Appeal No. UKEATPA/0807/16/DA

Case No. UKEAT/0056/17/DA

IN THE EMPLOYMENT APPEAL TRIBUNAL

BETWEEN:

1. UBER B.V.

2. UBER LONDON LIMITED

3. UBER BRITANNIA LIMITED

Appellants

AND

1. YASEEN ASLAM

2. JAMES FARRAR

Respondents

RESPONDENTS' SKELETON ARGUMENT

FOR FULL HEARING ON 27 & 28 SEPTEMBER 2017

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1. In accordance with convention the Respondents are referred to as they were before the Employment Tribunal (as Claimants *or* Cs). The Appellants are referred to as Uber (collectively), or UBV and ULL as appropriate. References in square brackets are to page numbers in the appeal bundles; references preceded by 'SB' are to pages in the agreed Supplementary Bundle.

2. In considering this appeal, the EAT is respectfully reminded of the remarks of Lord Denning MR in Hollister v National Farmers' Union [1979] ICR 542 at 552 - 553:

'In these cases Parliament has expressly left the determination of all questions of fact to the [employment] tribunals themselves…. It is not right that points of fact should be dressed up as points of law so as to encourage appeals. It is not right to go

through the reasoning of these tribunals with a toothcomb to see if some error can be found here or there—to see if one can find some little cryptic sentence.'

3. More recently, in ASLEF v Brady [2006] IRLR 576, at para. 55, Elias J held:

'The EAT must respect the factual findings of the employment tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not "use a fine toothcomb" to subject the reasons of the employment tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the tribunal has essentially properly directed itself on the relevant law.'

4. Similarly, in Fuller v London Borough of Brent [2011] ICR 806, at para. 30, Mummery LJ said:

'The employment 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.'

Finding 1

Ground 1 - the written contract(s) and the law of agency [44]

5. At the heart of this appeal is the proposition that legal relations between the Claimants and Uber are fully and properly set out in written contracts which are wholly consistent with basic principles of agency law and that the ET was therefore wrong to disregard the written contracts. The ET is criticised for failing to direct itself

properly as to basic principles of agency law[1]. Uber's case is set out, succinctly, in para. 3 of its Skeleton Argument dated 19 January 2017 ('the Skeleton') [52]:

'The Tribunal should have found that when a driver has confirmed his willingness to take a particular trip through the Uber application ("the App"), ULL accepts the booking on his behalf and the driver then provides services directly to the passenger he transports pursuant to a contract between driver and passenger. The driver is in no sense in an employment relationship with Uber. Rather, Uber acts as the driver's agent, in referring passengers to him and in handling the collection of fees and related matters, for the provision of which services it receives payment in respect of each trip.'

6. The point is developed in para. 17 of the Skeleton [56]: *' … as a matter of law, an agent with appropriate authority can bind his disclosed but unidentified principal to carry out a particular task for a third party'* (although, as the Claimants understand it, Uber does not argue that it does so - its case is that drivers are not bound to accept any particular job offered to them, see the Grounds of Resistance at para. 10 [188] and the ET Reasons at para. 15 [4 – 5]).

7. A relationship of agency is created by the express or implied agreement of principal and agent, see *Halsbury's Laws of England*, Vol. 1 (Agency) at para. 1(4)(i). Express agency is created where the principal, or some person authorised by him, expressly appoints the agent, whether by deed, by writing under hand, or orally. Implied agency arises from the conduct or situation of the parties, or by operation of law, for example from necessity.

[1] The Claimants note that no reference was made to *Bowstead & Reynolds on Agency* or to any other text or any of the authorities on agency now relied on, in either Uber's Opening Skeleton or Closing Submissions to the ET. The parties' skeleton arguments and closing submissions to the ET are not in the appeal bundles but can be made available if required.

8. Uber's case on the appeal is that there is an agency agreement between it and its drivers and, moreover that agreement is to be found in the written contracts, rather than having been made orally or inferred from conduct.

9. In passing, the Claimants note that in VAT Notice 700/25 at para. 3.4 HMRC advises private hire vehicle operators that: *'Whether you are acting as an agent depends on the terms of any written or oral contract between you and the drivers, and the actual working practices of your business.'* VAT Notice 700 (a different publication, most recently updated on 11 August 2017) states: *'To act as an agent, you must have agreed with your principal to act on their behalf in relation to the particular transaction concerned. This may be a written or oral agreement, or merely inferred from the way you and your principal conduct your business affairs. Whatever form this relationship takes: it must always be clearly established between you and your principal …'*

10. The Claimants agree.

11. Uber's pleaded case is that there are in fact <u>two</u> agency relationships to be considered. First, it is said that drivers are sent bookings *'that are accepted on their behalf as agent by [ULL] as holder of the relevant private hire vehicle operator licence'* ([188] para. 8). Second, UBV is the drivers' *'limited payment collection agent solely for the purpose of collecting the fare from the Rider'* [188] para. 9.

12. So, ULL is said to be the drivers' agent when it comes to making the booking and UBV is said to be the drivers' agent when it comes to collecting the fare. In its Skeleton at para. 3 [52] Uber elides the two. It is simply asserted that: *'Uber acts as the driver's agent, in referring passengers to him and in handling the collection of fees and related matters …'*. To like effect see:

    a. Para. 9.2 [53-54] where it is asserted that "*Uber*" acts as the driver's agent in procuring the passenger / driver contract.

b. Para. 21 [57] *'… drivers contract <u>with</u> passengers, <u>through</u> Uber as agent.'* (emphasis in original).
c. Para. 25 [59-60] which refers to *'… the possibility of the driver contracting with passengers, via Uber as his agent.'*

13. The 'Booking Services' provided to passengers by Uber, purportedly as agent for the driver[2], are set out in the UK Rider Terms[3] (SB[42]) and are listed in para. 28 of the ET Reasons [7]. They include:

a. The acceptance of Private Hire Vehicle bookings;
b. Allocating bookings to drivers;
c. Keeping a record of each accepted booking;
d. Monitoring the performance of each booking;
e. Dealing with feedback and complaints; and
f. Managing lost property queries.

14. The insuperable difficulty faced by Uber in this appeal is that it cannot point to any document in, or by which, the Claimants, as purported principals, expressly appoint and authorise Uber (that is UBV or ULL) to act as their agent, other than for the limited purpose of collecting payment. In fact, clause 13.1 of the New Terms (SB[27]) provides:

'Except as otherwise expressly provided herein with respect to Uber[4] acting as the limited payment collection agent solely for the purpose of collecting payment from Users on behalf of Customer, the relationship between the parties under this Agreement is solely that of independent contractors. The parties expressly agree that: … (b) no joint venture, partnership or agency relationship exists between Uber and Customer or Uber and any Driver.'

[2] See the definition of 'Booking Services' in the Rider Terms at SB[40].
[3] Drivers are not party to the Rider Terms which are made between Uber and users of the App i.e. passengers.
[4] which in the New Driver Terms means UBV SB[14].

15. Save in respect of the collection of fees, the New Terms are not couched in the language of agency. The terms 'principal' and 'agent' do not appear and instead drivers are described as 'Customers' desiring to enter into the agreement for the purpose of accessing and using Uber services (SB[14]). As a general rule Uber in fact prohibits contact between driver and passenger after the end of a trip and prohibits drivers from exchanging contact details with passengers: see the ET Reasons at paras. 49 and 50 [15]. This is wholly inconsistent with Uber merely acting as the drivers' agent.

16. Furthermore, whilst a principal can confer a discretion on his agent, *Bowstead & Reynolds on Agency* ('*Bowstead'*) notes, at para. 6-037, that:

'…the fact that an agent has a power to alter his principal's legal position makes it appropriate and salutary to regard the fiduciary duty as a typical feature of the paradigm agency relationship."

Halsbury's puts the point slightly differently but, for present purposes, to much the same effect:

'35. Agent's discretion.
In the absence of express directions, the agent may exercise his discretion so as to act in the best manner possible for his principal.'

17. In either case, it is plain that Uber/ULL does not act in the best interests of the Claimants when, for example, resolving passenger complaints. In fact Uber can and does agree (with passengers) to discount fares without even making reference to drivers, SB[124] is an example.

18. When allocating bookings, Uber deliberately does not tell the driver the destination and strongly discourages drivers from asking passengers the destination before pick up (so that drivers are not able to decline a booking because they do not wish to travel to that destination); see the finding of facts at paras. 15 & 16 of the Reasons [5]

and paras. 90 & 91 [29]. Again, Uber is clearly not acting in the drivers' best interests. As Uber stated in its response to TfL's consultation on the future of private hire regulation in London (SB[102]): *'The fact that an Uber partner-driver only receives the destination for a trip fare when the passenger is in the car is a safeguard that ensures we can provide a reliable service to everyone at all times, whatever their planned journey'*, see SB[103] (foot of page)(underlining added).

Agency relationship between Cs and ULL inconsistent with pleaded case

19. Further still, Uber's pleaded case is that the Claimants have *'no contractual relationship, neither express nor implied, with [ULL]'* ([189] para. 17), a point developed in Uber's closing submissions and recorded in the ET's Reasons at para. 98 [32]: *'Mr. Reade submitted that if the drivers had any limb (b) relationship with the organisation, it must be with UBV. There was no agreement of any sort with ULL, which only exists to satisfy a regulatory requirement.'*

20. If there is no agreement 'of any sort' between the Claimants and ULL, on what basis is it now asserted that the Claimants appointed ULL to act as their agent in procuring the passenger / driver contract? Or that they conferred a discretion on Uber to monitor their performance, deal with complaints (including agreeing fare reductions), handle lost property enquiries and, crucially, set rates? Where is the evidence that the Claimants authorised ULL to introduce fees for the provision of booking services?[5]

Lack of written agency agreement fatal to ground 1 of the appeal

21. The lack of a written instrument appointing ULL to act as the Claimants' agent and conferring on ULL the powers it claims to exercise on the Claimants' behalf, is fatal to the first ground of appeal (that the ET erred in disregarding the written contracts): the written contracts are plainly not an accurate record of the parties' agreement, even on Uber's own case.

[5] Para. 5 of the Rider Terms (SB[42]) states that Uber UK reserves the right to introduce a fee for the provision of the Booking Services.

ET entitled to conclude that documents did not correspond with reality

22. The Claimants do not accept that Autoclenz v Belcher [2011] ICR 1157 is distinguishable on the ground that the provision for a direct contract between putative worker and an end-user other than the putative employer takes the present case outside the facts of that case. The *ratio* of Autoclenz (where written documentation might not reflect the reality of the relationship, it is necessary to determine the parties' actual agreement by examining all the circumstances, of which the written agreement is only a part, and identifying the parties' actual legal obligations) is not in fact confined to employment cases (as can be seen from para. 23 of the judgment of Lord Clarke and the citation of Street v Mountford [1985] AC 809, Antoniades v Villiers [1990] 1 AC 417 and Bankway Properties Ltd v Pensfold-Dunsford [2001] 1 WLR 1369 – housing cases).

23. In employment cases, the trigger for supposing that written documentation might not reflect the reality of the relationship is simply the relative bargaining power of the parties - what Lord Clarke referred to as *'the critical difference between this type of case and the ordinary commercial dispute',* see paras. 34 – 35 of his Lordship's judgment (referred to by the ET at para. 78 of its Reasons [22]). Inequality of bargaining power is plain and obvious in this case but is in any event specifically referred to at para. 96 of the ET Reasons [32] and indirectly at para. 94 [31].

24. If Uber's argument is accepted it would significantly undermine the protection afforded to workers by the Autoclenz decision. The 'army of lawyers' referred to by Elias J (as he then was) in Consistent Group Ltd v Kalwak [2007] IRLR 560 could draft contracts which provide that there is a direct contractual relationship between the putative worker and end-users (making corresponding provision in contracts with end-users) and by this simple drafting technique, avoid the consequences of an employment relationship. In the Autoclenz case, the core service being provided by the valeters was washing cars at a British Car Auction site in Derbyshire (so not on any premises owned and/or operated by Autoclenz). That could readily be characterised in written documentation as the provision of services by valeters to British Car Auctions. Contracts could easily be drafted to provide that the valeters

provided their car washing services to BCA pursuant to a contract entered into by Autoclenz on their behalf.

25. In any event, on the findings of fact made by the ET, there were numerous grounds on which to suspect that even if the written documentation gave rise to a relationship of agency, it might not reflect the reality of the relationship between Uber and its drivers. By way of non-exhaustive list of examples:

    a. Clause 2.4 of the New Terms states that: *'Customer and its Drivers retain the option … to decline or ignore a User's request for Transportation Services …. or to cancel an accepted request …'* (SB[17]) but the finding of fact made by the ET is that drivers are penalised if they decline and/or cancel too many jobs, see paras. 51 – 53 [15 – 16].
    b. Clause 2.2 of the New Terms states that: *'As between Uber and Customer, Customer acknowledges and agrees that (a) Customer and its Drivers are solely responsible for determining the most effective efficient and safe manner to perform each instance of Transportation Services'* (SB[16]) but the findings of fact made by the ET are that drivers are provided with detailed directions to the destination, may suffer adverse consequences if they do not follow those directions and Uber itself adjudicates customer complaints about the efficiency of the route taken (ET Reasons paras. 16 [5], 23 [6], 54 [16] and 92(5) [30] and see the example at SB[124]).
    c. Clause 2.2 of the New Terms also states that: *'Driver will obtain the destination from the User, either in person upon pickup …'* (SB[16]) but in fact Uber prohibits drivers from asking passengers about their destination – as the exchange at SB[136] evidences. This would be absurd if in reality the contract is one made between driver and passenger with Uber merely acting as intermediary.
    d. The New Terms expressly provide, at clause 2.3, that: *'Neither Uber nor any of its Affiliates … is responsible or liable for the actions or inactions of a User in relation to the activities of Customer, a Driver or any Vehicle'* (SB[16]). Yet as a matter of practice Uber does, in certain circumstances, accept a financial

loss resulting from a passenger's actions / inactions (ET Reasons paras. 23 – 27, [6-7]). Whilst it may be true to state (Skeleton para. 20.3 [57]) that agents, known as *del credere* agents[6], can indemnify their principal against non-payment by a third party, this has no relevance to the present case. It is no part of Uber's case that it has given such an indemnity and no evidence that it receives extra remuneration for doing so.

e. Para. 2.4 of the New Terms provides that: '*Uber and its Affiliates … do not, and shall not be deemed to, direct or control Customer or its Drivers generally or in their performance under this Agreement specifically, including in connection with the operation of Customer's business …'* (SB[17]) yet as noted above, Uber prohibits contact between driver and passenger after the end of a trip and also prohibits drivers from exchanging contact details with passengers.

26. The Claimants also rely on the decision of the Court of Justice of the European Union in Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328. One of the issues in that case was whether the claimants were "workers" within the meaning of article 141 of the EC Treaty . At para. 71 the Court stated:

'The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of article 141(1)EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.'

27. The Claimants therefore submit that the ET was entitled, on a proper application of Autoclenz, to conclude that the written documentation did not reflect the reality of the relationship and to determine the parties' actual agreement by examining all the circumstances.

[6] *Bowstead* defines a *del credere* agent as follows*: 'A* del credere *agent is an agent who, in consideration of extra remuneration, which may be called a* del credere *commission, guarantees to his principal that third parties with whom he enters into contracts on behalf of the principal will duly pay any sums becoming due under those contracts.'*

Relevance of finding that Uber provides transportation services

28. The Notice of Appeal, at para. 12 [44], challenges the finding that Uber is a supplier of transportation services and also asserts that the finding was *'irrelevant to the characterisation of the relationship between Uber and the Claimants as an employment relationship'*.

29. The latter point is developed in para. 13.2 of Uber's Skeleton [54-55]. This is surprising. Whether Uber is a transportation company or not was a live issue on the pleadings, see paras. 2 and 16 of Mr. Aslam's Grounds of Claim [94 & 96] (paras. 2 and 18 in Mr. Farrar's Grounds of Claim [125 & 127]) and the rejoinder at para. 12 of the Grounds of Resistance [189]. Whether an individual carries on a business undertaking on their own account or whether they provide their services as part of a business undertaking carried on by someone else is, to put it at its lowest, a relevant consideration. To answer that question (as it does at para. 92 of its Reasons [30]), the ET had to determine what business was in fact carried on by Uber.

30. The finding that Uber is a supplier of transportation services is a finding of fact and can only be challenged as perverse (as to which see Crofton v Yeboah [2002] IRLR 634, CA paras. 12 & 92 – 95 – an 'overwhelming case' that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached needs to be made out). The ground is not developed in Uber's Skeleton and is bound to fail.

VAT cases

31. The fact that, for the purposes of determining VAT liability, a private hire operator might act as the agent of self-employed drivers is not of any great assistance in resolving the issues that arise in this case. At para. 23 of Uber's Skeleton [58] reference is made to para. 3.3 of VAT Notice 700/25. That paragraph appears in a

section headed 'Businesses which engage drivers' and begins by describing the types of business the section covers in para. 3.1:

'This includes all businesses, whether they are a sole proprietorship, partnership or limited company, which either:

- *employ staff to drive taxis or private hire-cars*
- *take on self-employed drivers to work under a contract for services.'*

32. 'Employed staff' are likely to work under a contract of service and thus come within s.230(1)&(2) of the Employment Rights Act 1996; and drivers who work under a contract for services could well come within the definition of a worker in s.230(3)(b) notwithstanding the fact that they are self-employed, see Lady Hale in Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730, SC at paras. 24 – 25 (and referred to by the ET at para. 76 of its Reasons [21]).

33. Para. 3.3 of the Notice provides:

'… if your drivers are self-employed you may, depending on the agreements you have with them, be acting as their agent for cash work and in some cases for account work as well.'

34. Para. 3.4 notes that:

'Whether you are acting as an agent depends on the terms of any written or oral contract between you and the drivers, and the actual working practices of your business …'

The Claimants agree.

35. Para. 3.2 of the VAT Notice provides:

'If you run a business of this kind, then unless you're acting as an agent for any of your drivers for some, or all, of the work they do (see paragraph 3.3), you're a principal in making the supply of transport to the customer.'
(underlining added)

36. The point that is made against Uber here is, whilst the VAT Notice contemplates that a private hire operator may act as the agent for self-employed drivers it just as readily contemplates a scenario in which the private hire operator is itself the provider of transportation services to the customer – the very finding made by the ET in the present case.

37. More importantly, each case will plainly depend on its own facts and in particular on an analysis of the actual agreement made between driver and operator. The cases cited in para. 23 of Uber's Skeleton turn on their particular facts. Some of the cases cited within them are examples of cases where a private hire operator has been held to be a principal and liable for VAT:

    a. Akhtar Hussain (t/a Crossleys Private Hire Cabs) v Customs & Excise Commissioners (No. 16194) (1999) - company bore the risk of bad debts, allowed discounts to account customers and bore the loss, set the fares, recorded all account work, operated a roster which ensured adequate cover for cash and account work;
    b. Argyle Park Taxis Limited v Commissioners for Her Majesty's Revenue and Customs (20277) (2007) - company solely responsible for obtaining the contract customers, carried out substantial negotiations on an ongoing basis with all the customers, was concerned to see that the service to those customers was carried out effectively and to that end was selective as to the drivers it wished to use, had worked out a complicated fare system which it insisted that its drivers use; and
    c. Bath Taxis (UK) Limited v Her Majesty's Revenue and Customs (20974) (2009) - company offered a priority service and a fixed-rate pricing structure to

account customers, had a pre-existing business relationship with account customers from whom it collected fares and bore the risk of bad debts.

38. In all of these cases the decision-maker placed reliance on the fact of the company bearing the risk of bad debts, setting fares and setting standards for the manner of the supply of the transportation service – all of which are features of the present case.

Ground 2 - Regulatory requirements [45]

39. The Notice of Appeal at para. 16 asserts that: *'It was not the intention of the regulatory regime to require private hire operators to enter into an employment relationship with drivers'* [45] and this is developed to some degree in the Skeleton in which it is asserted that *'the intention was to address concerns of passenger safety'* (para. 31 at [63]). No authority or other source is relied on for either assertion. In TfL v Uber [2015] EWHC 2918 (Admin) the legislative purpose was described in these terms by Ouseley J at para. 28:

'The purpose of the Act was to bring the hitherto unlicensed mini-cab trade in London within a licensed framework, to protect the public using the services of mini-cabs from a variety of mischiefs including unfitness of the driver, the safety of the vehicle, and the absence of insurance. It was also concerned that licensing mini-cabs should not lead the public to suppose that mini-cabs or PHVs were or were equivalent to black cabs.'

40. Guidance on private hire vehicle law for London's licensed private hire vehicle operators ('the Guidance') issued by Transport for London states at SB[81] that:

'The purpose of regulation is to give passengers confidence when using a licensed PHV operator that they are dealing with a regulated, professional organisation with honest drivers and safe vehicles.'

41. The Guidance continues on the same page:

'The PHV operator is the person with whom the passenger books the journey, and it is the operator's responsibility to see that it is carried out safely and efficiently. A responsible operator will know his or her drivers and their cars …'

42. Section 4 of the Private Hire Vehicles (London) Act 1998 provides as follows:

'4.— Obligations of London operators.

(1) The holder of a London PHV operator's licence (in this Act referred to as a "London PHV operator") shall not in London accept a private hire booking other than at an operating centre specified in his licence.

(2) A London PHV operator shall secure that any vehicle which is provided by him for carrying out a private hire booking accepted by him in London is—

(a) a vehicle for which a London PHV licence is in force driven by a person holding a London PHV driver's licence; or

(b) a London cab driven by a person holding a London cab driver's licence.

(3) A London PHV operator shall—

…

(d) keep at each specified operating centre such records as may be prescribed of particulars of the private hire vehicles and drivers which are available to him for carrying out booking accepted by him at that centre;

…'

43. Section 5 provides:

5.— Hirings accepted on behalf of another operator.

(1) A London PHV operator ("the first operator") who has in London accepted a private hire booking may not arrange for another operator to provide a vehicle to carry out that booking as sub-contractor unless—

… (not material for present purposes)

(5) For the avoidance of doubt (and subject to any relevant contract terms), a contract of hire between a person who made a private hire booking at an operating

centre in London and the London PHV operator who accepted the booking remains in force despite the making of arrangements by that operator for another contractor to provide a vehicle to carry out that booking as sub-contractor.'

44. Regulation 13 of the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000/3146 further provides:

'13.— Particulars of drivers

(1) For the purposes of section 4(3)(d) of the 1998 Act, an operator shall keep at each operating centre specified in his licence a record, containing the particulars set out in paragraph (2), of each driver who is available to him for carrying out bookings accepted by him at that centre.

(2) In relation to each driver the particulars referred to in paragraph (1) are—

(a) his surname, forenames, address and date of birth;

(b) his national insurance number;

(c) a photocopy of his driving licence;

(d) a photograph of him;

(e) the date on which he became available to the operator, and

(f) the date on which he ceased to be so available.'

45. Reflecting these statutory obligations, the Guidance provides:

- *'It is the responsibility of an operator to ensure that a vehicle <u>available to him</u> for carrying out private hire bookings is a London PH vehicle driven by a person holding a London PHV driver's licence'* SB[88] (foot of page) (emphasis added)
- *'An operator must also keep at each operating centre, particulars of drivers and vehicles <u>available to him'</u>* SB[88] (foot of page) (emphasis added)
- *'Irrespective of any sub-contracting, the contract of booking a PH vehicle remains <u>between the person making the booking and the initial operator'</u>* SB[89] (middle of the page) (emphasis added)

- *'Records of drivers used by a PHV operator must also be kept at each operating centre and must include particulars of … date when <u>he became available to the operator</u> and, where applicable, the date when he ceased to be available'* SB[91] (foot of page) (emphasis added)

46. The document 'Changes to private hire regulation' issue by TfL on 27 June 2016 SB[95] also contains the following at [100] (middle of the page):

'All operators will be required to email us details of the drivers and vehicles they have used to fulfil bookings, or have had available to them to fulfil bookings.'

47. It thus appears that the regulatory regime does indeed contemplate that drivers provide their services to operators to enable operators to fulful *their* obligations to *their* passengers. It was not necessary for the regulatory regime to go further and dictate the precise legal relationship between operators and their drivers, but as noted above for VAT purposes, HMRC certainly envisaged that operators either:

    a. employ staff to drive taxis or private hire-cars; or
    b. take on self-employed drivers to work under a contract for services.

which in either case could constitute employment as a worker under s.230(3) of the Employment Rights Act 1996.

48. In the premises, the fact that contractual relations between Uber and the Claimants are underpinned by, or even the result of, Uber's statutory obligations is not inimical to a finding of worker status.

<u>Ground 3 – whether Claimants required to accept work [46]</u>

49. This again is essentially a perversity challenge subject to the usual high threshold. The finding made by the ET is that whilst drivers are *'…nominally free to accept or decline trips'* (ET Reasons para. 51 [15]) in reality they are penalised if they decline

three trips in a row[7]. This finding of fact was plainly open to the Tribunal to make on the evidence, not least Uber's own documents as referred to in paragraph 52 [16].

50. In any event a lack of obligation to accept work is not determinative of worker status. In Cotswold Developments Construction Ltd v Williams [2006] IRLR 181[8] at para. 55, Langstaff P said:

'We are concerned that Tribunals generally, and this Tribunal in particular, may, however, have misunderstood something further which characterises the application of "mutuality of obligation" in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. Stevenson LJ in Nethermere put it as "… an irreducible minimum of obligation …". He did so in the context of a case in which home workers were held to be employees. Mrs Taverna refused work when she could not cope with any more. She worked in her own time. It is plain, therefore, that the existence and exercise of a right to refuse work on her part was not critical, providing that there was at least an obligation to do some.'

51. There appears to be no dispute that once a trip has been accepted – or at the very least once a passenger has been picked up - drivers are under an obligation to carry it out. Clause 2.4 of the New Terms (SB[17]) expressly provides that drivers' right to cancel is subject to Uber's then-current cancellation policies which again provide for a penalty system (ET Reasons para. 53 [16]). Even para. 3 of the Rider Terms (referred to at para. 28 of the ET Reasons [7]) states that *'…acceptance by Uber UK as agent for the Transportation Provider gives rise to a contract for the provision to you of transportation services …'*

[7] It is common ground that the duration of the period for which drivers are logged off – whether 10 minutes or two minutes - is immaterial, see final sentence of para. 39 of Uber's Skeleton at [66] and para. 6(d) at [75 – 76].

[8] The case is referred to at para. 76 of the ET Reasons [21]

52. The fact that there may be no obligation to accept work (no 'mutuality of obligation' between jobs) is, at most a factor to be taken into account (see Windle v SoS for Justice [2016] ICR 721 at para. 23 though c.f the further observations of Underhill LJ in Pimlico Plumbers Ltd v Smith [2017] ICR 657, CA at para. 145.

53. In relation to Mingeley v Pennock (t/a Amber Cars) [2004] ICR 727, CA on which Uber also relies, it is a case which (a) turns on its own particular facts and (b) would very likely be argued differently today. In that case the claimant's only contractual obligation to the respondent was to pay a £75 fee for access to its computer system and, as noted by Buxton LJ at para. 21, his contract with them therefore could not be a contract personally to execute any work or labour. The respondent's business was based on the profit it made from such rental payments. Mr. Mingeley dealt directly with his passengers and kept the fares he received from them. Maurice Kay LJ, as later cases have established, was wrong to hold at paras. 12 – 13 that pre-existing domestic legislation did not have to be interpreted consistently with EU law. Furthermore, the Court was not asked to, and did not, consider whether the claimant in that case might have been an employee (in the extended sense) when actually working, even if under no obligation to work generally, see the comment of Elias J in James v Redcats (Brands) Ltd [2007] ICR 1006 at para. 82:

'82. In my view, Mingeley has no relevance to this case. It cannot be doubted that whenever the claimant is actually working she is doing so pursuant to a contract and she is providing a service for which she is entitled to be paid. If she were not paid for work done, she would obviously have a claim in contract.'

54. Uber cannot derive any assistance from the case of Khan v Checkers Cars Limited UKEAT/0208/05/DZM (unreported) and if anything it assists the Claimants in the present case. The issue in Khan was whether the Claimant was an employee in the narrow sense, and so might proceed with a complaint of unfair dismissal. The Respondent conceded that the Claimant was a worker (see para. 2 of the EAT judgment).

Ground 4 – ET failed to take account of relevant considerations [47]

55. This ground of appeal is misconceived in the light of the fact that all of the matters referred to in the Notice of Appeal are expressly referred to by the ET in its Reasons, as the Notice of Appeal itself makes clear. The decision must be read as a whole. Paragraphs 2 – 4 above are repeated.

Ground 5 – ET wrongly applied extended definition of employment [48]

56. This is an *obiter* finding of the ET given its finding on the 'core' definition of worker (as set out in paras. 70 and 71 of the ET Reasons [18 – 19]). This ground of appeal is academic if the appeal on the core definition fails.

57. The extended definitions are set out in WTR reg. 36(1), NMWA s. 34 and s. 43K of the Employment Rights Act 1996.

58. Even if, as Uber argued (see ET Reasons para. 98 [32]), UBV rather than ULL was party to the relevant contract with drivers, the ET was entitled to find on the facts (as it did at para. 92 [30]) that drivers worked 'for' Uber and were supplied to ULL by UBV for that purpose. It is and was common ground that the terms on which drivers work are substantially decided not by the drivers but by UBV, ULL or by both of them.

Finding 2 – what counts as working time for purposes of WTR

59. The substance of this ground of appeal is that even whilst within the appropriate territory, with the App switched on, the Claimants were at liberty to take on or refuse work as they chose, to cancel trips already confirmed and were *'at liberty to work for others, including direct competitors of Uber'* (para. 28 [49]). The Claimants observe that 'competitors' as used here obviously refers to others providing taxi / minicab services, which is entirely consistent with Uber itself being a provider of transportation services.

60. Paragraph 47.2 of the Skeleton [69] confuses the question whether an individual is a worker with the question of what counts as working time once it has been established that the individual is in fact a worker. For the reasons set out above, a lack of mutuality of obligation between trips is not fatal to worker status.

61. As expressly stated by the ET at para. 122 [39], the finding on working time in paras. 121 – 124 has to be read together with paras. 100 – 102. The crucial finding(s) is (are) that *'it is essential to Uber's business to maintain a pool of drivers who can be called upon as and when a demand for driving services arises .. To be confident of satisfying demand [Uber] must, at any one time, have some of its drivers carrying passengers and some waiting for the opportunity to do so. Being available is an essential part of the service which the driver renders to Uber…'* [33].

62. For the purposes of reg. 2(1) of the Working Time Regulations 'working time' is defined as follows:

''working time', in relation to a worker, means—

(a) any period during which he is working, at his employer's disposal and carrying out his activity or duties,

…

and 'work' shall be construed accordingly;'

63. This definition is identical to that in article 2 of the Working Time Directive and it is therefore necessary (and appropriate) to give it a purposive construction. Furthermore the Court of Justice has repeatedly held that the concept of working time *'is placed in opposition to rest periods, the two being mutually exclusive'*, see Federación de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL C-266/14 [2015] IRLR 935 ('Tyco'), citing Jaeger C-151/02 at paragraph 48; Dellas C-14/04 at paragraph 42. The directive does not provide for any intermediate category between working time and rest periods.

64. The Claimants submit that it is plain and obvious that when a driver is within his territory, has the App switched on and is ready and willing to accept trips, he is not enjoying a period of rest.

Finding 3 – unmeasured work under NMWR

65. The issue before the ET was simply whether work was 'time work' (as Uber argued) or one of the statutory alternatives (it being common ground that it is not 'salaried hours work'), see ET Reasons para. 125 [40]). It was conceded before the ET that work could only be 'time work' if the driver is working when carrying a passenger but not otherwise. This ground of appeal therefore stands or falls with the preceding one.

66. The Claimants note that neither the Notice of Appeal nor the Skeleton now seek to argue that drivers' working time should properly be categorised as 'time work'.

67. The mischief suggested in this ground of appeal, that a driver might seek to claim minimum wage even though ignoring all trips offered to them (or claim minimum wage from Uber whilst in fact working for a competitor) is more theoretical than real. The ET's holding is that a driver is working only when willing and able to accept assignments. That is a question of fact. If a driver is not truly willing and able to accept assignments but is instead seeking to 'play the system' that is a contract performance / discipline issue (and treated as such by Uber through its penalty mechanism). It should not be raised as a matter of law disentitling the vast majority of drivers, who in good faith make themselves available to Uber, from relying on the legislation.

68. For the reasons set out above and to be developed orally the EAT is invited to dismiss this appeal.

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