going Home' function which allows a driver to indicate that he is going home and will accept fares which take him in the direction of home. This can only be used once every six hours.

9. The monitoring of acceptance and cancellation rates was referred to at paragraphs 36-37:

> 36. The respondent's evidence is that drivers can reject as many jobs as they want and this is not monitored. Once they accept a job, they can then cancel before the ride starts but, if they cancel more than six times in a day, they are asked to go through the administration department rather than just cancelling on the app. This is because cancellations lead to a negative customer experience and the respondent wants to impose a disincentive to cancel repeatedly, although it is always the driver's choice whether or not to cancel.
>
> 37. Some rides are booked in advance (FO rides) and drivers can select these from a list of available rides. They can then cancel at any time up to 30 minutes before the scheduled time. After that time, they must call the respondent in order to cancel. Repeated unjustified cancellations will lead to a temporary block of the driver (on an increasing scale) from FO rides but they can still access the immediate order rides (ASAP rides) through the app.

10. The possibility of the respondent excluding access to the driver app was discussed at paragraphs 38-39:

> 38. The respondent retains the discretion to prevent a driver from accessing or using the driver app but this is in cases where there has been incorrect documentation supplied or if the driver's conduct has raised concerns. It is not used as a penalty for poor customer ratings.
>
> 39. Customer evaluations have no impact on B2C rides but if a driver's rating is very low, this may affect the driver's access to B2B rides.

11. Communications between the driver and passenger were analysed at paragraph 40:

> 40. The driver is provided with the advanced information regarding the passenger and the passenger is provided with the driver's details. The driver and passenger can communicate with each other, for example to arrange a pickup location, and the respondent does not attempt to prevent the driver and passenger from having a conversation. The driver is still free to ply his trade as a black taxi driver.

12. The Employment Tribunal referred to the opportunity to advertise the respondent on drivers' vehicles but noted that there is no compulsion to do so.

13. The Employment Tribunal directed itself to the law at paragraphs 11-18, referring to the definition of worker in Section 230 of the **Employment Rights Act 1996** ("**ERA**"), and specifically directing itself by reference to **Uber BV & Ors v Aslam & Ors** [2018] EWCA Civ 2748; [2021] ICR 657 and **Autoclenz Limited v Belcher & Ors** [2011] UKSC 41; [2011] ICR 1157. The Employment Tribunal also noted that the claimant had brought another claim that, at the time, had been determined only in the Employment Tribunal, **Johnson v Mytaxi Network Limited** (case no. 2303018/2018). That decision has subsequently been considered by the Employment Appeal Tribunal where His Honour Judge Auerbach upheld the finding of the Employment Tribunal that Mr Johnson was not a worker: **Johnson v Transopco UK Limited** [2022] EAT 6; [2022] ICR 691.

14. The Employment Tribunal set out its conclusions at paragraphs 42-54:

> 42. The key issue for determination, following Uber, is the degree of control that the respondent had over the drivers. Applying the factors identified in Uber as being the most

important, my conclusions are set out below. However, my final decision will be taken on the basis of all these factors taken together 'in the round'.

43. Having reached a conclusion in relation to the respondent's relationship with its drivers, I will then consider if there are any additional matters to be taken into account as regards this particular claimant.

Setting fares

44. I find that this case can be distinguished from Uber on the grounds that the drivers using the respondent's app plying their trade from their black cabs and accepting fares from the respondent's app is an additional extra to their main business of operating a London black cab. It is acknowledged that black taxi drivers are in business on their own account when plying for hire.

45. Drivers who accept fares through the app are still branded as black taxis and are obliged to comply with the specific regulations which apply to black cabs, imposed by TfL, including setting of fares and the obligation to complete a ride once accepted.

46. Although there are a small number of fixed fares for B2B customers, these were very much the minority of the respondent's business and do not, in my view, change the underlying reality that the driver's fares are predominately set by TfL, not the respondent.

Terms and conditions

47. I find that the Driver terms are imposed by the respondent and the drivers have no opportunity to negotiate these. This is the same as in Uber.

Choice to accept rides

48. There are controls on accepting rides which are imposed by TfL on black taxi drivers. In relation to the accepting rides offered through the app, I do not find that there are any penalties imposed by the respondent for rejections of rides offered. There are no penalties imposed for cancellations of accepted rides although repeated cancellations are discouraged but cannot, ultimately, be prevented. I therefore find that this aspect of the respondent's model can be distinguished from Uber.

Control of how to deliver the service

49. I find that drivers, all of whom have 'The Knowledge' are free to follow the routes they consider best and there is no penalty for not following the GPS route (unlike in Uber). Aspects of how the driver delivers the service is governed and controlled by TfL which distinguishes this case from Uber.

Communications between driver and passenger

50. I find that the drivers are given limited customer details when they accept a fare. Given that the drivers are in business on their own account as black taxi drivers, they can presumably make an arrangement for other trips without involving the respondent, although I heard no direct evidence on this and there is no evidence that his is prohibited or discouraged. Drivers are able to increase their earnings by plying for hire in the traditional way or by signing up to other apps. This distinguishes the respondent's drivers from Uber drivers, who cannot ply for hire in the same way as a black taxi can.

Driver status conclusion

51. I find that, taking all these factors in the round, the respondent's drivers are not limb (b) workers. They are in business on their own account as black taxi drivers and use of the respondent's app is a way to increase their business. However, they are not subservient to the respondent and the relationship can be distinguished from the Uber drivers in the ways set out above.

The claimant's own position

52. The claimant has not been a driver on the respondent's app since 2017. He has continued to ply his trade as a black taxi driver. When he did use the app, this was on an occasional basis and his earnings through the app constituted a small proportion of his total earnings from taxi driving. Although this factor is not, of itself, conclusive, it is something I am able to take into account.

53. I find, therefore, that he could not be said to have been dependent or subordinate to the respondent.

54. I find that the claimant is not a worker for the purposes of the claims he wishes to pursue. The tribunal does not have jurisdiction to hear his claims and they are therefore dismissed.

The Relevant Law

15. In **The Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005; [2013] ICR 415, Maurice Kay LJ noted, at paragraph 3, that cases of this nature are particularly fact sensitive, and stated, at paragraph 20, that there is no single key with which to unlock the words of the statute in every case. The necessity of applying the statutory wording has been reiterated. I summarised the relevant authorities in **Sejpal v Rodericks Dental Limited** [2022] EAT 91; [2022] ICR 1339: at paragraphs 7-11 and 14-19.

The Law

7. The entitlement to significant employment protection rights depends on a person being a worker. Deciding whether a person is a worker should not be difficult. Worker status has been the subject of a great deal of appellate consideration in recent years. Worker status has come to be seen as contentious and difficult. But the dust is beginning to settle. Determining worker status is not very difficult in the majority of cases, provided a structured approach is adopted, and robust common sense applied. The starting point, and constant focus, must be the words of the statutes. Concepts such as "mutuality of obligation", "irreducible minimum", "umbrella contracts", "substitution", "predominant

purpose", "subordination", "control", and "integration" are tools that can sometimes help in applying the statutory test, but are not themselves tests. Some of the concepts will be irrelevant in particular cases, or relevant only to a component of the statutory test. It is not a question of assessing all the concepts, putting the results in a pot, and hoping that the answer will emerge; the statutory test must be applied, according to its purpose.

8. In *Clyde & Co LLP & another v Bates van Winkelhof* [2014] ICR 730, [2014] UKSC 32, Baroness Hale held, at paragraph 39:

> 'I agree with Maurice Kay LJ that there is not 'a single key to unlock the words of the statute in every case'. **There can be no substitute for applying the words of the statute to the facts of the individual case**. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves.' **[emphasis added]**

9. Accordingly, the starting point must be the words of the statute. Section 230 **Employment Rights Act 1996 ('ERA')** provides

> '230 Employees, workers etc.
>
> (1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act **'worker'** (except in the phrases 'shop worker' and 'betting 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**;
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> and any reference to a worker's contract shall be construed accordingly.' **[emphasis added]**

10. Accordingly, for an individual (A) to be a worker for another (B) pursuant to section 230(3)(b) ERA:

a. A must have entered into or work under a **contract** (or possibly, in limited circumstances briefly discussed below, some similar agreement) with B; and

b. A must have agreed to **personally perform some work or services for B**

11. However, A is excluded from being a worker if:

a. A carries on **a profession or business undertaking**; **and**

b. B is a **client or customer of A's** by virtue of the contract.

...

14. Baroness Hale identified three possible situations in **Bates van Winkelhof** [31]:

> 'As already seen, employment law distinguishes between **three types** of people: those **employed under a contract of employment**; those **self-employed people who are in business on their own account** and undertake **work for their clients or customers**; and an **intermediate class of workers who are self-employed but do not fall within the second class**. Discrimination law, on the other hand, while it includes a contract 'personally to do work' within its definition of employment (see, now, Equality Act 2010, s 83(2)) does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route.' **[emphasis added]**

15. Baroness Hale said of the distinction between the two types of self-employed people [25]:

> 'Second, within the latter class, the law now draws a distinction between **two different kinds of self-employed people**. **One kind** are people who **carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them**. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. **The other kind** are **self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else**. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005; [2013] ICR 415 , who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a 'worker' within the meaning of section 230(3)(b) of the 1996 Act.' **[emphasis added]**

16. So, it is clear that the focus must be on the statutory language, and distinguishing between employees, self-employed workers and self-employed people who carry on a profession or a business undertaking on their own account (and therefore enter into contracts with clients or customers to provide work or services for them).

17. Focus on the statutory language tells us that there must be a contract (or, for reasons we will briefly consider below, in limited circumstances, a similar agreement) between the worker and the putative employer. But how do we analyse the nature of the agreement? Is it by applying undiluted common law contractual principles? No, it is not; as the Supreme Court authorities now make clear. While there must generally be a contract, the true nature of the agreement must be ascertained and contractual wording, that may have been designed to make things look other than they are, must not be allowed to detract from the statutory test and purpose.

18. In **Autoclenz Ltd v Belcher and others** [2011] UKSC 41, [2011] ICR 1157 Lord Clarke held:

'29. However, the question for this court is not whether the two approaches are consistent but what is the correct principle. I unhesitatingly prefer the approach of Elias J in *Kalwak* and of the Court of Appeal in *Szilagyi* and in this case to that of the Court of Appeal in *Kalwak* . The question in every case is, as Aikens LJ put it at para 88 quoted above, **what was the true agreement between the parties**. I do not perceive any distinction between his approach and the approaches of Elias J in *Kalwak* , of Smith LJ and Sedley LJ in *Szilagyi* and this case and of Aikens LJ in this case.

30. In para 57 of *Kalwak* (set out above) Elias J quoted Peter Gibson LJ's reference to the importance of **looking at the reality of the obligations** and in para 58 to **the reality of the situation**. In this case Smith LJ quoted (at para 51) para 50 of her judgment in *Szilagyi* :

> 'The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by.'

31. She added in paras 52, 53 and 55:

> '52. I regret that that short paragraph [ie para 51] requires some clarification in that my reference to 'as time goes by' is capable of misunderstanding. What I wished to say was that the court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.
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> 53. In my judgment the true position, consistent with *Tanton*, *Kalwak* and *Szilagyi*, is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. **To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice** and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right.
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> ...
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> 55. It remains to consider whether the EJ directed himself correctly when he considered the genuineness of the written terms. I am satisfied that he directed himself correctly in accordance with, although in advance of, *Szilagyi*. In effect, he directed himself that he must seek to find the true nature of the rights and obligations and that the fact that the rights conferred by the

> written contract had not in fact been exercised did not mean that they were not genuine rights.'

32. Aikens LJ stressed at paras 90 to 92 the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in *Szilagyi* and in paras 47 to 53 in this case. In addition, he correctly warned against focusing on the 'true intentions' or 'true expectations' of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:

> 'What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the Chartbrook case at [64] to [65]. **But ultimately what matters is only what was agreed**, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.'

I agree.

33. At para 103 Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ:

> 'recognising as it does that **while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract**.'

I agree.

34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:

> '92. I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so...'

35. **So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem**. If so, I am content with that description.' **[emphasis added]**

19. This realistic and worldly-wise determination of the true nature of the agreement between the parties must be undertaken with a focus on the statutory provision. In **Uber BV v Aslam** [2021] UKSC 5, [2021] ICR 657, Lord Leggatt held:

> '62. Beginning at para 22 of the judgment, Lord Clarke considered three cases in which 'the courts have held that the employment tribunal should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship'. From these cases he drew the conclusion (at para 28) that, in the employment context, **it is too narrow an approach to say that a court or tribunal may only disregard a written term as not part of the true agreement between the parties if the term is shown to be a 'sham', in the sense that the parties had a common intention that the term should not create the legal rights and obligations which it gives the appearance of creating**: see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802 (Diplock LJ) . Rather, the court or tribunal should consider what was actually agreed between the parties, 'either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded': see para 32, again agreeing with observations of Aikens LJ in the Court of Appeal.
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> ...
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> 68. The judgment of this court in the *Autoclenz* case made it clear that **whether a contract is a 'worker's contract' within the meaning of the legislation designed to protect employees and other 'workers' is not to be determined by applying ordinary principles of contract law such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake**. Not only was this expressly stated by Lord Clarke but, had ordinary principles of contract law been applied, there would have been no warrant in the *Autoclenz* case for disregarding terms of the written documents which were inconsistent with an employment relationship, as the court held that the employment tribunal had been entitled to do. **What was not, however, fully spelt out in the judgment was the theoretical justification for this approach. It was emphasised that in an employment context the parties are frequently of very unequal bargaining power**. But the same may also be true in other contexts and inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary principles of contract law, except in so far as Parliament has made the relative bargaining power of the parties a relevant factor under legislation such as the Unfair Contract Terms Act 1977.
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> 69. Critical to understanding the *Autoclenz* case, **as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, *Autoclenz* had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a 'worker'** in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. **In short, the primary question was one of statutory interpretation, not contractual interpretation**.

> 70. The **modern approach to statutory interpretation** is to have regard to the purpose of a particular provision and **to interpret its language, so far as possible, in the way which best gives effect to that purpose**.
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> ...
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> 76. Once this is recognised, it can immediately be seen that **it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'**. To do so would reinstate the mischief which the legislation was enacted to prevent. **It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker**. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.' **[emphasis added]**.

16. I noted the statement in **Uber** that the focus should be on the statutory protections offered to workers, and the purposes of the relevant legislation that provides protection to those that have worker status, rather than being a matter of pure contractual construction.

17. In **Johnson** Judge Auerbach made several important points. Firstly, at paragraph 65, that the regulatory regime considered in **Uber** was different to that for black cabs:

> The tribunal also rightly noted at [67] that the regulatory regime *was* materially different in **Uber**. That case concerned private-hire vehicles (not Hackney Carriages) in respect of which the applicable regime means that the operator has to have a private hire license; and in that case, in fact, the operator controlled the fares. In the present case the respondent (properly) relied upon the fact that the claimant had a Hackney-Carriage license. It was common ground before the tribunal that in any event a licensed Hackney-Carriage driver can lawfully do private hire jobs (such as a prebooking). The decision in **UTAG** did not show that the present tribunal was wrong to regard the plying-for-hire issue as irrelevant to what it had to decide. It had still properly concluded that the licensing regime had no bearing on the essential character of the claimant's business activities, being conveying passengers for reward, regardless of the way in which they were obtained.

18. That point was emphasised by Lord Leggatt in **Uber** who specifically stated that he was not dealing with regulated black cab drivers.

19. The question of whether a person operates a profession or business undertaking is a matter of fact and impression to be determined on consideration of all of the relevant evidence. In **Johnson** Judge Auerbach stated:

> 69. Accordingly, we conclude that where, as here, the tribunal finds that the claimant carries on a profession or business undertaking, whether the work done for the respondent is done in the course of such profession or business, or is a distinct activity, is a matter of fact and impression for the tribunal. This is to be determined having regard to all the relevant facts and circumstances of the particular case, including the tribunal's findings about the respective nature of the activities performed otherwise in the course of the profession or business, and performed for the respondent, and other relevant facts relating to the relationship between the provider and the respondent. There is no single key to unlock that sub-strand of the definition any more than any other part of it. The EAT can only interfere with the tribunal's conclusion on the usual perversity grounds.

20. Judge Auerbach also stated that an Employment Tribunal, in considering whether a person is in business on their own account, is entitled to take account of what happens in between work for a putative employer because it may demonstrate that the individual is undertaking a business activity:

> 75. Pausing there, we conclude that the tribunal did not err by placing an impermissible focus on the claimant's activities whilst not working for the respondent. Neither domestic nor EU law precluded it from having regard to this as part of the overall picture. It did not err by taking the approach indicated in **Windle**, nor by failing to conclude that the claimant must be a worker of the respondent because his activities for it were 'more than marginal or ancillary'. It was entitled to take into account the found facts relating to the overall scale of the claimant's activity and of his work for the respondent, both in terms of money and jobs. It was entitled to conclude that whether the claimant was plying for hire when he used the respondent's App was irrelevant to what it had to decide. Ground 1(1) and the sub-thread of ground 1(5) pertaining to this point therefore fail.

21. I have some slight concern about the approach adopted by the Employment Tribunal. The key issues for the Employment Tribunal were whether the claimant had entered into a contract with the respondent and whether that contract involved an agreement personally to perform some work or service for the respondent. If so, was the claimant excluded from the protection because the respondent was a client or customer of the claimant in respect of a profession or business undertaking that he carried out. The Employment Tribunal did not specifically go through those stages. However, on a reading of the judgment overall, it is clear that the parties agreed that there was a contract between the claimant and the respondent.

22. There appears to have been no dispute that there was a degree of personal service by the claimant to the respondent. The Employment Tribunal determined the claim on the ground that the claimant was undertaking his own business activity on his own account. There was no specific consideration of whether the respondent was a client or customer of the claimant. That said, there was no challenge in the appeal to the approach that was adopted by the Employment Tribunal to the legal test of establishing worker status, and there is no assertion that the Employment Tribunal should have concluded that the respondent was not a client or customer of the claimant. Accordingly, that question does not arise in this appeal.

23. What the appeal does seek to challenge is the approach adopted by the Employment Tribunal. It is asserted that the factual situation is of remarkable similarity to that in **Uber**, whereas it is distinguishable from **Transopco**. As I pointed out in the course of the oral submissions, that is not the basis on which authorities should be used. Authorities set out propositions of law. It is not a matter of trying to find facts in an authority that are the most like those in the case being considered. Were that the case, it is obvious that the argument would not help the claimant because the facts in this case were closer to those in **Transopco** than they are to those in **Uber**.

24. The first ground of appeal asserts that the Employment Tribunal's findings in respect of matters identified as significant by the Supreme Court in **Uber** pointed away from the claimant being in business on his own account, such that the authority was misapplied and/or the decision was perverse. That broad ground was broken down into several assertions to which I shall return. The grounds of appeal suggest a failure on the part of the Tribunal to give sufficient weight to particular factors or assert that the Tribunal ignored other factors. Such grounds of appeal require the claimant to establish that no reasonable Employment Tribunal could have reached the conclusions reached by this Employment Tribunal.

25. There are multiple authorities that warn the EAT against interfering with the factual findings of the Employment Tribunal, the most recent and now regularly cited being **DPP Law Limited v Greenberg** [2021] EWCA Civ 672; [2021] IRLR 1016:

> 57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:
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> (1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:
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> > 'The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.'
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> This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The 'PACE')* [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards 'with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration'. This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.
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> (2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant (*Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In *Meek,* Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT v. Brain* [1981] I.C.R. 542 at 551:
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> > 'Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given.'
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> (3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *RSPB v Croucher* [1984] ICR 604 at 609-610:

> ‘We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in *Retarded Children's Aid Society Ltd. v. Day* [1978] I.C.R. 437 and in the recent decision in *Varndell v. Kearney & Trecker Marwin Ltd* [1983] I.C.R. 683.’

> 58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.

26. The first part of ground 1 asserts that the Employment Tribunal misdirected itself by not giving sufficient weight to the fact that the claimant had no control over the fare that passengers were charged. It is asserted that the fares were determined solely by the respondent. The Employment Tribunal dealt with this at paragraph 32 and 44. The fares were essentially those set under the provisions that regulate black cabs. The respondent set the percentage commission it obtained and a transaction fee. Employment The Tribunal clearly did take this factor into account and gave it such weight as it considered appropriate.

27. Next, it is contended that the Employment Tribunal failed to take into account that not all fares were on the meter. The Employment Tribunal specifically took that factor into account (see paragraph 32 of the Tribunal’s decision).

28. Next, it is asserted that the Employment Tribunal placed insufficient weight on its finding that the respondent imposes terms on its drivers. That was a matter that the Employment Tribunal specifically took into account at paragraphs 26 and 47, accepting, in that respect, the situation was

similar to that in **Uber**, but having weighed that factor against others, found overall that worker status had not been established.

29. It is contended the Employment Tribunal misdirected itself when considering drivers' choice of whether to accept rides. The claimant relies on the Get Going guide from October 2018. It is an historic document. Further, at paragraph 34 of the judgment, the Employment Tribunal took into account the fact that there was some provision for action being taken when fixed fares were not accepted. I am not persuaded that the claimant can establish there was anything perverse in the decision of the Employment Tribunal. The claimant relies on a reference to a maximum 10% cancellation rate in a document from December 2016. That also was historic and was only one piece of the evidential puzzle. I can see no arguable basis for asserting that the Employment Tribunal erred in law in reaching the factual conclusion it did at paragraph 34 of the judgment.

30. It is asserted that there was control over how drivers deliver the service. There was some provision for disciplinary action. The Employment Tribunal took that factor into account, noting the fact that there was some degree of sanction available to the respondent (see paragraphs 38 and 49).

31. It is asserted that the fact that there is some leeway as to how drivers conduct a job, by choosing the route, does not preclude the person being a worker. I can see nothing in the judgment to suggest that the Tribunal considered that was the case.

32. I do not consider that it can be said that the Employment Tribunal erred in law or was perverse in treating the circumstances as different to those in **Uber**.

33. It is argued that some factors the claimant asserted supported his contention that he was a worker were not referred to by the Employment Tribunal. The decision of the Court of Appeal in **Greenberg** makes it clear that an Employment Tribunal is not required to refer to each and every factor raised in evidence or considered in reaching its conclusions.

34. The claimant relies on the possibility of scrub fees if an order for a taxi was cancelled. He relies on a document from October 2018. Although the point may have been raised in oral submissions, it was not referred to in the written submissions and I cannot see that the Employment Tribunal erred in failing specifically to refer to it.

35. The claimant asserts the Employment Tribunal did not take account of previous discounts, bonuses, and staff entertainment events that he gave evidence about from when he had previously used the app. The claimant relies on WhatsApp messages from February 2017 and January 2018. These were historic. I cannot see that the Employment Tribunal can be properly criticised for failing to specifically mention those events.

36. It is asserted the respondent controlled the system of payments and that there was a limited period within which they could be challenged. The Employment Tribunal dealt with payments at paragraph 32 and 47, noting that terms and conditions were imposed upon the drivers by the respondent.

37. It is asserted the Employment Tribunal failed to take into account a competitive recruitment system which involved interviews. There does not appear to be any significant evidence to support the interviewing of candidates. That is contrary to the evidence given by Ms Bedwell at paragraph 15. Again, I do not consider the Employment Tribunal can be said to have erred in its approach to this issue.

38. It is said that the Tribunal failed to take into account instruction and training for drivers. There was consideration of this issue at paragraph 29 of the judgment.

39. It is argued that the Employment Tribunal failed to take into account the fact that the respondent monitored the performance of its drivers, but this was taken into account at paragraph 34 of the decision.

40. It is contended that historically, there had been a provision for guaranteed earnings. That was not a matter raised in the written submissions although it was referred to in the claimant's statement. I do not consider that historical matter was one that the Tribunal was required to refer to.

41. It is suggested that the Tribunal failed to take account of the Going Home feature on the app. That was specifically referred to at paragraph 35 of the Employment Tribunal's decision.

42. It is asserted that the Employment Tribunal misdirected itself when considering communications between the driver and passenger. That was dealt with at paragraph 50 of the decision. The Employment Tribunal held that there was nothing to suggest that, although initial communications when a fare was accepted would be through the app, that if there were discussions in the taxi during the course of the journey, that the driver could not offer to provide taxi services for the passenger on future occasions without use of the app (also see paragraph 40 of the Tribunal decision).

43. Accordingly, Ground 1 fails and it is dismissed

44. The second ground of appeal is that the Tribunal gave undue weight to immaterial factors. It is suggested that the Employment Tribunal held that the fact that the claimant was able to operate on a self-employed basis as a black cab driver meant he was not a worker. I do not accept that it is correct that the Employment Tribunal found that the fact that the claimant was a black cab driver meant that he could not possibly also be a worker for the respondent. It was a factor that was taken into account in the round in concluding that the claimant was in business on his own account.

45. It is suggested that a gloss was applied to the requirement of worker status in that the Employment Tribunal approached the matter on the basis that work on the app had to represent a large proportion of an individual's total earnings. I do not accept that that gloss was applied by the Employment Tribunal. The Employment Tribunal noted, as one of many factors, that the claimant spent the majority of his time acting as a black cab driver in the normal manner. It did not apply a

requirement for there to be any possibility of a driver being a worker, for an organisation such as the respondent, that their work for that organisation must represent a large proportion of their earnings.

46. Finally, in ground 3 it is contended that the reasoning of the Employment Tribunal was inadequate. The reasoning was fully adequate to explain to the claimant why he was unsuccessful in his claim. In **Simpson v Canter Fitzgerald**, the Court of Appeal emphasised that the requirement to give reasons is, in broad terms, to let a party know why he lost. The claimant lost this case because the Employment Judge concluded, on an analysis of the factors overall, that he was in business on his own account.

47. For those reasons, ground 2 and ground 3 of the appeal also fail, which will have the consequence that the appeal is dismissed.