Appeal No. UKEAT/0231/18/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 11 December 2019
Judgment handed down on
20 December 2019

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR WARREN AUGUSTINE	APPELLANT
ECONNECT CARS LIMITED	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR JEREMY LEWIS (of Counsel) Instructed through: Advocate (formerly the Bar Pro Bono Unit)
For the Respondent	MR CHARLES MURRAY (Of Counsel) Instructed by: DAS Law, North Quay, Temple Back, Bristol BS1 6FL

SUMMARY

JURISDICTIONAL POINTS – Worker, employee or neither

The employment tribunal had properly found that the claimant was a “worker” but not an “employee” within section 230 of the Employment Rights Act 1996. There was no error of law or wrong approach to that issue.

The tribunal had erred in deciding that the claimant was not a “part-time worker” within regulation 2(2) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the 2000 Regulations).

The claimant was a part-time worker within regulation 2(2) of the 2000 Regulations. His driving work was not piecework. Although paid on a commission only basis, he was paid in part by reference to the time he worked and was not identifiable as a full-time worker.

The tribunal properly and with adequate reasons found that the claimant’s treatment at the end of the relationship was not for any prohibited reason, i.e. making a protected disclosure, asserting a right to the national minimum wage and alleging a breach of the 2000 Regulations.

The claim for less favourable treatment under the 2000 Regulations would be remitted back to the same tribunal, if that tribunal was still available to sit and could reconvene without undue delay; otherwise, it would be remitted to a fresh tribunal.

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THE HONOURABLE MR JUSTICE KERR

Introduction and Summary

1. There are three main issues in this appeal and cross-appeal.

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(1) The first is whether the tribunal properly found that the appellant, the claimant below (whom I shall call the claimant) was a "worker" but not an "employee" within section 230 of the Employment Rights Act 1996 (the ERA).

(2) Secondly, did the employment tribunal go wrong in law when it decided that the claimant was not a "part-time worker" within regulation 2(2) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the 2000 Regulations)?

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(3) Thirdly, did the tribunal make a legally flawed or inadequately reasoned finding that the respondent's treatment of the claimant at the end of their relationship was not for a prohibited reason, namely making a protected disclosure, asserting a statutory right to the national minimum wage and alleging a breach of the 2000 Regulations?

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2. The appeal was allowed by His Honour Judge David Richardson to proceed to a full hearing, subject to amendment of the grounds and deletion of certain grounds. The three issues above are what remains of it. The appeal is against a decision of Employment Judge Goodrich, sitting in East London with Mr T. Burrows and Ms J. Owen. The hearing took place from 18-25 October 2017. The reserved judgment and reasons were dated 29 December 2017 and sent to the parties on 8 January 2018.

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The Facts

3. The tribunal found the following facts. The claimant is a private hire car driver and law graduate. He had worked for two other private hire car and driver providers before he joined the respondent, which had about 20 to 25 drivers working for it. The respondent's cars were all electric.

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4. Before joining the respondent, the claimant registered with Her Majesty's Revenue and Customs (HRMC) as self-employed pursuant to arrangements with his former employer. He filed his own tax return. That continued during his time with the respondent.

5. On 20 September 2016, the claimant contacted the respondent in response to an advertisement. After a preliminary telephone conversation with a man known only as "Luke", he had a meeting the next day with a Ms Yurttagul, an administrator for the respondent. She talked him through the respondent's driver terms and he signed the relevant documents.

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6. The tribunal found that the terms of the agreement were standard terms. As set out in the documents or agreed orally, the main terms were as follows:

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(1) rent free use of a car provided by the respondent for the first six weeks;

(2) thereafter, rent free use of the car if the car is collected at the start of a shift and returned at the end of the shift;

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(3) otherwise, drivers must pay a £200 per week rental charge after the first six weeks;

(4) drivers must wear a suit and tie when working;

(5) drivers would normally work five shifts a week of 10 to 12 hours, but the claimant could work part-time and determine his own hours but drivers were expected to notify their available hours weekly;

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(6) drivers must get the car cleaned daily at a car wash in Shoreditch, not at the driver's expense;

(7) the claimant signed a declaration that he was self-employed and responsible for his own tax and national insurance;

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(8) drivers receive 62.5 per cent of the fare paid by the customer for each journey; parking costs were reimbursed provided they were correctly added to the job;

(9) a bond of £1,000 must be provided by the driver to cover any damages or fines for which the driver was responsible, repayable 28 days after the last day of work, less any amount owing;

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(10) there were detailed provisions about allocation of jobs, communication by text, telephone and email and notification of readiness to work;

(11) there were detailed provisions about performing duties, e.g. never cancelling a job without permission, arriving on time, greeting passengers, not playing the car radio unless requested, not making private calls while driving, and so forth;

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(12) there were detailed provisions about the taking of breaks, notification of breaks, parking legally while on a break or awaiting the next job and keeping in touch with the controllers;

(13) there were detailed requirements about ending a shift, signing off to the controller, checking any work allocated at the start of the next shift and making sure the car battery was at least 80 per cent charged;

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(14) drivers had to sign a written agreement including confidentiality obligations and a one year post-termination restrictive covenant (of doubtful enforceability).

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7. The claimant asked for information about customer fare rates. He said he needed to know the rates to calculate his available hours, so he could balance working hours against other personal responsibilities. He was told the rates were commercially sensitive. However, the fare for each journey becomes known to the driver at the end of that journey.

8. The respondent had three types of customers. The first group, called "low" were customers of local authorities; the customer would pay part of the fare, the local authority part. The second, called "middle", were corporate clients serviced by another company which used the respondent to provide the service. The main client was the BBC. The rates were fixed. The third group was classified as "high". This group of clients comprised hotels or other

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contacts of the respondent, where the price paid by the individual passenger was negotiated between the client and the respondent.

9. The claimant was then introduced to the driving work. He was shown how to download the app used to allocate work, how and where to charge the car and so forth. He was taken on a test drive. Then he started working for the respondent, on 25 September 2016 at about 11pm.

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10. He had no control over which customers he drove. He did whichever jobs were allocated to him. He was not permitted to replace himself with a substitute driver. The tribunal found he was required to perform the work personally.

11. He told the respondent he could not specify his hours but would work three to four hour shifts five days a week. His hours were such that most of his jobs were done under the BBC contract. His hours were highly flexible and determined by him, not the respondent. He was expected to work a reasonable number of hours each week.

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12. From 17 October 2016, a Mr Naylor was appointed as the respondent's operations supervisor. He was instructed to devise a new bonus scheme for drivers. He conducted a survey of drivers' views. The drivers wanted more work to generate more earnings, but the respondent felt they were not working enough at times of high demand. Some, Mr Naylor thought (not the claimant), were unscrupulously taking advantage of the six week rent free period and then ceasing to work for the respondent when it was over.

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13. The six week rent free period was reduced to two weeks, with a new added condition that drivers must work at least five shifts of ten hours each during each of the two weeks. This new arrangement was to take effect at about the time the claimant was nearing the end of his six week rent free period. The claimant, however, wanted to continue rent free use of the car after the end of the six week period, by dint of dropping the car off at the end of each shift and collecting it at the start of the next one, as agreed with "Luke" and Ms Yurttugal at the outset.

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14. He telephoned and emailed the respondent to explain this. His calls were not returned. Mr Naylor responded to his email on 7 November 2016, saying that the option to return the car without incurring rent was no longer available. There would be an offer later that week that would enable drivers to work rent free but "it will be a scheme based around work done and points accrued". He suggested the claimant come to the office so he could explain the scheme.

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15. Instead, they spoke by telephone later the same day, 7 November 2016, when the claimant telephoned Mr Naylor. The latter confirmed that the new scheme would replace the old system and the option to return the car at the end of a shift and work rent free would no longer be available; instead, the new scheme would be available.

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16. Mr Naylor explained the proposed new scheme in outline. Drivers would earn points which would go towards reducing or eliminating the rental charge otherwise payable. More points would be earned for working at times the respondent needed drivers most, fewer at times when the respondent's need for drivers was lower.

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17. The claimant said it would not be viable for him to continue working for the respondent. An impasse was reached. The claimant became irritated or angry. He referred to a judgment of an employment tribunal in a case involving Uber. He said the Uber drivers had been found to be workers and had rights. The claimant sought to hold the respondent to the rent free option

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involving return of the car at the end of each shift, as had been agreed. To withdraw that option would be a breach of contract, he said.

18. In saying that the Uber drivers were workers and had rights, the tribunal found that the claimant did not specify what those rights were. He did not specifically mention the Working Time Regulations or the National Minimum Wage legislation, nor did he mention holiday pay or a minimum wage.

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19. Mr Naylor then suggested it would be best if the claimant returned the car. The claimant agreed. The call ended. The claimant returned the car the next day. Mr Naylor told him that if he changed his mind and agreed to the new scheme, he was welcome to continue driving for the respondent, as he was a good driver about whom there had been no complaints.

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20. The respondent did introduce the new points scheme, after the claimant had left. Under it, as Mr Naylor accepted, it would have been difficult if not impossible for the claimant to earn enough points to keep the car rent free for him, because his part-time hours did not fit with the respondent's peak demand times. The claimant's bond was returned to him. The respondent emailed him and other former drivers seeking recruits. The claimant did not take up the offer.

The Decision of the Tribunal

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21. Instead, he brought claims before the tribunal. The claims were for unfair dismissal, notice pay, holiday pay, arrears of pay, detriments imposed on the ground that the claimant had made protected public interest disclosures and asserted rights to the national minimum wage or rights as a part-time worker, less favourable treatment under the 2000 Regulations, failure to keep proper national minimum wage pay records and failure to provide a written statement of terms and conditions.

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22. The respondent's main ground of resistance was that the claimant was self-employed. The respondent also resisted the individual claims on numerous grounds. As the tribunal recorded in its judgment and reasons, the claims were clarified and amplified through the case management process, which led to the provision of further particulars and a list of issues that was eventually appended to the tribunal's judgment and reasons.

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23. The claimant represented himself at the hearing. The respondent was represented below by Mr Murray of counsel, who also appeared before me to resist the appeal and present the cross-appeal. The tribunal heard evidence from the claimant, Mr Naylor and Mr Clarke, the owner of the respondent. The parties produced written and oral argument in closing.

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24. The tribunal decided that the claimant was not an "employee" but was a "worker" within section 230(3)(a) of the ERA. He was not self-employed. The claims for unfair dismissal, breach of contract, notice pay and failure to provide a written statement of terms and conditions therefore failed. These would have required the claimant to be an employee, which he was not.

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25. Certain of his claims succeeded because he was a worker: the respondent had failed to permit access to national minimum wage records. The holiday pay claim and unlawful deduction of wages claim (based on the national minimum wage legislation) succeeded. However, he was not a part-time worker within regulation 2(2) of the 2000 Regulations. The

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claims founded on detriments failed on causation: the respondent's treatment of him was not done for any of the prohibited reasons relied on.

26. In its judgment and reasons, the tribunal set out the issues and procedural history, the relevant law and its findings of fact which were, in more detail, as related above. The tribunal then summarised the parties' closing submissions before proceeding to its reasoning and conclusions. So far as material for this appeal, they were as follows.

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27. The tribunal considered (paragraphs 143-150) the three tests in the seminal judgment of MacKenna J in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 QB 497. They found, first, that the claimant agreed to provide his own work and skill in return for remuneration.

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28. Next, the tribunal considered whether the claimant had expressly or impliedly agreed to be subject to a sufficient degree of control for the relationship to be one of master and servant. The tribunal had no doubt that he did. The terms and conditions required "detailed obligations on the part of the Claimant from the time he logged on to start his shifts … to the time he logged off to end his shifts". The tribunal noted that it had "set out these requirements in the findings of fact above". The tribunal had, indeed, done so.

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29. The tribunal then considered whether the other provisions of the contract were inconsistent with it being a contract of service. The tribunal "narrowly" concluded that they were not. They stated that they reached that conclusion "including for the following reasons". They then set out those reasons.

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30. The first was that the claimant was treated as self-employed for tax purposes. This dated from his time with a previous employer, as they had found earlier. They noted that was "not determinative of the issue" but it was "a factor in favour of self-employment". They noted that he had also signed a declaration that he was self-employed in his application form on joining the respondent. They attached a little, but not much weight to that "in view of the guidance given in the *Autoclenz* case as to equality of bargaining power" (see *Autoclenz Ltd v. Belcher* [2011] ICR 1157, SC).

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31. The second and "important" factor they took into account in determining that he was not an employee related to his "hours of work, numbers of hours worked, days worked and when he worked". These were "all determined by the Claimant, rather than the Respondent". They noted that he agreed to work part-time and was engaged or employed to do so. Ms Yurttugal "made no stipulation as to when the Claimant should work, or how many hours he should work."

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32. Furthermore, the tribunal stated, when he first telephoned the control room he said he was unable to specify his hours but it would be three to four hour shifts five days a week. He then departed from that regime, such that Mr Naylor later complained he had only worked seven hours during the last of his six rent free weeks.

33. At paragraph 150, the tribunal concluded:

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

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34. The tribunal went on to find (paragraphs 151-152) that the claimant was a "worker" within section 230. They stated that "his status was not that of a client or customer of the Respondent, despite the efforts of the Respondent's witnesses and Mr Murray to convince us that he was". I pause to note that the tribunal must have meant that the respondent was not a client or customer of the claimant, rather than the other way round. Neither party mentioned or relied on this apparent error, which I do not think is significant.

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35. The tribunal referred to the decision of Mr Recorder Underhill QC (as he then was) in *Byrne Brothers Ltd v. Baird* [2002] ICR 667, having earlier (at paragraph 34) quoted excerpts from his judgment in that case at [17], on the subject of the "intermediate class" of workers who are neither employed nor self-employed. The tribunal referred to the "bar being set lower in the Claimant's favour".

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36. They straightforwardly rejected the notion that the claimant was self-employed, in five sub-paragraphs. They referred to the mutual obligations – the claimant had to do some minimum level of work, while the respondent must provide it. The respondent provided the cars. They were essential to the respondent's business. There was no right of substitution either by contract or in practice.

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37. It did not assist the respondent that it may have considered the drivers to be "customers" of the respondent. "The customers of the drivers were … supplied by the Respondent" (paragraph 152.3). The respondent told the drivers where to go, where to pick up and deliver the customers (i.e. passengers) and when they could charge and clean the cars. The drivers were expected to promote the respondent's image.

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38. The tribunal decided that, since the claimant was a worker not an employee, his claims for unfair dismissal, wrongful dismissal and written particulars of employment must fail; while his complaints of failure to pay holiday pay and under the National Minimum Wage Act 1998 succeeded.

39. The tribunal went on to decide that (if the issue had arisen) the claimant was not expressly dismissed. Mr Naylor had suggested but not instructed the claimant to return the car.

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The withdrawal of the rent free option (to return the car after each shift) was repudiatory conduct, which the claimant had accepted as putting an end to the contract. However, he lacked the necessary two years' qualifying service to claim ordinary unfair dismissal.

40. He would therefore have to succeed in establishing that the dismissal – or a detriment, including a detriment comprising the repudiatory conduct – was caused by one of the prohibited reasons, applying the wording of the applicable legislation. Where the claim is founded on

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dismissal for a prohibited reason, the test is what was the reason or, if more than one, the principal reason for the dismissal and whether it was the prohibited reason. Where a detriment is relied on, the test is whether the detriment was imposed on the prohibited ground.

41. The tribunal did not engage with the niceties of these different formulations. They found that one of the five disclosures relied on as protected disclosures was made in the public interest; the other four were not. They decided simply (paragraph 161) that: "[t]he issue on

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which the Claimant fails in public interest disclosure detriment and in any form of automatic unfair dismissal is on causation. We find and conclude that he was not dismissed because of the protected disclosure he made".

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42. That was because Mr Clarke "had decided that the temporary vehicle option was not working, for the reasons set out in the … findings of fact". The tribunal reasoned that the protected disclosure and any assertion of statutory rights had no causative impact on the decision, already taken, to withdraw the "temporary vehicle option". "[T]he outcome would have been the same" whether or not the claimant had made a protected disclosure or asserted relevant statutory rights. The claims founded on automatic unfair dismissal and detriments imposed for prohibited reasons therefore all failed.

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43. The tribunal went on to decide (paragraph 163) that the claimant was not a part-time worker within regulation 2(2) because he was not paid "at least partly by reference to time worked". He was paid by a percentage of fares only and "[t]he hours worked by the Claimant were irrelevant to what he was paid". Earlier at paragraph 42, when setting out the law, the tribunal had commented that the definition in regulation 2(2) "suggests that a worker who is paid entirely on a piecework basis, or at various stages of a project, will not be covered … even if he or she works on fewer days or for shorter hours than others in the same workplace".

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44. The tribunal stated that for the purposes of the claim for payment of the national minimum wage, the claimant's working time amounted to the hours on which he was logged on. The holiday pay claim also, likewise, succeeded, pursuant to the Working Time Regulations 1998.

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The Issues, Reasoning and Conclusions

45. The parties were ably represented by counsel, Mr Lewis and Mr Murray. I am grateful to both. Mr Lewis was acting pro bono, for which the appeal tribunal is, as always, especially grateful. The issues were helpfully narrowed somewhat during the written and oral argument.

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The first issue: whether the tribunal properly found that the claimant was a "worker" but not an "employee"

46. This issue embraces, compendiously, the first two of the permitted grounds of appeal and the respondent's cross appeal. Mr Lewis criticised the tribunal for not reaching what he said was the only permissible conclusion: that the claimant was an employee. He cited various authorities, including the judgment of Briggs J (as he then was) in *Weight Watchers (UK) Ltd v. HRMC* [2011] UKUT 433 (TCC), [2012] STC 265, at [42]: if the judge has found that the first two of the three tests drawn from the *Ready Mixed Concrete* case are met:

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> **"the judge does not … approach the remaining condition from an evenly balanced starting point … but, rather, for a review of the whole of the terms for the purpose of ensuring that there is nothing that points away from the prima facie affirmative conclusion reached as a result of the satisfaction of the first two conditions".**

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47. Mr Lewis reminded me that the home workers in *Nethermere (St Neots) Ltd v. Gardiner* [1984] ICR 612, CA had considerable freedom to determine their own hours, time off and holidays, yet were held by the majority of the Court of Appeal to be employees. Langstaff J (P) in *White v. Troutbeck* [2013] IRLR 286 explained the fallacy of reasoning that persons could not be employees if they controlled their own hours of work and decided when and to what extent to carry out their work.

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48. Mr Lewis complained that in considering the third of the three tests, the tribunal relied on only two factors as negating the existence of a contract of service: the fact that the claimant was treated as self-employed for tax purposes and signed a declaration that he was self-employed; and the fact that the claimant could determine his own part-time hours of work. He submitted that, far from being inconsistent with a contract of service, the first matter was a mere labelling exercise of negligible weight; while the second matter could not point away from employment because the tribunal had already found, applying the second of the three tests, that the respondent exerted control over the claimant's work.

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49. He also contended that the tribunal had, at the third stage, failed to assess the issue "in the round"; they should have started from the premise that there was a prima facie employment relationship and reasoned that any factors pointing in the other direction were insufficient to displace that conclusion. The decision that the claimant was not an employee was, therefore, perverse and should be set aside.

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50. Mr Lewis then submitted (under ground 2 of the appeal) that the tribunal had failed to address the claimant's alternative case, argued below by the claimant in person, that he was an employee in relation to each discrete shift he worked even if he was not employed during the time when he was not working. The judge below was asked by Judge Richardson (under the *Burns/Barke* procedure) whether the tribunal had considered this issue and the response indicated that they had not. Mr Lewis submitted that, on any view, the claimant must have been employed when, by logging on to the app, he undertook an obligation to work a particular shift.

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51. Mr Murray, for the respondent, submitted that if the tribunal erred, its error was in finding, applying the second of the three *Ready Mixed Concrete* tests, that the claimant agreed to be subject to a sufficient degree of control for the relationship to be one of master and servant. That contention is the subject of the cross-appeal, which was permitted to proceed together with the appeal.

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52. In opposition to the first ground of appeal, he reminded me that the judgments of the Court of Appeal in *O'Kelly v. Trust House Forte plc* [1984] QB 90 (see especially the judgments of Sir John Donaldson MR and Ackner LJ) indicate that the question of employment status is effectively one of mixed fact and law, where the terms of the agreement are not derived solely from documents.

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53. The tribunal's findings overall, Mr Murray submitted, were to the effect that while the claimant was actually working, he was subject to a high degree of control over the manner in which he performed his work, which would suffice to satisfy the second stage of the enquiry; but that it was properly open to the tribunal to find, and it did find, that the claimant's autonomy over when and how often he worked was such that it negated the existence of a service contract, taken together with the less weighty self-employment declaration and tax status.

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54. Furthermore, Mr Murray submitted, the tribunal was required to consider all relevant factors and properly did so. The claimant appeared, in the amended grounds of appeal, to criticise the tribunal for not taking account of matters such as the allocation of customers, the fare structure, the obligation of personal service, the centrality of the drivers to the business, their obligation to promote the respondent's image, the provision of the cars by the respondent and the expectation to work a reasonable minimum number of hours.

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55. The tribunal had dealt with those factual matters in its judgment and had clearly taken them into account, said Mr Murray. It was not a misdirection to conclude from the overall picture, by a narrow margin as the tribunal did, that the claimant was a worker rather than an employee.

56. Mr Murray accepted that the tribunal had not dealt with the claimant's alternative contention that he was employed under a series of intermittent employment contracts while on shifts. He submitted that this did not matter and did not require the issue to be remitted back because the tribunal clearly and properly found that the claimant was a "worker" under a single continuous contract which subsisted between shifts, as well as during shifts while he was connected to the app.

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57. In my judgment, the tribunal did not err in law in finding that the claimant was a worker but not an employee. I do not think that either the appeal (on this point) or the cross-appeal are well founded. I think the tribunal was entitled to decide, and on a fair reading of the judgment and reasons did decide, that the cumulative effect of all the factual aspects of the contractual arrangements was such as to fulfil the first two of the *Ready Mixed Concrete* tests but, applying the third test, was sufficient to displace the conclusion that the relationship was one of employment.

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58. I agree with Mr Murray that the tribunal found the claimant was a worker engaged under a continuous contract, not a series of intermittent contracts. Although the tribunal did not consider the latter argument advanced by the claimant and it would have been better for it to have done so, no harm was done by the omission because the tribunal's principal finding was properly open to it and was inconsistent with the claimant's alternative contention that, if he was not employed under a single continuous employment contract, he was employed on and off under a series of intermittent employment contracts. The tribunal would plainly have rejected the claimant's alternative contention and would have done so properly.

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59. The question whether a person is self-employed or employed was characterised by Sir John Donaldson MR in *O'Kelly v. Trust House Forte plc* as, ultimately, one of law, but the conclusion is drawn from the facts found by the tribunal and from an assessment by the tribunal of those facts. The cases do not treat the exercise as one in which the tribunal finds the facts, there is only one permissible conclusion of law and the tribunal either reaches that conclusion or reaches a wrong conclusion. There may be room for more than one view of the facts and the conclusion to which they lead.

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60. The threshold of perversity or error of approach which must be reached before the appeal tribunal can interfere, therefore applies to the tribunal's assessment of the facts as well as to its findings of fact. In the present case, the tribunal's findings of fact are unchallenged. Rightly, it is not said by either party that any of the findings of fact are perverse. It is the assessment of the facts as found which Mr Lewis submits is perverse, leading to an impermissible conclusion. My starting point in evaluating that contention is that the findings of fact here are impressive. They are detailed, thoughtful and clear.

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61. I do not think the judgment of Briggs J (as he then was) in the *Weight Watchers* case should be treated as creating something like a legal presumption of an employment relationship in cases where the first two stages of the three stage test are met. The obligation of the tribunal is to "paint a picture from an accumulation of detail" (as Mummery J (P) put it in *Hall v.*

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Lorimer (Inspector of Taxes) [1992] ICR 739, at 744F-H). An "informed, considered, qualitative appreciation of the whole" may be gained by standing back from the picture, he said.

62. There is more than one aspect to the notion of control in a working relationship. MacKenna J's second question - whether the person expressly or impliedly agreed to be subject to a sufficient degree of control for the relationship to be one of master and servant – does not state what kind of control he had in mind. But a little further on, he explained that his notion of control refers to:

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> **"the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.…"**

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63. I do not accept that when applying the three stage test, the tribunal is necessarily precluded at stage three from revisiting, or reconsidering aspects of, the issue of control which is the subject of stage two. The tribunal was entitled to do that in the present case.

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64. The tribunal found that the issue of control was not uniform. When the claimant was actually working, the respondent exerted a high degree of control over him. The respondent held all the cards: the drivers must be subordinated to the respondent's interests; they must wear a suit and tie, accept jobs allocated, promote the respondent's image, communicate appropriately, not play the radio in the car unless asked, and so forth.

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65. Yet, it was the claimant who called the shots when it came to deciding whether, when and how often he would enter that realm of the respondent and subject himself to those detailed obligations subordinating him to the employer's interests and permitting himself to be controlled in the manner of performance of his work.

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66. I see no reason why it was not open to the tribunal to decide that, while the degree of the employer's control was sufficient for a contract of service at stage two of the enquiry, the worker's degree of autonomy in deciding whether to subject himself to that degree of control, how often and when, was a factor pointing away from a contract of service at stage three of the enquiry. I do not read the judgment of Briggs J in the *Weight Watchers* case as prohibiting that approach. Nor is the *Nethermere* case authority for the proposition that a person exercising autonomy over hours of work and time off is necessarily an employee.

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67. The tribunal's narrow conclusion that other provisions of the contract were not consistent with it being one of service was reached "*including* (my italics) for the following reasons". The two matters that were then rehearsed (the self-employed tax treatment and declaration, and the claimant's autonomy in choosing whether and when to work) should not be regarded as exhaustive. The picture painted from an accumulation of detail included other matters such as an obligation on drivers (unless they could avoid it) to pay car hire and remuneration by commission only, with no basic pay.

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68. As for the two matters that were expressly picked out for mention at the third stage of the enquiry, the first (the self-employed tax treatment and declaration) was correctly given only limited weight. There was no misdirection by giving it weight it did not deserve. The tribunal correctly referred to the *Autoclenz* decision on inequality of bargaining power. The tribunal did

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not err by giving some weight to the parties' own characterisation of the relationship. As Ackner LJ put it in *Young & Woods v. West* [1980] IRLR 201, at [30]:

> **"It is by now well settled that the label which the parties choose to use to describe their relationship cannot alter or decide their true relationship; but, in deciding what that relationship is, the expression by them of their true intention is relevant, but not conclusive."**

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69. The second matter singled out by the tribunal for discussion was, as I have noted, its return to the issue of control. The tribunal's treatment of the issue at paragraph 149, was nuanced:

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

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70. On a fair reading of the decision as a whole, the tribunal did not err in its treatment of the issue of employee or worker status. It was entitled to find that the claimant was not an employee. Mr Murray does not now challenge (though he did below) the finding that he was a worker. The tribunal was clearly entitled to make that finding, applying the approach of Mr Recorder Underhill QC in the *Byrne Brothers* case, where the boundary is pushed further in the putative worker's favour than when considering whether someone is employed or self-employed. I conclude that the first and second grounds of appeal fail, as does the cross-appeal.

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The second issue: did the tribunal err in law in deciding that the claimant was not a part-time worker within the 2000 Regulations?

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71. Mr Lewis submitted (under ground 3 of the appeal) that the tribunal erred in law by deciding that the claimant did not fall within the definition of a part-time worker in regulation 2(2) of the 2000 Regulations. He argued that the definition must be interpreted in a manner consistent with the Framework Agreement on Part-Time Work which was required to be implemented pursuant to the Part-Time Workers Directive (Directive 97/81/EC).

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72. The Framework Agreement, annexed to that directive, provides at clause 3 a definition of the term "part-time worker". The term "refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker".

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73. Clause 4 defines a comparable full-time worker as "a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/ skills."

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74. If necessary, said Mr Lewis, a broad interpretation of being paid in part by reference to the time worked must be adopted so that regulation 2(2) of the 2000 Regulations conforms to the obligations of the United Kingdom to implement the Framework Agreement. It is sufficient that working fewer hours will result in receiving less pay. The other drivers who worked a full 50 or 60 hour week were clearly identifiable as full-time workers.

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75. Mr Murray accepted that the tribunal had erred in not characterising the claimant as a worker whose pay is determined "wholly or in part by reference to the time he works" (within regulation 2(2)); but he submitted that there would have to be a remission to the tribunal so that it could consider whether the claimant met the second limb of the definition: whether "having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, [the claimant] is not identifiable as a full-time worker".

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76. Mr Murray's argument is that the tribunal did not make any finding as to what hours a "full-time" worker would work. That issue should be remitted, he said. A performance report showing hours worked by the various drivers including the claimant was in evidence before the tribunal and was shown to me. But, argued Mr Murray, it showed that a wide range of hours was worked by different drivers and it did not lead the tribunal to make a finding about what hours would be worked by a full-time driver. Therefore, he submitted, it was uncertain whether the claimant was "not identifiable as a full-time worker".

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77. I agree with both counsel that the tribunal erred in applying to the claimant the definition of a part-time worker in the 2000 Regulations. It found that the claimant was effectively doing piecework. "The hours worked by the Claimant were irrelevant to what he was paid", the tribunal said at paragraph 163. I do not agree. The performance report, as well as the application of robust common sense, show a strong correlation between hours worked and commission received.

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78. The distance travelled and therefore the time taken to complete a journey would obviously be at least one factor in determining the fare, of which the drivers received 62.5 per cent as their commission. That is sufficient to satisfy the first limb of the definition, even without the Framework Agreement. That Agreement makes the position even clearer. At clause 3, it refers to a worker's "normal hours" of work being less than those of a comparable full-time worker.

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79. I do not agree with Mr Murray that a remission is needed to determine whether the claimant is or is not "identifiable as a full-time worker" (the second limb of regulation 2(2)). Mr Murray suggested it might not be possible to identify any full-time workers because they worked such varied hours. However, the performance report includes several drivers who worked an average week of 50 hours or more per week over the relevant six week period. The claimant's hours averaged about 20 per week over the same period.

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80. That is ample to compel the conclusion that he meets the definition of a part-time worker in the 2000 Regulations. He is not identifiable as a full-time worker. He was paid in part by reference to the amount of his working time. There is no need for any remission of that issue back to the tribunal. I will substitute a finding that the claimant was a part-time worker within the 2000 Regulations. The remaining issues arising in his claim of less favourable treatment under those Regulations will have to be remitted and determined by the tribunal.

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The third issue: did the tribunal properly make the finding that the claimant's treatment at the end of the relationship was not for any prohibited reason?

81. Mr Lewis submitted that the tribunal failed to deal properly with the issue of whether the claimant was dismissed or subjected to detriments for making a protected disclosure and asserting relevant statutory rights. In this connection, the causes of action founded on dismissal would depend on success of the contention that the claimant was an employee, contrary to the tribunal's finding which I have upheld. But the causes of action founded on detriment are available to a worker as well as an employee.

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82. The tribunal had, Mr Lewis submitted, failed to address properly the claimant's case in relation to the treatment he received. The repudiatory conduct on which he relied, said Mr Lewis, was not just withdrawal of the scheme for free use of the car; it was also Mr Naylor's suggestion that it would be best if the claimant returned the car. The tribunal had failed to consider whether the claimant's acceptance of the respondent's repudiatory breach of his contract was in part because of Mr Naylor's suggestion that the claimant should return the car.

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83. The tribunal had also failed to consider whether Mr Naylor was materially influenced in the direction of making that suggestion by the fact that the claimant had made the protected disclosure he made and had asserted the relevant statutory rights. It would be sufficient, Mr Lewis pointed out, if the making of the protected disclosure or assertion of relevant statutory rights materially influenced the treatment the claimant received.

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84. The tribunal had not properly engaged with that issue, by omitting from its analysis the reason why Mr Naylor suggested he return the car and whether that was part of the repudiatory conduct of the respondent which the claimant accepted as putting an end to the relationship. Mr Lewis argued that a remission was necessary to correct this defect.

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85. Mr Murray demurred. He said it was clear from the tribunal's decision that they did not regard Mr Naylor's suggestion that the claimant return the car as repudiatory conduct. The conduct they found repudiatory was the withdrawal of the scheme for free use of the car. The suggestion that the claimant should return the car was obviously a consequence of the claimant's decision not to accept withdrawal of the scheme for its free use. It was obvious that the claimant could not keep the car unless he was going to go on working for the respondent.

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86. In my judgment, there was no deficiency in the tribunal's treatment of the causation issue in the claims for automatic unfair dismissal or detriment by reason of prohibited acts. The finding that was fatal to all those claims was the finding that the decision to introduce – for all drivers, not just the claimant – the new points based scheme and withdraw the scheme for free car use, predated significantly the claimant's solitary protected disclosure and the conversation on 7 November 2016 when he referred, albeit in a generic way, to certain rights that could include relevant statutory rights.

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87. I find unreal the contention that the suggestion that the claimant should return the car was omitted from the tribunal's analysis of the causation issue. Mr Naylor did not want the claimant to return the car. He needed drivers and wanted the claimant to be one of them, if they were able to agree a basis on which the claimant could continue. When they had their conversation on 7 November 2016, the decision to introduce the new points based scheme was a fait accompli. Its introduction, the tribunal found, had nothing to do with the claimant's

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protected disclosure or assertion of any relevant statutory rights. The decision to introduce it predated the claimant's statements.

88. The tribunal expressly differentiated between a suggestion and an instruction. Mr Naylor had not instructed the claimant to return the car, they found. He had merely suggested that the claimant do so. Mr Murray is obviously right to submit that this was a necessary consequence of the claimant's unwillingness to work in accordance with the points scheme. The claimant had already said it would not be viable for him to do so.

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89. He was therefore inevitably going to return the car. If the withdrawal of permission to keep using the car free of charge was not influenced by the claimant's protected disclosure or assertion of statutory rights, then nor, looking at the matter sensibly, was the suggestion that he return the car. For those reasons, the fourth and final ground of appeal fails.

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Conclusion: disposal

90. The appeal therefore succeeds upon the second ground only. The finding that the claimant was not a part-time worker within the 2000 Regulations is set aside. I substitute what I consider to be the obvious and only permissible finding: that the claimant was a part-time worker within the 2000 Regulations.

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91. The consequential issues arising from that substituted finding are remitted. Mr Lewis sought to persuade me that the remission should be to a freshly constituted tribunal. He said there was a risk of confirmation bias, that the judge had retired, that even if he were able to come back to sit, his recollection of the evidence was likely to be sketchy and that his recall could cause delay, especially if the same lay members were also sought.

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92. I do not think this is a case that should be referred to a differently constituted tribunal, applying the factors identified by Burton J (P) as he then was, in *Sinclair Roche & Temperley v. Heard* [2004] IRLR 763. The findings of the tribunal were nuanced and even-handed. Success was shared between the parties.

93. In my judgment, the claim for less favourable treatment under the 2000 Regulations should be remitted back to the same three person tribunal, if that tribunal is still available to sit and could reconvene without undue delay; otherwise, it should be remitted to a fresh tribunal or, if the Regional Judge so decides on the basis of considerations of availability, by the same judge sitting with different lay members.

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