Neutral Citation Number: [2025] EAT 94

Case No: EA-2023-000615-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 July 2025

Before :

MR JUSTICE CAVANAGH

- -

Between :

BCA LOGISTICS LTD

Appellant

- and –

BRIAN PARKER AND OTHERS

Respondents

- -
- -

Christopher Jeans KC and **Sophie Belgrove** (instructed by **Shoosmiths LLP**) for the Appellant
Karon Monaghan KC and **Darryl Hutcheon** (instructed by **Leigh Day**) for the Respondents

Hearing dates: 11 and 12 June 2025

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JUDGMENT

SUMMARY

Employee, Worker or Self Employed

This was a hearing to determine whether the Claimants were "workers" for the purposes of section 230(3)(b) of the Employment Rights Act 1996, regulation 2(1) of the Working Time Regulations 1998, and section 54(3)(b) of the National Minimum Wage Act 1998. The Claimants were engaged by the Appellant company to work as drivers to undertake vehicle collection, inspection, delivery and transport services for customers of the Appellant. At the time of the ET hearing, there were 422 Claimants, but more have joined since. The standard-form contact contained a term which permitted the drivers to make use of a substitute. A central issue in the case was whether the substitution clause was "genuine". It was not in dispute that an unfettered right to substitution meant that a contractor could not be a "worker", and it was similarly not in dispute that a right to substitution contained in a written contract would carry no weight if it disguised the reality of the situation. Furthermore, it was not in dispute, rightly, that the ET can take into account evidence of whether and how far any drivers had, in practice, enquired about substitution, how the Appellant had responded to any such enquiries, whether the Appellant had made any arrangements to deal with substitution, how far it would have been practicable for substitution to take place, and whether, in reality, the Appellant would have been willing to accept the risks inherent in substitution in the circumstances of its business.

The EJ decided that the substitution clause was not "genuine" and that the other aspects of the contract between the parties indicated that the Claimants were "workers".

The Appellant did not contend that the EJ had misdirected himself as regards the law regarding substitution. Rather, the Appellant contended that the EJ had erred in relation to two matters relating to the evidence, and that these errors had infected the decision on substitution, such that it should be set aside and the case remitted to the ET for redetermination.

The first alleged error was that the ET had referred in its judgment to a "striking gap" in the Appellant's witness evidence in that it had not called any current or recent drivers as witnesses. The Appellant contended that the ET erred in law in considering that it was for the Appellant to call current

or recent drivers as witnesses, and had thereby placed a false burden on the Appellant, and/or that the ET erred in law by drawing adverse inferences or conclusions from the Appellant's failure to call current or recent drivers as witnesses. This ground of appeal was dismissed on the basis that, when the judgment was read as a whole, it was clear that the ET had not drawn an adverse inference against the Appellant in this regard, the ET had not treated the failure to call witnesses as a factor in its decision, the ET had not placed a false burden on the Appellant, and there was no misdirection of law. The EAT held that, even if the "striking gap" observation had been an error, it was not material and it did not amount to an error or law.

The second ground of appeal was that the ET erred in law by discounting evidence of interactions about substitutions on the basis that the evidence had been obtained by the Appellant with the litigation in view. This ground was also dismissed. The ET was entitled to place little weight on the evidence of these interactions, for the reasons given in the judgment, which included that the interactions relied upon by the Appellant all took place after the claims had commenced. There was no error of law: rather, the Appellant was seeking to invite the EAT to substitute its view of the weight to be placed upon this evidence for that of the ET.

In the course of the judgment, the EAT gave a short summary of the law relating to substitution clauses as they affect the issue of "worker" status, and dealt briefly with (1) the law relating to the circumstances in which it is permissible to draw an adverse inference from the failure to call witnesses, (2) the law concerning the circumstances in which an ET was under a duty to seek the parties' submissions on a point which is material to the ET's decision; (3) the circumstances in which the EAT can uphold an ET's decision, notwithstanding that there was an error or errors of law; and (4) the scope of the remission, if the EAT had allowed the appeal.

Appeal dismissed.

MR JUSTICE CAVANAGH:

1. In this judgment, I will refer to the Appellant as "BCAL", and to the Respondents to this appeal as "the Claimants".

2. This is an appeal from the judgment of the Employment Tribunal, sitting at Birmingham, Employment Judge Meichen sitting alone ("the ET"), entered in the Register and sent to the Parties on 3 May 2023, in which the ET found that the Claimants were "workers" for the purposes of section 230(3)(b) of the Employment Rights Act 1996, regulation 2(1) of the Working Time Regulations 1998, and section 54(3)(b) of the National Minimum Wage Act 1998.

3. The effect of this ruling was that the Claimants were entitled to certain rights, as set out in the statutes. The relevant statutory test for "worker" status was the same in each statutory provision, namely whether the Claimants had undertaken:

> "to do or perform personally any work or services for the other 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."

4. This type of worker is often referred to as a "limb (b) worker", in contrast to those who have entered into or worked under a contract of employment, a "limb (a) worker".

5. There were, at the time of the hearing before the ET, 422 Claimants (more have joined the litigation since). Each of them was, or had been, engaged by BCAL as drivers to undertake vehicle collection, inspection, delivery, and transport services. Some of the drivers who performed these services were engaged as employees of BCAL. The Claimants did not come from this group, but came from a group of persons who were engaged on the basis that they would be self-employed. In the proceedings before the ET, the Claimants did not contend that they were actually employees of BCAL: the rights that they sought to establish arose from "worker" status, rather than from "employee" status, and so the ET was not required to determine whether or not the Claimants were

employees. Where I refer in this judgment to "drivers", I am referring to those who were not engaged by BCAL as its employees.

6. It is well-established in the authorities that a person cannot be a "worker", for the purposes of the relevant legislation, unless they have an obligation to provide personal service. It follows that, if they have an unfettered contractual right to provide a substitute to perform their services, then, whatever other indications of "worker" status there may be, they cannot be a "worker". This proposition has been approved by the Supreme Court in a series of decisions, including **Autoclenz v Belcher** [2011] UKSC 41; [2011] ICR 1157; **Pimlico Plumbers v Smith** [2018] UKSC 29; [2018] ICR 1511; and **R (IWGB) v CAC, Deliveroo, Interested Party** [2024] UKSC 43; [2024] ICR 189. The fact that the substitute must have suitable qualifications to carry out the work does not mean that there is a fetter on the contractual right.

7. It is also well-established that the question whether there is an unfettered right to provide a substitute is not determined solely by the written terms of the contract between the parties. If the evidence leads to the conclusion that a written substitution clause is not "genuine", in the sense that it does not reflect the true intentions of the parties, then the written clause will not be sufficient to show that there is no obligation to provide personal services. In particular, if the provision of a substitute is an "unrealistic possibility", then the written term can be disregarded as forming no part of the true contract. In **Consistent Group v Kalwak** [2007] IRLR 560 (EAT), Elias J said:

> "57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697G) "Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so."
>
> 58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.

> 59. . . . Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance . . .”

8. This passage, and the approach of Elias J in **Kalwak**, was approved by Lord Clarke JSC in **Autoclenz** (with whom Lord Hope DPSC, Lords Walker and Wilson JJSC, and Lord Collins agreed) at paragraphs 26 and 29. In **Deliveroo**, at paragraphs 68(4) and 69 of the judgment, the Supreme Court approved the statement by Underhill LJ in the Court of Appeal that “The right to use a substitute would carry no weight if it disguised the reality of the situation…”.

9. It does not necessarily follow from the fact that, in practice, work is done personally, that there is a contractual undertaking that it be done personally. Similarly, if a contractual right to a substitute exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that the term is not part of the agreement. The essential question in each case is what were the terms of the agreement (**Autoclenz**, at paragraphs 19 and 20). At paragraph 31 of the judgment in **Autoclenz**, Lord Clarke JSC cited with approval the following statement of principle from the Court of Appeal judgment in that case:

> “the true position, consistent with **Tanton** [[1999] ICR 693, CA], **Kalwak** and **Szilagyi** [[2009] EWCA Civ 98; [2009] ICR 835], 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 . . .”

10. It follows that evidence going to whether or not the stated right of substitution was exercised in practice is a relevant, but not conclusive, consideration for the question of “worker status”. It is relevant because it may shed light on what was actually agreed, notwithstanding the terms of the

written contract. Similarly, evidence going to whether substitution would be practicable is relevant, for the same reason.

11. None of these legal principles was in dispute in the proceedings below. Accordingly, a key issue that was addressed in the evidence before the ET was whether the Claimants had an unfettered, and genuine, right of substitution. There was evidence about whether the right of substitution, as set out in the standard-form written agreement for drivers, had ever been exercised, and about whether any drivers had made enquiries about substitution and, if so, what the response had been. There was also a great deal of evidence about whether substitution would have been practicable. I will summarise this evidence later in this judgment.

12. The ET found that the substitution clause in the drivers' contracts was not genuine. At paragraph 213 of the judgment, EJ Meichen said:

> "Not only was a substitute never used but nobody seriously expected a substitute to be used. The substitution clause was an unrealistic possibility that was not intended to be operated in practice and it therefore did not form part of the true agreement. It did not reflect what the parties realistically expected to occur. I reached this conclusion with reference to my analysis of the evidence on substitution which I have summarised above [and especially the points that he went on to refer to in the remainder of paragraph 213]."

13. At paragraph 222 of the judgment, EJ Meichen said:

> "I did not think that this was an uncertain, marginal or borderline case. In my view the key factual features of the relationship pointed one way – i.e. toward the claimants being limb (b) workers. In my judgement it was in the end relatively clear cut that the claimants in this case were limb (b) workers and the written contract did not reflect reality."

14. The appeal in this case is not on the basis that the ET misdirected itself as regards the legal test to be applied to the obligation of "worker" status, or as regards the principles relating to substitution clauses as set out by Elias J in **Kalwak** and subsequently approved by the Supreme Court in **Autoclenz**. The ET summarised the relevant authorities and legal principles in detail at paragraphs 47-59 of its judgment and no criticism is made of this summary. Accordingly, it is not necessary for me to set out or to analyse the key authorities on "worker" status in any further detail in this judgment.

15. This appeal is on the basis that the ET erred in law in the way in which it dealt with two aspects of the evidence regarding whether the express term relating to substitutes was a "genuine" contractual term. BCAL relied upon two alleged errors. These are that:

(1) The ET erred in law in supposing that it was for BCAL to call current or recent drivers as witnesses, and thereby placed a false burden on BCAL; and/or the ET erred in law by drawing adverse inferences or conclusions from BCAL's not calling current or recent drivers as witnesses (Ground 2 in the Notice of Appeal); and

(2) The ET erred in law in relation to the requirement that a substitution clause be "genuine", by discounting evidence of interactions about substitutions on the basis that the evidence was obtained with the litigation in view (Ground 1 in the Notice of Appeal).

16. BCAL contended that each of these errors of law infected the ET's conclusion on substitution and "worker" status, and that either one of these errors was sufficient to render the ET's finding that the Claimants were "workers" unsafe. BCAL invited the EAT to remit the case to the ET. BCAL also invited the EAT to make clear that fresh evidence would be admissible at the remitted hearing, to include fresh evidence of all events up to the date of the remitted hearing. This matters, BCAL said, because events since the hearing before EJ Meichen in January-February 2023 show that BCAL was right all along: since the ET hearing, BCAL said, substitution by drivers at BCAL has grown exponentially and has now become commonplace.

17. The Claimants' primary submission was that the EJ did not err in law in the two respects alleged by BCAL. In the alternative, even if there was a misdirection in relation to the evidence, it related only to two narrow aspects of the judgment. The Claimants submitted that, given the thorough and impressive reasoning of the ET in its conclusions on substitution, there is no prospect of a future ET reaching a different conclusion on "worker" status, even if there were one or two minor errors of law. In other words, even if there were errors, they could not have affected the result and so, applying

the Court of Appeal in **Jafri v Lincoln College** [2014] EWCA Civ 449; [2014] ICR 920, the ET's ruling should be upheld, without the need for remission for reconsideration by the ET. The Claimants further submitted that, if the appeal is allowed and remission takes place, the case should be remitted to the same judge for further consideration, leaving it to EJ Meichen to decide whether he should admit any fresh evidence.

18. BCAL was represented before me by Christopher Jeans KC and Sophie Belgrove, and the Claimants by Karon Monaghan KC and Darryl Hutcheon. All but Mr Hutcheon appeared below. I am grateful to all counsel for their very clear and helpful submissions, both oral and in writing.

19. I will first summarise the relevant findings of the ET on the substitution issue, and I will then deal with the grounds of appeal. The findings of fact by the ET related to the position as it stood on the first day of the ET hearing, 30 January 2023.

The relevant findings of the ET

20. The proceedings before the ET lasted five days. EJ Meichen was provided with a core bundle consisting of 4974 pages and a supplementary bundle consisting of 1909 pages. He was provided with seven witness statements. Four were on behalf of the Claimants. Two lead Claimants, Ian Williams and Tristram Moulton, gave oral evidence, as did another driver, David Graham. The Claimants also relied upon the witness statement of another driver, George Kitchen. Mr Kitchen did not give oral evidence because he was on holiday in Nicaragua at the time of the ET hearing. EJ Meichen decided to admit Mr Kitchen's statement nevertheless, but on the basis that the weight to be given to it would be a matter for the ET, taking into account the fact that the witness was not available to give evidence, and bearing in mind the submissions made by the parties on his evidence. There is no appeal against the decision to admit Mr Kitchen's evidence on this basis. BCAL provided statements from three witnesses, each of whom gave oral evidence. The lead witness for BCAL was Mark Dugmore, the Head of Operations and End of Contract. The other witnesses were Craig

Slammon, Team Leader Driver Planning, and Hafeez Khan, who had been engaged by BCAL as a driver between September 2017 and March 2018.

21. So far as the witness evidence is concerned, the ET said the following at paragraphs 13-16 of the judgment:

> "13. The lead claimants gave detailed evidence about the working arrangements and practices of the drivers. Their evidence was supported in some specific respects by the other witness evidence relied upon by the claimants. I found that the claimants' evidence was also consistent in some key respects with the contemporaneous documentation.
>
> 14. In contrast, a striking gap in the respondent's witness evidence is that they did not call any witnesses who are currently engaged by the respondent as a driver or any witnesses who have recently been engaged by the respondent as a driver. Mr Khan had only been a driver for a period of about 6 months about 5 years ago. Mr Dugmore was the lead witness for the respondent.
>
> 15. Overall, I found the claimants' evidence to be more cogent and credible than the respondent's on the crucial issue of how the drivers operated in practice. I found that some features of the respondent's case were not supported by the documentary evidence and did not match my perception of the realities of the situation. I will give examples of this in my findings below. Furthermore, I had some concerns about the reliability of the respondent's lead witness Mr Dugmore's evidence. I will give examples of this below as well. For these reasons I generally found it harder to accept the respondent's case than the claimants'.
> 16. I should note that Mr. Dugmore gave evidence in his witness statement (paragraph 200 – 202) about difficulties the respondent had faced in obtaining witness evidence from drivers. He suggested that a number of drivers are supportive of the respondent because they "do not want their "status" to be interfered with". According to Mr. Dugmore however when those drivers were approached to give evidence they declined because they were scared as the claimants had been aggressive in seeking support for their cause and abusive towards those who did not want to join it. He said the drivers were "fearful of the backlash" if they were to give evidence and they had therefore refused. Mr. Dugmore did not give any specifics as to who was involved in this or what had happened. Ms. Monaghan pointed out, in my view quite fairly, that the claimants could not test this evidence in view of the lack of specifics. Mr. Jeans did not put what was suggested to any of the witnesses and he did not seek to rely on what Mr. Dugmore had suggested in his submissions. For these reasons I did not attach much weight to this aspect of Mr. Dugmore's evidence."

22. The ET's judgment ran to 223 paragraphs over 52 pages. Much of it dealt with other factors that were relevant to the question whether the drivers were "workers". There is no challenge to the findings on these matters, nor to the ET's conclusion that, leaving aside the "substitution" question, the terms of the contracts between the drivers and BCAL, and the way in which their functions were

performed in practice, pointed towards them being "workers". As I have said, however, it was not in dispute that, if an unfettered right of substitution existed, this meant that, regardless of any other factors, the contract could not be one of personal service and so the individual would not be a "worker".

23. A substantial part of the ET's judgment dealt with the "substitution" issue. As I have also said, the ET directed itself on the relevant law relating to this issue at paragraphs 47-59 of the judgment. The summary of the law in this part of the judgment was, in my view, impeccable, and admirably clear. No challenge is made to it. Having made findings about the nature of BCAL's business, the nature of the work undertaken by the drivers, the written agreement between the parties, and on many other matters, including recruitment, training, equipment supplied, arrangements for insurance, working arrangements, pay, and sanctions for not accepting jobs, the ET dealt with the evidence specifically relating to substitution over 13 pages, at paragraphs 149-208 of the judgment. The ET then highlighted the key considerations which had led to the conclusion that the written substitution clause was not "genuine" at paragraph 213 of the judgment. It would not be helpful for me to set out in this judgment the entirety of the 60 paragraphs of the judgment which set out the findings of fact and conclusions relevant to the substitution issue. Instead, I will set out the contractual term and will then summarise the ET's findings on BCAL's business and the duties of the drivers, before going on to set out the seven points which the EJ said, at paragraph 213 of his judgment, were the most important points that led to his conclusion on substitution. I will then summarise the evidence and findings of fact which underpinned the seven points. It will be necessary to summarise the evidence and findings in some detail.

The written term on substitution

24. The written term on substitution is at paragraph 1.7 of the standard-form contract between BCAL and the drivers. It states that:

> "1.7. The Contractor [i.e. the driver] may provide a substitute contractor to undertake the Services and/or a Specified Job. The Contractor is wholly responsible for the payment of any fee to the substitute contractor as may be agreed between the Contractor and the substitute contractor. The Company will have no contractual, financial or legal relationship with the substitute contractor. The Contractor should ensure that any substitute contractor meets and complies with the Company's insurance and driving licence requirements, have obtained a copy of the substitute contractor licence and make such driving licence available for inspection on request by the Company. The Contractor will provide details of any substitute contractor in advance of the Contractor using such substitute contractor. The Contractor should inform the Company at the earliest opportunity of any changes to his/her nominated substitute contractor or contractor."

BCAL's business and the duties of the drivers

25. At paragraphs 66 to 68 of the judgment, the ET said:

> "66 The respondent provides services within the car retail industry. Amongst other activities, the respondent arranges the inspection of cars and their delivery to and from locations specified by the respondent's customers. Delivery is achieved by driving the car to its destination. Some of the vehicles inspected and delivered by the respondent are high value and the respondent works with some premium brands, like Mercedes. The respondent's customers include manufacturers, vehicle leasing companies, car dealerships and trade buyers.
>
> 67 The respondent has Service Level Agreements ("SLAs") with its customers. The service to be provided by the respondent's drivers is defined by the specifications of the respondent's customers. The respondent and its customers expect that service to be delivered in accordance with the SLAs.
>
> 68 The respondent is clearly very concerned to ensure that all its drivers perform their activities in compliance with their customers' expectations and requirements as set out in the SLAs…."

26. BCAL has used self-employed drivers since 1995 and employed drivers since 1998. At the time of Mr Dugmore's witness statement, BCAL had 907 employed drivers and 1204 self-employed drivers. There is a very high turnover of self-employed drivers, amounting to 15-20 per week.

27. Drivers have no knowledge of the SLAs. They are reliant on BCAL to instruct them as to how, when, and where to perform their work so as to meet the requirements of BCAL's customers and the commitments BCAL has made to its customers under the SLAs. BCAL keeps detailed records on its drivers, known as a ManPack.

28. Drivers are required to have had a UK driving licence for at least 3 years, and to have no more than 9 points on their licence. At the time when the Claimants were recruited, they had to confirm that they had private (i.e. offroad) parking to store a vehicle, as they might be required to pick up a vehicle one day and to deliver it the following day.

29. The drivers deliver vehicles, but they also inspect vehicles. There are two types of job. A Standard Trade Plate move requires the driver to collect BCAL's customer's vehicle from a particular location and to deliver it to another specified location, within the parameters set by the SLA in relation to date, time, and reasonable mileage. The driver also has to do a visual inspection check for damage, and a check of the vehicle's power, oil, water, electrics and other core safety features. The second type of job is an Inspect & Collect job. This also involves collection and delivery, but in addition the driver must carry out an in-depth inspection of the vehicle, in order to assess any issues with or damage to the vehicle. The SLA will set out the method of the inspection and the parameters of what must be inspected.

30. Jobs are allocated to drivers by means of an app. They are expected to work either three or five days a week, and to mark the particular days for which they are available on the app. Drivers generally have no choice as to the location, number, and type of jobs offered to them, but they can refuse a particular job. The ET found, however, that in reality the way that BCAL's business operated meant that if there was work available, the Claimants were obliged to do it. There was a practice of punishing drivers for refusing to work on days they were meant to be available, by not being offered work for a period, or by not being offered more lucrative weekend work.

31. When a job is offered to a driver on the BCAL app, it is specifically stated that, "If you are now unable to complete the work offered to you, you have the option to provide a substitute…"

32. The fees for each job and the hourly rates are set by BCAL, with no facility to negotiate. Drivers pay a weekly administration fee of £6.50 and a contribution to insurance costs of £6.50 or

£3.50 per week, depending on whether they worked five or three days per week. Newly-recruited drivers are required to go on a four-day training course, in person. The training includes training on inspection and guidance on health and safety. Drivers are given a detailed training manual, which is regularly updated. Drivers are given a badge and a hi-vis vest, both branded with BCAL's name. They are given a phone, pre-loaded with the BCAL app, and a charging cable. They are given other equipment, including an EVO device, a fuel card, paint gauge, tyre gauge, magnetic markers, zebra board, paperwork, and PPE. Most, if not all, of this is branded.

33. Each driver is given a trade plate. These allow an individual to drive an unregistered or untaxed vehicle for the purposes of business movement. BCAL pays for a trade plate licence from the DVLA and is issued with a certain number of trade plates, which it then issues to the drivers. Drivers cannot obtain trade plates themselves.

34. BCAL provides insurance for its drivers. Although the written contract includes a term saying that self-employed drivers can arrange their own insurance, it was agreed at the hearing that in practice all drivers are insured under the BCAL trade policy. The insurance policy only provides cover for self-employed drivers whilst they are under BCAL's control.

The reasons given by the ET in paragraph 213 of its judgment for its finding that there was no genuine contractual right to substitution, notwithstanding clause 1.7 of the standard-form contract

35. The ET focused on seven points.

(1) The Claimants' evidence on this issue was much more credible than that provided by BCAL

36. The ET said, at paragraph 213.1:

> "The claimants' evidence as to the genuineness of the substitution clause was much more credible than that provided by the respondent. The evidence obtained by Mr Kitchen and Mr Allison showed how a substitution request would in reality be treated and this was

> supported by Mr Graham. If the substitution clause was genuine this would have been communicated to Mr Kitchen and Mr Allison, at least once the queries had been escalated to more senior/appropriate people, as I find that they obviously were. The respondent's attempt to undermine this evidence, particularly through Mr Dugmore, was unconvincing."

37. Ground (2) above (which was part of Ground 1 in the Notice of Appeal) relates directly to this finding. I will explain who Mr Kitchen and Mr Allison are, and what this is evidence about, later in this judgment.

(2) No plan or process to deal with the practical problems that would arise if drivers used a substitute

38. The ET said, at paragraph 213.2:

> "There are clear practical difficulties with self-employed drivers using substitutes, including difficulties relating to trade plates, insurance, data protection and equipment. What became obvious at the hearing was that the respondent had given little thought as to how these difficulties could be overcome. Even if the issues which I have outlined were surmountable there was no plan or process in place for what would happen in practice. This contributed to my very strong impression that nobody seriously expected a substitute to be used."

(3) No training or guidance for drivers on how to engage and use a substitute

39. This was dealt with at paragraph 213.3:

> "The respondent did not provide any training or guidance on how to engage and use a substitute. There were no processes or procedures in place for this to be done. This supports my strong impression that nobody realistically expected a substitute to be used."

(4) No training offered to substitutes

40. At paragraph 213.4, the ET said:

> "It is unrealistic for the respondent to suggest it would go to the time and expense of training self-employed drivers over a 4-day course, the production and distribution of the lengthy drivers manual and ongoing updates and audits but be content for a substitute to be used without the respondent training them at all. It was unrealistic to expect a self-employed driver to pass on that amount of training and it is unclear whether and if so how that could in reality be done."

(5) Unrealistic to think that substitutes could do inspections, or that BCAL's customers would be content for a possibly untrained substitute to do this work

41. Paragraph 213.5 states:

> "It is unrealistic for the respondent to suggest that a substitute, quite possibly with little or no training, could undertake the inspections part of the services to meet the requirements in the SLAs and the respondent's customers' expectations. It is unrealistic to think that the respondent and its customers would be content for a possibly untrained substitute to even attempt that."

(6) Unrealistic to think that BCAL would be prepared to risk handing the customers' vehicles over to someone they do not know

42. At paragraph 213.6, the ET said:

> "It is unrealistic to suggest that the respondent would take the serious risks involved in handing over its customers' high value cars to a substitute with whom it has no contact or relationship and knows very little about."

(7) In just over 25 years, no driver has ever made use of a substitute

43. The final point made by the ET, at paragraph 217.7 was:

> "As the respondent has used self-employed drivers for at least 25 years and in that period has engaged thousands of self-employed drivers this case provided ample opportunity to consider how the parties really conducted themselves in practice. No self-employed driver has ever used a substitute, despite the fact it would be of obvious benefit if it was a genuine right. Furthermore the evidence relating to a nascent interest in substitution had only come out during these proceedings and was unpersuasive. In my view the evidence of how the parties conducted themselves in practice prior to the respondent's concern to defend this litigation is persuasive. It creates a strong inference that the practice of never using substitutes reflected the true obligations and expectations of the parties. This supported my overall view that the substitution clause was not genuine."

44. This finding is of direct relevance to Ground (2), above, which was Ground 1 in the Notice of Appeal.

The disputes in the evidence between the parties on substitution

45. Much of the relevant evidence on substitution was not disputed. The evidence concerning the general nature of the work undertaken by the Respondent, and the working arrangements of the

drivers, was not, on the whole, in dispute. It was not in dispute that, as at the time of the ET hearing, and in the preceding 25 years, no driver had ever used a substitute. It was not in dispute that the Respondent's manual did not give guidance about the use of substitutes. It was not in dispute that no training was offered to substitutes. It was not in dispute that BCAL did not have any systems in place to deal with substitutes (indeed, it was BCAL's evidence that it would have no contact or relationship with the substitute whatsoever) or that BCAL had not made any special arrangements for occasions on which its services were provided via a substitute.

46. However, there were some areas of dispute, and there were some aspects of Mr Dugmore's evidence, in particular, that the ET did not accept. The ET did not accept Mr Dugmore's evidence that the equipment supplied to drivers was unbranded, for example: the EJ regarded the Claimants' evidence on this issue as being much more credible (judgment, paragraph 97). The ET rejected Mr Dugmore's evidence that a driver could make themselves unavailable on any given day without notice and without reason. This was inconsistent with BCAL's own training materials which said that drivers were required to provide 48 hours' notice for leave, except for illness (paragraph 127). The ET rejected an assertion in Mr Dugmore's witness statement that Claimants had negotiated an increase in pay for particular jobs: the ET accepted the Claimants' evidence that this did not happen, which was supported by the documentation, was consistent with the realities of the situation, and was further supported by the lack of any evidence of particular instances of negotiations for fee increases (paragraphs 135 and 139). BCAL, including Mr Dugmore, denied that there was a practice of penalising drivers for refusing work by not accepting jobs on days when they meant to be available. The ET preferred the Claimants' witnesses' evidence on this issue. The EJ pointed out that Mr Dugmore had sent an email on 11 May 2018 to members of his team, telling them that under no circumstances should drivers be penalised for refusing work. EJ Meichen took the view that there would have been no point in sending such an email unless there was a practice of penalising drivers. Mr Dugmore had said in evidence that the email was sent because of the actions of a single "rogue

element" on the co-ordination team. The judge observed that the email said that "It appears that if the driver refuses work we are then blocking the driver's calendar out.", not that a single individual was doing this, and said that there would have been no point in sending such an email unless there was a systemic practice. There were also clear examples of Mr Moulton being penalised in July 2021, and Mr Graham being penalised in September 2022 (judgment, paragraphs 140-148).

47. The ET rejected the evidence of BCAL's witnesses that the Claimants were trained in how to appoint or use a substitute. The ET pointed out that there is no reference to this in the very extensive training materials (paragraph 152).

48. Mr Moulton, one of the lead Claimants, told the ET that he was not aware of the right to use a substitute: it was not mentioned at his training course and the contract terms were not explained to him. He told the ET that he was told not to allow anyone else to drive a car that he was responsible for.

49. Both of the lead Claimants, Mr Williams and Mr Moulton, said that they did not think it would be practicable to use a substitute.

50. Mr Graham told the ET that he had attempted to arrange a substitute driver on several occasions, but, whenever he did, BCAL refused and took the job off him, without asking who the proposed substitute was and without providing any reason. He gained the impression that those to whom he spoke were unaware of the term about substitution in the contract.

51. Mr Kitchen, who did not give oral evidence, had at one stage been the driving force behind the litigation. He said in his written statement that substitution was impractical, for example because substitutes would not be trained and might have to park the car off-road overnight.

52. Mr Kitchen's statement referred to an occasion in March 2021 when he decided to test whether the substitution clause would be used in practice. He emailed the email inbox "bcaldriverqueries"

and asked whether a family member could substitute for him sometimes. He said that the family member had a full, clean, UK driving licence. He asked open questions about how the process would work. He received the following response from Karen Shakespeare, Administration Clerk, on 31 March 2021:

> "I have asked the question and have been informed that as a self-employed driver only you are authorised to use BCA vehicles and under no circumstances should your trade plates and equipment be used by any other person. If you are unavailable to work you need to inform your coordinator who will then arrange for work to be covered by other drivers."

53. BCAL contended before the ET that this had been "set up" by Mr Kitchen and that he had deliberately sent the email to an inappropriate email address.

54. The Claimants also relied upon an email that had been sent by a driver who, though a Claimant, had not been called as a witness. His name was Andrew Allison. On 1 April 2021 Mr Allison sent an email to the same inbox as Mr Kitchen. He asked, "Can I ask any other person, family member or friend to perform the work on my behalf if and when I can't get child care?" Mr Allison received a reply from another Administration Clerk, Leanne Downes, who said, "I don't believe that this will be possible but I have sent this to the relevant department to advise you on." Mr Allison did not receive any further reply.

55. It was not disputed by the Claimants that these emails had been deliberately sent to check whether the substitution clause was genuine, and to collect evidence about it.

56. In his evidence before the ET, Mr Dugmore sought to discredit this evidence on behalf of the Claimants. It was suggested that Mr Kitchen and Mr Allison had deliberately contacted an email address which they knew was not the right point of contact for operational matters such as the appointment of a substitute. Mr Jeans KC submitted, as I have said, that this was a set-up, and

pointed out that he had been unable to cross-examine either Mr Kitchen or Mr Allison. He suggested that it was curious that Mr Kitchen should be in Nicaragua at the time of the ET hearing.

57. EJ Meichen considered these submissions and decided that he should take account of the evidence of Mr Kitchen and Mr Allison. He gave detailed reasons for this decision at paragraph 177 of the judgment. He was not impressed by the argument that they had deliberately used the wrong email address. Drivers had never been told which email address to use for substitution requests and, in any event, both of the Administration Clerks had passed the requests on to others to deal with. Even though it was clear by the time of the ET hearing that the requests had been co-ordinated and had been sent with an eye on the ET litigation, BCAL's staff did not know this. So far as they were aware, they were responding to genuine queries. The judge decided that there was nothing sinister in Mr Kitchen's absence in Nicaragua: he had offered to give evidence remotely, but it could not be arranged, and if he had wanted to provide an excuse for failing to turn up to give evidence, there would have been easier ways of doing it. It was inherently unlikely that Messrs Kitchen and Allison would have raised these queries if they knew that BCAL would respond favourably. Mr Dugmore had given evidence that he asked the Finance Director to speak to Ms Shakespeare and she had told him that she had only passed the query on to another Administration Clerk, and Mr Dugmore also gave evidence that he had discovered that Ms Downes had not passed on the query at all. The ET did not accept this, because, in both cases, it was inconsistent with what the Administration Clerks had said in their emails in response.

58. Mr Kitchen left BCAL's employment in April 2021 and shortly afterwards an article about the issues in this case was published in the Independent newspaper. Mr Kitchen had provided information to the newspaper. Mr Dugmore then called Mr Kitchen and left a voicemail on his phone on 28 May 2021. The ET was provided with a transcript of the voicemail. Mr Dugmore said that Mr Kitchen had been fed some "incorrect information" about substitution which he wanted to discuss, and said that there was a right to substitute within the contract, and that he wanted to talk through the

options with Mr Kitchen (who had already left BCAL's employment by this time). EJ Meichen found Mr Dugmore's behaviour in this regard to be suspicious. He said that it was an attempt to repair the damage caused by Mr Kitchen's query which was "contrived and unconvincing" (judgment, paragraphs 177.7 and 183). The ET found that this was not a genuine response to Mr Kitchen's query, but instead a reaction to these claims and the adverse publicity. EJ Meichen said that "This was a further factor which led me to question the reliability of Mr Dugmore's evidence."

59. In support of the contention that the substitution clause was genuine, BCAL relied upon evidence advanced by the Respondent's witnesses of what Mr Jeans KC described as "evidence of nascent interest in substitution at BCAL."

60. EJ Meichen was not impressed by BCAL's evidence of recent interest in substitution on the part of drivers. He said that the evidence for it was "extremely thin", especially when one considers that the company has operated with self-employed drivers for at least 25 years, and that the evidence relied upon only came out during the ET proceedings.

61. Mr Slammon, the Team Leader Driver Planning, said that he was aware that drivers had an absolute right to appoint a substitute. He said that a driver could simply contact the co-ordination team, provide the name of the substitute and confirm that the substitute was over 21 with a valid UK driving licence, had a right to work in the UK, and had been fully trained as a self-employed driver.

62. Mr Slammon said that he had spoken to a driver, Colin Brown, about appointing a substitute. The ET did not place much, if any, reliance on this evidence, because Mr Brown did not give evidence or provide a statement and the ET was not referred to any documentary evidence of this enquiry.

63. Mr Khan, the former driver called by BCAL, said that he was aware that as a driver he could appoint a substitute. He did not ever do so, but he knew that if he had wanted to he could have contacted the co-ordination team, and he said that his substitute could have used his equipment and trade plates.

64. The key evidence in support of the contention that substitution was a genuine contractual term came from Mr Dugmore. He said that the drivers had a completely free right to use a substitute and that the company had no right, or desire, to prevent them. He said that the only request BCAL would make would be for the drivers to ensure that their substitute was qualified to carry out the services in accordance with the obligations placed on BCAL under the SLAs and UK legislation. EJ Meichen observed that it was not clear how such qualifications could be assessed or checked in practice. Mr Dugmore did not suggest that BCAL would provide any training for the substitute. Rather, the drivers would be responsible for ensuring that the substitutes had been fully trained on how to carry out the services, and for ensuring that they were over 21, had a UK driving licence for at least three years, and had the right to work in the UK. Mr Dugmore said that it would be the responsibility of the driver to ensure that the substitute performed the duties and it was the responsibility of the driver to pay them for it. Mr Dugmore said that the company would have no contact or relationship with the substitute whatsoever.

65. The ET did not accept Mr Dugmore's evidence that the company would be willing to have no contact with the substitute (paragraph 170). As the substitute would be driving and inspecting the customer's vehicles, using BCAL's trade plates, and using BCAL's trade insurance, it was unrealistic to suggest that BCAL would be content to have no relationship whatsoever with the subject.

66. Mr Dugmore gave evidence of two occasions on which drivers had enquired about appointing a substitute.

67. The first was in October/November 2021, when a driver, Kieran Pratt, had asked for and been given permission to appoint a substitute, Ramiska Siriwardena. The request had been referred directly to Mr Dugmore. Mr Dugmore gave permission and confirmed on 12 November 2021 that Mr Siriwardena was insured on the company policy and a set of trade plates would be sent out to him. In fact, Mr Pratt never used Mr Sirwardena as a substitute.

68. EJ Meichen was sceptical about this evidence. There was no explanation as to why the request needed to be referred directly to the Head of Operations. Mr Pratt did not himself give evidence. There was no evidence as to why Mr Pratt went to all this trouble but then never used the substitute, or whether, and if so how, he trained Mr Siriwardena. There was no evidence about how Mr Pratt or BCAL assessed Mr Siriwardena as being qualified to carry out the services in accordance with the company's responsibilities under the SLAs and UK legislation.

69. The second case referred to by Mr Dugmore was that in February 2022 a driver, Hussein Mohamed, had raised a query about appointing a substitute called Ahmed Hussain. This was again passed to Mr Dugmore. Mr Dugmore spoke to Mr Mohamed on 24 February 2022 and told him what he needed to do to appoint a substitute, including the necessary training. In the event, Mr Mohamed did not appoint a substitute. There was no evidence as to why.

70. Neither Mr Pratt, Mr Mohamed, Mr Siriwardena, nor Mr Hussein provided evidence to the ET.

71. The ET decided that the responses provided to Mr Pratt and Mr Mohamed did not reflect reality. EJ Meichen pointed out that these apparently positive responses to substitution enquires came only after the litigation had started and, indeed, only after Mr Dugmore had learned of the negative response received by Mr Kitchen to his enquiry. There was no explanation as to why these queries were escalated to Mr Dugmore. In any event, there was still no evidence of a positive response to a substitution request in the period of over 25 years before the proceedings were commenced (judgment, paragraphs 171-174).

72. Mr Dugmore also gave evidence about the position relating to equipment and trade plates, which the ET did not accept. Mr Dugmore said that drivers would have been free to pass all of the equipment provided to them by BCAL to a substitute to use, including trade plates. The ET did not see how this could be done. The ID badge is unique to the driver. If it was seriously intended to

permit substitutes to be used, BCAL would have made arrangements to provide them with their own ID badges. As for trade plates, Mr Dugmore acknowledged that they are issued by BCAL to a specific self-employed driver so that the company knows where the trade plates are being held under the terms of its licence with the DVLA. However, he said that trade plates may be used by a substitute appointed by a driver. EJ Meichen did not accept this evidence (paragraphs 190-191). He did not think that BCAL would realistically be content for the trade plates to be passed to a substitute, as BCAL would lose any control over them. This was inconsistent with what drivers were told, "Trade plates must remain with you at all times". A trade plate was offered to Mr Pratt's proposed substitute, and it was not clear why this was done if Mr Dugmore was right that the substitute could use the driver's trade plates.

73. Once again, the ET did not accept Mr Dugmore's evidence about the position relating to insurance (paragraphs 192-196). Mr Dugmore first suggested that a substitute could be insured under the driver's own insurance, but in practice all drivers used BCAL's trade insurance (and paid a weekly fee for doing so). Mr Dugmore's second suggestion was that a substitute could be added to the company's group insurance, which happened when Mr Pratt asked to use a substitute. However, as EJ Meichen pointed out, Mr Siriwardena was only added to the group insurance after the ET proceedings had begun. The insurer had agreed to do this only on the basis that the substitute was subject to the usual self-employed driver checks and procedure, and once the substitute had been "approved" by BCAL, but BCAL's evidence before the ET was that these checks and procedures were not going to be applied to substitutes, and there would be no process for approval of the substitute – the arrangements would be much more informal. EJ Meichen said that Mr Dugmore was not able satisfactorily to explain how a substitute would be working under BCAL's control, and the EJ concluded that BCAL had explained the system of substitution differently to the insurers from how it was explained to him. There was no adequate system in place for ensuring substitutes were insured.

74. There was another matter in respect of which the ET noted that no arrangements had been made for substitutes. Drivers were required to undertake to BCAL that they would comply with data protection legislation. This was to provide protection in respect of data concerning BCAL's customers that would come into the possession of drivers. Drivers were trained in data protection and gave certain undertakings. There were no arrangements in place for substitutes to give similar undertakings, or to receive similar training.

75. The ET dealt with a further matter that was relied upon by BCAL in relation to substitution. This was a telephone call on the first day of the ET hearing, 30 January 2023, between a driver, Samantha Kinsey, and a Driver Operations Team Leader, Owen Goulding. Neither Ms Kinsey nor Mr Goulding gave evidence. However, the ET was given a transcript of the telephone call that took place after Mr Goulding called Ms Kinsey back, following a call from Ms Kinsey to her co-ordinator. The call was first drawn to the attention of the ET by BCAL on the basis that it was evidence of a substitution enquiry. However, on analysis it became clear that this was not what it was: rather, Mr Goulding had made the call after Ms Kinsey had raised concerns about having insufficient time to do the volume of work she had been provided with. There was a discussion between them about working in teams with other drivers, or sub-contracting work to other drivers. Mr Goulding then suggested to Ms Kinsey, after discussing other possible solutions to her workload problems, that she might think of using a substitute. He sent a follow-up email. Later that day, Mr Goulding forwarded the email to Mr Dugmore. Once again, EJ Meichen was sceptical about this. The suggestion of a substitute had been made by the company representative, not the driver. It was on day one of the ET hearing and the email had then been forwarded to Mr Dugmore. Mr Dugmore accepted that this was because it was relevant to this case. The ET said that it was doubtful that Mr Goulding would have pushed the agenda of substitution were it not for this hearing.

76. The final evidential matter that was dealt with by the ET in relation to substitution was concerned with Mr Dugmore's evidence that "there are no restrictions as to who a self-employed

driver can use as a substitute." The ET considered that it "beggars belief" that BCAL would go to the time, trouble, and expense of thoroughly training its drivers over a 4-day course, and with ongoing feedback/updates/audits, but would then allow them to use a substitute who may have been inadequately trained or not have had any training at all. BCAL would have had no way of ensuring that a substitute provided their services in accordance with the SLAs and BCAL's customers' requirements. EJ Meichen did not think that it was realistic to suggest that BCAL or its customers would be content with this risk. This was particularly the case as drivers did not simply deliver cars; they also carried out inspections and it was of paramount importance that inspections were carried out in a way that was in compliance with BCAL's customer's expectations. If a substitute was used, BCAL would have no way of ensuring that a substitute provided services to the necessary standard. Again, the ET did not think it realistic that BCAL would be prepared to hand over its equipment, some of which was valuable, to a substitute it had no relationship with and knew very little about. Still further, a substitute would be provided with the customer's car, which may be of high value, and may have to store the car overnight. If the car was lost, stolen, or damaged, BCAL would know very little about the substitute. All BCAL would have would be a name and address and a copy of a driving licence which had not been checked or verified. Once again this was not realistic; it was too risky.

77. EJ Meichen put these risks to Mr Dugmore. Mr Dugmore's response was that BCAL was willing to take the risk. The EJ did not accept this evidence. He took the view that it was another assertion which did not reflect the reality of the situation.

The Grounds of Appeal

(1) The ET erred in law in supposing that it was for BCAL to call current or recent drivers as witnesses, and thereby placed a false burden on BCAL; and/or the ET erred in law in drawing adverse inferences or conclusions from BCAL's not calling current or recent drivers as witnesses

The submissions on behalf of BCAL

78. This ground is centred upon the "striking gap" observation, made by the ET at paragraph 14 of its judgment (set out at paragraph 21, above). The ET said that a striking gap in BCAL's evidence was that the company did not call any witnesses who were current drivers or who had recently been engaged. The only driver whom BCAL called was Mr Khan, who had only been a driver for about six months, some five years previously.

79. Mr Jeans KC submitted that this was an error of law, because it means that the ET was saying that BCAL ought to have called Claimants or potential Claimants as their own witnesses, and because the ET took this into account as a factor that undermined the company's argument on substitution, and drew an adverse inference against the company because it had not done so. This was a misdirection as regards the circumstances in which it is legitimate to hold the absence of a witness against a party. Mr Jeans KC said that this error was a remarkable one, because all drivers or recent drivers were actual or potential Claimants, and a respondent cannot realistically be expected to call as a witness those who are or who might be a claimant, or who have a competing interest with their own. They cannot be expected to give helpful evidence, and the rules of evidence mean that BCAL's counsel would not have been able to cross-examine them if they gave unhelpful evidence. In any event, Mr Dugmore had given evidence that, though there were drivers who were supportive of BCAL's position, they had declined to give evidence out of fear.

80. It was submitted that this error was compounded by the fact that the ET had not told BCAL at the hearing that it was minded to hold the supposed failure to call such individuals against the company. This meant that BCAL had no opportunity to deal with a fundamental error in what proved to be the ET's starting point for analysing the case. Mr Jeans KC submitted that the ET had erred, because parties must be put on notice of important points which may be taken against them. Moreover, the point about drivers being unwilling to give evidence for BCAL because of fear of the consequences was not developed at the hearing because the Claimants had not taken the position that

BCAL should have called some current or recent drivers, whether on the substitution issue or at all, and the ET had not indicated that this was a matter it was interested in Moreover, there was no suggestion that the witnesses who gave evidence for the Claimants were the ones who had put others in fear, and so there was no scope for BCAL's counsel to cross-examine them about it.

81. Still further, Mr Jeans KC submitted that, by expecting such evidence to be called by BCAL and by treating its absence as a "striking gap" in BCAL's case, the ET had placed a false burden on BCAL's case and so approached BCAL's case incorrectly in law. This infected the ET's approach to the evidence in Mr Dugmore's witness statement that Mr Mohamed's request to appoint a substitute had received a favourable response and that Mr Pratt's request to appoint a substitute had been actioned. The ET explicitly noted the absence of witness evidence from the two individuals and questioned the reliability of the apparently positive responses on the part of BCAL, as they had come after the ET proceedings had started (judgment, at paragraphs 172-173). A similar approach had been taken in relation to the evidence that Ms Kinsey had expressed an interest (paragraphs 198-200). Mr Jeans KC said that this was an inversion of the true position. The ET should have held that if the Claimants wanted to challenge this evidence then it was for them to call these witnesses. BCAL could not be expected to call drivers, especially as there was documentary evidence of the positive responses.

82. Mr Jeans KC said that the error arising from the "striking gap" was a material error. This was not just an anodyne general statement about the relative value of each party's witness statement: it was an unequivocal statement that drivers should have been called by BCAL, and so there was an important part missing from BCAL's case, meaning that it was "incoherent". Mr Jeans KC emphasised the force of the word "striking".

83. Mr Jeans KC accepted that there were many factual findings against BCAL, and that weighing the competing evidence was a matter for the ET. However, he submitted that the ET had failed to conduct the necessary exercise through the correct legal framework. As he put it "the ET's focus was

distorted by using the wrong lenses." It did not just lead to an error in the way that the ET treated the evidence of Mr Pratt, Mr Mohamed and Ms Kinsey; rather it changed the lens, or prism, through which the whole case had been viewed. At another place in the skeleton argument, Mr Jeans KC used a different metaphor, "The findings here are the fruit of a poisoned tree.", and in his oral submissions he said that, by relying on the "striking gap", the EJ had "put a millstone on one side of the scale" when deciding the case. He submitted that it was impossible to say that the ET's conclusion on the genuineness of the substitution clause could not have been influenced by this "plain and serious misdirection", and, following **Jafri**, the appeal should be allowed and the case remitted for redetermination.

The submissions on behalf of the Claimants

84. Ms Monaghan KC stressed that the judgment of the ET contained very thorough and careful reasons for the conclusion that the substitution clause was not "genuine". The attack mounted by BCAL upon it has a very narrow focus, concerning a single sentence in the judgment, the one that contains the "striking gap" observation. This was contained in an early section of the judgment, entitled "This hearing and the evidence". The observation must be read in context. Read as such, it was not a self-direction by the ET at all on a matter of law, and it did not amount to the drawing of a conclusion or an adverse inference arising from BCAL's failure to call any current or recent drivers. It was simply a general observation in a section of the judgment relating to the parties' witnesses. It had to be read alongside the very detailed findings of fact that were set out later in the judgment.

85. Ms Monaghan KC submitted that there is no rule of law that governs the circumstances in which adverse inferences may be drawn from the failure to call a witness. There is certainly no rule of law that prevents the drawing of such an inference in the present case. Even if, properly understood, the ET had drawn an adverse inference, it was one that the ET was entitled to draw, and the EAT should only interfere if no reasonable ET could have drawn such an inference.

86. If, contrary to her primary submission, an adverse inference was drawn by the ET from this "striking gap", then, Ms Monaghan KC submitted, it was not perverse. Given the large number of current or recent drivers, it was indeed striking that none of them had given evidence. It was valid to infer from the absence of driver witnesses for the company (save for one who had left five years before) that this supported the Claimants' case that no-one really thought that substitution was an option. Mr Dugmore had given an explanation for this in his witness statement, in an attempt to neutralise any negative impression that might be formed. This was that there were a number of drivers who were happy with the status quo regarding "worker" status, but they were unwilling to give evidence because they were frightened of a backlash from their colleagues. However, the ET had not been impressed by Mr Dugmore's explanation.

87. As for the contention that it was an error for the ET to fail to forewarn BCAL that it was going to hold it against the company that it had not called any current or recent drivers, Ms Monaghan KC emphasised that Mr Dugmore had given evidence to explain why this had not been done: because of the fear factor. He was questioned about this, though the questioning could not go very far because he had not provided any specific information. The ET did not attach much weight to this evidence, but it shows that BCAL was aware that the ET might be interested in the fact that BCAL had not called any current or recent drivers. In any event, however, there is no rule of law that requires a party to be given advance warning by an ET before any adverse inference is drawn, or any adverse comment is made in a judgment. To do so would place an impossible burden on ETs.

88. Ms Monaghan KC submitted that it is clear from the entirety of the judgment that the ET did not place a "false burden" on BCAL. There was no indication anywhere in the judgment that the ET had improperly shifted the burden of proof onto BCAL.

89. Finally even if, contrary to the Claimants' primary submissions, there was an error of law, this is one of the class of cases in which the appeal should nevertheless be dismissed because "the error cannot have affected the result" (**Jafri**, paragraph 21).

Discussion

Was the fact that no current or recent drivers had been called on behalf of BCAL a significant consideration informing the ET's finding that the substitution clause was not "genuine", and/or was that decision based on an adverse inference resulting from this failure?

90. The foundation-stone for this ground of appeal is the "striking gap" observation in paragraph 14 of the ET's judgment. In my view, this observation cannot bear the weight that is sought to be imposed on it by the arguments on behalf of BCAL. This ground of appeal is based upon the proposition that the "striking gap" observation shows that the ET fell into error by taking the fact that no current or recent drivers were called by BCAL into account as a factor in its decision to find against the company on the substitution issue, when it was an irrelevant or improper consideration, and/or that the observation amounts to the drawing of an adverse inference by the ET. In my judgment, it is neither. Nor was it some form of misdirection. Reading the judgment as a whole, and reading the section of the judgment in which the observation appears as a whole, it is clear that this was no more than a passing comment, which had no impact upon the outcome of the case. It was, as Ms Monaghan KC put it in her submissions, a remark upon the obvious.

91. The "striking gap" comment appears in a section of the judgment which is headed, "This hearing and the evidence." In this section, EJ Meichen described the length of the hearing and the number of documents that were presented to the ET by the parties. He then listed the seven witness statements that had been relied on by the parties, and explained that he had decided to admit Mr Kitchen's statement, notwithstanding that Mr Kitchen did not attend to give oral evidence. He gave reasons for this decision. The EJ then went on to make some general comments about the credibility of the Claimants' witnesses' evidence and the credibility of the evidence put forward on behalf of BCAL, and, in particular, Mr Dugmore's evidence. It was in this context that he referred to the "striking gap" in that BCAL did not call any current or recent drivers. He then went on to say that he would explain, later in the judgment, why he was impressed by the evidence on behalf of the

Claimants, and was unimpressed by Mr Dugmore's evidence. The EJ then dealt with the evidence from Mr Dugmore to the effect that the company had been faced with difficulties in persuading drivers to give evidence for it, even though they were content with their non-worker status, because they were fearful of a backlash. The EJ said that he did not attach much weight to it, because he had not been given any specific information about the basis for the alleged fears, or who had been fearful. Then the ET went on to deal with another issue relating to the evidence, namely that BCAL had informed the Claimants' legal advisers and the ET that only incoming calls were recorded by BCAL, when this turned out not to be the case, coming to light when BCAL wished to rely upon an outgoing call to Ms Kinsey. The EJ gave reasons why he admitted this evidence.

92. The EJ never stated in terms that he was drawing an adverse inference against BCAL because of the "striking gap". The only place in the judgment at which the words "adverse inferences" appear is at paragraph 25 of the judgment, a few paragraphs beyond the "striking gap" observation, when the ET considered, and rejected, the proposition that adverse inferences should be drawn against Mr Dugmore because he had not informed BCAL's counsel that they were mistaken when they informed the ET that outgoing calls were not recorded. If the ET was intending to draw an adverse inference from the "striking gap", it would have said so expressly.

93. Furthermore, the EJ did not say in terms that he regarded the "striking gap" as a factor that was relevant to his decision to find in favour of the Claimants. It is clear from the judgment as a whole that there was a plethora of other reasons why the ET found against BCAL.

94. It is significant that, in the remainder of a very long judgment, the EJ never referred again to the "striking gap" point. As described above, the EJ gave very detailed reasons for his conclusion that the substitution clause was not genuine, but those reasons did not include that BCAL had failed to call as witnesses any current or recent drivers. Rather, the ET reached the conclusion that it did on the substitution point for a large number of other reasons, summarised in the seven points set out in paragraph 213 of the judgment.

95. There is no basis for concluding that, even though the judgment did not say so expressly, the ET had drawn and relied (in whole or in part) upon an adverse inference from the fact that no current or recent drivers were called by BCAL. As I have said, many of the background facts were not in dispute. They did not need inferences to decide them. Where the facts were in dispute, the reasons why the ET preferred the evidence on behalf of the Claimants had nothing to do with the fact that no current or recent drivers had been called by BCAL, or with any inferences arising from that fact. The ET was influenced, understandably, by two undisputed features of the case, namely that (1) in over 25 years, not a single driver had ever asked for or been permitted to use a substitute; and (2) there was no evidence that, at any stage over the same period, BCAL had ever made any arrangements or contingency plans for the use of substitutes. This strongly suggested that no-one really expected that substitutes would ever be used. The fact that no drivers were called as witnesses by BCAL was not relevant to either of these features. It was common ground that no driver had ever used a substitute, and so there would have been no scope for BCAL to call a witness to challenge this. There is, therefore, no basis for concluding that the failure to do so played any part in the ET's decision.

96. There was a third feature that plainly, and again understandably, strongly influenced the ET. This was that the position adopted by BCAL, and by Mr Dugmore in particular, "beggars belief". The ET took the view that it was wholly unrealistic to think that BCAL would entrust its customers' cars, and the performance of the services that BCAL had undertaken to provide to its customers to a high standard, to third parties whom BCAL did not know and had no relationship with; whom BCAL had not trained, even though BCAL required its drivers to go through a thorough training course; who would be expected to inspect cars to the customers' standards, even though BCAL had no way of knowing whether they would be competent to conduct the inspections; and who might have to store the customers' cars overnight. This would be to risk BCAL's reputation by allowing their cars to be put in the hands of complete strangers, and this ran counter to the careful way in which BCAL operates its business. Furthermore, there were a number of obvious practical difficulties about

allowing substitutes to be used and there was no evidence that BCAL had thought through or prepared for these difficulties. These included: how BCAL's trade insurance was going to cover the substitutes; how BCAL could safely entrust their trade plates to strangers; how strangers could be entrusted with the customers' data; and how strangers could be entrusted with BCAL's equipment (including ID badges identifying someone else entirety). Overall, the ET decided that it was unrealistic to suggest that BCAL would take the serious risks involved in handing over its customers' high value cars to a substitute with whom it had no contact or relationship and whom it knew very little about (the sixth point).

97. None of these matters required or involved any reliance upon, or an adverse inference from, the failure on the part of BCAL to call current or recent drivers. There was an abundance of other evidence to support the Claimants' case on the substitution issue.

98. Still further, it is clear from the judgment as a whole that the reasons why the ET preferred the evidence of the Claimants over the evidence of Mr Dugmore and the other witnesses for BCAL had nothing to do with the "striking gap" observation. Rather, the EJ found the Claimants' witnesses to be credible, and their evidence to be consistent with the contemporaneous documents and with common sense. As for Mr Dugmore, the EJ's rejection of important parts of his evidence had nothing to do with the fact that no current or recent drivers had been called to corroborate it. On each occasion when he rejected Mr Dugmore's evidence, the EJ was scrupulous to explain precisely why he did not place much if any weight on Mr Dugmore's evidence. On each occasion the reason was concerned with the detail of the evidence itself, mainly because there was no contemporaneous documentary support for what Mr Dugmore asserted or because what Mr Dugmore said made no business sense. It had nothing to do with BCAL's failure to call any current or recent drivers. So, for example:

(1) The difficulty with the assertion that other drivers had declined to give evidence for BCAL through fear was that Mr Dugmore gave no names or details;

(2) The EJ rejected Mr Dugmore's assertion that equipment was unbranded, because the evidence of the Claimant witnesses was more credible;

(3) Mr Dugmore's evidence that a driver could make themselves unavailable on any given day without notice or reasons was inconsistent with BCAL's own written training materials;

(4) Again, Mr Dugmore's evidence that drivers had negotiated increases in fees for particular jobs was inconsistent with the realities of the situation and was unsupported by any documentary evidence;

(5) Mr Dugmore's evidence that there was no practice of penalising drivers for declining to accept jobs on days that they were meant to be available was rejected because it was inconsistent with the contents of an email that Mr Dugmore himself sent;

(6) The ET rejected Mr Dugmore's evidence that the two Administrative Clerks who had been contacted by Mr Kitchen and Mr Allison about whether they could use a substitute had not raised the matter with their superiors, because it was inconsistent with what the two Clerks wrote at the time;

(7) The ET found Mr Dugmore's behaviour in contacting Mr Kitchen in May 2021 to be suspicious because his behaviour was obviously contrived;

(8) The ET rejected the most important part of Mr Dugmore's evidence, to the effect that in practice the drivers had a completely free right to use a substitute and the company had no right, or desire, to prevent them, because it was clear on the evidence that no arrangements had been made for this, and the company had plainly not anticipated that this would ever happen in real life;

(9) The ET rejected Mr Dugmore's evidence that BCAL would be comfortable with having no contact of any sort with the substitute, because it was contrary to business common sense;

(10) The ET rejected Mr Dugmore's evidence that the company would be happy for substitutes to use BCAL's equipment and trade plates because, again, this was contrary to business common sense;

(11) The ET rejected Mr Dugmore's evidence about insurance, because it was internally contradictory. At first, he had said that the substitute could use the driver's insurance, and then he said that the substitute could use BCAL's group trade insurance. Moreover, neither of the options was practicable; and

(12) Finally, the ET rejected the evidence of Mr Dugmore that BCAL would be happy to take the risk of substitutes being used because it made no business sense: it was too risky.

99. I have, perhaps, somewhat laboured the point in relation to the reasons for the rejection of Mr Dugmore's evidence. This is because they make clear, in my view, that the rejection of the Respondent's evidence was not based, either in whole or in part, upon the failure to call current or recent drivers, or upon any adverse inference arising therefrom.

100. As for the other witnesses on behalf of the Respondent, the EJ once again was sceptical about the statements of Mr Slammon and Mr Khan that they believed that substitutes could be used, because it ran counter to business sense, because there was no evidence that BCAL had ever planned for substitutes to be used, and because it had never actually happened. Once again, the fact that no current or recent drivers had been called was irrelevant.

101. As for the submission that the very use of the magnifier "striking" means that EJ Meichen must have placed great significance on the point, I do not agree. For the reasons already given, read in its context, and in light of the findings made by the ET in the main body of the judgment, the "striking gap" observation was not relevant to the ET's decision and does not have the importance that BCAL seeks to place upon it. It was a legitimate comment to make, but it goes no further than

that. It would be wrong to draw the inference from the use of the adjective "striking" that this was a matter that had an influence on the ET's decision on the substitution issue.

102. It is for these reasons that I am satisfied that the "striking gap" observation was no more than a passing comment. It was not made in the part of the judgment that dealt with the substitution issue. It was not something that featured in the ET's reasoning on substitution. It did not involve the drawing of an adverse inference.

103. Furthermore, the "striking gap" observation did not take the form of a self-direction in law. It was just an observation about the scope of the evidence placed before the ET.

104. I should add that, insofar as the "striking gap" observation was a passing comment, it was not an inaccurate passing comment: it was correct and the EJ was, in my view, entitled to make the observation that the failure to call any current or recent drivers was striking. It was, and this is why Mr Dugmore attempted to explain it away in his witness statement.

The way that the ET treated the evidence concerning the enquiries about substitution that were made by Mr Pratt and Mr Mohamed, and the interaction with Ms Kinsey

105. Mr Jeans KC submitted that it was clear from the way that the ET discounted the evidence relating to enquiries about substitution made by the drivers Mr Pratt and Mr Mohamed, who did not give evidence, that the ET was being influenced by the fact that it had not heard from current or recent drivers. Mr Jeans KC said that there was documentary evidence relating to these enquiries, and, rather than pointing out that Mr Pratt and Mr Mohamed did not give evidence, the ET should have relied on the fact that the Claimants had not called Mr Pratt and Mr Mohamed, their fellow drivers, when forming its judgment about this aspect of the case.

106. I do not accept this submission. The ET pointed out, perfectly sensibly and properly, that BCAL had not called two drivers whom it contended had expressed an interest in substitution. The

ET mentioned this as a relevant consideration when deciding how much weight to place upon this aspect of BCAL's case. It was obviously relevant to this particular issue. It would be wrong to extrapolate from the fact that the ET took into account BCAL's failure to call two specific witnesses in relation to two specific incidents which BCAL relied upon at the ET hearing to conclude that this meant that the ET had drawn a general adverse inference against BCAL because the company had called no current or recent drivers at all. In any event, the greater significance of the events relating to Mr Pratt and Mr Mohamed was whether they shed light on whether BCAL realistically expected to permit or accommodate substitutes. For the reasons given in the judgment, the ET decided that it was not appropriate to draw any conclusions from these two incidents, because they took place after the ET proceedings had commenced, and they had been referred up to Mr Dugmore. Furthermore, if anyone should have called these drivers as witnesses, it should have been BCAL. It was BCAL which was relying upon evidence that concerned them.

107. The same points can be made in relation to the ET's findings as regards the conversation with Ms Kinsey. She had not, in fact, made an enquiry about substitution, but when it was raised by Mr Goulding, Ms Kinsey said that she had discussed the possibility with other drivers. Plainly the force of this evidence would have been substantially greater if BCAL had called Ms Kinsey. The fact that the ET pointed out that this had not been done does not mean that the ET had drawn a general adverse inference against BCAL because it had not called any current or recent drivers.

The circumstances in which it is permissible to draw an adverse inference from the failure to call witnesses

108. Both parties made submissions about the circumstances in which it is lawful to draw adverse inferences from the failure by a party to call one or more witnesses. In light of my conclusion that, in this case, the ET did not draw any adverse inference against BCAL from its failure to call any current or recent drivers, this issue does not arise. Moreover, the issue has recently been considered

by the Supreme Court in **Efobi v Royal Mail** [2021] UKSC 33; [2021] ICR 1263, and so little benefit will be gained by extensive obiter dicta from me. I will, therefore, deal with it only briefly.

109. In **Efobi**, at paragraph 41, Lord Leggatt JSC, with whom Lord Hodge DPSC, Lord Briggs, Lady Arden and Lord Hamblen JJSC agreed, said:

> "41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in **Wisniewski v Central Manchester Health Authority** [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.
>
> 42. There is nothing in the reasons given by the employment tribunal for its decision in this case which suggests that the tribunal thought that it was precluded as a matter of law from drawing any adverse inference from the fact that Royal Mail did not call as witnesses any of the actual decision-makers who rejected the claimant's many job applications. The position is simply that the tribunal did not draw any adverse inference from that fact. To succeed in an appeal on this ground, the claimant would accordingly need to show that, on the facts of this case, no reasonable tribunal could have omitted to draw such an inference. That is, in its very nature, an extremely hard test to satisfy."

110. I agree with Ms Monaghan KC that the two main propositions to be derived from this passage are (1) tribunals should use their common sense in deciding whether or not to draw adverse inferences from the absence of a witness, in light of all of the circumstances, unencumbered by legal or technical rules; and (2) if a tribunal does or does not draw an adverse inference, then an appeal on that ground would only succeed if the tribunal's decision to do so was perverse – an extremely hard test to satisfy. **Efobi** was a case in which the ET had declined to draw an adverse inference from the absence of witnesses, but the same test on appeal must, in my view, apply where the complaint is that the ET

should not have drawn an adverse inference but did so. Mr Jeans KC did not challenge these propositions, though he said that assistance can still be gained from authorities on the drawing of adverse inferences from a failure to call witnesses which pre-dated the **Efobi** judgment, specifically **Wisniewski v Central Manchester Health Authority** [1998] PIQR 324 (CA), at page 340, and **Magdeev v Gaynulin** [2020] EWHC 887 (Comm), at paragraphs 149-154. It is clear from **Efobi**, and indeed from the judgments in **Wisniewski** and **Magdeev** themselves, however, that observations made by judges in those earlier cases are not to be regarded as hard-edged legal rules, and, in any event, and with respect, the observations in those cases are no more than statements of common sense principles, such as that if there is a satisfactory reason for the witnesses' absence, then no adverse inference should be drawn (**Wisniewski**).

111. I also agree with Ms Monaghan KC that if, contrary to my view, the ET in this case did draw an adverse inference from the failure of BCAL to call any current or recent drivers to support their case, then this would not have been perverse. The "striking gap" observation was fair comment. There was a very large number of drivers, with a very substantial turnover. At any time, therefore, there will also be a considerable number of recently-departed drivers. Only one, Mr Khan, gave evidence to support the company's position that it was understood that drivers could make use of substitutes if they so wished, and he had left a considerable time ago. It was not the case that all current and recent drivers, without exception, were Claimants. It was the company's position that many drivers were content with the status quo, and the company was obviously sensitive to the fact that no current or recent drivers had been called by it, because the alleged reason for it was addressed in Mr Dugmore's witness statement (and this reason was not because they were unwilling to give evidence because they did not agree with BCAL's stance on worker status). It is significant that BCAL was therefore alive to the possibility, in advance of the ET hearing, that the ET might be surprised that the company did not call any current or recent drivers as witnesses. Moreover, as again Ms Monaghan KC pointed out, the line taken in Mr Dugmore's statement, that many drivers felt that

their interests were aligned with BCAL's, and that there was a completely different reason why they were unwilling to give evidence, runs counter to the position advanced in this appeal that it stands to reason that all current and recent drivers would be hostile to BCAL's interests in this litigation. The ET was entitled to place little weight on Mr Dugmore's evidence that drivers would have given evidence to support BCAL were it not for the fear factor, in circumstances in which Mr Dugmore gave no names or details.

The contention that the ET acted unfairly in that it did not flag up to BCAL that it was going to hold it against the company that it had not called any current or recent drivers

112. Again, in light of my finding on the first issue, this does not arise. I will deal with the point briefly, however, as I heard submissions upon it.

113. Mr Jeans KC said that there were no suggestions anywhere in the submissions on behalf of the Claimants at the hearing, or in questions asked by the EJ, to alert BCAL to the fact that the ET was going to take account of, or draw an adverse inference from, the failure to call any current or recent drivers. He said that the ET was under an obligation of fairness to draw to BCAL's attention the possibility that this would be held against the company, so that BCAL could make submissions about it.

114. Even if, contrary to my view, the ET had decided that the failure to call driver witnesses undermined the company's case on substitution, or was a reason for an adverse inference, I do not accept that the ET was under an obligation specifically to draw the matter to BCAL's attention. There are three reasons why I take this view. First, because the possibility that this might need addressing was obvious. If BCAL was saying that drivers were aware that they could rely on substitutes, then it would be an obvious step to call at least a few of them. Second, because BCAL was obviously alive to this, as it did call Mr Khan, who was a driver, and Mr Dugmore's statement pre-emptively gave an explanation about why the company had not called current drivers. I accept Ms Monaghan

KC's submission that BCAL was aware of the potential need to explain why it had not called any current or recent drivers, because this was specifically addressed in Mr Dugmore's statement. The company had worked this out for itself. Third, because an ET is not under a duty to alert a party to every matter which may form a part of the ET's reasoning, however minor, so as to give the party an opportunity to make specific representations upon it. Mr Jeans KC referred to a number of authorities which he said show that parties must be put on notice of important points which may be taken against them, **Neale v Hereford and Worcester County Council** [1986] ICR 471 (CA), especially at 486D-F; **Laurie v Holloway** [1994] ICR 32 (EAT), at 36H-38E, and **Launahurst v Larner** [2010] EWCA Civ 334, especially at paragraphs 19-20. In each of those cases, however, the ET had relied upon a completely new and decisive issue which had not been raised by the parties and had not been drawn to the losing party's attention: in **Neale**, procedural defects in the process leading to dismissal that had not been suggested or relied upon by the claimant's counsel; in **Laurie,** a finding that the contract of employment was illegal; and in **Launahurst**, that the key contract term was a sham. These authorities are not authority for the proposition that an ET is under a duty to draw the parties' attention to every point that had an impact upon the ET's decision, however minor. It is clear that this is not necessary: see **Stanley Cole (Wainfleet) Ltd v Sheridan** [2003] EWCA Civ 1046; [2003] ICR 1449, at paragraphs 29-34, per Ward LJ, and 49, per Buxton LJ (a case concerning a complaint that the ET relied upon an authority that had not been drawn to the attention of the parties). In the present case, even if, contrary to my view, the "striking gap" observation had any impact at all upon the ET's decision, then at most it was a minor issue. There were many more far more important reasons why the ET found that the substitution clause was not "genuine".

115. Mr Jeans KC also submitted that the ET erred in that it failed to identify the precise adverse inference or inferences that it drew. There is a good reason for this, namely and simply that the ET did not draw any adverse inference or inferences from the failure to call current or recent drivers.

Indeed, the very fact that the ET did not identify any precise inferences to be drawn is a further sign that it did not draw any adverse inferences from the "striking gap".

The "false burden" submission

116. In my judgment, with respect, this is just another way of putting BCAL's main argument that the ET wrongly held it against the company that the company had not called any current or recent drivers. There is no suggestion anywhere in the ET's judgment that it fell into the trap of shifting the legal or evidential burden of proof so as to place it upon BCAL, and there is no basis for inferring that this was done.

117. Furthermore, I do not accept that the ET's view of the "striking gap" in any way infected the ET's approach to the evidence in Mr Dugmore's witness statement that Mr Mohamed's request to appoint a substitute had received a favourable response and that Mr Pratt's request to appoint a substitute had been actioned, or the ET's approach to the evidence relating to Ms Kinsey. This was evidence about discrete events. It was entirely appropriate for the ET to note that none of the protagonists in these matters, which were raised and relied upon by BCAL, had been called by the company to give evidence (a point that had been made by BCAL in relation to Mr Kitchen and Mr Allison's evidence). The ET gave a full explanation about why it was sceptical about these parts of BCAL's case, as summarised above. This was not limited to the fact that the main protagonists were not called. It was not the responsibility of the Claimants to call the named individuals to give evidence on these matters, simply because they happened to be drivers. It was the company which sought to rely upon these matters. It was their case that would potentially have been strengthened if direct, rather than second-hand, evidence had been given about them. It was a matter for argument as regards how significant the failure to call the individuals was, but I do not accept that the ET was bound to take the view that BCAL could not be expected to call drivers.

118. Even if the ET had drawn an adverse inference from the failure to call current or recent drivers, this would not amount to a shifting in the burden of proof (cf **Efobi**, paragraph 40).

If there was an error, was it "material", such that it amounted to an error of law?

119. The judgment in the present case was exhaustive, thorough, and very carefully-reasoned. The EJ correctly directed himself on the law, and he dealt comprehensively with the evidence. He considered each of the points made on behalf of BCAL and explained why he rejected them. It was, in my opinion, a very impressive judgment. For the reasons that I have explained, I think that the criticisms that have been made of the "striking gap" observation are unfounded, but, even if, contrary to my view, the comment was inapt or inelegant, or the use of the words "striking gap" was unnecessary or exaggerated, it is nothing more than that, and this is nowhere near enough to justify allowing an appeal against this judgment. Even if there was a minor error, this did not mean, as Mr Jeans KC submitted, that the ET approached the whole case on substitution in the wrong way, looking at things through the wrong lens, or that it wrongly drew an adverse inference, or that it misdirected itself in law, or that the ET's findings of fact were the fruits of a poisoned tree. In a well-known passage in **Brent London Borough Council v Fuller** [2011] EWCA Civ 267; [2011] ICR 806 (CA), Mummery LJ said, at paragraph 31:

> "The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. 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 the decision is written; focusing 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."

120. Even if, contrary to my view, it would have been better if the "striking gap" observation had not been made in the ET's judgment, in my judgment it did not amount to an error of law which required the ET's judgment to be set aside on appeal. At most, it was just a minor slip.

121. This does not amount to the conclusion that, even if there was an error of law in the ET's judgment, this is one of the exceptional class of cases in which the EAT should nonetheless decline to allow the appeal and to remit the case, because there was only one possible outcome (the **Jafri** issue). Rather, I mean that, even if, contrary to my view, valid criticisms can be made of the "striking gap" observation, it did not amount to an error of law. I will deal separately, and briefly, with the **Jafri** issue at the end of this judgment.

(2) The ET erred in law by discounting evidence of interactions about substitutions on the basis that the evidence was obtained with the litigation in view

The submissions on behalf of BCAL

122. Mr Jeans KC submitted that evidence that drivers were in fact interested in making use of a substitute, and that one had appointed a substitute, was important evidence that the substitution clause was "genuine". Mr Jeans KC said that the ET erred in law in repeatedly discounting the significance of evidence that BCAL received and responded to substitution requests and enquiries. This was the evidence that Mr Pratt had appointed and registered a substitute, that Mr Mohamed had raised an enquiry about a substitute and had received a positive response, and the evidence that Ms Kinsey had had a discussion with Mr Goulding which was partly about substitution. This evidence was supported by written records and, in Ms Kinsey's case, by a transcripted conversation. Mr Jeans KC submitted that the ET erred in law by discounting this evidence by reference to its finding that BCAL, and, in particular, Mr Dugmore, had been seeking to obtain evidence to assist BCAL's case.

123. Mr Jeans KC submitted that even if the ET was entitled to find that Mr Dugmore was keen to collect evidence to support BCAL's defence, and the collection of this material reflected this objective, the question arises, so what? It is still highly material evidence.

124. Mr Jeans KC drew an analogy with a passage in the judgment of the Central Arbitration Committee, chaired by HHJ Stacey, in the **Deliveroo** case. At paragraph 81 of the judgment, when

dealing with evidence about a delivery rider who had passed a job to a fellow driver in mid-job, without any operational need to do so, the CAC said:

> "It does sound a little surprising but even if the whole situation was crafted to provide an example of mid-job substitution, it effectively demonstrates the capacity of a Rider to do such a thing, should they want to".

125. Mr Jeans KC said that the approach of the CAC was right in law, and that it reflected the correct position, which was that it was not necessary to show that substitutions had actually taken place. The real question is what would have happened if a substitution enquiry had been raised through proper channels. He submitted that, in the present case, the EJ misdirected himself in law as to the requirement of "genuineness" in discounting this material.

The submissions on behalf of the Claimants

126. On behalf of the Claimants, Ms Monaghan KC submitted that it is not the case that the ET "discounted" the evidence about substitution enquires. Rather, the ET considered and explained its view of the significance of each of them, and gave reasons for attaching little weight to them. These were factual findings which the ET was entitled to make. The ET was entitled to conclude that BCAL would not have responded to those enquiries as it did, were it not for the litigation. This conclusion did not stand on its own, but was inter-connected with the ET's findings in relation to the other "threads" of evidence which pointed away from the genuineness of the substitution clause.

Discussion

127. I accept Ms Monaghan KC's submissions. There is no support in the ET's judgment and reasoning for the conclusion that the ET erred in law in relation to the test for the "genuineness" of a substitution clause. The ET set out the relevant law carefully and accurately. The ET was plainly entitled to find that the evidence of recent interest in substitution on the part of drivers was "extremely thin". There were two occasions, after the ET proceedings had begun, when drivers (Mr Pratt and

Mr Mohamed) had enquired about the use of substitutes. Neither actually used a substitute, and neither gave evidence before the ET. On each occasion, the enquiry was escalated to Mr Dugmore, a senior manager. The EJ gave reasons why he was sceptical about these events, at paragraphs 168-171. Mr Slammon gave very vague evidence about an enquiry about substitution by another driver, Mr Brown. There was no documentary evidence about this, and Mr Brown did not give evidence. As for the interaction with Ms Kinsey, it became clear during the hearing that she had not asked about substitution: this was something that was raised with her by her Team Leader, Mr Goulding, who then forwarded his email to Mr Dugmore. The ET did not "discount" this evidence in the sense of overlooking or ignoring it. Rather, the ET considered that the evidence did not support the conclusion that, in the ordinary course of events, and even without the existence of the proceedings, BCAL would have looked favourably on requests for substitution. It was not strong evidence that drivers were genuinely interested in or expecting to make use of substitutes. BCAL may not be happy with this conclusion, but it does not contain an error of law. It was a legitimate conclusion for the ET to reach, based on findings of fact made by the ET. It was not perverse. As Ms Monaghan KC pointed out, it was only one of many considerations that led to the conclusion that the substitution clause was not genuine. It was not, as BCAL submitted, a misdirection as to the requirement of "genuineness". It was not, as Mr Jeans KC said in his oral submission, "an error of law to discount Mr Dugmore's evidence because of his motive for gathering it." It was not a self-direction of law at all. It was a conclusion based on the facts. Mr Jeans KC's submissions on this ground were, in reality, an attempt to reargue the case below, by inviting the EAT to place greater weight on one particular aspect of the evidence than was placed on it by the ET.

128. The reference to a conclusion in **Deliveroo** does not assist BCAL. That was a conclusion reached on the facts in a different case. The observation in **Deliveroo** does not establish some sort of principle of law of general application.

If there is an error or errors of law by the ET, should the ET's ruling nonetheless be upheld because there was only one possible outcome?

129. I heard extensive argument on the question whether, if I found that the ET had made an error or errors of law, I was obliged to remit the case to the ET or whether I could, nevertheless, uphold the ET's decision. I was referred to the well-known authorities of **Jafri** (citation above); **Burrell v Micheldever Tyre Services Ltd** [2014] EWCA Civ 716; [2014] ICR 935; and **De Souza v Vinci Construction UK Ltd** [2017] EWCA Civ 879; [2018] ICR 433. In **Jafri**, the Court of Appeal held that if the EAT detected a legal error by the ET, it had to remit the matter, unless either it concluded that the error could not have affected the result and was therefore immaterial, or, though the result would have been different without the error, the appeal tribunal was able to conclude what the result would have been, and, in either case, the result had to flow from findings made by the employment tribunal, supplemented (if at all) only by undisputed or indisputable facts; that the appeal tribunal was not to make any factual assessment for itself, or any judgment of its own as to the merits; that in any case where, once the employment tribunal's error of law was corrected, more than one outcome was possible, it had to be left to the tribunal to decide what the outcome should be, however well placed the appeal tribunal might be to take the decision itself (per Laws LJ at paragraph 21, Underhill LJ at paragraph 45, and Sir Timothy Lloyd at paragraph 48). This approach was followed by Maurice Kay LJ in **Burrell** (paragraphs 19-20). Maurice Kay LJ said that, provided it is intellectually honest, the EAT can be robust, rather than timid, in deciding whether there could only be one outcome. In **De Souza**, at paragraph 52, referring to the **Jafri** principle, Underhill LJ said that the EAT can refrain from remitting if the outcome is "clear beyond argument". Parties can consent to the EAT disposing of the case without remission (**Burrell**, paragraph 20).

130. If I had been persuaded by Mr Jeans KC that there was indeed an error or errors of law which had tainted the entirety of the ET's reasoning and conclusions on substitution, because it meant that the ET's focus in relation to the "genuineness" issue had been distorted as the ET had used the wrong

lenses, then I would have felt compelled to allow the appeal and remit the case to be re-determined by the ET. I would have done so with very considerable reluctance, because in my view, in light of the findings of fact, the EJ was almost certainly right to say, at paragraph 222 of the judgment, that this was not "an uncertain, marginal or borderline case". Mr Jeans' KC's argument was, however, that there was a fundamental error which did, or at least might have, affected the entirety of the ET's reasoning. If I had accepted this argument, I would have been obliged to remit.

131. However, in light of my decision that there was no error of law on the part of the ET, the question of whether, notwithstanding the error or errors of law, the judgment should be upheld, does not arise.

The scope of a rehearing if the appeal had been successful

132. If the appeal had been successful, and I had decided to remit the case, I would have had to consider the parties' respective submissions about the nature and scope of the remission. The EAT can determine the scope of remittal and can also decide whether to remit to the same or a different ET (**Burrell**, paragraph 20). Mr Jeans KC submitted that, whilst he did not criticise EJ Meichen (and, indeed, complimented the way in which he had presided over the hearing), the case should be remitted to a different EJ, as it was unrealistic to expect the original EJ in circumstances such as these to come back to a remitted hearing with a fresh perspective. He said that there should be a full rehearing. Ms Monaghan KC submitted that the case should be remitted to EJ Meichen and that its scope should be limited to the "genuineness" of the substitution clause. There was also argument about the scope of the evidence that should be heard on a re-hearing, and about whether I should give directions on this matter, or whether it should be left to the ET. Mr Jeans KC submitted that the ET on a remitted hearing should hear fresh evidence and, in particular, that it should hear evidence about events since the first ET hearing in January-February 2023. Mr Jeans KC asserted in his skeleton argument and in oral argument that, since the hearing in January-February 2023, substitution has become commonplace. There was, of course, no evidence of this before me, one way or the other, because

it was not relevant to the grounds of appeal. Mr Jeans KC did not suggest that this gave rise to a ground of appeal or that it was a reason to impugn the ruling made by the ET in May 2023. The EJ rightly, and with the agreement of the parties, had based his decision on the position as it applied on day one of the ET hearing, 30 January 2023. Mr Jeans KC accepted that if the case were remitted, the question of "genuineness" should once again be determined by reference to the position as at 30 January 2023. However, he said that evidence to the effect that, since that date, a large number of drivers had made use of substitutions on a large number of occasions would be relevant evidence of the position as at that date. Mr Jeans KC submitted that, if the appeal was successful and the case remitted, I should direct the ET that it should allow the parties to adduce evidence of events after 30 January 2023. Ms Monaghan KC accepted that, in principle, evidence of substitutions in practice after 30 January 2023 (if there was such evidence), may well be relevant evidence at a remitted hearing, but that it would be inappropriate and premature for the EAT to give directions about it to the ET. It was impossible to know, at this stage, what form the evidence might take, or what relevance, if any, the evidence might have, or whether there may be issues regarding admissibility. The question of the scope of the evidence to be admitted at a remitted hearing should be a matter to be determined by the ET which deals with the remitted hearing.

133. Plainly, as I am not allowing the appeal, and I will not be remitting the case back to the ET, I do not have to decide these matters. I express no view as regards whether it would be more appropriate to remit the case back to EJ Meichen or to another EJ, but I will say that, if I had decided that remission was to take place, I would have stipulated that evidence and argument should be limited to the issue of "genuineness" of the substitution clause. I agree with Ms Monaghan KC that, if there were to be remission, it should be a matter for the ET to decide on matters relating to evidence, including scope and admissibility. Whilst I agree with both parties that, in principle, evidence of the use of substitution, or conversely that substitution was rare or non-existent, in the period since the hearing in January-February 2023 would be relevant evidence, there may be issues of scope or

admissibility which are not presently apparent. It would be wrong for the EAT to tie the hands of the EJ. If, in the counter-factual circumstances in which I allowed the appeal and remitted the case, the EJ admitted such evidence, it would be for the EJ to decide upon the significance and impact of such evidence (if any).

Conclusion

134. This was an impressive judgment, encompassing accurate self-directions of law, clear findings of fact that were based on the evidence, and conclusions drawn from the findings of fact which were not only rational but, in my view, were more or less inevitable. The ET gave detailed reasons for its findings of fact and for the conclusions based upon them. In my opinion, the ET did not fall into any error.

135. For these reasons, and notwithstanding the attractive way in which BCAL's arguments were advanced by Mr Jeans KC, the appeal is dismissed.