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EMPLOYMENT TRIBUNALS

Claimant: **Mr W Augustine**

Respondent: **eConnect Cars Ltd**

Heard at: **East London Hearing Centre**

On: **18-20 & 24-25 October 2017**

Before: **Employment Judge Goodrich**

Members: **Mr T Burrows**
Ms J Owen

Representation

Claimant: In person

Respondent: Mr C Murray (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1 The Claimant was not an employee satisfying the definition of an employee as set out in section 230(3)(a) Employment Rights Act 1996. The Claimant's complaints of unfair dismissal, breach of contract for notice pay and failure to provide a statement of employment particulars fail and these complaints are dismissed.

2 The Claimant was a worker who satisfied the definition set out in section 230(3)(b) Employment Rights Act 1996. The Respondent failed to permit access to national minimum wage records. The Claimant's holiday pay complaint and unlawful deduction of wages complaint (based on the National Minimum Wage Act and Regulations) succeed, as further set out below.

The case is listed, if the parties do not agree remedy themselves, for a remedy

hearing, for one day, on Monday 26 February 2018, commencing at 10.00 a.m. The remedy hearing will take place at East London Tribunal Service, 2nd Floor, Anchorage House, 2 Clove Crescent, London E14 2BE, reserved to the above Tribunal.

REASONS

The claim and the issues

1 The background to this hearing is as follows.

2 The Claimant obtained an early conciliation certificate from ACAS covering the period from 3 February 2017 to 3 March 2017, as is now required before commencing proceedings.

3 On 8 March 2017, the Claimant presented his Employment Tribunal claim.

4 In box 8.1 of his claim form the Claimant ticked that he was bringing claims for unfair dismissal, notice pay, holiday pay, arrears of pay and other payments.

5 The other payments were described as being:-

5.1 The Respondent caused the Claimant to suffer detriments by its acts or deliberate omissions on the ground the Claimant qualifies, or might qualify for the national minimum or living wage.

5.2 The Respondent convened (sic) its duty to keep records under section 9 of the National Minimum Wage Act 1998 Regulation 59 of the National Minimum Wage Regulations 2015.

5.3 The Respondent denied the Claimant access to records contrary to section 10 of the National Minimum Wage Act 1998.

5.4 The Respondent treated the Claimant less favourably and detrimentally as a part-time worker, contrary to Regulation 5(1) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

5.5 The Claimant seeks a preparation time order in connection with this claim.

6 In box 9.1 of his claim form the Claimant clarified that he was seeking compensation for unfair dismissal, not reinstatement or re-engagement, and a recommendation for a discrimination claim. The Claimant, in box 9.2, sought numerous declarations such as to his status as an employee or worker, unlawful deductions from wages, less favourable treatment under the Part-time Workers Regulations, as to a statement of employment particulars, payment in lieu of notice, payment of additional remuneration, payment in lieu of annual leave entitlement and compensation under the National Minimum Wage Act.

7 The Claimant also provided a description of his claim, which contained 46 paragraphs. This included his account of the relevant facts as to what had occurred; and to the types of claim he was making. Amongst the points made by him were to dispute the Respondent's classification of the Claimant as a self-employed driver, disputing that any clauses to that effect were genuine; and contending that he was an employee or worker for the Respondent.

8 The Respondent entered an ET3 response denying the Claimant's claims.

9 At the heart of the Respondent's grounds of resistance to the claim was an assertion that the Claimant was self-employed. In paragraphs 19.1 to 19.6 of the grounds of resistance they set out the basis on which they contended that the Claimant was self-employed, rather than being an employee or worker with the Respondent.

10 Additionally the Respondent had various grounds of defence if, contrary to their main case, he was held to be an employee or worker for the Respondent. The Respondent also denied that the Claimant had made any protected disclosures and asserted that he had resigned, rather than having been dismissed or constructively dismissed.

11 Standard case management orders were made by Employment Judge Russell, who listed the case for this five day hearing, contained in a document sent to the parties on 5 May 2017.

12 On 15 May 2017, a preliminary hearing took place conducted by Employment Judge O'Brien.

13 Judge O'Brien set out an agreed list of issues in the case.

14 The list of issues was, however, incomplete in that Judge O'Brien ordered the Claimant to provide further details of his protected disclosure complaints by 29 May 2017 and asked the parties to agree a final list of issues.

15 There was correspondence between the Claimant and the Tribunal between the date of the preliminary hearing and Judge O'Brien sending out his preliminary hearing document. This led to the Judge making orders that to the extent that the Claimant did not believe that the issues recorded encompassed his claim fully, he should attempt to agree any additional issues with the Respondent; and any application to amend the claim was to be made by not later than 10 July 2017, to include a draft amended description of claim with deleted text legibly struck through and new text underlined.

16 The Claimant, as ordered, set out a list of five disclosures he stated to be protected.

17 The Claimant also provided an amended description of his claim, albeit later than when ordered by Judge O'Brien; together with an explanation for an apology for it being late.

18 The case was listed for hearing before this Tribunal.

19 The hearing started with the Judge discussing with the parties what were the issues in the case and how to proceed.

20 As regards the Claimant's amended claim, Mr Murray (Counsel for the Respondent) requested some clarification by the Claimant. He also expressed some concern with the amended description of claim, particularly as to paragraphs 61-63, where he referred to: "void unenforceable and void contract clauses and disputed clauses and exemption clauses" without specifying what they were.

21 The Claimant clarified to the Tribunal that what he meant by this was that he contended that the declaration that he had signed as being self-employed was void or invalid because:-

21.1 It did not reflect the reality of the relationship, relying on the case of *Autoclenz v Belcher*.

21.2 It amounted to an unlawful attempt to contract out of the protection conferred under the Employment Act.

21.3 The clauses were void as being in breach of the Unfair Contract Terms Act.

22 Having thus clarified what was meant by the clause in question the Claimant was content to rely on his original grounds of claim, rather than the amended description.

23 The agreed issues in the case are therefore those stated by Judge O'Brien at the preliminary hearing; the additional issues caused by the further details of protected disclosures given by the Claimant; and the additional clarification given by the Claimant as described above as to the basis on which he disputed that his self-employed status was genuine.

24 Attached to this judgment, as Appendix 1, is a copy of the part of Judge O'Brien's Preliminary Hearing in which he identified the issues in the case; and the list of what the Claimant described as being protected disclosures. The parties also indentified the following issue, namely- were these disclosures made; and, if so, were they protected within the meaning of section 43B(1)(b) Employment Rights Act 1996?

The relevant law

25 The statutory definition of employees is set out in section 230 Employment Rights Act 1996 ("ERA").

26 Section 230 provides:

"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or

apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

27 Section 230(3) ERA provides a definition of a worker. The definition of worker is identical in section 230(3) ERA, Regulation 2(1) of the Working Time Regulations 1998, section 54(3) of the National Minimum Wage Act 1998 and Regulation 1(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

28 Section 230(3) ERA provides:

> "… "worker" … means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer or any profession or business undertaking carried on by the individual."

29 The question of whether an individual is an employee, a worker or a contractor that falls within neither of these definitions has been the subject of much litigation; and much scrutiny by appellate courts.

30 At the heart of the litigation has been the desire on the part of the Respondents' to put into place contractual arrangements that avoid claimants receiving employment protection; and the desire of Claimants' to assert and enforce such protection.

31 In the case of *Autoclenz v Belcher* [2011] IRLR 820 (SC), the Supreme Court gave guidance that the question in every case is what is the true agreement between the parties. Where there is a dispute as to the genuineness of a written term in an employment contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other. Evidence of how the parties conduct themselves in practice may be so persuasive that an inference can be drawn that the practice reflects the true obligations of the parties, although the mere fact that the parties conduct themselves in a particular way does not of itself mean that the 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 the right is never exercised in practice does not mean that it is not a genuine right. The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what agreed. Organisations which offer work or require services to be provided by individuals are frequently in a position to dictate the written terms which the other party has to accept. In practice, in employment cases, it may be more common for a court or tribunal to have to

investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.

32 In the case of *Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance* [1968] I AER 43 (QB) it was held that a contract of service existed if three conditions were fulfilled namely:-

32.1 Did the worker agree to provide his or her own work and skill in return for remuneration?

32.2 Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

32.3 Were the other provisions of the contract consistent with its being a contract of service?

33 Although the guidance given in the *Ready Mixed Concrete* case remains relevant in ascertaining whether an individual is an employee, numerous considerations have been held to be relevant. Considerations include the extent to which the individual is controlled by the employer, the individual's position in the enterprise, economic realities, issues such as methods of payment, mutuality of obligation, ability to substitute. Courts and tribunals have been encouraged to consider all relevant factors, rather than regarding individual factors as necessarily being determinative.

34 In the case of *Byrne Brothers Ltd v Baird & others* [2002] IRLR 96 (EAT) Mr Recorder Underhill (as he then was) gave the following guidance which has subsequently been endorsed in numerous cases:

> "The intention behind the regulation is plainly to create an intermediate class of protected worker who, on the one hand, is not an employee but, on the other hand cannot in some narrower sense be regarded as carrying on a business. The policy behind the inclusion of limb (b) can only have been to extend the protection accorded by the Working Time Regulations to workers who are in the same need of that type of protection as employees in the strict sense – workers, that is, while viewed as liable, whatever their employment status, to be required to work excessive hours. The reason why employees were thought to need protection is that they are in a subordinate and dependent position vis-à-vis their employees. The purpose of regulation 2(1)(b) is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.
>
> Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services, but with the boundary pushed further in the putative worker's favour. It may be relevant, for example, to assess the degree of control

> exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc."

35 In the case of *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, guidance was given as follows:

> "A focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

36 In view of our conclusions as to whether the Claimant was an employee or worker (below) and the concessions made by the Claimant and the Respondent's representative (below) we do not set out in detail the provisions as to unfair dismissal, wrongful dismissal, holiday pay and sections 9-11 of the National Minimum Wage Act 1998, although we have borne them in mind.

37 As regards public interest disclosure definitions under section 43B ERA 1996 the dispute in this case focus on whether the disclosures of the Claimant were in the public interest. The Court of Appeal has recently held, in the case of *Chesterton Global Ltd and another v Nurmohamed and Public Concern at Work* [2017] IRLR 837 (CA) as follows:

> "The question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people serving that interest … where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case which make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case. Relevant factors could include: the numbers in the group whose interest the disclosure serves; the nature of the interest affected and the extent to which they are affected by the wrongdoing disclose; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer."

38 Although section 43K ERA extends the definition of a worker, this is not relevant for the Tribunal's purposes as we decided (below) that the Claimant fell within the definition in section 230(3) ERA and equivalent provisions.

39 Section 47B provides that the worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Consideration of this issue involves consideration of the motivation of an individual carrying out a detrimental act towards the Claimant in question.

40 Section 48(2) ERA provides that when considering a protected disclosure

detriment complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

41 Regulation 2(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides:

> "A worker is a part-time worker for the purpose of these regulations if he is paid wholly or in part by reference to the time he works and having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker."

42 The first element of that definition suggests that a worker who is paid entirely on a piecework basis, or at various stages of a project, will not be covered by the regulations, even if he or she works on fewer days or for shorter hours than others in the same workplace.

43 The National Minimum Wage Regulations 2015 define work as being either salaried hours work, time work, output work, or unmeasured work. Regulation 30 sets out the definition of time work. Unmeasured work is defined as being any other work that is not time work, salaried hours work our output work.

44 Section 1 of the National Minimum Wage Act 1998 provides that a person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage. Section 1(2)(a) provides that a worker is so entitled.

45 The national minimum wage rate in force at the time the Claimant worked for the Respondent was £7.20 per hour.

The evidence

46 On behalf of the Claimant the Tribunal heard evidence from the Claimant himself.

47 On behalf of the Respondent the Tribunal heard evidence from Mr Julian Naylor, Operations Supervisor for the Respondent at the relevant times; and Mr Alistair Clarke, owner of the Respondent.

48 In addition the Tribunal considered the documents to which it was referred in an agreed bundle of documents.

Findings of fact

49 The Tribunal sets out the findings of fact it considers relevant and necessary to determine the issues we are required to determine. We do not seek to set out every detail provided to us, nor to make findings on each point that was in dispute. We have however considered all the evidence provided to us and we have borne it all in mind.

50 The Claimant, Mr Warren Augustine, holds a private hire vehicle drivers licence.

51 Prior to working for the Respondent, from November 2015 to February 2016 he worked for Uber.

52 The Claimant worked for Data Cars, another private car company, from February to September 2016.

53 In order to work for Uber or Data Cars the Claimant was required to be self-employed.

54 The Claimant, in order to start work at Uber, registered with HMRC as self-employed. He filled in a tax return as Warren Augustine. He did not have to register for VAT because his income was insufficient.

55 Prior to working in the private car industry the Claimant obtained a law degree in 2012. So far as the Tribunal is aware, however, he never followed this up by pursuing either a further step towards qualifying as a lawyer or working in the legal profession.

56 The Claimant is an intelligent, quietly spoken individual who has researched his case diligently, as shown by the length and breadth of his witness statement and closing submissions.

57 At the time the Claimant worked for the Respondent the Respondent's workforce consisted of:-

57.1 Mr Clarke, the owner of the business, who started the business in 2014. Mr Clarke looked after the finance, human resources and business development aspects of the company.

57.2 Mr Ken James, Operations Manager. When Mr Clarke started the Respondent's business he did not have experience of the industry, having spent the previous 10 years in the oil and gas industry. He relied on Mr James for his knowledge and experience.

57.3 Shortly after the Claimant started working for the Respondent Mr Julian Naylor was employed as an Operations Supervisor. His main function, at least initially, was to optimise the vehicle fleet used by the Respondent and the income from it. He was also brought in to manage the drivers.

57.4 Ms A Yurttagul carried out administrative work for the Respondent.

57.5 There were four controllers, who controlled the jobs allocated to the drivers, i.e. which passengers the driver would be picking up.

57.6 Around 20 to 25 drivers worked for the Respondent.

58 After leaving Data Cars the Claimant was out of work and needing work. He looked at private hire driver job vacancies on the internet and saw an advertisement from the Respondent. Neither party has retained the advertisement.

59 On 20 September 2016, the Claimant telephoned to enquire about the job and spoke with one of the Respondent's controllers, called Luke (the Tribunal was not made aware of his surname).

60 Luke explained to the Claimant that the Respondent operated a private hire service using electric vehicles. He explained that the vehicles used for customers were Nissan Leaf Tekna's. He also explained that the Respondent's drivers avoided fuel costs as the Respondent provided access to free vehicle charging facilities.

61 Luke also explained to the Claimant that the Respondent offers its new drivers use of the vehicles rent free for the first six weeks of the driver contracts. He informed the Claimant that the Respondent's drivers were then given the option to collect a vehicle from the Respondent's office at the start of the shifts and return the vehicle at the end of the shifts without paying the vehicle rent. He informed the Claimant that by opting for the temporary vehicle use option, drivers only use the vehicle whilst working shifts and ceased to have use of the vehicle following its return to the Respondent at the end of shifts. In addition the Respondent offered an executive service to its customers, using a Tesla Model S. He explained that there was one Tesla in the fleet which was used by two of its drivers in split shifts, one for night shifts and another for day shifts.

62 Luke also informed the Claimant that the Respondent regarded itself as a chauffeur service and its drivers were required to wear a suit and tie whilst on shifts; and the Claimant agreed that he would do this.

63 The Claimant asked Luke as to the number of drivers engaged with the Respondent and was informed that the Respondent had about 15 drivers engaged with it.

64 Luke invited the Claimant to attend the Respondent's offices on 21 September 2016 at 11am to complete the necessary paperwork. He asked the Claimant to bring his passport, driving licence, private hire driver licence, and bank details to the appointment. He instructed the Claimant to ask for Ms Yurttagul on arrival who would deal with matters from there.

65 Luke sent the Claimant an email to confirm the meeting and the Respondent's address. The Respondent's address is in London E14 where they have charging points for charging the electric vehicles and have four parking spaces for their vehicles.

66 On 21 September 2016, the Claimant attended a meeting with Ms Yurttagul.

67 Ms Yurttagul asked the Claimant about his previous experience as a private hire driver, the Claimant explaining that he had worked as a private hire driver vehicle driver for almost a year for two private hire companies.

68 Ms Yurttagul gave a similar explanation to the explanation the Claimant had previously been given of the service the Respondent provided, together with the option for six weeks free use of the car; and the rent free option if the driver collected the electric vehicle at the start of the shift from Canary Wharf and returned it at the end of the shift.

69 Ms Yurttagul explained to the Claimant that the Respondent's drivers were required to wear a suit and tie whilst working; gave him the same information about the executive car shared by two drivers in split shifts; and explained that drivers were to work 10 to 12 hour shifts, five days a week.

70 The Claimant explained to Ms Yurttagul that he was only able to work part-time hours and asked her whether this was acceptable.

71 Ms Yurttagul confirmed to the Claimant that it was acceptable for him to work part-time hours and asked him to notify her of the hours he was able to work weekly.

72 The Claimant explained to Ms Yurttagul that he was unable to confirm his weekly number of working hours at that point and would notify her later.

73 Ms Yurttagul explained that the Respondent's vehicles were to be cleaned daily, and that they had an arrangement with a 24hr car wash in Shoreditch East London which enabled the Respondent's drivers to get their respective vehicles cleaned on a daily basis free of charge.

74 Ms Yurttagul explained that upon entering the driver agreement he was entitled to exercise the rent free period; and that on entering the driver agreement, he was permitted to exercise the temporary vehicle option (i.e. as explained above, to use the vehicles rent free provided they were collected from the Respondent's charging point and car spaces in Canary Wharf and returned at the end of each shift).

75 The Claimant, at Ms Yurttagul's request, completed the standard form driver application. This gave the Claimant's details as to address, email address, employment history, right to take self-employment, criminal record and health details, including whether he was suffering from a disability.

76 At the end of the application form the Claimant signed a declaration as follows:-

76.1 "I declare that I am not knowingly claiming any government benefit to which I am not legally entitled.

76.2 I declare myself to be self-employed. I understand fully the terms and meanings of my self-employed status and as such wish to be paid accordingly. I understand I will be totally responsible for the payment of my own taxes in regards to my earnings as a self-employed subcontractor.

76.3 I agree that in the event of any non-payment of income tax and N.I. contributions that I am legally obliged to pay, that eConnect Cars Limited is not responsible for this that should a demand for any such no-payment be made on eConnect Cars Limited, I will repay the income tax and N.I. contributions accordingly.

76.4 I confirm that the above information is complete and correct to the best of my knowledge and that any untrue or misleading information provided by

me will give eConnect Cars Limited the right to terminate my self-employed driver agreement with immediate effect."

77 In addition, as required by Ms Yurttagul, the Claimant signed the Respondent's standard form terms and conditions. These included the following terms and conditions:-

77.1 There was a section "Commission Rates". This provided that drivers retain 62.5% of the fares completed, which included any waiting time charged; that if it was not possible to charge the client for that journey due to service issues that were the fault of the driver, the driver would not receive any commission for the job; and the parking costs were to be reimbursed to the driver provided that they had been correctly added to the job.

77.2 There was another head "Deductions". This provided that any cash paid directly to the driver would be deducted from the pay as cash retained unless handed into the office and a receipt obtained. There was a provision that the total cost of the car was £200 per week; and that a bond of £1,000 was required to cover any damages or fines that the driver was responsible for, which would be collected weekly from the driver's pay at a rate of £50 per week; and that the bond was repayable 28 days after the last day of work with eConnect less any amount owing to eConnect for cost of repair to car or unpaid PCNs (parking charge notices).

77.3 There is a section on whose responsibility it was to pay parking charge notices.

77.4 There was a section on pay dates, pay being calculated weekly from Monday to Sunday and made by BACs transfer on the second Friday following the last day of the week in question.

77.5 There was a section headed "What is required by eConnect" on what is required.

77.6 The requirements of eConnect gave requirements of the drivers before starting their shift, before leaving for work, during their shift, when receiving a job, when arriving at a job, whilst on a job, whilst finishing a job, whilst on a break and at the end of the shift. These were detailed and specific requirements.

77.7 Before starting a shift the driver was required to call the office to let them know that they were getting ready for the shift and of any jobs allocated to them the previous day. If unable to work the driver was asked to either telephone, text, email or come to the office giving as much notice as possible. It was stated not to be acceptable to be absent without communication.

77.8 There were numerous requirements before leaving for a shift. For

example there were requirements as to the condition of the car, money to give change to customers, leaving in sufficient time to arrive at the first job at least 10 minutes before the recommended time of arrival ("RTA") and as to logging on to the driver app. There was a provision "we expect our drivers to work a 10/12 hour shift, unless otherwise prearranged".

77.9 Similarly, there were detailed instructions as to what was required of drivers during their shift. In bold type it was emphasised that a driver must never pull out of a job without getting permission from control; just go to the car wash; just drive around; just go for a charge; or just go for a break. These provisions were explained as that if a driver needed to take a break or charge or wash the car they were to talk to control when they were clear and control would schedule time for them to do so.

77.10 The provisions for what was required of a driver when receiving a job included such factors as arriving 10 minutes early, and, if struggling to get to the job in time, to call ahead and warn the passenger or, if there was not a contact number available or they were likely to be more than three to four minutes late, to call control immediately.

77.11 Requirements when arriving from the job included how they should greet the passenger, to remember that eConnect provides a service to its customers and that the driver was their ambassador and that they were not a minicab. It was repeated that a driver should never pull away from a pick up without express permission of control.

77.12 The requirements whilst on a job included never to have the radio on unless the passenger requested this; never to have a private telephone conversation; not to make text messages or read media messages while a passenger was on board.

77.13 When finishing a job the driver's requirements included requirement such as to collect the right cash, ensure that any waiting time or parking extras to the job were added; if going to another job marking themselves on route and proceeding to the pick up; if not having a job finding somewhere to stop legally and wait for instruction. The driver was required to make control aware if they needed to make a personal call and if clear for 15 minutes without instruction to call control for an update.

77.14 The requirements whilst going on a break were to mark themselves on a break and keeping their status up to date on their app.

77.15 At the end of the shift the requirements provided that the driver say good night to the duty controller, check if they had any work for the start of their next shift; make sure that they had a minimum of 80% charge to start the next shift; and, if needing to use the company car whilst off shift, to speak to control first.

77.16 There was a section on arrangements as to car damage.

78 In addition the Claimant signed a confidentiality agreement. Amongst the provisions of this agreement were:-

78.1 Not to disclose any confidential information relating to or received from eConnect Cars, its staff and other parties;

78.2 Not to use any information as to identifiable legal individuals governed by the Data Protection Act;

78.3 Keeping confidential and personal data securely;

78.4 Passing back all records to eConnect Cars; and,

78.5 On termination of his position as a private hire driver, not to contact any of eConnect Cars customers in any shape or form for a period of no less than 12 months from the date of completion of my services to eConnect Cars.

79 Ms Yurttagul then arranged for a driver to give the Claimant a demonstration of the Respondent's mobile phone application used to communicate job request to drivers and facilitate their completion.

80 The Claimant asked Ms Yurttagul whether he could have details of the customer fare rates. He was concerned to try to find out how much he was likely to earn as a driver. Ms Yurttagul responded that the fare tariff was unavailable but the value of each fare was displayed on the application upon their completion. In the course of his evidence Mr Clarke explained that this information was commercially sensitive information.

81 Ms Yurttagul arranged for the Claimant to be sent a test job to the demonstration phone and a link by text message to his mobile phone to enable him to download the application to his phone.

82 Ms Yurttagul arranged for the Claimant to take a test drive with Mr James; and Mr James explained the characteristics of the electric vehicles. Mr James also showed the Claimant the Respondent's business cards for handing to customers. The Claimant drove the vehicle, with Mr James and Ms Yurttagul also in the car.

83 Mr James showed the Claimant the vehicle charges and charging procedure. Charging a vehicle to 80% capacity took about 20 minutes with rapid charges; or standard charges would charge the vehicle more slowly. Mr James also explained to the Claimant that the Respondent provided its drivers with charging cards providing free access to multiple vehicle charging points across London.

84 Ms Yurttagul offered the Claimant immediate use of the vehicle, explaining that he could use the vehicle for free for six weeks thereafter and exercise the temporary vehicle option.

85 The Claimant wanted to work part-time and had no intention to pay a rent for the car because he was concerned that he would not be able to afford the £200 per week

rental that would otherwise be charged for the vehicle.

86 The Claimant, however, signed the rental agreement provided to him.

87 This agreement provided that the hire rate was £200 and that the first six weeks there were no rental charges. There were sections headed "time out" and "date out" although these were left blank.

88 On 23 September 2016, the Claimant sent Ms Yurttagul an email. In the course of that email he stated that he would be available for part-time work. He referred to Ms Yurttagul's request that he inform her of the number of hours he would be available to work weekly. He stated that he was unable to specify the number of hours he would be available to work without the means to calculate the minimum number of fare paying miles required to covering running costs while maintaining other personal responsibilities. He asked her to supply him with fare tariff information to calculate customer's fares, to enable him to specify the number of hours he would be available to drive weekly.

89 Ms Yurttagul did not reply to the Claimant's email.

90 The Claimant wanted to work part-time because he was studying to complete the taxi driver knowledge test.

91 The terms and conditions referred to above were the standards that the Claimant adhered to, as confirmed by the Claimant when cross-examined on this issue.

92 Mr James, Mr Naylor, the controllers and Ms Yurttagul were all classified by the Respondent as being employees.

93 The drivers were all engaged on the same self-employed status as the Claimant.

94 The business of the Respondent was as follows.

95 The Respondent's business could be classified into three types.

96 One type of business, which Mr Clarke described as "low" was to provide lifts for customers of local authorities, for example to go to doctor's appointments or hospital appointments. The customer would pay part and the local authority part of the fare. The driver was required, therefore, to collect from the customer the difference between the amount paid by the local authority and the amount paid by the customer, the fare being set by agreement between the local authority and the Respondent.

97 The second type of custom for the Respondent was described by Mr Clarke as "middle" and "aggregators". The main customer of the Respondent in this respect was the BBC. The Respondent was offered work by a company called "One Transport" who had various private car companies delivering this service, including the Respondent. The BBC would provide a taxi service, for example, when their employees finished work after a particular time (around, the Tribunal understands to be

10pm). The price that the Respondent could take was dictated to them.

98 The third category, classified as "high" by Mr Clarke was their own contracts. For example the Respondent has contracts with hotels where it was up to the Respondent to determine a price with the hotel. This was commercially sensitive information. There were also a small number of individuals for whom they provided services, called cash customers.

99 The Claimant, therefore, had no control over the customers for whom he provided work. The customers and fare structure were determined by the Respondent and their customers, not the Claimant.

100 The arrangements for the Claimant's work were as follows.

101 The Claimant, as referred to earlier in the terms and conditions, was paid on a fortnightly basis. His email address was obtained when he started working for Uber and maintained by him. He described himself as "Len Motors". He explained that this was an email address he had taken on for Uber and that Len represented the name of his late father. The performance report produced by Mr Clarke to set out what he described as the log on times, idle times, total jobs times, total charge and earnings per hour describes the Claimant by his individual name i.e. "Warren Augustine" not by the Len Motors name.

102 It was suggested to the Claimant in cross-examination that he could provide a substitute if unable to work for the Respondent. This is incorrect and we do not find this to be the case. It did not form part of the terms of conditions, it was never notified to the Claimant that he could provide a substitute and no mention was made of this possibility in the rental car hire agreement.

103 The Claimant first started work for the Respondent on 25 September 2017 at around 11pm. He telephoned the control room prior to starting work at around 10pm and explained that he was a new part-time driver. He explained that he was unavailable to specify his hours but would work three to four hour shifts five days a week.

104 The hours stated by the Claimant suited the Respondent for their BBC contract. The bulk of the work the Claimant performed for the Respondent was to service their BBC contract.

105 The Claimant would telephone the control room when he was about to log on. He lived in Lewisham and would log on when he was leaving for work. When cross-examined, Mr Naylor accepted that the Claimant was working from the point he logged on for work from Lewisham and allowed his driving time for his first picking up of a passenger. Sometimes his first lift for a passenger had already been prearranged from his previous shift, sometimes it would be after he had had logged on for a new shift.

106 In contrast, Mr Naylor explained that if a controller lived out of the area, he would not regard them as being at work from the point they signed on. He explained that he regarded drivers as available for work if they were logged in and near where work was available. If, for example, they were in Stevenage they were too far away

from work to be regarded as available for work.

107 The drivers' movements were dictated by the controllers. The controllers had a tracker system so knew where any driver that was logged on was at any given point. The controllers also estimated how much charge a driver had in order to make sure that any passengers they were driving would not lead to the driver running out of charge and getting stranded.

108 Mr Clarke produced a performance report for the purposes of this litigation in which he divided the time out between log in, idle, total time and total fares charged, making an estimate of earnings per hour from this. His description of idle time was, however, at odds with Mr Naylor's evidence that idle time included the requirement to wash the vehicle at some point during the shift and the need and requirement to charge the vehicle's battery. Mr Naylor also referred to some drivers sitting in Sainsbury's having a cup of tea; although it was not suggested that the Claimant was doing so. The Claimant's evidence, which we accept, was that during the time he was logged on he was either on a job, travelling to or from a job, waiting for a job, or cleaning the car or charging the vehicle. In other words, when the Claimant's total log in time was calculated by the Respondent to be 176hrs 3mins, the Tribunal finds that this was the time that he was working for the Respondent, not the total number of hours (121hrs 32mins) that he was classified as actually working on the jobs.

109 The £200 per week rental paid by drivers who had not entered into an arrangement to collect and deliver cars at the beginning and end of the shift was a subsidised rate for the drivers designed to encourage their recruitment. Mr Clarke further explained that one or two drivers were using the same system the Claimant was offered, namely that rather than paying the £200 per week rental they could use the cars rent free provided that they collected the cars from the Canary Wharf point at the start of their shift and brought it back at the end of the shift so that other drivers could then use the car.

110 In summary the method of operation of the Respondent in relation to the Claimant and, to a large extent, its other drivers was as follows:-

110.1 At the time the business started the Respondent was a pioneer in providing electric cars for its private car hire service.

110.2 The drivers were central to the Respondent's business as they would have no business without them. When cross-examined Mr Naylor explained that the drivers brought money to the business by giving a good service and promoting eConnect; and that they were essential to the business and it was essential to have them working when the Respondent had bookings.

110.3 The Claimant had a considerable amount of flexibility as to exactly when he logged in and logged off work. His hours of work were predominantly determined by him, rather than the Respondent.

110.4 There was nonetheless an expectation that he would be working a reasonable amount of hours each week. This can be seen from the fact

that he was being provided the car rent free for the first six weeks; and the £200 per week (even if paid, rather than a driver opting for the rent free scheme described above) was a subsidised rate for the car. Additionally, as referred to below, Mr Naylor criticised the Claimant for only having worked eight hours in the last week of his six week rent free period.

110.5 There was also an expectation that the Respondent would find the Claimant work whilst he was logged on for a shift.

110.6 Whilst at work the Claimant was expected to adhere to the requirements set out in the terms and conditions and did do so.

110.7 The Claimant was responsible for payment of tax and national insurance and this arrangement was accepted by Inland Revenue.

111 On 17 October 2016, Mr Naylor was appointed by the Respondent as Operations Supervisor.

112 The first main task allocated to Mr Naylor was to devise a new bonus scheme for the drivers. Mr Naylor explained that from the driver's point of view they were concerned that they were not getting enough work to obtain the income they desired, having in mind that they were paid according to the amount of income they generated from fares. From the Respondent's point of view the drivers were tending not to work at the peak times for business. Mr Naylor wished, therefore, to devise a scheme that would incentivise drivers to work at the times when there was most business. Mr Naylor had a great deal of experience in working in the private car industry.

113 On 20 October 2016, Mr Naylor sent a letter and questionnaire to all the drivers including the Claimant. He introduced himself to them and sent a survey asking for what they enjoyed about working for the Respondent, what they did not enjoy, what they might want to change, what types of fares they enjoyed the most or least, what would make their job easier, what they thought could be done to make eConnect Cars even more successful and how much they would like or need to earn.

114 Mr Murray, in submissions on the Respondent's behalf, sought to persuade the Tribunal that this survey was an indication that the Claimant was an independent contractor and would be one never sent to employees or workers. The Tribunal does not agree. Each of us have seen in Employment Tribunal cases from time to time employee satisfaction surveys of a similar nature to the one undertaken by Mr Naylor; and the lay members have from time to time conducted employee satisfaction surveys themselves.

115 Although the Claimant did not personally respond to the survey by the time his employment or engagement with the Respondent ended, the general theme of the drivers that did respond was that they felt that they were not earning enough.

116 In Mr Naylor's words, when cross-examined, the drivers were bringing money to the business by giving a good service and promoting eConnect, for Connect to make

money it was essential for eConnect to have drivers; and it was also essential to have them when the Respondent had bookings.

117 From Mr Clarke's perspective he was also wanting to devise a scheme that would both be successful in being profitable for the Respondent and would also encourage the recruitment and retention of drivers.

118 Mr Clarke also came to the view that the scheme whereby a driver would not be charged rent for the car if he collected and returned the car to the Respondent's base in Canary Wharf, rather than keeping it at home, so that it could be shared with another driver was not as successful as he wanted it to be. It was successful with the one executive car, which was shared by two drivers, because they worked well together in delivering the car to each other's homes in order for the other driver to start their shift. It was less successful for the other cars and the other drivers for various reasons. They were having difficulty in finding sufficient drivers to share the cars; and operational issues arose. For example, if the last journey for one driver took them to West London, he might be late getting back to their depot in East London (Canary Wharf) to hand over the car to the next driver. There were also issues over the battery level of the car, as a driver receiving a car might not want to waste time charging the car if it was handed over empty from the previous driver. Mr Clarke wished to withdraw the scheme.

119 Another concern of Mr Clarke's was that some drivers had been acting unscrupulously for the six week period by taking up the six week free rental offer without any serious intention of continuing to work for the Respondent or to work for any significant number of hours during the six week period, but to use it as six weeks free car hire. There was no suggestion that the Claimant was acting in an unscrupulous way such as this. The Respondent therefore subsequently changed the six weeks rent free to two weeks rent free, with the condition that the driver worked five 10 hour shifts in each of the two weeks.

120 Meanwhile, the Claimant was coming towards the end of his six week rent free use of the car in which he was allowed to take the car home with him. He wanted to take up the temporary vehicle option that had been explained to him by the controller (Luke) and by Ms Yurttagul (as referred to above). On 5 and 7 November 2016, the Claimant telephoned the Respondent's office to notify them that he wished to take up the temporary vehicle option. His telephone calls were not returned.

121 On 7 November 2016, the Claimant sent an email to the Respondent. He referred to having made four telephone calls regarding the expiry of the free rental period; and requesting information as to the procedure to be followed to return the vehicle to avoid attracting vehicle rental charges. He stated that he had been told that his calls would be returned by an individual possessing the requisite information but that they had not been returned. He stated at the end of his email that he wished to continue driving with eConnect Cars by taking up the option offered to him when he signed up which consisted of collecting a vehicle from the office at the start of his shifts and returning it to the office at the end of his shifts.

122 Later that day Mr Naylor replied to the Claimant's email. He apologised for not having responded earlier. He stated:

> "Unfortunately, the option to return the car after your shift without incurring rent is no longer available. I will be releasing an offer later this week which could allow you to work without paying any "rental" for the car but it will be a scheme based around work done and points accrued.
>
> I think it best if you come in to discuss and I can take you through it."

123 Later that day the Claimant telephoned Mr Naylor. There is a measure of agreement between the evidence of the Claimant and Mr Naylor about what was said in the telephone conversation, although neither of them made a contemporaneous written record of the conversation. In particular, although the Claimant gives a great deal more detail than Mr Naylor about what was said, both agree that:-

123.1 Mr Naylor confirmed that the option of the Claimant being able to continue to have the use of the electric car rent free if he collected and delivered the car at the beginning and end of his shifts would not be available under the new scheme that Mr Naylor was in the process of devising.

123.2 The Claimant insisted that the scheme he had identified had been offered to him and objected vigorously to the withdrawal of it. There was a discussion as to the Claimant's wish to continue working part-time and, after having an outline of the points scheme explained to him, the Claimant expressed the opinion that it would not be viable for him to continue to work for the Respondent.

123.3 In the course of the impasse the two of them had reached. The Claimant became irritated or angry.

123.4 The Claimant referred to the judgment of the Employment Tribunal in the Uber case that the Uber drivers were workers and had rights.

124 Mr Naylor agreed with the general gist of the Claimant's account of the telephone conversation given in the Claimant's witness statement, with the exception that he thought that the person who first made the suggestion of returning the vehicle was the Claimant, rather than the Claimant's account that it was Mr Naylor; although Mr Naylor accepted when cross-examined that he could no longer recall exactly.

125 What the Tribunal finds to have taken place is also assisted by the only contemporaneous documentation on the matter. In an email Mr Naylor wrote to Mr James immediately after the telephone conversation he stated as follows:

> "Just spoken to Warren who is unhappy at possibly having to pay rent. He obviously isn't interested in the new deal claiming he could only ever work part time. He quoted employment law saying he was a worker who had certain rights and we have reneged on a contract without notice. He asked "don't you read the news" referring to the current Uber case."

126 What the Tribunal finds took place in the telephone conversation is that:-

126.1 Mr Naylor confirmed that the Claimant would no longer have the option of a rent free arrangement if he collected and return the vehicle at the beginning and end of his shift.

126.2 The Claimant notified Mr Naylor that this would be a breach of the contract that he had agreed when starting work for the Respondent.

126.3 Mr Naylor gave an explanation in outline of what he was proposing as the new points scheme by which the drivers would have to earn a certain amount of points by driving at times the Respondent wanted them to in order to reduce or eliminate the rental charges.

126.4 The Claimant notified Mr Naylor that he wanted to continue to work part-time so the new point system would not be viable for him.

126.5 In the course of a discussion becoming heated the Claimant referred to the Uber case and told Mr Naylor that the outcome of the case meant that he and the other drivers were workers and had rights.

126.6 The Claimant did not specify what those rights were. He accepted when cross-examined that he did not specifically mention the Working Time Regulations or National Minimum Wage Act or that he would be claiming holiday pay or a minimum wage. The Claimant assumed that Mr Naylor would understand this as one of the implications of the judgment in the Uber case.

126.7 Mr Naylor then suggested to the Claimant that it would be best if he returned the car. The Claimant replied that he thought it would be best too. We find that it was Mr Naylor who initiated the suggestion. The Claimant's recall was likely to be better than that of Mr Naylor, as Mr Naylor was only asked as to this conversation months later when he had already left the Respondent's employment. Mr Naylor explained to the Tribunal that he had given the matter no further thought once the Claimant had returned the vehicle and, when questioned by the Tribunal, stated that he could no longer recall the sequence. In contrast, the Claimant was more likely to have a clearer recollection because the matter affected him more personally than it did Mr Naylor.

127 In the course of the conversation between Mr Naylor and the Claimant, Mr Naylor expressed concern that the Claimant had worked around seven hours only in the week commencing 31 October 2016 and around 16 hours in the week commencing 24 October 2016.

128 The telephone conversation concluded with Mr Naylor and the Claimant making arrangements for the Claimant to return the car at the end of his six week rent free period. There was some difficulty with the return of the car on the date initially agreed. When the Claimant subsequently returned the car the following day Mr Naylor said to the Claimant that if he changed his mind (i.e. if he was willing to agree to the new points scheme being introduced) he was welcome to continue with the Respondent.

From Mr Naylor's point of view the Claimant was a good driver and he had no complaints from customers about his work.

129 The Respondent subsequently introduced a points scheme. It is unnecessary for the Tribunal to give great detail about it as it was introduced after the Claimant's departure. In summary, Mr Naylor devised a scheme that incentivised the drivers to work at times of peak demand by devising a point system that gave more points to drivers for working at times of peak demand. Mr Naylor accepted in cross-examination that it would at least have been difficult for the Claimant to have worked part-time and obtained the vehicle rent free, although he also stated that it would not have been impossible. He also explained that some drivers would work extra days, for example Sundays, if they were near to getting the maximum points to have the use of the vehicle rent free and needed additional hours to build up the necessary points.

130 Subsequently the Respondent returned the bond paid by the Claimant against damage to vehicle and parking charges.

131 The Respondent remained interested in recruiting more drivers. Subsequently the Claimant was sent a flyer by email, which was sent to former drivers of the Respondent, setting out the points scheme and inviting the drivers to rejoin. The Claimant did not, however, wish to do so and brought these proceedings.

Closing submissions

132 Both the Claimant and Mr Murray, on behalf of the Respondent, gave typed closing submissions. Both read each other's submissions before delivering oral submissions to enable them to have an opportunity to respond to each other.

133 The Judge indicated to the parties its preliminary thinking on the issues, emphasising that it was preliminary thinking only. In addition the Tribunal provided the parties with copies of the Employment Tribunal's judgment in the case of Lange, Olszeski and Morahan v Addison Lee Ltd (case numbers 2208029, 2208030 and 2208031/2016). The Tribunal asked the representatives to include in their oral submissions their responses to the provisional indications given by the Tribunal.

134 In the course of discussion of the closing submissions in the case both parties accepted that, if the Claimant was to be classified as a worker in order to be able to bring a National Minimum Wage Act claim, his method of work was agreed to be unmeasured time within the meaning of the 2015 National Minimum Wage Regulations.

135 Mr Murray accepted that if the Tribunal held that the Claimant was a worker he would be entitled to holiday pay and his claim under section 10 National Minimum Act as to production of records would succeed.

136 For his part the Claimant accepted that if the Tribunal held that he was not an employee of the Respondent his claims for unfair dismissal, written particulars of employment and notice pay would fail.

137 Both parties made reference to a large number of cases, only some of which we

have referred to in our summary of the law, although we have borne in mind the cases referred to us.

138 In addition to the above, the parties' closing submissions included the following.

139 On behalf of the Respondent, in summary the Respondent's closing submissions included the following:-

139.1 The Claimant was not an employee of the Respondent because he did not have to provide the service himself, there being nothing in the agreement to prevent others driving. There was not enough control for him to be an employee, the Respondent considered their drivers as customers, the Claimant took the risk that he would have to pay £200 per week car rent without earning enough to cover it.

139.2 Neither for similar and additional reasons (which he outlined) was the Claimant a worker for the Respondent.

139.3 The Claimant was not a part-time worker because he did not fall into the definition in Regulation 2(2) of the Part-time Workers Regulations because he was paid commission and not wholly or in part by reference to the time he worked. Neither was the nature of the contract such that it could be identified what a full-time worker was. He was not treated less favourably than full-time comparators because he could have achieved his rent free status by focusing his three to four hours work per day on periods when each job earn three points. Additionally, any unfavourable treatment was justified by the cost to the Respondent in employing him part-time as they needed to be used regularly if they were to make a loss; and that it had tried arranging the sharing of cars but this did not work. These reasons amounted to objective justification.

139.4 If, contrary to the Respondent's primary case, the Claimant was an employee of the Respondent, he was not dismissed. The termination was by mutual consent. Neither was the Claimant constructively dismissed as there was no contractual provision for a temporary vehicle but it was provided only on an experimental scheme. Even if there was a breach it was not a fundamental breach as Mr Naylor wanted to meet the Claimant to address his wishes. Even if the Claimant was dismissed it was not for any of the reasons in section 103A, section 104, section 104A or because of unfavourable treatment under the Working Time Regulations.

139.5 Of the protected disclosures the Claimant said that he made, only the fifth was arguable. The first four were unquestionably not in the public interest and neither was the fifth. In any event, any detriment suffered by the Claimant was not because of any public interest disclosure he made.

139.6 If one took the Claimant's working time as not including the column headed "idle time" the Claimant was paid more than the national minimum wage.

140 On behalf of the Claimant, in addition to the matters referred to above, his submissions included the following:-

140.1 There was sufficient mutuality of obligations for him to be an employee. He was required to work for the Respondent and the Respondent to provide him with work. He was obliged under a verbal agreement to work a minimum of 15 hours per week and to perform the requirement of the Respondent's terms and conditions. There was no right to substitution under his contract or in practice.

140.2 In any event he was a worker for the Respondent under the definitions of work in the Employment Rights Act, Working Time Regulations, Part-time Workers Provisions and National Minimum Wage Act. His classification by the Respondent as self-employed did not mean that he was in business on his own account and the declaration of self-employment was not determinative. As referred to in the *Autoclenz* case equality of bargaining power should be taken into account.

140.3 He was integrated into the Respondent's business as opposed to having a business on his own account. The customers were customers of the Respondent not of his. He was recruited to perform the role of private car hire and subject to terms and conditions in a confidential agreement. The Respondent had a large degree of control about how he worked (setting out in what ways).

140.4 As regards equipment supplied by the worker, referring to the *Byrne* case (referred to in the summary of law section earlier above), the vehicle was supplied by the Respondent.

140.5 As regards his unfair dismissal claim he was either expressly dismissed by being invited to return his car; or his return of the car was in response to a fundamental breach of contract, namely withdrawing the rent free car option. The principal reason for his dismissal was a combination of the prohibited reasons for him asserting statutory rights, to the National Minimum Wage Act and for holiday pay and making protected disclosures. He was dismissed because he was a part-time worker and alleged a breach of the part-time workers regulations.

140.6 He worked a total of 176hrs 3mins for the Respondent, i.e. the hours he was logged on, not just the hours he was actually driving a passenger, so that he was not paid at the National Minimum Wage Act rate.

Conclusions

141 We have taken our conclusions approximately in the order set out in the issues identified at the preliminary hearing on 15 May 2017, with the addition of the protected disclosures subsequently set out by the Claimant.

Was the Claimant an employee of the Respondent?

142 The Tribunal finds and concludes that the Claimant was not an employee of the Respondent including for the following reasons.

143 We have considered the three tests set out in the Ready Mix Concrete case.

144 Did the worker agree to provide his own work and skill in return for remuneration? Clearly the Claimant did. Under the terms and conditions agreed by him he was recruited by the Respondent, as a licensed private hire vehicle driver to carry out work for the Respondent at the rate of 62.5% of the fares paid to the Respondent by the customers he was directed by the Respondent's controllers to drive. In the words of Mr Naylor he and the other drivers brought money to the Respondent's business by giving a good service and promoting eConnect.

145 We have considered whether the Claimant agreed expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant. The Tribunal has no doubt that he did. The terms and conditions entered into by the Claimant required detailed obligations on the part of the Claimant from the time he logged on to start his shifts at work to the time he logged off to end his shifts. We set out these requirements in the findings of fact above.

146 We have considered whether the other provisions of the contract were consistent with its being a contract of service, the third question posed in the *Ready Mix Concrete case*. The Tribunal has concluded, narrowly, that they did not, including for the following reasons.

147 The Claimant was declared to be self-employed for the purposes of Inland Revenue and satisfied them that he was so as to be treated by Inland Revenue as self-employed. This is not determinative of the issue but is a factor in favour of self-employment.

148 The Claimant signed a declaration that he was self-employed in his application form to the Respondent. We give only a little weight to this factor in view of the guidance given in the *Autoclenz* case as to equality of bargaining. All the drivers were required to treat themselves in this way and it was a stipulation on the part of the Respondent. The Claimant was out of work at the time and he needed to work. Nonetheless the declaration probably carries a little weight in that the Claimant knew the arrangements he was working under.

149 An important factor in determining that the Claimant was not an employee was that his hours of work, numbers of hours worked, days worked and when he worked were all determined by the Claimant, rather than the Respondent. The Claimant agreed to work for the Respondent part-time and was employed or engaged on the basis that he would work part-time, as per his discussion with Ms Yurttagul. Ms Yurttagul made no stipulation as to when the Claimant should work, or how many hours he should work. When he telephoned the Respondent's control room on 25 September 2017 to start work he notified them that he was unable to specify his hours but would work three to four hour shifts five days a week. In fact, however, he did not do so as, for example, Mr Naylor complained that he had only worked for seven hours in the last week of his six week rent free arrangement.

150 Although, therefore, there are indications, particularly that of control, suggesting that the Claimant was an employee, on balance we have found and concluded that the Claimant does not fall within the definition of employment within section 230 ERA.

Was the Claimant a worker?

151 The Tribunal has found and concluded that he was a worker within the meaning of section 230(3) ERA and equivalent legislation. We find and conclude that his status was not that of a client or customer of the Respondent, despite the efforts of the Respondent's witnesses and Mr Murray to convince us that he was. We also have in mind the guidance given in the *Byrne Brother's* case as to the bar being set lower in the Claimant's favour.

152 In addition to the Claimant having fulfilled the first two parts of the test set out in the *Ready Mix Concrete* case there are numerous other factors supporting finding and conclusion that the Claimant was a worker such as:-

152.1 There were mutual obligations on the part of the Claimant and Respondent. There was an expectation that he would work for them at least part-time. Otherwise he would not have been given free use of an electric car for the six weeks in question. There was an expectation, described in the terms and conditions, that drivers were expected to work a 10/12 hour shift unless otherwise prearranged. It was prearranged by the Claimant that he could work part-time. There was also an expectation that the drivers would be provided with work. Unless they were provided with work the Respondent would not cover the costs of hiring electric cars and, indeed, Mr Clarke complained that the Respondent lost money for the Claimant's six weeks of work because of the insufficient hours he was working for the use of the electric car.

152.2 The drivers were essential to the Respondent's business. Without the drivers there would be no business. In that sense the employees of the Respondent were a support service, or overhead, for the drivers.

152.3 Neither of the arguments of Mr Murray that he contended were fatal to the Claimant being worker stood up to scrutiny. There was no right of substitution either in the Claimant's contract or in practice. None of the drivers, so far as the Tribunal was made aware, were allowed to provide a substitute if they wished to. There were two drivers that shared the use of the Respondent's executive car; and some other drivers that took up, in addition to the Claimant's wish to do so, the Respondent's offer not to have to pay the £200 per week car rental cost by collecting and returning the Respondent's electric car they were using at the beginning and end of the shift. Nor did his additional argument that the Respondent considered the drivers to be customers of theirs withstand scrutiny. The customers of the drivers were customers supplied by the Respondent. The Respondent told the drivers where they had to go, where to pick up and deliver the customers, and when they could charge or clean the vehicles.

152.4 Additionally, as referred to by Mr Naylor, the drivers were expected to promote the image of the Respondent. They were the Respondent's public face to the Respondent's clients.

152.5 So far as equipment was concerned the main equipment required, namely the electric car driven by the Claimant, was supplied by the Respondent.

Consequences of Tribunal's decisions as to whether the Claimant was an employee of the Respondent and whether he was a worker

152 In view of the Tribunal's findings and conclusions above and the concessions made by the parties, therefore, the Claimant claims for written particulars of employment, unfair dismissal and wrongful dismissal fail (because he was not an employee of the Respondent). By contrast his complaints of failure to pay holiday pay and under section 10 National Minimum Wage Act succeed. His complaint that he was not paid the minimum wage and entitled to the shortfall depends on whether the hours he worked were as claimed by him, or as claimed by the Respondent.

Other unfair dismissal issues

153 Had it been necessary to do so, the Tribunal would have found and concluded that the Claimant was not expressly dismissed (issue 6.1 identified at the preliminary hearing). Mr Naylor suggested that the Claimant return his car and the Claimant agreed with that suggestion. A suggestion is different from an instruction. An instruction would probably have amounted to an express dismissal; a suggestion, however, does not.

154 The Tribunal would have concluded, however, that the rent free option agreed between the Claimant and Ms Yurttagul before the Claimant started work for the Respondent amounted to an oral term of the contract, an express term. She made no qualification to the offer and the Claimant accepted it. It was clearly a fundamental term of the contract. The Claimant would not have worked for the Respondent without it because he intended to work part-time and considered that he would be unable to pay the £200 per week rent. That it was clearly a fundamental term of contract is demonstrated both by the Claimant's email in which he notified the Respondent that he wish to continue working for them after the end of the six weeks on the basis of the agreement he had entered into; and he resigned from working for the Respondent when the offer was withdrawn. Had the offer been continued he would have been perfectly content to work for the Respondent.

156 The Claimant did not have the necessary qualifying period of service to bring an "ordinary" unfair dismissal claim. He would have been required to show that he was dismissed for one of the prohibited reason set out in the issues identified at the preliminary hearing.

Detriment

157 The Tribunal has considered whether any of the qualifying disclosures relied on

him were protected disclosures.

158 The Tribunal has concluded that the first four disclosures, in which the Claimant was asserting a breach of contract on the Respondent's part were not protected disclosures. They were not in the public interest but concern a private dispute between him and the Respondent as to the contractual agreement entered into between him and the Respondent. At best the only others of the Respondent's drivers to whom they might apply were the two drivers who shared the executive car; and those of the other two drivers that had accepted the option of collecting and returning the vehicles at the start and end of their shifts, rather than taking them home with them. There was no public interest in whether the Claimant and these few drivers were being subjected to a breach of contract by the Respondent withdrawing this option for use of the electric cars.

159 By contrast, the Tribunal finds and concludes that the Claimant's fifth disclosure was (just) a disclosure the Claimant reasonably believed to be in the public interest having in mind the guidance given in the *Chesterton* case. He disclosed information about the Uber case. The information affected all the drivers in that they were working for the Respondent on the same basis as him. It was reasonable for him to believe that it was in the public interest. The issue of the so called "gig" economy is very much in the public interest and news in recent times. Zero hour contracts have been very much in the news in recent years. The Uber Employment Tribunal case was widely reported in the media, which suggests that it is a matter of public interest. The Government set up the Taylor review to report on issues such as the one affecting the Claimant.

160 Although the Uber and Addison Lee cases are of similar standing to this Tribunal and not binding on us, they are nevertheless of some persuasive value. There are similarities and differences as to the facts. In both those cases the law was fully set out and considered and both sides represented by QCs.

161 The issue on which the Claimant fails in public interest disclosure detriment and in any form of automatic unfair dismissal is on causation. We find and conclude that he was not dismissed because of the protected disclosure he made. The decision to withdraw the scheme accepted by the Claimant was made before any disclosure made by the Claimant. Mr Clarke had decided that the temporary vehicle option was not working, for the reasons set out in the Tribunal's findings of fact. He directed Mr Naylor to set up a new scheme. Mr Naylor notified the Claimant in his email to him, before their telephone conversation in which the Claimant mentioned the Uber case that the scheme was being withdrawn. Even if the Claimant had made no protected disclosures or assertions of statutory rights the outcome would have been the same – namely the withdrawal of the rent free vehicle option after the expiry of the six week free period. Indeed, Mr Naylor told the Claimant that he was welcome to continue working for the Respondent when the Claimant returned the car; and hire offering to reengage him under the new points system introduced by Mr Naylor.

162 The Claimant's public interest disclosure detriment claims, therefore, fail as does the Claimant's part-time worker dismissal/detriment claim.

Part-time worker less favourable treatment

163 The Claimant does not fulfil the requirement in Regulation 2(2) Part-time Workers Regulations for him to be paid at least partly by reference to time worked. The Claimant was paid entirely on the percentage of the fares paid by customers for the journeys the Claimant carried out. The hours worked by the Claimant were irrelevant to what he was paid.

164 This claim, therefore, fails.

National minimum wage

166 The Claimant succeeds in his claim under section 10 of the National Minimum Wage Act, in view of the concession made by the Respondent that this claim would succeed if the Tribunal were to hold that the Claimant was a worker for the Respondent.

165 For the reasons set out in the Tribunal's findings of fact the Claimant's working time amounted to the hours on which he was logged on, as referred to in page 157 of the bundle of documents and the Claimant's closing submissions. He is entitled to be paid at the minimum wage rate for the hours in question at the rate in force in October and November 2016.

Holiday Pay claim

167 Likewise, as conceded by the Respondent, the Claimant succeeds in his holiday pay claim under the Working Time Regulations, in view of the Respondent's concession that this claim would succeed, if the Claimant was held by the Tribunal to be a worker of the Respondent.

Remedy

168 We invite the parties to settle remedy themselves as payment to the Claimant depends on mathematical calculations the parties can carry out, the issues of principle having been resolved in this judgment.

169 Having in mind the pressures on the Employment Tribunal's list the parties are ordered to notify the Tribunal, by not later than 26 January 2018 whether remedy has been settled. If not, as notified to the parties a remedy hearing will take place on Monday 26 February 2018, listed for one day.

Employment Judge Goodrich

29 December 2017