IN THE EMPLOYMENT APPEAL TRIBUNAL **UKEATPA/0807/16/DA**

BETWEEN:

(1) UBER B.V.
(2) UBER LONDON LIMITED
(3) UBER BRITANNIA LIMITED

Appellants

(1) YASEEN ASLAM
(2) JAMES FARRAR

Respondents

APPELLANTS' SKELETON ARGUMENT

References are to the core bundle [CB/tab/page] and the supplementary bundle [SB/tab/page].

Introduction

1. The Appellants ("Uber"), who were the Respondents below, appeal from the Judgment of the Central London Employment Tribunal ("the Tribunal") in case number 2202551/2015 & Others.

2. Uber appeals against the following findings of the Tribunal:

   2.1. The finding at paragraph (1) of the Judgment **[CB/1/1]** that in the circumstances and to the extent explained in the accompanying Reasons **[CB/2/2-41]**, the Claimants were *"employed"* as *"workers"* by the Second Appellant ("ULL"), within the meaning of section 230(3)(b) of the Employment Rights Act 1996 ("ERA"), regulation 36(1) of the Working Time Regulations 1998 ("WTR"), and section 54(3) of the National Minimum Wage Act ("NMWA") ("finding 1");

   2.2. The finding at paragraph (2) of the Judgment that the Claimants' working time is to be calculated in accordance with regulation 2(1) of the WTR ("finding 2"); and

2.3. The finding at paragraph (3) of the Judgment that for the purposes of regulation 44 of the National Minimum Wage Regulations ("NMWR"), the Claimants were engaged in "*unmeasured work*" and their hours of work are to be reckoned in accordance with regulations 45 and 47 ("finding 3").

3. 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.

4. The Tribunal wrongly found that the Claimants were employed by Uber as workers, *inter alia* because it: (1) erred in law in interpreting the written contracts, and failed to direct itself properly as to basic principles of agency law; (2) as a result of its errors of law, wrongly concluded that the written contracts did not reflect the reality of the relationship between the parties, and wrongly concluded that they should be disregarded in their entirety; (3) reached a perverse conclusion that "*Uber requires drivers to accept trips and/or not to cancel trips*", despite having found as a fact that drivers who are logged on to the App are at liberty to ignore all notified trips; (4) wrongly took into account, as supporting its finding that the true contractual relationship between the parties was one of employment, matters which reflected the statutory regulatory requirements on ULL, which were irrelevant to that question; and (5) wrongly ignored binding authority on both the nature of the relationship between private hire drivers and private hire operators, and the need for a minimum mutuality of obligation between employers and workers.

5. On 13 January 2017, prior to the sift, the Claimants took the unusual step of filing 6-page *Submissions as to why the appeal should be dismissed in whole or in part* ("Claimants' Sift Submissions") **[CB/5/73-78]**. These submissions were subsequently adopted by

them as their Answer to the Appeal **[CB/5/71-72]**. Reference is made below to certain assertions in the Claimant's Sift Submissions: where any point is not addressed it should not be taken to be accepted.

Finding 1

6. The Tribunal concluded at paragraph 86 of the Reasons that any driver who: (a) has the App switched on; (b) is within the territory in which he is authorised to work; and (c) is *"able and willing to accept assignments"* is *"for as long as those conditions are satisfied, working for Uber under a 'worker' contract and a contract within each of the extended definitions"*.

7. In making that finding, the Tribunal erred in law, as set out below.

(1) The Tribunal erred in law in disregarding the written contracts

8. The Tribunal wrongly found that the written contracts entered into between the Claimants, the First Appellant ("UBV") and passengers **[SB/4&9]**, which were inconsistent with the existence of any employment or worker relationship, *"did not correspond with the practical reality"* (paragraphs 90 and 91), and could accordingly be disregarded in their entirety (paragraph 96).

9. It should be emphasised that the Tribunal in this case disregarded, as not reflecting reality, not only the contract between the driver and Uber **[SB/4]**, but also the contract which (under the terms of the written documents) arises in respect of each trip (once a booking is accepted by ULL on the driver's behalf) between the driver and the passenger.

    9.1. 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 cases such as *Autoclenz Ltd v Belcher* [2011] ICR 1157. In those cases, it was clear that services were being provided to the putative employer: the only question before the Tribunal concerned the capacity in which those services

were provided.

9.2. Here, Uber's case is that drivers do not provide services to Uber at all, but instead to passengers. Hence, any application of the *Autoclenz* principle must start with an analysis of the question whether that passenger/driver contract, with Uber acting as the driver's agent in procuring it, reflects reality.

10. The Tribunal erred in law in concluding that any of the facts or matters on which it relied at paragraphs 87 - 96 were inconsistent with a conclusion that the written contracts, properly construed, reflected the true relationship between the parties.

10.1. As set out below, a number of the reasons given in those paragraphs did not even purport to be findings as to the actual nature of the parties' relationship. They were instead legally irrelevant (and pejoratively expressed) commentary on Uber's own descriptions of its business model in other contexts and for other purposes.

10.2. To the extent that the Tribunal's conclusions were legally relevant, they demonstrate a misunderstanding of, and consequential failure to apply, relevant legal principles.

The Tribunal's reasons

11. The first reason given by the Tribunal for disregarding the written contracts (in paragraph 87) was that language used in the written contracts and in Uber's witness evidence justified "*a degree of scepticism*". That conclusion was unjustified. Commercial parties are entitled to use contractual language that might strike some as complex or technical, and it is common for highly-regulated businesses to do so. But, in any event, it was not a finding that there was any legal obligation on the Claimants to perform work, whether for Uber or at all.

12. The Tribunal's second reason (in paragraph 88) was that certain of Uber's marketing materials and public statements contained language that was, in the Tribunal's view,

consistent with the Claimants' case. Again, however, that observation was not a finding of any legally relevant obligation on the part of the Claimants. It was expressed as no more than a further reason for *"scepticism"*.

13. The Tribunal's third reason (in paragraph 89) was that *"it is, in our opinion, unreal to deny that Uber is in business as a supplier of transportation services"*. By appeals to *"simple common sense"* and *"self-evident"* truths, the Tribunal considered that the only service that Uber could possibly be marketing was its own transportation service. However:

    13.1. That reasoning failed to engage with the possibility that Uber could (in accordance with the written contracts) be marketing its services as the agent of drivers who provide transportation services directly to passengers. That failure to direct itself properly as regards the legal relationship of agency, as well as the nature of the regulatory regime, runs through the Tribunal's reasoning.

    13.2. Further, and in any event, the question whether Uber is a provider of transportation services is irrelevant to the legal question in this case. What is at issue is not the correct characterisation of Uber's broader business model, but the nature of the legal relationship between Uber and the Claimants, and the Claimants and passengers. It is possible for providers of transportation-related services to deliver them otherwise than through drivers who are their *"workers"*. The Tribunal expressly recognised this in paragraph 97, when it emphasised that *"none of our reasoning should be taken as doubting that the Respondents could have devised a business model not involving them employing drivers"*.

14. The Tribunal's fourth reason (in paragraph 90) was that it struck it as *"faintly ridiculous"* to regard a driver as being engaged in a *"small business"* that consisted of *"a man with a car seeking to make a living by driving it"*. That conclusion was wrong in law as well as factually perverse. There are many thousands of such businesses throughout the UK.

15. As a matter of law, a "*man with a car seeking to make a living by driving it*" can indeed be in business on his own account. That was the *ratio* of the CA's decision in *Mingeley v Pennock (t/a Amber Cars)* [2004] ICR 727 CA, as well as the *obiter* holding of the EAT in *Khan v Checkers Cars* UKEAT/0208/05/DZM. Those decisions are addressed further below.

16. That position is unaffected by the Claimants' limited ability to negotiate fares with individual passengers. In both *Mingeley* and *Khan* the minicab drivers were required to charge passengers according to a scale set by the minicab firm. Indeed, it is a standard regulatory requirement, across the private-hire industry, for fares to be agreed between the operator (whether that operator is Uber, or a traditional minicab firm) and the passenger.

17. The Tribunal's fifth reason (in paragraph 91) was that the contract between driver and passenger in respect of each journey is a "*pure fiction*". In so holding, the Tribunal misunderstood and failed to apply basic principles of agency law. In particular, the Tribunal failed to appreciate that, 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.

18. The point is elementary. See e.g. Bowstead & Reynolds on Agency (20th edition, 2016) at 1-005:

> "*The mature law recognises that a person need not always do things that change his legal relations himself: he may utilise the services of another to change them, or to do something during the course of which they may be changed. Thus, where one person, the principal, requests or authorises another, the agent, to act on his behalf, and the other agrees or does so, the law recognises that the agent has power to affect the principal's legal position by acts which, though performed by the agent, are to be treated in certain respects as if they were acts of the principal. This result is not confined to cases where the agent simply has specific instructions to do one thing, e.g. to sign a document … Any developed system must also recognise the more advanced notion of permitting a person to give to another a general authority to act according to his own discretion within certain limits*".

19. Accordingly, as a matter of law, an authorised agent can bind his principal to carry out

a task: (1) in a particular way (e.g. by driving a third party on a recommended route, to a destination that may only be disclosed to the principal when the journey is about to start); (2) for a price negotiated or calculated without consultation with the principal, and collected directly by the agent; and (3) without either the principal or the third party being provided with any particular information about the identity of the other.

20. The Tribunal misunderstood and failed to have any regard to those legal principles when characterising the position under the written contracts as "*absurd*". Instead, it sought to justify its apparently intuitive reaction by hypothetical speculation, which was irrelevant and involved further errors of law. In particular:

20.1. It suggested that Uber was obliged to argue that, if it became insolvent, drivers would have a right to sue passengers. On standard legal principles, that would indeed be the case, unless the passenger had already paid Uber as the driver's agent. The Tribunal made no finding of fact that, if litigation were necessary, Uber would not provide the passenger's name to the driver. In fact, Uber's terms with passengers would allow it to do so.

20.2. It suggested that, if there were a contract between driver and passenger, the passenger could be "*exposed to potential liability as the driver's employer under numerous enactments such as, for example, NMWA*". Aside from being irrelevant, that speculation was legally flawed: the relationship between a self-employed taxi or private hire driver and a passenger is a paradigm example of a contract involving a client or customer of a business.

20.3. It suggested that, if there were a contract between driver and passenger, Uber would be under no obligation to indemnify the driver for the non-payment of a fare. The Tribunal did not elaborate on its bald assertion that such a situation would be "*manifestly unconscionable*". As a matter of law, an agent may or may not agree to indemnify his principal against non-payment by a third party. Those agents who provide such an indemnity are sometimes known as *del credere* agents: see e.g. Bowstead & Reynolds, Article 2(5). In fact,

as the Tribunal acknowledged, it is Uber's policy to bear the loss of certain fraudulent actions by passengers. Remarkably, that acceptance of the risk of certain fraud by passengers was later found by the Tribunal to be a reason supporting "*worker*" status (paragraph 92(11)).

21. The Tribunal's sixth reason (in paragraph 92) was that "*it is not real to regard Uber as working 'for' the drivers*" and "*the only sensible interpretation is the other way around*". That binary choice, however, was false. It was the result of the Tribunal's failure to consider the alternative analysis whereby drivers contract with passengers, through Uber as agent.

22. A proper direction as to agency principles was crucial to a proper analysis of whether drivers work "*for*" Uber at all (whether as workers or otherwise). But instead of analysing agency principles, the Tribunal focussed repeatedly on the question of control, so as to enquire whether Uber could be viewed as a "*client or customer*" of the driver. Hence the Tribunal's revealing reliance on *Hospital Medical Group Ltd v Westwood* [2013] ICR 427: a case where it was common ground that the doctor was subject to an obligation to work "*for*" the medical group, and the only issue was whether the medical group was his "*client or customer*". The same revealing reliance is placed on *Hospital Medical Group* in paragraph 7(c) of the Claimants' Sift Submissions **[CB/5/76]**. But if drivers are not in fact providing services to Uber at all, the question of control is beside the point.

23. The concept of a private hire operator acting as an agent for drivers was not invented by Uber in response to these proceedings. It is not only the obvious analysis, but the subject of extensive case law. For example, in the VAT field, it can be important to determine whether a private hire operator is providing services to passengers as principal, or merely as agent for individual drivers. In a line of cases, private hire operators have been found to be agents for individual drivers, even where the work allocated is 'account' work, i.e. work from a regular passenger who pays the operator directly rather than the driver. See e.g. *Lafferty v Revenue and Customs*

Commissioners [2014] UKFTT 358 (TC) (Tribunal Judge Cornwell-Kelly); *Khalid Mahmood v Revenue and Customs Commissioners* [2016] UKFTT 0622 (TC) (Tribunal Judge Thomas); and *Carless v Customs and Excise Commissioners* [1993] STC 632 (QBD, Hutchison J). Indeed, the possibility that a private hire operator may act as the agent for self-employed drivers is expressly contemplated in the relevant HMRC guidance (see *VAT Notice 700/25: taxis and private hire cars*, paragraph 3.3).

24. As to the sub-paragraphs to paragraph 92:

24.1. Points (1), (3), (5), (6), (9), (11) and (12) reflect the Tribunal's failure to engage with principles of agency law, as set out above. Each of the facts and matters referred to in those points is consistent with the position where an agent is authorised to conclude bargains and to conduct negotiations with third parties on behalf of a disclosed but unidentified principal. That position was the one created by the written contracts. As to the potential for agents to be authorised to act independently of their principal, see e.g. Bowstead & Reynolds at paragraph 1-017: "*It is common to regard control by the principal as a defining characteristic of agency … But agents will often not accept control by their principals as to the manner in which they act, and some will only accept instructions to act in accordance with usages of their own market*". The Supreme Court has confirmed that it is consistent with a relationship of agency – particularly where the agent has greater bargaining power – for the agent to reserve to itself functions such as dealing with complaints and compensation without reference to the principal: see *HMRC v Secret Hotels2 Ltd* [2014] UKSC 16 at [45] – [46].

24.2. Points (2), (4) (which is challenged as a perverse finding of fact, discussed further below), (7), (8) and (10) also reflect a failure to engage with principles of agency law. These include that an agent is free to select the principals for whom he will act; to agree payment terms; and to make his ongoing representation subject to conditions. Had the Tribunal directed itself properly

regarding agency law, it would have concluded that it is perfectly permissible for an agent to make clear that he will only continue to represent a principal whose standards and conduct preserve his own business reputation and relationships with third parties. Actors' and models' agents provide obvious examples of this type of agent: so do the owners of traditional minicab firms. Again, the Supreme Court has held that it is consistent with an agency relationship for an agent to require the principal to conduct itself in a particular way when providing services to end-users: see *HMRC v Secret Hotels2 Ltd* at [39] – [41].

24.3. Point (13) is legally irrelevant. Any type of contract may include provision for unilateral amendment by one party. Such a provision is not an indicator of a sham, if the contract otherwise reflects reality.

25. The Tribunal's seventh reason (in paragraph 93) was the conclusion that "*the essential bargain between driver and organisation is that, for reward, the driver makes himself available to, and does, carry Uber passengers to their destinations*". For the reasons set out above, that conclusion was vitiated by the Tribunal's error of law in failing to direct itself properly on the principles of agency law. Of course taxi and private hire drivers carry passengers for reward: the question is whether it is unrealistic to regard them as doing so pursuant to a bargain with the passenger, who pays the fare ultimately received (net of Uber's flat-rate service charge) by the driver. While the Tribunal stated that it did not need to base its reasoning on "*a process of elimination*", in fact it was essential to eliminate the possibility of the driver contracting with passengers, via Uber as his agent. Accordingly, its failure to direct itself properly on that issue of law was fatal.

26. The Tribunal's eighth reason (in paragraph 94) was that the relationship was of the type characterised in the authorities as one of a "*dependent work relationship*", where a worker is an "*integral component*" of an organisation. Again, however, that conclusion was vitiated by the Tribunal's failure to direct itself to consider whether the situation could properly be characterised as one of agency. A principal may be viewed as

"*dependent*" on his agent to obtain work, and as "*integral*" to his agent's business as an agent. Neither of the authorities cited by the Tribunal (*Cotswold Developments v Williams* [2006] IRLR 181, and *James v Redcats (Brands) Ltd* [2007] ICR 1006) involved the disregarding of contracts between the putative worker and the end-user of his services, or any suggestion that such contracts were arranged by the defendant as agent.

27. The Tribunal's ninth reason (in paragraph 95) was a purported distinguishing of the authorities relied on by Uber, which strongly support the conclusion that drivers using the App are self-employed. There was no legal basis to distinguish those cases.

27.1. First, in paragraph 95(2), the Tribunal mischaracterised the relevant legal question. It stated that "*the question at the heart of our case*" was "*whether, in performing individual services (here driving trips), a claimant is working 'for' the putative employer*". That is not the question. The question, answered by the Tribunal in the affirmative, was whether the Claimants were working "*for*" Uber when logged on to the App, regardless of whether they were actually "*driving trips*". See further below, in relation to the appeal against finding 2.

27.2. Secondly, the Tribunal distinguished both *Stringfellow Restaurants v Quashie* [2013] IRLR 99 (table dancers) and *Cheng Yuen v Royal Hong Kong Golf Club* [1998] ICR 131 (golf caddies) on the basis that those cases concerned putative employees who were providing services "*ancillary*" to the principal service provided by the putative employers. That conclusion is dubious on its own terms: it is difficult to view the services of dancers are merely "*ancillary*" to an unspecified "*principal service or facility*" offered by Stringfellows. But, in any event, it is legally misconceived. There is nothing in the authorities to suggest that their reasoning was influenced by the extent to which end-users of the services were also receiving other services from the putative employer, and no logical basis for such reasoning.

27.3. Thirdly, the Tribunal failed to give any explanation at all for its assertion that the facts in the cases of *Mingeley* and *Khan* were materially different from

those in the present case. That failure was remarkable, in circumstances where those cases: (1) involved private hire drivers; (2) the decision in each case was that the drivers did not undertake to perform work "*for*" the private hire operator; and (3) the Tribunal accepted that, on their facts, "*there was ample room … for the finding that the arrangements between the parties were consistent with the claimant personally entering into a contract with each service user*".

27.4. In truth, the reasoning in *Mingeley* and *Khan* directly applies to the present case. As set out below, in various respects drivers who use the App are more independent than the drivers in those cases. If the Tribunal had properly directed itself, it would have followed those authorities and found that there were no grounds to disregard the written contracts.

28. Finally, the Tribunal's tenth reason (in paragraph 96) was the suggestion that the present case is one of unequal bargaining power leading to unreal contracts. As a general observation, unequal bargaining power may of course be exploited to produce sham contracts. For the reasons set out above, however, the written contracts in this case were in fact consistent with the reality of the relationships, when analysed in accordance with the correct legal principles. Accordingly, there was no proper basis on which they could have been disregarded by the Tribunal. The Tribunal's conclusion to the contrary was flawed by the legal errors identified above, and cannot stand.

(2) The Tribunal erred in law in relying on regulatory requirements as indicia of an employment relationship

29. The Tribunal erred in law in taking into account, as indicia of a relationship of employer and worker, a number of factors which were required of ULL as part of its regulatory obligations as the holder of Private Hire Vehicle Operator's Licence, pursuant to the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000 ("the Regulations"), and other legislation.

30. Examples include the following:

30.1. Paragraph 92(1): Uber's "*assertion of sole and absolute discretion to accept or decline bookings*". This was required of ULL under section 2(1) of the Private Hire Vehicles (London) Act 1998;

30.2. Paragraph 40 and paragraph 92(2): "*Uber interviews and recruits drivers*", and required them to "*present themselves and their documents personally*". As a licensed operator, ULL was legally obliged to ensure that drivers had all necessary documents, including a driver's licence, private hire licence, national insurance number, insurance certificate, vehicle licence and MOT: Regulation 13;

30.3. Paragraph 92(3): "*Uber controls the key information (in particular, the passenger's surname, contact details and intended destination) and excludes the driver from it*". ULL was required to obtain and keep this information pursuant to Regulation 11;

30.4. Paragraph 92(6): "*the fact that UBV fixes the fare, and the driver cannot agree a higher sum with the passenger*". This was required of ULL under Regulation 9(3);

30.5. Paragraph 92(12): "*The fact that Uber handles complaints by passengers, including complaints about the driver*". This was required of ULL under Regulations 9(7) and 14;

30.6. The fact that the right to use the App was personal to the driver and not transferable (paragraph 39). This was required of ULL under Regulation 11.

31. Such factors were legally irrelevant to the characterisation of the contractual relationship between the parties. They would by legal obligation have to be present in *any* arrangement between a private hire operator and drivers. However, it was not the intention of the regulatory regime to require private hire operators to enter into an employment relationship with drivers. The intention was to address concerns of

passenger safety. Indeed, the regulatory scheme[1] is predicated on the separate regulation of operators and drivers, with distinct and independent requirements applying directly to each of them. Where an operator breaches a requirement imposed on it, an offence is committed by it rather than the driver, and *vice versa*. Such a scheme would not have been necessary if Parliament had regarded individual drivers as the employees of operators. Features of the relationship derived from regulatory obligations were accordingly irrelevant to the characterisation of the nature of the parties' agreement, and the Tribunal erred in law in taking them into account.

32. Further, the Tribunal's reliance on these factors was inconsistent with its express statement (in paragraph 97) that Uber "*could have devised a business model not involving them employing drivers*". If that is the case (as it is), then the Tribunal could not logically have held against Uber its compliance with minimum regulatory requirements imposed on all private hire operators.

33. Accordingly, the Claimants' Sift Submissions are wrong in law to state (in paragraph 5(b)) that "*the reasons why ULL had [certain] dealings with drivers were nothing to the point*" **[CB/5/74]**. Nor is there anything in the point made at paragraph 5(c) of those submissions, that the "*fact that ULL had regulatory obligations was therefore (at the very least) capable of supporting the conclusion that it entered into a contractual relationship with each driver under which each driver agreed, inter alia, to arrangements which would enable ULL to comply with its statutory obligations*" **[CB/5/75]**. All London private hire drivers must carry out their activities in a way that enables the relevant private hire operator to "*comply with its statutory obligations*". It has never been suggested by the Claimants that all such drivers are "*workers*". Any such suggestion would be untenable in light of *Mingeley* and *Khan*.

(3) The Tribunal erred in law and made internally inconsistent and perverse findings of fact in concluding that the Claimants were required to work for Uber

[1] Both under the Private Hire Vehicles (London) Act 1998 (which governs private hire in London) and the Local Government (Miscellaneous Provisions) Act 1976 (which governs private hire outside of London).

34. The Tribunal wrongly held at paragraph 92(4) that, when the App is switched on, Uber "*requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements*". The Tribunal's statement at paragraph 92(4) was inconsistent with the findings of fact which it had made, including at paragraphs 15, 48, 51, 52 and 53 and was not based on any evidence capable of sustaining it.

35. Those paragraphs made it clear that drivers including the Claimants were not under any contractual obligation to take trips when logged in to the App. If Uber had had the power under the contract to compel the Claimants to take trips when logged on to the App they would have had no reason to seek to persuade them to do so, as these paragraphs showed that they did.

36. The only action which the Tribunal found could be taken by Uber when drivers repeatedly ignored trip requests (or repeatedly cancelled trips without good reason after they had been confirmed) was to log them off the system for a few minutes, on the basis that their behaviour was an indication that they were unavailable. Uber has an obvious interest in avoiding drivers remaining logged on to the App when unavailable, as its procedure involves waiting for a response in turn from each logged-on driver in the vicinity of a passenger requesting a trip (Reasons, paragraph 15). The presence of logged in but unavailable drivers on the system will therefore cause undesirable delay in finding a driver for a prospective passenger, and also be detrimental to other drivers who are available and seeking a passenger.

37. In paragraph 6(c) of the Claimants' Sift Submissions, this procedure is mischaracterised as meaning that "*whilst logged on [a driver] was obliged to accept a minimum number of jobs*" **[CB/5/75]**. There was no such obligation, and the Tribunal's factual findings are not capable of establishing that there was. A driver can ignore potential trips as often as he likes, but he will be aware that repeatedly ignoring trips will result in Uber regarding him as unavailable and requiring him actively to log back on to the system a short while later. There is no "*obligation*", but simply an operational procedure that

responds to a driver's apparent lack of interest in leads by a temporary removal of the lead-generation service provided to him by Uber. Uber has no contractual power to require the driver to carry out a booking. Crucially, the Tribunal did not find that a driver's failure to confirm any trip would be a breach of contract on his part, for which Uber could seek damages if passengers went elsewhere. Any such interpretation of the relationship would be obviously unsustainable.

38. Once again, the Tribunal's approach to this issue reflected a failure to consider matters from the perspective of agency. Where an agent acts for multiple principals, seeking to put them in touch with paying customers, he will have an interest in his principals responding promptly during periods when they have indicated they are available for assignments. Where there is urgency in allocating assignments (as there is in the case of Uber's App), the agent will naturally not wish to waste time contacting those of his principals who are unresponsive. Such an agent might well say to his principals: 'If you ignore three calls on a day that you have told me you are available, I won't try again but will instead email you to say that you will need to re-confirm your availability the next day'. It is not unknown for barristers' clerks to act in this way. The result would not be to oblige the principal to accept work, still less to convert a relationship of agency to one of employment.

39. In paragraph 20 of Uber's Notice of Appeal, it is noted that the relevant policy had recently changed, from a 10 minute to a 2 minute log-off period. As the Claimants' Sift Submissions acknowledge at paragraph 6(d) **[CB/5/75]**, this was explained in Ms Bertram's written Witness Statement. The Tribunal did not reject that evidence. It simply failed to deal with it. The Claimants do not now say that Ms Bertram's evidence was incorrect, and nor did they at the time: their attitude appears to be one of non-admission. The Tribunal had no reason to doubt Ms Bertram's evidence, and should have recorded the change in its Reasons. In any event, the analysis above is the same, whether the period for which a driver could be logged off is taken to be 2 minutes or 10 minutes.

(4) The Tribunal failed to take account of relevant considerations

40. The Tribunal failed to take into account, in its analysis at paragraphs 85 – 97, further facts which were inconsistent with the existence of any relationship of employer and worker between ULL and the Claimants, but, rather, strongly indicated that the Claimants were carrying on a business undertaking on their own account. These included the following:

40.1. The Claimants paid a flat-rate service fee in respect of the use of the App, and otherwise retained all fares charged to passengers (paragraphs 19 and 21);

40.2. The Claimants chose and supplied their own vehicles, and were responsible for all costs incidental to owning and running the vehicles (paragraphs 43 - 45);

40.3. The Claimants were responsible for funding their own private hire licences (paragraph 63);

40.4. The Claimants were under no obligation to undertake any minimum number of trips in any given period (paragraph 43);

40.5. The Claimants were free to work for or through other organisations, including direct competitors operating through digital platforms or traditional radio systems (paragraph 61). They were free to do this even when logged on to the App. A driver could accordingly be logged on to a number of delivery or private hire apps simultaneously, including the App, and take trips at will from amongst them, as he chose;

40.6. The Claimants treated themselves as self-employed for tax purposes (paragraph 65);

40.7. The Claimants were not provided with any uniform, and were discouraged from displaying Uber branding (paragraph 66).

41. Further, those findings of fact were inconsistent with the Tribunal's conclusion at paragraph 92(11) that Uber *"accepted the risk of loss which if the drivers were genuinely in business on their own account would fall on them"*. On the Tribunal's own findings, the drivers accepted the economic risk of loss, albeit that Uber was prepared to assist in certain marginal cases involving passenger fraud or vehicle soiling (then seek to recover all or part of such sums from passengers). Moreover, drivers were in a position to take steps to manage their own costs of doing business, e.g. by deciding which type of car to use, whether and how to buy or rent it, etc.

42. The Claimants' Sift Submissions assert (in paragraph 7 **[CB/5/76]**) that these factors were relevant only to whether Uber was a "*customer*" of a *"business undertaking"* carried out by the Claimants. In fact, they were of much broader relevance, in respect of each of findings 1, 2 and 3. In particular:

42.1. They were relevant to the Tribunal's consideration of whether transportation services are provided by Uber or by individual drivers (paragraph 89). It is remarkable that the Tribunal rejected out of hand the proposition that individual drivers provide transportation services, without making any reference to the fact that the cars are selected, owned or rented, maintained, and fuelled by the drivers rather than Uber;

42.2. They were relevant to the Tribunal's consideration of whether *"a man with a car seeking to make a living by driving it"* can be said to be in business on his own account (paragraph 90);

42.3. The lack of any obligation for a driver to log on at any particular time, or at all, is a factor pointing towards self-employed status, which the Tribunal should have taken into account (see e.g. *Secretary of State for Justice v Windle and Arada* [2016] IRLR 628, per Underhill LJ at [23] – [24]).

42.4. They were relevant to the Tribunal's consideration of whether the facts of the present case could be distinguished from *Mingeley* and *Khan*. In truth, when

those facts are taken into account, it is apparent that drivers using the Uber App are in several respects more independent than the drivers in those cases. For example, in *Mingeley* the driver was required to wear a uniform, and was not permitted to work for any other operator. Indeed, traditional minicab firms typically require drivers to 'rent' radio equipment for a fixed weekly or monthly fee, and frequently allocate them 'shifts': features which are not part of Uber's more flexible relationship with drivers.

(5) The Tribunal wrongly applied the extended definition of employment

43. The Tribunal further erred in law at paragraph 99 in concluding (*obiter*) that if the drivers were supplied by UBV to work for ULL, claims would lie against UBV by virtue of section 34 NMWA, regulation 36(1) WTR and section 43K(1) ERA. That conclusion was based on the erroneous finding that there was no contract between the Claimants and their passengers. For the reasons set out above, on a proper interpretation of the written agreements in the light of the facts as found, there was such an agreement, under which the passenger was a customer of the Claimants.

44. In this regard, the Claimants' Sift Submissions (paragraphs 9-10 **[CB/5/77]**) ignore Uber's central contention that drivers do not work "*for*" either UBV or ULL, but instead provide services to passengers (who are customers of the drivers).

The "gig economy"

45. The Tribunal will be aware of the public, press and political attention recently attracted by concerns over the "*gig economy*". Uber's business model has often been held out as an example of this phenomenon. In fact, for the reasons set out above, the position of drivers who use the App is materially identical to the (familiar and long-established) position of self-employed private hire drivers who operate under the auspices of traditional minicab firms. Nevertheless, Uber makes the following submissions on why its case is unaffected by four recent high-profile "*gig economy*" decisions (albeit three of them only at first instance).

46. In *Pimlico Plumbers v Smith* [2017] ICR 657, the CA upheld the decisions of the ET and EAT that a plumber was in fact a "*worker*" employed by Pimlico Plumbers, notwithstanding contractual wording describing him as a self-employed independent contractor. Permission has recently been granted for the company to appeal to the Supreme Court, but in any event the distinctions between that case and this are illuminating.

46.1. In particular, there was no suggestion of the plumber contracting with each end-user of his services, with the company acting as agent in arranging and facilitating such contracts. Instead, the starting point (subject only to an argument about ability to substitute) was that he worked "*for*" the company and provided services to end-users "*on its behalf*" (see Judgment at [4] – [5]). Hence, after it was found that there was no relevant ability to substitute[2], the only live issue was whether he provided his services to the company as an independent business providing services to its client or customer.

46.2. In this regard, the CA placed emphasis on factors which are also in revealing contrast to the present case, *viz.*: (1) the plumber was obliged to work a normal week of 40 hours over 5 days; (2) he was required to rent his van and mobile phone from the company; (3) he was required to wear a uniform with the company's logo; and (4) he was subject to extensive restrictions limiting his ability to compete with the company. As set out above, none of those factors are present in this case.

47. The ET has in three recent cases (all decided by Employment Judge Wade) found that cycle couriers were "*workers*".

47.1. In *Dewhurst v CitySprint* (2202512/2016, 5 January 2017) there was no suggestion of any contract between the courier and end-users: the only question (again, after the finding that there was no relevant right to

[2] Which was held to be the result of contractual agreement rather than (as here) a standard regulatory requirement.

substitute) was the capacity in which she worked for the company. In this regard, and in contrast to the present case: (1) she was required to wear a company uniform; (2) in practice she was only able to refuse delivery assignments when 'logged on' if there was a good reason; and therefore (3) she was not free to pick and choose assignments, or work for other companies.

47.2. Similarly, in *Boxer v Excel* (3200365/2016, 23 March 2017), the only dispute was whether the courier provided his services to the company (there being no suggestion of providing services under a contract directly with end-users) as a client or customer of his independent business. In this regard, again in contrast to the present case, the ET found that he was required in practice: (1) to work 5 days a week; and (2) during those days, to be available for, and to accept, whatever assignments might be allocated to him.

47.3. In *Gascoigne v Addison Lee* (2200436/21016, 2 August 2017), the company's case was that the cycle courier was its "*sub-contractor*" in relation to "*account*" work, and that it was his agent in relation to "*non-account*" work. The ET found, however, that there was no practical distinction between these different kinds of work, and that in each case the courier was providing services to the company, so that the company could in turn fulfil its own contractual obligations to end-users. The reality was that a customer contracted with Addison Lee for its "*fleet*" to make a delivery, and the company fulfilled this requirement by then allocating the job to a courier. Further, the Tribunal found that in practice the courier was required to fulfil every assignment allocated to him: indeed, there was no "*decline*" option on the computer system. This can be contrasted with the present case, where Uber only accepts a passenger booking upon a driver confirming that he wishes to take the trip; and where drivers are at liberty to log on and off at will throughout any given day, and to ignore trip requests.

48. The result is that, despite frequent press references to the present case alongside those above, they do not reveal any legal principle (whether established or emerging) inconsistent with Uber's case on this appeal.

Finding 2

49. The Tribunal erred in law at paragraph 122 in concluding that a driver is working at Uber's disposal and carrying out his activity or duties for the purposes of regulation 2(1) WTR when he is within his territory, has the App switched on, and is *"able and willing to accept assignments"* (whether or not he is actually on a confirmed trip).

50. As set out above, when actually on a trip, the Claimants were providing services to the passenger, rather than to or "*for*" Uber. They were not otherwise providing services to anybody.

51. In the alternative, to the extent that it is found that a driver does provide services to Uber as a worker, that can only be while he is actually on a trip.

    51.1. On the facts found by the Tribunal, the Claimants were at liberty to take on or refuse work as they chose while logged on; they were at liberty to cancel trips already confirmed; and they were at liberty to work for others, including competitors of Uber. In those circumstances, they were not at Uber's disposal, or working for Uber except (at the most, and if Uber's primary arguments under finding 1 are rejected) while actually driving a confirmed trip.

    51.2. This reflects the legal requirement that there must be a minimum mutuality of obligation in order to establish a contract at all (whether as a worker or an independent contractor). Without *"an irreducible minimum of obligation"* there is simply no contract: see e.g. Elias LJ in *Stringfellow* at [10] - [14]. In the present case, there is no such obligation simply by virtue of a driver indicating that he is available to confirm trips, in circumstances where drivers are not obliged to confirm any trips at all, may cancel them after confirmation, and indeed may be working for Uber's competitors while logged on to the App.

Finding 3

52. The Tribunal erred in law at paragraphs 125 - 128 in concluding that the Claimants were engaged in "*unmeasured work*" for the purposes of regulation 30 NMWR, and that the relevant hours were the hours spent by the Claimants within their territory with the App switched on.

53. This analysis was wrong for the reasons set out above. Its absurd consequences expose the flaws in the entirety of the Tribunal's approach to this case. On the Tribunal's finding, Uber is liable to pay the national minimum wage to drivers while they are in their territory with the App switched on, even if those drivers ignore all trips offered to them. Indeed, a driver who had entered into similar relationships with Uber and other Apps could, on the Tribunal's analysis, seek the minimum wage from all of them for the same period of time, whilst ignoring all trips from any App.

Disposal of the appeal

54. For all the reasons set out above, the only legally proper conclusion on the facts found by the Tribunal was that the Claimants were not employed as workers by Uber. Uber accordingly invites the Appeal Tribunal to set aside the Judgment, and to substitute an order dismissing all the claims on the basis that the Claimants are not workers employed by Uber within the meaning of the relevant legislation.

55. Alternatively, Uber seeks remittal for a rehearing to a differently-constituted tribunal. Given the strong, adverse and erroneous views expressed by the Tribunal about the status of Uber's contracts and the nature of its witness evidence, remittal to the same Tribunal would be inappropriate.

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