Case Number: 2300419/2017

JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr W Augustine		**Data Cars Limited**

Held at Croydon **On 8 & 9 July 2019**

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: **In person**

For the Respondent: **Mr M Paulin, Counsel**

JUDGMENT ON PRELIMINARY HEARING

The decision of the tribunal is:-

1. The claims for unfair dismissal under section 94(1) and 104A of the Employment Rights Act 1996 are dismissed upon withdrawal.
2. The claim that the Claimant was subjected to a detriment for making a protected disclosure under section 47B of the Employment Rights Act 1996 is dismissed upon withdrawal.
3. By consent, the Claimant is found to be a 'worker' for the purposes of the Working Time Regulations 1998 and the National Minimum Wage Act 1998.
4. The Claimant was an employee of the Respondent

REASONS

1. The Claimant brings a number of claims relating to his period working as a driver for the Respondent. He claims that he was both a worker and an employee, and that as such he was entitled to payment of the national minimum wage, holiday pay, notice pay and written particulars of employment. He also claims that he was subjected to a detriment first because he was a

part-time worker and second for asserting that he was entitled to the national minimum wage and third for raising matters relating to health and safety and to the working time regulations. This preliminary hearing was called to deal only with the question of the Claimant's status. Just prior to the start, Mr Paulin submitted a written skeleton in which he conceded that the Claimant was a 'worker'. The Claimant indicated that he wished to argue that he was also an employee of the Respondent. I have heard evidence from Mr Leslie Chapman, a director of the Respondent. I also heard evidence from the Claimant.

2. The facts I found and the conclusions I have drawn from them are as follows.

3. In February 2016 the Claimant applied to join the Respondent as a mini-cab driver. He received an acknowledgment inviting him for interview that asked him to bring with him his driving licence and private hire driving licence. If he was going to use his own vehicle he needed the log book, MOT certificate and statement of insurance. The form stated that he would be joining as a self-employed driver and that he would be responsible for his own fuel and maintenance costs, and would have to pay a weekly 'circuit fee'.

4. The Claimant signed an 'application for a self-employed driver' form. He also signed a form agreeing to the Respondent retaining his private hire driver licence for safekeeping.

5. There is a Private Hire Operator and Driver Agreement which sets out the terms of the arrangement.

6. The Claimant was required to rent various items of equipment from the Respondent including camera power leads and a card machine for £12 a week (or £5 if he had given notice that he was not working).

7. Clause 4.2 of the agreement stated that it was the Claimant's responsibility to collect money from clients. Under 4.3 he was liable for unpaid fares.

8. Under 5.2 he was expected to take on a 'reasonable' amount of 'account work' ie jobs where the passenger did not pay the driver but whose organisation would be invoiced by the Respondent, and a proportion paid to the driver.

9. Under 6.3 the Claimant was required to undertake a minimum of 15 jobs per month. He was later instructed to take on at least 5 account jobs per week.

10. If the Claimant did not wish to work for a period, he had to give 48 hours' notice of absences of up to 21 days. If he was unavailable for more than 21 days, the Respondent could treat the arrangement as being at an end.

11. Under clause 7.2 he had to notify the Respondent of sickness or other immediate absences through the 'portal'.

12. Clause 8.1 states that 'for the duration of this agreement you agree not to enter into any agreements of a similar nature with any other provider of private hire services or to perform for such parties' services which may result in damage to

the business carried on by us'. Clause 8.2 prevented the Claimant from holding a private hire operator licence.

13. The Claimant had to maintain insurance on his vehicle. He was given the option of renting a car from an associated company of the Respondent, subject to a rental fee. He opted to rent a vehicle from the 23 March 2016 onwards. He could also purchase insurance through a group cover scheme.

14. Under 11.3 the Claimant had to maintain a suitable appearance (with clothing and uniform requirements that varied according to the level of work he was doing) and abide by the driver's handbook. The handbook provided very detailed guidance on how drivers should conduct themselves in a wide variety of situations. The Respondent's signage had to be displayed on any vehicles.

15. He was not permitted to accept bookings from anyone other than the Respondent (clause 11.4.4). The rate for the booking was determined by the Respondent.

16. The circuit fee amounted to £148 per week, which would be set off against any account jobs accepted by the Claimant. If the value of account jobs exceeded £148, no fee was due.

17. In practice, the Claimant could log onto the Respondent's app whenever he wanted, and log off at any time. He would be offered a job, and if he accepted it, the rate and details would be displayed. Once a job was accepted, the Claiamant says (and I accept) that he could not cancel the job as the 'return job' on the app did not work.

18. If the Claimant refused a job, he says (and Mr Chapman agreed) that there would be an electronic 'time out'. The Claimant says that this lasted twenty minutes. Mr Chapman disputes that. He says that the purpose of the time out was to ensure that the same job was not offered to the driver again. He agrees in his statement that if a job was refused, the driver went to the 'back of the queue'. Mr Chapman says that this was only for account jobs, not cash jobs. On balance, as Mr Chapman agreed that a 'timeout' occurred, I accept the Claimant's evidence as to what happened.

19. There is no right of substitution contained in the Driver Agreement. Mr Chapman advised that in practice, if a driver had accepted a job and then did not want to fulfil it, he could swap with another driver. He suggested that this happened a lot with drivers of 8-person vehicles on airport transfer jobs and similar. The drivers would have each other details if they had got to know each other. However the job would still have to be re-allocated through the operator. The Claimant's evidence which I accept is that he did not have the details of other drivers and so could not operate swaps in this way.

20. The Claimant's experience of working for the Respondent was not a happy one. He took time off because of sickness absence in August. However it appears he did not give notice of absence and kept himself live on the portal, so that his obligation to pay the weekly circuit fee continued. He later reached agreement with the Respondent over paying back the arrears of fees. He says

and I accept that when he expressed concern to the Respondent about earning enough to cover the fees, he was told by Mr Bansal that he would certainly be able to: 'trust me, you will'.

21. On another occasion he was late paying cash into his bank to cover the rent and his access to the app was stopped. He had been unwell between 7 and 11 September 2016. He was given until 13 September to pay the fee and he worked on 12 September to raise the money. He paid the cash into his bank late on 13 September but was unable to access the circuit fee payment system. He was told he must pay £480 in total before access to the app was restored.

22. On 15 September 2016 the Respondent collected the rented vehicle from the Claimant and he has not worked for them since.

Decision

23. First I find that in general, the Driver Agreement accurately reflects the *practical* working arrangements that applied between the parties although the Claimant challenges the labelling of the agreement as a contract for services.

24. Mr Paulin argues that it is clear that the Claimant was a worker engaged by the Respondent, in accordance with the principles set out in other cases involving mini-cab drivers for other operators such as Addison Lee and Uber. However he denied that he was an employee. He points to the fact that the Claimant had agreed that he was self-employed, that he had to maintain insurance, that he collected payments from the passengers, paid for his own fuel and car maintenance and that he took the risk of unpaid fares.

25. Mr Paulin refers me to *Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99* and in particular the statement by Elias LJ that it would 'be an unusual case where a contract of service is found to exist when the worker takes the economic risk and is paid exclusively by third parties'.

26. He also refers me to the three tests set out in *Ready Mix Concrete Ltd v Minister of Pensions and National Insurance [1968] I AER 43.*

27. More recent authority has suggested that these tests do not operate as a checklist and that all the relevant factors need to be taken into account when deciding whether a person is operating under a contract of service. I heed that warning, but nevertheless the *Ready Mix Concrete* case offers a useful starting point.

28. First I find that the Claimant agreed to provide his own work and skill in return for remuneration. I have noted that there is no right of substitution contained in the Driver Agreement. I have taken note of Mr Chapman's evidence about drivers swapping jobs on an informal basis. Nevertheless these still had to be re-allocated through the operator. The arrangement described is quite different from a driver having the ability to send someone else along himself to fulfil a particular job that he accepted.

29. There was a substantial degree of control over the activities of the driver. He was obliged to observe the provisions of the driver handbook, and had to wear a uniform if he wanted to accept certain categories of work. He drove a vehicle displaying the Respondent's signage.

30. The Respondent's position is that the Claimant could work or not work whenever he wanted to. The reality was rather different. If he was off sick, it was not a case of not logging into the app. He had to notify the Respondent or he would continue to be charged equipment fees and circuit fee. Likewise if he decided to suspend working for the Respondent for a period, for example if he wanted to take a holiday, he had to give notice to avoid the charges continuing. If he was off for more than three weeks, the contract could be terminated.

31. I find that although once logged on the Claimant could refuse a particular job, if he did so he suffered the penalty of being locked out of the app and unable to work for 20 minutes.

32. Were the other provisions of the contract consistent with it being a contract of service?
33. I have noted that the Claimant took a degree of economic risk in that he was liable for any unpaid fares. He had to pay his own fuel and maintenance.

34. It is also of relevance however that the Claimant was prevented by the terms of the Driver agreement from either working for another private hire company himself or holding a private hire operator licence.

35. The Claimant agrees that he submitted a tax return for financial year 2015/2016 at the start of his engagement with the Respondent. For the financial year 2016/2017, the Claimant asserted to HMRC that he was in fact an employee.

36. I go on to consider the question of whether mutuality of obligation existed between the Claimant and the Respondent: did the Respondent agree to provide work and did the Claimant agree to accept work for which he would be paid?
37. It is clear that the Claimant accepted a minimum obligation to carry out 15 jobs per month, as specified in the agreement. He was later instructed to carry out at least 5 account jobs per week. I find therefore that there was an obligation upon the Claimant to offer some work to the Respondent although this was limited.

38. Was the Respondent under any obligation to offer work? The application form issued by the Respondent states that they 'cannot guarantee the volume of work available'. However the economic reality of the situation was this. Unless the contract was suspended by the driver giving notice, they remained liable for equipment fees and circuit fees for the duration of the time that they worked for the Respondent. If the Respondent was under no obligation to provide work, the drivers would continue to accrue debt to the Respondent after they had logged on whilst having no means to pay the fees off. In any event, the Respondent clearly expected a certain level of work, as evidenced by the requirement to work 15 jobs a month and later 5 account jobs a week. It seems to me that the whole arrangement was geared to ensuring that the drivers

worked a reasonable number of hours in order to cover their expenses. In those circumstances, I am not able to infer that the Respondent had no obligation to offer any work. As a matter of business efficacy, it must be implied that the Respondent would offer drivers enough work first of all to cover their minimum obligations and secondly to cover their weekly fees. That understanding is reflected in the answer that the Claimant records from Mr Bansal where he asked him if he would be offered enough jobs to cover his outstanding fees, and the answer came 'trust me, you will'.

39. I conclude that although drivers were able to suspend the operation of the agreement between them, there was a reasonable level of mutual obligation between them that is not inconsistent with a contract of employment.

40. Where does that leave the question of the Claimant's status? On the one hand, he is described as self-employed, pays his own expenses and takes the risk of fares not being paid. He can log on and off the app whenever he wants.

41. On the other hand, he is expected to work a reasonable amount and in turn has an expectation that he will be offered enough work to cover his fees. He is prevented from working for other operators. If he refuses a job he incurs a twenty minute time out. He is required to give notice of sickness and other absences, or he will still be charged the circuit fee and full equipment fee.

42. It is clear that the Claimant is not in business on his own account as a private hire driver. The drivers' agreement effectively prevents him from carrying on his own private hire business or offering his services to other users. Mr Chapman asserts that his other drivers frequently log off the app and go and work for another operator. However under the terms of the agreement, that is a breach of contract. Further whilst the Claimant initially competed a tax return as self-employed, the following year he asserted that he was an employee. In any event, tax status is not determinative of employment status.

43. If the Claimant is not self-employed, can he demonstrate that he is an employee? I have noted the reference to *Quarshie* and take account of the fact that the Claimant collected payments from 'cash' customers himself. Nevertheless he was not exclusively paid by customers. The Respondent expected that he would do a certain amount of account work and for this he was paid by the Respondent. I accept that there was a degree of risk in relation to both types of passenger that they might refuse to pay, and that this was the responsibility of the Claimant. No evidence has been provided about how often this might have occurred. In any event that risk was not counterbalanced by a right to charge what he wanted for the job, as the rate was set by the Respondent and the Claimant had no right to negotiate it directly with the customer. I have concluded that the risk around unpaid fares is one factor, but not a determinative factor in the current proceedings.

44. The conclusion I have reached, having applied the various tests in turn, is that whereas there are some matters that suggest that the Claimant did not have employment status, the majority of the factors identified above point to a relationship that is consistent with the Claimant working under a contract of service.

45. That finding has limited application to this case, given the Respondent's concession that the Claimant is a worker. He has withdrawn his claims for unfair dismissal. The impact of this decision is that the Claimant will be entitled to payment for a statutory minimum notice period of one week if he can establish that he was dismissed.

46. A further hearing is to be listed to determine the claims based on the Claimant's status as a worker, including his claims to have suffered detriment and his claims for notice pay, holiday pay and for arrears of the national minimum wage.

_____
Employment Judge Siddall
Date: 9 July 2019.