Appeal No. UKEAT/0056/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 27 & 28 September 2017
Judgment handed down on 10 November 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

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(1) UBER B.V. APPELLANTS
(2) UBER LONDON LTD
(3) UBER BRITANNIA LTD

(1) MR Y ASLAM
(2) MR J FARRAR
(3) MR R DAWSON AND OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MS DINAH ROSE (One of Her Majesty's Counsel) and MR FRASER CAMPBELL (of Counsel) Instructed by: DLA Piper UK LLP 3 Noble Street London EC2V 7EE
For the First and Second Respondents	MR JASON GALBRAITH-MARTEN (One of Her Majesty's Counsel) and MS SHERYN OMERI (of Counsel) Instructed by: Bates Wells and Braithwaite LLP 10 Queen Street Place London EC4R 1BE
For the Third Respondents	No appearance or representation by or on behalf of the Third Respondents

SUMMARY

JURISDICTIONAL POINTS - Worker, employee or neither

WORKING TIME REGULATIONS - Worker

"Worker status" - section 230(3)(b) ***Employment Rights Act 1996*** *("ERA"), regulation 36(1)* ***Working Time Regulations 1998*** *("WTR") and section 54(3)* ***National Minimum Wage Act 1998*** *("NMWA").*

"Working time" - regulation 2(1) ***WTR***

The Claimants were current or former Uber drivers in the London area who, along with others, had brought various claims in the Employment Tribunal ("the ET"), which required them to be "workers" for the purposes of section 230(3)(b) **Employment Rights Act 1996** ("ERA"), regulation 36(1) **Working Time Regulations 1998** ("WTR") and section 54(3) **National Minimum Wage Act 1998** ("NMWA"). The ET concluded that any Uber driver who had the Uber app switched on, was within the territory in which they were authorised to work (here, London) and was able and willing to accept assignments was working for Uber London Ltd ("ULL") under a "worker" contract and was, further, then engaged on working time for the purposes of regulation 2(1) **WTR**.

The Appellants ("Uber") appealed, contending (relevantly) as follows:

> (1) That the ET had erred in law in disregarding the written contractual documentation. There was no contract between the Claimants and ULL but there were written agreements between the drivers and Uber BV and riders, which were inconsistent with the existence of any worker relationship. Those agreements made clear, Uber drivers provided transportation services to riders; ULL (as was common within the mini-cab or private hire industry) provided its services to the drivers as their agent. In finding otherwise, the ET had disregarded the basic principles of agency law.

(2) The ET had further erred in relying on regulatory requirements as evidence of worker status.

(3) It had also made a number of internally inconsistent and perverse findings of fact in concluding that the Claimants were required to work for Uber.

(4) It had further failed to take into account relevant matters relied on by Uber as inconsistent with worker status and as, on the contrary, strongly indicating that the Claimants were carrying on a business undertaking on their own account.

Held: *dismissing the appeal*

The ET had been entitled to reject the characterisation of the relationship between Uber drivers and Uber, specifically ULL, in the written contractual documentation. It had found (applying **Autoclenz Ltd v Belcher and Ors** [2011] ICR 1157 SC(E)) that the reality of the situation was that the drivers were incorporated into the Uber business of providing transportation services, subject to arrangements and controls that pointed away from their working in business on their own account in a direct contractual relationship with the passenger each time they accepted a trip. Having thus determined the true nature of the parties' bargain, the ET had permissibly rejected the label of agency used in the written contractual documentation. The ET had not thereby disregarded the principles of agency law but had been entitled to consider the true agreement between the parties was not one in which ULL acted as the drivers' agent.

In carrying out its assessment in this regard, the ET was not obliged to disregard factors simply because they might be seen as arising from the relevant regulatory regime; that was part of the overall factual matrix the ET had to consider. In any event, in this case, the ET's findings on control were not limited to matters arising merely as a result of regulation.

In considering the ET's findings, it was necessary to have regard to its Judgment as a whole. Doing so, it was apparent that they were neither inconsistent nor perverse. In particular, the ET had permissibly concluded there were obligations upon Uber drivers that they should accept trips offered by ULL and that they should not cancel trips once accepted (there being potential

penalties for doing so). It was, further, no objection that the ET's approach required the drivers not only to be in the relevant territory, with the app switched on, but also to be "able and willing to accept assignments"; that was consistent with Uber's own description of a driver's obligation when "on-duty". These findings had informed the ET's conclusions not just on worker status but also on working time and as to the approach to be taken to their rights to minimum wage. Inevitably the assessment it had carried out was fact- and context-specific. To the extent that drivers, in between accepting trips for ULL, might hold themselves out as available to other PHV operators, the same analysis might not apply; hence the ET's observation that it would be a matter of evidence in each case whether and for how long a driver remained ready and willing to accept trips for ULL.

HER HONOUR JUDGE EADY QC

Introduction

1. This case arises from what has been described as a modern business phenomenon, commonly known simply as "Uber". It was founded in the United States of America in 2009 and its smartphone app - the tool through which the business operates ("the app") - was released in 2010. In its first instance decision, the Employment Tribunal ("the ET") recorded how Uber's then Chief Executive, Mr Kalanick, described the business in February 2016:

> **"Uber began life as a black car service for 100 friends in San Francisco - everyone's private driver. 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."**

2. There are around 30,000 Uber drivers in the London area (of some 40,000 in the United Kingdom) and about two million passengers there registered to use Uber's services.

3. These proceedings concern the employment status of the Claimants as Uber drivers in London. The London Central ET (Employment Judge Snelson and members Mr Pugh and Mr Buckley) held (relevantly) that Uber London Limited employed the Claimants as "workers", as defined by section 230(3)(b) **Employment Rights Act 1996** ("ERA"), regulation 36(1) **Working Time Regulations 1998** ("WTR") and section 54(3) **National Minimum Wage Act 1998** ("NMWA"). It further held that their working time was to be calculated in accordance with regulation 2(1) **WTR** and that they were engaged in "unmeasured work" for the purposes of the **National Minimum Wage Regulations 2015** ("NMWR"). Uber appeals.

4. For completeness, I note the ET made alternative findings that Uber drivers would fall to be considered as "workers" - supplied by Uber BV to Uber London Ltd or to passengers -

pursuant to extended definitions covering contractors, under section 43K **ERA**, section 34 **NMWA** and regulation 36(1) **WTR**. The focus of the appeal has been on the ET's primary finding as against Uber London Ltd and I have not addressed this secondary case further as it has been unnecessary to do so; I record, however, that this finding is also disputed by Uber.

The Parties

5. Various entities within the Uber family of companies were Respondents before the ET:

5.1. Uber BV ("UBV") - a Dutch corporation and parent company of the other two Respondents; it holds the legal rights to the Uber app.

5.2. Uber London Ltd ("ULL") - a company registered in the United Kingdom, which holds a Private Hire Vehicle ("PHV") Operator's Licence for London and makes provision for the invitation and acceptance of PHV bookings.

5.3. Uber Britania Ltd ("UBL") - also a UK registered company, which holds and/or manages PHV Operator's Licences issued by various district councils outside London. Both the underlying ET hearing and this appeal focuses on London-based drivers and UBL does not feature in the ET's reasoning.

When it is unnecessary to distinguish between these entities by name, I adopt the same approach as the ET and simply refer to "Uber".

6. The Claimants before the ET (referred to as such in this Judgment) are current or former Uber drivers; they were selected by agreement between the parties as "test Claimants" for the

purposes of a Preliminary Hearing to determine whether they met the statutory definition of "worker" and how they should be treated for the purposes of the **WTR** and **NMWA**.

7. The parties were represented by leading counsel below but not by those (leading or junior counsel) who now appear.

The Relevant Factual Background

8. The following account of the facts is taken from the ET's fuller record. When citing passages from the ET's Judgment I have omitted footnotes appearing in the original text.

9. Uber describes the various services provided to users of its app as "products"; the most popular is UberX but there is also UberXL (larger vehicles, holding at least six passengers), UberEXEC and UberLUX (a premium service, using higher specification vehicles with a higher minimum fare), UberTAXI (London black taxis using the Uber platform) and UberWAV (vehicles with wheelchair access, where the driver has undergone special training). As well as differentiating by vehicle size and specification, these services require different driver ratings (see below); a higher rating is required to deliver EXEC and LUX services than UberX work.

10. Prospective Uber drivers sign up online. Acknowledging that they are not subjected to close scrutiny, the ET found potential drivers were required to personally attend at a specified location to present originals of relevant documentation, when they would be subjected to a form of interview and induction; a process Uber calls "onboarding"; once "onboard", they have access to Uber's drivers' app, either by their own smartphones or by a modified smartphone hired from UBV (allowing access only to the Uber app and satellite navigation system).

A

11. Under a contract with UBV, a driver's access to the app is stated to be personal: the right of use is non-transferable and drivers are not permitted to share accounts or their driver IDs (used to log on to the app). As the ET observed:

> **"39. … There is no question of any driver being replaced by a substitute."**

B

12. As part of the onboarding process, new drivers would be issued with a "Welcome Packet", which provides (under the heading "WHAT UBER LOOKS FOR"):

C

> **"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."**

D

13. The Welcome Packet also includes a number of slides. One addressing "Safety & Quality", reads as follows:

E

> **"• 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."**

F

14. The last of these points is reiterated in a further document given to drivers, entitled "Uber UK Partner Standards Advice", which states:

G

> **"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."**

H

15. As the ET observed, although presented as a series of "Recommendations" the Standards Advice included the following statement:

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

16. The ET found that Uber drivers are not at liberty to exchange contact details with passengers; something explained in an email of 6 June 2014, in a "Q&A" format, as follows:

"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."

17. Uber drivers supply their own vehicles, albeit Uber publishes a list of makes and models it will accept and there is a requirement that vehicles be manufactured post 2006 and in good condition and a preference that they be black or silver. The driver is responsible for all costs incidental to owning and running the vehicle.

18. Although not operational by the time of the ET hearing, new drivers had previously been entitled under certain schemes to a guaranteed income for a specified period.

19. As for prospective passengers, those aged 18 or over can register (providing contact and payment card details) and then book a trip by downloading the Uber app on to their smartphones and logging on. They are not obliged to state their destination when booking but generally do so; if they ask, they will receive a fare estimate. Once a passenger request is received, ULL passes this (by the app) to the nearest available driver, who is informed of the passenger's first name and rating. The driver has 10 seconds to accept the trip; if there is no response, ULL assumes that driver is unavailable and will locate another. Once a driver accepts, ULL confirms the booking to the passenger and allocates the trip to the driver. At this

stage, passenger and driver are put into telephone contact but in such a way that neither has access to the number of the other. Drivers are unaware of the destination until they pick up the passenger (and are strongly discouraged from asking for it in any 'phone conversations with the passenger before pick up); if it has already been notified, this will be provided once the driver presses the "start trip" button on the driver app, otherwise the driver will learn of the destination from the passenger. Once the journey starts, the driver app provides detailed directions using satellite navigation technology; drivers are not bound to follow these directions but may face adverse consequences if they do not. On arrival, the driver presses the "complete trip" button and a fare is calculated by Uber servers, based on global positioning system data from the driver's smartphone, which takes account of time and distance and at "surge times" a multiplier will be applied resulting in a charge above standard levels. As the ET describes:

> **"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 to UBV by credit or debit card and receives an emailed receipt. Separately UBV generates an "invoice" addressed to the passenger (using simply their first name and providing no other contact details) by the driver, but this is not sent to the passenger; it is available to the driver though the app and serves as a record of the trip.

21. Payment to drivers is made by UBV on a weekly basis; it is calculated on the basis of the fares charged for trips undertaken by the driver less a service fee, initially charged at 20% of the fare but increased to 25% by the time of the ET hearing. Although Uber contended it was permissible for drivers to accept tips from passengers, the ET recorded it had seen documents evidencing Uber's disapproval of drivers soliciting tips.

22. As for disputes between passengers and drivers - for example, over the route taken, which might impact upon the fare - the ET described how these would be resolved as follows:

> **"23. … the matter is considered by ULL and a decision taken whether to compensate the passenger. … Mr Farrar explained that on several occasions Uber made deductions from his account without prior reference to him. … [when queried] 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 concluded that two points emerged 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."**

23. Should a passenger cancel a trip more than five minutes after a request is accepted by a driver, there is a £5 cancellation fee; this is deemed to be a fare and thus subject to UBV's service charge.

24. As for cases in which the Uber ride has been procured by fraud, the ET found that:

> **"26. … Uber's general practice is to accept the loss and not to seek to pass it on to the driver, at least where … Uber's systems have failed. Some correspondence … suggests that the organisation may take a harder line if it considers that a driver has failed to react to evidence pointing to fraud."**

The ET noted that Uber's case seemed to suggest it could reverse this policy and leave the driver to bear the loss. It found, however, that would be:

> **"91. … incompatible with the shared perceptions of drivers and Uber decision-makers as to Uber's legal responsibilities. …"**

25. The ET also found Uber would in certain instances pay drivers the cost, or a contribution towards the cost, of cleaning vehicles soiled by passengers, without suggesting this was conditional upon Uber receiving any corresponding sum from the passenger.

A 26. Although nominally free to accept or decline trips, the ET noted (paragraph 51) that a driver's acceptance statistics were recorded and Uber had warned:

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

B In oral argument, Uber has disputed that this was a warning that could apply to the Claimants.

27. Further, on drivers' obligations to accept work, the ET found:

C
> **"52. Drivers who decline three trips in a row are liable to be forcibly logged off the App by Uber for 10 minutes. … an Uber document called "Confirmation and Cancellation Rate Process" shows that the expression "Penalty Box waring" 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."**

D

E In argument before me, Uber has explained that in fact a driver would now only be logged off the app for two rather than ten minutes.

28. In any event, as the ET further found, a similar system of warnings, culminating in a

F forced log-off penalty would also apply to cancellations by drivers after accepting a trip. The warnings state that cancellation amounts to a breach of the agreement between the driver and Uber unless there is a "good reason" for cancelling (see ET paragraph 53).

G

29. The ET found various examples of control being exercised by Uber over how drivers performed their work:

H
> **"54. … No Uber manager instructs the driver to take any particular route … In practice, however, the App's mapping software determines the route for most purposes. … [and] 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 … that it is for the driver to justify any departure from the route indicated on the App.**

55. … Passengers are required to rate drivers at the end of every trip on a simple 0-5 scoring system. Ratings are monitored and [UberX] drivers with average scores below 4.4 become subject to a graduated series of "quality interventions" aimed at assisting them to improve. "Experienced" drivers [who have undertaken 200 trips or more] 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 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"."

30. On the other hand, the ET recorded those matters relied on by Uber as suggesting that the drivers operated as independent contractors:

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

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."

31. It was also part of Uber's case that many of the factors relied on as indicative of worker status were simply consequential upon the regulatory regime; I now turn to that.

The Regulatory Regime

32. The **Private Hire Vehicles (London) Act 1998** ("the 1998 Act") makes provision for "*the licensing and regulation of private hire vehicles, and drivers and operators of such vehicles, within the metropolitan police district and the City of London; and for connected purposes*". By section 2 it provides:

"*Requirement for London operator's licence*

(1) No person shall in London make provision for the invitation or acceptance of, or accept, private hire bookings unless he is the holder of a private hire vehicle operator's licence for London (in this Act referred to as a "London PHV operator's licence").

(2) A person who makes provision for the invitation or acceptance of private hire bookings, or who accepts such a booking, in contravention of this section is guilty of an offence …"

33. A private hire vehicle driver must hold a PHV licence but only the holder of a PHV operator licence can take bookings. In London, ULL holds the relevant PHV operator licence.

34. Section 4 then sets out the obligations of "operators", (relevantly) as follows:

"Obligations of London operators

(1) The holder of a London PHV operator's licence (in this Act referred to as a "London PHV operator") shall not in London accept a private hire booking other than at an operating centre specified in his licence.

(2) A London PHV operator shall secure that any vehicle which is provided by him for carrying out a private hire booking accepted by him in London is -

(a) a vehicle for which a London PHV licence is in force driven by a person holding a London PHV driver's licence; or

(b) a London cab driven by a person holding a London cab driver's licence.

(3) A London PHV operator shall -

(a) display a copy of his licence at each operating centre specified in the licence;

(b) keep at each specified operating centre a record in the prescribed form of the private hire bookings accepted by him there;

(c) before the commencement of each journey booked at a specified operating centre, enter in the record kept under paragraph (b) the prescribed particulars of the booking;

(d) keep at the specified operating centre or, where more than one operating centre is specified, at one of the operating centres such records as may be prescribed of particulars of the private hire vehicles and drivers which are available to him for carrying out bookings accepted by him at that or, as the case may be, each centre;

(e) at the request of a constable or authorised officer, produce for inspection any record required by this section to be kept.

…

(5) A London PHV operator who contravenes any provision of this section is guilty of an offence …

(6) It is a defence in proceedings for an offence under this section for an operator to show that he exercised all due diligence to avoid committing such an offence."

35. To this end, it is also necessary to consider the **Private Hire Vehicles (London) (Operators' Licences) Regulations 2000** (SI 2000/3146) ("the Regulations"), introduced by the Secretary of State under regulation 32 of the **1998 Act**, which relevantly provide:

> **"9.** ***Conditions***
>
> **(1) Every licence shall be granted subject to the conditions set out in the following provisions of this regulation.**
>
> **(2) …**
>
> **(3) The operator shall, if required to do so by a person making a private hire booking -**
>
> > **(a) agree the fare for the journey booked, or**
> >
> > **(b) provide an estimate of that fare.**
>
> **(4) If, during the currency of the licence -**
>
> > **…**
> >
> > **(c) any driver ceases to be available to the operator for carrying out bookings, by virtue of that driver's unsatisfactory conduct in connection with the driving of a private hire vehicle,**
>
> **the operator shall, within 14 days of the date of such event, give the licensing authority notice containing details of the conviction or change, as the case may be, or, in a case falling within sub-paragraph (c), the name of the driver and the circumstances of the case.**
>
> **…**
>
> **(7) The operator shall establish and maintain a procedure for dealing with -**
>
> > **(a) complaints, and**
> >
> > **(b) lost property,**
>
> **arising in connection with any private hire booking accepted by him and shall keep and preserve records …**
>
> **…**
>
> **10.** ***Form of record of private hire bookings***
>
> **The record which an operator is required to keep by virtue of section 4(3)(b) of the 1998 Act at each operating centre specified in his licence of the private hire bookings accepted by him there shall be kept -**
>
> > **(a) in writing, or**
> >
> > **(b) in such other form that the information contained in it can easily be reduced to writing.**
>
> **11.** ***Particulars of private hire bookings***
>
> **Before the commencement of each journey booked at an operating centre specified in his licence an operator shall enter the following particulars of the booking in the record referred to in regulation 10 -**
>
> > **(a) the date on which the booking is made and, if different, the date of the proposed journey;**
> >
> > **(b) the name of the person for whom the booking is made or other identification of him, or, if more than one person, the name or other identification of one of them;**

(c) the agreed time and place of collection, or, if more than one, the agreed time and place of the first;

(d) the main destination specified at the time of the booking;

(e) any fare or estimated fare quoted;

(f) the name of the driver carrying out the booking or other identification of him;

(g) if applicable, the name of the other operator to whom the booking has been sub-contracted, and

(h) the registered number of the vehicle to be used or such other means of identifying it as may be adopted.

12. ***Particulars of private hire vehicles***

(1) For the purposes of section 4(3)(d) of the 1998 Act, an operator shall keep at each operating centre … a record, containing the particulars … of each private hire vehicle which is available to him for carrying out bookings accepted by him …

…

13. ***Particulars of drivers***

(1) For the purposes of section 4(3)(d) of the 1998 Act, an operator shall keep … a record, containing the particulars … of each driver who is available to him for carrying out bookings accepted by him …

…

14. ***Record of complaints***

(1) An operator shall keep … a record containing -

(a) the particulars set out in paragraph (2) of any complaint made in respect of a private hire booking accepted by him …;

…

(2) In relation to each complaint the particulars referred to in paragraph (1) are -

(a) the date of the related booking;

(b) the name of the driver who carried out the booking;

(c) the registration mark of the vehicle used;

(d) the name of the complainant and any address, telephone number or other contact details provided by him;

(e) the nature of the complaint; and

(f) details of any investigation carried out and subsequent action taken as a result.

15. ***Record of lost property***

(1) An operator shall keep … a record, containing the particulars … of any lost property found -

…

(b) in any private hire vehicle used to carry out a booking accepted by him …"

36. As there is no contractual documentation directly governing the relationship between Uber drivers and ULL, when looking at the nature of the arrangements between them, Uber says much is determined as a result of this regulatory framework. That said, there are written terms and conditions between (i) the passenger (described as "the rider") and Uber (although referred to as "Uber UK", this can be taken to mean ULL for present purposes) ("the Rider Agreement"), and (ii) UBV and Uber drivers; it is to that documentation that I now turn.

The Contractual Documentation

37. Starting with the Rider Agreement, by Part 1, this sets out the "Booking Service Terms", where "Booking Services" are defined (see clause 1) as the services:

> **"… which shall be provided to you by [ULL] as the agent of the Transportation Provider"**

38. "Transportation Provider" is then defined as:

> **"… the provider … of transportation services, including any drivers licensed to carry out private hire bookings …"**

39. By clause 2, it is explained that a private hire booking must be made with a person holding a relevant operator's licence; that is, ULL. Clause 3 then deals with ULL's acceptance of bookings as "disclosed agent for the Transportation Provider".

40. Clause 4 concerns the provision of booking services by ULL; these are the services provided via the Uber app and are stated to include:

> **"1. The acceptance of PHV Bookings [in accordance with clause 3] … but without prejudice to [ULL'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 [ULL] may choose;**
>
> **3. Keeping a record of each accepted PHV Booking;**
>
> **4. Remotely monitoring (from [ULL's] registered office and/or operating centres) 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."

41. Payment is then dealt with by clause 5, where it is explained that:

> **"The Booking Services are provided by [ULL] to you free of charge. [ULL] reserves the right to introduce a fee for the provision of the Booking Services. If [ULL] 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."**
>
> **"The rates that apply for the transportation services provided by the Transportation Provider can be found … through the Uber App. …"**

42. There are separate terms relating to use of the Uber website and app (see Part 2 of the Rider Agreement), made available by UBV. It is explained (see clause 4 of this Part) that:

> **"… After you have received services … [UBV] will facilitate your payment of the applicable Charges on behalf of the Third Party Provider [defined to include Uber drivers] as disclosed payment collection agent for the Third Party Provider (as Principal) …"**

43. Within Part 2 of the Rider Agreement, it is further provided:

> **"*Repair or Cleaning Fees***
>
> **You shall be responsible for the cost of repair for damage to, or necessary cleaning of, Third Party Provider vehicles and property … in excess of normal "wear and tear" … In the event that a Third Party Provider reports the need for Repair or Cleaning, and such Repair or Cleaning request is verified by Uber in Uber's reasonable discretion, Uber reserves the right to facilitate payment for the reasonable cost of such Repair or Cleaning on behalf of the Third Party Provider using your payment method designated in your Account. Such amounts will be transferred by Uber to the applicable Third Party Provider and are non-refundable."**

That said, as recorded above, the ET found that Uber would sometimes meet such cleaning costs without suggestion that this was conditional upon recovering any sum from the passenger (whether under the terms of the Rider Agreement or otherwise).

44. Turning to the agreement between UBV and Uber drivers, this was initially recorded in "Partner Terms" of 1 July 2013. In October 2015, without prior consultation or warning, a "New Partner-Driver Agreement" ("the New Terms") was issued to drivers via the app, and had

to be accepted before the driver could go on-line and become eligible for further driving work. The email alerting drivers to the New Terms was sent out from "Uber UK Partners", which for present purposes can be understood to be ULL. In argument on the current appeal, all parties have relied on the New Terms and I have proceeded on the basis that there is nothing in the former Partner Terms that would materially impact upon my analysis.

45. The New Terms are stated to comprise a "Services Agreement" between:

> **"an independent company in the business of providing Transportation Services … ("Customer") and Uber BV …"**

46. The term "transportation services" is defined as follows:

> **"1.14. … the provision of passenger transportation services to Users via the Uber Services in the Territory by [the] Customer and its Drivers using the vehicles."**

47. "Users" are the "end user" of the "Transportation Services" obtained using the Uber App (see definition clause 1.18), i.e. passengers.

48. The vast majority of Uber drivers are sole operators (ET paragraph 34), so, for the purposes of the New Terms, the reality is that they are both "driver" and "customer" and it is the individual driver who provides "transportation services" to users of those services (passengers).

49. For its part, UBV provides "the Uber Services", which are defined as:

> **"1.17. … Uber's electronic services rendered via a digital technology platform, being on-demand intermediary and related services that enable transportation providers to provide Transportation Servers to Users seeking Transportation Services; such Uber Services include access to the Driver App and Uber's related software, websites, payment services … and related support services systems …"**

A

50. Under the New Terms, it is expressly acknowledged that UBV:

> **"is a technology services provider that does not provide Transportation Services, function as a transportation carrier or agent for the transportation of passengers"**

B

51. It is further provided, under the sub-heading "Relationship of the parties", that:

> **"13.1. Except as otherwise expressly provided herein with respect to Uber acting as the limited payment collection agent solely for the purpose of collecting payment from Users on behalf of Customer, the relationship between the parties under this Agreement is solely that of independent contractors. The parties expressly agree that: (a) this Agreement is not an employment agreement, nor does it create an employment relationship … between Uber (or any of its Affiliates in the Territory) and a Customer or any Driver; and (b) no joint venture, partnership, or agency relationship exists between Uber and Customer or Uber and any Driver."**

C

52. UBV's role as "payment collection agent" arises from clause 4 of the New Terms; under the sub-heading "Financial Terms", it is (relevantly) provided:

D

> **"4.1. *Fare Calculation and Customer Payment.* Customer is entitled to charge a fare for each instance of completed Transportation Services provided to a User that are obtained via the Uber Services ("Fare") … Customer: (i) appoints Uber as Customer's limited payment collection agent solely for the purpose of accepting the Fare, applicable Tolls and, depending on the region and/or if requested by the Customer, applicable taxes and fees from the User on behalf of the Customer via the payment processing functionality facilitated by the Uber Services; and (ii) agrees that payment made by User to Uber shall be considered the same as payment made directly by User to Customer. …**
>
> **…**
>
> **4.4. *Service Fee.* In consideration of Uber's provision of the Uber Services, Customer agrees to pay Uber a service fee on a per Transportation Services transaction basis calculated as a percentage of the Fare …**
>
> **4.5. *Cancellation charges.* Customer acknowledges and agrees that Users may elect to cancel requests for Transportation Services that have been accepted by a Driver (either directly or via Uber's Affiliate …[ULL] acting as agent) at any time prior to the Driver's arrival. In the event that a User cancels an accepted request for Transportation Services, Uber may charge the User a cancellation fee on behalf of the Customer. If charged, this cancellation fee shall be deemed the Fare for the cancelled Transportation Services …"**

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53. Otherwise the New Terms lay down how the Uber Services are to be used (clause 2) and grant the driver ("the Customer") a non-transferable licence to use the app (clause 5). Under clause 2.1, each driver is to be given a non-transferable "Driver ID" - the identification and password key enabling them to access and use the app - and, by clause 2.2, it is provided:

H

> **"… When the Driver App is active, User requests for Transportation Services may appear to a Driver via the Driver App if the Driver is available and in the vicinity of the User. If a Driver accepts (either directly or through an Uber Affiliate … [ULL] acting as agent for the Customer/Driver) a User's request for Transportation Services, the Uber Services will provide**

certain User Information to such Driver via the Driver App, including the User's first name and pickup location. Driver will obtain the destination from the User, either in person upon pickup or from the Driver App if the User elects to enter such destination via Uber's mobile application. Customer acknowledges and agrees that once a Driver has accepted (either directly or through … [ULL] acting as agent for the Customer/Driver) a User's request for Transportation Services, Uber's mobile application may provide certain information about the Driver to the User … As between Uber and Customer, Customer acknowledges and agrees that: (a) Customer and its Drivers are solely responsible for determining the most effective, efficient and safe manner to perform each instance of Transportation Services; and (b) except for the Uber Services or any Uber Devices (if applicable), Customer shall provide all necessary equipment, tools and other materials, at Customer's own expense, necessary to perform Transportation Services."

54. Further, at clause 2.3, it is provided:

"2.3. *Customer's Relationship with Users*. Customer acknowledges and agrees that Customer's provision of Transportation Services to Users creates a legal and direct business relationship between Customer and the User, to which neither Uber nor … [ULL] is a party. Neither Uber nor … [ULL] is responsible or liable for the actions or inactions of a User in relation to the activities of Customer, a Driver or any Vehicle. Customer shall have the sole responsibility for any obligations or liabilities to Users or third parties that arise from its provision of Transportation Services. …"

55. Although, at clause 2.4, the New Terms acknowledge the "*legal and direct business relationship between Uber and Customer*", it is further provided that:

"… Uber and … [ULL] do not, and shall not be deemed to, 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. Whilst authorised to provide Transportation Services under this Agreement, Customer and its Drivers retain the sole right to determine when and for how long each of them will utilize the Driver App or the Uber Services. Customer and its Drivers retain the option, via the Driver App, to decline or ignore a User's request for Transportation Services via the Uber Services, or to cancel an accepted request …"

56. Provision is also made for a ratings' system, relevantly:

"2.6.2. 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 … 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 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 … 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 the Driver App."

57. There are further requirements for drivers at clause 3 of the New Terms, ensuring that the driver holds a valid driver's licence and all other required documentation and that:

> **"3.3. … To ensure Customer's and each of its Drivers' compliance with all [driver and vehicle] requirements … and to allow Uber and … [ULL] to comply with their regulatory requirements, Customer must provide Uber with written copies of all such licenses, permits … [etc] prior to … provision of any Transportation Services … [and on renewal] …"**

58. There is, additionally, a specific Driver Addendum to the New Terms, again entered into with UBV, which essentially replicates the relevant provisions set out above but is framed as an agreement directly between UBV and the individual driver.

59. Having set out the relevant contractual provisions, I note the ET considered there were discrepancies in language between how Uber's case was presented in the proceedings (consistent with the contractual documentation) and other material emanating from Uber, which appeared incompatible: for example, the various references to "*Uber drivers*", "*our drivers*" and to "*Ubers*" or "*an Uber*" (that is, to Uber vehicles) (paragraph 67 of the ET Reasons); the assertion that Uber had provided "*job opportunities*", potentially generating "*tens of thousands of jobs …*" (ET Reasons paragraph 68); and the use of the language of "*commission*" (ET paragraph 69).

The Relevant Legislative Provisions

60. For the purposes of the **ERA**, section 230(3) defines "worker" as follows:

> **"230. *Employees, workers etc***
>
> **…**
>
> **(3) In this Act "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."

A contract falling within section 230(3)(b) has come to be referred to as a "limb (b)" contract.

61. The same definition is also found at section 54(3) **NMWA** and regulation 2(1) **WTR**.

62. The ET was further concerned with the definition of "working time", as provided by regulation 2(1) **WTR**:

> **" "working time", in relation to a worker, means -**
>
> > **(a) any period during which he is working, at his employer's disposal and carrying out his activities or duties,**
> >
> > **…**
>
> **and "work" shall be construed accordingly."**

63. As for calculating pay for the purposes of the **NMWA** and **NMWR**, Uber argued that drivers (if workers) were carrying out "time work", defined by regulation 30 **NMWR** as:

> **"… work, … in respect of which a worker is entitled under their 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;**
> >
> > **(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."**

64. It is common ground that if the drivers are not engaged on "time work", the default position must be that they are engaged on "unmeasured work" (regulation 44 **NMWR**).

The ET's Decision and Reasoning

65. Acknowledging that Uber drivers in the UK were under no obligation to switch on the app - and noting the Claimants' case accepted that there was no overarching "umbrella" contract - the ET considered the legal position when the app was switched on, concluding:

> **"86. … any driver who (a) has the App switched on, (b) is within the territory in which he is authorised to work … and (c) is able and willing to accept assignments, is, for so long as those conditions are satisfied, working for Uber under a 'worker' contract and a contract within each of the extended definitions. …"**

66. In reaching that conclusion, the ET commented that any organisation:

> **"87. … (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 … and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits … a degree of scepticism. …"**

67. More specifically, the ET rejected Uber's denial that it was in business as a supplier of transportation services, concluding that its "products" spoke for themselves:

> **"89. … 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 this vein, the ET referenced proceedings under the title **Douglas O'Connor v Uber Technologies Inc** Case 3: 13-cv-034260EMC, 11 March 2015, in which the North Carolina District Court had rejected Uber's assertion that it was a technology company and not in the business of providing transportation services.

68. The ET further concluded that Uber's:

> **"90. … 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. …"**

A And it rejected Uber's contention that drivers might "grow" their businesses:

> **"… no driver is in a position to do anything of the kind, unless growing his business simply means spending more hours at the wheel. …"**

B Or that Uber's function could be characterised as supplying drivers with "leads":

> **"… 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."**

C 69. Testing Uber's case further, the ET noted:

> **"91. … 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 … 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). …"**

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70. In the circumstances, the ET concluded any supposed driver/passenger contract was a

F "pure fiction", bearing no relation to the real dealings and relationships between the parties. It further rejected any suggestion that Uber was working for the drivers - the only sensible interpretation was that the relationship was the other way around:

G

> **"92. … The drivers provide the skilled labour through which the organisation delivers its services and earns its profits. We base our assessment … 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.**

H

> **(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 scheme (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.

(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."

71. The ET was thus satisfied that the Claimants fell to be considered as "limb b" workers for the purpose of section 230(3) **ERA**:

> **"93. … 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. … 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 regard that notion as absurd."**

72. The ET considered this conclusion was compatible with the guidance from case-law:

> **"94. … 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. 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."**

73. Having found that the terms on which Uber relied did not correspond with the reality of its relationship with the drivers, the ET considered itself free to disregard them; noting the unequal bargaining positions of the parties (in particular, many Uber drivers - a substantial

proportion of whom did not speak English as their first language - would be unused to reading and interpreting dense legal documents couched in impenetrable prose), the ET saw this as:

> **"96. … an excellent illustration of the phenomenon of which Elias J warned in the *Kalwak* case of "armies of lawyers" contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides"**

74. As for when Uber drivers should be treated as undertaking services as "workers", the ET rejected the contention this could only be when a driver was actually carrying a passenger:

> **"100. … 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 an opportunity to do so. Being available is an essential part of the service which the driver renders to Uber. …"**

75. In the alternative, the ET concluded:

> **"102. … 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."**

76. Having found the Uber driver to be a "limb b" worker, the ET turned to the question when their "working time" would begin and end for the purposes of regulation 2(1) **WTR**. It rejected the Claimants' broader case that this was from their leaving to returning home. Consistent with its earlier reasoning, the ET concluded (subject to cases when a trip would take a driver outside the relevant territory, on which it had heard insufficient argument) the drivers' working time started as soon as they were in their territory, with the app switched on, ready and willing to accept trips, and would end as soon as one of those conditions ceased to apply:

> **"122. … 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." … (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.) …"**

77. In the alternative, the ET found that working time began at the latest when the driver accepts a trip and ends when the trip is completed (see paragraph 124).

78. Lastly the ET considered how the Uber drivers' working time was to be treated under the **NMWA**. Relying on its earlier reasoning, the ET rejected Uber's submission that the drivers were to be treated as engaged on "time work" (working only when actually carrying a passenger). In the circumstances, it concluded the default position must apply: an Uber driver was to be treated as performing "unmeasured work", which would include time spent returning to the driver's territory after completing a trip outside that area but not travel time for the purpose of getting to and from work (ET paragraphs 127 to 128).

The Appeal and the Parties' Submissions

The Appeal

79. Uber's appeal challenges the following three findings of the ET:

(1) That the Claimants were "employed" as "workers" by ULL;

(2) That the Claimants' working time was to be calculated in accordance with regulation 2(1) **WTR**; and

(3) That for the purposes of the **NMWR**, they were engaged in "*unmeasured work*".

Submissions

Uber's Case

80. The central question in this appeal was whether the ET had erred in law in finding that the Claimants were employed by ULL as workers; in particular, whether they were working under a contract with ULL whereby they undertook to personally perform services for ULL

(questions that underpinned each of the ET's findings challenged by the appeal). It was Uber's case that the Claimants had never worked under a contract with ULL: they had made no contractual undertaking to perform any services but, even if they had, it was not with ULL. The Claimants' contract was with UBV, the entity that owned the Uber app, which allowed them to access the app, in consideration of which they would pay UBV commission of 20 or 25% of the fare for each journey. The app was a powerful piece of technology putting drivers in touch with those wanting to utilise their driving services. Neither drivers nor passengers were under any obligation to use the Uber app; if they did not do so, they would pay nothing to UBV. ULL's function was to hold the PHV operator licence for London and to meet the regulatory requirements for that licence: dealing with complaints and lost property, accepting bookings; as such ULL was operating in the same way as a traditional mini-cab company, although its scale was much greater because of the app. The case thus had to be seen in the context of the traditional mini-cab or hire car operation, subject to a particular regulatory environment, utilising the modern technology of the Uber phone app.

81. Mini-cab companies could operate in different ways. Drivers might be employees, alternatively, they might be self-employed but still "workers" for statutory purposes. Another alternative would be for the company to act as agent for drivers who were in business on their own account; in such cases, any contract between company and driver would not be for services provided by the latter but for the agency services provided by the company to the driver. These common methods by which mini-cab companies might operate were recognised as such in employment and VAT case-law. In the employment law context, see: **Mingeley v Pennock and Anor (trading as Amber Cars)** [2004] ICR 727 CA (a discrimination case (but subject to essentially the same statutory test) in which it was held there was no contract for Mr Mingeley to personally execute any work or labour for Amber Cars, he simply paid a weekly fee to access

their computer system and (per Buxton LJ) had collateral contracts with passengers); and **Khan v Checkers Cars Ltd** UKEAT/0208/05 (in which the EAT questioned the Respondent's concession that Mr Khan was a worker when there was no mutuality of obligation). Under VAT law, the position was recognised in the guidance provided by VAT Notice 700/25; in the case-law, the decisions went both ways although in "cash" cases it was consistently held that the passenger and driver were the parties to the relevant contractual relationship (the position required greater investigation in account cases), see **Carless v Customs and Excise Commissioners** [1993] STC 632 QBD, the High Court upholding the VAT Tribunal's finding that the contract was one of agency. Although a different conclusion was reached by the VAT and Duties Tribunal in **Akhtar Hussain t/a Crossleys Private Hire Cars v The Commissioners of Customs and Excise** (No. 16194) [1999], in that case the business offered customer discounts not passed on to the drivers (a distinction noted by the First-Tier Tribunal (Tax Chamber) in **Lafferty and Anor v Commissioners for HMRC** [2014] UKFTT 358). As recognised in **Khalid Mahmood v Commissioners for HMRC** [2016] UKFTT 622 TC, the key question was: who made the supplies of transportation?

82. Uber's agency model was nothing new: it was simply the scale of the arrangement that was different but that reflected the new technology. An analogous arrangement could be seen in the case of the golf club caddie in **Cheng Yuen v Royal Hong Kong Golf Club** [1998] ICR 131, in which the Privy Council rejected the view taken at first instance that it was "artificial" to see the club as acting as agent for the caddie when collecting the fee for his services from individual golfers, allowing there could be a separate contract each time the complainant agreed to caddie for a particular golfer (an analysis adopted by Elias LJ in **Stringfellow Restaurants Ltd v Quashie** [2012] EWCA Civ 1735 at paragraph 49).

83. Here the written agreements made clear that the drivers provided transportation services to passengers; Uber was simply the agent. The question was whether the written contracts reflected the true position (**Autoclenz Ltd v Belcher and Ors** [2011] ICR 1157 SC(E)), but inequality of bargaining power did not mean the written agreement should be ignored (**Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners** [2014] UKSC 16). And the absence of a contract between the drivers and ULL was not fatal to the existence of an agency relationship, which could be inferred from conduct (see *Bowstead & Reynolds on Agency* (20th edition, Sweet & Maxwell 2016, at paragraph 1-0006) and **Garnac Grain Company Inc v HMF Faure & Fairclough Ltd and Ors** [1968] AC 1130 HL(E)). The ET here erred in disregarding the written contracts between the drivers, UBV and the passengers, failing to have regard to the contract arising thereby in respect of each trip between driver and passenger once ULL accepted a booking on the driver's behalf. The provision for a direct contract between putative worker and service end-user (rather than putative employer) distinguished this case from **Autoclenz** (there the services were provided to the putative employer; the only question was as to the *capacity* in which they were provided). The ET further erred in concluding that any of the matters on which it relied (see ET paragraphs 87 to 96) meant the written contracts, properly construed, did not reflect the true relationship between the parties. First, there was no proper basis for the ET's rejection of the written contracts; second, it erred in finding Uber was a supplier of transportation services when such services were contractually supplied by the drivers to the passenger, not by Uber; and third, the ET disregarded basic principles of agency law and thus erred in finding "absurd" a number of propositions which were legally orthodox and factually unremarkable (as agent, Uber could still market its services; it was unremarkable that an agent might bind a disclosed but unidentified principal; a *del credere* agent could indemnify their principal (*Bowstead* paragraph 1-038)).

84. The ET had further erred in relying on regulatory requirements as indicia of an employment relationship, specifically as required of ULL as holder of the PHV Operator's Licence, pursuant to the **Regulations**. The written agreement between UBV and drivers envisaged a contract between driver and passenger, which might be arranged through an affiliate (in London, ULL) as required by the relevant regulatory regime. The regulatory context of itself could not establish a particular form of relationship: Parliament legislated for PHV drivers in London in 1998 (**the 1998 Act**) but there was nothing to suggest it had intended to outlaw the use of the agency model in the PHV industry; the regulatory requirements (accepting and declining bookings; checking drivers' documentation; obtaining a record of passenger details; fixing the fare; handling passenger complaints) were, at most, neutral in this context - they were legally irrelevant to the characterisation of any contractual relationship between the parties.

85. The ET had further made internally inconsistent and perverse findings of fact in concluding the Claimants were required to work for Uber. It had wrongly held that drivers were required to accept trips and not cancel, when the ET had: (i) found there was no obligation on a driver to switch on the app (ET paragraph 85), and (ii) expressly allowed that a driver might have the app switched on but still not be able and willing to accept assignments (ET paragraph 86). Specifically, the finding at paragraph 92(4) that drivers were required to accept trips was without evidential foundation and paragraph 51 could not be relied on in support as this was not a finding of fact by the ET (Uber contends this was in fact a reference to a US document; there was no evidence the warning had been applied in the UK). It was also wrong to hold that Uber "*accepted the risk of loss*" (ET paragraph 92(11)), given the ET's findings were consistent with the conclusion that the drivers accepted that risk. Similar points could be made in respect of the conclusion that the Claimants' working time was to be calculated in

accordance with regulation 2(1) **WTR**: as stated above, the Claimants were at liberty to take on or refuse work as they chose, or to cancel trips already confirmed, and could work for others, including direct competitors of Uber; in the circumstances, they were not at Uber's disposal or working for Uber; they were providing services to the passenger, not to or for Uber. That was also the position in respect of the finding that, for the purposes of regulation 44 of the **NMWR**, the Claimants were engaged in "*unmeasured work*", a finding that meant the drivers would be entitled to be paid at national minimum wage rates once they were in the relevant territory with the app switched on, even if they refused all trips offered.

The Claimants' Case

86. The agency argument was crucial to Uber's case: if ULL was not the drivers' agent, the driver/passenger contract was a fiction and if the written characterisation of the relationship did not reflect the reality, the label used by the parties would not matter and the ET was entitled to so find. In the case of ULL, there was no written document under which drivers had appointed it as their agent. Uber now contended agency was to be inferred from the way the relationship operated in the regulatory context but that was not how the case was put in terms below. The ET's decision reflected the case before it (see ET Reasons paragraph 91); on that basis it rejected any argument that the driver was acting pursuant to agreements entered into with passengers by ULL as agent. Moreover, the suggestion that an agency relationship might commonly be inferred from the conduct of mini-cab businesses was not supported by VAT Notice 700/25: whether a taxi or private hire business acted as agent for drivers depended on the terms of any (written/oral) contract with the drivers. And the VAT cases took the matter little further, showing this was a complex and fact-specific question for the first instance tribunal (see, for example, **Carless** at page 638a-d). Notwithstanding Uber's contention that the agency model was normal within the industry, the VAT cases showed it was not uncommon for

the PHV operator licence holder to act as principal, see, for example, **Hussain t/a Crossleys Private Hire Cars v Commissioners of Customs and Excise** (16194) [1999] and **Bath Taxis (UK) Ltd v HMRC** (20974) [2009] - both cases emphasising the fact-sensitive nature of the enquiry.

87. In conducting this enquiry, aspects of the relationship arising from the regulatory regime were not irrelevant - for example, the personal service requirement (section 4 of the **1998 Act** and regulation 2 of the **Regulations**) could not be ignored - although here the facts took this beyond a relationship dictated by the regulatory requirements. Given it was inherent in Uber's case that the written contractual documentation did not provide the complete picture (ULL's agency relationship with the drivers being inferred from conduct), that had to be for the ET to determine, taking into account all facts and circumstances. Even if this had been a case where the relevant relationship was governed by a written contract between the relevant parties, the ET was entitled to look at the reality of the situation, see **Autoclenz**. **Secret Hotels2** was of less assistance, not least as the very feature causing scepticism in the employment context - inequality of bargaining power - was the basis for the decision, and it was not being said (in contrast to the present case) that the contractual documentation did not reflect the reality.

88. The perversity challenge to the ET's conclusions had to meet the high threshold for such appeals. The ET had made findings as to what happened in practice - for example, as to the way drivers were penalised for cancellations or for not using the Uber-GPS route; or as to Uber's acceptance of financial loss - not reflected in the contractual documentation. It found ULL gave direction and control beyond that required by the regulatory regime (e.g. complaint investigation and adjudication going further than the requirement to record; the prohibition on drivers contacting passengers, which was no part of the regulatory requirements), at a level that

A pointed away from an agency relationship (*Bowstead* paragraph 1-017) and towards the existence of an employment relationship (and see paragraphs 70 to 72, **Allonby v Accrington and Rossendale College and Ors** [2004] ICR 1328 ECJ). Similar observations could be made relating to the ET's findings relevant to the integration of the drivers into the Uber business as a supplier of transportation services (see paragraph 89) - a further factor acknowledged to be relevant for the determination of employment status, see paragraph 25 **Bates van Winkelhof v Clyde & Co LLP and Anor** [2014] ICR 730 CA.

89. Moreover, the drivers' right to decline work when offered was not fatal to a finding of worker status, see **Carmichael and Anor v National Power plc** [1999] 1 WLR 2042 HL, in which it was held that lack of mutuality of obligation might be fatal to the existence of an umbrella contract but said nothing about employment status when actually working (see at page 2047G-H), and also see **James v Redcats (Brands) Ltd** [2007] ICR 1006 EAT at paragraphs 82 to 84 (although it was allowed to have a potential relevance in **Quashie v Stringfellow** at paragraphs 10 to 13, in **Windle v Secretary of State for Justice** [2016] ICR 721 CA at paragraphs 22 to 25 and in **Pimlico Plumbers Ltd v Smith** [2017] ICR 657 CA at paragraph 145). In any event, the ET here found there was a requirement for drivers to accept 80% of offers of work, which was sufficient for a finding of an obligation to work. The ET had found that being in the territory, with the app switched on and being willing and able to work amounted to working time for the purposes of the **WTR** (and the finding that this was unmeasured work for **NMWA** purposes stood or fell with the **WTR** finding): being available was part of the service - ULL needed a pool of available drivers in the territory. Even if that was not correct, the drivers had to be workers engaged on working time once they were actually driving a particular passenger on an accepted trip. The fact that a different view had been taken

in **Mingeley** was nothing to the point, not least as that case was argued pre-**Autoclenz** (a point that could also be made in respect of **Cheng**).

The Case-Law - Discussion and Conclusions as to the Correct Approach

90. There have been a number of appellate cases concerned with the proper interpretation of the definition of the limb (b) worker. The first point to note is that the statutory test does not require that there is an "umbrella" contract; there may, instead, be a series of contracts arising as and when work is undertaken, see **Carmichael v National Power plc** [1999] 1 WLR 2042, HL and **James v Redcats (Brands) Ltd** [2007] ICR 1006 EAT. There does, however, have to be a contract between putative worker and putative employer, even if purely assignment based, and the determination of the nature of the relationship may be informed (as part of the overall factual matrix) by the fact that there are gaps between assignments (see **Quashie v Stringfellow** at paragraphs 10 to 13, **Windle v SoS for Justice** [2016] ICR 721 CA at paragraphs 22 to 25, and **Pimlico Plumbers Ltd v Smith** [2017] ICR 657 CA at paragraph 145).

91. The question at the heart of the current appeal is whether there was any contract between the drivers and ULL and, if so, whether that was a contract whereby the drivers provided services to ULL or whether ULL provided a service (as agent) to the drivers as and when they undertook driving services for passengers. Although there was no written contract directly between ULL and the drivers, that would not be fatal to either case. For its part, ULL relies on the characterisation of its relationship with Uber drivers in other contractual documentation, which it contends represents the reality of the position: Uber drivers acknowledging that it acts as their agent in their provision of transportation services to passengers. The ET disagreed, holding that the contractual documentation did not reflect the

reality and thus that - following **Autoclenz Ltd v Belcher and Ors** [2011] ICR 1157 SC(E) - it was entitled to disregard the terms in the written agreements and the labels used therein.

92. In **Autoclenz** Lord Clarke of Stone-cum-Ebony JSC (with whom the other members of the Court agreed) considered the normal approach under contract law (as summarised by Aikens LJ in the Court of Appeal in **Autoclenz** [2010] IRLR 70):

> **"20. …**
>
> > **"87. … Express contracts (as opposed to those implied from conduct) can be oral, in writing or a mixture of both. Where the terms are put in writing by the parties and it is not alleged that there are any *additional* oral terms to it, then those written terms will, at least prima facie represent the whole of the parties' agreement. Ordinarily the parties are bound by those terms where a party has signed the contract: see eg *L'Estrange v F Graucob Ltd* [1934] 2 KB 394. If a party has not signed a contract, then there are the usual issues as to whether he was made sufficiently aware of the clauses for a court to be able to conclude that he agreed to the terms in them. That is not an issue in this case.**
> >
> > **88. Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.**
> >
> > **89. Generally, if a party to a contract claims that a written term does not accurately reflect what was agreed between the parties, the allegation is that there was a continuing common intention to agree another term, which intention was outwardly manifested but, because of a mistake (usually a common mistake of the parties, but it can be a unilateral one) the contract inaccurately recorded what was agreed. If such a case is made out, a court may grant rectification of a contract. See, generally, the discussion in the speech of Lord Hoffmann, in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, paras 48-66, with whom all the other Law Lords agreed." "**

93. Whilst not departing from those principles in respect of ordinary contracts, in particular commercial contracts, Lord Clarke observed that a different approach had been adopted in the case-law applicable to employment contracts. In particular, he approved the judgment of Elias J (as he then was), in the EAT case **Consistent Group Ltd v Kalwak** [2007] IRLR 560:

> **"25 …**
>
> > **"57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem [in *Express & Echo Publications Ltd v Tanton* [1999] ICR 693]. He said this (p 697G) 'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'**

> **58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.**
>
> **59. … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance …" "**

94. The EAT's judgment in **Kalwak** was reversed by the Court of Appeal but Lord Clarke was clear Elias J had set out the correct approach: the question in every case was what was the true agreement between the parties and that required looking at the reality of the obligations and the reality of the situation (paragraph 29 **Autoclenz** SC). In the employment context, the particular reality of the situation is likely to be different to the environment in which a commercial contract is agreed; as Aikens LJ identified (paragraph 92) in the Court of Appeal:

> **"92. … the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. …"**

95. Lord Clarke agreed, holding:

> **"35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."**

96. In considering the approach to this issue in the present case, however, Uber relies on a more recent judgment of the Supreme Court (given by Lord Neuberger) in **Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners** [2014] UKSC 16, [2014] STC 937. **Autoclenz** was not cited in **Secret Hotels2**, no doubt because **Secret Hotels2** had nothing to do with an employment relationship but concerned the potential VAT liability of a travel company ("Med"), which marketed and arranged the sale of holiday accommodation.

A The Court held that Med acted as an agent for the providers of the accommodation, so did not have to account for VAT on the sales; it was not (contrary to the finding by the First-Tier Tribunal, upheld by the Court of Appeal) supplying accommodation to customers or acting as principal. In considering how the relationships were to be characterised - and noting it was not suggested the written agreements were a sham or liable to rectification - the Court stated:

> **"34. … (i) the right starting point is to characterise the nature of the relationship between Med, the customer, and the hotel, in the light of the … Agreement and the website terms ('the contractual documentation'), (ii) one must next consider whether that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts, and (iii) if so, the final issue is the result of this characterisation so far as [the relevant provision under the EC Principal VAT Directive] … is concerned."**

97. HM Revenue and Customs Commissioners ("the Commissioners") argued that particular aspects of the contractual documentation demonstrated this was not properly to be characterised as an agency arrangement; specifically, the Commissioners relied on the one-sided (in favour of Med) nature of the documentation. The Supreme Court disagreed: the matters relied on were not inconsistent with a relationship of agency and, to the extent the contractual obligations favoured Med, merely reflected the relative negotiating positions of the parties (see paragraph 41). In **Secret Hotels2**, the imbalance in the parties' relative negotiating positions was thus seen as an explanation for the one-sided nature of the contractual bargain reached; it did not inform the Court's approach when testing the characterisation of the relevant relationships in the contractual documentation as against the economic reality. As I read **Autoclenz**, that represents (understandably, given the different context of the case) a difference to the approach that is to be adopted in the field of employment.

98. Moreover, recognition of the imbalance of power between the parties in the employment context has informed the introduction of the statutory rights (such as minimum wage and working time protections) that the Claimants seek to exercise in this case, see, for example, the observation of Lord Reed JSC in **R (oao Unison) v Lord Chancellor** [2017] UKSC 51:

> **"6. Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract. In more recent times, further measures have also been adopted under legislation giving effect to EU law. In order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice."**

99. Given the context in which the present case is to be determined, I return to **Autoclenz**. The ET had to determine what was the true agreement between the parties (here, the drivers and ULL) (**Autoclenz** paragraph 29). In so doing, it was important for it to have regard to the reality of the obligations and the reality of the situation (**Autoclenz** paragraph 30) and, in investigating allegations that the written contractual documentation did not represent the actual terms agreed, it was to be "*realistic and worldly wise*" (**Autoclenz** paragraph 34); that is an approach properly to be described as "*purposive*", taking into account the relative bargaining power of the parties when deciding whether the terms of any written agreement represented their true intentions (the true agreement often having to be gleaned from all the circumstances of the case, of which the written agreement is only a part (**Autoclenz** paragraph 35)).

100. In thus approaching its task, the ET's starting point must always be the statutory language, not the label used by the parties: simply because the parties have used the language of self-employment does not mean that the contract does not fall within section 230(1)(b); the distinction drawn by that provision being explained by Baroness Hale of Richmond DPSC in **Bates van Winkelhof v Clyde & Co LLP** [2014] ICR 730 SC(E), as follows:

> **"25. … within the latter class [the self-employed], 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 someone else. …"**

101. Which side of the divide an individual falls will inevitably be case- and fact-sensitive. That, indeed, is the message I take from the various "mini-cab" cases I was referred to in the

VAT context. Most are first instance decisions and not binding on this Tribunal, but, in any event, what they show is an attempt to determine in each case whether the drivers were providing their services as such to or as part of another entity (the taxi firm) or directly to the passengers as their clients or customers.

102. In determining that question in the employment context, it will be relevant to consider the nature of the obligations between the parties, but the absence of a general obligation to work cannot be fatal to those cases where it is accepted that there are gaps between particular engagements or assignments (see per Elias J (as he then was) in **James v Redcats**, at paragraph 82, distinguishing **Mingeley v Pennock** [2004] ICR 727 CA). Other factors that may be helpful are likely to include the degree of integration into the business undertaken by another (see **Hospital Medical Group Ltd v Westwood** [2013] ICR 415 CA, in particular per Maurice Kay LJ at paragraph 19) and the degree of true independence in the provision of the service (see **Allonby v Accrington and Rossendale College** C-256/01, [2004] ICR 1328 ECJ at paragraph 71). Seeking to provide any more specific definition to the statutory test would, however, be futile: the legislative language allows for the flexibility required in this field and respect has to be given to the nuanced assessment carried out by an ET at first instance.

Conclusions

103. The issue at the heart of the appeal can be simply put: when the drivers are working, who are they working for? The ET's answer to this question was that there was a contract between ULL and the drivers whereby the drivers personally undertook work for ULL as part of its business of providing transportation services to passengers in the London area. On the ET's findings, there are two possible times when the drivers might thus be considered to be working: (1) when they are in their territory, have the app switched on and are able and willing

to work; or (2) when they have accepted a trip. I consider first the general question and then turn to the issue of timing.

104. It is Uber's case that Uber drivers are working in business on their own account directly for their passengers: ULL acts as agent for those drivers in their relationship with passengers; the drivers do not work for ULL. Uber's case on appeal has focussed on what it contends was the ET's inability to understand the nature of this agency relationship. Key to Uber's argument is its contention that the ET erred in disregarding the written contracts, which not only recorded the parties' agreed characterisation of the relationship between ULL and the drivers as one of agent/principal but (in the same way as in **Secret Hotels2**) set out terms governing that relationship that were consistent with that label; to the extent the ET considered those terms to be one-sided, that (again consistent with **Secret Hotels2**) (i) did not point away from an agency relationship, and (ii) did not entitle the ET to disregard the written contract.

105. In the normal commercial environment (that pertaining in **Secret Hotels2**) the starting point will be the written contractual documentation; indeed, unless it is said to be a sham or liable to rectification, the written contract is generally also the end point - the nature of the parties' relationship and respective obligations being governed by its terms. Here, however, the ET was required to determine the nature of the relationship between ULL and the drivers for the purposes of statutory provisions in the field of employment law; provisions enacted to provide protections to those often disadvantaged in any contractual bargain. The ET's starting point was to determine the true nature of the parties' bargain, having regard to *all* the circumstances. That was consistent with the approach laid down in **Autoclenz** and was particularly apposite given there was no direct written contract between the drivers and ULL. Adopting that approach, the ET did not accept that the characterisation of the relationship between drivers and

ULL in the written agreements properly reflected the reality. In particular - and crucial to its reasoning - the ET rejected the contention that Uber drivers work, in business on their own account, in a contractual relationship with the passenger every time they accept a trip.

106. Uber argues that the ET thereby failed to understand how an agency relationship (i) might be typical within the private hire industry, and (ii) might operate; specifically, it criticises the ET's objection that:

> **"90. … The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is … faintly ridiculous. …"**

Uber says, on the contrary, the private hire industry is full of examples of single drivers operating as separate businesses, albeit sharing certain services.

107. The ET was not, however, denying the possibility of individual drivers operating as separate businesses and, as such, entering into direct contracts with passengers (albeit possibly through a shared agent (the mini-cab "firm") operating as the contact); it was saying this was not what it found to be the true position in this case. In part that was due to the size of the operation: 30,000 individual drivers operating as separate businesses but sharing one point of contact might well raise a question as to whether that is a correct characterisation of what is happening and, while not determinative, the ET was entitled to have regard to the scale of the operation as part of the relevant factual matrix. More than that, however, the ET went on to test the proposition that these 30,000 individuals might still (regardless of numbers) be operating as businesses on their own account (as opposed to that of ULL), finding that did not reflect the reality: the drivers could not grow their "businesses", they had no ability to negotiate terms with passengers (save to agree a fare reduction) and had to accept work on Uber's terms.

A

108. Uber objects that a one-sided bargain is not incompatible with an agency arrangement (again, see **Secret Hotels2**). It further takes issue with specific findings by the ET, which it says fail to appreciate how the circumstances in question might simply be aspects of an agent/principal arrangement. More specifically, on the question of control, Uber contends that the ET failed to appreciate how control on the part of an agent might still be compatible with its role as agent to a principal; wrongly had regard to factors resulting from the regulatory regime; and reached inconsistent or perverse findings as to the existence of control.

B

C

109. Uber's case in these respects is founded on the premise that the ET's starting point should have been informed by the characterisation of the relationship between ULL and the drivers as set out in the documentation. I disagree. The ET was not bound by the label used by the parties; in the same way as the first instance tribunals in the VAT context, the ET was concerned to discover the true nature of the relationships involved. Its findings led it to conclude that the reality of the relationship between ULL and Uber drivers was not one of agent and principal; specifically, it rejected the argument that the drivers were the principals in separate contracts with passengers as and when they agreed to take a trip. It rejected that case because it found the drivers were integrated into the Uber business of providing transportation services, marketed as such (paragraphs 87 to 89), and because it found the arrangements inconsistent with the drivers acting as separate businesses on their own account, given that they were excluded from establishing a business relationship with passengers (drivers could neither obtain passengers' contact details nor provide their own), worked on the understanding that Uber would indemnify them for bad debts and were subjected to various controls by ULL (paragraphs 90 to 92). Having found that Uber drivers did not operate businesses on their own account and, as such, enter into contracts with passengers, the ET was entitled to reject the label of agency and the characterisation of the relationship in the written documentation.

D

E

F

G

H

110. Descending into the ET's specific findings relevant to these conclusions, although an agent might well market services as agent of its principal, the ET was entitled to see Uber's marketing as being for its collection of 'products'; the drivers being integrated into the business as deliverers of those products. Similarly, an agent may bind a disclosed but unidentified principal but where the purported 'principal' is prevented from building up a business relationship with the end user of the service, an ET is entitled to question whether that is the right way to characterise the relationship. As for the ET's finding that the parties had a shared understanding that Uber would indemnify drivers for unpaid fares, while there might be *del credere* agents who effectively undertake to indemnify their principals, the commentary in *Bowstead* (paragraph 1-038) suggests that would not be a common inference and, again, I am unable to see why the ET was not entitled see this as something also pointing away from Uber drivers being the principals in separate contractual relationships with passengers.

111. As for control, an agent-principal relationship need not assume power lies with the principal: while a principal must have control in the sense of authorising the agent to act as such, it is not seen as an essential aspect of the continuing relationship (*Bowstead* paragraph 1-017). That said, where control lies can be important in the employment field, not least as it can found vicarious liability on the part of the putative employer. Again, the ET was not bound to start from the assumption that this was a relationship of agent/principal; it was entitled to look at all factors to determine whether this was a case in which the Claimants as Uber drivers were entering into contracts with passengers as part of their own business undertakings. Seeing that they were subjected to control on the part of ULL was an indication that they were not.

112. As for the regulatory requirements point, where there is no suggestion that such requirements were intended to give rise to a particular form of employment or worker status,

A that is no doubt part of the relevant background. That said, I cannot see that an ET has to disregard factors simply because they might be said to arise from compliance with a particular regulation. In the present case, personal service was a regulatory requirement but was also a relevant matter in determining worker status. An ET is not obliged to disregard such a factor, although it should see it in context, which may include the regulatory context. At the risk of repetition, it is all part of the factual matrix for the ET to assess.

C 113. In any event, the ET's findings on control in this case were not limited to matters arising as a result of regulation. Although ULL, as holder of the relevant PHV operator licence, was required to hold copies of documentation relating to PHV drivers and their vehicles, there was no regulatory requirement for it to carry out the interview and induction process ("onboarding") it chose to operate. While it was required to obtain and record passenger details, there was no regulation stopping ULL passing these on to the drivers, still less for it to stop drivers providing their contact details to passengers. Uber says these are matters of common sense, arising due to security concerns or for obvious commercial reasons (the concern about solicitation). That might be true but I cannot see that these factors - controls introduced by ULL at its choice - were thereby rendered any the less relevant. Similarly, although ULL - as the PHV operator licence holder - was required to operate a complaints procedure, it was not obliged to resolve those complaints without recourse to the drivers; again that was its choice. Yet further, there was no regulatory requirement for the guaranteed earnings scheme that had previously been in operation for new drivers, nor any obligation to indemnify drivers against fraud, nor to meet cleaning costs. And there was nothing in the regulatory regime that obliged ULL to warn drivers they should accept at least 80% of trip requests to retain their account status (as to which, see further below), to operate a ratings system (deactivating the accounts of those unable

to improve poor scores), to log drivers off if they decline three trips in a row or to provide a suggested route for each trip.

114. Uber further argues that crucial findings by the ET are simply inconsistent or perverse. Specifically, having found Uber drivers were under no obligation to switch on the app (paragraph 85), it was perverse to conclude that ULL exercised control. And when a driver had switched on the app, by also requiring they are "*able and willing to accept assignments*", it was perverse to conclude other than that switching on the app, of itself, gave rise to no obligation. Uber submits that, on the ET's own findings, it could not mean drivers assumed an obligation to accept all trips offered (see paragraph 51) and it was inconsistent for the ET then to conclude that drivers were required to accept trips (paragraph 92(4)).

115. The difficulty in deconstructing the ET's reasoning in this way is that the overall sense of the findings is lost. An ET is entitled to expect its Judgment to be read as a whole. Doing so, it is apparent that the finding that there was no absolute requirement to accept a trip was nuanced by the finding that a driver's account status would be lost if there was a failure to accept at least 80% of trips (ET paragraph 51). Uber objects that paragraph 51 cannot constitute a finding of fact by the ET and says the warning has been taken out of its (US) context. That presents a difficulty in that there is no specific challenge to paragraph 51 in the Notice of Appeal and the expectation there recorded has been relied on by the Claimants in oral argument before me. It would, moreover seem consistent with the ET's finding that the "Welcome Packet" given to drivers as part of the onboarding process informed them (as part of "*WHAT UBER LOOKS FOR*") that "*Going on-duty means you are willing and able to accept trip requests*" (ET paragraph 48). Similarly, while the ET did not find a driver was unable to cancel a job once accepted, it did record the warning given to those who did - that (absent good

cause) this amounted to a breach of the agreement between driver and Uber (ET paragraph 53). Adopting a 'whole Judgment' approach to the reasoning, I do not see its findings as inconsistent and Uber has not met the high burden of showing that they were perverse.

116. For these reasons, I am satisfied the ET did not err either in its approach or in its conclusions when rejecting the contention that the contract was between driver and passenger and that ULL was simply the agent in this relationship, providing its services as such to the drivers. Having rejected that characterisation of the relevant relationships, on its findings as to the factual reality of the situation, the ET was entitled to conclude there was a contract between ULL and the drivers whereby the drivers personally undertook work for ULL as part of its business of providing transportation services to passengers in the London area.

117. At this stage, it is necessary to return to the timing issue identified at the outset of this discussion. The Claimants' case was not put on the basis of an umbrella contract and the ET found they were only working under a contract to personally undertake work or services for ULL as and when they had the app switched on, were within the territory in which they were authorised to work, and were able and willing to accept assignments. Allowing that there could be gaps, when the drivers did not meet these requirements, the ET did not consider that to be fatal to their status as "workers" when they did.

118. On the ET's findings, I certainly see no difficulty with that conclusion in respect of those periods when a driver accepts a trip from ULL (see the ET's alternative finding at paragraph 102): the obligation assumed at that point is clear - the trip is assigned to that driver and there is an expectation that they will undertake the assignment personally (substitution is

not allowed), for which they will be paid at a rate laid down by ULL (through the payment collection agency of UBV), or face possible penalties if they fail to do so.

119. The more difficult question arises in respect of the ET's broader conclusion, that Uber drivers are also workers in between accepting assignments. The ET saw this as a consequence of the obligation on the part of the driver to be "*available*" (paragraph 100). Uber objects, however, that at such times the driver has no greater obligation to accept an offer of a trip from ULL than from any other private hire operator which might also have the driver on its books. The driver might thus "*be available*" for others in the private hire industry (possible competitors of Uber) who may also assign trips, using similar smartphone technology, to those who stand ready to take on such assignments.

120. This is a point that has troubled me, not least as it is a finding that also informs the ET's approach to the determination of the drivers' "working time" for the purposes of the **WTR** (and, correspondingly, underpinned its rejection of Uber's contention that the drivers would be engaged on "time work" under regulation 30 **NMWR**). Is it fatal to the drivers' working status, or to their being engaged on working time, that they might also hold themselves out as seeking work from other PHV operators in the same territory at the same time?

121. In most instances of assignment-specific work (sometimes referred to as "zero-hours" work), there will simply be no mutuality of obligation between assignments: no obligation for work to be offered and no obligation for any offer of work to be accepted. That, however, is not what the ET found to be the reality of this case. Once Uber drivers are in the territory and have switched on the app, they will be offered a trip if they are the nearest driver and, as I understand the ET to have found, were told they "*should accept at least 80% of trip requests*"

to retain their account status (ET paragraph 51). There might be no requirement for a driver to stay in the territory or have the app switched on (in either event ULL will not offer them trips), but it cannot be said that no obligation arises at those times when they do. It is that obligation the ET characterised as "*being available*" (or, as Uber's onboarding "Welcome Packet" puts it: "*Going on-duty*"), an obligation it found essential to Uber's business (paragraph 100).

122. I record again that Uber disputes that paragraph 51 can be relied on. It says it cannot be seen as a finding of fact by the ET and wrongly refers to a warning that would never have been given to the Claimants (it says the document referenced relates to Uber in the USA). As I have previously observed, however, that gives rise to a difficulty at this level as I do not read the Notice of Appeal as including a specific challenge to paragraph 51 (nor has there been an application to the ET to correct this part of its Judgment by way of reconsideration). As the issue arose in the argument regarding paragraph 92(4) (unambiguously put in issue in the Notice of Appeal), the Claimants relied on paragraphs 51 and 52 as supporting the ET's conclusion. As I have also recorded, it is a reference that seems consistent with Uber's notion of "*Going on-duty*" and with the ET's finding as to ULL's business model. Taking the ET's findings in the round, I am satisfied that it permissibly found that Uber drivers assume an obligation when they are in territory and switch on the app and are available for work.

123. As for whether this would constitute "working time" under regulation 2(1) **WTR**, the definition is conjunctive: all three elements (working; at his employer's disposal; carrying out his activity or duties) need to be present for the time in question to be "working time". Allowing for a purposive approach, I can see that the Uber driver, having driven to the relevant territory (although this may be where they live) and switched on the app, might be deemed to be working and carrying out an activity or duty (being "*available*"). The question arises as to

whether the driver is also at ULL's disposal if, at the same time, permitted to be waiting (similarly "*available*") for a possible assignment from another PHV operator.

124. While, as I have said, I think the point is a difficult one, ultimately I am persuaded that the ET grappled with this issue and permissibly concluded that this was not a fatal consideration in this case. The answer to the question lies again in the requirement that drivers "*should accept at least 80% of trip requests*" (if paragraph 51 can be relied on) or (more generally) that being "*on-duty*" means being "*willing and able to accept trip requests*". The ET found this amounted to a requirement to "*accept trips*" (ET paragraph 92(4)). Even if the evidence allowed that drivers were not obliged to accept *all* trips, the very high percentage of acceptances required justified the ET's conclusion that, once in the territory with the app switched on, Uber drivers were available to ULL and at its disposal.

125. Uber complains that this finding is contradicted by the ET's additional requirement, that drivers also be "*able and willing to accept assignments*". That language, however, is taken from Uber's own onboarding literature. The ET seems to have used the expression in the same way to mean that the driver is then "*on-duty*" (as opposed to being "*off-duty*") and I read this as the ET's answer to the concern that the drivers might also be workers for other putative employers while engaged on working time for Uber. If the drivers have entered into an obligation of the same nature for another entity (so, to similarly accept almost every trip request made of them), then - as a matter of evidence - they are unlikely to be at Uber's "disposal"; that is how I read the ET's observation (paragraph 122) that it will "*be a matter of evidence in each case whether, and for how long, [the driver] remains ready and willing to accept trips*".

126. As I have stated, I do not see any difficulty with the characterisation of the Uber driver's time as "working time" when a trip offer from ULL is accepted. The assessment of the driver's status and time in between the acceptance of individual trips will, however, be a matter of fact and degree. On the ET's findings of fact in this case, I do not consider it was wrong to hold that a driver would be a worker engaged on working time when in the territory, with the app switched on, and ready and willing to accept trips ("*on-duty*", to use Uber's short-hand). If the reality is that Uber's market share in London is such that its drivers are, in practical terms, unable to hold themselves out as available to any other PHV operator, then, as a matter of fact, they are working at ULL's disposal as part of the pool of drivers it requires to be available within the territory at any one time. That might indeed seem consistent with Mr Kalanick's description of the original Uber model as a "*black car service*". If, however, it is genuinely the case that drivers are able to also hold themselves out as at the disposal of other PHV operators when waiting for a trip, the same analysis would not apply.

127. In the circumstances and for all those reasons, I dismiss Uber's appeal.