Case Nos: 2202550/2015
& Others

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	and	Respondents
(1) Mr Y Aslam (2) Mr J Farrar & Others		(1) Uber B.V. (2) Uber London Ltd (3) Uber Britannia Ltd

REASONS FOR THE RESERVED JUDGMENT ON PRELIMINARY HEARING SENT TO THE PARTIES ON 28 OCTOBER 2016

Introduction

1 Uber is a modern business phenomenon. It was founded in the United States in 2009 and its smartphone app, the essential tool through which the enterprise operates ('the App'), was released the following year. On 2 February 2016 its Chief Executive, Mr Travis Kalanick, posted this on the Uber website:

> **Uber began life as a black car service for 100 friends in San Francisco - everyone's private driver.[1] Today we're a transportation network spanning 400 cities in 68 countries that delivers food and packages, as well as people, all at the push of a button. And ... we've gone from a luxury, to an affordable luxury, to an everyday transportation option for millions of people.**

There are now about 30,000 Uber drivers operating in the London area and 40,000 in the UK as a whole. The organisation has some two million passengers registered to use its services in London.

2 The Claimants in these consolidated proceedings are current or former Uber drivers.

3 The First Respondents ('UBV') are a Dutch corporation with headquarters in Amsterdam and the parent company of the Second and Third Respondents. They hold the legal rights to the App.

4 The Second Respondents ('ULL') are a UK company which, since May 2012, has held a Private Hire Vehicle ('PHV') Operator's Licence for London. Their functions include making provision for the invitation and acceptance of private hire vehicle bookings and accepting such bookings.

[1] It seems that the Uber organisation has registered intellectual property rights in the slogan.

5 The Third Respondents ('UBL') hold and/or manage PHV Operator's Licences issued by various district councils outside London. Because, as we will explain, our attention has focussed on London-based drivers, UBL do not feature further in these reasons.

6 We will refer to UBV and ULL by name where appropriate. At certain points it will be more convenient to refer simply to 'Uber', usually because it is unnecessary to identify the applicable company or because we are speaking about the entire organisation or brand.

7 The Claimants bring claims under the Employment Rights Act 1996 ('ERA'), Part II, read with the National Minimum Wage Act 1998 ('NMWA') and associated Regulations, for failure to pay the minimum wage, and the Working Time Regulations 1998 ('WTR'), for failure to provide paid leave. Two, who include Mr Yaseen Aslam, also complain under ERA, Parts IVA and V, of detrimental treatment on 'whistle-blowing' grounds.

8 In their amended response form the Respondents deny that the Claimants were at any material time 'workers' entitled to the protection of the legislation on which they rely and, in addition, plead jurisdictional defences based on applicable law and forum points.

9 At a case management hearing held on 18 December 2015 the Tribunal listed a public preliminary hearing to determine the status and jurisdiction issues and certain other matters. That preliminary hearing came before us[2] on 19 July this year. Mr Thomas Linden QC, instructed by Ms Annie Powell, appeared for the Claimants and Mr David Reade QC, instructed by Mr Adam Hartley, for the Respondents. We are most grateful for the care and skill with which the cases on both sides were prepared and presented.

10 By agreement, two 'test Claimants' were selected for the preliminary hearing, Mr Aslam (already mentioned) and Mr James Farrar. We heard evidence from both and, on behalf of the Respondents, Ms Joanna Bertram, Uber's Regional General Manager for the UK, Ireland & the Nordic Countries. We were also taken to numerous documents in the five-volume bundle.

11 Following an initial reading day, oral evidence occupied days two and three. We did not sit on day four, allowing leading counsel that time for preparation of closing submissions. Reading those submissions and hearing supplementary oral argument accounted for day five. Our private deliberations in chambers occupied day six and one further day, 12 October.

The Issues

12 The parties helpfully agreed a list of issues but for present purposes it is sufficient to borrow from this summary in Mr Linden's closing submissions:

> **8. ... The core issue remains as to whether the Cs are "workers" for the**

[2] It was agreed at the case management hearing that the preliminary hearing should be before a full panel.

purposes of the various definitions under the domestic legislation. There are also conflict of laws issues, but these have narrowed substantially:

a. **Uber now accepts that the Tribunal has jurisdiction in respect of all of the Rs i.e. that it is competent (in the international jurisdiction sense) to adjudicate the claims against all of the Rs including UBV;**
b. **They also accept that the WTR apply to the Cs *provided they are workers as defined*;**
c. **They also accept that the ERA and the NMWA would apply to any claim against ULL provided they are workers;**
d. **But they say that the ERA and NMWA do not apply to any contract with UBV – Dutch law applies, such that the Cs do not have any protection under UK employment protection legislation.**

9. **If the Cs are "workers", the Tribunal is then asked to determine, in principle, what counts as work and/or working time for the purposes of the WTR and the national minimum wage legislation.**

The Facts

The Uber 'product range'

13 Uber markets a variety of 'products'. These reflect, largely, the range of services which passengers may wish to receive. Ms Bertram summarised them in her witness statement as follows:

16.1 **UberX (including uberPOOL) is the most popular Product on the Uber platform for both Drivers and Passengers, and has a lower cost for Passengers than the other Products;**
16.2 **UberXL is a product for larger vehicles that have a capacity for at least six Passengers;**
16.3 **UberEXEC and UberLUX are more premium Products than UberX. The minimum fares applicable to these products are also higher. The vehicles that are able to drive on these Products are of a higher specification and provide a more luxurious service to Passengers;**
16.4 **UberTAXI are London black taxis that are signed up to use the Uber platform;**
16.5 **UberWAV is a product for vehicles that are able to provide wheelchair access to Passengers.**

14 The vast majority of drivers are in the UberX category. The 'products' are differentiated not only by the quality and/or size of the vehicles but also by the ratings of the drivers. We will deal with the subject of ratings below. It is sufficient for present purposes to say that a higher rating is required to deliver the 'EXEC' and 'LUX' services than for UberX work. To deliver the UberWAV 'product' a driver must have undergone special training from an organisation called Transport for All.

'Taking an Uber' – summary

15 The Uber system works in this way. Fare-paying passengers must be aged 18 or over. They register by providing certain personal information including credit or debit card details. They can then book a trip by downloading the App on to their smartphones and logging on. They are not obliged to state their destination when booking but generally do so.[3] They may, if they request, receive a fare estimate.

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[3] Presumably they must state where the proposed trip is to start from

Once a passenger request has been received, ULL locates from the pool of available drivers the one estimated by their equipment, which tracks drivers' movements, to be closest to the passenger and informs him[4] (via his smartphone) of the request. At this stage the driver is told the passenger's first name and his/her rating. He then has 10 seconds in which to accept the trip. If he does not respond within that time he is assumed to be unavailable and another driver is located. Once a driver accepts, ULL confirms the booking to the passenger and allocates the trip to the driver. At this point the driver and passenger are put into direct telephone contact through the App, but this is done in such a way that neither has access to the telephone number of the other. The purpose is to enable them to communicate, for example to agree the precise location for pick-up, to advise of problems such as traffic delay and so forth. Drivers are strongly discouraged from asking passengers for the destination before pick-up.

16 The driver is not made aware of the destination until he has collected the passenger.[5] The App incorporates software linked to satellite navigation technology, providing detailed directions to the destination. The driver is not bound to follow the route proposed and will not do so if the passenger stipulates a different route. But an unbidden departure from the App route may have adverse consequences for the driver (see below).

17 On arrival at the destination, the driver presses or swipes the 'Complete Trip' button on his smartphone. Assuming he remains logged on to the App, he is then eligible to be allocated further trips.

Payment

18 At the end of any trip, the fare is calculated by the Uber servers, based on GPS data from the driver's smartphone. The calculation takes account of time spent and distance covered. In 'surge' areas, where supply and demand are not in harmony, a multiplier is applied to fares resulting in a charge above the standard level.

19 Strictly speaking, the figure stipulated by Uber is a recommended fare only and it is open to drivers to agree lesser (but not greater) sums with passengers. But this practice is not encouraged and if a lower fare is agreed by the driver, UBV remains entitled to its 'Service Fee' (see below) calculated on the basis of the recommended amount.

20 The passenger pays the fare in full to UBV, by credit or debit card, and receives a receipt by email. Separately, UBV generates paperwork which has the appearance of being an invoice addressed to the passenger by the driver. The 'invoice' document does not show the full name or contact details of the passenger, just his or her first name. Nor is it sent to the passenger. He or she would no doubt be vexed to receive it, having already paid the fare in full to Uber and received a receipt. The relevant driver has access to it electronically through the App. It serves as a record of the trip undertaken and the fare charged, but

[4] It seems that most Uber drivers are male. We use the masculine for the sake of brevity only.
[5] He learns it from the passenger directly or, where the passenger has stated the destination to Uber, from the App, when he presses the 'Start Trip' button.

does not fulfil the ordinary function of an invoice, namely to present a formal request for payment to a customer.

21 UBV renders payment to drivers weekly. It characterises this activity as paying the drivers the fares which they have earned, less a 'Service Fee' in respect of the use of the App. On the standard 'product' the 'fee' is now 25% of the fare. The percentage has increased: Mr Farrar and Mr Aslam joined the organisation at a time when the standard charge was set at 20% and the higher figure was never applied to them.

22 The Respondents' position before us was that drivers are perfectly at liberty to accept tips from passengers. We have, however, been shown documents which evidence their disapproval of drivers soliciting tips.

23 On occasions passengers complain that they have been overcharged. They may, for example, assert that a driver has followed an inefficient route, causing the fare to be needlessly inflated. If this happens, the matter is considered by ULL and a decision taken whether to compensate the passenger. In his witness statement (paras 185-198), Mr Farrar explained that on several occasions Uber made deductions from his account without prior reference to him. Being astute to check his records, he picked up the discrepancies and queried them. Typically, the explanation was that ULL had agreed a partial refund of the fare with the passenger, resulting in a re-calculation of Mr Farrar's payment. Sometimes he anticipated a deduction (for example, on becoming aware of a refund agreed between ULL and the passenger) but no deduction was ultimately made. It seems that all challenges raised by Mr Farrar resulted either in reassurance that his pay was unaffected or in an adjudication in his favour, reversing a deduction. Two points in particular emerge clearly from the evidence. First, refunds are handled and decided upon by ULL, sometimes without even referring the matter to the driver concerned. Secondly, the organisation in practice accepts that, where it is necessary, or at least politic, to grant the passenger a refund – say because a journey took much longer than anticipated – but there is no proper ground for holding the driver at fault, it must bear the loss.

24 Where a passenger cancels a trip more than five minutes after it has been accepted by a driver, a £5 cancellation fee is payable. That fee is deemed a fare, and accordingly UBV takes its customary percentage.

25 One other category of payment from Uber to drivers is, we were told, no longer applicable. New drivers were entitled under certain schemes to guaranteed incomes for specified periods. Ms Bertram did not suggest that the fact that the organisation no longer feels a need to resort to incentives of this sort was indicative of any change in its relationship with drivers.

26 From time to time, Uber rides are procured by fraud. The passenger masquerades as someone else, having 'stolen' that person's identity. When the deception comes to light, the innocent third party is, necessarily, compensated for whatever has been deducted against his/her credit/debit card. The question then arises as to who is to bear the cost of the fraud. Uber's general practice is to accept the loss and not to seek to pass it on to the driver, at least where, as Ms Bertram put it, Uber's systems have failed. Some correspondence shown to us

suggests that the organisation may take a harder line if it considers that a driver has failed to react to evidence pointing to fraud.

27 The Respondents will, in some circumstances, pay drivers the cost, or a contribution towards the cost, of cleaning vehicles soiled by passengers. It was not suggested that such payments were conditional upon Uber receiving a corresponding sum (or any sum) from the passenger.

Terms between Uber and the passenger

28 Passengers logging on to the App are required to signal their acceptance of Uber's terms. The UK 'Rider Terms', updated on 16 June 2016, were shown to us. We assume that the document which they replaced was similar. Part 1 is entitled "Booking Services Terms". Para 3 includes this:

> **Uber UK[6] accepts PHV Bookings acting as disclosed agent for the Transportation Provider[7] (as principal). Such acceptance by Uber UK as agent for the Transportation Provider gives rise to a contract for the provision to you of transportation services between you and the Transportation Provider (the "Transportation Contract"). For the avoidance of doubt: Uber UK does not itself provide transportation services and is not a Transportation Provider. Uber UK acts as intermediary between you and the Transportation Provider. You acknowledge and agree that the provision to you of transportation services by the Transportation Provider is pursuant to the Transportation Contract and that Uber UK accepts your booking as agent for the Transportation Provider, but is not a party to that contract.**

Para 4 lists the "Booking Services" provided to the passenger by ULL (strictly as agent for the "Transportation Provider") as follows:

1. **The acceptance of PHV Bookings in accordance with paragraph 3 above, but without prejudice to Uber UK's rights at its sole and absolute discretion to decline any PHV Booking you seek to make;**
2. **Allocating each accepted PHV Booking to a Transportation Provider via such means as Uber UK may choose;**
3. **Keeping a record of each accepted PHV Booking;**
4. **Remotely monitoring ... the performance of the PHV Booking by the Transportation Provider;**
5. **Receipt of and dealing with feedback, questions and complaints relating to PHV Bookings ... You are encouraged to provide your feedback if any of the transportation services provided by the Transportation Provider do not conform to your expectations; and**
6. **Managing any lost property queries relating to PHV Bookings.**

Para 5 is entitled "Payment". It states:

> **The Booking Services are provided by Uber UK to you free of charge. Uber UK reserves the right to introduce a fee for the provision of the Booking Services. If Uber UK decides to introduce such a fee, it will inform you accordingly and allow you to either continue or terminate your access to the Booking Services through the Uber App at your option.**

Under the rubric "Applicable Law", para 7 reads:

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[6] As defined – for these purposes, ULL

[7] Defined elsewhere as "the provider to you of transportation services, including any drivers licensed to carry out private hire bookings ..."

The Booking Services and the Booking Service Terms set out in this Part 1, and all non-contractual obligations arising in any way whatsoever out of or in connection with the Booking Service Terms shall be governed by, construed and take effect in accordance with the laws of England and Wales.

Any dispute, claim or matter of difference arising out of or relating to the Booking Services or Booking Service Terms is subject to the exclusive jurisdiction of the courts of England and Wales.

29 Part 2 of the Rider Terms sets out detailed provisions purporting to govern the conditions on which the passenger is given access to the App. They avowedly characterise a contractual relationship between the passenger and UBV and are declared to be exclusively governed by the laws of the Netherlands. Para 2 includes these passages:

The Services[8] constitute a technology platform that enables users ... to pre-book and schedule transportation, logistics, delivery and/or vendors services with independent third-party providers ... (including Transportation Providers as defined in Part 1) ... YOU ACKNOWLEDGE THAT UBER[9] DOES NOT PROVIDE TRANSPORTATION, LOGISTICS, DELIVERY OR VENDORS SERVICES OR FUNCTION AS A TRANSPORTATION PROVIDER OR CARRIER AND THAT ALL SUCH TRANSPORTATION, LOGISTICS, DELIVERY AND VENDORS SERVICES ARE PROVIDED BY INDEPENDENT THIRD PARTY CONTRACTORS WHO ARE NOT EMPLOYED BY UBER OR ANY OF ITS AFFILIATES.

30 Para 4, entitled "Payment", includes the following:

You understand that use of the Services may result in charges to you for the services or goods you receive from a Third Party Provider ("*Charges*"). After you have received services or goods obtained through your use of the Services, Uber will facilitate your payment of the applicable Charges on behalf of the Third Party Provider as disclosed collection agent for the Third Party Provider (as Principal) ...

As between you and Uber, Uber reserves the right to establish, remove and/or revise Charges for any or all services or goods obtained through the use of the Services at any time in Uber's sole discretion ...

This payment structure is intended to fully compensate the Third Party Provider for the services or goods provided. Except [not applicable], Uber does not designate any portion of your payment as a tip or gratuity to the Third Party Provider. Any representation by Uber ... To the effect that tipping is "voluntary," "not required," and/or "included" in the payments you make for services ... is not intended to suggest that Uber provides any additional amounts, beyond those described above, to the Third Party Provider.

31 Para 5 contains a lengthy disclaimer in respect of the use of the "Services" and an even longer clause purporting to exclude or limit UBV's liability for any loss or damage suffered by the passenger as a result of his or her use of the "Services".

Terms between Uber and the driver

32 The terms purporting to govern the relationships between Uber and the

[8] Essentially, use of the App
[9] Defined as UBV

drivers were initially contained in a document dated 1 July 2013, entitled "Partner Terms". It begins with, among others, these definitions:

> **"Customer" means a person who has signed up and is registered with Uber for the use of the App and/or the Service.**
> **"Driver" means the person who is an employee or business partner of, or otherwise retained by the Partner and who shall render the Driving Service of whom the relevant ... details are provided to Uber.**
> **"Driving Service" means the driving transportation service as provided, made available or rendered ... by the Partner (through the Driver (as applicable) with the Vehicle) upon request of the Customer.**
> **"Partner" means the party having sole responsibility for the Driving Service ...**
> **"Service" means the on-demand, intermediary service through the App ... by or on behalf of Uber ...**
> **"Uber" means Uber B.V. ...**
> **"Vehicle" means any motorized vehicle ... that is in safe and cleanly condition and fit for passenger transportation as required by applicable laws and regulations and that has been approved by Uber for the provision of the Driving Service.**

33 Under "Scope", para 2.1.1 declares:

> **The Partner acknowledges and agrees that Uber does not provide any transportation services and that Uber is not a transportation or passenger carrier. Uber offers information and a tool to connect Customers seeking Driving Services to Drivers who can provide the Driving Service, and it does not and does not intend to provide transportation or act in any way as a transportation or passenger carrier. Uber has no responsibility or liability for any driving or transportation services provided by the Partner or the Drivers ... The Partner and/or the Drivers will be solely responsible for any and all liability which results or is alleged to be as a result of the operation of the Vehicle(s) and/or the driving or transportation service ... Partner agrees to indemnify, defend and hold Uber harmless from any (potential) claims or (potential) damages incurred by any third party, including the Customer or the Driver, raised on account of the provision of the Driving Service. By providing the Driving Service to the Customer, the Partner accepts, agrees and acknowledges that a direct legal relationship is created and assumed solely between the Partner and the Customer. Uber shall not be responsible or liable for the actions, omissions and behaviour of the Customer or in relation to the Partner, the Driver and the Vehicle. The Drivers are solely responsible for taking reasonable and appropriate precautions in relation to any third party with which they interact in connection with the Driving Service. Where this allocation of the Parties' mutual responsibilities may be ineffective under applicable law, the Partner undertakes to indemnify, defend and hold Uber harmless from and against any claims that may be brought against Uber in relation to the Partner's provision of the Driving Service under such applicable law.**

Para 2.2.1 includes:

> **Notwithstanding the Partner's right, if applicable, to take recourse against the Driver, the Partner acknowledges and agrees that he is at all times responsible and liable for the acts and omissions of the Driver(s) vis-à-vis the Customer and Uber, even where such vicarious liability may not be mandated under applicable law. ... The Partner acknowledges and agrees that he will retain and, where necessary exercise, sole control over the Driver and comply with all applicable laws and regulations ... governing or otherwise applicable to his relationship with the Driver. Uber does not and does not intend to exercise any control over the driver - except as provided under the [Partner] Agreement and nothing in the [Partner] Agreement shall create an employment relationship between Uber and the Partner and/or the Driver or create either of them an agent of Uber. ... Where, by implication of mandatory law or otherwise, the Driver and/or the Partner may be deemed an agent, employee or representative of Uber, the Partner undertakes and agrees to indemnify, defend and**

> **hold Uber harmless from and against any claims by any person or entity based on such implied employment or agency relationship.**

34 It is common ground that the vast majority of Uber drivers were and are sole operators such as Mr Aslam and Mr Farrar. Nonetheless, for the purposes of the Partner Terms, they provided "Driving Services" through their "Drivers" (*ie* in the ordinary case, themselves) to the "Customers".

35 A number of other features of the Partner Terms are worthy of note. By para 4.3.4 Partners were required to "support Uber in all communications", actively engage other Partners or Drivers if requested to do so and refrain from speaking negatively about Uber's business and business concept in public. Several provisions in para 9 imposed mutual duties of confidentiality. Deemed representations of Partners and Drivers under para 6 went well beyond the scope of standard regulatory requirements (concerning, for example, qualifications and fitness to perform driving duties). By para 6.1.1 the Partner represented (inter alia):

> **(vii) the Driver and the Vehicle comply at all times with the quality standards set by Uber ...**

Para 9.4 required the Partner and Driver to agree to constant monitoring by Uber and to Uber's retention of data so generated. Uber reserved wide powers to amend the Partner Terms unilaterally (see paras 1.1.2 and 5.3). By para 8.1, the Agreement was declared to terminate automatically,

> **... when the Partner and/or its drivers no longer qualifies, under the applicable law or the quality standards of Uber, to provide the Driving Service or to operate the Vehicle.**

And by para 8.2(a) either party was entitled to terminate without notice in any case of a material breach of the Agreement, which might take the form of:

> **... (e.g. breach of representations ... or receipt of a significant number of Customer complaints) ...**

The Partner Terms made provision for Uber to recover fares on behalf of Drivers and deduct 'Commission', calculated as a percentage of the fare in each case (para 5.2). The Agreement was declared to be governed by the law of the Netherlands and, unless otherwise resolved, any dispute was to be referred to arbitration under the International Chamber of Commerce Arbitration Rules (para 11).

36 In October 2015, Uber issued revised terms ('the New Terms') to drivers.[10] They were not the subject of any consultation or discussion. They were simply communicated to drivers via the App and the drivers had to accept them before going online and becoming eligible for further driving work.

37 The New Terms are contained in a document which begins:

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[10] All current drivers are subject to the New Terms. Mr Aslam and one other Claimant ceased to be Uber drivers before October 2015 and so were subject to the Partner Terms throughout.

> **This Services Agreement between an independent company in the business of providing Transportation Services ... (*"Customer"*) and Uber BV ...**

It continues:

> **Uber provides the Uber Services (as defined below) for the purpose of providing lead generation to Transportation Services providers. ...**
>
> ...
>
> **Customer acknowledges and agrees that Uber is a technology services provider that does not provide Transportation Services, function as a transportation carrier or agent for the transportation of passengers (sic).**

Although the terminology has undergone a striking transformation (in addition to the 'Partner' losing his or her definite article and becoming 'Customer', the 'Customer' has become the 'User', and 'Commission' has become 'Service Fee'), much of the substance of the Partner Terms is reproduced in the New Terms (albeit in modified language), including the key provisions which we have quoted above. But there are some entirely new stipulations. A few examples will suffice. In para 2.4, it is declared that:

> **Uber and its Affiliates ... [*ie* ULL] do not, *and shall not be deemed to*,[11] direct or control Customer or its Drivers generally or in their performance under this Agreement specifically including in connection with the operation of Customer's business, the provision of Transportation Services, the acts or omissions of Drivers, or the operation and maintenance of any Vehicles.**

In the same para the right of "Customer and its Drivers" to cancel an accepted trip is declared to be:

> **... subject to Uber's then-current cancellation policies.**

Para 2.5 is entitled "Customer's relationship with Drivers". Apparently in order to defeat any challenge based on privity,[12] and no doubt for other reasons, it includes this:

> **Customer acknowledges and agrees that it is at all times responsible and liable for the acts and omissions of its Drivers vis-à-vis Users and Uber, even where such liability may not be mandated under applicable law. Customer shall require each Driver to enter into a Driver Addendum (as may be updated from time to time) and shall provide a copy of each executed Driver Addendum to Uber. Customer acknowledges and agrees that Uber is a third party beneficiary to each Driver Addendum, and that, upon a Driver's execution of the Driver Addendum (electronically or otherwise), Uber will have the irrevocable right (and will be deemed to have accepted the right unless it is rejected promptly after receipt of a copy of the executed Driver Addendum) to enforce the Driver Addendum against the Driver as a third party beneficiary thereof.**

Para 2.6 is concerned with ratings. Para 2.6.2 includes:

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[11] Our emphasis: the deeming provision is new and the implicit admission of control to the extent provided for under the terms of the Partner Agreement (para 2.2.1, quoted above) has gone.

[12] Of course, in all but a tiny minority of cases, 'Customer' and 'the Driver' are one and the same individual and no question of privity arises.

> **Customer acknowledges that Uber desires that Users have access to high-quality services via Uber's mobile application. In order to continue to receive access to the Driver App and the Uber Services, each Driver must maintain an average rating by Users that exceeds the minimum average acceptable rating established by Uber for the Territory, as may be updated from time to time by Uber in its sole discretion ("*Minimum Average Rating*"). In the event a Driver's average rating falls below the Minimum Average Rating, Uber will notify Customer and may provide the Driver in Uber's discretion, a limited period of time to raise his or her average rating ... if such Driver does not increase his or her average rating above the Minimum Average Rating within the time period allowed (if any), Uber reserves the right to deactivate such Driver's access to the Driver App and the Uber Services. Additionally, Customer acknowledges and agrees that repeated failure by a Driver to accommodate User requests for Transportation Services while such Driver is logged in to the Driver App creates a negative experience for Users of Uber's mobile application. Accordingly, Customer agrees and shall ensure that if a Driver does not wish to provide Transportation Services for a period of time, such Driver will log off of (sic) the Driver App.**

38 The Driver Addendum begins thus:

> **This Driver Addendum Services Agreement ("*Addendum*") constitutes a legal agreement between an independent company in the business of providing Transportation Services (as defined below) ("*Transportation Company*") and an independent, for-hire transportation provider ("*Driver*").**
>
> **Driver currently maintains a contractual or employment arrangement with Transportation Company to perform passenger carriage services for Transportation Company.**
>
> **Transportation Company and Uber B.V. (*"Uber") have separately entered into a Services Agreement* ("*Agreement*") in order for Transportation Company to access the Uber Services ...**
>
> **In addition to the Transportation Services it (sic) regularly performs pursuant to his or her contractual arrangements with Transportation Company, Driver is interested in receiving lead generation and related services through the Uber Services. Transportation Company and Driver desire to enter into this Addendum to define the terms and conditions under which Driver may receive such lead generation and related services.**
>
> **In order to use the Uber Services, Driver and Transportation Company must agree to the terms and conditions that are set forth below. Upon Driver's execution (electronic or otherwise) of this Addendum, Driver and Transportation Company shall be bound by the terms and conditions set forth herein.**

The document proceeds to set out terms which largely mirror those contained in the New Terms, adopting the same terminology (save that 'Customer' has become 'Transportation Company'). Clause 2.3, entitled "Driver's Relationship with Uber", includes the following passages:

> **Uber and its Affiliates in the Territory do not, and shall not be deemed to, direct or control Driver generally or in Driver's performance of Transportation Services or maintenance of any Vehicles. Driver acknowledges that neither Uber nor any of its Affiliates in the Territory controls, or purports to control: (a) when or for how long Driver will utilise the Driver App for the Uber Services; or (b) Driver's decision ... to decline or ignore a User's request for Transportation Services, or to cancel an accepted request ... for Transportation Services ... subject to Uber's then-current**

> **cancellation policies. Driver may be deactivated or otherwise restricted from accessing or using the Driver App or the Uber Services in the event of a violation of this Addendum or Transportation Company's violation of the Agreement or Driver's or Transportation Company's disparagement of Uber or any of its Affiliates, or Driver's or Transportation Company's act or omission that causes harm to Uber's or any of its Affiliates' brand, reputation or business as determined by Uber in its sole discretion. Uber also retains the right to deactivate or otherwise restrict Driver from accessing or using the Driver App or the Uber Services for any other reason at the sole and reasonable discretion of Uber. Additionally, Driver acknowledges Uber's rights in the UBER family of trademarks and names, including UBER ... the UBER Logo and EVERYONE'S PRIVATE DRIVER ...**

Personal performance

39 Under the Partner Terms, the New Terms and the Driver Addendum, access to the App was and is personal to the 'Partner'/'Customer' and (if not the same person) the driver. The right to use the App was and is non-transferable. Drivers are not permitted to share accounts. Nor may they share their Driver IDs, which are used to log on to the App.[13] There is no question of any driver being replaced by a substitute.

Driver recruitment or 'onboarding'?

40 Those interested in becoming Uber drivers can sign up online. In order to be admitted to the cohort, they must attend a specified location, produce certain documents and undergo a form of induction. The Uber word for this process is 'onboarding'. Ms Bertram appeared to suggest in evidence that there was no requirement for personal attendance by the putative driver. If that was her suggestion we reject it. She also denied that, in so far as drivers attend to produce their documents and receive relevant information, they undergo any form of interview. But an email of 15 March 2015 sent from an Uber email address urged an applicant to:

> **Book an interview slot NOW!**

Ms Bertram was also clear that there was no form of assessment of would-be drivers, but she accepted that anyone unable to communicate adequately in English would be excluded. She also appeared to accept that a person exhibiting signs of a mental health problem might have to be referred to Transport for London. We accept the general tenor of her evidence that Uber does not subject applicant drivers to close scrutiny. That said, they must present themselves and their documents personally and they are, we find, subjected to what amounts to an interview, albeit not a searching one.

41 The documents to be produced (originals) comprise a national insurance certificate, a drivers licence (both forms), a Public Carriage Office licence, a PHV licence, a logbook, a current MOT certificate and a valid insurance certificate.

42 Besides attending to produce documents, applicants are required to view a video presentation which explains the App and how it works and certain Uber

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[13] See *e.g.* Driver Addendum, clause 2.1

procedures.

Drivers' obligations

43 Mr Farrar suggested that Uber required drivers to undertake at least one trip in every period of 30 days. We accept Ms Bertram's evidence that that rule does not apply in the UK.

44 The driver supplies the vehicle. Uber publishes a list of makes and models which it will accept. A document in the bundle evidences a prohibition on cars manufactured before 2006. Vehicles must be in good condition. Uber prefers them to be black or silver.

45 The driver is also responsible for all costs incidental to owning and running the vehicle, including fuel, repairs, maintenance, MOT inspections, road tax and insurance.

46 Drivers who own smartphones have free access to the App. Those who do not may hire one from UBV at a rate of £5 per month.[14]

Instruction, management and control or preserving the integrity of the platform?

47 The Claimants' case was that, in a host of different ways, Uber instructs, manages and controls the drivers. The Respondents, faithful to their published terms from which we have quoted above, stoutly deny doing so and say that, to the extent that documentary evidence points to them guiding or directing drivers' behaviour, it merely reflects their common interest in ensuring a satisfactory "rider experience" and (to adopt a formula repeatedly employed by Ms Bertram) "preserving the integrity of the platform". This topic, is to an extent, already covered in our findings above on express terms and other matters. To those we add the following.

48 We were shown a 'Welcome Packet' containing materials used in the 'onboarding' of new drivers. It included "5 Star Tips", below which were two columns, one headed "WHAT RIDERS LIKE," and the other, "WHAT UBER LOOKS FOR". In the latter, the following appeared:

> **High Quality Service Stats: We continually look at your driver rating, client comments, and feedback provided to us. Maintaining a high rating overall helps keep a top tier service to riders.**
>
> **Low Cancellation Rate: when you accept a trip request, you have made a commitment to the rider. Cancelling often or cancelling for unwillingness to drive to your clients leads to a poor experience.**
>
> **High Acceptance Rate: Going on-duty means you are willing and able to accept trip requests. Rejecting too many requests leads to rider confusion about availability. You should be off-duty if not able to take requests.**

[14] Smartphones hired from Uber are modified to prevent them from being used for any purpose other than operating the App and Uber's satellite navigation system.

The 'Welcome Packet' included a number of slides. One, on the subject of "Safety & Quality," reads:

- **Polite and professional at all times**
- **Zero tolerance to any form of discrimination**
- **Avoid inappropriate topics of conversation**
- **Acts of sexual harassment, aggressive or threatening behaviour, and violence will not be tolerated. We will cooperate with the police where necessary**
- **Do not contact the rider after the trip has ended**

49 The general rule prohibiting contact with a passenger after the end of the trip is qualified in a minor way in the "Uber UK Partner Standards Advice" ('the Standards document') to which we were referred, which states:

> **RETURNING LOST PROPERTY IS THE ONLY INSTANCE WHERE IT IS APPROPRIATE TO CONTACT THE RIDER AFTER THE TRIP ENDS; IF YOU DISCOVER LOST PROPERTY LATER ON, PLEASE CONTACT UBER.**

The Standards document is presented as a series of "Recommendations", but it includes on the first page:

> **PLEASE REMEMBER THAT THERE ARE SOME RECOMMENDATIONS THAT IF NOT FOLLOWED, MAY CONSTITUTE A BREACH OF YOUR PARTNER TERMS OR LICENCE CONDITIONS.**

50 Drivers are not at liberty to exchange contact details with passengers. An email of 6 June 2014 to Mr Aslam from the "Uber London team", which clearly incorporated material circulated more widely, included a section in Q & A format:

> **Can I ask for the phone number directly?**
> **Asking for a riders phone number directly may be seen as a violation of privacy and lead to an uncomfortable rider experience. Such experiences often lead to low ratings and can be reported to Uber.**
>
> **Can I give them my direct phone number?**
> **Providing an Uber user with your phone number during a trip may be seen as solicitation which is a violation of the partner agreement.**

In the same document was a "PRO TIP", which purported to set out "reasons Uber users like and don't like to receive phone calls or messages from drivers". Among "Unnecessary Reasons" were:

> **Asking for a destination**

and (a circumstance rather than a reason):

> **After a trip without Uber approval**

51 Although a driver is nominally free to accept or decline trips as he chooses, his acceptance statistics are recorded and an Uber document shown to us warns:

> **You should accept at least 80% of trip requests to retain your account status.**

52 Drivers who decline three trips in a row are liable to be forcibly logged off the App by Uber for 10 minutes. Ms Bertram denied that this amounted to a penalty but an Uber document called "Confirmation and Cancellation Rate Process" shows that the expression "Penalty Box warning" is current within the organisation. The third in a graduated series of standard form messages reads:

> **... we noticed that you may have left your partner app running whilst you were away from your vehicle, and therefore have been unable to confirm your availability to take trips. As an independent contractor you have absolute flexibility to log onto the application at any time, for whatever period you choose. However, being online with the Uber app is an indication that you are available to take trips, in accordance with your Services Agreement. From today, if you do not confirm your availability to take trips twice in a row we will take this as an indication you are unavailable and we will log you off the system for 10 minutes.**

53 A similar system of warnings, culminating in the 10-minute log-off penalty, applies to cancellations by drivers after a trip has been accepted. As we have mentioned, the New Terms (and the Driver Addendum) provide that the right to cancel is subject to Uber's cancellation policy. There appears to be no document setting out the policy but the standard form warning messages state that cancellation amounts to a breach of the agreement between the driver and Uber unless there is a "good reason" for cancelling. A message from ULL to a driver dated 19 September 2014 reads:

> **We noticed you cancelled more than 15% of your jobs last week. Cancelling jobs you have accepted leads to highly frustrating experiences for riders, an unreliable experience and lower earnings. Only accept a job if you are prepared to pick up the user and complete that job and if you are not in a position to do work for Uber remember to log Offline at any time.**

54 Ms Bertram did not accept that Uber exercises any control over routes. In a sense she is obviously right. No Uber manager instructs the driver to take any particular route from A to B. In practice, however, the App's mapping software determines the route for most purposes. It is clear from Mr Farrar's evidence, which we accept, that if an issue arises as to whether a passenger should receive a refund on the ground that the driver did not follow the most efficient route, ULL starts from the position is that it is for the driver to justify any departure from the route indicated on the App.

55 The Claimants rely on the ratings system as a further means by which Uber seeks to exert control over drivers. Uber says otherwise. Passengers are required to rate drivers at the end of every trip on a simple 0-5 scoring system. Ratings are monitored and drivers with average scores below 4.4[15] become subject to a graduated series of "quality interventions" aimed at assisting them to improve. "Experienced" drivers[16] whose figures do not improve to 4.4 or better are "removed from the platform" and their accounts "deactivated."

56 Uber seeks to tackle what is seen as more serious conduct on the part of drivers through the "Driver Offence Process". Again, provision is made for a graduated series of measures. These begin with a "warning" sent by SMS

[15] In the case of UberX drivers. Some of the other 'products' require a higher average.
[16] Those who have undertaken 200 trips or more

message. The ultimate penalty is 'deactivation'.

57 Finally, we have been shown numerous instances of ULL's practice of directing messages at drivers (individually or collectively), presented as "recommendations", "advice", "tips" and/or "feedback", seeking in one way or another to modify their behaviour in order to improve the "rider experience".

The regulatory/licensing regime

58 The regulatory framework applicable to the capital derives from the Private Hire Vehicles (London) Act 1998. PHVs can only be operated under licence from Transport for London ('TfL'). A licence holder is permitted by s2(1) to "make provision for the invitation or acceptance of private hire bookings".[17] Separate provisions require the licence holder to maintain detailed records of all bookings made, all vehicles operated and all drivers "available" to drive them. If asked by a passenger who makes a booking, an operator must agree a fare or provide an estimate.

59 Another important duty of the PHV Operator is to maintain full records of customer complaints for at least six months. Where a driver is "dismissed" for unsatisfactory conduct in connection with the driving of a PHV, particulars of the circumstances must be delivered to TfL within 14 days. Details of lost property must also be recorded.

60 Licence holders are required to take out public liability insurance cover to a value of at least £5m in respect of any one event.

Drivers' rights and freedoms and other points relied upon by Uber

61 As well as undertaking work for or through Uber, drivers can work for or through other organisations, including direct competitors operating through digital 'platforms'.

62 The drivers must meet all expenses associated with running their vehicles.

63 The drivers must fund their own individual PH licences.

64 The drivers are free to elect which 'product(s)' to operate.[18]

65 The drivers treat themselves as self-employed for tax purposes.

66 Drivers are not provided with any clothing or apparel in the nature of an Uber uniform. And in London they are discouraged from displaying Uber branding of any kind.[19]

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[17] Individual drivers cannot tout for work and cannot accept bookings. They are necessarily dependent upon the Operator to whom they are attached.

[18] Subject to being accepted ('onboarded') by Uber and subject to the rating requirements and any other special requirement applicable to particular 'products' (see above).

[19] Elsewhere, local legislation may make it necessary to attach some signage to vehicles, but London is free of any such requirement.

Uber's use of language generally

67 In her evidence Ms Bertram chose her words with the utmost care. But in publicity material and correspondence those speaking in Uber's name have frequently expressed themselves in language which appears incompatible with their central case before us. Some illustrations are to be found above.[20] A few further instances will suffice. We were taken to, among many other examples, references to "Uber drivers" and "our drivers", to "Ubers" (*i.e.* Uber vehicles), to "Uber [having] more and more passengers". One Twitter feed issued under the name of Uber UK reads:

> **Everyone's Private Driver. Braving British weather to bring a reliable ride to your doorstep at the touch of a button.**

And in a response of 19 June 2015 to a TfL consultation ULL wrote:

> **The fact that an Uber partner-driver only receives the destination for a trip fare when the passenger is in the car is a safeguard that ensures that we can provide a reliable service to everyone at all times, whatever their planned journey.**

And:

> **Every single person that gets into an Uber knows that our responsibility to him doesn't end when they get out of the car.**

68 Ms Bertram told us that Uber provides the drivers with "business opportunities", but strenuously denied that they had jobs with the organisation. However, in a submission to the GLA Transport Scrutiny Committee ULL boasted of "providing job opportunities" to people who had not considered driving work and potentially generating "tens of thousands of jobs in the UK."

69 On the subject of payment of drivers, we have referred above to the Partner Terms and New Terms, which provide for Uber to collect fares on behalf of drivers and deduct their 'Commission' or 'Service Fee'. But in its written evidence dated 3 October 2014 to the GLA Transport Scrutiny Committee, Ms Bertram on behalf of ULL stated:

> **Uber drivers are commission-based ... Drivers are paid a commission of 80% for every journey they undertake.**

To our considerable surprise, Ms Bertram attempted before us to dismiss this as a typographical error.

'Workers': Legislation and Authorities

70 The 'core definition' of a worker (to adopt Mr Linden's expression) is to be found in ERA, s230:

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[20] *Eg* "We're a transportation network" (para 1), "Book an interview slot NOW!" (para 40), references to drivers being "on-duty" and "off-duty" (para 48) and to the "Penalty Box warning" (para 52) and instructions presented in the imperative mood, rather than as recommendations: "Only accept ..." (para 53).

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) —

(a) a contract of employment, or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

We will refer to a contract within s230(3)(b) as a 'limb (b) contract'.

71 The same definitions apply under NMWA and WTR.[21]

72 In anticipation of Mr Reade's argument in the alternative that the drivers were 'employed' by UBV to work for passengers (or perhaps for ULL), Mr Linden drew our attention to NMWA, s34, which includes:

Agency workers who are not otherwise "workers"

(1) This section applies in any case where an individual ("the agency worker") —

(a) is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal; but
(b) is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal; and
(c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

WTR contains an almost identical provision.[22]

73 Under ERA, protection of workers from detrimental treatment on 'whistle-blowing' grounds attaches to employees and workers in the ordinary way, but is extended under s43K as follows:

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who —

(a) works or worked for a person in circumstances in which—
(i) he is or was introduced or supplied to do that work by a third person, and
(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,
(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b)

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[21] S54(3) and reg 2(1) respectively
[22] Reg 36(1)

> **if for "personally" in that provision there were substituted "(whether personally or otherwise)" ...**

74 Again borrowing Mr Linden's terminology, we will refer collectively to the provisions mentioned in paras 72 and 73 as the 'extended definitions.'

75 In *Byrne Brothers (Formwork) Ltd-v-Baird & others* [2002] ICR 667, Mr Recorder Underhill QC (as he then was), sitting in the EAT, offered this guidance on the proper interpretation of the definition of the limb (b) worker[23]:

> **(1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client"...**
>
> **(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. (Possibly this explains the use of the rather odd formulation "business undertaking" rather than "business" *tout court*; but if so, the hint from the draftsman is distinctly subtle.) It is sometimes said that the effect of the exception is that the Regulations do not extend to "the genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuine" self-employment is to be defined.**
>
> **(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in the sense intended by the Regulations – given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship – see below – but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.**
>
> **(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That 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.**
>
> **(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker**

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[23] Judgment, para 17

supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.

(6) What we are concerned with is the rights and obligations of the parties under the contract - not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position ...

76 In the Supreme Court case of *Bates van Winkelhof-v-Clyde & Co LLP and another* [2014] 1 WLR 2047, in which the central issue was whether a member of a limited liability partnership was a limb (b) worker, Lady Hale DPSC offered these comments:

24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.

25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. ... The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. ...

She went on to mention[24] *Cotswold Developments Construction Ltd-v-Williams* [2006] IRLR 181, in which Langstaff J, sitting in the EAT remarked:[25]

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

She also cited[26] these remarks of Elias J (as he then was) in *James-v-Redcats (Brands) Ltd* [2007] ICR 1006 EAT:[27]

... the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? ... Its purpose is to distinguish between the concept of worker and the independent contractor who is in business on his own account, even if only in a small way.

Lady Hale's review of the domestic authorities ended with a reference to the judgment of Maurice Kay LJ in *Hospital Medical Group Ltd-v-Westwood* [2013] ICR 415 CA, as to which she said this[28]:

I agree with Maurice Kay LJ that there is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy

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[24] Para 34
[25] Para 53
[26] Para 36
[27] Para 59
[28] Para 39

> **to do. ... The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves.**

77 In *Autoclenz Ltd-v-Belcher and others* [2011] ICR 1157 SC, the Supreme Court upheld the decision of the Employment Tribunal ('ET') that the claimant car valeters were, notwithstanding the express terms under which they worked, employed by the respondent company as 'workers' for the purposes of, *inter alia*, WTR.[29] Those terms, which were drafted on behalf of the company and the claimants were required to sign, declared that they were sub-contractors, that they had to provide their own materials, that there was no obligation on them to provide any services or on the company to give them work, and that they were free to provide substitutes (suitably qualified) to carry out the work on their behalf. The ET found that the terms did not reflect the true agreement between the parties since, *inter alia*, the claimants were required to perform defined services under the direction of the company and were required to carry out the work offered and to do so personally (despite the substitution clause). Moreover, they would not have been offered the work if they had not signed the terms.

78 In his judgment, with which all other members of the Court agreed, Lord Clarke resolved a conflict in the authorities as to whether the freedom of a court to disregard terms apparently agreed between contracting parties depended on whether or not those terms were a 'sham' in the sense that both parties intended to misrepresent the true nature of their obligations to one another. Lord Clarke emphatically rejected that view, stating:[30]

> **The question in every case is ... what was the true agreement between the parties.**

He also cited with approval[31] these remarks of Elias J, then President of the EAT, in *Consistent Group Ltd-v-Kalwak* [2007] IRLR 560:[32]

> **The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to provide or accept work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.**

At a later point, Lord Clarke commented on the importance which may attach to the relative bargaining power of the parties, particularly in the sphere of the employment relationships.[33]

79 Mr Reade relied on *Cheng Yuen-v-Royal Hong Kong Golf Club* [1998] ICR 131 PC, a decision of the Privy Council. The claimant worked as a caddie for individual members of the respondent golf club. He was issued by the club with a number, a uniform and a locker. Caddying work was allocated to available caddies in strict rotation. They were not obliged to make themselves available for work and received no guarantee of work. Their pay was at a rate set by the club. They were

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[29] They were found to be employees under contracts of employment as well
[30] Para 29
[31] Para 25
[32] Para 57
[33] Paras 34-35

paid by the club for each day's work and the club then recovered from the member(s) concerned the sum(s) so paid. When told that his services were no longer required, the claimant brought claims against the club for the purposes of which it was essential to show that he had been an employee of the club rather than an independent contractor. The majority of the Privy Council concluded that he had not been an employee. Lord Slynn, delivering the majority judgment, said this:

> **18. It seems to their Lordships in the present case that the Labour Tribunal proceeded on the basis that there was a contract of employment between the Club and Mr. Cheng and considered only the question whether that contract was one of service or for the provision of services in the light of the authorities. In so doing the Tribunal undoubtedly considered with care the authorities on the test to be adopted in drawing this distinction. What it did not do, however, was to consider sufficiently or at all the question as to whether the contract (if any) between the Club and Mr. Cheng was of a different nature and whether, if there was a contract of employment (whether of service or to provide services), it was with individual golfers rather than with the Club. In so proceeding it seems to their Lordships that the Tribunal misdirected itself in a way which justified the Court of Appeal setting aside the findings of the Tribunal and the High Court.**
>
> **19. If the Tribunal had considered the alternative possibilities it seems to their Lordships that the "true and only reasonable conclusion [to which the Tribunal could have come] contradicts that determination" that Mr. Cheng was an employee of the Club. Mr. Cheng was not an employee of the Club whether on a continuing basis or by separate contracts, like a casual worker, each time he actually worked. In the language of Viscount Simonds (*supra*) the Tribunal accepted "a view of the facts which could not reasonably be entertained".**
>
> **20. It is to their Lordships clear that the only reasonable view of the facts is that the arrangements between the Club and Mr. Cheng went no further than to amount to a licence by the Club to permit Mr. Cheng to offer himself as a caddie for individual golfers on certain terms dictated by the administrative convenience of the Club and its members. Thus he was required to wear a uniform, to behave well on the Club premises and to charge a fee per round at a scale uniform for all caddies which was fixed and collected by the Club and paid to the caddies. The Club was not, however, obliged to give him work or to pay him other than the amount owed by the individual golfer for whom he caddied. Conversely he was not obliged to work for the Club and he had no obligation to the Club to attend in order to act as a caddie for golfers playing on the Club premises. He did not receive any of the sickness, pension or other benefits enjoyed by employees of the Club nor indeed any pay over and above that resulting from particular rounds of golf for which the golfer was debited by the Club even if as a matter of machinery the Club handed the fee to Mr. Cheng.**
>
> **21. There was thus between him and the Club no mutual obligation that the Club would employ him and that he would work for the Club in return for a wage. Conversely Mr. Cheng did, when his turn came in the line, offer to caddie for an individual golfer, who if Mr. Cheng was accepted by him, was responsible ultimately for the payment of the caddying fees. It was that golfer who, subject to the Club's rules, could tell the caddie what he wanted and how he wanted it done during the round of golf. Their Lordships do not accept the view of the High Court that it was artificial to regard the Club as an agent collecting the fee and guaranteeing its payment to the caddie. Far from being artificial it seems a perfectly reasonable and sensible course to have taken and not to be inconsistent with Mr. Cheng not being an employee under a contract of employment with the Club.**

80 Mr Reade also placed reliance on *Stringfellow Restaurants Ltd-v-Quashie* [2013] IRLR 99 CA. The claimant in that case was a lap dancer who performed for

the entertainment of guests at the respondents' clubs. She paid the respondents a fee for each night worked. Doing so enabled her to earn substantial payments from the guests for whom she danced. She negotiated those payments with the guests. In due course the respondents ended their working relationship with her and complained of unfair dismissal. At a preliminary hearing, an ET held that there was no contract of employment. The EAT disagreed but the Court of Appeal restored the first-instance decision. Elias LJ gave the only substantial judgment. After discussing the *Cheng Yuen* case, he said this:

> **50. I agree with Mr Linden that this is essentially the position here, given the findings of the employment judge. The club did not employ the dancer to dance; rather she paid them to be provided with an opportunity to earn money by dancing for the clients. The fact that the appellant also derived profits from selling food and drink to the clients does not alter that fact. That is not to say that *Cheng* provides a complete analogy; I accept Mr Hendy's submission that the relationship of the claimant to the club is more integrated than the caddie with the golf club. It is not simply a licence to work on the premises. But in its essence the tripartite relationship is similar.**
>
> **51. The fact that the dancer took the economic risk is also a very powerful pointer against the contract being a contract of employment. Indeed, it is the basis of the economic reality test, described above. It is not necessary to go so far as to accept the submission of Mr Linden that absent an obligation on the employer to pay a wage ... the relationship can never as a matter of law constitute a contract of employment. But it would, I think, be an unusual case where a contract of service is found to exist when the worker takes the economic risk and is paid exclusively by third parties. On any view, the Tribunal was entitled to find that the lack of any obligation to pay did preclude the establishment of such a contract here.**

81 Mr Reade also claimed support from *Mingeley-v-Pennock and another t/a Amber Cars* [2004] ICR 727 CA. There the claimant owned his own vehicle and paid the respondents, mini-cab operators, £75 per week for a radio and access to their computer system, which allocated calls from customers to a fleet of drivers. Under his agreement with the respondents he was required to wear a uniform and prohibited from working for any other operator. On the other hand, he was not required to work particular hours, or any hours, and all the fare money was his to keep. When he brought a complaint of racial discrimination he was met with the defence that he was not 'employed' by the respondents for the purposes of the Race Relations Act 1976, as he was not required "personally to execute any work or labour" (see s78(1)). The ET upheld that defence and his appeals to the EAT and Court of Appeal both failed. Giving the principal judgment in the latter court, Maurice Kay LJ stated:[34]

> **In my judgment, on the plain words of section 78 and the authorities to which I have referred, the Employment Tribunal was correct to conclude that, in order to bring himself within section 78 Mr Mingeley had to establish that his contract with Amber Cars placed him under an obligation "personally to execute any work or labour". As the Tribunal found, there was no evidence that he was ever under such an obligation. He was free to work or not to work at his own whim or fancy. His obligation was to pay Amber Cars £75 per week and if he chose to work then to do so within the requirements of the arrangement. However, the absence from the contract of an obligation to work places him beyond the reach of section 78.**

[34] Para 14

82 In addition, Mr Reade relied on *Khan-v-Checkers Cars Ltd* (unreported) UKEAT/0208/05/DZM, a decision of the EAT handed down on 16 December 2005. The claimant in that case sought to challenge the ET's decision that it did not have jurisdiction to consider his complaint of unfair dismissal because there was no "mutuality of obligation" between the parties. Giving judgment on the appeal, Langstaff J began by setting the scene:

> **1. ... the issue which the Tribunal had to address was identified as being whether the Claimant was an employee, and so might proceed with a complaint of unfair dismissal, which unless he was an employee he could not do.**
>
> **2. The Respondent ("Checkers") conceded that the Claimant was a worker. It nonetheless contended that there was no mutuality of obligations between it and the Claimant. No one – and that includes the Employment Tribunal – appears to have recognised that there might be an inconsistency between the concession, and the contention. ...**

The learned judge went on to recite the facts:

> **7. The Claimant worked as a private hire car driver. He claimed to have worked since April 2001 for Checkers, who operated a 24 hour taxi service based at Gatwick Airport under an exclusive contract between it and the British Airport Authority. The Tribunal's findings of fact are expressed in terms which are sufficiently economical for us to set them out in full, beginning with paragraph 5 of its decision.**
>
>> **"5. Checkers Cars Limited operates a 24 hour taxi service based at Gatwick Airport under an exclusive contract between it and British Airport Authority. The Authority operates the Gatwick Airport site and strictly enforces its requirements. The Respondent engages approximately two hundred drivers who provide a taxi service to both terminals and to the train station. All of the drivers, under their terms of engagement, only work for the Respondent. The volume of work is such that work is always available to drivers, although some periods are busier than others. It was not disputed that once a driver attended work, he or she was required to comply with many requirements such as maintaining the clean and tidy appearance of their vehicles, driving certain makes of vehicle and complying with the company's dress code. Drivers are required to comply with the Respondent's operating procedures that include what fares they can charge customers and what routes they can drive.**
>>
>> **6. The Claimant was engaged to work as a driver and owned and was responsible for his own vehicle. He was required to obtain a private hire driver licence from Crawley Council. He paid his own income tax and National Insurance. In common with the other drivers, he was required to use set routes and charge set fares. He collected fares from customers, paying a commission to the Respondent. All of the drivers had complete flexibility over when they worked. Accordingly, the Claimant was not obliged to accept work and the Respondent was not obliged to offer him work. He could work at the times he wanted to work and for as few or as many hours as he wished. He did not have to give notice of when he was or was not available. This flexibility was evidenced by a schedule of days worked by the Claimant that was put before the Tribunal. Drivers were never required to attend work and were never disciplined for attending or not attending work. All drivers reporting for work were allocated jobs fairly by way of a queuing system administered by the drivers themselves. In addition to driving, the Claimant carried out other duties commensurate with his work, that included collecting**

> **lost luggage or parcels left by passengers and delivering them from one terminal to the other where necessary.**
>
> **7. Mr Maskell gave evidence that whilst drivers varied in their attendance the Respondent had adapted procedures to ensure an even flow of drivers to meet demand. For example, from time to time when there was a shortage of drivers steps were taken to inform drivers through contacting them by leaving a message on their mobile telephones that work was available in an effort to encourage them to offer themselves for work."**

The central conclusions of the EAT were expressed in these paragraphs:

> **31. The issue before the Tribunal was simply whether the Claimant was, or was not, an employee so as to be able to qualify for unfair dismissal rights. What was in issue was not whether, when he worked, he did so as an employee or independent contractor, for no issue as to continuity of employment pursuant to Section 212 of the Employment Rights Act 1996 arose. It is thus a sufficient answer to the Claimant's case for us to hold, as we do, that this Tribunal was entitled to find that there was no contract of employment.**
>
> **32. It is thus strictly unnecessary for us to determine whether Mr Irons is correct to submit that the contract between the Claimant and Checkers was neither one of service nor for provision of services ... [I]f it had been material to our decision, we would have been inclined to find that the arrangement here was analogous to that in the <u>Hong Kong Golf Club</u> case, as it is to that of the position of the Claimant in <u>Mingeley v Pennock</u>, and, on the findings of fact that the Tribunal made, the contract went no further than to amount to a licence by Checkers to permit the Claimant to offer himself as a private hire taxi driver to individual passengers on terms dictated by the administrative convenience of Checkers and BAA. For that reason, too, we would have dismissed the appeal.**

Submissions

83 We will leave the comprehensive written submissions on both sides to speak for themselves. In bare outline, Mr Linden advanced the following arguments.

(1) The written terms between UBV and the Claimants should be read sceptically. They do not properly reflect their relationship. On the contrary, they are designed to misrepresent it. The truth is that the Claimants work for Uber, not the other way around. They are within the core definition of 'worker' under ERA, s230(3)(b) and the extended definitions, at least when they have the App switched on.

(2) The entity by which the Claimants are employed is ULL. If that is correct, no jurisdictional issue arises.

(3) Even if, contrary to the Claimants' primary case, they were employed by UBV, the choice of (Dutch) law in their standard terms would not be effective because it would have to give way to the protections enacted in the Rome I Regulations 2008 ('Rome I'), Arts 8 and/or 9 and/or 3(3) and (4) and/or 21.

(4) The Claimants' working time begins when they leave home and ends when they return home at the end of a period of work.

(5) For the purposes of NMWA, travelling from and to home 'counts' as work. Alternatively, at the very least the Claimants are 'working' at all times when they are logged on to the App.

84 Mr Reade replied to the following effect.

(1) UBV's terms are valid and fairly define their relationship with the Claimants. The fact that Uber makes (and enforces) stipulations about the way in which the Claimants may make use of the 'platform' is unremarkable and unexceptionable. It simply reflects the common interest of the parties in maintaining service standards.

(2) If, contrary to the Respondents' case, the Claimants were 'workers' rather than in business on their own account, they were so employed by UBV.

(3) By operation of Rome I, Art 3(4), the choice of law clause between UBV and the drivers is not effective to defeat claims under WTR because those Regulations implement Community law, but the same does not go for ERA or NMWA, and the claims under those Acts are accordingly unsustainable (the Claimants' other arguments under Rome I being unsound).

(4) For the purposes of WTR (if applicable at all), working time is confined to periods when drivers are carrying passengers.

(5) Likewise, for the purposes of NMWA, the only activity capable of amounting to 'work' is driving passengers.

Analysis and Conclusions

Employment status – the core definition

85 Mr Reade laid great emphasis on the point that Uber drivers are never under any obligation to switch on the App or, even if logged on, to accept any driving assignment that may be offered to them. These freedoms are, he maintained, incompatible with the existence of *any* form of employment, or indeed *any* contract whatsoever under which the Claimants undertake to provide *any* service to Uber. We accept that the drivers (in the UK at least) are under no obligation to switch on the App. There is no prohibition against 'dormant' drivers. We further accept that, while the App is switched off, there can be no question of any contractual obligation to provide driving services. The App is the only medium through which drivers can have access to Uber driving work. There is no overarching 'umbrella' contract. All of this is self-evident and Mr Linden did not argue to the contrary.

86 But when the App is switched on, the legal analysis is, we think, different. We have reached the conclusion that any driver who (a) has the App switched on, (b) is within the territory in which he is authorised to work,[35] and (c) is able and willing to accept assignments, is, for so long as those conditions are satisfied, working for Uber under a 'worker' contract and a contract within each of the extended definitions. Our reasons merge and/or overlap in places, but we will endeavour to keep the main strands separate.

87 In the first place, we have been struck by the remarkable lengths to which Uber has gone in order to compel agreement with its (perhaps we should say its lawyers') description of itself and with its analysis of the legal relationships

[35] As already explained, we are concerned with London drivers. Mr Farrar, who lives in Hampshire, told us that he enters the Metropolitan area, in which he is entitled to work, at Guildford.

between the two companies, the drivers and the passengers. Any organisation (a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator, but (c) requiring drivers and passengers to agree, *as a matter of contract*, that it does not provide transportation services (through UBV *or* ULL), and (d) resorting in its documentation to fictions,[36] twisted language[37] and even brand new terminology,[38] merits, we think, a degree of scepticism. Reflecting on the Respondents' general case, and on the grimly loyal evidence of Ms Bertram in particular, we cannot help being reminded of Queen Gertrude's most celebrated line:

> **The lady doth protest too much, methinks.**[39]

88 Second, our scepticism is not diminished when we are reminded of the many things said and written in the name of Uber in unguarded moments, which reinforce the Claimants' simple case that the organisation runs a transportation business and employs the drivers to that end. We have given some examples in our primary findings above.[40] We are not at all persuaded by Ms Bertram's ambitious attempts to dismiss these as mere sloppiness of language.

89 Third, it is, in our opinion, unreal to deny that Uber is in business as a supplier of transportation services. Simple common sense argues to the contrary. The observations under our first point above are repeated. Moreover, the Respondents' case here is, we think, incompatible with the agreed fact that Uber markets a 'product range.'[41] One might ask: Whose product range is it if not Uber's? The 'products' speak for themselves: they are a variety of driving services. Mr Aslam does not offer such a range. Nor does Mr Farrar, or any other solo driver. The marketing self-evidently is not done for the benefit of any individual driver. Equally self-evidently, it is done to promote Uber's name and 'sell' its transportation services. In recent proceedings under the title of *Douglas O'Connor-v-Uber Technologies Inc*[42] the North California District Court resoundingly rejected the company's assertion that it was a technology company and not in the business of providing transportation services. The judgment included this:[43]

> **Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs.**

We respectfully agree.

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[36] *Eg* the passenger's 'invoice' which is not an invoice and is not sent to the passenger
[37] *Eg* calling the driver ("an independent company in the business of providing Transportation Services") 'Customer' (in the New Terms). This choice of terminology has the embarrassing consequence of forcing Uber to argue that, if it is a party to any contract for the provision by the driver of driving services, it is one under which it is a client or customer of 'Customer'.
[38] *Eg* 'onboarding' for recruitment and/or induction and 'deactivation' for dismissal
[39] *Hamlet*, Act III, sc 2
[40] See especially paras 67-69.
[41] See our primary findings above, paras 13-14.
[42] Case3:13-cv-034260EMC, dated 11 March 2015
[43] At p10

90 Fourth, it seems to us that the Respondents' general case and the written terms on which they rely do not correspond with the practical reality. The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous. In each case, the 'business' consists of a man with a car seeking to make a living by driving it.[44] Ms Bertram spoke of Uber assisting the drivers to "grow" their businesses, but no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel. Nor can Uber's function sensibly be characterised as supplying drivers with "leads".[45] That suggests that the driver is put into contact with a possible passenger with whom he has the opportunity to negotiate and strike a bargain. But drivers do not and cannot negotiate with passengers (except to agree a reduction of the fare set by Uber). They are offered and accept trips strictly on Uber's terms.

91 Fifth, the logic of Uber's case becomes all the more difficult as it is developed. Since it is essential to that case that there is no contract for the provision of transportation services between the driver and any Uber entity, the Partner Terms and the New Terms require the driver to agree that a contract for such services (whether a 'worker' contract or otherwise) exists between him and the passenger, and the Rider Terms contain a corresponding provision. Uber's case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract (UBV) from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger. Uber's case has to be that if the organisation became insolvent, the drivers would have enforceable rights directly against the passengers. And if the contracts were 'worker' contracts, the passengers would be exposed to potential liability as the driver's employer under numerous enactments such as, for example, NMWA. The absurdity of these propositions speaks for itself. Not surprisingly, it was not suggested that in practice drivers and passengers agree terms. Of course they do not since (apart from any other reason) by the time any driver meets his passenger the deal has already been struck (between ULL and the passenger).[46] The logic extends further. For instance, it is necessarily part of Uber's case (as constructed by their lawyers) that where, through fraud or for any other reason,[47] a fare is not paid, it has no *obligation* to indemnify the driver for the resulting loss. Accordingly, in so far as its

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[44] We are mindful of Ms Bertram's evidence concerning the small number of individuals who operate more than one vehicle on their Uber account. These could, perhaps, be seen as in independent businesses, but those driving the cars in their fleets (all of whom must be individually approved ('onboarded') by Uber), we think, cannot. Whether such drivers are 'employed' by the account holder or by Uber would be a question for determination on the evidence.

[45] See the extracts from the New Terms and Driver Addendum quoted in paras 37 and 38 above.

[46] Hence, for example, the right (in UBV) to levy the £5 cancellation fee. Presumably Uber would have to say that that sum was also payable under a private (unwritten) contract made between the driver and the passenger, two individuals who not only did not know each other's identities but had never met or even communicated remotely.

[47] There might be innocent causes – say technological glitch, system failure etc

policy is to bear the loss and protect the driver (we were only told of a policy relating to fraud), it must be free to reverse the policy and if it does so, drivers will be left without remedy.[48] That would be manifestly unconscionable but also, we think, incompatible with the shared perceptions of drivers and Uber decision-makers as to Uber's legal responsibilities. For all of these reasons, we are satisfied that the supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties.

92 Sixth, we agree with Mr Linden that it is not real to regard Uber as working 'for' the drivers and that the only sensible interpretation is that the relationship is the other way around. Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits. We base our assessment on the facts and analysis already set out and in particular on the following considerations.

(1) The contradiction in the Rider Terms between the fact that ULL purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings.
(2) The fact that Uber interviews and recruits drivers.
(3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.
(4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements.
(5) The fact that Uber sets the (default) route and the driver departs from it at his peril.
(6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory.)
(7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties.
(8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.
(9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.
(10) The guaranteed earnings schemes (albeit now discontinued).
(11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.[49]
(12) The fact that Uber handles complaints by passengers, including complaints about the driver.
(13) The fact that Uber reserves the power to amend the drivers' terms unilaterally.

93 Seventh, turning to the detail of the statutory language, we are satisfied, having regard to all the circumstances and, in particular, the points assembled

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[48] If one discounts the negligible chance of pursuing the (nameless) passenger
[49] *Eg* in the case of fraud, or where a car is soiled

above, that the drivers fall full square within the terms of the 1996 Act, s230(3)(b). It is not in dispute that they undertake to provide their work personally. For the reasons already stated, we are clear that they provide their work 'for' Uber. We are equally clear that they do so pursuant to a contractual relationship. If, as we have found, there is no contract with the passenger, the finding of a contractual link with Uber is inevitable. But we do not need to base our reasoning on a process of elimination. We are entirely satisfied that the drivers are recruited and retained by Uber to enable it to operate its transportation business. The essential bargain between driver and organisation is that, for reward, the driver makes himself available to, and does, carry Uber passengers to their destinations. Just as in *Autoclenz*, the employer is precluded from relying upon its carefully crafted documentation because, we find, it bears no relation to reality. And if there is a contract with Uber, it is self-evidently not a contract under which Uber is a client or customer of a business carried on by the driver. We have already explained why we regard that notion as absurd.

94 Eighth, while it cannot be substituted for the plain words of the statute, the guidance in the principal authorities favours our conclusion. In particular, for the reasons already given, it is plain to us that the agreement between the parties is to be located in the field of dependent work relationships; it is not a contract at arm's length between two independent business undertakings.[50] Moreover, the drivers do not market themselves to the world in general; rather, they are recruited by Uber to work as integral components of its organisation.[51]

95 Ninth, we do not accept that the authorities relied upon by Mr Reade support the conclusion for which he argues. We have four main reasons.

(1) None of the authorities actually turned on the limb (b) test.[52]
(2) They were concerned wholly or very largely with whether there was an 'umbrella' contract between the claimants and the respondents, an issue with which we are not concerned at all. Only one addressed (and then only in a single sentence) the question at the heart of our case of whether, *in performing individual services* (here driving trips), a claimant is working 'for' the putative employer pursuant to a contract.[53]
(3) Two of the cases arise out of facts which have little in common with the matter before us. *Cheng Yuen* and *Quashie* concern arrangements by which individuals were permitted to render to the golf club members and nightclub 'clients' services ancillary to the principal service or facility offered by the proprietors. But there is nothing 'ancillary' about the Claimants' work. It seems to us that there are added difficulties for the putative employer with a defence modelled on *Cheng Yuen* and *Quashie* where the claimants perform the very service which the respondent exists to provide. In such a case it is (as Uber appears to recognise) essential to the defence for the Tribunal to find not only that the claimants contract personally with those who receive the services in question but also that they collectively, rather than the respondent, 'are' the business. In a proper case the evidence

[50] See the *Redcats* case, cited above, para 78.
[51] See the *Cotswold* case, also cited at para 78 above.
[52] Although an *obiter* opinion is volunteered upon it in *Khan*
[53] See the judgment of Lord Slynn in *Cheng Yuen*, para 19 (cited at para 78 above).

warrants such findings[54] but on a careful review of all the material placed before us, our conclusions on both propositions are, for the reasons already stated, entirely adverse to Uber.

(4) Although the facts of *Mingeley* and *Khan* are closer to those of the instant case, there was ample room in both for the finding that the arrangements between the parties were consistent with the claimant personally entering into a contract with each service user. As we have explained, there is no room for that interpretation to be placed upon the dealings (such as they are) between the Uber driver and his passenger.

In all the circumstances, it seems to us that Mr Reade's arguments in reliance on the authorities he cited cannot prevail in the face of our findings on the evidence.

96 Tenth, it follows from all of the above that the terms on which Uber rely do not correspond with the reality of the relationship between the organisation and the drivers. Accordingly, the Tribunal is free to disregard them. As is often the case, the problem stems at least in part from the unequal bargaining positions of the contracting parties, a factor specifically adverted to in *Autoclenz*. Many Uber drivers (a substantial proportion of whom, we understand, do not speak English as their first language) will not be accustomed to reading and interpreting dense legal documents couched in impenetrable prose. This is, we think, an excellent illustration of the phenomenon of which Elias J warned in the *Kalwak* case[55] of "armies of lawyers" contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides.

97 Eleventh, none of our reasoning should be taken as doubting that the Respondents *could* have devised a business model not involving them employing drivers. We find only that the model which they chose fails to achieve that aim.

Which is the employing entity?

98 Mr Reade submitted that if the drivers had any limb (b) relationship with the organisation, it must be with UBV. There was no agreement of any sort with ULL, which only exists to satisfy a regulatory requirement. We reject that submission. UBV is a Dutch company the central functions of which are to exercise and protect legal rights associated with the App and process passengers' payments. It does not have day-to-day or week-to-week contact with the drivers. There is simply no reason to characterise it as their employer. We accept its first case, that it does not employ drivers. ULL is the obvious candidate. It is a UK company. Despite protestations to the contrary in the Partner Terms and New Terms, it self-evidently exists to run, and does run, a PHV operation in London.[56] It is the point of contact between Uber and the drivers. It recruits, instructs, controls, disciplines and, where it sees fit, dismisses drivers. It determines disputes affecting their interests.

Employment status – the extended definitions

99 Given our decision on the core definition, applicability of the extended

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[54] As *Mingeley* and *Khan* illustrate
[55] Cited at para 78 above
[56] As Ms Bertram in her oral evidence was eventually prevailed upon to accept

definitions does not, and cannot, arise. But, for what it is worth, we agree with Mr Linden[57] that if the drivers were supplied by UBV to work for ULL (or even for the passengers), claims would lie against UBV (subject to the conflict of laws issues) by virtue of NMWA, s34, WTR, reg 36(1) and ERA, s43K(1). Mr Reade's submissions to the contrary depend in the first place on there being a contract between driver and passenger. We have found that there is none.

When are drivers 'working' under a limb (b) or extended definition contract?

100 We have already stated our view that a driver is 'working' under a limb (b) contract when he has the App switched on, is in the territory in which he is licensed to use the App, and is ready and willing to accept trips. Mr Reade submitted that, even if there is a limb (b) contract between the driver and Uber, he is not 'working' under it unless and until he is performing the function for which (on this hypothesis) the contract exists, namely carrying a passenger. We do not accept that submission because, in our view, it confuses the service which the passenger desires with the work which Uber requires of its drivers in order to deliver that service. It is essential to Uber's business to maintain a pool of drivers who can be called upon as and when a demand for driving services arises. The excellent 'rider experience' which the organisation seeks to provide depends on its ability to get drivers to passengers as quickly as possible. To be confident of satisfying demand, it must, at any one time, have some of its drivers carrying passengers and some waiting for the opportunity to do so. Being available is an essential part of the service which the driver renders to Uber. If we may borrow another well-known literary line:

> **They also serve who only stand and wait.**[58]

101 We are inclined to think that the three conditions given in our last paragraph would need to be qualified where an Uber trip takes a driver out of the 'territory' in which he is authorised by Uber to work. It seems to us that, having ended the trip, he would be 'working' under his contract while returning to the territory with a view to undertaking more trips. But the point was not debated before us and accordingly no definitive ruling is given.

102 In case we are wrong in our primary conclusion, we would hold in the alternative that, at the very latest, the driver is 'working' for Uber from the moment when he accepts any trip. He is then bound, subject to the cancellation policy, to complete the trip (and will not be offered any other work until he has done so) and is required immediately by Uber to undertake work essential to Uber's delivery of the service to the passenger, namely to proceed at once to the pick-up point.

Conflict of laws

103 Given our conclusions so far, the conflict of laws points are strictly otiose. But in case, contrary to our view, the drivers are not employed by ULL but by UBV, and in deference to the arguments addressed to us, we will complete the analysis.

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[57] Submissions, paras 79-83
[58] Milton, *On his blindness*. The line encapsulates our view, although we are alive to the fact that those to whom the poet referred were not seen as rendering "day-labour".

104 As we have recorded, the dispute is confined to applicable law. That brings into play Rome I. Mr Reade's starting-point is Art 3, which begins thus:

> **(1) A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.**

105 It seems to us that Mr Reade is faced with an immediate difficulty. The choice of law set out in the Partner Terms and the New Terms specifies that those agreements are to be governed by the laws of the Netherlands, but the hypothesis on which we are now proceeding is that quite separate agreements must be inferred, under which UBV employs drivers as limb (b) workers. Do claims under these inferred contracts fall within the choice of law clause? So far as material, it reads:

> **Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of the Netherlands, excluding its rules on conflicts of laws.**

It seems to be necessary to Mr Reade's argument to interpret "this Agreement" as including the inferred worker contract. We see no reason to do so. As we have recorded, both versions of the document purport to set out terms on which drivers are given access to the App and strenuously deny that they create, or give rise to, any form of employment relationship. How could one imply further terms which say the very opposite?[59] It is one thing to disregard terms on the basis that they are not consistent with the real bargain between the parties,[60] quite another to imply into the written contract an entirely fresh agreement wholly incompatible with its express terms. We conclude that any inferred 'worker' contract must have an existence separate and apart from "this Agreement," in which the choice of law clause relied on by Mr Reade is contained. (Nor, to state the obvious, could there be any basis for holding, independently of the choice of law clause, that any inferred 'worker' contracts between drivers and UBV were governed by the law of the Netherlands. On Rome I principles, the applicable law would inevitably be that of England and Wales.)[61]

106 In case we are wrong, and the choice of law clause contained in the agreement between the drivers and UBV 'bites', we will briefly consider the submissions addressed to us. In the first place, we were taken to two further provisions of Art 3:

> **(3) Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.**
>
> **(4) Where all other elements relevant to the situation at the time of the choice are**

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[59] See *eg* the speech of Lord Hoffmann in *Johnson-v-Unisys Ltd* [2001] ICR 480 HL, para 37: "Implied terms may supplement the express terms of the contract but cannot contradict them."
[60] Such as the right of substitution provision in *Autoclenz*
[61] See Art 8(2)-(4), cited below.

> **located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.**

107 Mr Reade conceded that, since WTR implement Community law and cannot be derogated from by agreement,[62] Art 3(4) applies to claims under those Regulations. But he maintained that that provision did not assist the Claimants in respect of their other claims. In particular, Art 3(3) did not apply because "all other elements relevant to the situation at the time of choice" were not located in England and Wales: for one, UBV was and is domiciled in the Netherlands.

108 In a very brief submission, Mr Linden appeared to argue that Art 3(4) wins the day for the Claimants in respect of all categories of claim.

109 We accept Mr Reade's submission. Domicile of the employer must be a relevant 'element'.

110 Next, attention turned to Art 8, which provides:

> **(1) An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs (2), (3) and (4) of this Article.**
>
> **(2) To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.**
>
> **(3) Where the law applicable cannot be determined pursuant to paragraph (2), the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.**
>
> **(4) Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs (2) or (3), the law of that other country shall apply.**

111 Here, the contest before us was confined to the question whether the limb (b) contract under which the Uber driver works is an 'individual employment contract' within the meaning of para (1).

112 Mr Linden submitted, in reliance on the recitals to Rome I[63] that the legislation must be read purposively, having regard to its stated aim of protecting parties who enter into contracts from a position of weakness. He also drew our attention to the judgments of the CJEU in *Allonby-v-Accrington and Rossendale College* [2004] ICR 1328, *Lawrie-Blum-v-Land Baden-Württemberg* [1987] ICR 483 and *Holterman Ferho Exploitatie BV-v-Spies von Büllesheim* [2016] IRLR 140, all

[62] Reg 35
[63] In particular, (22) and (33)-(36)

of which, he submitted, argue for the need for an ample interpretation of the concept of 'employment' in the European context.

113 Mr Reade in reply also cited the *Spies von Büllesheim* case, quoting extensively from the judgment. He relied particularly on these passages:

> **45 It is in the light of the foregoing considerations ... that the referring court must determine ... whether in the present case Mr Spies von Büllesheim, in his capacity as director and manager of Holterman Ferho Exploitatie, for a certain period of time performed services for and under the direction of that company in return for which he received remuneration and was bound by a lasting bond which brought him to some extent within the organisational framework of the business of that company.**
>
> **46 More specifically, with regard to the relationship of subordination, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties ...**

We understood Mr Reade's broad contention to be that the 'individual employment contract' was to be equated with our contract of service. At all events, he submitted that, on the facts, the requirements specified by the CJEU were not met.

114 We prefer the submissions of Mr Linden. We do not read the *Spies von Büllesheim* case as marking a departure from established Community jurisprudence. In the *Allonby* case, the ECJ said this:

> **66. The term "worker"... cannot be defined by reference to the legislation of the member states but has a Community meaning. Moreover, it cannot be interpreted restrictively.**
>
> **67 ... there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration ...**
>
> **68 ... It is clear from [the Article 141(2) definition of "pay"] that the authors of the Treaty did not intend that the term "worker" ... should include independent providers of services who are not in a relationship of subordination with the person who receives the services ...**
>
> **69 ... the question whether such relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.**
>
> **70 Provided that a person is a worker ... the nature of his legal relationship with the other party to the employment relationship is of no consequence ...**
>
> **71 The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker ... if his independence is merely notional, thereby disguising an employment relationship ...**

In our view, it is clear that the critical distinction for Community law purposes is between the dependent worker (who is seen as meriting protection) and the independent contractor in business on his own account (who is not). Those in the former category may work under contracts of service or under some looser legal relationship. The distinction is unimportant, provided that the individual has a

dependent (or 'subordinate') status.[64] All are in 'employment' and the question whether an individual can properly be classified for any purpose as 'self-employed' is likely to be a distraction.[65] The key question in every case is whether or not he or she is operating an independent profession or business.[66]

115 Mr Linden relied in the alternative on Art 9, the material parts of which read as follows:

> **(1) Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.**
>
> **(2) Nothing in this Convention shall restrict the application of the overriding mandatory provisions of the law of the forum.**

116 Mr Linden submitted that the rights which the Claimants seek to enforce are contained in 'overriding mandatory provisions'. He relied upon *Simpson-v-Intralinks Ltd* [2012] ICR 1343 EAT, in which Langstaff P held that the Sex Discrimination Act 1975 and the Equal Pay Act 1970 were 'mandatory rules' within what was then Art 7 of the Rome Convention and that accordingly, although the contract was expressed to be governed by the law of Germany and provided for any dispute to be determined in Frankfurt, the Employment Tribunal in London had jurisdiction to consider her claims under those Acts. Art 7 read:

> **(1) When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.**
>
> **(2) Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.**

One part of the judge's reasoning was his view that the legislation under which the claims were brought was mandatory "by definition", because parties are prohibited from derogating from it by agreement. The result was that the case was remitted to the Employment Tribunal for determination of the statutory claims on the basis that German law was to be applied on all issues other than those on which the 1975 and 1970 Acts were mandatory. On the facts, one such issue (perhaps the only one) would be whether there was a contract of employment.

117 Mr Reade submitted that *Simpson* was of no assistance. It did not concern

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[64] We see very little distance between domestic and Community law in this area. In *Bates van Winkelhof* (*supra*), Lady Hale acknowledged that 'subordination' may point to worker status although it not a "freestanding and universal characteristic" (judgment, para 39).

[65] As *Allonby* itself points out (para 71). In *Byrne Brothers*, Mr Recorder Underhill appeared to regard workers as quasi-employees, whereas Lady Hale in *Bates van Winkelhof* put them in the self-employed category. Neither treated the label as important in itself.

[66] If authority is needed, see *eg Hashwani-v-Jivraj* [2011] ICR 1004 UKSC, *per* Lord Clarke.

Art 9 and 'mandatory rules' were not to be equated with 'overriding mandatory provisions'. He contended that the National Minimum Wage and 'whistle-blowing' claims do not fall into the exceptional category in which Art 9 permits the parties' agreement as to applicable law to be overridden, praying in aid *Dicey & Morris*,[67] Rule 238.

118 Again, we prefer the submission of Mr Linden. We accept that *Simpson* does not bind us, but it is nonetheless valuable and enlightening. It tells us, among other things, that the claims under consideration are 'mandatory' since parties cannot contract out of the relevant protections. Moreover, ERA, s204(1) provides that it is immaterial whether the law which otherwise governs a person's employment is the law of the UK or not. We agree with Mr Linden that this signals the importance which Parliament has attached to the rights which it seeks to guarantee. We are satisfied that NMWA and the 'whistle-blowing' provisions[68] were and are seen by Parliament as crucial measures to safeguard public interests. Both enacted reforms which occupy a central position in our scheme of workplace rights and seek at the same time to benefit society as a whole. Moreover, we do not read *Dicey & Morris* as assisting the Respondents' arguments. Rather the reverse. At para 33-294, dealing with NMWA, the authors write:

> **Although the Act does not explicitly state that its provisions apply irrespective of the law applicable to the contract of employment, it would seem clear that it has this effect with the consequence that the relevant provisions of the Act will be regarded as non-derogable provisions for the purposes of Art 8 and, arguably, as overriding mandatory provisions for the purposes of Art 9(2) of the Rome I Regulation.**

It is true that elsewhere in the work[69] doubt is expressed about whether the rights contained in ERA amount to 'overriding mandatory provisions', but there is no discussion of the wide range of entitlements which the Act contains and no attempt to address the possibility that some come within Art 9(2) and some do not.[70] The separate section entitled "Public Interest Disclosure Act 1998"[71] passes up the further opportunity to give specific consideration to the 'whistle-blowing' provisions against the language of Art 9(2). In the circumstances we do not regard *Dicey & Morris* as offering a considered view of whether the 'whistle-blowing' provisions are 'overriding mandatory provisions'. Further, if this is wrong, we are not persuaded that there is any valid basis for holding that they are not but NMWA rights are. That, it seems to us, would be an odd and unsatisfactory outcome.

119 A further argument was addressed to us based on Art 21, which states:

> **The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.**

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[67] Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed (2016)

[68] Contained, we remind ourselves, in the <u>Public Interest</u> Disclosure Act 1998 (our emphasis)

[69] Para 33-282

[70] Few would argue that a right to receive, say, an itemised pay statement or written notification of a change in terms of employment satisfied the demanding language of Art 9(2). But the 'whistle-blowing' legislation enacts protection of a quite different order.

[71] Para 33-295

Mr Linden suggested a public policy that those shown to qualify as workers should enjoy the employment rights which they assert. We do not accept that such a principle would fall within Art 21.[72] In any event, the Claimants do not identify any provision of Dutch law which is said to be "manifestly incompatible" with it. We reject the submission based on Art 21.

120 For all of these reasons, we are clear that if, contrary to our view, the Claimants were employed by UBV under limb (b) contracts, they would be entitled to rely on Art 8 or, in the alternative, Art 9. As in *Simpson*, the Claimants would have to litigate on the basis that Dutch law applied on all issues save those on which WTR, ERA and NMWA were mandatory.

Working time

121 We have already considered the issue as to when the Uber driver is to be treated as 'working' under his limb (b) contract. The closely related (but not identical) question now for consideration is when his 'working time' begins and ends. Under WTR, reg 2(1), a worker's working time is defined as including:

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

122 Mr Linden submitted that the entire time from when the driver leaves home to when he returns home at the end of a period of work is working time. He relied "by analogy" on *Federación de Servicios Privados del Sindicato Comisiones Obreras-v-Tyco Integrated Security SL* [2015] IRLR 935 CJEU, in which it was held that working time of the claimant field technicians spanned the entire period from leaving home to visit their first customer to returning home after making their last call. We reject that submission. For the reasons already given, we find that (subject to the case where a trip takes him outside his 'territory') the Uber driver's working time starts as soon as he is within his territory, has the App switched on and is ready and willing to accept trips and ends as soon as one or more of those conditions ceases to apply. For so long as the conditions apply, but no longer, we consider that he is "working, at his employer's disposal and carrying out his activity or duties." In the case of a driver who lives within the territory in which he works (presumably the majority do), working time may start as soon as he leaves home and continue (more or less) until he returns home. (It will, of course, be a matter of evidence in each case whether, and for how long, he remains ready and willing to accept trips.) In the case of a driver (like Mr Farrar) who lives outside the territory in which he works, time spent travelling from home to the territory where he works and, at the end of the period of work, from the territory to home is not, in our judgment, working time. When outside the territory he is not working, at Uber's disposal or carrying out the activity or duties for which he is employed. Rather, he is a commuter travelling to and from his place of work. The *Tyco Integrated Security* case does not assist us. There the claimants' travel from home to their first assignment and from their last visit to home were necessary incidents of the employers' provision of technical services to its customers. That cannot be said of the time which Mr Farrar spends travelling to and from the London territory.

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[72] If Mr Linden was right, choice of law would count for nothing and Arts 8 and 9 would be superfluous.

123 We are also inclined to think that the time of an Uber driver who undertakes a trip which takes him outside his territory continues to be working time for the duration of the trip and the return journey to his territory. But that depends at least in part on whether he is 'working' under his limb (b) contract throughout the relevant time time and since, as we have already stated,[73] we do not feel able to determine that issue because it has not been the subject of argument, it is not appropriate for us to offer a concluded view on the corresponding working time point.

124 In case we are wrong in our primary conclusion, we hold in the alternative that working time begins at the latest when the driver accepts a trip and ends when that trip is completed.

'Work' under NMWA

125 The National Minimum Wage Regulations 2015 ('NMWR') contain complex provisions governing the way in which time is to be reckoned for the purpose of establishing in any particular case whether the employer has satisfied the requirements of NMWA. The first question is whether the Uber driver's working hours are given to 'salaried hours work', 'time work', 'output work' or 'unmeasured work'. It is common ground that the first of these is inapplicable. Mr Reade argued that the second, 'time work', applies. NMWR, reg 30 provides:

> **Time work is work, other then salaried hours work, in respect of which a worker is entitled under their (sic) contract to be paid –**
> **(a) by reference to the time worked by the worker;**
> **(b) by reference to a measure of output in a period of time where the worker is required to work for the whole of that period; or**
> **(c) for work that would fall within sub-paragraph (b) but for the worker having an entitlement to be paid by reference to the period of time alone when the output does not exceed a particular level.**

Rightly, in our view, Mr Reade proceeded on the footing that the 'time work' analysis fits the case only if the driver is 'working' when he is carrying a passenger but not otherwise. For the reasons already stated, that is not our view and accordingly we are satisfied that the Uber driver does not undertake 'time work'.

126 Are we then concerned with 'output work'? NMWR, reg 36 reads:

> **Output work is work, other than time work, in respect of which a worker is entitled under their (sic) contract to be paid by reference to a measure of output by the worker, including a number of pieces made or processed, or a number of tasks performed.**

In our judgment, 'output work' is inapplicable. The Uber driver's entitlement to pay does not depend on his achieving set units of production or completing a particular number of tasks.

127 It follows that the Uber driver performs 'unmeasured work'.[74] The hours of

[73] See para 101 above.
[74] The 'default' analysis, if the other three possibilities are discounted: reg 44

unmeasured work in any pay reference period are to be computed in accordance with NMWR, reg 45. In the ordinary case, the relevant hours are the "hours … worked."[75] We were not asked to determine any issue as to how that provision should be applied, save for Mr Linden's submission that travelling time to and from home 'counts'. He relied on reg 47, which provides:

> **The hours when a worker is travelling for the purposes of unmeasured work are to be treated as unmeasured work.**

The argument was not elaborated and Mr Reid did not make submissions in response. We do not consider that reg 47 is apt to include time spent by drivers who live outside the London territory travelling between home and the territory or returning home from it. Travel "for the purposes of work" is not, it seems to us, to be equated with travel for the purposes of getting to and from work.

128 But a driver's hours spent returning to his territory to continue working after an out-of-territory trip commencing within it would, it seems to us, count as reckonable time.[76]

Outcome and Further Conduct

129 For the reasons given, the Claimants succeed to the extent explained in these reasons.

130 Subject to any appeal, it will be necessary to consider case management and further hearings, but we think it right to allow time first for the parties to digest our decision and the representatives to communicate with one another with a view to achieving as much common ground as possible on the further conduct of the litigation. The parties are asked to deliver to the Tribunal no later than 2 December written representations, preferably agreed, as to the best way forward.

A.M. Snelson

EMPLOYMENT JUDGE

Reasons entered in the Register and copies sent to the parties on ……………………

…………………………………… for Office of the Tribunals

[75] Reg 45(1)(a)
[76] Here we feel able to give a definitive view because it seems to us that the driver must succeed by one or other of two routes. He spends the time either 'working' (reg 45 - *cf* para 101 *sup*) or travelling "for the purposes of" work (reg 47).