Case Number: 3313324/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Ali Sayed	**v**	Skyline Taxi and Private Hire Limited

Heard at: Bury St Edmunds (by CVP) **On:** 10 & 11 August 2020
12 October 2020

Before: Employment Judge Laidler

Appearances

For the Claimant: In person.
Assisted by an Interpreter: Mr M Iqbal (on 10 & 11 August 2020)
(Translation: Urdu) Mr N Mursalin (on 12 October 2020)

For the Respondent: Ms G Crew, Counsel.

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.
This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because of the Coronavirus pandemic.

RESERVED JUDGMENT

The claimant was not an employee of the respondent and the Tribunal therefore has no jurisdiction to determine his complaint of unfair dismissal which is dismissed.

REASONS

1. The claim in this matter was received on 22 March 2019. In the claim form the claimant brought a complaint of unfair dismissal.

2. In its response the respondent stated that the arrangement between the parties was such that at all material times there was a business to business agreement under which the respondent was a client of the claimant's business undertaking of a self-employed private hire driver. It contended that there was no jurisdiction for the claimant to bring a complaint of unfair dismissal as he was not at all material times an employee of the respondent in accordance with s.230(1) of the Employment Rights Act 1996 (ERA).

3. When issued the matter was listed for a one day hearing in the Cambridge Employment Tribunal on 2 January 2020 and orders were made for the preparation of a bundle of relevant documents and the exchange of witness statements on 18 June 2019.

4. On 2 January 2020 an Unless Order was made by Employment Judge Ord in which the claimant was directed to confirm to the respondent by 28 February 2020 that "he is able to and does engage in the exchange of statements of all witnesses upon whose evidence (including his own evidence) he will be relying upon at the resumed hearing".

5. By letter of 19 March 2020 the respondent's representative advised that witness statements had not been received. They requested that considering multiple breaches of the Unless Order the claim be struck out. Unfortunately, the national lockdown due to the Coronavirus started on 23 March 2020 and it does not appear the matter was referred to a Judge until Employment Judge Ord reviewed the recent correspondence and directed a letter be sent to the parties on 17 May 2020. In the correspondence referred to him it was not clear if either party was seeking an order and he queried what the position was in that respect.

6. On 27 May 2020 the claimant emailed the Watford Employment Tribunal saying that he had sent everything to the other party on a USB stick including his evidence.

7. There continued to be difficulties between the parties and on 6 July 2020 the respondent's solicitors again wrote to the Employment Tribunal.

8. The matter came before this Employment Judge on the papers on 7 August 2020 when having reviewed the file she was not prepared to confirm that the claim had been struck out under the unless order. From the emails it was clear that the claimant had provided some disclosure and provided some witness statements on 20 January 2020. It therefore appeared there had been some compliance. The hearing listed for 10 August was converted to CVP (Cloud Video Platform) hearing.

9. At this hearing the Tribunal had a paginated bundle but also was provided with a bundle of the claimant's additional evidence. This contained photographs, screenshots and various other documents as well as video clips and audio recordings. The claimant was concerned that all the video and audio recordings had not been provided to the Tribunal and were not in the final bundle. The respondent's position was that they were not relevant

to the issues. When it did not prove to be possible to conclude the preliminary hearing in its entirety within the two day listing the Judge determined it was only appropriate and in accordance with the overriding objective that she be given the opportunity to view the video clips and audio recordings within the time between then and the adjourned listing. The respondent's solicitor agreed to forward the documents which were downloaded by the Judge and viewed by her prior to the resumed hearing on 12 October 2020.

The claimant's bundle of evidence

10. The supplementary bundle of documents containing the evidence from the claimant totalled 60 different items. The first 28 comprised various screenshots some of which were believed to be from the respondent's mobile phone app for drivers, but some appeared to be from other organisations using a similar or the same app. There were other emails and images of the prices of journeys to local airports and a picture of a gentleman in an office whose identity was not even revealed. A large proportion of that section of the bundle contained the Court of Appeal decision in the Uber case.

11. The next section of the supplemental bundle contained approximately 30 audio and video files. These comprised radio interviews and several videos about a strike by Milton Keynes taxi drivers. There were videos of strike organisers addressing demonstrations or making appeals for support and one gentleman seeking advice on the way he had been treated. His identity was not disclosed and some of the events appeared to be after the end of the claimant's relationship with the respondent.

12. None of these supplemental documents, audio or video clips assisted the Tribunal in determining the issues before it. The claimant appeared to be of the view that this Employment Tribunal would not only look at his employment status which he was alleging but also conduct an overarching investigation into the way in which the respondent company was run and managed. The Tribunal had to remind the claimant numerous times throughout the hearing that that was not its role. It only has jurisdiction to deal with employment law disputes and its sole function at this hearing has had been to determine whether the claimant was an employee within the meaning of the Employment Rights Act such as to entitle him to bring a complaint of unfair dismissal.

13. The Tribunal heard from the claimant and from Mr Gavin Sokhi on behalf of the respondent. A Mr Sadiq Noyan had provided two witness statements in support of the claimant but he did not attend to be cross examined and therefore no weight is given to his evidence.

14. In addition to the supplemental bundle the Tribunal had a bundle of documents in excess of 400 pages and in addition the respondent disclosed entries from its iCabbi booking system which ran to 205 pages.

15. From the evidence heard the Tribunal finds the following facts.

Findings of Fact

16. The respondent is a family run business owned and operated by Mr Sokhi and his brothers. It was founded by his parents in or about 1985 and operates in the Milton Keynes and Northampton area.

17. Mr Sokhi gave evidence which the Tribunal accepts that private hire drivers are regulated by the relevant local licensing authority which in the Milton Keynes area was Milton Keynes Council. It is a regulatory requirement for all private hire drivers to work with a "licenced operator" such as the respondent. Private hire drivers are only licensed to collect pre-booked fares from a licensed operator and are not permitted under the regulatory framework to pick up fares from members of the public on the street. The claimant however also held a Hackney Carriage Licence and as such can operate independently of a licensed private hire operator to make his own bookings by being hailed in the street or hired from a taxi rank without the need for pre-booked fares.

18. The respondent takes bookings from members of the public. The arrangement with drivers is that they pay a weekly administration fee to the respondent which the respondent refers to as "rent" to gain access to those bookings. Mobile phones have now replaced traditional radios for the purpose of these bookings.

19. The claimant initially worked for the respondent in 2006. The respondent has not been able to produce a copy of the signed contract for services entered into, but a specimen copy has been provided. The Tribunal accepts that that is evidence of the type of agreement that would have been provided to the claimant and under which he worked both in 2006 and when he returned in or about 20 September 2017.

20. Under the agreement the respondent agrees to supply software and booking services to the driver in consideration for a payment by the driver to the company of the rent. Clause 2.4 of the driver agreement expressly states:-

> "Skyline agrees to engage the driver as an independent and self-employed contractor (and not as an employee) to provide the account services in accordance with these conditions."

21. Paragraph 4 of the driver agreement specifically deals with the relationship between the parties as follows:-

> "4.1 The Contract in these Conditions shall not constitute or imply any partnership, joint venture, agency, employment or other relationship between the Driver and Skyline other than the relationship expressly provided for in the Contract and these Conditions.

> 4.2 Neither the Driver nor Skyline shall have or represent that it has any authority to make any commitments on the other's behalf. At no time shall the Driver represent himself or hold himself out as an employee of Skyline. The Driver shall not have any authority to act on behalf of Skyline, to conclude any Contracts or incur any obligation or liability on behalf of or binding upon Skyline, or to sign any document on Skyline's behalf.
>
> 4.3 The Driver shall at all times be a self-employed individual who performs the Services. The Driver agrees that nothing in the Contract and these Conditions amounts to or is intended to bring about an employment relationship between the Driver and Skyline and that, subject to the requirements to give Skyline reasonable notice of the intention to do so the Driver may bring to an end the Contract at any time and can in the course of the Contract at the Driver's sole discretion determine when he wishes to provide the services. Skyline does not guarantee work for the Driver.
>
> 4.4 When providing services to cash customers who have made individual private hire bookings through Skyline and who pay the driver Cash Fares in cash or by credit/debit card transaction, the driver acts as principal and Skyline acts as the Driver's agent taking bookings for cash customers for services that the Driver will provide. It shall be the Driver's responsibility to collect payments from cash customers for the services provided to them. Skyline shall not be liable to the Driver for unpaid cash fares."

22. The agreement went on to provide:

> 5.5 The Driver shall retain all Cash Fares received by him in each Relevant Period and where they have been paid by way of credit or debit card and processed by Skyline on behalf of the Driver, Skyline shall pay in full such Cash Fares to the Driver.

Skyline then has the obligation to pay to the Driver the account services payment for the account service provided off-set against any outstanding rent payment due and payable by the Driver to Skyline. The balance if any of the account services payments remaining after the rent has been discharged shall be paid by Skyline to the Driver.

23. Clause 5.8 provided that the Driver shall be wholly responsible for all Income Tax and National Insurance and any other taxes payable in relation to the receipt of the payments received. As is set out below the claimant was so responsible.

24. When the claimant began using the respondent's services again in September 2017, he was a Hackney Carriage driver licensed to operate within South Oxfordshire area. He was thus entitled to accept bookings from other private hire operators across the country in line with his licensing obligations.

25. There has been no dispute that the "rent" paid by the claimant was £80 per week plus 20 pence per booking. By the end of the claimant's time with the respondent it had risen to £130 per week.

26. It is the decision of each driver as to when and how often they chose to work. At the end of each week the driver is provided with a sheet which shows the breakdown of the amount owed in respect of any account and card work that they have undertaken. Those for the claimant were seen in the bundle at pages 145-256. The amount owing to the driver in any week is detailed at the bottom of the sheet and off-set against the rent due by the driver to the respondent.

27. The respondent uses a dispatch system called iCabbi. It is used by a significant proportion of taxi companies in the UK and indeed Mr Sokhi gave evidence that one of the screenshots that the claimant has produced he believed was from another company using the same app. The app is downloaded by drivers onto their smartphone and bookings are distributed via it. It allows drivers to log in without accepting jobs and sometimes drivers do that simply to see if there are lots of jobs around to determine whether they wish to start working. It allows the respondent to communicate with drivers rather than by using radios and to determine a driver's location relative to a booking that has been received. The equipment to use the app is not provided by the respondent and drivers use their own devices.

28. The respondent has no control over the design of the iCabbi system which is provided by that entity to its customers. The terminology used on it has not been set down by the respondent.

29. Bookings are offered to drivers based on the driver's GPS location generated from their mobile phone. That is compared with the customer pick up location and the requirements of the customer as well as how long a driver has been waiting for a pick up compared with other drivers in the area. The only thing that would influence whether the booking was given to a particular driver would be if the customer had a requirement for example wheelchair access in which case it would be assigned to the driver with the appropriate vehicle.

30. If drivers wishes to accept work, they simply log onto the app but if they do not wish to then work, they simply log out and turn the app off or alternatively they can reject the offer of a booking if it is provided.

31. It is up to drivers which geographical area they work in, what times they work and in what location. They can log on and off the app during the day and take what breaks they wish to take. They are not required or expected to even turn on their device if they do not wish to do so. They do not have to notify the respondent in advance if they are not turning the app on.

32. It has been the claimant's case to this Tribunal that the respondent operates a shift system. The Tribunal accepts the evidence of Mr Sokhi that that is not the case. It is the case that the respondent seeks to encourage drivers to work at peak times, but it is a matter for the drivers whether they wish to do so.

33. The claimant also states that if a job is rejected by the driver, the driver is penalised by not being offered jobs for another 30 minutes. Mr Sokhi explained, and the Tribunal accepts that this only occurs if a driver has accepted a booking, been provided with the details and then rejected it (paragraphs 46-48 of Mr Sokhi's witness statement). The driver system will be placed on a further time out to avoid drivers picking and choosing the best fares which in his evidence and which the Tribunal accepts is the version of the cab rank rule.

34. The respondent provides services to several corporate customers through account work which is then sub-contracted to the drivers. It is made available through the iCabbi app in the same way as the other work.

35. The drivers are provided with magnetic signage that they can place on their car doors. It is a requirement of the Licensing Authority for private hire drivers to display signage of the operator for which they provide services. It is not a requirement for Hackney Carriages to display the signs and therefore the claimant was not required to display them.

36. There is no strict dress code and no uniform provided. The driver provides his own car for which he is responsible. The driver may work elsewhere.

37. In a supplementary bundle was provided the iCabbi data in relation to the claimant from the commencement of this period of work with the respondent in September 2017 until November 2018. This comprised over 200 pages but the respondent had also provided and was added to the bundle at page 205 two summaries for the respective tax years. That coloured beige was for the period September 2017 to 2 April 2018. It showed the claimant working variable hours and days ranging from 1 to 7 days a week and from 5.25 hours to 79 hours per week. It showed cash earned of £12,423.85 plus account payments of £3,418.45 making a total earnings of £15,842.30. The schedule does not for that period show the rent paid which the claimant was paying at £80 a week.

38. Also, in the bundle was seen the claimant's tax return for the year to April 2018. He completed this with accountants indicating he was not an employee but was self-employed and he declared earnings of £22,540 deducting allowances and declaring a net profit of £11,424 after deduction of £11,116 in allowable expenses. The claimant also claimed £2,592 capital allowance under the heading of "Allowances for vehicles and equipment". This led to a tax calculation of £208.32 due and payable for that tax year.

39. On the document at page 205 a summary from the iCabbi system was also seen in green, the amounts earned by the claimant for the tax year to the date he left in November 2018 and from April to November his cash and account earnings were £30,561.80 against which he was charged rent of £2,654.60. Again, the days that the claimant worked varied from 5, 6 or 7 days a week as did the hours worked in a day. The tax return for the year to April 2019 showed total earnings of £20,590 from which allowable

expenses of £10,052 were deducted giving a nett profit of £10,538. Capital allowances were declared of £2,125 leaving a nett profit of £8,413 on which tax was paid of £153.40.

40. The claimant has therefore been prepared to declare self-employed status and obtain the benefits of the deductions that that gave him.

Relevant Law

41. This hearing is solely concerned with s.230(1) ERA which provides as follows:-

> **"230 Employees, workers etc.**
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
>
> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
>
> (b) in relation to a worker, means employment under his contract;
>
> and "employed" shall be construed accordingly.
>
> (6) This section has effect subject to sections 43K, 47B(3) and 49B(10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, "worker", "worker's contract" and, in relation to a worker, "employer", "employment" and "employed" have the extended meaning given by section 43K.
>
> (7) This section has effect subject to section 75K(3) and (5)."

42. The Tribunal must consider the guidance given in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 ALL ER 433 in which it was said that a contract of service exists if the employee agrees to provide his own work and skill, subject to the control of the employer and the other provisions of the contract are consistent with it being a contract of service.

43. In Autoclenz Ltd v Belcher & Others [2011] ICR 1157 ESC it was said that the Ready Mixed formulation of the multiple test can be summarised by asking three questions:-

> "1 Did the worker agree to provide his or her own work and skill in return for remuneration?
>
> 2 Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?
>
> 3 Were the other provisions of the contract consistent with it being a contract of service?"

44. The courts have said that there is an "irreducible minimum" without which it will not be possible for a contract of service to exist namely control, personal performance and mutuality of obligation.

45. The Autoclenz decision has also made it clear that the courts and tribunals must look at the reality of the relationship and the true nature of the parties' bargain having regard to all the circumstances. They are not bound by the label used by the parties.

46. Although the claimant submitted a copy of the decision in Uber BV & Others v Aslam, Farrar & Dawson A2/2017/3467 CA he made no reference to it and it has not been suggested in this hearing that the system operated by this respondent was the same or similar to that operated by Uber. Also, it must be noted that the issue in the Uber decision was whether the drivers were workers not whether they were employees.

The Tribunal's Conclusions

47. It has not been disputed by the respondent that personal service was present. There is no suggestion that the claimant ever sent a substitute for himself.

48. What is missing in this case however is mutuality of obligation. The claimant had no obligation to attend work and the respondent no obligation to provide him with work. It was entirely up to the claimant whether he logged on to the app and whether having done so he then accepted jobs that were offered. The claimant says that he had to accept the jobs to pay the rent, however if he did not work for the week then no rent was payable. That is clear from the iCabbi data. The claimant chose which hours he wished to work and on what days. When he resumed working for the respondent in 2017 his hours were much more varied then they were in the following year. That was his choice.

49. The claimant relies heavily on the fact that there was control of him by the respondent. The Tribunal does not accept that submission. The claimant was not subject to any rules of the respondent, he merely had to comply with those imposed by the licensing authority.

50. The main matter that the claimant relies upon as evidencing control is that if a job was rejected the driver was sent to the "back of the queue" for 30 minutes. The Tribunal has however accepted the evidence of Mr Sokhi that that was only if the driver had accepted the job and then rejected it and was to discourage them from doing so because of the difficulty that that caused with passengers and running the business. It was not what occurred if the driver did not accept a job from the outset.

51. The respondent did not control the hours that the claimant worked, they did not require him to wear a uniform or to display their signage on his vehicle. He provided his own vehicle which he ran and maintained (and for which as can be seen from his tax return he obtained a capital allowance).

52. It is acknowledged by the tribunal that the respondent has not been able to provide a driver agreement signed by the claimant. It has however produced the driver agreement which it states would have been issued to him and under which its drivers work. That is of evidential value to the tribunal and is consistent with the evidence given by the respondent which has been accepted as to the nature of the relationship.

53. The claimant was not an employee of the respondent and as such he does not have the relevant status to bring an unfair dismissal claim which is now dismissed.

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Employment Judge Laidler

Date: 28 October 2020

Sent to the parties on: ...4th Nov 2020...
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For the Tribunal Office