EMPLOYMENT TRIBUNALS

Claimant: Mr Z Ali

Respondent: Leeds Taxi Owners Ltd

HELD by CVP ON: 14 and 15 June 2021

BEFORE: Employment Judge Davies

REPRESENTATION:

Claimant: Mr Menon (counsel)
Respondent: Ms Hashmi (counsel)

JUDGMENT having been sent to the parties on 17 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and Issues

1. This was a preliminary hearing in respect of claims brought by Mr Zulquarnain Ali against the Respondent, Leeds Taxi Owners Ltd. Mr Ali has been represented by Mr Menon of counsel and the Respondent has been represented by Ms Hashmi of counsel. I heard evidence from Mr Ali himself and for the Respondent I heard evidence from Mr Utting and Mr Howard. There was an agreed file of documents.
2. The issues to be decided at the preliminary hearing were:

2.1 From September 2018 onwards, was the Claimant a worker of the Respondent within the meaning of s 230 Employment Rights Act 1996 and regulation 2 Working Time Regulations 1998; and

2.2 From September 2018 onwards was the Claimant an employee of the Respondent within the meaning of s 83 and s 212 Equality Act 2010?

Findings of Fact

3. The Claimant is a hackney carriage licence holder of longstanding, licensed by Leeds City Council. As such he is subject to the Leeds City Council byelaws dealing with hackney carriages. Among other things, they specify that he must have a meter and must charge metered fares in accordance with the byelaws. They lay down standards that his vehicle must meet, and they say that he must deliver passengers by the shortest available route.

4. The Respondent is a limited company, Leeds Taxi Owners Limited. It describes itself as providing taxi booking services. It is owned by its members, who are predominantly taxi drivers or former taxi drivers. There is a board of directors elected by those members and I was told and accept that it is run more like a cooperative for the benefit of the members. The elected directors are paid modest part-time salaries for the work they do. The company does not declare dividends. If it made a substantial profit, its members would expect to see a reduction in their fees.

5. The Respondent has two types of "system work". One is cash or credit card work, which arises when a member of the public contacts the Respondent and books a taxi. The other is account work. The Respondent has a large number of contracts with a range of public bodies and private companies for providing taxi services to them. For that account work, sometimes the Respondent goes through a competitive tendering process and has to put forward competitive fares in order to win the contract. For those clients, the agreed contractual fare will be sometimes less than the metered fare would have been. For the other clients, the fare charged will be the metered fare as set by Leeds City Council.

6. The Respondent directly employs office workers who work as despatchers, but it describes all the taxi drivers on its books as members. The members are all hackney carriage licence holders. To come onto the Respondent's books, a hackney carriage licence holder approaches the Respondent and meets with a director. They have to prove that they have the relevant licence and documentation and then they are taken on the books. The Respondent does not recruit for drivers in the way that some private hire companies do; it is the hackney carriage licence holders who approach it.

7. That is what happened in the Claimant's case. He used to be on the books of a different company, but he approached the Respondent to come on their books instead. The Respondent agreed to take him on once he had proved he had the relevant licence and documentation. The Respondent did not enter into a written agreement with the Claimant and the evidence I heard was that it does not enter into written agreements with any of its members. I did see a draft blank agreement

but there was no evidence before me of any member ever entering into such an agreement.

8. When a new driver joins the Respondent, one of the directors inducts that driver into the Respondent's systems and processes. They show them how to use the systems, and tell them about the Respondent's rules (see below). They outline the structure of the company and show the driver how to use the Respondent's PDA system. Sometimes they take them through a PowerPoint presentation, but that was not done in the Claimant's case.

9. The PDA system is the system that the Respondent uses for allocating jobs. There is a PDA device, which is allocated to a particular vehicle. Drivers can log into the PDA using their unique driver ID assigned to them by the Respondent. A driver who owns a car can therefore sub-let their car and other drivers can use the car, if they have an ID number of their own from the Respondent. Therefore, more than one driver can use the same car and log into the PDA in that car, but each driver uses their own separate driver ID. That is not one driver substituting for another, it is multiple drivers making use of the same vehicle on terms agreed between them, to login and do work in their own right.

10. Since 2011 the Respondent has had a range of "membership options" available. One option is that the driver pays a fee of £60 per month and agrees to pay 10% of the fares received on any system work the driver accepts and completes. If drivers take that option, they have access to the Respondent's app and that will give them access to its account work. They will also have access to the cash and credit card work. Another option is for the driver to simply pay 10% of fares. If they choose that option, they do not have access to the account work, but they will be allocated cash or credit card jobs that come through the Respondent's system. They may get some account work if there is a surplus and there is a need for drivers to perform that work.

11. The Claimant initially started on another basis, what was referred to as a brand or logo only member. He did not pay any fee at all and he did not have any access to any of the Respondent's system work, but he used its branding and logo. He simply carried on operating as a hackney carriage operator but with the Respondent's branding and logo on his vehicle. Some time after that, he changed to the option where he paid 10% and had access to the cash or credit card system work. In about September 2018 he changed again and started paying the £60 a month membership fee and 10% so that he had access to the account work as well. On each occasion he approached the Respondent and elected to make those changes.

12. If a driver does system work and the passenger pays in cash, the driver takes the cash and informs the Respondent of the amount through the PDA system. For credit card and account work the payment may go directly to the Respondent. The Respondent runs a separate bank account into which all fares are put. It produces weekly statements for the drivers setting out their fares charged and fees deducted, and specifying the amount of money that is either due to or due from them. The drivers receive payments from the Respondent in accordance with those weekly invoices.

13. When drivers are working they can sign on with their driver ID to the PDA. They can either use the dedicated PDA in the vehicle or they can use an app on their mobile phone to do that. Once they sign in, they join a queue which is effectively a virtual taxi rank. The system has a number of buttons that the driver can press. One of those is labelled “book off” and the drivers can press that button if they need

    to take a break, for example a comfort break or a break to go to the mosque for daily prayers as the Claimant did. There is another button labelled “flag down.” If the driver picks up a fare from the street, they press the flag down button and that tells the Respondent that they have been flagged down and picked up a fare entirely independently and are not available to be allocated any system work. In those cases, they do not have to report the street work that they have done or the fare charged, and they do not have to pay 10% of that fare to the Respondent. That means drivers are free to respond to members of the public flagging them down or to go to the taxi ranks for work without telling the Respondent and without paying any percentage to the Respondent. There is also a button for a follow-on job, which means drivers can let the Respondent know where they are going to drop their passenger off and ask to be allocated a job in the drop off area if one is available. The system can operate in this way because all of the drivers are licensed hackney carriage drivers and that is what gives them the right to ply for trade in the streets. That is an important difference between them and private hire drivers.

14. When system jobs are available, they are allocated to the drivers who are signed in using a virtual cab rank system, based on the order in which the drivers signed in and also their location. If nobody is signed in and available in the relevant area, the job is put on the system for drivers to bid for. The system shows where the job is and drivers who want to go and do a job in that area can bid for it. The job is distributed on a first come first serve basis. If a driver is offered a system job and rejects it, the driver will be “sin-binned” for 10 minutes. That means they cannot be allocated any jobs through the app for a 10-minute period. The Respondent says the purpose of this is to prevent drivers from cherry-picking the best jobs. If the driver accepts a job and then rejects it, the period of the sinbinning may be rather longer than 10 minutes. Drivers in the sin-bin can still do street hires if there are fares available.

15. I was shown a range of documents. Some of those seem to have been on the Respondent’s notice board in its office at some point. It is not always clear precisely which were on the notice board and when. It does not appear that anybody is suggesting that any of the documents was actually given to the drivers, but they may have been shown them during their induction process or they may have had their attention drawn to them on the notice board.

16. One of the documents was a blank application form. The Claimant did not fill in an application form and the evidence before me was that drivers generally did not do so. There were a number of documents labelled “induction course.” The one dated October 2012 appears to have been the relevant version that was on the Respondent’s notice board at the relevant time and may well have been shown to the Claimant during his induction. That document says that drivers cannot work independently and that the Respondent demands first call on their services. The

PowerPoint presentation that is shown to some drivers in their induction (although not to the Claimant) is in similar terms. In fact, it says in strong terms, "Some drivers believe they have the option to switch on the system when they wish or to work the ranks when they wish. They do not. That is a disciplinary offence punishable with a fine." However, the evidence I heard is that in practice that is not really what happens. Mr Utting said that they try to encourage the drivers to take the system work and that it is a truism that taxi drivers will take cash fares and reject the system jobs if they can. He said it was in everybody's interest to keep the account customers happy and to service them properly, because that work was then available for everybody. It was bad for the Respondent's reputation if it could not provide the services to its account clients. He said there was no fine for anybody who worked the ranks or switched off their system and no disciplinary process or sanction. There was only the 10-minute sin-bin for drivers who were signed-in as available but rejected a job, and that was to stop people from cherry-picking. Mr Utting said that if there was a complaint about a driver, he would talk to the driver, try to get to the bottom of it and perhaps give some guidance but he had never had that kind of discussion with a driver on the basis that they were rejecting too many jobs.

17. The Claimant referred to these documents in his witness statement, but he did not say that he had been provided with them at the relevant time or had operated on the basis of them at the relevant time. Further, he went on in his witness statement to explain about the button he could press when he was unavailable for jobs, including if he wished to pick up independent work. It was absolutely clear on the evidence before me that the Claimant did that regularly. I was provided with printouts of the Claimant's weekly data. They showed, for example, that he worked between 0 hours in some weeks to 83 hours in one week and a whole range of different hours in between. He worked between 0 days per week and 7 days per week. On one particular sheet, he rejected between 0% and 35% of the system jobs offered to him. He recorded up to 27 street hire jobs in some weeks. Those are the ones he recorded in the system, but of course he may well have done others that he did not record. There was no suggestion from him that he was ever spoken to about rejecting too many jobs, fined, punished or put through any kind of disciplinary process. The only thing that happened was that he was put in the sin-bin if he rejected a job allocated to him when he was signed in as available. Nor was there any evidence before me that anybody else was ever spoken to, fined or sanctioned in any way, apart from the sin-bin.

18. The Claimant's evidence in his witness statement was that he was not allowed to be unavailable unless he had pressed the button. But in my view, in the light of his evidence, the emphasis should have been the other way round: he was allowed to be unavailable, provided that he pressed the button.

19. Taking all this evidence into account, I find that despite what some of the written documents say, in some cases in strong terms, the actual agreement between the drivers and the Respondent, and between the Claimant and the Respondent, is essentially reflected in the setup of the PDA and app. The drivers are hackney carriage drivers. They can ply for trade or (if they have paid the relevant fee) they can sign in and access system work. If they pick up a street fare they can press a button to show that they have done so and they will not be allocated any system

jobs. For everybody's mutual benefit they are encouraged to do system work, and if they are signed in as available and reject a system job then they will be sin-binned but no other sanction will be imposed. If they pick up street fares, they must charge the metered fare as hackney carriage drivers. If they do system work and a discounted fare has been agreed with an account customer, they must charge that fare. Otherwise, they charge the metered fare. The Claimant accepted in his evidence that around 10% of account jobs paid less than the metered fare and around 90% of account jobs were at the metered fare, that is the rate that the Claimant would have had to charge as a result of Leeds City Council's byelaws if he had picked up the passenger directly.

20. The Claimant provided his own vehicle and was responsible for the upkeep, insurance and cleanliness of that vehicle. He had to make sure that it met the standards laid down by the byelaws.

21. The Respondent had a dress code and it is that in part that gives rise to these proceedings, because the Claimant wanted to wear his shalwar kameez so that he could conveniently go to the mosque and pray. There is no dispute that the Respondent had a written policy that its drivers should wear smart western dress and not shalwar kameez. An issue arose in 2019 when it was obviously brought to somebody's attention that the Claimant was wearing shalwar kameez and he was removed from the system for a period. He was reinstated after a couple of weeks. There were various discussions and he ended up having a meeting with the directors. Mr Utting told me that some of the Respondent's clients object to drivers in shalwar kameez and want them to be in smart western dress. It appears not to be disputed that the Claimant was told that if he was unwilling to comply with a requirement to wear smart western dress he would be removed from the app.

22. I am not resolving the Claimant's discrimination complaint, which relates to this requirement. However, the implementation and enforcement of a dress code is plainly one of the relevant factors in assessing whether or not the Claimant was a worker or an employee.

23. The Claimant engaged an accountant and submitted accounts to the tax authorities on a self-employed basis. I was shown his accounts for two separate years. The tax years do not coincide precisely with the dates during which he says he was a worker or employee of the Respondent, which is September 2018 to October 2019. Nonetheless, I note that in each year of his accounts only a third or so of the fares received were from the Respondent and two thirds were evidently from other sources.

Legal principles

24. The Claimant is bringing claims under the Working Time Regulations 1998, the Employment Rights Act 1996 and the Equality Act 2010. The relevant definitions of worker/employee are found in regulation 2, section 230 and sections 83 and 212 respectively. These definitions of worker or employee are not materially different from one another. This case is concerned with limb (b) of the definitions.

The starting point in determining whether an individual is a limb (b) worker as so defined is to identify the terms of the contract and what they mean. The express terms of a contract are, of course, those expressly agreed, in writing or orally, by the parties, applying established principles including those in Autoclenz Ltd v Belcher [2011] ICR 1157 SC as further explained and elucidated in Uber BV and others v Aslam and others [2021] ICR 657 SC.

25. There are two principal elements to the limb (b) definition. One is an obligation personally to do work, and the other is the requirement that the other party to the contract is not a client or customer of the worker's profession or business undertaking. The case law in relation to personal service culminated recently in the decision of the Supreme Court in Pimlico Plumbers Ltd v Smith [2018] UKSC 29.

26. The second part of the limb (b) definition concerns the dividing line between those who are truly self-employed, carrying on a profession or business undertaking on their own account and entering contracts with clients or customers to provide work or services for them, and those who, while self-employed, in fact provide their services as part of a profession or business undertaking carried on by someone else. The dividing line was considered most recently by the Supreme Court in Uber. Lord Leggatt emphasised the purpose behind the inclusion of this category of workers within scope of the relevant employment rights, citing the EAT in Byrne Bros (Formwork) Ltd v Baird [2002] ICR 677 almost twenty years ago:

> "[T]he policy behind the inclusion of limb (b) … can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations 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."

27. The Supreme Court in Uber emphasised that in determining whether an individual is a worker there can "be no substitute for applying the words of the statute to the facts of the individual case"; see also Bates van Winkelhof v Clyde and Co LLP [2014] ICR 730. At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. The vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. A touchstone of such subordination and dependence is the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed

under a "worker's contract". The Supreme Court held that this approach is also consistent with the case law of the CJEU, which is relevant in respect of certain employment rights. That case law treats the essential feature of a contract between an employer and a worker as the existence of a hierarchical relationship.

28. The Supreme Court confirmed that it is well-established that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working. This was subject to the express qualification that, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence or lack of subordination in the relationship while at work that is incompatible with worker status: see Windle v Secretary of State for Justice [2016] ICR 721.

29. In Uber the Supreme Court placed particular emphasis on: (1) the fact that the rate of remuneration was fixed by Uber; (2) the contractual terms were fixed by Uber; (3) although drivers had the freedom to choose when and where to work, once a driver had logged onto the Uber app, a driver's choice about whether to accept requests for rides was constrained by Uber limiting the information provided to the driver and monitoring the driver's acceptance and cancellation rates and operating an escalating system of warnings and penalties; (4) Uber exercised a significant degree of control over the way drivers provided their services; and (5) Uber restricted the communication between passenger and driver.

Application of the law to the facts

30. These cases are fact sensitive. The Tribunal's role is to make findings about what the actual agreement between the parties was and then apply the established principles to decide whether that arrangement amounted to self-employment in the true sense or to limb (b) status, the category of self-employment that nonetheless benefits from the types of employment rights that are in issue here.

31. In the Uber case, the particular part of the definition of a worker that was at issue was about whether the drivers were contracting with Uber as a client or customer of theirs or whether they were performing services as an integral part of its business. The dispute was not about whether the drivers were obliged personally to do work. In my view, this case turns on the same point. I accept Mr Menon's submission that this is not a case about substitution. As Mr Menon aptly submitted, substitution is "baked into the cake" already. Any driver with an ID from the Respondent can at any time, subject to the agreement of the car owner, choose to sign in and offer themselves as available for work, be allocated work and perform that work. That is not the car owner sending a substitute driver along, it is different drivers using the same vehicle to perform work in their own right according to their contractual agreement with the Respondent. Once signed in, the driver chooses whether to accept fares from the Respondent on a job by job basis. If any driver accepts a specific job then that driver must perform the job. The driver cannot send a substitute to do the job, but there is no need to do so.

Either the driver could choose not to make themselves available for jobs in the first place, or they could reject a specific allocated job (and would not be allocated another for 10 minutes).

32. The focus in this case is therefore on whether the Claimant was contracting with the Respondent as a client or customer of his or whether he was performing services as an integral part of its business. Taking into account the touchstone of subordination - is this someone who can look after themselves in the relevant respects or is this someone who is in such a degree of dependence that they need the protection of the legislation – I find that the Claimant falls on the side of the line of being in business on his own account and able to look after himself in the relevant respects. He is a hackney carriage driver plying his trade. He can choose at any time simply to pick up street fares. He can go down to the station and pick up passengers there, join a taxi rank or stop if somebody flags him down. He chose to sign up with the Respondent. He chose initially to pay 10% to have access to the cash and credit card work. He chose later to pay 10% and a membership fee so as to have access to the account work as well. Having regard to the context of the way he works, I find that was in the nature of a business decision taken by him. He thought it was in his benefit to pay £60 a month so as to have access to a whole different source of work, namely the Respondent's system work. He does not have any obligation to logon and do that work at any time. When he is logged on, he can press the flag down button and pick up a street fare at any time. He is essentially choosing between different available sources of work throughout his working time. If there is street work available, he can take it. If there is not, he can see whether the Respondent has system work available. I find that in that way the Claimant is fundamentally running a self-employed business as a taxi driver on his own account. One source of work for his business, which he can choose to exploit, is the Respondent's system work. He can look after himself in the relevant respects.

33. I have borne in mind that the fact that somebody is not obliged to attend work on a particular day or at particular times is not fatal to the question whether they are a worker or not. It may well be that somebody is not obliged to attend work on particular dates or times, but when they do attend they are nonetheless treated as a worker. Mr Menon rightly emphasised that point and I have taken careful account of it. However, as the Supreme Court reiterated in the Uber case, referring to the decision in Windle, the fact that there simply is no obligation to provide any specific amount of work or to do it on particular occasions, may be one of the factors that points to a degree of independence rather than a degree of subordination. Here, a further factor is that the Claimant can be signed into the PDA but making himself unavailable for the Respondent's system work at the same time.

34. If the Claimant signs in and makes himself available for work through the PDA or app he is undoubtedly bound by some rules. A number of those derive from or mirror his obligations as a licensed hackney carriage driver. He is also bound by the rule that says that if he rejects a job when he is signed in as available to work he will go in the sin bin for 10 minutes. That is not unlike the taxi rank itself in real life. Drivers cannot go to the front of the taxi rank, refuse the job and sit and wait for the next job or until they get the job they want. Indeed, that is the very essence

of the cab rank rule. The Claimant is also bound by the rule about dress code. That is one factor pointing towards a degree of subordination and integration into a business of the Respondent's, but I find that it is outweighed by the other factors that point more towards true self-employment. It is not by itself fundamentally inconsistent with true self-employment to have to wear a particular uniform or dress code if required by a client.

35. Dealing specifically with some of the particular points emphasised by the Supreme Court in the Uber case, and to which the parties referred, as far as remuneration is concerned this case is different. It is right that the Respondent does agree a discounted fare on about 10% of its account work, but the vast majority of the system work is at the metered rate, which is the rate the Claimant would have to charge anyway as a licensed hackney carriage driver. The discount in 10% of cases might be regarded as the price that the drivers choose to pay for having access to the contract work that the Respondent is able to negotiate. If the Respondent did not negotiate the discounted rate it would not have that work available for the Claimant. It is entirely up to the Claimant whether to pay a monthly fee to access the contract work.

36. There are no written terms in this case. It is not like the Uber case, which was very heavily overlaid with a whole range of documentation that the Tribunal and the higher Courts found had very little basis in reality. In this case the contract is a verbal contract between the Claimant and the Respondent and is not much more than an agreement to pay the monthly fee and percentage of fares in return for

    access to the app and the work and services that the Respondent provides. There is a modest number of "rules". The degree of control that the Respondent exercises over the Claimant and its drivers is far more limited than the control exercised by Uber over its drivers. Fundamentally, the Respondent's drivers have much more independence because as licensed hackney carriage drivers they can press the flag down button and do other work, or they can sign out of the Respondent's system and simply ply for trade. There is no star rating and there is no disciplinary process or system of escalating sanctions culminating in de-platforming for a low acceptance rate or driver offences. The only real sanction is the 10-minute sin bin for rejecting a fare if signed in as available. I do not regard that as being equivalent to the kind of constraint that was present in the Uber case. Unlike the Uber case and situation of private hire drivers more generally, if one of the Respondent's drivers is in the sin bin they can still work. It is their choice whether or not to accept a job and if they are rejecting a job after signing in as available, one might expect that they are rejecting it because there is a better option available. That is not the case for the Uber drivers. There was also the situation where the Claimant was temporarily removed from the app when he refused to comply with the dress code. That was an element of control being exercised over him and is one factor pointing towards limb (b) status. However, again, it is not in my view determinative and the balance of the relevant factors weighs against that status.

37. It is true that there are some rules imposed about the Claimant's car, but they are broadly equivalent to the rules that arise from the byelaws imposed on hackney

carriage drivers in any event. The same is true of the route. As a hackney carriage driver, the Claimant is obliged in any event to go by the shortest available route.

38. The Respondent does not operate the same elaborate process to keep the passengers' information away from the drivers and, again, even the byelaws discourage drivers from having the personal information of their passengers. In this case, if a passenger chooses to pay cash then the Claimant takes that cash payment and accounts for it to the Respondent, whereas in the Uber case payment is all managed by credit card through the app and the drivers simply have no involvement in that part of the process.

39. Looking at all these elements, the arrangements between the Respondent and its drivers is fundamentally different from the arrangements between Uber and its drivers. For all these reasons, I find that the Claimant falls on the side of the line of being properly self-employed.

S-J Davies

Employment Judge Davies

26 July 2021

REASONS SENT TO THE PARTIES ON

27 July 2021

FOR THE TRIBUNAL OFFICE