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Uber BV, Uber London Limited and Uber Britannia Limited v. Yaseen Aslam and James Farrar

Article by David Bowden

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Executive speed read summary

The Employment Appeal Tribunal heard a high-profile appeal in this case involving Uber. In a reserved judgment in the Employment Tribunal, Judge Snelson held that private hire drivers were '*workers*' and entitled to protection afforded to such workers such as a right to the national minimum wage and a maximum working week under the Working Time Regulations. The 3 Uber companies appealed and the Employment Appeal Tribunal (EAT) has now heard argument over 2 days as to why applying the prior case law it is right that these freelance private hire drivers are nevertheless '*workers*'. Uber maintains it is not part of the gig economy and that the decision by TfL to refuse to renew its PHO licence is irrelevant. Uber says that prior case law particularly that relating to the VAT treatment of minicab companies taking account (rather than cash) business is relevant. Uber says the agency model is well established and that drivers are accordingly not employees. Uber says that the prior Supreme Court case of *Autoclenz* is of no assistance because there is no question that its contractual documents does anything other than correctly reflect the position. Instead Uber says the EAT should follow the other Supreme Court case of *Secret Hotels 2* which supports its contention that Uber is the agent of drivers seeking freelance driving work. Uber London holds the PHO licence and says it has to comply with TfL's regulatory requirements including those relating to complaints or record keeping and that this is not an indicia of an employer-employee relationship. The drivers say it is false to suggest that Uber is their agent and there is nothing in the documentation where the term '*agency*' is used. Instead the drivers say that the EAT should follow the CJEU in *Rossendale* submitting that the independence of Uber drivers is merely notional and thereby disguises an employment relationship with Uber London. The drivers urge the EAT to follow the recent Supreme Court case of *Bates van Winkelhof* where a self-employed partner in a law firm was held to a '*worker*' for a whistleblowing claim. The drivers say that they are working when they are in their cars with the Uber app switched on even if they are not driving. The drivers urge the EAT to give a purposive construction to the Working Time Regulations referring to prior CJEU case law which holds that the concept of working time '*is placed in opposition to rest periods, the 2 being mutually exclusive*'. Judgement was reserved. Judge Eady QC said that producing this judgement is a priority and it will definitely appear this side of Christmas. Judge Eady gave an indication that she would be amenable to granting a leap frog certificate to the losing side on this. Uber want to take this case to the Supreme Court of the United Kingdom and have it heard at the same time as the *Pimlico Plumbers* appeal which is already listed in February 2018. An Advocate-General to the CJEU has given his opinion in *Uber Spain* and a judgment from that court is imminent. Matthew Taylor delivered his gig economy report to BEIS ('*Good Work – the Taylor review of modern working practices*') on 11 July 2017 and he has been summoned to give evidence before the Work and Pensions Select Committee on 11 October 2017. TfL has refused to renew Uber London's PHO licence.

Uber BV, Uber London Limited and Uber Britannia Limited v. Yaseen Aslam and James Farrar
UTEATPA/0807/16/DA *27 & 28 September 2017*
Employment Appeal Tribunal (Her Honour Judge Jennifer Eady QC sitting alone)

What is the business model of Uber? What is the relationship between the 3 Uber companies?
Uber BV is a Dutch company which owns the rights in the computer platform which contains the traffic, location, driver, passenger and payment data. According to a release dated 14 April 2017 issued by Bloomberg, Uber BV is valued at $69 billion by investors and operates in 75 countries. In the final quarter of 2016, globally Uber increased its gross bookings by 28% from the previous quarter to $6.9 billion. Globally for the whole of 2016 Uber had gross income of $20 billion and after expenses this reduced to net revenue of $6.5 billion. However this has translated into an unexplained loss of $2.8 billion.

Uber London Limited is an English company which was incorporated in April 2012. It was licenced as a private hire operator ('PHO') by Transport for London ('TfL') in May 2012. On 26 May 2017 TfL granted a 4-month licence extension whilst it concluded its consideration of this initial 5 year licence. Uber's licence to run a minicab service in London with TfL expired on 30 September 2017. TfL has said it will not renew this licence. It its last filed accounts for the period up to 31 December 2015, Uber London recorded turnover of £23.3million. However it also had '*administrative expenses'* of £21.5million which included substantial royalty payments to Uber BV to use the platform and computer programme. This meant a profit of £1.4million. The Uber London accounts were prepared on a '*going concern'* basis.

Uber Britannia Limited was also named as a party in the proceedings. This company was formed in December 2013 but does not hold a PHO licence from TfL. Again its last filed accounts relate to the period ending December 2015 and show a turnover of £376k which after expenses of £347k turned into a small profit of £22½k.

How much cut does Uber rake off its drivers?
Drivers with an appropriate car sign up with Uber London to be drivers. Drivers have to use Uber software. Passengers seeking a minicab use the Uber app installed on their iPhones or similar devices. Uber calculates a fare based on a route calculated by GPS technology and provides this to the passenger. Uber collects the fare from the passenger using a stored debit or credit card. Uber initially creamed off 20% of the fare as commission. However in 2016 Uber London issued new driver conditions and is now creaming off 25% of all fares as commission. If Uber succeeds in crushing competition from established London black cabs, minicabs and other online taxi operators, it is not clear at what level this commission level will ultimately rise to.

What are the typical commission rates that other online businesses charge?
Uber's commission rate of 25% of fares to its drivers is high. These online delivery businesses charge these commission levels:

- Addison Lee charges its drivers commission of 20% of the fare,
- Just Eat charges its participating takeaways 12% of the menu price, and
- MyTaxi charges its drivers commission of 7% of the fare.

What are the facts?
Drivers sign up to be drivers with Uber London and agree to use the Uber software. Passengers install the Uber software on their smart phones. Passengers use the Uber software to say where they are and where they want to go. Uber calculates a price for the passenger. A driver with the Uber software on who is near or nearest to the passenger accepts the job. When the driver accepts the job they do not know the destination. Only when a passenger gets in the car is the driver told the destination. The driver has to drive the route dictated by Uber by GPS on its software unless the passenger gives an alternative route. Uber collects the fare from the passenger, takes its commission and pays the driver the balance. There is a rating system for passengers to give feedback on drivers. If a driver turns down a job, Uber will turn them off the system. The drivers have contracts with Uber London. Uber now has 40,000 drivers on its books.

What happens when a passenger assaults an Uber driver?
James Farrar is an Uber driver and one of the 2 claimants that brought the employment tribunal case against Uber. A passenger assaulted Mr Farrar in his car. Mr Farrar asked Uber for the data it held on the passenger including name, address, credit card number and email address. Uber refused voluntarily to give either Mr Farrar or the police the data it held so that the offender could be brought to justice.

What is the available data on passenger rapes and sexual assaults committed by Uber drivers?
The Metropolitan Police Service ('MPS') on 23 March 2016 provided an answer to a request that it had received under the Freedom of Information Act 2000. For the 2015 calendar year the MPS said that '*154 allegations of rape or sexual assault were made to the MPS in which the suspect was alleged to have been a taxi driver*' and '*of those reports 32 allegations were reported in which it was stated that the suspect was an Uber driver.*'

On 29 June 2017, in answer to another FoI request, the MPS said that '*there have been 48 offences in the period, 1 February 2016 to 28 February 2017, where Uber was referenced in the crime report for a taxi or private hire journey-related sexual offence in London*' but cautioned that '*the figures may include drivers that do not work for Uber but the victims used this description in their report*.'

What happens when a paying passenger is sick in an Uber car?
An Uber driver accepts the fare when he indicates to Uber he is near and available to take the fare. At that point the driver will not know what state a passenger is in. If a passenger is sick in a car, then ordinarily the driver will have to pay to clean up the mess. As a concession Uber has sometimes made a contribution to these costs but it does not appear that Uber has sought to claim these cleaning costs back from a passenger. Uber is more concerned with building customer loyalty with its passengers than looking after its drivers.

What happens when an Uber passenger has paid for a ride with a stolen credit card?
Uber has the passenger data and credit card data. The drivers must be paying Uber something for the substantial commission it takes on all their fares. However where a ride is paid for with a stolen credit card, the contractual documentation produced to the Employment Tribunal properly interpreted meant that credit card losses were a liability of the driver and not Uber. There was only a slight softening on this, where Uber would bear the loss if it was satisfied that the driver had done enough checks on the credit card. The position on fraud losses is very odd.

What relief did the freelance drivers seek in the Employment Tribunal case?
The drivers said that the constraints that they operated under were such that they did not have the freedoms that self-employed people had, were in effect Uber's workers and had protection given to workers including the rights relating to working time and the national minimum wage.

What did Judge Snelson rule below in the Central London Employment Tribunal?
In a detailed reserved unanimous judgment dated 28 October 2016 Judge Snelson presiding with lay members Mr D Pugh and Mr D Buckely ruled that the freelance drivers were indeed 'workers' with all the protection that this entailed. The ET made these 11 findings in relation to the employment status of the drivers:

- It was '*struck by the remarkable lengths to which Uber had gone in order to compel agreement'* with its '*analysis of the legal relationships between the 2 companies, the drivers and the passengers*'. The ET said Uber had resorted in '*its documentation to fictions, twisted language and even brand new terminology*' which the ET said merited a '*degree of scepticism'*,
- Uber had during '*unguarded moments'* said things which reinforced the workers' case that it '*runs a transportation business and employs drivers to that end'*,
- It is '*unreal to deny that Uber is in business as a supplier of transportation services'*,
- Uber's general case does '*not correspond with the practical reality'* and that the '*notion that Uber in London is a mosaic of 30,000 small businesses linked by a common "*platform*"'* was to the ET's mind *'faintly ridiculous*',
- The logic of Uber's case became '*all the more difficult'* as it was developed. On the way fraud losses were treated the ET ruled that what Uber did was '*manifestly unconscionable'*, was '*incompatible with the shared perceptions of drivers'* and the ET was satisfied that '*the supposed driver/passenger contract is a pure fiction*',
- It is '*not real'* to regard Uber as working for the drivers and that the only '*sensible interpretation'* is the other way round,
- The ET was '*satisfied*' that 'the drivers fall full square within the terms of' section 230(3)(b) of the ERA 1996,
- The Uber contract with its drivers was '*not a contract at arm's length between 2 independent business undertakings'*,
- The authorities relied on by Uber were not relevant because they were concerned '*wholly or very largely with whether there was an "*umbrella*" contract'* between the 2 parties which was an issue with which the ET was '*not concerned at all'* here,
- The terms on which Uber relies '*do not correspond with the reality of the relationship'* and so the ET was '*free to disregard them'*, and
- Uber '*could have devised a business model not involving them employing drivers'* but that the model Uber chose '*fails to achieve that aim'*.

Based on these 11 key findings, Judge Snelson made these 5 rulings:

- Uber London Limited was the entity which employed the drivers,
- The choice of law clause for the contracts was English not Dutch law,
- A driver was working for Uber when he had the Uber app switched on (even if he was not driving),
- Uber drivers could not be made to work more than the maximum period of 48 hours under the Working Time Regulations, and
- Uber drivers were entitled to be paid the national minimum wage.

Who acted in this case in the Employment Appeal Tribunal?
In the Employment Tribunal Leigh Day were the instructing solicitors for the 2 freelance drivers, Mr Aslam and Mr Farrar. The workers were originally funded and supported in this litigation by the GMB trade

union. Below Mr Thomas Linden QC of Matrix Chambers, Griffin Building, Gray's Inn, London, WC1R 5LN represented the workers.

The workers are now members of a different trade union. For the appeal, the services of Leigh Day were dispensed with - which is somewhat surprising given that not only did they win below but also they have the legacy knowledge of the finer details of the case. For the appeal, Bates Wells & Braithwaite were instructed by the trade union for the workers. Again rather surprisingly, a new leader was instructed for the appeal. The workers turned to Cloisters chambers in the Temple for representation for the appeal. Mr Jason Galbraith-Martin QC led Miss Sheryn Omeri (who made her name in her native Australia defending the rights of native Aborigines).

The only constant in terms of legal representation in this case is that Uber turned to DLA Piper LLP to be its solicitors both at the original tribunal hearing and for the appeal. The DLA Piper team was led by its national head of employment law, Adam Hartley. Below Mr David Reade QC of Littleton Chambers, 3 King's Bench Walk North, Temple, London, EC4Y 7HR acted for Uber.

However Uber turned to Blackstone Chambers for representation for this appeal. For a brief fee rumoured to be substantially into 6 figures for this 2 day hearing, Uber was represented by Miss Dinah Rose QC. This caused something of a stir as Miss Rose was instructed by the Unison trade union in the Supreme Court (but not in the courts below) in its successful challenge to the legality of employment tribunal fees. Miss Rose led former solicitor Mr Fraser Campbell who is also at Blackstone Chambers. Mr Fraser has much useful prior experience in judicial review cases involving regulated businesses. This extra layer of expertise was deployed to devastating affect by Uber who were able not only to plumb Miss Rose's expertise in employment law but also to set it all in the context of statutory regulation of taxis. Further Uber had spent much time in preparation on the tax position of taxi companies especially in relation to VAT which was well deployed to make Uber's affirmative case.

Despite the change of leader by the worker's trade union, Mr Galbraith-Martin's performance was not as dazzling as that of Miss Rose. Although he made a number of good points, he was not sufficiently flexible or nimble to deal with some of the new strong points that Miss Rose made in her oral submissions. He appeared to be unable to take the broader view required of the financial technology market and seemed to struggle with how the tax cases fitted into the overall picture. Dinah Rose was in command from the very start, is at the very top of her game, had full command of the material and addressed the judge directly without the need for much recourse to any notes. It was telling that Judge Eady listened to Miss Rose's fluent submissions with few interventions.

What were the grounds of appeal?
These are the 5 grounds of appeal contained in the Notice of Appeal filed on 9 December 2016. They are that the Employment Tribunal:

- Erred in law in
  - disregarding the written contracts,
  - relying on regulatory requirements as indicia of an employment relationship,
- made internally inconsistent findings, erred in law and made perverse findings of fact in concluding that the drivers were required to work for Uber,
- failed to take account of relevant considerations, and
- wrongly applied the extended definition of employment.

Uber invited the EAT in its Notice of Appeal to do either of the following 2 things:

- Set aside the Employment Tribunal ruling and substitute an order dismissing all claims on the basis that the drivers are note workers employed by Uber, or
- Remit the matter for re-hearing in a differently constituted Employment Tribunal.

What did Uber say were the elephants in the room?
At the beginning of the hearing Miss Rose QC said there were these 2 elephants in the room which she invited Judge Eady to '*acknowledge and show the door*':

- **TfL's decision not to renew Uber London's PHO licence**. Miss Rose said that Uber had made a public statement and this was not relevant to the appeal but that Uber was right to point out to the EAT the regulatory restraints under which it operated.
- **The 'Gig' economy** and the tendency to '*lump Uber with other internet platforms that operate in a different way to Uber*'. Miss Rose said Judge Eady's task was not to participate in this legal,

> political and economic debate but rather her task was more '*mundane*' as to whether the Employment Tribunal had erred in law or made a decision that no reasonable tribunal could have made.

Judge Eady did not make any interventions on this or seek to question this. More worryingly, Mr Galbraith-Martin in his oral submissions failed to challenge that either of these 2 things were relevant to his clients' case.

What has the Supreme Court of the United Kingdom ruled recently which is of key relevance?
The Supreme Court has given 2 recent rulings. These rulings are binding on Judge Eady in the EAT.

The first is *Autoclenz Limited v. Belcher* **[2011] UKSC 41** where it looked beyond the written terms and examined instead the practical realities of a situation. Lord Clark JSC in giving the unanimous judgment of the Supreme Court held that when considering the employment status of an individual, the nature of the true agreement between the parties must be determined and to the extent that the written terms do not reflect reality they may be disregarded. This is largely due to the inequality of bargaining power between the parties in the employment context and where circumstances are perceived to involve more vulnerable and lower paid employees, the courts are even more likely to look behind the written terms to ascertain the reality of the arrangement.

The second is *HMRC v. Secret Hotels 2 Limited* **[2014] UKSC 16.** This appeal concerned the VAT liability of Secret Hotels which marketed hotel accommodation in the Mediterranean and the Caribbean through its website. Any hotelier who wished his hotel to be marketed by it had to enter into a written Accommodation Agreement with it. When a potential customer identified a hotel at which he wished to stay, he would book a holiday through a form on the website which set out standard booking conditions. The customer had to pay the whole of the agreed gross sum with Secret Hotels before arriving at the hotel. However, Secret Hotels only paid the hotel a lower net sum for the holiday after it had ended. VAT is tax levied on the supply of goods or services. By article 2.1(c) of the Principal VAT Directive **2006/112/EC** VAT is liable to be levied on '*the supply of services for consideration within the territory of a Member State by a taxable person acting as such'* and Article 45 states that '*the place of the supply of services connected with immovable property…shall be the place where the property is located…*'.

Here Lord Neuberger PSC gave the unanimous judgement of the Supreme Court and ruled that where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, in order to determine the legal and commercial nature of that relationship it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham. While it is not possible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement, this may be invoked for these reasons:

- to support the contention that the written agreement was sham,
- to support a claim for rectification,
- to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract, or
- to establish that the written agreement represented only part of the parties' contractual relationship.

In *Secret Hotels* it was not suggested that either the Accommodation Agreement or the website terms were a sham or liable to rectification. The court must start by characterising the nature of the relationship between Secret Hotels, the customer, and the hotel in the light of the contractual documentation. It had to then consider whether this characterisation represents the economic reality of the situation or not and, it must determine the result of this characterisation under the Principle VAT Directive.

Lord Neuberger ruled that the contractual documentation made it clear that both as between Secret Hotels and the hotelier, and as between Secret Hotels and the customer, that the hotel room is provided by the hotelier to the customer through the agency of Secret Hotels. The customer pays a gross sum to the hotelier on the basis that the amount by which it exceeds the net sum is to be Secret Hotel's commission as agent. None of the provisions of the contractual documentation relied on by HMRC was inconsistent with Secret Hotels acting as the hotelier's agent - they merely reflect the relative bargaining positions of Secret Hotels and the hoteliers. They did not alter the nature of the relationship between Secret Hotels, the hotelier and the customer.

What do the law textbooks say about agency?
The 20th edition of *Bowstead and Reynolds on Agency* (2016) says this:

> '**1-005** *The mature law recognises that a person need not always do things that change his legal relations himself: he may utilise the services of another to change them, or to do something during the course of which they may be changed. Thus, where one person, the principal, requests or authorises another, the agent, to act on his behalf, and the other agrees or does so, the law recognises that the agent has power to affect the principal's legal position by acts which, though performed by the agent, are to be treated in certain respects as if they were acts of the principal. This result is not confined to cases where the agent simply has specific instructions to do one thing, e.g. to sign a document … Any developed system must also recognise the more advanced notion of permitting a person to give to another a general authority to act according to his own discretion within certain limits'.*

At paragraph **6-037** it goes on to say:

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

What submissions did Uber as appellant make?
Uber's written submissions can be summarized as:

- The Employment Tribunal erred in law in interpreting Uber's written contracts and failed to direct itself properly on the basic principles of agency law,
- The ET below as a result of errors of law wrongly concluded that the written Uber contracts did not reflect the reality of the relationship between the drivers and Uber,
- The ET below made a perverse finding that Uber required '*drivers to accept trips and/or not to cancel trips'* whilst at the same time finding that drivers who were logged on to Uber's app were at liberty to ignore all notified trips,
- The ET below wrongly took into account as supporting its findings that the true contractual relationship was one of employment and that this reflected the statutory regulatory requirements on Uber London, and
- The ET wrongly ignored binding authority on the nature of the relationship between private hire drivers and PHOs and the need for a mutuality of obligation between employers and workers.

Miss Rose QC took all of the allotted 4½ hours on the first day to make her powerful opening submissions. She made these points orally:

- She said the main issue was whether the ET erred in law that the drivers were employed by Uber as '*workers*' under section 233(3) of the Employment Rights Act 1996 ('ERA') and their equivalent provisions under the Working Time Regulations 1998 ('WTR') and the National Minimum Wage Act 1998 (''NMWA').
- Uber London Ltd has a PHO from TfL and is obliged to comply with its statutory obligations in relation to record keeping of drivers and complaints.
- Uber is no different from a conventional minicab company which takes bookings over the telephone and radios those bookings to its drivers. All that is different is that Uber is doing this in a digital environment using its app installed on user's mobile phones and in driver's cars.
- The agency model where each driver is in business on their own account is not new, is well recognized and has been upheld by the Court of Appeal in *Mingeley v. Amber Cars*
- *Khan v. Checkers Cars Limited* is different because its facts are striking because there was a far closer degree of integration.
- The way Uber operates is no different to the golf caddie in *Royal Hong Kong Golf Club* or the lap dancer in *Quashie.*
- *Autoclenz* has no relevance here because there is no question that the Uber contracts do anything other than correctly and fully reflect the contractual relations.
- A VAT guidance note **700/25** (Taxis and private hire cars) issued by HMRC dated 19 September 2016 is relevant. It says that '*if you have purchased or rent your own vehicle and operate it on a self-employed basis, you'll normally be in business on your own account'*.
- *Carless* was different to Uber too because that case concerned owner-drivers who paid only for their radios.
- 2 other more recent VAT cases from the First Tier Tribunal are of assistance – *Lackerby* and *Khalid Mahmood*. In *Lackerby* the account customers did not know who would be driving them that day when they made a booking and the customers did not know what arrangements exist. *Mahmood* is significant because the risk of bad debts was not with the drivers – this is a '*pointer*'.

- The ET case in *Addison Lee* **2208029/2016** handed down on 25 September 2017 is also different and of no help to the workers here. The Addison Lee drivers had to lease a car from a connected company and that car was branded '*Addison Lee'*. Addison Lee provides its drivers with its hand held PDA.
- Whilst there is a temptation to '*lump together'* everyone working in the Gig economy it is wrong to do so because there are a number of different operating models. There has been no case where a worker with a relationship similar to Uber has been found to be a '*worker*'.
- *Secret Hotels 2* is a comparable decision to the way Uber works. As it is from the Supreme Court the EAT is bound to follow it.
- The fact that a relationship between Uber and its drivers is one-sided is not a reason to ignore the contractual documents. You don't '*just bin it because of inequality of bargaining power'*.
- Uber operates a rating system. If a driver falls below a threshold, he is given guidance as to how to improve. If he does not, then Uber can terminate the contract. The ET was wrong to say this is equivalent to a performance management system operated by an employer. It is not – it is there to protect Uber's brand and goodwill.
- When Parliament enacted the Private Hire Vehicles (London) Act 1998 there was no suggestion that it was seeking to outlaw the established agency model at all. It is a criminal offence to accept a booking unless either you have a PHO licence yourself, or you set up a minicab business or you work under the auspices of a company which does have a PHO licence.
- Uber has to vet its drivers before they are accepted to ensure they are suitable. There can be no question of any driver substitution taking place.
- The Private Hire Vehicles (London) (Operators' Licences) Regulations 2000 **SI 2000/3146** include these duties or features:
    - Record keeping (the date, name of passenger, destination, fare, name of driver, registration number of the vehicle)
    - Complaint handling,
    - Lost property.
    - Driver details (National Health Insurance number)
- The Uber driver terms and conditions are '*not a novelty, not a ruse'* but rather they are '*common in this market*'.
- There are critical differences between Uber and Addison Lee. Uber drivers must <u>not</u> display the Uber logo and there is no Uber uniform for them to wear.
- If a driver does not want to work, then all he needs to do is switch the Uber app off in his car
- When you look at the suite of contracts, there is a '*coherent set of relations'* between Uber BV and Uber London, the drivers and the passengers. There is '*nothing odd, strange or surprising about these contracts'*.
- An Uber driver has 10 seconds to decide if he wants to accept a booking or not.
- There is '*no suggestion that Uber can require drivers to take trips'*.
- The ET's conclusions in paragraph 85 represent an error of law and Uber maintains that '*is enough to get us home'*
- There is an '*oddity*' in the ET's reasons in paragraphs 85 and 86 and the ET goes '*sideways*'. There is a '*circular analysis'* which Uber says is '*perverse*' and which is '*enough to bury this decision*'. The reasoning in the ET judgment is '*internally inconsistent'*.
- If an Uber driver was signed up with 5 other taxi hailing app companies, then on the ET's findings he could claim an entitlement 6 times over to the national minimum wage – this is an '*absurd consequence*'. This shows how '*untenable*' the ET decision is.

What submissions did Mr Aslam and Mr Farrar as respondents make?

The workers' skeleton argument can be summarized as:

- Determinations of questions of fact are for ETs. Points of fact should not be dressed up as points of law.
- Uber cannot point to any document in which the drivers as purported principals expressly appoint either Uber BV or Uber London to act as their agent (other than for a limited purpose of collecting payment).
- The language used in Uber's documents is not *'principal'* and '*agent*' but rather the drivers are described instead as '*customers*'. This is inconsistent with Uber's case that Uber merely acts as the driver's agent.
- The lack of any written agency agreement is fatal to ground 1 of Uber's appeal

- The ET was entitled to conclude that Uber's documents did not correspond with the reality and *Autoclenz* is indistinguishable.
- If Uber's submissions are correct, this would significantly undermine the protection afforded to workers following *Autoclenz*.
- The EAT should follow the CJEU in *Rossendale*. The independence of Uber drivers is merely notional and thereby disguises an employment relationship with Uber London.
- The ET found that Uber is a supplier of transportation services and this finding can only be challenged as '*perverse'*.
- The VAT cases concerning taxis are not of any great assistance to the EAT.
- The HMRC VAT notice **700/25** supports the drivers case because 3.2 says '*If you run a business of this kind, then unless you're acting as an agent for any of your drivers for some, or all, of the work they do (see paragraph 3.3), you're a principal in making the supply of transport to the customer'*.
- Some of the VAT cases have found private hire operators have been a principal and liable to VAT including *Akhtar Hussain*, *Argyle Taxis* and *Bath Taxis*.
- The TfL regulatory regime does indeed contemplate that drivers provide their services to operators to enable operators to fulfil their obligations to their passengers. It was not necessary for the regulatory regime to go further and dictate the precise legal relationship between operators and their drivers, but for VAT purposes, HMRC envisages that operators either employ staff to drive taxis, or take on self-employed drivers to work under a contract for services. In in either case this could constitute employment as a '*worker*' under section 230(3) of the ERA 1996.
- The lack of obligation to accept work is not determinative of worker status.
- *Mingeley* is different on its facts. The court there did not consider whether the driver might have been an employee in the extended sense when actually working even if he was under no obligation to work generally.
- The definition of '*worker*' in the EU Working Time Directive had to be given a purposive construction. The concept of working time '*is placed in opposition to rest periods, the 2 being mutually exclusive*'.

Mr Galbraith-Martin QC looked a couple of gift horses in the mouth. Firstly although Miss Rose QC finished with 10 minutes to spare on the 1st day, he declined to start his submissions. This meant that overnight the only noises in Judge Eady's head were the submissions made by Uber and she was not left with a couple of bullet points from the workers to lay any seeds of doubt in her mind. Secondly, his submissions took only the morning of the 2nd day. They did not deal with a number of good and/or new points made by Miss Rose. This also gave Miss Rose the full lunch adjournment to marshal all her thoughts in reply. Thirdly, as said earlier, he failed to question and challenge the relevance of the 2 elephants in the room that Uber identified at the beginning.

That being said, Mr Galbraith-Martin's oral submissions made these points:

- The VAT cases address a different question than the one this tribunal has to determine. However *Aktar Hussain* is of '*some value'* and Judge Thomas followed it in *Mahmood*.
- The TfL regulatory requirements are '*neutral*' and they '*don't point one way or another'* as to whether a driver is a '*worker*' or '*employee*' or not
- The language used by Uber does '*not obviously point to the relationship of agency'* between Uber London and the drivers.
- The EAT should follow *Autoclenz* where the Supreme Court approved Lord Justice Aikens in the Court of Appeal that a court or tribunal must '*focus on the reality of the situation'*.
- It is '*odd*' that Uber relies on *Secret Hotels 2*. It is a case where inequality of bargaining power was relied on.
- An Uber driver is only '*nominally free'* to decline bookings. Uber says its drivers '*should accept 80%*' or more of the work referred. Uber operates a penalty system where drivers decline 3 offered trips in a row.
- The latest Uber version of its contract with its drivers says '*we expect you to complete the majority'* of them and not to seek to cancel trips offered '*unless you have a good reason to do so'*. The ET was right to find there was an obligation on the drivers to accept some work.
- As there is a finding on this, Uber's appeal on this ground is a perversity challenge and fails.
- The provision in the Uber driver contract that Uber is '*solely responsible for determining the route'* is '*contrary to the reality'*.

- *Bowstead on Agency* says that the resolution of complaints by an agent is a fiduciary duty. The word '*agent*' is sometimes used quite loosely. As Uber resolves complaints about fares/routes made by passengers, then Uber as agent owes a fiduciary duty to its drivers as principal.
- In the new Uber driver conditions, Uber does seek to control its drivers – it prohibits them from giving passengers their contact details. Although Uber says this is done because it is a '*regulatory requirement'* of TfL – it is done because it is '*in Uber's interest'*.
- Uber says the ET focused too much on the question of control but the drivers say that his '*puts the cart before the horse'*. There is not any dispute that the drivers do not exercise any control over Uber, it is '*all the other way around'*.
- In *Bates van Winkelhof* Lady Hale DPSC said that a partner in a law firm could be a '*worker*' for a whistleblowing claim.
- The question for the EAT is whether Uber is a '*single business with 30,000 drivers'* or is it 30,000 businesses?
- Lord Irvine in *Carmichael* said that a '*lack of mutuality when not working was fatal*' to an umbrella contract.
- There is some similarity to *Redcats (Brands*) where the parcel delivery couriers were self-employed and used their own vehicles. They had a right to deliver for other companies and did not have to wear a uniform. However the issue of mutuality of obligation there was '*only of minor significance*'.
- *Quashie* shows there needs to be an '*irreducible minimum'* – either you continue in breaks or there is a global or umbrella contract.
- Although in *Windle* freelance court translators working for the Ministry of Justice were found not to be '*workers*' under the Equality Act 2010 but nothing was said there that conflicts with *Quashie.*
- *Pimlico Plumbers* means that '*flexibility is not fatal to the finding of worker status'*.
- The fact that Uber drivers are '*ready and willing'* to drive for Uber in the light of authority does '*not defeat their worker status'*.
- Where you voluntarily put yourself in a position to work, you '*could be a worker'*. The lack of mutuality when you are not working '*is a factor but not determinative'*.
- An Uber driver cannot say when he is in his car with a passenger in the back that there is '*no obligation*' at all.

Was there a Respondent's Notice?
No.

What did Uber say in reply?
A table of the VAT cases involving taxis had been prepared overnight and was handed up. This analysed all the features and compared or contrasted both the similarities and differences to the way Uber works. In her reply (which lasted nearly an hour and a half) in addition to reinforcing the points she made in opening, Miss Rose made these additional points and points in answer to the submissions of Mr Galbraith-Martin:

- There is a '*central error'* in the ET's decision which '*vitiates the whole decision'*. What is missing in the ET's judgment is any analysis of the concept of agency. It is not in paragraph 91 of the ET judgment.
- The evidence of intention of all 3 parties here is '*overwhelming*'.
- Uber says it has no control over the drivers. In the light of the documentation any conclusion by the ET other than one of agency is '*perverse*'.
- The VAT cases address the same legal question but they have different consequences. These cases show a universal acceptance that where a taxi business operates on a cash basis an agency model is applied. The only areas of '*nuance*' or '*debate*' relate to account work. Different tribunals have come to different findings depending on who has liability for bad debts.
- There are 4 possible relationships the taxi drivers could have
  - Employee
  - Independent contractor:
    - Working for 1 supplier,
    - Working for a number of suppliers
  - Driver running own business
- The agency model is perfectly well established model recognized by HMRC. Paragraph 91 of the ET judgment is '*absurd*' and this is a '*key error'*.

- Faced with a '*carefully drafted contract'*, the ET should take it as the evidential starting point and then consider if it reflects the economic reality. Only if an ET concludes that it is inconsistent with what happens is it free to disregard the contract. This is the flaw in paragraph 91.
- In the *Hussain* VAT case, there were 5 factors and this was in the context where the FTT had no contractual documents to construe at all which is a very significant difference to Uber. Uber sets the fares and keeps the records – but these are TfL regulatory requirements and cannot be '*pointers*' as to employment status. The ET found the drivers have no liability for bad debts. Where Uber is satisfied that drivers have done enough, then drivers are not responsible for losses from credit card fraud. This is all consistent with Uber being an agent.
- There are these 4 features from the VAT cases that are not present with Uber
  - Exclusivity,
  - Operation of shift or roster,
  - Payment of 'rent' to the minicab owner, and
  - Uniform or dress code.
- If a driver has to pay rent, they are under '*economic pressure'* and this is central to the ET's reasoning in the recent *Addison Lee* case. This is very different to Uber.
- None of TfL's regulatory requirements could be said to be '*inconsistent with agency'*. Uber goes further and says it could be relevant to all workers/self-employed people. It is not something that '*tips the balance'*.
- Although the workers' counsel say they have to accept at least 80% of trips offered, this is not a finding of fact made by the ET. It is a new point by the workers. It is based on a document taken from the Uber US website. This point gets the workers nowhere in any event.
- The driver makes a decision whether or not to accept the job offered by Uber, it is only when he does that at that point does Uber accept the booking with the prospective passenger.
- The workers' points about ratings and publicity were not relied on below, there is no evidence about it and no finding by the ET about it.
- The case of *Mingeley* is on point. The personal services cases (*Quashie/Pimlico Plumbers)* are not.
- If there is no undertaking to do any work, the drivers are not within the scope of section 133 (3)(b) because
  - No control by Uber London over driver,
  - No undertaking to provide any work at all, and
  - When driver provides work, this is provided to the passenger and not to Uber London.
- The workers have no answer to our point that if the ET was right, and they worked for numerous taxi hailing companies, then they would on the ET's analysis have a right to the national minimum wage from multiple companies.
- In *Addison Lee* there was no analysis by the ET of the agency point. The whole finding is based on integration. The *Dewhirst* cycle courier case is not comparable to Uber at all.

What authorities were referred to in oral argument?
These authorities (listed chronologically) are relevant in this case and are referred to in either the oral and/or written submissions:

Carless v. Customs & Excise Commissioners **[1993] STC 632** (High Court, QBD, Hutchison J)
In determining whether a person acts as a principal or agent in any particular situation, it is necessary to consider the contractual relations in the light of the facts. Carless ran a private hire taxi business. The business had credit customers - some of whom were served by drivers who were provided with vehicles by the minicab business and in return paid it a percentage of the takings. The Customs and Excise decided that in such cases the business was acting as an agent for the drivers and was accordingly making supplies to them which were chargeable to VAT. The minicab's business appeal was dismissed because the conclusion reached by the tribunal was open to it on the facts before it.

Chen Yuen v. Royal Hong Kong Golf Club **[1998] ICR 131** (Privy Council - Lords Browne-Wilkinson, Slynn, Lloyd, Steyn and Hoffmann)
The tribunal misdirected itself in proceeding on the basis that there was a contract of employment between the golf caddie and the golf club. The only question for consideration was whether that contract was one of service or for the provision of services. The Tribunal did not consider sufficiently (or at all) the question as to whether the contract, if any, between the gold caddie and gold club was of a different nature. The misdirection entitled the Court of Appeal to set aside the tribunal's findings. The only reasonable view of the facts was that the arrangements between the caddie and golf club went no further than to amount to a licence by the golf club to permit the caddie to offer himself as a caddie for individual golfers on certain terms dictated by the administrative convenience of the golf club and its members. The golf club was not

obliged to give him work and the caddie was not obliged to work for the golf club. The caddie did not receive any of the sickness, pension or other benefits enjoyed by golf club employees nor any pay over and above that resulting from particular rounds of golf.

Carmichael v. National Power PLC **[1999] 1 WLR 2042** (House of Lords - Lords Irvine, Lord Goff, Jauncey, Browne-Wilkinson and Hoffmann).
The guides were not obliged to accept work and not guaranteed that casual work would be available. The parties were under no obligation to provide or accept work. A moral obligation of loyalty merely existed. The guides were not entitled to written particulars of their terms of employment as they were not employees under contracts of employment as defined by the Employment Protection (Consolidation) Act 1978. There was clearly an absence of any mutually binding obligations to create an employment contract because when the guides were not working as guides it was not the parties' intention to be regulated by a contract. The EAT correctly based their decision on the nature and effect of the documentation and the evidence of the parties' intention as to how the documents were to be understood. In construing the documents, the Court of Appeal applied the natural and ordinary meaning of the phrase '*on a casual as required basis'* without reference to objective evidence of the intention and conduct of the parties and how the contract worked in practice. It was a question of fact rather than law, as to the construction of the exchange of letters between the company and the guides. The Court of Appeal wrongly found that the exchange of letters was an offer and acceptance which gave rise to a contract of employment. The exchanges should have been assessed on the basis of a question of fact which clearly showed that there was no intention on either side, that the letters in isolation were to constitute a contract.

Allonby v. Accrington and Rossendale College **Case C-256/01** (CJEU Grand Chamber, 13 January 2004 - Judges Skouris, Jann, Timmermans , Gulmann, Cunha Rodrigues, La Pergola, Puissochet, Schintgen, Macken, Colneric and von Bahr. Advocate General Leendert Geelhoed)
As regards the possibility of indirect sex discrimination resulting from UK domestic legislation which restricted the membership to the TSS to those employed under a contract of employment (A worked under a contract for services) a number of requirements had to be met. First it had to be established whether the claimant was a *'worker'* within the meaning of Article 141. The formal classification of a self-employed person under national law was to be disregarded if his independence was merely notional. In the case of teachers who were in relation to an intermediary company under an obligation to undertake an assignment at a college, it was necessary in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work.

Mingeley v. Pennock t/a Amber Cars **[2004] EWCA Civ 328** (Court of Appeal – Buxton, Maurice Kay and Nourse LJJ)
The employment tribunal had been correct to conclude that in order to bring himself within section 78(1) of the Race Relations Act 1976, the driver had to establish that his contract with the minicab company placed him under an obligation '*personally to execute any work or labour'*. There was no evidence that he had ever been under such an obligation - he had been free to work or not to work at his own whim or fancy. The ET had not erred when applying the '*dominant purpose'* test. While the test had its difficulties in that the search for a dominant purpose could be elusive and did not always result in clear or incontrovertible conclusions, the test had been read into s.78(1) by a consistent and strong line of authority, and it bound the court. Whether Parliament had intended to exclude arrangements such as this from the operation of the RRA 1976 had to be questioned. Their inclusion, however, could now only be achieved by legislation.

Khan v. Checkers Cars Limited **UKEAT/0208/05/DZM** (Employment Appeal Tribunal – Langstaff J, Ms P Tatlow and Professor Wickens. 16 December 2005)
The right to exercise control, at least in so far as there was room for it, was a necessary element of a contract of employment. An obligation resting upon a purported employee to provide at least some minimum of work personally for the employer and, whilst doing so, to be subject to the control referred to, was a separate and equally necessary requirement. However, the phrase '*mutuality of obligation'* should be understood as referring to providing some minimum of work. It did not require the would-be employee to be obliged to work whenever asked by the purported employer. It permitted the purported employee to refuse work - although this might involve a factual assessment as to whether any refusal was so extensive as to deny the existence of an obligation to even do a minimum of work. Here drivers were never required to attend work and so there was no obligation even to perform a minimum of work. The restrictive term agreed between the parties might have suggested that there was a contract of employment. It was for the ET to make the necessary factual assessment. Although the ET should have been more expansive with its reasoning on the issue, the terseness of its decision could not be categorised as an error of law. On the findings of fact made by the ET, the contract went no further than to amount to a licence by the minicab company to permit the driver to offer himself as a private hire car driver to individual passengers on terms dictated by the administrative convenience of the minicab company and the Gatwick airport authority.

Cotswold Developments Construction Limited v. Williams **[2006] IRLR 181** (Employment Appeal Tribunal - Langstaff J)
Mutuality of obligation was a prerequisite to the existence of a contract. If there was a contract, it was then necessary to determine whether or not it was a contract of employment. The issue of control was not the determinative factor in deciding whether a contract was one of employment as it had to be established whether the contract obliged one party to provide work and the other to pay for it. Here the ET had applied the wrong test and its reasoning was inconsistent. It had failed to determine whether there was a minimum amount of work that the worker was required to perform and for those purposes it was irrelevant that the worker had on occasion refused to work for Cotswold. The matter was remitted to the ET to consider whether there was one contract or a succession of shorter contracts. If one contract was found to exist, it then had to be determined whether the worker was obliged to perform a minimum amount of work capable of giving rise to sufficient control for it to amount to a contract of employment. However, if there was insufficient control, it had to be determined whether the worker was nevertheless obliged to work personally.

James v. Redcats (Brands) Limited **[2007] ICR 1006** (Employment Appeal Tribunal - Elias J)
The lack of any mutual obligations when no work was being performed was of little, if any, significance when determining the status of the individual when work was performed. There was no inconsistency in finding that there was a contract of employment for particular contractual stints even though there was no continuing overarching contract because of a lack of mutual obligations in the period between engagements.

Hospital Medical Group Limited v. Westwood **[2012] EWCA Civ 1005** (Court of Appeal – Lords Justices Maurice Kay LJ, Longmore and Toulson)
The observations of Aikens LJ in *Autoclenz Ltd v. Belcher* **[2009] EWCA Civ 1046** concerning Employment Rights Act 1996 section.230(3)(b) were obiter but the court was content to adopt them. Lord Justice Aikens had stated that there were 3 requirements: (1) the worker was an individual who had entered into or worked under a contract with another party for work, (2) the individual undertook to perform the work personally, and (3) the other party did not have the status of a client or customer of the individual carrying on a business. The first 2 requirements were not in issue. As to the 3rd third requirement there was no doubt that the cosmetic surgeon was engaged in a business on his own account. However, if Parliament had intended to provide for an excluded category defined as those in business on their own account it would have said so, rather than providing a more nuanced exception. The status exception in s.230(3)(b) provided a 3rd hurdle to be overcome but it was counter-intuitive to see the hospital as the cosmetic surgeon's client or customer. Separately from his general practice work, he had contracted specifically and exclusively to carry out hair restoration surgery on behalf of the hospital. In its marketing material the hospital referred to the doctor as '*one of our surgeons'*. Although the doctor was not working for the hospital under a contract of employment, he was clearly an integral part of its undertaking when providing services in respect of hair restoration, even though he was in business on his own account. There was not a single key to unlock the words of the 1996 Act in every case and neither *Cotswold Developments Construction Ltd v. Williams* **[2006] IRLR 181** nor *James v. Redcats (Brands) Ltd* **[2007] ICR 1006** had propounded a test of universal application. However, the '*integration*' test set out by Langstaff J in *Cotswold* would often be appropriate.

Stringfellows Restaurants v. Quashie **[2012] EWCA Civ 1735** (Court of Appeal – Lords Justices Ward, Elias and Pitchford)
The critical question was whether the nature of those contractual obligations were such as to render it a contract of employment. The ET properly inferred from the evidence that the nightclub was under no obligation to pay the lap dancer - she negotiated her own fees with the clients, took the risk that on any particular night she would be out of pocket and received back from the nightclub only monies received from clients after deductions. The nightclub did not employ the lap dancer to dance but rather she paid the nightclub for an opportunity to earn money by lap dancing for clients. The fact that the nightclub also derived profits from selling food and drink to clients did not alter that fact. The economic risk the lap dancer took was also a powerful pointer against there being a contract of employment and the lack of any obligation to pay precluded the establishment of such a contract. The ET's conclusion was reinforced by the fact that the contract terms involved the lap dancer accepting that she was self-employed and she conducted her affairs on that basis by paying her own tax. Further she did not receive sick pay or holiday pay. Whilst there were some mutual obligations in play when the lap dancer was at work (and she had a duty - at least once on the rota - to work certain days) and the nightclub was under some obligation to allow her to dance when she was at work, but there was no relationship of employer and employee constituted by that arrangement.

Lafferty v. HMRC **[2014] UKFTT 358 (TC)** (First Tier Tribunal - Judge Malachy Cornwell-Kelly and lay member Mrs Sharwar Sadeque)
The issue had to be looked at primarily in terms of the relations between the minicab firm and its drivers - although the account customers' perceptions might contribute to that analysis. The relationship in respect of account customers was akin to one where the drivers' customers paid by cash or credit card. The fare was subject to the same local authority-regulated tariff - no particular drivers were selected for account work and (as with cash customers) the rule was 1st come, 1st served. The payment mechanism for getting the fare money to the drivers for account work paralleled that where customers paid by credit card with the minicab

company acting simply as the collector of the fares. No driver was obliged to respond to a request by an account customer any more than they were obliged to be at the rank to get work. A bad debt arising from an account customer was a loss to the driver not to the minicab company. Against that, the account customer might conclude (especially from the absence of any reference to the individual driver on the invoice) that they were dealing with a firm running a taxi service staffed by drivers whom the firm controlled. However, that was not sustained by the relations actually existing between the drivers and the minicab company. The circumstances were materially different from authorities where a taxi firm had been shown to have acted as principal. In those cases, the taxi firm carried the risk of bad debts, charged different fares for account work, made sure there were drivers available or selected particular drivers for account customers, and negotiated contracts with such customers.

Clyde & Co LLP v *Bates van Winkelhof* [**2014] UKSC 32** (Supreme Court – Lord Neuberger PSC, Lady Hale DPSC, Lords Clarke, Wilson and Carnwath)
A partner in a law firm could be a '*worker*' for a whistleblowing claim. The phrase '*employed by'* in section 4(4) of the ERA 1996 covers a person employed under a contract of service. However, it does not also cover those who '*undertake to do or perform personally any work or services for another party to the contract…*'.. Section 4(4) of the Limited Liability Partnership Act 2000 does not mean that members of an LLP can only be '*workers*' within the meaning of ERA 1996 section 230(3) if they would also have been '*workers*' had the members of the LLP been partners in a traditional partnership. While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker

Pimlico Plumbers v. Smith **[2017] EWCA Civ 51** (Court of Appeal - Sir Terence Etherton MR, Lords Justices Davis and Underhill)
The starting point was that the manual (including the provision for a normal working week of 5 days and a minimum of 40 hours) formed part of the 2005 agreement. The ET tribunal was both entitled and right to conclude that under the terms of the 2009 agreement, the plumber was obliged to work a normal 40 hour week even if that was not enforced. A provision in the 2009 agreement that the plumber was not under any obligation to accept work interpreted in the light of practical reality was also not inconsistent with the manual's contractual obligation to work a minimum 40 hour week. It meant that the plumber was free to refuse any particular work assignment or any particular date but not that he could refuse all assignments. The plumber, like the other operative, was required to use the van with Pimlico Plumber's logo on it for work assignments as well as a work mobile phone. The plumber had to earn sufficient from work assignments to be able to pay for both the van and telephone before he made any income. The fact that the plumbing company might choose not to insist on the full 40 hours work in any particular week was not inconsistent with those legal obligations.

What interventions did Judge Eady QC make? What points seemed to be troubling her?
Judge Eady was very polite and patient with interventions from her being sparing but focused.

Her 1st intervention was to flag one point with Miss Rose. She asked whether the authorities had dealt with where there had been similar requirements to those faced by Uber. Miss Rose said not to which Judge Eady said she had gone through the authorities and they were '*not dissimilar'* to which Miss Rose said the point had not been argued and not been decided.

Her 2nd intervention was on the characterization of the agency relationship. Judge Eady said that Miss Rose talked about the taxi cases but the judge said neither case discusses this in terms of agency. The judge asked whether that was a difference to which Miss Rose said there were a number of VAT cases. The judge came back to enquire about the label of agency to which Miss Rose was forced to concede that in the VAT cases that label was not in fact used. The judge pressed this point saying that whilst this precise label may not have been used, had it been **required** to? To this Miss Rose said she would have to go to the analysis in the *Hong Kong Golf Club* case where there was a greater degree of subordination.

The 3rd intervention was to ask Miss Rose about *Autoclenz*. Her answer was that *Autoclenz* had no bearing at all on the question of agency. The judge then went on to question the ET's '*mosaic*' categorization saying there were 10s of thousands of drivers but only 1 platform. To this Miss Rose said that what you saw was an inability to undermine the nature of the relationship.

The judge then asked Miss Rose about VAT guidance note **700/25** to which Miss Rose said that Uber acts or arranges through someone else and then went through the sections in that note that assisted Uber's case.

In the afternoon of the 1st day, the judge started by asking Miss Rose what was the point of clause 6.3 in Uber's driver conditions to which the reply was it permits the publication of the driver's ratings. The judge came back to say that that the clause seemed very wide to her and that reading on it gave Uber a very wide discretion to share driver ratings to which Miss Rose simply answered '*it says what it says'*. Next Judge Eady turned her attention to clause 4.2 and asked whether it mattered that Uber charged for cancellations to which Miss Rose said not.

Next came a critical intervention when the judge put the 10 seconds to accept a booking by a driver condition under her microscope. Judge Eady said that this was not a regulatory requirement but was just a commercial one for Uber to which Miss Rose was forced to agree.

On the 2nd day, Judge Eady started by raising with Mr Galbraith-Martin a point of concern that her troubled her overnight. The judge said she envisaged other regulatory requirements but wanted to know if they were determinative of the relationship be that self-employed or whether it **must** be one of employment. She went on to say that in other cases a tribunal could infer the nature of the relationship but it either a statute or statutory instrument doesn't specify the relationship to be of a certain form, she must be careful. Whilst this is part of the factual relationship the judge said that this is all you have and it is not enough to dictate the relationship unless the legislation sets it out. To this Mr Galbraith-Martin said that the drivers would not go that far and that they had more than just the TfL regulatory requirements.

The final intervention was to ask whether it mattered that in part that the contact with customers was not between particular workers and particular employers to which Mr Galbraith-Martin said it did not matter. In the afternoon the judge picked Miss Rose up early on to remind her that Mr Galbraith-Martin had used the term '*intermediary*' rather than '*agent*'. Other than that the judge listened intently to Miss Rose's submissions in reply without further interruption.

What did the Court say about judgment in this case?
Judge Eady said that producing a judgment is this case was a '*priority*' and said that it would definitely appear this side of Christmas. However to manage expectations she cautioned about her other workload. The feeling was that a judgement is likely to surface in early November 2017 with a formal hand down and dealing with applications for consequential matters to follow within a week or 2 thereafter.

What is the usual appeal route for the losing party?
A party losing in the Employment Appeal Tribunal would need permission to bring an appeal to the Court of Appeal. Although the EAT could grant permission, it will often not do so leaving the losing side to ask the Court of Appeal directly for permission.

What changes have been made for employment appeal tribunal cases for appeals recently?
Section 65 of the Criminal Justice and Courts Act 2015 inserts a new section 37ZA into the Employment Rights Act 1996. This provides that where the EAT is satisfied that '*that a point of law of general public importance is involved in the decision*' and that point of law is either one which '*relates wholly or mainly to the construction of an enactment or statutory instrument'* and '*has been fully argued in the proceedings and fully considered*' in the EAT judgment or is one where the EAT '*is bound by a decision of the Court of Appeal or the Supreme Court in previous proceedings'*, then the EAT can grant a leap-frog certificate so the a party can ask the Supreme Court for permission to appeal. If a leapfrog certificate is granted, then the Court of Appeal is bypassed.

However to obtain a leap frog certificate the EAT has also to be convinced that the proceedings '*entail a decision relating to a matter of national importance*' or the result of the proceedings is '*so significant'* that in the EAT's opinion a hearing by the Supreme Court is '*justified*', or that the '*benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal'*.

Practice Direction 1 deals with a '*General Note and the Jurisdiction of the Supreme Court'* and provides in section 1.2.17 that appeals in '*civil matters may exceptionally be permitted to be made direct to the Supreme Court'* but that such '*appeals are permitted only if the relevant statutory conditions are satisfied and the Supreme Court grants permission'*. Practice Direction 3 of the Supreme Court deals with the form of application for permission to appeal. Paragraph 3.6.1 provides that not only must a leap frog certificate be first obtained from the EAT but then permission to appeal needs to be sought and granted in the usual way by a panel of 3 Supreme Court Justices.

Did Judge Eady say anything about a 'leap-frog' certificate?
Yes. At the end of the hearing Dinah Rose QC rose to raise this matter with her and advising her that *Pimlico Plumbers* was listed for a final appeal in February 2018. Judge Eady gave a judicial indication that she would be amenable to granting a leap frog certificate in this case when that point was reached.

What about the Uber Spain case?
On 7 August 2015 in Case **C-434/15** the Professional Elite Taxi Association in litigation against Uber Systems Spain SL had a number of questions referred to the Court of Justice of the European Union. The referred questions raise issues of interpretation under both the Services Directive **2006/123/EC** and the Information Society Directive **2000/31/EC** and particularly the scope of article 2(2)(d) of the former. The nub of the referral is whether Uber is merely a '*transport service'* or whether instead it is an '*electronic intermediary service or an information society service'* to be covered by these Directives' requirements. It also seeks a ruling on whether Uber has breached the Unfair Commercial Practices Directive and has infringed the rules governing competitive activity.

On 11 May 2017, Advocate General Szpunar delivered his advisory opinion to the CJEU. His conclusions were that:

- Article 2(a) of the E-Commerce Directive **2000/31/EC** read in conjunction with Article 1(2) of Information Society Services Directive **98/34/EC** had to be interpreted as meaning that a service that connects (by means of mobile telephone software) potential passengers with drivers offering individual urban transport on demand, where the provider of the service exerts control over the key conditions governing the supply of transport made in particular the price, does <u>not</u> constitute an information society service, and
- Article 58(1) of the Treaty on the Functioning of the EU and Article 2(2)(d) of the Services Directive **2006/123/EC** have to be interpreted as meaning that Uber's service constitutes a '*transport service'* for the purposes of those provisions.

This case is awaiting a hearing before the CJEU. It is not clear which Governments of other EU member states have intervened to make submissions in this case. In view of the significance of the case, it is likely that the Grand Chamber of the CJEU will hear it rather than a smaller panel of judges in one of its 10 other chambers. The CJEU's rulings are always unanimous but they do not always agree with their Advocate-General. A Grand Chamber is constituted of 15 CJEU judges.

Will the action taken by TfL about Uber's operating licence have any affect?
It does not appear that this will have any effect on the determination of this appeal. Miss Rose said it was an '*elephant in the room'* which should be acknowledged and '*then shown the door'*. The worker's counsel made little capital of it and there were no interventions or questions about its implications by Judge Eady.

What is happening on *Pimlico Plumbers*?
In the Employment Tribunal, Judge Corrigan ruled that the plumbers were '*workers*' for the purposes of the Working Time Regulations 1998 and HHJ Serota QC in the Employment Appeal Tribunal agreed with this ruling. This ruling was upheld (but with some other observations) by the Court of Appeal on 10 February 2017 - **[2017] EWCA Civ 51.** On 9 August 2017, the Supreme Court of the United Kingdom granted the employer permission for a final appeal. This has been listed for a 2 day hearing to start on 20 February 2018.

What is happening with the *Taylor* review?
On 11 July 2017 Matthew Taylor, Chief Executive of the Royal Society of the Arts, delivered his 116 page report to the Department of Business, Energy and Industrial Strategy. This report entitled '*Good Work – the Taylor review of modern working practices*' proposes 7 steps 'towards fair and decent work with realistic scope for development and fulfilment'. These include:

- the British way should be explicitly directed toward the goal of good work for all,
- Platform based working offers welcome opportunities for genuine two way flexibility and can provide opportunities for those who may not be able to work in more conventional ways. These should be protected while ensuring fairness for those who work through these platforms and those who compete with them,
- The law and the way it is promulgated and enforced should help firms make the right choices and individuals to know and exercise their rights,

- The best way to achieve better work is not national regulation but responsible corporate governance, good management and strong employment relations within the organisation,
- It is vital to individuals and the health of our economy that everyone feels they have realistically attainable ways to strengthen their future work prospects
- The shape and content of work and individual health and well-being are strongly related. For the benefit for firms, workers and the public interest we need to develop a more proactive approach to workplace health, and
- The National Living Wage is a powerful tool to raise the financial base line of low paid workers. It needs to be accompanied by sectoral strategies engaging employers, employees and stakeholders to ensure that people – particularly in low paid sectors – are not stuck at the living wage minimum or facing insecurity but can progress in their current and future work.

As to Uber, this is mentioned 6 times:

- In relation to '*Multi-jobs'* it says '*This official data is not likely to include the increasing number of people earning additional money in a more casual way, through the use of online platforms for example. McKinsey Global estimates that 20-30% of the working age population is engaged in independent work. This includes self-employed people but also accounts for people using sharing or gig economy platforms e.g. individuals renting out rooms on Airbnb, driving for Uber, or selling goods on eBay or Etsy*'.
- In relation to '*Gig economy work'* it says '*The gig economy tends to refer to people using apps to sell their labour. The most commonly used examples are Uber and Deliveroo but there are many and a growing number of platforms facilitating working in this way. Current limitations on Labour Force Survey data means that we do not know with any certainty how many people are undertaking gig economy work and whether they are doing so to supplement other work, or substituting employment totally with this type of work'*.
- '*The courts have sought to ensure that the way in which employment legislation is applied keeps pace with these changes, with last year's ruling against Uber being one of the latest manifestations. However, in order to ensure that in the future, all work is fair and decent, we have to re-examine whether the legislation meets the needs of a modern labour market*.'
- On '*Broader justice'* it says '*The question of fairness goes beyond the individual bringing a case. The recent case against Uber raised questions about the applicability of tribunal rulings to the wider workforce. While many have suggested that the judgment (which is being appealed) means all Uber drivers are workers, the reality is that the ruling only applies to the two drivers who brought cases. It is neither just nor efficient for the system to operate so that every single person in an organisation has to bring a case to be recognised as a worker for the judgment to apply to the whole workforce.*'
- Uber's submission to the review included '*We are interested in exploring how technology can further support tax compliance. For example, through our API we enable third party developers to build services that can help partner drivers*'.
- A case study from Estonia - '*The Estonian Tax and Custom Board (ETCB) have been working with Uber in Estonia to pilot a collaborative project which simplifies taxation for Sharing Economy workers. This involves Uber sharing information on financial transactions between customers and drivers, which they already collect via their platform. This information can then be used by the ETCB to prefill the driver's tax-forms. This is made possible by the fact that Uber's services are paid for electronically.'*

On 11 July 2017 Margot James MP, the BEIS Parliamentary Under-Secretary of State said this in Parliament (Hansard volume 627, column 158):

> '*This is an independent review addressed to Government. Although we may not ultimately accept every recommendation in full, I am determined that we consider the report very carefully and we will respond fully by the end of the year'*.

Where has the Work and Pensions Select Committee got to in its work?

Following the June 2017 General Election, Mr Frank Field MP was re-elected to Parliament to represent the Labour Party and has once again been elected to chair the House of Commons Work and Pensions Select Committee. He has announced 4 new enquiries including one on the Taylor Report. There will be a one-off evidence session on the Taylor Report on 11 October 2017. The Committee proposes to question Mr Taylor on his recent report including how the Government should act to ensure rights and fair pay for gig economy workers.

Comment

On its face Uber has done enough to succeed on its appeal in the EAT. Whether it does or not remains to be seen. In some ways who wins or loses in the EAT is irrelevant. Judge Eady has indicated that she is prepared to grant a leap frog certificate. On the basis that she does and that the Supreme Court of the United Kingdom grants permission to appeal, it seems highly likely that in February 2018 the Supreme Court will in February 2018 be hearing a final appeal in this case alongside *Pimlico Plumbers*. In the EAT, Uber was careful in the way it treated the prior Supreme Court decision in *Autoclenz* saying that it had no or limited relevance to Uber where the contractual documentation did fully and accurately reflect what happened. Whether the Supreme Court will agree that its decision in *Autoclenz* should be given such a narrow or restricted interpretation remains to be seen. Similarly Uber was keen to champion the virtues of the *Secret Hotels* case in the EAT. Whilst this too was a Supreme Court case, it charted a turbulent zig-zag course through its appeals. The Supreme Court will have to give coherence to both decisions.

What happens in the Supreme Court will partly depend on who hears the case. With the new 3 justices sworn in yesterday, there are now 4 judges in the Supreme Court with a background in family law. The outcome could be very different if the appeal is heard by Lady Hale PSC (with say Lady Black, Lord Wilson, Lord Reed and Lord Kerr JJSC on the panel) to that with Lord Mance DPSC (with say Lords Briggs, Sumption, Hodge and Carnwath JJSC on the panel).

The trade union backing this case and the other gig economy cases are determined to get rulings early on that outlaw or limit the effect of worker's rights in the gig economy. The trade unions still feel very bruised that they did not act firmly 20 years ago when outsourcing of jobs started to become common.

It is unlikely that the battle will end in the Supreme Court either. It was telling that neither side made any reference to the *Uber Spain* case in the EAT hearing which is surprising given that its Advocate-General's opinion has been given. It is likely that the Court of Justice of the EU will hand down its ruling either before or around the same time as the February 2018 hearing in *Pimlico Plumbers*. Uber relied heavily on a number of VAT cases to support its case. Those VAT cases concerning supplies made by taxi companies ultimately turned on the interpretation of the 6th Council VAT Directive (now consolidated in the 2006 Principal VAT Directive). Our Supreme Court must refer a case to the CJEU unless it considers that the legal position is already sufficiently clear ('*acte clare*'). Given that the resolution of this will depend on how the VAT Directive interweaves with employment rights directives (such as on working time) and online economy measures (such as the E-Commerce, Information Society and Distance Selling Directives), it will be difficult for the Supreme Court to say this is *acte clare*.

The Taylor review seems to have pleased no-body. Although the Government has made sympathetic noises, it is unlikely that this will be a priority legislative area whilst Brexit is negotiated. It is more likely that it will be content to see what the Work and Pensions Select Committee does or recommends before committing itself to action. A Supreme Court judgment in *Pimlico Plumbers* will likely appear in June or July 2018. Whatever the outcome, this may provide the necessary spur for legislation.

Finally this leaves those advising on-line businesses in something of a quandary. Although the focus of this case is worker's rights, the decision of the Employment Tribunal has involved an attack on all of Uber's contractual documentation – including that between Uber BV and Uber London – and not simply that between Uber London and the drivers. The ET scathingly lambasted as '*faintly ridiculous'* the '*notion that Uber in London is a mosaic of 30,000 small businesses*'. Although the outcome of this case will be of greatest interest to those working in human resources and employment lawyers advising them, it does not end there. For those drafting and negotiating IT contracts with online platforms, they will need to dissect its ultimate outcome too to ensure that future contracts are as watertight as they can be.

In the meantime we will see a trickle of rulings in other Gig economy cases in employment tribunals, some of which may also go on appeal. This will remain a fluid and uncertain area for some time to come.

3 October 2017

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