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FINAL JUDGMENT
IN
UBER & OTHERS
-V-
ASLAM & OTHERS
[2021]

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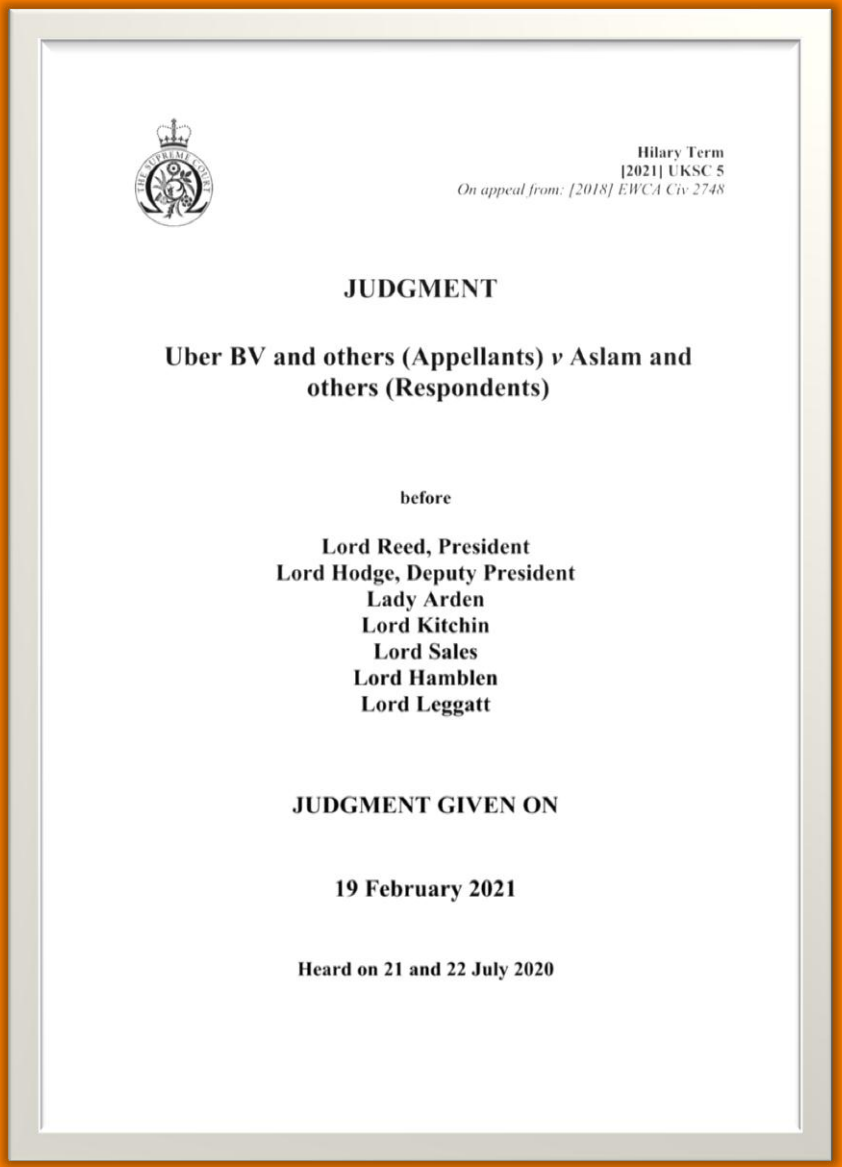
JUDGMENTS **SECTION**



Hilary Term
[2021] UKSC 5
On appeal from: [2018] EWCA Civ 2748

JUDGMENT

Uber BV and others (Appellants) *v* Aslam and others (Respondents)

before

Lord Reed, President
Lord Hodge, Deputy President
Lady Arden
Lord Kitchin
Lord Sales
Lord Hamblen
Lord Leggatt

JUDGMENT GIVEN ON

19 February 2021

Heard on 21 and 22 July 2020

SECTION 1

Case Nos: 2202550/2015
& Others

EMPLOYMENT TRIBUNALS

BETWEEN

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Issues

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

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

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

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

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

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

The Facts

The Uber 'product range'

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

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

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

'Taking an Uber' – summary

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

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

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

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

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

Payment

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

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

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

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

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

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

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

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

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

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

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

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

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

Terms between Uber and the passenger

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

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

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

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

Para 5 is entitled "Payment". It states:

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

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

---

[6] As defined – for these purposes, ULL

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

> **The Booking Services and the Booking Service Terms set out in this Part 1, and all non-contractual obligations arising in any way whatsoever out of or in connection with the Booking Service Terms shall be governed by, construed and take effect in accordance with the laws of England and Wales.**
>
> **Any dispute, claim or matter of difference arising out of or relating to the Booking Services or Booking Service Terms is subject to the exclusive jurisdiction of the courts of England and Wales.**

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

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

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

> **You understand that use of the Services may result in charges to you for the services or goods you receive from a Third Party Provider ("*Charges*"). After you have received services or goods obtained through your use of the Services, Uber will facilitate your payment of the applicable Charges on behalf of the Third Party Provider as disclosed collection agent for the Third Party Provider (as Principal) ...**
>
> **As between you and Uber, Uber reserves the right to establish, remove and/or revise Charges for any or all services or goods obtained through the use of the Services at any time in Uber's sole discretion ...**
>
> **This payment structure is intended to fully compensate the Third Party Provider for the services or goods provided. Except [not applicable], Uber does not designate any portion of your payment as a tip or gratuity to the Third Party Provider. Any representation by Uber ... To the effect that tipping is "voluntary," "not required," and/or "included" in the payments you make for services ... is not intended to suggest that Uber provides any additional amounts, beyond those described above, to the Third Party Provider.**

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

Terms between Uber and the driver

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

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

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

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

33 Under "Scope", para 2.1.1 declares:

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

Para 2.2.1 includes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It continues:

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

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

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

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

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

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

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

Para 2.6 is concerned with ratings. Para 2.6.2 includes:

---

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

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

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

38 The Driver Addendum begins thus:

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

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

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

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

Personal performance

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

Driver recruitment or 'onboarding'?

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

> **Book an interview slot NOW!**

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

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

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

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

procedures.

Drivers' obligations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> **Asking for a destination**

and (a circumstance rather than a reason):

> **After a trip without Uber approval**

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

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

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

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

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

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

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

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

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

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

message. The ultimate penalty is 'deactivation'.

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

The regulatory/licensing regime

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

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

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

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

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

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

63 The drivers must fund their own individual PH licences.

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

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

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

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

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

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

Uber's use of language generally

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

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

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

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

And:

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

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

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

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

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

'Workers': Legislation and Authorities

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

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

> **(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) —**
>
> **(a) a contract of employment, or**
> **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;**
>
> **and any reference to a worker's contract shall be construed accordingly.**

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

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

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

> **Agency workers who are not otherwise "workers"**
>
> **(1) This section applies in any case where an individual ("the agency worker") —**
>
> **(a) is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal; but**
> **(b) is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal; and**
> **(c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.**

WTR contains an almost identical provision.[22]

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

> **(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who —**
>
> **(a) works or worked for a person in circumstances in which—**
> **(i) he is or was introduced or supplied to do that work by a third person, and**
> **(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,**
> **(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b)**

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

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

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

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

> **(1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client"...**
>
> **(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. (Possibly this explains the use of the rather odd formulation "business undertaking" rather than "business" *tout court*; but if so, the hint from the draftsman is distinctly subtle.) It is sometimes said that the effect of the exception is that the Regulations do not extend to "the genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuine" self-employment is to be defined.**
>
> **(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in the sense intended by the Regulations – given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship – see below – but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.**
>
> **(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.**
>
> **(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker**

[23] Judgment, para 17

> **supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.**
>
> **(6) What we are concerned with is the rights and obligations of the parties under the contract - not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position ...**

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

> **24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.**
>
> **25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. ... The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. ...**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[34] Para 14

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

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

The learned judge went on to recite the facts:

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

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

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

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

Submissions

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

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

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

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

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

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

84 Mr Reade replied to the following effect.

(1) UBV's terms are valid and fairly define their relationship with the Claimants. The fact that Uber makes (and enforces) stipulations about the way in which the Claimants may make use of the 'platform' is unremarkable and unexceptionable. It simply reflects the common interest of the parties in maintaining service standards.
(2) If, contrary to the Respondents' case, the Claimants were 'workers' rather than in business on their own account, they were so employed by UBV.
(3) By operation of Rome I, Art 3(4), the choice of law clause between UBV and the drivers is not effective to defeat claims under WTR because those Regulations implement Community law, but the same does not go for ERA or NMWA, and the claims under those Acts are accordingly unsustainable (the Claimants' other arguments under Rome I being unsound).
(4) For the purposes of WTR (if applicable at all), working time is confined to periods when drivers are carrying passengers.
(5) Likewise, for the purposes of NMWA, the only activity capable of amounting to 'work' is driving passengers.

Analysis and Conclusions

Employment status – the core definition

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

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

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

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

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

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

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

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

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

We respectfully agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Which is the employing entity?

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

Employment status – the extended definitions

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

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

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

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

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

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

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

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

Conflict of laws

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

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[57] Submissions, paras 79-83

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[67] Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed (2016)
[68] Contained, we remind ourselves, in the Public Interest Disclosure Act 1998 (our emphasis)
[69] Para 33-282
[70] Few would argue that a right to receive, say, an itemised pay statement or written notification of a change in terms of employment satisfied the demanding language of Art 9(2). But the 'whistle-blowing' legislation enacts protection of a quite different order.
[71] Para 33-295

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

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

Working time

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

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

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

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

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

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

'Work' under NMWA

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

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

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

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

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

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

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

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

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

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

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

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

Outcome and Further Conduct

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

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

A.M. Snelson

EMPLOYMENT JUDGE

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

..... for Office of the Tribunals

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

SECTION 2

Appeal No. UKEAT/0056/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

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

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

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

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

Transcript of Proceedings

JUDGMENT

APPEARANCES

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

SUMMARY

JURISDICTIONAL POINTS - Worker, employee or neither

WORKING TIME REGULATIONS - Worker

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

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

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

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

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

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

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

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

Held: *dismissing the appeal*

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

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

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

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

HER HONOUR JUDGE EADY QC

Introduction

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

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

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

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

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

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

The Parties

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

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

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

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

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

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

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

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

The Relevant Factual Background

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

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

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

A

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

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

B

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

C

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

D

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

E

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

F

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

G

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

H

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

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

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

"Can I ask for the phone number directly?

Asking for a riders phone number directly may be seen as a violation of privacy and lead to an uncomfortable rider experience. Such experiences often lead to low ratings and can be reported to Uber.

Can I give them my direct phone number?

Providing an Uber user with your phone number during a trip may be seen as solicitation which is a violation of the partner agreement."

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

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

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

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

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

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

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

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

> **"23. … the matter is considered by ULL and a decision taken whether to compensate the passenger. … Mr Farrar explained that on several occasions Uber made deductions from his account without prior reference to him. … [when queried] Typically, the explanation was that ULL had agreed a partial refund of the fare with the passenger, resulting in a re-calculation of Mr Farrar's payment. Sometimes he anticipated a deduction (for example, on becoming aware of a refund agreed between ULL and the passenger) but no deduction was ultimately made. …"**

It concluded that two points emerged from the evidence:

> **"… First, refunds are handled and decided upon by ULL, sometimes without even referring the matter to the driver concerned. Secondly, the organisation in practice accepts that, where it is necessary, or at least politic, to grant the passenger a refund - say because a journey took much longer than anticipated - but there is no proper ground for holding the driver at fault, it must bear the loss."**

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

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

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

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

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

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

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

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

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

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

C
> **"52. Drivers who decline three trips in a row are liable to be forcibly logged off the App by Uber for 10 minutes. … an Uber document called "Confirmation and Cancellation Rate Process" shows that the expression "Penalty Box waring" is current within the organisation. The third in a graduated series of standard form messages reads:**
>
> > **… we noticed that you may have left your partner app running whilst you were away from your vehicle, and therefore have been unable to confirm your availability to take trips. As an independent contractor you have absolute flexibility to log onto the application at any time, for whatever period you choose. However, being online with the Uber app is an indication that you are available to take trips, in accordance with your Services Agreement. From today, if you do not confirm your availability to take trips twice in a row we will take this as an indication you are unavailable and we will log you off the system for 10 minutes."**

D

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

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

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

G

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

H
> **"54. … No Uber manager instructs the driver to take any particular route … In practice, however, the App's mapping software determines the route for most purposes. … [and] if an issue arises as to whether a passenger should receive a refund on the ground that the driver did not follow the most efficient route, ULL starts from the position … that it is for the driver to justify any departure from the route indicated on the App.**

55. … Passengers are required to rate drivers at the end of every trip on a simple 0-5 scoring system. Ratings are monitored and [UberX] drivers with average scores below 4.4 become subject to a graduated series of "quality interventions" aimed at assisting them to improve. "Experienced" drivers [who have undertaken 200 trips or more] whose figures do not improve to 4.4 or better are "removed from the platform" and their accounts "deactivated".

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

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

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

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

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

63. The drivers must fund their own individual PH licences.

64. The drivers are free to elect which 'product(s)' to operate [subject to being accepted ('onboarded') by Uber and subject to the rating requirements and any other special requirement applicable to particular 'products'].

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

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

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

The Regulatory Regime

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

"*Requirement for London operator's licence*

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

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

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

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

"Obligations of London operators

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

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

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

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

(3) A London PHV operator shall -

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

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

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

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

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

…

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

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

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

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

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

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

(e) any fare or estimated fare quoted;

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

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

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

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

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

…

13. ***Particulars of drivers***

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

…

14. ***Record of complaints***

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

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

…

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

(a) the date of the related booking;

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

(c) the registration mark of the vehicle used;

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

(e) the nature of the complaint; and

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

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

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

…

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

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

The Contractual Documentation

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

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

38. "Transportation Provider" is then defined as:

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

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

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

> **"1. The acceptance of PHV Bookings [in accordance with clause 3] … but without prejudice to [ULL's] rights at its sole and absolute discretion to decline any PHV Booking you seek to make;**
>
> **2. Allocating each accepted PHV Booking to a Transportation Provider via such means as [ULL] may choose;**
>
> **3. Keeping a record of each accepted PHV Booking;**
>
> **4. Remotely monitoring (from [ULL's] registered office and/or operating centres) the performance of the PHV Booking by the Transportation Provider;**

5. Receipt of and dealing with feedback, questions and complaints relating to PHV Bookings … You are encouraged to provide your feedback if any of the transportation services provided by the Transportation Provider do not conform to your expectations; and

6. Managing any lost property queries relating to PHV Bookings."

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

> **"The Booking Services are provided by [ULL] to you free of charge. [ULL] reserves the right to introduce a fee for the provision of the Booking Services. If [ULL] decides to introduce such a fee, it will inform you accordingly and allow you to either continue or terminate your access to the Booking Services through the Uber App at your option."**
>
> **"The rates that apply for the transportation services provided by the Transportation Provider can be found … through the Uber App. …"**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A

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

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

B

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

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

C

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

D

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

E

F

G

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

H

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

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

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

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

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

"… Uber and … [ULL] do not, and shall not be deemed to, direct or control Customer or its Drivers generally or in their performance under this Agreement specifically, including in connection with the operation of Customer's business, the provision of Transportation Services, the acts or omissions of Drivers, or the operation and maintenance of any Vehicles. Whilst authorised to provide Transportation Services under this Agreement, Customer and its Drivers retain the sole right to determine when and for how long each of them will utilize the Driver App or the Uber Services. Customer and its Drivers retain the option, via the Driver App, to decline or ignore a User's request for Transportation Services via the Uber Services, or to cancel an accepted request …"

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

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

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

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

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

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

The Relevant Legislative Provisions

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

> **"230. *Employees, workers etc***
>
> **…**
>
> **(3) In this Act "worker" … means an individual who has entered into or works under (or, where the employment has ceased, worked under) -**
>
> **(a) a contract of employment, or**
>
> **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;**

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

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

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

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

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

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

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

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

The ET's Decision and Reasoning

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

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

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

> **"87. … (a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator, but (c) requiring drivers and passengers to agree, *as a matter of contract,* that it does not provide transportation services … and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits … a degree of scepticism. …"**

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

> **"89. … they are a variety of driving services. Mr Aslam does not offer such a range. Nor does Mr Farrar, or any other solo driver. The marketing self-evidently is not done for the benefit of any individual driver. Equally self-evidently, it is done to promote Uber's name and 'sell' its transportation services. …"**

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

68. The ET further concluded that Uber's:

> **"90. … general case and the written terms on which they rely do not correspond with the practical reality. The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous. …"**

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

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

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

> **"… That suggests that the driver is put into contact with a possible passenger with whom he has the opportunity to negotiate and strike a bargain. But drivers do not and cannot negotiate with passengers (except to agree a reduction of the fare set by Uber). They are offered and accept trips strictly on Uber's terms."**

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

> **"91. … Since it is essential to that case that there is no contract for the provision of transportation services between the driver and any Uber entity, the Partner Terms and the New Terms require the driver to agree that a contract for such services (whether a 'worker' contract or otherwise) exists between him and the passenger, and the Rider Terms contain a corresponding provision. Uber's case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract (UBV) from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger. Uber's case has to be that if the organisation became insolvent, the drivers would have enforceable rights directly against the passengers. And if the contracts were 'worker' contracts, the passengers would be exposed to potential liability as the driver's employer … The absurdity of these propositions speaks for itself. Not surprisingly, it was not suggested that in practice drivers and passengers agree terms. Of course they do not since (apart from any other reason) by the time any driver meets his passenger the deal has already been struck (between ULL and the passenger). …"**

D

E

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

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

G

> **"92. … The drivers provide the skilled labour through which the organisation delivers its services and earns its profits. We base our assessment … in particular on the following considerations.**
>
> **(1) The contradiction in the Rider Terms between the fact that ULL purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings.**
>
> **(2) The fact that Uber interviews and recruits drivers.**

H

> **(3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.**
>
> **(4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements.**

(5) The fact that Uber sets the (default) route and the driver departs from it at his peril.

(6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory.)

(7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties.

(8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.

(9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.

(10) The guaranteed earnings scheme (albeit now discontinued).

(11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.

(12) The fact that Uber handles complaints by passengers, including complaints about the driver.

(13) The fact that Uber reserves the power to amend the drivers' terms unilaterally."

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

> **"93. … the drivers fall full square within the terms of the 1996 Act, s230(3)(b). It is not in dispute that they undertake to provide their work personally. … we are clear that they provide their work 'for' Uber. We are equally clear that they do so pursuant to a contractual relationship. If, as we have found, there is no contract with the passenger, the finding of a contractual link with Uber is inevitable. But we do not need to base our reasoning on a process of elimination. We are entirely satisfied that the drivers are recruited and retained by Uber to enable it to operate its transportation business. The essential bargain between driver and organisation is that, for reward, the driver makes himself available to, and does, carry Uber passengers to their destinations. Just as in *Autoclenz*, the employer is precluded from relying upon its carefully crafted documentation because, we find, it bears no relation to reality. And if there is a contract with Uber, it is self-evidently not a contract under which Uber is a client or customer of a business carried on by the driver. … we regard that notion as absurd."**

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

> **"94. … the agreement between the parties is to be located in the field of dependent work relationships; it is not a contract at arm's length between two independent business undertakings. Moreover the drivers do not market themselves to the world in general; rather they are recruited by Uber to work as integral components of its organisation."**

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

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

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

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

> **"100. … We do not accept that submission because, in our view, it confuses the service which the passenger desires with the work which Uber requires of its drivers in order to deliver that service. It is essential to Uber's business to maintain a pool of drivers who can be called upon as and when a demand for driving services arises. The excellent 'rider experience' which the organisation seeks to provide depends on its ability to get drivers to passengers as quickly as possible. To be confident of satisfying demand, it must, at any one time, have some of its drivers carrying passengers and some waiting for an opportunity to do so. Being available is an essential part of the service which the driver renders to Uber. …"**

75. In the alternative, the ET concluded:

> **"102. … at the very latest, the driver is 'working' for Uber from the moment when he accepts any trip. He is then bound, subject to the cancellation policy, to complete the trip (and will not be offered any other work until he has done so) and is required immediately by Uber to undertake work essential to Uber's delivery of the service to the passenger, namely to proceed at once to the pick-up point."**

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

> **"122. … For so long as the conditions apply, but no longer, we consider that he is "working, at his employer's disposal and carrying out his activity or duties." … (It will, of course, be a matter of evidence in each case whether, and for how long, he remains ready and willing to accept trips.) …"**

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

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

The Appeal and the Parties' Submissions

The Appeal

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

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

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

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

Submissions

Uber's Case

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

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

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

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

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

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

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

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

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

The Claimants' Case

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

95. Lord Clarke agreed, holding:

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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

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

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

A

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

B

C

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

D

E

F

G

H

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 3

Neutral Citation Number: [2018] EWCA Civ 2748

Case No: A2/2017/3467

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ Eady QC
UKEAT/0056/17/DA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2018

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE UNDERHILL VP
and
LORD JUSTICE BEAN

- -

Between :

UBER B.V. ("UBV") (1) **UBER LONDON LIMITED ("ULL") (2)** **UBER BRITANNIA LIMITED (3)**	**Appellants**
- and -	
Yaseen ASLAM (1) **James FARRAR (2)** **Robert DAWSON & others (3)**	**Respondents**

- -
- -

Dinah Rose QC and **Fraser Campbell** (instructed by **DLP Piper UK LLP**) for the **Appellants**
Jason Galbraith-Marten QC and **Sheryn Omeri** (instructed by **Bates Wells and Braithwaite LLP**) for the **First** and **Second Respondents.**
Thomas Linden QC (instructed by **Leigh Day**) for the **Third Respondents**

Hearing dates : 30-31 October 2018

- -

Approved Judgment

Sir Terence Etherton MR and Lord Justice Bean:

Introduction

1. In the words of the employment tribunal ("the ET"), from whose decision this appeal is brought, "Uber is a modern business phenomenon". It was founded in the United States in 2009 and its smartphone app, the essential tool through which the enterprise operates ("the App"), was released the following year. At the time of the ET hearing in 2016 there were about 30,000 Uber drivers operating in the London area, and 40,000 in the UK as a whole. The organisation has some 2 million passengers registered to use its services in London.

2. The Claimants are current or former Uber drivers working in London.

3. The first Appellant, Uber BV ("UBV"), is a Dutch corporation and the parent company of the second and third Appellants. It holds the intellectual property rights in the App.

4. The second Appellant, Uber London Limited ("ULL"), is a UK registered company which, since May 2012, has held a Private Hire Vehicle ("PHV") Operator Licence pursuant to the Private Hire Vehicles (London) Act 1998 and the regulations made under it. Its functions include making provision for the invitation and acceptance of PHV bookings and accepting such bookings.

5. The third Appellant, Uber Britannia Limited, holds or manages PHV Operator Licences issued by various local authorities outside London. It was named in the claim form in this case but its activities did not feature in the evidence in the ET nor in the argument before us.

6. The claims brought before the ET were under the Employment Rights Act 1996 ("ERA"), read with the National Minimum Wage Act 1998 ("NMWA") and associated Regulations, for failure to pay the minimum wage and under the Working Time Regulations 1998 ("WTR") for failure to provide paid leave. Two claimants, including Mr Aslam, also complained under Parts IVA and V of the ERA of detrimental treatment on "whistleblowing" grounds.

7. In their response form the Appellants, to whom we will refer collectively as "Uber", denied that the Claimants were at any material time "workers" entitled to the protection of the legislation on which they relied. In addition, they raised jurisdictional defences based on applicable law and forum points.

8. The ET held a public preliminary hearing to determine the status and jurisdiction issues before Employment Judge Snelson and two lay members beginning on 19 July 2016. Thomas Linden QC appeared for the Claimants and David Reade QC for Uber. Oral evidence was heard from Mr Aslam and Mr Farrar, the First and Second Claimants, and, on behalf of Uber, from Ms Joanna Bertram, Uber's Regional General Manager for the UK, Ireland and the Nordic Countries.

9. The ET summarised the principal issues before them at the preliminary hearing in terms taken from Mr Linden's closing submissions:-

> "The core issue remains as to whether the claimants are "workers" for the purposes of the various definitions under the

> domestic legislation. There are also conflict of laws issues, but these have narrowed substantially.
>
> > a) Uber now accepts that the Tribunal has jurisdiction in respect of all of the respondents, i.e. that it is competent (in the international jurisdiction sense) to adjudicate the claims against all of the respondents including UBV.
> >
> > b) They also accept that the WTR apply to the claimants provided they are workers as defined;
> >
> > c) They also accept that the ERA and the NMWA would apply to any claim against ULL provided they are workers.
> >
> > d) But they say that the ERA and NMWA do not apply to any contract with UBV – Dutch law applies such that the claimants do not have any protection under UK employment legislation."
>
> If the claimants are "workers", the Tribunal is then asked to determine, in principle, what counts as work and/or working time for the purposes of the WTR and the national minimum wage legislation."

10. The ET decided that:-

    a) English law applied;

    b) The Claimants were "employed" by ULL as "workers" within the meaning of section 230(3)(b) of the ERA 1996, the Working Time Regulations and the NMWA;

    c) The working time of each of the Claimants started as soon as he was within his "territory" (London), had the App switched on and was ready and willing to accept trips, and ended as soon as any of those three conditions ceased to apply;

    d) For the purposes of the National Minimum Wage Regulations 2015 the Claimants were engaged in "unmeasured work".

11. The first and last of these rulings were not the subject of argument before us.

"Taking an Uber"

12. The ET made the following findings which were not in dispute before us:-

> "15. The Uber system works in this way. Fare-paying passengers must be aged 18 or over. They register by providing certain personal information including credit or debit card details. They can then book a trip by downloading the App on to their smartphones and logging on. They are not obliged to state their

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

16. The driver is not made aware of the destination until he has collected the passenger (he learns it from the passenger directly or, where the passenger has stated the destination to Uber, from the app, when he presses the 'Start Trip' button). The App incorporates software linked to satellite navigation technology, providing detailed directions to the destination. The driver is not bound to follow the route proposed and will not do so if the passenger stipulates a different route. But an unbidden departure from the App route may have adverse consequences for the driver (see below).

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

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

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

20. The passenger pays the fare in full to UBV, by credit or debit card, and receives a receipt by email. Separately, UBV generates

> paperwork which has the appearance of being an invoice addressed to the passenger by the driver. The 'invoice' document does not show the full name or contact details of the passenger, just his or her first name. Nor is it sent to the passenger. He or she would no doubt be vexed to receive it, having already paid the fare in full to Uber and received a receipt. The relevant driver has access to it electronically through the App. It serves as a record of the trip undertaken and the fare charged, but
>
> …
>
> 24. Where a passenger cancels a trip more than five minutes after it has been accepted by a driver a £5 cancellation fee is payable. That fee is deemed a fare and accordingly UBV takes its customary percentage."

The Rider Terms

13. The ET found as follows:

> "28. Passengers logging on to the App are required to signal their acceptance of Uber's terms. The UK 'Rider Terms', updated on 16 June 2016, were shown to us. We assume that the document which they replaced was similar. Part 1 is entitled "Booking Services Terms". Para 3 includes this:
>
> > Uber UK accepts PHV Bookings acting as disclosed agent for the Transportation Provider (as principal). Such acceptance by Uber UK as agent for the Transportation Provider gives rise to a contract for the provision to you of transportation services between you and the Transportation Provider (the "Transportation Contract"). For the avoidance of doubt: Uber UK does not itself provide transportation services and is not a Transportation Provider. Uber UK acts as intermediary between you and the Transportation Provider. You acknowledge and agree that the provision to you of transportation services by the Transportation Provider is pursuant to the Transportation Contract and that Uber UK accepts your booking as agent for the Transportation Provider, but is not a party to that contract.
>
> Para 4 lists the "Booking Services" provided to the passenger by ULL (strictly as agent for the "Transportation Provider") as follows:
>
> > 1. The acceptance of PHV Bookings in accordance with paragraph 3 above, but without prejudice to Uber UK's rights at its sole and absolute discretion to decline any PHV Booking you seek to make;

> 2. Allocating each accepted PHV Booking to a Transportation Provider via such means as Uber UK may choose;
>
> 3. Keeping a record of each accepted PHV Booking;
>
> 4. Remotely monitoring ... the performance of the PHV Booking by the Transportation Provider;
>
> 5. Receipt of and dealing with feedback, questions and complaints relating to PHV Bookings ... You are encouraged to provide your feedback if any of the transportation services provided by the Transportation Provider do not conform to your expectations; and
>
> 6. Managing any lost property queries relating to PHV Bookings.

Para 5 is entitled "Payment". It states:

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

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

> The Booking Services and the Booking Service Terms set out in this Part 1, and all non-contractual obligations arising in any way whatsoever out of or in connection with the Booking Service Terms shall be governed by, construed and take effect in accordance with the laws of England and Wales.
>
> Any dispute, claim or matter of difference arising out of or relating to the Booking Services or Booking Service Terms is subject to the exclusive jurisdiction of the courts of England and Wales.

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

> The Services constitute a technology platform that enables users ... to pre-book and schedule transportation, logistics, delivery and/or vendors services with independent third-party providers ... (including Transportation Providers as

> defined in Part 1) ... YOU ACKNOWLEDGE THAT UBER [defined as Uber BV, see below] DOES NOT PROVIDE TRANSPORTATION, LOGISTICS, DELIVERY OR VENDORS SERVICES OR FUNCTION AS A TRANSPORTATION PROVIDER OR CARRIER AND THAT ALL SUCH TRANSPORTATION, LOGISTICS, DELIVERY AND VENDORS SERVICES ARE PROVIDED BY INDEPENDENT THIRD PARTY CONTRACTORS WHO ARE NOT EMPLOYED BY UBER OR ANY OF ITS AFFILIATES.

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

> You understand that use of the Services may result in charges to you for the services or goods you receive from a Third Party Provider ("Charges"). After you have received services or goods obtained through your use of the Services, Uber will facilitate your payment of the applicable Charges on behalf of the Third Party Provider as disclosed collection agent for the Third Party Provider (as Principal) ...
>
> As between you and Uber, Uber reserves the right to establish, remove and/or revise Charges for any or all services or goods obtained through the use of the Services at any time in Uber's sole discretion ...
>
> This payment structure is intended to fully compensate the Third Party Provider for the services or goods provided. Except [not applicable], Uber does not designate any portion of your payment as a tip or gratuity to the Third Party Provider. Any representation by Uber ... to the effect that tipping is "voluntary," "not required," and/or "included" in the payments you make for services ... is not intended to suggest that Uber provides any additional amounts, beyond those described above, to the Third Party Provider.

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

Terms between Uber and the driver

The 2013 Partner Terms

14. The ET continued as follows:

> “32. The terms purporting to govern the relationships between Uber and the drivers were initially contained in a document

dated 1 July 2013, entitled 'Partner Terms". It begins with, among others, these definitions:

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

33. Under "Scope", para 2.1.1 declares:

> The Partner acknowledges and agrees that Uber does not provide any transportation services and that Uber is not a transportation or passenger carrier. Uber offers information and a tool to connect Customers seeking Driving Services to Drivers who can provide the Driving Service, and it does not and does not intend to provide transportation or act in any way as a transportation or passenger carrier. Uber has no responsibility or liability for any driving or transportation services provided by the Partner or the Drivers ... The Partner and/or the Drivers will be solely responsible for any and all liability which results or is alleged to be as a result of the operation of the Vehicle(s) and/or the driving or transportation service ... Partner agrees to indemnify, defend and hold Uber harmless from any (potential) claims or (potential) damages incurred by any third party. including the Customer or the Driver, raised on account of the provision of the Driving Service. By providing the Driving Service

> to the Customer, the Partner accepts. agrees and acknowledges that a direct legal relationship is created and assumed solely between the Partner and the Customer. Uber shall not be responsible or liable for the actions, omissions and behaviour of the Customer or in relation to the Partner, the Driver and the Vehicle. The Drivers are solely responsible for taking reasonable and appropriate precautions in relation to any third party with which they interact in connection with the Driving Service. Where this allocation of the Parties' mutual responsibilities may be ineffective under applicable law, the Partner undertakes to indemnify, defend and hold Uber harmless from and against any claims that may be brought against Uber in relation to the Partner's provision of the Driving Service under such applicable law.

Para 2.2.1 includes:

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

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

35. A number of other features of the Partner Terms are worthy of note. By para 4.3.4 Partners were required to "support Uber in all communications", actively engage other Partners or Drivers if requested to do so and refrain from speaking negatively about Uber's business and business concept in public. Several provisions in para 9 imposed mutual duties of confidentiality.

> Deemed representations of Partners and Drivers under para 6 went well beyond the scope of standard regulatory requirements (concerning, for example, qualifications and fitness to perform driving duties). By para 6.1.1 the Partner represented (inter alia):
>
> > (vii) the Driver and the Vehicle comply at all times with the quality standards set by Uber
>
> Para 9.4 required the Partner and Driver to agree to constant monitoring by Uber and to Uber's retention of data so generated. Uber reserved wide powers to amend the Partner Terms unilaterally (see paras 1.1.2 and 5.3). By para 8.1, the Agreement was declared to terminate automatically,
>
> > ... when the Partner and/or its drivers no longer qualifies, under the applicable law or the quality standards of Uber, to provide the Driving Service or to operate the Vehicle.
>
> And by para 8.2(a) either party was entitled to terminate without notice in any case of a material breach of the Agreement, which might take the form of:
>
> > ... (e.g. breach of representations ... or receipt of a significant number of Customer complaints) ...
>
> The Partner Terms made provision for Uber to recover fares on behalf of Drivers and deduct 'Commission', calculated as a percentage of the fare in each case (para 5.2). The Agreement was declared to be governed by the law of the Netherlands and, unless otherwise resolved, any dispute was to be referred to arbitration under the International Chamber of Commerce Arbitration Rules (para 11)."

The 2015 New Terms

15. The ET continued as follows:-

> "36. In October 2015, Uber issued revised terms ('the New Terms') to drivers. They were not the subject of any consultation or discussion. They were simply communicated to drivers via the App and the drivers had to accept them before going online and becoming eligible for further driving work.
>
> 37. The New Terms are contained in a document which begins:
>
> > This Services Agreement between an independent company in the business of providing Transportation Services ... ("Customer') and Uber BV…
>
> It continues:

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

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

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

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

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

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

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

> Driver Addendum) to enforce the Driver Addendum against the Driver as a third party beneficiary thereof.

Para 2.6 is concerned with ratings. Para 2.6.2 includes:

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

38. The Driver Addendum begins thus:

> "This Driver Addendum Services Agreement ("Addendum") constitutes a legal agreement between an Independent company in the business of providing Transportation Services (as defined below) ("Transportation Company") and an independent, for-hire transportation provider ("Driver").
>
> Driver currently maintains a contractual or employment arrangement with Transportation Company to perform passenger carriage services for Transportation Company.
>
> Transportation Company and Uber B.V. ("Uber") have separately entered into a Services Agreement ("Agreement") in order for Transportation Company to access the Uber Services ...
>
> In addition to the Transportation Services It (sic) regularly performs pursuant to his or her contractual arrangements with Transportation Company, Driver is interested in

> receiving lead generation and related services through the Uber Services. Transportation Company and Driver desire to enter into this Addendum to define the terms and conditions under which Driver may receive such lead generation and related services.
>
> In order to use the Uber Services, Driver and Transportation Company must agree to the terms and conditions that are set forth below. Upon Driver's execution (electronic or otherwise) of this Addendum, Driver and Transportation Company shall be bound by the terms and conditions set forth herein."

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

> Uber and Its Affiliates in the Territory do not, and shall not be deemed to, direct or control Driver generally or in Driver's performance of Transportation Services or maintenance of any Vehicles. Driver acknowledges that neither Uber nor any of its Affiliates in the Territory controls, or purports to control: (a) when or for how long Driver will utilise the Driver App for the Uber Services; or (b) Driver's decision ... to decline or ignore a User's request for Transportation Services, or to cancel an accepted request ... for Transportation Services ... subject to Uber's then-current cancellation policies. Driver may be deactivated or otherwise restricted from accessing or using the Driver App or the Uber Services in the event of a violation of this Addendum or Transportation Company's violation of the Agreement or Driver's or Transportation Company's disparagement of Uber or any of its Affiliates, or Driver's or Transportation Company's act or omission that causes harm to Uber's or any of its Affiliates' brand, reputation or business as determined by Uber in its sole discretion. Uber also retains the right to deactivate or otherwise restrict Driver from accessing or using the Driver App or the Uber Services for any other reason at the sole and reasonable discretion of Uber. Additionally, Driver acknowledges Uber's rights in the UBER family of trademarks and names, including UBER ... the UBER Logo and EVERYONE'S PRIVATE DRIVER..."

16. The ET observed in a footnote to the introduction to paragraph 2.5 of the New Terms that "of course, in all but a tiny minority of cases "Customer" and "the driver" are one and the same individual…"

Personal performance

17. The ET set out paragraph 39 of the New Terms which provided that:-

> "…access to the App was and is personal to the 'Partner/Customer' and (if not the same person) the driver. The right to use the App was and is non-transferable. Drivers are not permitted to share accounts. Nor may they share their Driver IDs, which are used to log on to the App."

It was and is common ground that there is no question of any driver being replaced by a substitute.

Other findings of the ET

18. The ET noted (at paragraph 40) that those interested in becoming Uber drivers can sign up online but must attend a specified location, produce certain documents and undergo a form of induction known as "onboarding". They recorded that Ms Bertram appeared to suggest in evidence that there was no requirement for personal attendance by the putative driver and said "if that was her suggestion, we reject it". They accepted "the general tenor of her evidence that Uber does not subject applicant drivers to close scrutiny", adding: "that said, they must present themselves and their documents personally and they are, we find, subjected to what amounts to an interview, albeit not a searching one".

19. The ET also recorded that the driver supplies the vehicle. Uber publishes a list of makes and models which it will accept. Vehicles have to be in good condition, manufactured in or after 2006 and preferably black or silver. The driver is responsible for all costs incidental to owning and running the vehicle, including fuel, repairs, maintenance, MOT inspections, road tax and insurance.

20. The Claimants' case before the ET was that "in a host of different ways, Uber instructs, manages and controls the drivers". The ET were shown a "Welcome Packet" containing materials used in the "onboarding" of new drivers. Under the heading "what Uber looks for" the following appeared:-

> "Low Cancellation Rate: when you accept a trip request you have made a commitment to the rider. Cancelling often or cancelling for unwillingness to drive to your clients leads to a poor experience.
>
> High Acceptance Rate: Going on duty means you are willing and able to accept trip requests. Rejecting too many requests leads to rider confusion about availability. You should be off duty if not able to take requests."

21. The ET made findings about acceptance and cancellation of trips as follows:-

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

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

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

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

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

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

22. The Claimants also relied on the ratings system as evidence of control. Passengers are asked by email at the end of every trip to rate drivers on a scale from zero (worst) to five (best). Ratings are monitored and drivers with average scores below 4.4, once they have undertaken their first 200 trips, become subject to a graduated series of "quality interventions" aimed at assisting them to improve. Experienced drivers, that is to say those who have undertaken 200 trips or more, whose figures do not improve to 4.4 or better, are "removed from the platform" and their accounts "deactivated".

23. There is a rule prohibiting drivers from exchanging contact details with passengers or contacting them after the end of the trip, except for the purpose of returning lost property.

24. As well as undertaking work for or through Uber, drivers are expressly permitted by clause 2.4 of the 2015 New Terms to work for or through other organisations, including direct competitors operating through digital platforms. The drivers, as we have noted, must meet all expenses associated with running their vehicles. They must fund their own individual private hire licences. They treat themselves as self-employed for tax purposes. They are free (subject to being accepted by Uber) to elect which of the Uber "products" (Uber X, Uber Pool and various Uber Deluxe products) to operate. They are not provided with any clothing in the nature of an Uber uniform. In London they are discouraged from displaying Uber branding of any kind.

The regulatory and licensing regime

25. The Private Hire Vehicles (London) Act 1998 ("the PHVA 1998") provides, so far as material:-

> "2. (1) No person shall in London make provision for the invitation or acceptance of, or accept, private hire bookings unless he is the holder of a private hire vehicle operator licence for London (in this Act referred to as a London PHV Operator Licence).
>
> …
>
> 3. (1) Any person may apply to the licensing authority for a London PHV Operator Licence.
>
> (2) An application under this section shall state the address of any premises in London which the applicant proposes to use as an operating centre.
>
> (3) The licensing authority shall grant a London PHV Operator Licence to the applicant if the authority is satisfied that-
>
> (a) the applicant is a fit and proper person to hold a London PHV operator licence …..
>
> (b) Any further requirements that may be prescribed (which may be requirements relating to operating centres) are met.
>
> 4. (1) The holder of a London PHV Operator's Licence (in this Act referred to as a "London PHV Operator") shall not in London accept a private hire booking other than at an operating centre specified in his licence.

> (2) A London PHV operator shall secure that any vehicle which is provided by him for carrying out a private hire booking accepted by him in London is:
>
> > (a) a vehicle for which a London PHV Licence is in force driven by a person holding a London PHV driver's licence or;
> >
> > (b) a London cab driven by a person holding a London Cab driver's licence.
>
> 5. (1) A London PHV operator (the first operator) who has in London accepted a private hire booking may not arrange for another operator to provide a vehicle to carry out that booking as sub-contractor unless;
>
> > (a) the other operator is a London PHV Operator and the subcontracted booking is accepted at an operating centre in London…….
>
> (4) It is immaterial for the purposes of subsection (1) whether or not subcontracting is permitted by the contract between the first operator and the person who made the booking.
>
> (5) For the avoidance of doubt (and subject to any relevant contract terms) a contract of hire between a person who made a private hire booking at an operating centre in London and a London PHV Operator who accepted the booking remains in force despite the making of arrangements by that operator to provide a vehicle to carry out that booking as sub-contractor."

26. The Private Hire Vehicles (London) (Operators Licences) Regulations 2000 originally provided by regulation 9(3):-

> "The Operator shall, if required to do so by a person making a private hire booking:
>
> (a) agree the fare for the journey booked or,
>
> (b) provide an estimate of that fare."

By an amendment made with effect from 27 June 2016 this was changed to read:

> "Before the commencement of each journey the operator shall;-
>
> (a) Agree the fare with the person making the private hire booking or;
>
> (b) Provide an accurate estimate of the fare to the person making the private hire booking.

> What constitutes an accurate estimate for the purposes of this condition may be specified by the licensing authority from time to time."

Value Added Tax

27. We were shown a print out from the www.gov.uk website of VAT Notice 700/25, on "How VAT applies to taxis and private hire cars". Under paragraph 3, "Businesses that engage drivers", this states:

> "3.1 The types of business this covers
>
> This includes all businesses, whether they're a sole proprietorship, partnership or limited company, which either:
>
> employ staff to drive taxis or private hire-cars; [or]
>
> take on self-employed drivers to work under a contract for services.
>
> 3.2 Accounting for VAT
>
> If you run a business of this kind, then unless you're acting as an agent for any of your drivers for some, or all, of the work they do, you're a principal in making the supply of transport to the customer. In working out the value of your supply you must include:
>
> the full amount payable by the customer before deducting any payments made to your drivers;
>
> any fares you (as the sole proprietor, director or partner) take if you drive for the firm;
>
> the full fares payable by passengers even if you sub-contract work to an independent business or owner driver; and
>
> any referral fee you get from other taxi businesses.
>
> 3.3 Agent or principal
>
> As a taxi or private hire car business you may perform two different types of work. These are:
>
> cash work, where individual customers pay cash to the driver on completion of the journey; and
>
> account work, where regular customers, particularly companies and institutions, are allowed to settle their bills periodically.
>
> ……If all your drivers are employees, you're a principal and must follow paragraph 3.2 when accounting for VAT. But, if your drivers

> are self-employed you may, depending on the agreements you have with them, be acting as their agent for cash work and in some cases for account work as well."

Employment Rights Act 1996

28. Section 230 of the ERA 1996 provides:-

> "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."

29. The phrase "limb (b) worker" is now widely used to refer to individuals working under a contract within section 230(3)(b) above.

30. Section 43K of the ERA provides an extended definition of "worker" for the purposes of the legislation on protected disclosures. There are also extended definitions of

"worker" under regulation 36 of the WTR and under Section 34 of the NMWA which provides:-

> "*Agency workers who are not otherwise "workers"*
>
> (1) This section applies in any case where an individual (the agency worker"):–
>
> > (a) is supplied by a person "the agent" to do work for another ("the principal") under a contract or arrangements made between the agent and the principal but;
> >
> > (b) is not as respects that work a worker, because of the absence of a worker's contract between the individual and the agent or the principal and;
> >
> > (c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is by virtue of the contract that of a client or customer of any professional or business undertaking carried on by the individual."

The decision of the ET

31. The ET's central conclusion (at paragraphs 85-86) was as follows:-

> "85… We accept that the drivers (in the UK at least) are under no obligation to switch on the App. There is no prohibition against 'dormant' drivers. We further accept that, while the App is switched off, there can be no question of any contractual obligation to provide driving services. The App is the only medium through which drivers can have access to Uber driving work. There is no overarching 'umbrella' contract. All of this is self-evident and Mr Linden did not argue to the contrary.
>
> 86. But when the App is switched on, the legal analysis is, we think, different. We have reached the conclusion that any driver who (a) has the App switched on, (b) is within the territory in which he is authorised to work, and (c) is able and willing to accept assignments, is, for so long as those conditions are satisfied, working for Uber under a 'worker' contract and a contract within each of the extended definitions."

32. In view of the conclusion that ULL was the employer the conflict of laws issue became irrelevant, but for the avoidance of doubt the ET held that, on Rome I principles, English law would have been applicable in any event.

The appeal to the Employment Appeal Tribunal ("the EAT")

33. The Appellants appealed to the EAT. The case was heard by Judge Eady QC (sitting alone) on 27-28 September 2017. Uber's grounds of appeal can be summarised as being that:-

> (1) The ET had erred in law in disregarding the written contractual documentation. There was no contract between the Claimants and ULL but there were written agreements between the drivers and UBV and riders, which were inconsistent with the existence of any worker relationship. As those agreements made clear, Uber drivers provided transportation services to riders; ULL (as was common within the mini-cab or private hire industry) provided its services to the drivers as their agent. In finding otherwise, the ET had disregarded the basic principles of agency law.
>
> (2) The ET had further erred in relying on regulatory requirements as evidence of worker status.
>
> (3) It had also made a number of "inconsistent" and "perverse" findings of fact in concluding that the Claimants were required to work for Uber.
>
> (4) It had further failed to take into account relevant matters relied on by Uber as inconsistent with worker status and as, on the contrary, strongly indicating that the Claimants were carrying on a business undertaking on their own account.

34. In her reserved judgment handed down on 10 November 2017 Judge Eady dismissed the appeal. She held that the ET had been entitled to reject the characterisation of the relationship between the drivers and Uber, specifically ULL, set out in the written contractual documents. Applying *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157, the ET had to determine what was the true agreement between the drivers and ULL. In so doing it was important for the ET to have regard to the reality of the obligations and of the factual situation. The starting point must always be the statutory language, not the label used by the parties; simply because the parties have used the language of self-employment does not mean that the contract does not fall within section 230(1)(b). After referring to *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 16, [2014] 2 All ER 685, she continued:-

> "105. In the normal commercial environment (that pertaining in *Secret Hotels2*) the starting point will be the written contractual documentation; indeed, unless it is said to be a sham or liable to rectification, the written contract is generally also the end point - the nature of the parties' relationship and respective obligations being governed by its terms. Here, however, the ET was required to determine the nature of the relationship between ULL and the drivers for the purposes of statutory provisions in the field of employment law; provisions enacted to provide protections to those often disadvantaged in any contractual bargain. The ET's starting point was to determine the true nature of the parties' bargain, having regard to *all* the circumstances. That was consistent with the approach laid down in *Autoclenz* and was particularly apposite given there was no direct written contract between the drivers and ULL. Adopting that approach, the ET

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

35. She therefore upheld the central finding of the ET that the drivers were "workers" providing their services to ULL. She held that the findings of the ET were consistent and that Uber had not met the high burden of showing that they were perverse.

36. On the issue of the time during which the drivers were to be treated as working, she found a "more difficult" issue the ET's finding that the drivers were workers not only when they had accepted a trip request or were carrying passengers for Uber, but also in between accepting assignments. She held that, taking the ET's findings in the round, "it permissibly found that Uber drivers assume an obligation when they are in the Territory, switch on the App and are available for work." She added:-

> "126… The assessment of the driver's status and time in between the acceptance of individual trips will, however, be a matter of fact and degree. On the ET's findings of fact in this case, I do not consider it was wrong to hold that a driver would be a worker

> engaged on working time when in the territory, with the app switched on, and ready and willing to accept trips ("*on-duty*", to use Uber's short-hand). If the reality is that Uber's market share in London is such that its drivers are, in practical terms, unable to hold themselves out as available to any other PHV operator, then, as a matter of fact, they are working at ULL's disposal as part of the pool of drivers it requires to be available within the territory at any one time. That might indeed seem consistent with Mr Kalanick's description of the original Uber model as a "*black car service*". If, however, it is genuinely the case that drivers are able to also hold themselves out as at the disposal of other PHV operators when waiting for a trip, the same analysis would not apply."

37. She therefore dismissed the appeal. On a subsequent application by Uber, Judge Eady gave permission to appeal to this court but refused a certificate under Section 37ZA of the Employment Tribunals Act 1996 to enable Uber to make a leapfrog application to the Supreme Court.

The appeal to this court

38. Uber now appeal to this court, essentially on the same grounds as those raised before the EAT. Their principal grounds of appeal are against the conclusion of the ET, upheld by the EAT, that any driver who had the Uber App switched on was within the Territory and was able and willing to accept assignment was, for as long as those conditions were satisfied, working for Uber (in the Claimants' case, for ULL) under a "worker contract" and a contract within each of the extended definitions. Before examining their arguments we should set out the relevant authorities which featured in the decisions below and in the argument before us.

Authorities

39. Many reported cases have considered the distinction between a limb (b) worker and a self-employed contractor. In *Cotswold Developments Construction Ltd v Williams* [2006] UKEAT 0457, [2006] IRLR 181, Langstaff J suggested that:

> "53. …a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

40. In *James v Redcats (Brands) Ltd* [2007] UKEAT 0475, [2007] ICR 1006, Elias J said:

> "59... the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? ... Its purpose is to distinguish between the

> concept of worker and the independent contractor who is in business on his own account, even if only in a small way."

41. In the Supreme Court case of *Bates van Winkelhof v Clyde & Co LLP and another* [2014] UKSC 32, [2014] 1 WLR 2047, in which the central issue was whether a member of a limited liability partnership was a limb (b) worker, Lady Hale DPSC said:

> "24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.
>
> 25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them.... The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else...."

42. Lady Hale also referred with approval to the previous observations of Langstaff J and Elias J which we have quoted.

43. The leading case is *Autoclenz Ltd v Belcher*. The claimants carried out car cleaning services on behalf of the appellant company. In order to obtain the work they were required to sign contracts which stated that they were sub-contractors and not employees, that they had to provide their own material, that they were not obliged to provide services to the company nor was the company obliged to provide work to them, and that they could provide suitably qualified substitutes to carry out the work on their behalf. They brought tribunal proceedings claiming that they were "workers" entitled to the national minimum wage ("the NMW") and to statutory paid leave under the WTR. The ET found that the contractual documents did not reflect the true agreement between the parties and that the claimants came within both limbs of the definition of "worker" as (a) working under contracts of employment and as (b) working pursuant to contracts for services. The former finding was the subject of differing decisions on appeal but, since there is no suggestion in the present case that the Claimants have contracts of employment with any of the Uber companies, we need not consider it further. The finding that the claimants in *Autoclenz* were "workers" under contracts for services was upheld in the EAT, in this court and in the Supreme Court.

44. Lord Clarke of Stone-cum-Ebony JSC, with whom all the other members of the Supreme Court agreed, said (at paragraph 17) that the case:-

> "involves consideration of whether and in what circumstances the employment tribunal may disregard terms which were included in a written agreement between the parties and instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties of the true intentions or expectations of the parties".

45. He said, at paragraph 20, that "the essential question in each case is what were the terms of the agreement." He referred to *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 in which Diplock LJ had referred to the concept of a sham as being acts done or documents executed by the parties intended by both of them to give an appearance to third parties of creating legal rights and obligations different from the actual ones which the parties intended to create. In that type of case, Diplock LJ went on, all the parties must have a common intention that the acts or documents are not to create the legal rights and obligation which they give the appearance of creating.

46. Lord Clarke continued (at paragraph 23):-

> "I would accept the submission made on behalf of the claimants that, although the case is authority for the proposition that if two parties conspire to misrepresent their true contract to a third party, the court is free to disregard the false arrangement, it is not authority for the proposition that this form of misrepresentation is the only circumstance in which the court may disregard a written term which is not part of the true agreement. That can be seen in the context of landlord and tenant from *Street v Mountford* [1985] AC 809 and *Antoniades v Villiers* [1990] 1 AC 417, especially per Lord Bridge at p 454, Lord Ackner at p 466, Lord Oliver at p 467 and Lord Jauncey at p 477. See also in the housing context *Bankway Properties Ltd v Pensfold-Dunsford* [2001] 1 WLR 1369 per Arden LJ at paras 42 to 44.
>
> 24. Those cases were examples of the courts concluding that relevant contractual provisions were not effective to avoid a particular statutory result. The same approach underlay the reasoning of Elias J in *Kalwak* in the EAT, where the questions were essentially the same as in the instant case. One of the questions was whether the terms of the written agreement relating to the right to refuse to work or to work for someone else were a sham."

47. He went on to approve these observations of Elias J in the EAT in *Consistent Group Ltd v Kalwak* [2007] UKEAT 0535, [2007] IRLR 560:

> "57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship….
>
> 58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the

rights conferred have not in fact been exercised will not render the right meaningless.

59. … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…"

48. Lord Clarke continued:

"34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 [of the judgment under appeal] as follows:

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

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

36. With characteristic clarity and brevity Sedley LJ described the factual position as follows:

"104. Employment judges have a good knowledge of the world of work and a sense, derived from experience, of what is real there and what is window-dressing. The conclusion that Autoclenz's valeters were employees in all but name was a perfectly tenable one on the evidence which the judge had before him. The elaborate protestations in the contractual documents that the men were self-employed were odd in themselves and, when examined, bore no practical relation to the reality of the relationship.

105. The contracts began by spelling out that each worker was required to 'perform the services which he agrees to carry out for Autoclenz within a reasonable time and in a good and workmanlike manner' - an obligation entirely consistent with

> employment. Notwithstanding the repeated interpolation of the word 'sub-contractor' and the introduction of terms inconsistent with employment which, as the judge found, were unreal, there was ample evidence on which the judge could find, as he did, that this was in truth an employment relationship.
>
> 106. His finding did not seek to recast the contracts: it was a finding on the prior question of what the contracts were. Rightly, it was uninfluenced by the fiscal and other consequences of the relationship, which were by no means all one way."

49. There is no dispute that *Autoclenz* puts paid, at least in an employment context, to the idea that all that matters is the terms of any written contract, with the exception of a document intended by all parties executing it to be a sham. Clearly, however, the case goes a good deal further. We regard as particularly significant Lord Clarke's endorsement of the advice of Aikens LJ to tribunals to be "realistic and worldly wise" in this type of case when considering whether the terms of a written contract reflect the real terms of the bargain between the parties; and of the similar advice of Elias J that tribunals should take a "sensible and robust view of these matters in order to prevent form undermining substance".

50. We also attach importance to the approval given by Lord Clarke to the conclusions drawn by Sedley LJ in this court from what he (Lord Clarke) described as the "critical findings of fact" by Employment Judge Foxwell in the ET. Judge Foxwell noted that the claimants had no say in the terms on which they performed work; the contracts were devised entirely by Autoclenz; and the services they provided were subject to a detailed specification. The claimants had no control over the way in which they did their work. Judge Foxwell's conclusion from the facts was that the "elaborate protestations in the contractual documents that the men were self-employed" bore no practical relation to the reality of the relationship. Consequently, Lord Clarke held, the documents did not reflect the true agreement between the parties. The ET had been entitled to "disregard" the terms of the written documents, insofar as they were inconsistent with the true terms agreed between the parties.

51. Ms Dinah Rose QC, for Uber, laid great emphasis on the later decision of the Supreme Court in *Secret Hotels2*. The appellant company, formerly known as Med Hotels, marketed hotel rooms and other holiday accommodation through a website. Any hotelier who wished his hotel to be marketed by the company had to enter into an accommodation agreement which began by identifying the hotelier as the "Principal" and the company as the "Agent". The hotelier as Principal appointed the company as its selling agent and the company agreed to act as such. The company agreed to deal accurately with the clients' requests for accommodation bookings and relay all money it received from the Principal's clients which was due to the Principal. A potential customer (whether a travel agent or an individual holidaymaker who used the website) would be referred to booking conditions which stated that "reservations you make on this site will be directly with the company whose hotel services you are booking" and that the company was acting "as agent only for each of the hotels to provide you with information on the hotels and an online reservation service". The customer had to pay

the whole of the sum agreed for the holiday to the company before arriving at the hotel. The company would deduct its share and pay the net sum to the hotelier.

52. An issue arose under both domestic and EU law as to the treatment of these transactions for VAT purposes. The Revenue assessed the company for VAT on the gross sums it received from clients. The company challenged this on the basis that it was a travel agent acting solely as an "intermediary". After decisions by the First Tier Tribunal, the Upper Tribunal and this court, the Supreme Court held that the effect of the contractual documentation was that the company marketed and sold accommodation to customers as agent of the hoteliers and that it was an "intermediary" for tax law purposes. It was in that context that Lord Neuberger (with whom all other members of the court agreed) said:

> "31. Where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, then, in order to determine the legal and commercial nature of that relationship, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations, unless it is established that it constitutes a sham.
>
> 32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J said in *A1 Lofts Ltd v Revenue and Customs Commissioners* [2010] STC 214, para 40, in a passage cited by Morgan J:
>
> > "The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in *Street v Mountford* [1985] AC 809); or as a fixed or floating charge (as in *Agnew v IRC* [2001] 2 AC 710), or as a consumer hire agreement (as in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them."
>
> 33. In English law it is not permissible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement – see *FL Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. The

> subsequent behaviour or statements of the parties can, however, be relevant, for a number of other reasons. First, they may be invoked to support the contention that the written agreement was a sham – ie that it was not in fact intended to govern the parties' relationship at all. Secondly, they may be invoked in support of a claim for rectification of the written agreement. Thirdly, they may be relied on to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract (agreed by words or conduct). Fourthly, they may be relied on to establish that the written agreement represented only part of the totality of the parties' contractual relationship.
>
> 34. In the present proceedings, it has never been suggested that the written agreements between Med and hoteliers, namely the Accommodation Agreements, were a sham or liable to rectification. Nor has it been suggested that the terms contained on the website ("the website terms"), which governed the relationship between Med and the customers, namely the Terms of Use and the Booking Conditions, were a sham or liable to rectification. In these circumstances, it appears to me that (i) the right starting point is to characterise the nature of the relationship between Med, the customer, and the hotel, in the light of the Accommodation Agreement and the website terms ("the contractual documentation"), (ii) one must next consider whether that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts, and (iii) if so, the final issue is the result of this characterisation so far as article 306 is concerned.
>
> 35. This is a slightly more sophisticated analysis than the single issue as it has been agreed between the parties, as set out in para 16 above, but, as will become apparent, at least in the circumstances of this case, it amounts to the same thing. In order to decide whether the FTT was entitled to reach the conclusion that it did, one must identify the nature of the relationship between Med, the hotelier, and the customer, and, in order to do that, one must first consider the effect of the contractual documentation, and then see whether any conclusion is vitiated by the facts relied on by either party."

53. *Autoclenz* was not mentioned in the judgment, nor even apparently cited in argument, in *Secret Hotels2*. The latter is obviously not an employment case and there was no suggestion that the written terms misrepresented what was occurring on the ground. There was undoubtedly a contract between the company and each hotel, in contrast to the present case where Uber seek to argue that there is no contractual relationship between the drivers and ULL.

54. In the course of supplementary oral submissions Ms Rose argued that *Autoclenz* could not be used to disregard the Rider Terms, since these were a contract between passenger and driver, not an employment contract in any sense. Instead, she said, we should follow

Secret Hotels2. We disagree. *Autoclenz* holds that the Court can disregard the terms of any contract created by the employer in so far as it seeks to characterise the relationship between the employer and the individuals who provide it with services (whether employees or workers) in a particular artificial way. Otherwise employers would simply be able to evade the consequences of *Autoclenz* by the creation of more elaborate contrivances involving third parties.

55. Ms Rose cited two other decisions about minicab drivers. *Mingeley v Pennock and others (trading as Amber Cars)* [2004] EWCA Civ 328, [2004] ICR 727, was not about "worker" status but about whether the claimant was entitled to bring a claim of racial discrimination under section 78 of the Race Relations Act 1976, which he could only do if there was a contract of employment within the meaning of the section. There was a preliminary issue as to whether he was required personally to execute any work or labour. The issue was decided in favour of the respondents in the ET, the EAT and this court.

56. The essential facts were that the Claimant owned his own vehicle and paid the respondents minicab operators £75 per week for a radio and access to their company system, which allocated calls from customers to a fleet of drivers. He was required to wear a uniform and prohibited from working for any other operator, but was not required to work, nor (in contrast to the present case) to accept any fare allocated to him by the system. All the fare money was his to keep.

57. The judgments in this court were unreserved. Maurice Kay LJ, with whom Nourse LJ agreed, held that the absence from Mr Mingeley's contract with the respondents of any obligation to work placed him "beyond the reach" of section 78. Buxton LJ said that:

> "21… Mr Mingeley's only contractual obligation to Amber Cars was to pay the £75 weekly fee for access to Amber Cars' computer system. He does nothing else contractually for Amber Cars and therefore, on the plain meaning of the words, his contract with them cannot be a contract personally to execute any work or labour."

Like Judge Richardson in the recent case of *Addison Lee* (see below), we consider that the critical finding in *Mingeley* was the absence of any requirement for the driver to accept a fare offered to him by the system: which, given the terms of the statutory test then in issue, was decisive. We did not find this case of assistance in determining whether, on the different and more complex facts in the present case, the Claimants are providing services to ULL so as to be "workers" within limb (b) of section 230(3).

58. The other minicab case to which we were referred at the oral hearing before us was *Khan v Checkers Cars Ltd*, an unreported decision of the EAT handed down on 16 December 2005. This also was an employment contract case. The claimant worked as a private hire car driver for the respondent company which operated a taxi service based at Gatwick Airport. The claimant owned and was responsible for his own vehicle. He paid his own income tax and national insurance. He was required to use set routes and charge set fares. He collected fares from customers, paying a commission to the respondent. He had complete flexibility over when he worked: he was not obliged to accept work and the respondent was not obliged to offer him work. Drivers were never required to attend work. The only issue (since the claim was one of unfair dismissal)

was whether he was an employee, not whether he was providing services as a limb (b) worker. The case is in our view unreported for good reason. The EAT simply held that on these facts the ET had been entitled to find that there was no contract of employment.

59. On 14 November 2018, after the oral hearing of this appeal, HHJ David Richardson gave the judgment of the EAT (himself and two lay members) in *Addison Lee Ltd v Lange* [2018] UKEAT 37. The claimants were drivers working for Addison Lee's PHV business. Almost invariably they used a vehicle hired from Eventech Ltd, an associated company of the respondents (in contrast to the owner-drivers in the present case). The vehicles were in Addison Lee livery. Each driver was given a hand held computer known as an XDA. When ready to work the driver would use the XDA to log on to the respondent's computer system which could locate the XDA and the vehicle. Allocation of jobs was automatic. When a job was notified to the driver he had to accept it forthwith or give an acceptable reason for not doing so. If the controller deemed the reason to be unacceptable, the matter was referred to a supervisor and a sanction might follow.

60. Each driver had a Driver Contract with the respondent. It provided (more than once) that the driver agreed he was an independent contractor and that nothing in the agreement rendered him an employee, worker, agent or partner of the respondent.

61. Clause 5, under the heading "Provision of Services", stated:

> "5.1 Subject to Clause 5.4, you choose the days and times when you wish to offer to provide the Services in accordance with the terms of the Driver Scheme but unless we are informed otherwise, you agree that if you are in possession of and logged into an Addison Lee XDA you shall be deemed to be available and willing to provide Services.
>
> 5.2. For the avoidance of doubt, there is no obligation on you to provide the Services to Addison Lee or to any Customer at any time or for any minimum number of hours per day/ week/month. Similarly, there is no obligation on Addison Lee to provide you with a minimum amount of, or any, work at all.
>
> 5.3. You agree to perform promptly each Customer Contract in accordance with its terms and to indemnify us against any claims from Customers for your breach of the Customer Contract which are directed against us as a result either of having acted as your agent in concluding the Customer Contract or as principal where you have fulfilled the Customer Contract as a sub-contractor on our behalf.
>
> 5.4. By ticking the appropriate box at the start of this Driver Contract you select which of the "Anytime Circuit", the "Night Circuit", or the "Weekend Circuit" you wish to participate in.
>
> 5.4.1. As a Driver on the Anytime Circuit, you are indicating that, subject to Clause 5.2, you may be available to provide the Services whenever you wish under this Driver Contract at any time.

> 5.4.2. As a Driver on the Night Circuit, you are indicating that, subject to Clause 5.2, you may be available to provide the Services whenever you wish from 1700hrs each day until 0500hrs the following day.
>
> 5.4.3. As a Driver on the Weekend Circuit, you are indicating that, subject to Clause 5.2, you may be available to provide the Services whenever you wish from 1730hrs each Friday to 1730hrs the following Sunday."

62. The ET held that: (a) there was an overarching contract between each claimant and the respondent; (b) but in any event, whether that was so or not, the claimants were workers within the meaning of the legislation; (c) whenever they logged on, they were undertaking to provide driving services personally; (d) even if they chose to park in a vehicle but remained logged on, they were no less at the disposal of Addison Lee.

63. The EAT held, at paragraph 55, that "applying *Autoclenz* principles the ET was..…entitled to reach the conclusion…..that the drivers, when they logged on, were undertaking to accept the driving jobs allocated to them". They held that this conclusion was consistent with the finding that the driver had to accept a job allocated to him in the absence of an acceptable reason and that if he did not do so a sanction might be imposed. As to the terms of Clause 5.2 on which the respondents placed reliance, the EAT observed that:

> "58… In our judgment the ET was entitled to hold that drivers accepted an obligation to undertake driving jobs allocated to them notwithstanding the apparently general terms of Clause 5.2. Indeed, we see very little point in Clause 5.1, which deems a driver to be available when logged on, if Clause 5.2 really permitted a driver to make himself unavailable should he be allocated a job which did not suit him."

64. The ET had disregarded some provisions of the Driver Agreement, particularly clause 5.2. The EAT found that the ET had been entitled to do so by application of the *Autoclenz* principles because the relevant provisions did not reflect the reality of the bargain made between the parties. After referring to other authorities, including the observations of Langstaff J in the *Cotswold Developments* case set out above in the citation from *Autoclenz*, they dismissed the appeal.

65. Although the facts of *Addison Lee* are not identical to those of the present case we consider it helpful, both in the summary by Judge Richardson of the relevant case law (which we will not repeat here) and because of the finding that the ET had been entitled to disregard clauses in the Driver Contract which did not reflect the reality of the bargain between the parties.

66. In their supplementary submissions on behalf of Uber, Ms Rose and Mr Campbell seek to distinguish the case on the grounds that "disregarding the written contract between Addison Lee and the drivers did not involve disregarding any contracts with third parties outside the employment field". We do not accept that this is a significant distinction. The effect of *Autoclenz* in our view is that, in determining for the purposes of section 230 of the ERA 1996 what is the true nature of the relationship between the

employer and the individual who alleges he is a worker or an employee, the court may disregard the terms of any documents generated by the employer which do not reflect the reality of what is occurring on the ground.

67. Ms Rose also cited two very different authorities. In *Cheng Yuen-v-Royal Hong Kong Golf Club* [1998] ICR 131 PC the question was whether the claimant was an employee or an independent contractor. It did not concern whether he was a "worker". The claimant worked as a caddie for individual members of the respondent golf club. He was issued by the club with a number, a uniform and a locker. Caddying work was allocated to available caddies in strict rotation. They were not obliged to make themselves available for work and received no guarantee of work. The club was not obliged to give them work or to pay anything other than the amount of the fee per round owed by the individual golfer for whom they had caddied.

68. When told that his services were no longer required, the claimant brought claims against the club, for the purposes of which it was essential to show that he had been an employee of the club rather than an independent contractor. The majority of the Privy Council concluded that he had not been an employee. This is not a surprising conclusion since, as Lord Slynn emphasised in delivering the majority judgment, there was no mutuality of obligation. The case is of no assistance in deciding whether the Claimants in the present case are workers providing services to ULL.

69. Ms Rose also placed reliance on *Stringfellow Restaurants Ltd v Quashie* [2013] IRLR 99 CA; [2012] EWCA Civ 1735. That again was not a case about "worker" status but about whether the claimant was an employee or an independent contractor. The claimant was a lap dancer who performed for the entertainment of guests at the respondents' clubs. She paid the respondent a fee for each night worked. Doing so enabled her to earn substantial payments from the guests for whom she danced. She negotiated those payments with the guests. The respondent ended its working relationship with her and she complained of unfair dismissal. At a preliminary hearing, an ET held that there was no contract of employment. The EAT disagreed but the Court of Appeal restored the first instance decision. Elias LJ gave the only substantive judgment. After discussing the *Cheng Yuen* case, he said this:

> "50…….The club did not employ the dancer to dance; rather she paid them to be provided with an opportunity to earn money by dancing for the clients. The fact that the appellant also derived profits from selling food and drink to the clients does not alter that fact. That is not to say that *Cheng* provides a complete analogy; I accept Mr Hendy's submission that the relationship of the claimant to the club is more integrated than [that of] the caddie with the golf club. It is not simply a licence to work on the premises. But in its essence the tripartite relationship is similar.
>
> 51. The fact that the dancer took the economic risk is also a very powerful pointer against the contract being a contract of employment. Indeed, it is the basis of the economic reality test, described above. It is not necessary to go so far as to accept the submission of Mr Linden that absent an obligation on the employer to pay a wage ... the relationship can never

> as a matter of law constitute a contract of employment. But it would, I think, be an unusual case where a contract of service is found to exist when the worker takes the economic risk and is paid exclusively by third parties. On any view, the Tribunal was entitled to find that the lack of any obligation to pay did preclude the establishment of such a contract here."

70. Central to Elias LJ's conclusion was the finding that the claimant took an economic risk in view of the fixed sums which she had to pay the club irrespective of the number of her customers. As with the golf club case and for similar reasons, we did not find this case of any assistance.

Discussion

71. In our view the ET was not only entitled, but correct, to find that each of the Claimant drivers was working for ULL as a "limb (b) worker".

The legal test to be applied

72. Whether or not there was a contract between each of the Claimants and ULL is a mixed question of fact and law. It has often been said in this court that an appellate court should not interfere with such a determination of the first instance court unless no reasonable tribunal, properly directing itself, could have reached the decision it did: see e.g. *Stringfellow* at [9]. What were the terms of any such contract, in the absence of a comprehensive written agreement, is a question of fact: *Carmichael v National Power* [1999] ICR 1226 at 1233B-C, *Secret Hotels2* at [20].

73. As discussed above, *Autoclenz* shows that, in the context of alleged employment (whether as employee or worker), (taking into account the relative bargaining power of the parties) the written documentation may not reflect the reality of the relationship. The parties' actual agreement must be determined by examining all the circumstances, of which the written agreement is only a part. This is particularly so where the issue is the insertion of clauses which are subsequently relied on by the inserting party to avoid statutory protection which would otherwise apply. In deciding whether someone comes within either limb of section 230(3) of the ERA 1996, the fact that he or she signed a document will be relevant evidence, but it is not conclusive where the terms are standard and non-negotiable and where the parties are in an unequal bargaining position. Tribunals should take a "realistic and worldly-wise", "sensible and robust" approach to the determination of what the true position is.

The argument that the facts are consistent with Uber's case

74. An overarching argument of Ms Rose for Uber was that all the operational matters relied upon by the ET and put forward by the Claimants for characterising them as limb (b) workers are entirely consistent with them being simply conditions of the licence to use the App, and in that way entirely consistent with the written agreements between UBV and the drivers and between UBV and the passengers.

75. We suggest that the answer to that point is to look at the different stages in the process of carrying out a passenger's request for a ride: (1) the request made to ULL by the

passenger and its acceptance by the driver; (2) the picking up of the passenger by the driver; and (3) the completion of the journey and calculation of the fare, where estimated in advance.

76. At stage (1), acceptance of the request by the driver means that, subject to the right of the driver and the passenger to cancel, the driver is expected to proceed to collect the passenger from the notified location and to complete the journey. That is consistent with the language of 2.4 of the 2015 New Terms, which talks of the option "to cancel an accepted request". In the language of *Autoclenz,* at paragraph 35, the "reality" is that at that stage there is an obligation on the driver to fulfil that expectation. The contractual documentation states that, at that stage, there is a contract between the driver and the passenger but that cannot be correct as vital elements of any such contract are missing.

The driver does not know at that point a fundamental fact, namely the passenger's destination, as, according to the ET, he only obtains that information either directly from the passenger or via the App at the moment of pick up.

77. It is also true that the driver does not know what the fare will be where ULL (as the PHV operator) has given an estimate, as the actual fare will be determined by Uber at the end of the ride. That, however, while relevant to the issue of the reality of the situation, may be seen as less decisive as a matter of strict contract law as it is arguably consistent with a contract that the fare will be as determined by Uber.

78. Our initial view was that, irrespective of the absence of agreement on an essential term (the destination), the passenger has not, at that stage, provided any consideration for an obligation on the driver to collect him or her. In supplementary submissions following circulation of draft judgments, which we heard in private at Ms Rose's request as they concerned the draft judgment, Ms Rose argued that this point had not been argued below (nor expressly before us); that it was a mixed question of law and fact; and that it was unfair to her clients that it should be taken for the first time in this court by the court itself.

79. We do not think that there has been any unfairness to Uber: it has been clear from the start that the Claimants' case is that there is in reality no contract between passenger and driver. However, the question of whether any consideration passes between driver and passenger is a minor point and, on reflection, we are content not to pursue it.

80. The passenger has no contract to compel the driver to pick up him or her. The contract at the point of acceptance of the request must be with ULL. The request is communicated to the driver by ULL and is accepted by the driver in responding to Uber. There is no basis for saying that it is with UBV, via the agency of ULL, as there is nothing in either version of the UBV agreement that says that ULL, in sending the request and receiving the driver's acceptance, is acting as UBV's agent. Clause 2.2 of the New Terms says that ULL is at that stage acting as the driver's agent but, plainly, that cannot be correct if there is a contract between ULL and the driver.

81. Both the existence of any such contract and its terms must be established objectively. In relation to the factual aspects of both matters, the *Autoclenz* "reality" and "worldly wise" approach applies. There is a contract with ULL for the reasons we set out in this judgment. The terms are those fulfilling the expectation, on the driver's acceptance of the request from ULL, that the driver will proceed to collect the passenger from the

notified location and to complete the journey and are the same as those found by the ET as a matter of fact. There is no finding by the ET and it is not a ground of appeal that, if there was a contract between the driver and ULL, it is limited to picking up the passenger.

82. The ET found that there is no contract between the driver and the passenger. That is not a necessary finding in order to support a contract between ULL and the driver at the point of acceptance by the driver. There is no analytical reason why there could not be two contracts subsisting at the same time, or rather from the time of pick up, the contract between ULL and the driver having commenced at an earlier point of time in accordance with the above analysis. But any contract was plainly not one under which ULL was the driver's client or customer for the purposes of section 230(3)(b) of the ERA 1996.

83. If that analysis is correct, two fundamental strands of Ms Rose's submissions fall away. First, there is no general comparison with minicabs. There is no evidence about how minicabs generally operate. What is clear is that there is more than one business model for minicabs. That is apparent from the VAT Notices (BA2/ 54 AND 56). What is critical is that there is no evidence of contractual arrangements for minicabs which precisely mirror the contractual arrangements above, that is to say the contract between the driver and the operator (ULL) at a time when the driver does not know the intended destination of the intended passenger.

84. Secondly, in addition to the points we have already made distinguishing the cases relied upon by Ms Rose, the situation in the present case is highly fact specific and is not matched by that in any of those cases.

85. The minicab cases such as *Mingeley* and *Khan* considered above do not address the issue of the status of the minicab firm as statutory PHV operator, a regime which in any event is not the same outside London (Mr Mingeley worked in Leeds and Mr Khan was based at Gatwick Airport).

86. The analogy with black cab drivers drawn by Ms Rose is not helpful. Black cab drivers ply for hire, can advertise in their own right and can contract directly with passengers.

The significance of the regulatory regime

87. The Appellant's submissions repeatedly referred to the regulatory regime as if it were irrelevant or of trivial importance. We disagree. In our view the statutory position strongly reinforces the correctness of the ET's conclusion that the drivers were providing services to Uber (specifically to ULL), not the other way round.

88. ULL is the PHV operator for the purposes of the PHVA 1998 and the regulations made under it. It is ULL which has to satisfy the licensing authority for the purposes of section 3(3)(a) of the Act that it is a fit and proper person to hold a PHV licence. It is ULL which alone can accept bookings, and ULL which is required by the PHV Regulations to provide an estimate of the fare on request. For ULL to be stating to its statutory regulator that it is operating a private hire vehicle service in London, and is a fit and proper person to do so, while at the same time arguing in this litigation that it is merely an affiliate of a Dutch registered company which licenses tens of thousands of

proprietors of small businesses to use its software, contributes to the air of contrivance and artificiality which pervades Uber's case.

89. Consistently with what we have said about the reality being reinforced by the regulatory framework, it is of interest to note that section 56 of the Local Government (Miscellaneous Provisions) Act 1976 expressly provides for the hire of a licensed private hire vehicle to be deemed to be made with the operator who accepted the booking, whether or not he himself provided the vehicle. For this purpose, it is irrelevant that the Act only applies outside London.

The artificiality of the contractual documents

90. There is a high degree of fiction in the wording (whether in the 2013 or the 2015 version) of the standard form agreement between UBV and each of the drivers:-

a) ULL, despite being the PHV operator in London, and therefore the only entity legally permitted to operate the business, is scarcely mentioned at all, even as an "Affiliate" of UBV;

b) The agreement refers to the party with whom UBV is contracting as the "Partner" (2013) or "Customer" (2015), as if it were a separate legal entity employing one or more drivers. Indeed, in the 2015 version, the "Customer" is described as "an independent company in the business of providing transportation services". But, as the ET noted (para 34) and Ms Rose accepted in this court, it is common ground that the vast majority of drivers are sole operators; in the words of the ET at para 80, the "business" consists of a man with a car who seeks to make a living from driving it.

c) We agree with the submission of Mr Linden QC, for some of the Claimants, that:-

> "The documents required the drivers to agree to numerous facts and legal propositions about the position of others, such as the relationships between the customer and Uber and/or the driver, rather than being confined, as one would expect, to the mutual obligations of the parties to the agreement. This unusual feature was the hallmark of an attempt to describe the set up as Uber wished to portray it and then bind the driver to that description, whereas the function of a contract is actually to set out obligations and then only the obligations of the party to the contract. Moreover, the drivers could not be bound by facts or legal propositions of which they were unaware and/or which were false."

91. The omission of ULL from both versions of the standard terms is all the more striking because ULL enforces a high degree of control over the drivers and for the most part does so (quite understandably and properly) in order to protect its position as PHV operator in London. It is difficult to see on what basis ULL is entitled to act in this way

other than pursuant to a contractual relationship between itself and each driver. We do not accept as realistic the argument that ULL is merely acting as local enforcer for UBV as holder of the intellectual property in the App.

92. The ET found at paragraph 20 that after each ride has been completed UBV "generates paperwork which has the appearance of being an invoice addressed to the passenger by the driver. The invoice document does not show the full name or contact details of the passenger, just his or her first name. Nor is it sent to the passenger." The ET described this standard document (at paragraph 87) as a "fiction"; as it clearly was.

93. There are, on the other hand, some points made by the ET with which we cannot agree. We do not find helpful, whether or not correct, that "Uber's case has to be that if the organisation became insolvent the drivers would have enforceable rights directly against the passengers". We also disagree with the ET's proposition that, if the Rider Terms were worker contracts, the passenger would be exposed to potential liability as the driver's employer under enactments such as the NMWA: this would indeed be absurd but it cannot be correct since, on this hypothesis, the "client or customer" exception would apply. We also do not attach significance to the possibility that Uber might reverse its policy, which was in evidence before the ET, that it will reimburse a driver who suffers loss because of fraud by the passenger. Even added together, however, all these points form only a small part of the ET's reasoning and are certainly not essential to its conclusions.

Uber's public statements

94. The ET were also right to attach significance to what they described as "the many things said and written in the name of Uber in unguarded moments which reinforce the Claimants' simple case that the organisation runs a transportation business and employs the drivers to that end." Under the heading "Uber's use of language generally" the ET made the following findings:-

> "67. In her evidence Ms Bertram chose her words with the utmost care. But in publicity material and correspondence those speaking in Uber's name have frequently expressed themselves in language which appears incompatible with their central case before us. Some illustrations are to be found above. A few further instances will suffice. We were taken to, among many other examples, references to "Uber drivers" and "our drivers", to "Ubers" (i.e. Uber vehicles), to "Uber [having] more and more passengers". One Twitter feed issued under the name of Uber UK reads:
>
> > "Everyone's Private Driver. Braving British weather to bring a reliable ride to your doorstep at the touch of a button."
>
> And in a response of 19 June 2015 to a TfL consultation ULL wrote:
>
> > "The fact that an Uber partner-driver only receives the destination for a trip fare when the passenger is in the car

> is a safeguard that ensures that we can provide a reliable service to everyone at all times, whatever their planned journey."

And:

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

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

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

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

This statement neatly encapsulates the Claimants' case that they are workers providing their services to ULL as employer. It is wholly at odds with Uber's case. The ET records at the end of paragraph 69 that Ms Bertram attempted before them to dismiss it as a typographical error. The ET's observation that this attempt was made by the witness "to our considerable surprise" is notably restrained.

The ET's finding that the drivers were working for Uber

95. We agree with the ET's finding at paragraph 92 that "it is not real to regard Uber as working "for" the drivers and that the only sensible interpretation is that the relationship is the other way round. Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits."

96. We set out below the thirteen considerations (in para 92 of the ET's decision) which the ET said led them to that conclusion in italics, with our comments in ordinary type:-

> (1) *The contradiction in the Rider Terms between the fact that ULL purports to be the driver's agent and its assertion of "sole and absolute discretion" to accept or decline bookings.* Ms Rose criticised this on the grounds that it was necessary because under the regime of the PHVA 1998 only ULL can accept or decline bookings. In our view, the fact that this is a statutory requirement does not invalidate its significance: if anything it reinforces it.

> (2) *The fact that Uber interviews and recruits drivers.* We agree with the ET that this is significant.

(3) *The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.* Ms Rose argued that these were important and desirable measures in the interests of passenger safety. We agree that they are: but, as with the statutory requirement that only ULL may accept or decline bookings, this does not detract from the significance of what is stated.

(4) *The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements.* We agree that this is significant as showing a high degree of control.

(5) *The fact that Uber sets the (default) route and the driver departs from it at his peril.* This is not as stringent an element of control as some others because the driver may depart from the route prescribed by the App and the peril is only financial: nevertheless, it does have some significance.

(6) *The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory).* Ms Rose submits that this also is a regulatory requirement; again, in our view, that fact does not detract from its significance in supporting the ET's conclusion that Uber runs a transportation business and the drivers provide the skilled labour through which its services are provided.

(7) *The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles) instructs drivers on how to do their work, and in numerous ways, controls them in the performance of their duties.* Ms Rose submitted that these conditions are standard in the taxi and minicab industry. No doubt they are, but again they support the ET's findings that the drivers are working for Uber, not the other way around.

(8) *The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.* This is a powerful point supporting the case that the drivers work for Uber.

(9) *The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.* This is another similar point, though somewhat less powerful than the last one.

(10) *The guaranteed earning schemes (albeit now discontinued).* As the words in parenthesis indicate, these had ceased by the time the case came before the ET. We did not hear argument from either side on whether this was in reality a significant point.

(11) *The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.* The ET may have overstated this point in summarising it. As their findings at paragraph 26 made clear, Uber's general practice is to accept the loss in cases where the passenger has procured the ride by fraud, at least where, as Ms Bertram put it, Uber's systems have failed. On those findings this does not seem to us a point of real significance in the Claimants' favour.

(12) *The fact that Uber handles complaints by passengers, including complaints about the driver.* This is another regulatory requirement, but again it supports the Claimants' case and the ET's conclusion.

(13) *The fact that Uber reserves the power to amend the driver's terms unilaterally.* We agree that this supports the ET's conclusion.

97. Viewing paragraph 92 of the ET's decision as a whole, and even if one discounts points (10) and (11), these findings appear to us to be ample evidence to support the ET's analysis of the true relationship between Uber and the drivers.

Were the drivers providing services to UBV rather than ULL?

98. Before the ET it was submitted by leading counsel on behalf of Uber (David Reade QC) that "if the drivers had any limb (b) relationship with the organisation, it must be with UBV. There was no agreement of any sort with ULL, which only exists to satisfy a regulatory requirement". This was not a prominent feature of the submissions of Ms Rose before this court. For the reasons we have given above, and for the avoidance of doubt, we agree with the following findings of the ET at paragraph 98:-

> "UBV is a Dutch company the central functions of which are to exercise and protect legal rights associated with the App and process passengers' payments. It does not have day-to-day or week-to-week contact with the drivers. There is simply no reason to characterise it as their employer. We accept its first case, that it does not employ drivers. ULL is the obvious candidate. It is a UK company. Despite protestations to the contrary in the Partner Terms and New Terms, it self-evidently exists to run, and does run, a PHV operation in London. It is the point of contact between Uber and the drivers. It recruits, instructs, controls, disciplines and, where it sees fit, dismisses drivers. It determines disputes affecting their interests."

When are the drivers workers?

99. If, as the ET found and we accept, the drivers were workers providing their services to ULL, the final question (argued only briefly before us) is at what times they were to be classified as so working. Uber places great emphasis on the fact that its standard terms (whether in the 2013 or the 2015 versions) expressly permit drivers to use other competing apps and to have more than one switched on at the same time. There appears to have been very little evidence before the ET as to how often this occurs in practice.

100. It is common ground that a driver can only be described as providing services to Uber when he is in the Territory (i.e., for present purposes, in London) and has the Uber App switched on. The Claimants contended, and the ET found, that they were providing services to ULL throughout the time when they satisfied these requirements. Uber submitted that, if (contrary to its primary submissions) the drivers were providing services to ULL, it could only be during each ride, that is to say from the time the passenger is picked up until the time the car reaches the passenger's destination. A middle course is to say that the driver is providing services to ULL from the moment

he accepts the booking until the end of the passenger's journey but not when (in the words of counsel) he is simply circling around waiting for a call.

101. The ET (at paragraph 100) accepted the Claimants' submissions for the following reasons:-

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

102. In paragraph 102 they held, in the alternative, that "at the very latest the driver is "working" for Uber from the moment he accepts any trip.

103. We agree with the ET that at the latest the driver is working for Uber from the moment when he accepts any trip. The point which we have found much more difficult, as did Judge Eady QC in the EAT, is whether the driver can be said to be working for Uber when he is in London with the App switched on but before he has accepted a trip. In the end, like Judge Eady, we take the view that the conclusion in paragraph 100 was one which the ET were entitled to reach. We bear in mind that appeal from an ET lies only on a question of law (Employment Tribunals Act 1996, section 21(1)).

104. Even if drivers are not obliged to accept all or even 80% of trip requests, the high level of acceptances required and the penalty of being logged off if three consecutive requests are not accepted within the ten second time frame justify the ET's conclusion that the drivers waiting for a booking were available to ULL and at its disposal. If a particular driver had entered into an obligation of the same nature for another entity and also had the rival app switched on then, as a matter of evidence, Uber would be able to argue that that driver was not at Uber's disposal. As Judge Eady observed:-

> "If the reality is that Uber's market share in London is such that its drivers are, in practical terms, unable to hold themselves out as available to any other PHV operator, then, as a matter of fact,

> they are working at ULL's disposal as part of the pool of drivers it requires to be available within the Territory at any one time. If, however, it is genuinely the case that drivers are able to also hold themselves out as at the disposal of other PHV operators when waiting for a trip, the same analysis would not apply."

Final general observation

105. In the section headed "Broader Considerations" at the end of his judgment Underhill LJ refers to current debate, quotes from an article by Sir Patrick Elias, refers to the Taylor Review and the consultation on the issues raised by the Review, and concludes that, if any change is to be made to what he concludes is the legal answer in the present case, it should be left to Parliament. None of those documents and developments was referred to in the oral or written submissions before us and we do not consider that it would be appropriate to engage with what Underhill LJ writes about them. At the end of the day, the differences between ourselves and Underhill LJ on the main issue turn on two broad matters, one primarily a matter of law and the other primarily a matter of fact. The former concerns the extent to which *Autoclenz* permits the court to ignore written contractual terms which do not reflect what reasonable people would consider to be the reality. The latter concerns the question as to what reasonable people would consider to be the reality of the actual working relationship between Uber and its drivers. We consider that the extended meaning of "sham" endorsed in *Autoclenz* provides the common law with ample flexibility to address the convoluted, complex and artificial contractual arrangements, no doubt formulated by a battery of lawyers, unilaterally drawn up and dictated by Uber to tens of thousands of drivers and passengers, not one of whom is in a position to correct or otherwise resist the contractual language. As to the reality, not only do we see no reason to disagree with the factual conclusions of the ET as to the working relationship between Uber and the drivers, but we consider that the ET was plainly correct.

Conclusion

106. We would dismiss this appeal.

Lord Justice Underhill:

INTRODUCTION

107. I have the misfortune to disagree with the Master of the Rolls and Bean LJ about the outcome of the appeal in this case. I shall have to give my reasons fairly fully, but I can gratefully adopt the introductory and background material at paras. 1-37 of their judgment and will use their abbreviations.

108. The Claimants' primary case, which the ET accepted, is that an Uber driver is a worker, within the meaning of the relevant statutes/regulations[1], throughout any period when

[1] The definitions in the ERA, the WTR and the NMWA are identical, and for convenience I will in this judgment refer only to section 230 (3) of the ERA.

he[2] (a) is within his territory (i.e., in this case, London); (b) logged on to the App; and (c) ready and willing to work. Their fallback case is that he is a worker from the moment that he accepts a trip until the end of that trip. On either alternative, however, an essential basis of their case is that they provide their services *for* Uber (specifically, for ULL) under a contract *with* ULL. That is necessary because of the requirement of section 230 (3) (b) that a worker has entered into "a contract … whereby [he] undertakes to do or perform personally any work or services *for another party to the contract*". On their primary alternative their case is that they have contracted with ULL to be available, when logged on to the App, to drive passengers[3] who book trips from it. On their fallback alternative their case is that when they accept a trip they thereby contract with ULL to work for it by driving its passenger. On both alternatives the parties to the contract for any actual trip are Uber and the passenger.

109. It is Uber's case, by contrast, that the only contract that drivers enter into to provide work or services is a contract which they make with the passenger at the moment that they accept a trip, with Uber acting only as the driver's agent in making the booking and collecting payment.

110. The question of for whom, and under a contract with whom, drivers perform their services is the central issue in the case. It is worth noting that it is different from the issue in most of the reported cases on employee and worker status, and the familiar questions of whether the putative worker contracts to provide his or her services personally or whether they do so for the putative employer as a "client or customer" are not directly engaged. Having said that, the issue is not entirely novel. It was at the heart of the decisions of the Privy Council in *Cheng Yuen v Royal Hong Kong Golf Club* [1998] ICR 131 and of this Court in *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735, [2013] IRLR 99, to which I return at para. 144 below.

111. I will deal first in this judgment with whether the drivers provide services for ULL, and under a contract with it, at all, which I will call "the main issue". I will then deal with the secondary, but still potentially important, issue of the period covered by any such contract and with the closely related issues of whether such periods constitute working time for the purpose of the WTR or fall to be taken into account in calculating the national minimum wage under the National Minimum Wage Regulations 2015 ("the NMWR").

THE MAIN ISSUE

THE WRITTEN AGREEMENTS

112. If the main issue depended on the terms of the written contract to which the Claimants, like all Uber drivers, have agreed ("the Agreement"[4]), there would be no room for

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2 For convenience, since the Claimants are all men I will refer to Uber drivers generally as "he".

3 I do not propose to adopt the volatile and idiosyncratic Uber descriptions for passengers – variously "Customers", "Users" and "Riders".

4 As the ET explains, we are in fact concerned with two sets of terms, current at different times – "the Partner Terms" and "the New Terms". Since it is common ground that, despite numerous differences of structure and terminology, they are, so far as concerns the present issue, to

argument. The Master of the Rolls and Bean LJ have set out passages from the ET's Reasons containing extensive extracts from the Agreement, but I will repeat the key provisions. Para. 2.3 of the New Terms reads:

> "Customer[5] acknowledges and agrees that Customer's provision of transportation services to Users creates a legal and direct business relationship between Customer and the User, to which neither Uber nor any of its Affiliates in the territory is a party."

Para. 2.1.1 of the Partner Terms begins:

> "Partner acknowledges and agrees that Uber does not provide any transportation services, and that Uber is not a transportation or passenger carrier. Uber offers information and a tool to connect Customers seeking Driving Services to Drivers who can provide the Driving Service, and it does not and does not intend to provide transportation or act in any way as a transportation or passenger carrier.[6]"

"Driving Service" is defined as "the driving transportation service … rendered by the Partner (through the Driver …) upon request of the Customer".

113. It is thus perfectly explicit in the Agreement that drivers provide their services to the passengers as principals, with Uber's role being that of an intermediary. The contract between Uber and the passenger is to the same effect: see para. 3 of the Rider Terms set out at para. 28 of the ET's Reasons (para. 13 in the judgment of the Master of the Rolls and Bean LJ.)

114. The ET draws attention to two points about the Agreement which I should address, though they were not at the centre of the argument before us and are not relied on in my Lords' reasoning.

115. First, it observes that few if any Uber drivers would in practice read the Agreement and that even if they did not all would understand its effect. I am sure that that is so, but they signed up to them (electronically rather than in hard copy) and on ordinary principles, and, subject to the question of the effect of *Autoclenz* which I consider below, they are bound by them whether they read them or not: *L'Estrange v F. Graucob Ltd.* [1934] 2 KB 394.

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substantially the same effect, I will where appropriate refer to them together as "the Agreement".

5 As I have already observed, Uber's terminology is idiosyncratic. The New Terms distinguish between "Customer" and "Driver", to cater for the case where the App is licensed to a business which makes available the service of drivers, that business being the Customer; the equivalent under the Partner Terms is the Partner. In virtually all cases, however, the licensees are owner-drivers, and Customer and Driver can be treated as equivalent.

6 See previous footnotes: here "Customer" means passenger (or "User" in the terminology of the New Terms), and "Partner" for all practical purposes means driver.

116. Secondly, the Agreement is made not with ULL, which is the putative employer, but with UBV. But in this context that does not matter. This is not a question of privity of contract but of identifying for whom, contractually, the Claimants perform their services. The fact that they have agreed with UBV that they do not do so under a contract with it or any affiliate is just as much an obstacle to their case as if they had agreed it with ULL itself.

AUTOCLENZ

117. On the face of it, therefore, the Claimants have clearly agreed that they perform their services for, and under a contract with, the passenger and not for, or under a contract with, Uber. But their case, which the ET accepted, and which my Lords also accept, is that the terms of the Agreement negativing any agreement to perform services for ULL can be disregarded in accordance with the principles established in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157.

118. The Master of the Rolls and Bean LJ have set out most of the relevant passages from the judgment of Lord Clarke in *Autoclenz*, but I should add that in the final substantive paragraph, para. 38, he summarised his decision and reasoning as follows (p. 1171B):

> "It follows that, applying the principles identified above, the Court of Appeal was correct to hold that those were the true terms of the contract and that the ET was entitled to disregard the terms of the written documents, in so far as they were inconsistent with them."

119. I believe that the principles emerging from those passages can be stated as follows:

(1) It is open to an employment tribunal to disregard any terms of a written agreement between an employer and an employee (but also, it is clear, a worker) which are inconsistent with the true agreement between the parties. Such an agreement may be described as a "sham", but it does not have to be a sham in the particular sense defined by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.

(2) What the true agreement is may be gleaned from all the circumstances of the case, of which the written agreement is part but only a part.

(3) In ascertaining whether the written agreement does in fact represent the true agreement the relative bargaining power of the parties will be a relevant consideration, because employers will typically be in a position to dictate the terms of the paperwork to which an employee must sign up, including terms that do not reflect the true agreement. Tribunals should accordingly take a realistic and worldly-wise approach to deciding whether that is the case.

120. It is an essential element in that ratio that the terms of the written agreement should be inconsistent with the true agreement as established by the tribunal from all the circumstances. There is nothing in the reasoning of the Supreme Court that gives a tribunal a free hand to disregard written contractual terms which *are* consistent with how the parties worked in practice but which it regards as unfairly disadvantageous (whether because they create a relationship that does not attract employment protection or otherwise) and which might not have been agreed if the parties had been in an equal

bargaining position.[7] In that connection it is worth noting that the facts in *Autoclenz* were very stark. The written agreements provided (a) that the putative employer was under no obligation to provide work to the claimants, nor they to accept it, so that they were engaged on a casual basis shift-by-shift, and (b) that they were entitled to provide substitutes. The reality, however, was that it was understood on both sides that the claimants would be available to work, and would be offered work, on a full-time basis, and that they should provide their services personally. There was thus a plain inconsistency between the contractual paperwork and the parties' mutual understanding as appeared from how they worked in practice; and the tribunal was thus entitled to draw the conclusion that it was the latter and not the former that represented the real terms of the agreement.

121. The question therefore for the ET in the present case was whether, in all the circumstances of the case and taking a worldly-wise approach, the reality of the relationships between Uber, driver and passengers was inconsistent with that apparently created by the Agreement (and the Rider Terms). That is a question of fact: although the precise question is different, the approach required by *Carmichael v National Power plc* [1999] ICR 1226 plainly applies here also – see per Lord Hoffmann at p. 1233C.

THE BACKGROUND LAW ABOUT TAXI AND MINICAB DRIVERS

122. In the era before the introduction of app-based platforms of the type pioneered and exemplified by Uber, the question whether taxi and minicab drivers whose services are pre-booked through an intermediary contracted directly with their passengers was the subject of some case law and associated HMRC guidance. It will be helpful to start with that before I turn to the reasoning of the ET.

Taxis

123. So far as taxi drivers are concerned, when they are plying for hire they necessarily contract directly with the passengers who pick them up at a rank or flag them down: there is no intermediary. Passengers are very familiar with the idea that taxi drivers are in business on their own account and themselves either own or rent the cabs which they drive.

124. In addition to taxis plying for hire on the street, there have for many years been intermediary radio-cab services operating in London (and in other cities) for members of the public wanting to book a taxi. In their original form passengers phoned the service, which would then allocate bookings to drivers over the radio. We were not addressed about the legal analysis of such arrangements[8]. However, I do not believe that a member of the public would have found anything surprising in the proposition that the radio service acted as an intermediary only and that as regards the ride itself they were dealing directly with the driver, just as they would have had they hailed him on the street or picked him up at a rank.

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7 As to this, see also the observations of Sir Patrick Elias quoted at para. 165 below.

8 Nor were we addressed about the app-based systems for booking London taxis, such as Gett, which have emerged more recently.

125. The correct analysis of the contractual arrangements where taxi drivers (though not black cab drivers) operate under the aegis of a named operator was considered by the EAT in *Khan v Checkers Cars Ltd* [2005] UKEAT 0208/05/1612. The British Airports Authority gave Checkers Cars ("Checkers") an exclusive licence to provide a taxi service at Gatwick airport. It had a fleet of over 200 drivers, of whom the claimant was one, who plied for hire at the airport taxi-rank. Checkers took a commission and imposed numerous conditions on its drivers, including requiring them to charge set fares, use fixed routes and wear a uniform. Drivers were entirely free as to whether and when they chose to work but they were not permitted to drive for anyone else. The issue was whether the claimant was an employee of Checkers within the terms of section 230 (3) and so could bring a claim of unfair dismissal. The EAT held that he was not because there was no mutuality of obligation between jobs. But Langstaff J expressed the view, *obiter*, at para. 32, that "the contract went no further than to amount to a licence by Checkers to permit the Claimant to offer himself as a private hire taxi driver to individual passengers on terms dictated by the administrative convenience of Checkers and BAA", drawing an analogy with *Cheng Yuen* and *Mingeley* (as to the latter, see paras. 127-9 below).

Minicab drivers

126. The position of taxi drivers is different from that of Uber drivers, who do not ply for hire. A closer analogy is with minicab drivers, whose services have to be pre-booked. Traditional minicab operations have no doubt suffered some impact from the rise of Uber, at least in the largest cities, but they remain widespread and familiar. It is clear from the case law that a common structure for such operations is, or was, as follows:

(1) The operator advertises minicab services to the public under its own name, typically in directories or online and by distribution of flyers and business cards.

(2) The operator does not have a fleet of vehicles owned by it, or drivers employed by it, but instead has relationships with a number of individual drivers who own their own vehicles and have the appropriate private hire licences and insurance.

(3) Customers obtain the services of a driver by phoning the operator, who contacts the nearest available driver by radio or telephone and offers them the job and, if they accept, gives them details of the passenger. (Latterly this element may have been to a greater or lesser extent computerised, so that customers can make bookings with the operator online and/or the operator may use software to allocate jobs efficiently.) Drivers are free whether to make themselves available to work and whether to accept particular jobs.

(4) Fares are set by the operator (possibly, but not necessarily, in accordance with a regulatory requirement), who may also impose other conditions such as the use of uniforms, quality of vehicles to be used etc.

(5) As regards payment, the procedure differs between cash and account customers. Cash customers pay the driver themselves at the end of the journey, whether by cash or card. In the case of account customers the driver notifies the amount of the fare to the operator, who debits the account accordingly and pays the driver within a specified period.

(6) The operator either charges the driver a set fee or takes a commission.

I am not to be taken as saying that this is the only possible model, simply that the cases show that it is one which is commonly adopted.

127. The legal analysis of the operator-driver-passenger relationships in that model was considered by this Court in *Mingeley v Pennock* [2004] EWCA Civ 328, [2004] ICR 727. The facts incorporated essentially all the above features (save that there was no express finding about account customers). In particular, as appears from para. 3 of Maurice Kay LJ's judgment (pp. 729-730):

- the operator was as a private hire service (based in Leeds) with a fleet of over 200 drivers operating under a trading name (Amber Cars);
- the driver owned his own car and had his own licence from the Council;
- he paid a flat weekly fee for access to what is described by Maurice Kay LJ as "initially a radio and later a computer system which … allocated calls to drivers from [the operator's] customers";
- he was under no obligation to work or even to notify Amber Cars of his ability to work;
- there was a fixed scale of charges;
- the driver was obliged to wear a uniform; and
- Amber Cars had a procedure for dealing with complaints from passengers about the conduct of its drivers.

Maurice Kay LJ described this as "a type of arrangement commonly found in the private hire industry".

128. The claimant driver, who alleged racial discrimination, was found not to be "employed by" the operator, within the meaning of the Race Relations Act 1976. The Master of the Rolls and Bean LJ say at para. 55 of their judgment that the case "was not about 'worker' status". But the definition of "employment" in the 1976 Act extends beyond employment under a contract of service to "employment under … a contract personally to execute any work or labour" (see section 78 (1)). That is substantially the same as the definition in the Equality Act 2010 (see section 83 (2) (a)), which has in turn been held to be to substantially the same effect as the more elaborate definition of "worker" in the legislation with which we are concerned: see *Secretary of State for Justice v Windle* [2016] EWCA Civ 459, [2016] ICR 721, at paras. 7-10 (pp. 723-5), discussing the judgment of Lady Hale in *Bates van Winkelhof v Clyde & Co.* [2014] UKSC 32, [2014] 1 WLR 2047.

129. Buxton LJ, at para. 23 of his concurring judgment (p. 735 C-D), explicitly rejected the argument of the driver's counsel that he was an employee "because [he] had obligations to the passengers to whom he might be directed by [the operator] to execute work in respect of them [i.e. by driving them]". Counsel had described those obligations as "a collateral contract", and Buxton LJ turned that description against him, pointing out

that the driving was indeed collateral to the contract with the operator, which he had previously characterised, at para. 21, as being simply "to pay £75 weekly fee for access to [the operator's] computer system" (p. 734 G-H). In short, the driver drove the passenger under a contract with him or her and not pursuant to any obligation to the operator. The judgment of Maurice Kay LJ, with whom Sir Martin Nourse agreed, does not explicitly adopt that analysis and on one reading focuses only on the fact that the driver was under no obligation to accept jobs; but it is not necessary to my reasoning to identify the majority ratio. (I would add that the Court expressed some concern at the conclusion that it felt obliged to reach: see per Maurice Kay LJ at para. 17 of his judgment and Buxton LJ at para. 24.)

130. The question whether minicab drivers contract directly with their passengers has also been considered in a series of first instance decisions of the High Court and the VAT and First-tier Tribunals in the context of whether the services supplied by private hire operators are subject to VAT. That depends on whether the services in question are in law provided by the drivers as principals, with the operator acting as a booking agent – what was referred to before us as "the intermediary model" – or by the operator. HMRC in its published guidance recognises that that question may have to be answered separately as regards cash and account customers. In the cases to which we were referred there has been no dispute that the services provided to cash customers were provided by the drivers as principals: the issue has been about the services to account customers. We were referred in counsel's skeleton arguments to *Carless v Customs and Excise Commissioners* [1993] STC 632 (Hutchison J), *Hussain v Customs and Excise Commissioners*, VAT Tribunal case no. 19194 (1999), *Argyle Park Taxis Ltd v Her Majesty's Commissioners of Revenue and Customs*, VAT Tribunal case no. 20277 (2007), *Bath Taxis (UK) Ltd v Her Majesty's Commissioners of Revenue and Customs*, VAT Tribunal case no. 20974 (2009), *Lafferty v Her Majesty's Commissioners of Revenue and Customs* [2014] UKFTT 358 (TC), and *Mahmood v Her Majesty's Commissioners of Revenue and Customs* [2016] UKFTT 622 (TC); but in oral argument we were taken only to *Bath Taxis* and *Mahmood*. It is unnecessary to examine these decisions individually. What matters is that in each of them the tribunal carefully considers the details of the relationship between the driver and the operator and reaches a fact-specific decision about whether the drivers performed the account work as principals or as agents for the operator. In most the decision was that they did so as agents, but in *Mahmood* the FTT reached the contrary conclusion.

131. The legal position as appears from those authorities is summarised in HMRC's VAT Notice 700/25 – *How VAT Applies to Taxis and Private Hire Cars* – as follows (para. 3.4):

> "Whether you're acting as an agent depends on the terms of any written or oral contract between you and the drivers, and the actual working practices of your business. For further information on how to decide whether you're acting as an agent or a principal see the section dealing with agents in VAT guide (Notice 700)[9]. Typically in acting as an agent for your drivers you'll:

[9] We were shown this Notice but the relevant parts are general in character and contain nothing relevant for our purposes.

- relay bookings to the drivers (usually on a rota basis) for an agreed fee;

- collect fares on their behalf from account customers.

You could also provide them with other services such as the hire of cars or radios."

132. There are obviously differences between the arrangements under consideration in the minicab cases and Uber's platform-based system. For one thing, the number of drivers whose services are potentially available through the Uber app, at least in London, is incomparably larger than in any minicab fleet and probably also much larger than the number of black cabs belonging to any one of the old radio taxi services. For another, the technology is much more sophisticated (though some aspects of it, such as use of web-based mapping services to plot a route, are not unique to Uber). But it does not necessarily follow that the essentials are different for the purpose of a legal analysis. Subject to some technological differences, all of the features enumerated in para. 126 above are present in Uber's model. In oral argument, in answer to a question from the Master of the Rolls, Mr Galbraith-Marten accepted that some minicab businesses run on the intermediary model. He was asked to identify any differences in Uber's arrangements which he said required a fundamentally different approach from that taken in such cases. The only difference to which he referred was that of scale, which he said was "not decisive but relevant". I thus understood him to accept, as Mr Linden certainly did, that in principle Uber could operate on the intermediary model, though it was of course their case that on the Tribunal's findings it did not do so. Indeed that was the view of the Tribunal itself: see para. 97 of the Reasons.

133. I should emphasise that I am not concerned to establish that the taxi and minicab cases reviewed above are on all fours with the present case or indeed necessarily that they are on their particular facts correctly decided. Rather, the significance of this body of law is that it demonstrates that one well-recognised means of operating a private hire business is for the operator to act as a booking agent for a group of self-employed drivers who contract with the passengers as principals. It is not decisive whether all or most passengers understand this to be the case, but I certainly do not think that they would regard it as outlandish. I have already observed that it is commonly understood that black cab drivers plying for hire are in business on their own account, and it is not a big step for passengers to appreciate that the same may be true of minicab drivers even if they are, of necessity, booked through an intermediary.

134. Very recently the EAT had to consider the worker status of private hire drivers in *Addison Lee Ltd v Lange* [2018] UKEAT 0037/18 (see paras. 59-65 of the judgment of the Master of the Rolls and Bean LJ). Nothing in that case casts doubt on what I have said in the previous paragraphs. It is not clear to what extent the issue in the present appeal – that is, whether the driver was providing services to Addison Lee rather than the passenger – arose at all, and it is certainly not directly addressed in the reasoning of the EAT. (I would add, though this is not the main point, that the arrangements between Addison Lee and the drivers were substantially different in any event from those in the present case.)

THE REASONING OF THE ET

135. The ET's reasoning on the primary issue is at paras. 87-97 of the Reasons. These are summarised by the Master of the Rolls and Bean LJ, at para. 96 of their judgment, but my comments on them require me to set them out in full, which I do in the annex to this judgment. The fact that I shall have to be critical of aspects of the Tribunal's reasoning does not detract from the admiration that I feel for the thoughtfulness with which it undertook its task and the clarity with which it expressed itself.

136. As the Tribunal acknowledges, its eleven numbered points involve a degree of repetition, and some of them also in my view cover more than one point. That being so, I do not think it would be helpful to go through them one-by-one. The main thrust of the reasoning, through all its various iterations, is (a) that it is not realistic to treat Uber drivers as entering into a direct contractual relationship with their passengers, with ULL acting merely as the agent or broker (see in particular para. 91); and (b) – which is the corollary – that realistically the drivers contract with ULL to provide their services to it (see in particular para. 92). I have done my best to group thematically the various points made in support of that conclusion.

137. I start with a group of points which do not address the actual features of the relationships but appear to be intended to provide a context against which they should be considered. These are:

(1) *"The lady doth protest too much"*. At para. 87 the Tribunal says that the very fact that Uber goes to such trouble to specify in its contractual paperwork the nature of the relationships created is cause for scepticism about whether the picture there painted is accurate. I do not accept that. There is nothing suspicious as such about Uber wanting to have full and careful paperwork setting out the terms of the relationships into which it enters: any prudent business of any size, would, or at least should, do the same. It would of course be different if the paperwork does not reflect what the parties otherwise understood or agreed; but that begs the very question that has to be answered in this case.

(2) *Idiosyncratic language.* Also at para. 87 the Tribunal refers to the Agreement as resorting to "fictions, twisted language and … brand new terminology". It gives examples in its footnotes, which do indeed show some egregiously ugly pieces of corporate-speak, tendentious definitions and lawyerisms. But, again, the question is whether these various offences against good English actually conceal a different reality.

(3) *"Transportation services"*. The Tribunal attaches importance to the fact that Uber has from time to time described itself as providing "transportation services": see paras. 88 and 93. I do not see that this has much significance, since it all depends what you mean by that term. In one sense Uber obviously provides transportation services. But the question is whether it does so by providing the services of the drivers itself or by providing a service for booking (and paying for) them. The same applies to the Tribunal's reliance (para. 88) on the fact that Uber markets its "product range" in its own name: the question is what the products in question consist of. The fact that the service is branded "Uber" does not seem to me determinative: Checkers Cars and Amber Cars (see paras. 125 and 127 above) likewise advertised themselves in their own names, but that did

not prevent Langstaff J and Buxton LJ from regarding them as intermediaries who did not contract directly with the passenger. The Tribunal quotes the decision of the California District Court in *O'Connor* that "Uber does not simply sell software; it sells rides"; but that is, as far as it goes, an unanalysed assertion.[10] If I may say so, much of the debate in the ET seems to have been side-tracked into considering (and cross-examining Uber's hapless witness on) words and labels rather than analysing the nature of the actual obligations.

(4) *Uber's references to its drivers.* At para. 88 the Tribunal refers to Uber having acknowledged that it employs drivers for the purpose of the transportation services which it supplies. That is cross-referenced to paras. 67-69 (set out by my Lords at para. 94 of their judgment), but the examples there given are the use in marketing material of such phrases as "Uber drivers" and "our drivers" and attaching the label "Uber" to the ride as well as the booking. All of these are thoroughly equivocal: they could mean a driver or a ride provided through Uber just as much as a driver employed by Uber or a ride provided by it as principal.

(5) "*30,000 separate businesses"*. The Tribunal says at para. 90 that it is "faintly ridiculous" to say that "Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform'". I agree that in some contexts – though not all – it might seem rather unnatural to describe a driver with his own car and a private hire licence who gets all or most of his work through Uber as carrying on a "business"; and Uber's references to drivers "growing" such businesses are unconvincing. But this seems to me to be another example of focusing on a label rather than on the underlying question. I see nothing inherently ridiculous in the notion that Uber provides access to 30,000 drivers who will offer their services as principals. The same, subject only to numbers, could be said of the old "radio taxi" services or, depending on its particular arrangements, a minicab service following the model summarised at para. 126 above.

138. The Tribunal's points so far considered are, as I read it, by way of a preliminary barrage. Its consideration of the actual features of the relationships between Uber, the drivers and the passengers appears principally in paras. 91-92 of the Reasons, which are, as I have said, two sides of the same coin (though parts of para. 90 may be relevant also). The points there made can be grouped as follows*:*

(1) *Limited information available to the driver at the point of acceptance.* The Tribunal found it "absurd" to believe that the driver enters into a contract with a person whose identity he does not know and who does not know his to drive him or her to a destination unknown at the time that he accepts the job: see paras. 91 and 92 (3). As to the passenger and driver not knowing each other's names, I cannot see that this is inconsistent with the existence of a contract between them: that is the case not only whenever a passenger flags a taxi in the street but also whenever he or she books a minicab operating on the model described above where the driver is the principal. (In fact the passenger at least is not entirely in the dark, since Uber supplies the driver's first name, and he or she will be able to

[10] Not all Courts in the United States have taken the same position on this. Ms Rose referred us to the decision of a District Court of Appeal in Florida in *McGillis v. Department of Economic Opportunity*, 210 So. 3d 220.

ascertain his identity if necessary because he will have to display his private hire licence.) As for the driver not knowing the destination in advance, this is the case whether he contracts with the passenger or with Uber, and I do not see how it is relevant to that question. But I do not in any event see what the supposed absurdity consists in: the driver is in business to drive passengers where they want to go[11], and it is not likely to be of importance to him (at least for any legitimate reason[12]) to know the destination at the point of acceptance.

(2) *Driver's lack of control over key terms.* The Tribunal, again, found it absurd to treat the driver as entering into a contract with the passenger of which the key terms – specifically route and fare – are set by a non-party (i.e. Uber): see paras. 91 and 92 (5) and (6). As to the route, the Tribunal found at para. 54 that the driver was not required by Uber to follow the route shown on the App, but that if there was a departure from it and the passenger subsequently asked for a refund because the most efficient route was not followed the driver would have to justify the departure. I do not think that it is accurate to describe that, as the Tribunal does in this paragraph, as a finding that Uber "prescribes" the route; but, whether it is accurate or not, I cannot see that it is inconsistent with the passenger and driver contracting directly. Whenever a passenger hires a cab or minicab it must be an implicit term that the driver will make a reasonable judgement of the best route; the fact that on an Uber hire that judgement is normally, in effect, delegated to the App cannot make a fundamental difference. (Indeed, as already noted, it is increasingly usual for any private hire driver to employ satnav or similar apps.) As for the fare, though that is indeed set by the Uber software, with no opportunity for negotiation by the driver, I cannot see why that is inconsistent with the existence of a contract between driver and passenger. As set out above, it is very common for minicab operators to prescribe set fares, but the drivers may nonetheless contract as principals.

(3) *Payment arrangements.* Another feature which the Tribunal believed rendered it "absurd" to treat the driver as entering into a contract with the passenger is that his or her payment is made to Uber: see para. 91. But it is not at all unusual for minicab operators (and booking services for taxis) to collect payment on behalf of their drivers: that will routinely happen in the case of account customers. It does not follow that the driver is not contracting with the passenger as a principal: the debt is owed to him, even though the passenger pays it through a third party. Again, that is apparent from the case law to which I refer above.

(4) *Invoice*. The ET attaches importance to the fact that the payment mechanism generates an invoice from the driver to the passenger and says that this is clearly

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11 Counsel were unable to confirm at the hearing whether there is any limit on the destinations that Uber's software will accept, or, if not, whether drivers in London are expected to take passengers literally anywhere in the UK. It seems very unlikely that they are, but almost all destinations are presumably in or around London, and cases in which it is one that could not reasonably have been contemplated must be too rare to affect the analysis.

12 It would not be legitimate to be unwilling to take passengers to unpopular areas (as in the common, though doubtless unfair, belief that some black cabs in London are reluctant to go "south of the river" at night). That is of course one of the reasons why destinations are not revealed at the point of offer.

a fiction. I would not accept that description. The invoice records the service rendered by one party to the other and states the price. It is true that it is not a demand, because the price is paid automatically by debit to the passenger's card; but it is not uncommon to find business systems generating invoices for goods or services which have already been paid for. It is less usual for a copy of the invoice not even to be given to the recipient of the goods or services, but it is not particularly surprising in a case like the present, since it is not clear what use the passenger would have for it: he or she gets a receipt anyway at the end of each trip.

(5) *Quality control.* The Tribunal notes at para. 92 (7) that Uber "imposes numerous conditions on drivers". The only specific example which it gives is the list of acceptable vehicles, but no doubt it had in mind earlier findings about what drivers are told about how to behave towards passengers. But this does not seem to me inconsistent with the existence of a contract between driver and passenger. Even if Uber acts only as an intermediary it plainly has an interest in maintaining the quality of the product from which it makes its profit. The same goes for the maintenance of the ratings and performance management system referred to at para. 92 (8) and more fully explained at paras. 55-56. Similar measures to ensure quality – including some more intrusive ones such as the requirement to wear uniform – are found in the taxi and minicab cases referred to above.

(6) *Recruitment*. The Tribunal found at paras. 40-41 of its Reasons that would-be Uber drivers had to attend personally at its office to present the required documentation (Public Carriage Office licence, PHV licence, proof of insurance etc) and that they would be "assessed" in the very limited sense that if it was apparent that they could not speak English they would be excluded and that if they exhibited signs of mental illness they would be referred to TfL. At para. 91 (2) it summarises that as: "Uber interviews and recruits drivers". I am not sure that that fairly reflects the actual findings. But in any event the facts as found seem to me to be entirely neutral as regards the question of whether, once recruited, drivers provide their services for Uber or for the passengers.

139. I take separately a point made only briefly in para. 92 – see point (4) – but about which there was a fair amount of argument before us. At paras. 52-53 of its Reasons the ET finds that Uber drivers are liable to be logged off the system for ten minutes (more recently reduced to two) if they decline three offers in a row or too often cancel trips once accepted. At least the former practice is directly authorised by the Agreement. Para. 2.6.2 of the New Terms concludes:

> "Additionally, Customer acknowledges and agrees that repeated failure by a Driver to accommodate User requests for Transportation Services while such Driver is logged in to the Driver App creates a negative experience for Users of Uber's mobile application. Accordingly, Customer agrees and shall ensure that if a Driver does not wish to provide Transportation Services for a period of time, such Driver will log off of [*sic*] the Driver App."[13]

[13] Again, it needs to be borne in mind that for practical purposes "Customer" can be taken to mean "driver".

Mr Galbraith-Marten submitted that that term necessarily demonstrated that drivers were under a contractual obligation to Uber (he would say ULL) to be available to work when logged on. I do not accept that. It is equally consistent with Uber's case that its essential relationship with drivers is to license them the use of the App. It is consistent with that case that it should reserve the right to take steps which disincentivise drivers from being logged on when they are not in fact available (which can give would-be passengers a misleading idea of how many cars are in fact available nearby). That is not the same as a penalty for breach of a positive obligation owed to it or an affiliate.

140. Finally, the ET in para. 91 makes three points about what it regards as absurd consequences of Uber's argument that the drivers provide their services for, and under a contract with, the passengers. These are:

(1) It is said to be absurd that if Uber became insolvent and failed to pass on the payment the passenger should be liable to the driver. But if Uber – whether for insolvency or any other reason – failed to account to the driver for the fare paid in relation to a particular ride, the driver would have no claim against the passenger, since he or she would have made payment by the agreed mechanism (i.e. by authorising a debit to his or her card at the conclusion of the ride).

(2) The Tribunal suggests that if the contract were between the passenger and the driver the passenger might have the obligations of an employer under the legislation protecting workers – e.g. to pay the national minimum wage. I agree with the Master of Rolls and Bean LJ that that is, with all respect to the Tribunal, obviously wrong: quite apart from anything else, the passenger is plainly a customer of the driver's business so that the words of exception in section 230 (3) (b) would apply.

(3) The Tribunal says that the parties cannot have contemplated that the driver, rather than Uber, would bear the risk of non-payment by the passenger as a result of a some failure in the card collection systems or of unauthorised use of the card by the passenger (fraud); and that that is illustrated by the fact that Uber in fact has a policy that it will pay the driver at least in cases of fraud. This too seems to me neutral. Even on Uber's analysis it is its obligation to collect the fares and there is nothing surprising in it bearing the risk of a failure – innocent or dishonest – in the collection process.

141. The ET does not, at least as I read it, make any explicit point in para. 91 – which describes the notion of a direct contract between driver and passenger as "fictitious" – about the perception of the customer about who he or she is contracting with; but it may be that such a point is implicit, and I think it should be addressed. Of course in the real world few if any passengers would consider the question at all: the transaction is a simple one, with very little opportunity for disputes to arise[14]. Even if they were forced to confront the question, I do not think it can be assumed that they would all say that they thought they were contracting with Uber as principal. It is, I believe, widely understood that Uber drivers own the cars which they drive, and are their own masters as regards how much they drive. They do not wear any kind of uniform and the cars

[14] By far the most serious possibility is of course of injury caused by the driver's negligence. But the passenger would, rightly, assume that the driver was insured, and no question of any claim against Uber as distinct from the driver need arise.

have no Uber branding or identification. I would not be surprised if many passengers regarded them in the same way as taxi drivers or minicab drivers in business on their own account. But even if most did assume that they were making a contract with Uber as principal, since it was on Uber's App that they had made the booking, I am not sure how that advances the argument. Passengers too have agreed to terms and conditions which make it plain that their contract is with the driver, and that contract can only be disregarded if it fails to reflect the reality, which brings us back to the same question as in relation to the Uber-driver contract. Certainly the fact that passengers may assume that they are dealing directly with Uber rather than with the driver does not necessarily mean that they are. That appears from *Secret Hotels2 Ltd v Her Majesty's Commissioners of Revenue and Customs* [2014] UKSC 16, [2014] STC 937, which I discuss below: see paras. 152-4.

142. At paras. 94-95 the ET turns to the case law relied on respectively by the Claimants and by Uber. I take the two paragraphs in turn.

143. At para. 94 the ET refers, albeit rather obliquely, to two EAT authorities – *Cotswold Developments Construction Ltd v Williams* [2005] UKEAT 0457/05, [2006] IRLR 181, and *James v Redcats (Brands) Ltd* [2007] UKEAT 0475/06, [2007] ICR 1006 – which were cited with approval by Lady Hale in *Bates van Winkelhof*. In the former Langstaff J encouraged tribunals to focus on "whether the purported worker actively markets his services as an independent person to the world in general … or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations" (para. 52). In the latter Elias J refers to the distinction between "dependent work relationships" and "[contracts] between two independent business undertakings". The Tribunal regards the drivers' relationship with Uber as "dependent" and finds that their services are marketed to the public as "an integral part of [Uber's] operations". Those are plainly – to put it no higher – legitimate conclusions. But they are not decisive of, or indeed directly relevant to, the issue on this appeal, which is whether the putative worker is providing the relevant services for, and under a contract with, a third party, namely the direct beneficiary of the services. That was not an issue in either *Cotswold Development* or *James v Redcats*. In the former the claimant was a "self-employed" carpenter engaged by a building company, and in the latter she was a courier making deliveries for a delivery company. In neither was it, nor could it sensibly have been, argued by the putative employer that the claimant provided his or her services for, or under a contract with, the end-recipient of the services. Rather, the issues were of the more usual kind referred to at para. 109 above, and also about whether there was any mutuality of obligation when the claimant was not working. (Likewise in *Bates van Winkelhof* itself there was no question of the claimant, who was a partner in a firm of solicitors, providing her service under a contract with anyone save the firm itself.) I do not accordingly believe that these cases advance the argument.

144. At para. 95 the ET addresses the authorities relied on by Uber as illustrating relationships where the putative employer is held to be no more than an intermediary between the putative worker and a third party for whom the services are performed. These include *Mingeley* and *Khan* but also *Cheng Yuen* and *Quashie*. I do not agree with the Master of the Rolls and Bean LJ (see para. 69 of their judgment) that these cases are of no assistance. They confirm that there can be cases in which, on a proper legal analysis, A provides services to B's customers under contracts with the customers themselves notwithstanding that the services in question are integral to B's business

and are provided on conditions largely dictated by B. But I accept that that is the limit of any assistance they give, since the actual facts are very different from those in the present case. The Tribunal does not in fact dispute the availability of such an analysis in principle – indeed it could not, since *Quashie* at least was binding on it (as it is on us) – but it said that its earlier findings meant that it was not applicable on the facts of the present case.

DISCUSSION AND CONCLUSION

145. The upshot of that, I fear laborious, review is as follows. The essential proposition which the reasoning in paras. 87-97 of the ET's judgment is deployed to support is that it is unrealistic to treat Uber drivers as performing their services for, and under a contract with, their passengers rather than for, and under a contract with, ULL; and, that being so, that the contractual paperwork can be ignored on *Autoclenz* principles. For the reasons which I have given, I do not believe that any of the points made by the Tribunal supports that proposition. In particular, the various features relied on in paras. 91 and 92 are in my view entirely consistent with the position as stated in the Agreement.

146. I have reminded myself that even if none of the individual points relied on by the ET might be inconsistent with the position set out in the contract the cumulative effect could be. But, standing back so as to be able to see the wood as well as the trees, it still seems to me that the relationship argued for by Uber is neither unrealistic nor artificial. On the contrary, it is in accordance with a well-recognised model for relationships in the private hire car business.

147. That being so, *Autoclenz* gives no warrant for disregarding the terms of the Agreement. *Autoclenz* is an important tool in tribunals' armoury because it enables them to look to the reality of a relationship rather than a false characterisation imposed by the employer. But the premise is that the characterisation is indeed false. As I have said, *Autoclenz* does not permit the re-writing of agreements only because they are disadvantageous. Protecting against abuses of inequality of bargaining power is the role of legislation: I return to this below.

148. The Master of the Rolls and Bean LJ endorse much, though not all, of the ET's reasoning as reviewed above. I will not repeat all the points on which I have already expressed my view. However, they also attach importance to the regulatory regime under which Uber operates: see para. 89 of their judgment. For myself, I see no inconsistency between Uber's position as the operator of its service within the meaning of the 1998 Act and it being obliged to operate a system under which it makes all bookings and has to provide fare estimates on request. As Ms Rose pointed out, it used to be a regulatory rule that all barristers must deal with solicitors through a clerk; but that did not mean that the clerk was the principal. A minicab service operating on the intermediary model described above would be subject to the same regulatory obligations, but that would not mean that its drivers performed their services as its agents. In my view the focus must be on the arrangements between the parties themselves: the fact that they may be in order to comply with regulatory requirements is in itself neutral.

149. I am conscious that I have not addressed the reasoning of the EAT. Since ultimately the question for us is whether there was any error of law in the decision of the ET, and

in the context of a dissenting judgment, I hope I will be forgiven for not doing so. The reasons why I do not accept Judge Eady's conclusions will be sufficiently apparent from what I have said above.

OTHER POINTS

150. I should pick up two points which do not feature in the ET's reasoning but did feature, at least to some extent, in the arguments before us.

151. First, we were referred by Mr Galbraith-Marten to three decisions of the CJEU on the meaning of "worker" – *Allonby v Accrington & Rossendale College* (C-256/01) [2004] ICR 1328; *Trojani v Centre Public d'Aide Sociale de Bruxelles* (C-456/02) [2004] 3 CMLR 38; and *Fenoll v Centre Public d'Aide par le Travail "La Jouvene"* (C-316/13) [2016] IRLR 67. The facts of those cases were very different from those with which we are concerned, but he relied on them as establishing the following points of principle – (1) that the term "worker" has an autonomous meaning in EU law; (2) that whether a person providing services is a worker must be decided having regard to all the circumstances of the case; and (3) "that the essential feature of an employment relationship is … that for a certain period of time a person performs services for and under the direction of another person for which he receives remuneration" (as to this, see para. 27 of the judgment of the Court in *Fenoll*). I have no difficulty with any of those propositions. As regards the third in particular, it merely raises the same issue as arises under section 230 (3) of the ERA, namely for whom the driver performs his services. Mr Galbraith-Marten did not advance any submissions to the effect that, even if the Claimants were not workers on an ordinary domestic construction of section 230 (3) (b), the *Marleasing* principle should be applied.

152. Secondly, Ms Rose placed considerable emphasis on *Secret Hotels2*, to which I have already referred and which the Master of the Rolls and Bean LJ address in detail at paras. 51-53 of their judgment. As there appears, that was a case concerning VAT arising out of an internet platform-based service under which hotel rooms could be booked online. The issue was whether the intermediary who operated the website, Med Hotels, sold the rooms as principal or on behalf of the hoteliers. The contractual terms stated that Med Hotels acted only as an agent, but the FTT and this Court accepted HMRC's submission that that was inconsistent with the commercial reality. The Supreme Court allowed the taxpayer's appeal and upheld the decision of the Upper Tribunal that there was no basis for going behind the explicit terms of the contractual documentation. Lord Neuberger, with whose judgment the other members of the Court agreed, carefully examined a number of features of the relationship between Med Hotels, the hoteliers and the customers who booked the rooms which were said to be inconsistent with a purely intermediary relationship and found that all of them were perfectly consistent with Med Hotels being an agent in a powerful bargaining position who was able to impose a degree of control over how the principal did business. His approach as a whole, and some of the particular points, closely parallel the approach which Ms Rose asked us to take in this case.

153. Mr Galbraith-Marten submitted that *Secret Hotels2* was of no assistance because it was not a decision in the employment context, and *Autoclenz* was not cited; and I understand my Lords to take the same view. With respect, I do not agree that this disposes of the relevance of the decision. If the ET is right it is not only the Agreement which mischaracterises the relevant relationships but also the Rider Terms which apply

between the passenger and Uber, which are a consumer contract and not in the employment field at all. In any event, although Lord Neuberger did not refer to *Autoclenz* itself the line of authorities which he made it clear that he was following is the same as that on which Lord Clarke's analysis in that case was based: see para. 32 of his judgment and para. 23 of the judgment of Lord Clarke in *Autoclenz*, both of which, for example, refer to the seminal landlord-and-tenant case of *Street v Mountford* [1985] AC 809. Inequality of bargaining power is central to the analysis in both cases and was expressly referred to by Lord Neuberger: see para. 40 of his judgment. I accordingly think that Ms Rose is entitled to rely on *Secret Hotels2* as confirming that the operator of an internet platform which puts together suppliers of services and customers of those services can effectively stipulate that it is acting only as an agent even if it has its own strong customer-facing brand and exercises a high degree of control over aspects of the transaction between supplier and customer. But it takes her no further than that: whether the contractual terms reflect the reality of the relationships in any particular case must depend on the circumstances of that case.

154. My Lords also make the point that there was in *Secret Hotels2* a written contract between the platform and the hotelier, whereas there was no such contract between ULL and the driver. For the reason given at para. 116 above, I do not believe that that is a material difference. Drivers do have a contract with UBV, which provides in terms that its local affiliates – in this case ULL – act on its behalf in respect of specified matters, including the collecting of fares.

CONCLUSION

155. For those reasons I do not believe that Uber drivers at any stage provide services to ULL under a contract with it. The Agreement provides that they do not, and none of the ET's factual findings, individually or cumulatively, is capable of supporting a conclusion that the true agreement is different. The ET's conclusion was accordingly wrong in law, and I would have allowed the appeal on the main issue.

B. THE SECONDARY ISSUES

156. If, contrary to my view, Uber drivers do contract with ULL to provide services for it, the next question is over what period such a contract is in place. The Claimants have always accepted, given that they are under no obligation to switch the App on, that there is no "umbrella contract" creating rights and obligations between periods of work. On any view, therefore, they are only workers on a gig-by-gig basis: the question is what constitutes the gig.

157. What the ET held, and is the Claimants' primary case before us, is, as I have said, that there is a contract in place between them and ULL throughout the period that the driver has the App switched on, is in the territory in which he is licensed to use it, and is ready and willing to accept trips: see paras. 86 and 100 of the Reasons. It held in the alternative (para. 102) that such a contract arises when the driver actually accepts a trip. The difference between the two alternatives is thus the period during which the driver satisfies the ET's three requirements but has not accepted a trip: I will refer to this as "availability time".

158. Uber's case is that it has no relevant contract with the driver at all; but its fallback position is, as I understand it, that there is only a contract in place when the driver is

actually carrying a passenger: see Mr Reade's submissions in the ET, summarised at para. 100 of the Reasons. That differs from the Tribunal's alternative conclusion since it does not cover the period between the driver's initial acceptance on the App and the definitive acceptance that occurs when the trip actually starts, during which the driver retains the possibility of cancelling.

159. It is of course essential to all three heads of claim that the Claimants should be workers during the period to which their claim relates. But there are also two closely related issues relating to the claims under the WTR and the NMWR. Specifically:

(1) Does availability time constitute "working time" for the purpose of the WTR – namely (regulation 2) "any period during which he is working, at his employer's disposal and carrying out his activity or duties" ? We were not taken to any of the authorities about the effect of that definition.

(2) Does availability time fall to be taken into account in calculating whether the driver has received the national minimum wage ? We were not taken through the NMWR, which are extremely complex, but the central element in the relevant provisions is the time during which the worker is "working". The Claimants' case, which the ET accepted, is that the during availability time they were doing "unmeasured work" within the meaning of Chapter 4 of Part 5 of the Regulations.

The Tribunal, correctly, recognised that the three questions are distinct and addressed them separately. But it regarded the answer to the first as effectively dictating the answer to the other two.

160. The submissions before us did not address the practical impact of a finding that availability time counts as working time or that it counted for national minimum wage purposes. So far as the latter is concerned, the impact would depend on the relationship between availability time and time spent actually carrying passengers: if drivers spent too high of a proportion of their time "available" but not carrying passengers (either because work was not offered or because it was offered but not accepted) the average of their earnings over the whole period when they had the App switched on would be liable to fall below the prescribed minimum.

161. In my view, if drivers provide services to, and under a contract with, ULL at all it is only during the period when they have accepted a trip. It is common ground that drivers are not obliged to accept any particular trip when offered. The only basis on which the ET held that they are nevertheless under a contractual obligation to Uber while the App is switched on is that they are liable to be disconnected for a specified period if they reject trips, or cancel them, too often. But, as I say at para. 138 above, I do not believe that that implies a positive contractual obligation on the part of drivers to accept (and not cancel thereafter) a minimum number of trips offered. I would add that if there were such an obligation it would be necessary to specify what the minimum obligation was. The ET did not in its actual reasoning rely on any finding as to that. The EAT, however, relied on a document quoted by the ET in its findings which referred to drivers being obliged to accept 80% of trips offered: see para. 51 of its judgment (quoted by my Lords at para. 21) and para. 89 of the judgment of the EAT. Ms Rose objected that the recitation of that document did not amount to a finding and that in fact the oral evidence had been that it was not a figure applied by Uber in the UK. There may be some force in that objection, but I do not in any event regard the point as central. If,

contrary to my view, the right to disconnect drivers who declined offers or cancelled too often reflected a positive obligation on their part to accept most trips it would not be impossible to find an appropriate formulation for that obligation by reference to a criterion of reasonableness and/or evidence about what happened in practice.

162. My view on this issue is reinforced, at least as regards entitlement under the WTR and NMWR, by the consideration that under the Agreement drivers are explicitly entitled during availability time to be available also for other driving work, and specifically for platforms providing a similar app-based service to Uber (see para. 24 of my Lords' judgment). It is well-known that such alternative providers exist in the United States. The ET makes no findings about whether they currently operate in London, or, therefore, about whether drivers do in fact "multi-app" in this way. Ms Rose told the Court that there are such services, albeit not on the same scale as Uber, but Mr Linden told us that Mr Farrar's evidence had been that there were none at the period to which the claims relate. Be that as it may, what matters is that the right exists and cannot be regarded as merely theoretical. There is no conceptual difficulty about a worker being in a contractual relationship with two employers during the same period; but I find it much more difficult to see how they could be said to be at the disposal of two employers, and carrying out duties for both, during the same period, or how the same period could be taken into account twice (or indeed more) for the purpose of calculating the national minimum wage obligations of different employers. The position would be still more extraordinary if drivers could bring into account time when they were actually driving on a trip obtained through a different platform: I take the ET's point that in such a case they would not satisfy the third of its criteria, but compliance would be very difficult to police. I will not explore this further, however, not least because, as I have said, we were not addressed on the details of either set of Regulations.

163. Those difficulties only apply up to the point that the driver accepts a trip – that is, presses "accept" on the App and is given details of the pick-up. It seems to me clear that at that point the driver comes (if I am wrong on the main issue) under an obligation to ULL to carry its passenger. That is subject to the right of cancellation, but the ET found, as one would expect, that cancellation could only be for a good reason: see para. 21 of its Reasons (quoted by my Lords at para. 21). Likewise I see no difficulty in treating the driver thereafter as working exclusively for Uber, for the purpose of the WTR and the NMWR, until the end of the trip. I would not, therefore, have accepted Uber's case, as advanced by Mr Reade in the ET, that any obligation only arose at the moment that the passenger was picked up.

BROADER CONSIDERATIONS

164. The question whether those who provide personal services through internet platforms similar to that operated by Uber[15] should enjoy some or all of the rights and protections that come with worker status is a very live one at present. There is a widespread view that they should, because of the degree to which they are economically dependent on the platform provider. My conclusion that the Claimants are not workers does not depend on any rejection of that view. It is based simply on what I believe to be the correct construction of the legislation currently in force. If on that basis the scope of

[15] The range of such services is reviewed in Professor Prassl's recent book *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford 2018).

protection does not go far enough the right answer is to amend the legislation. Courts are anxious so far as possible to adapt the common law to changing conditions, but the tools at their disposal are limited, particularly when dealing with statutory definitions. I have already explained why I do not think that *Autoclenz* can be treated as a tool to re-write any disadvantageous contractual provision that results from the disparity of bargaining power between (putative) employer and (putative) worker: in cases of the present kind the problem is not that the written terms mis-state the true relationship but that the relationship created by them is one that the law does not protect. Abuse of superior bargaining power by the imposition of unreasonable contractual terms is of course a classic area for legislative intervention, and not only in the employment field.

165. A similar point is made by Sir Patrick Elias in his recent article in the Oxford Journal of Legal Studies, *Changes and Challenges to the Contract of Employment*, in the context of the analogous question of zero-hours contracts. He says, at p. 16:

> "There is no doubt that zero-hours contracts are a matter of very great concern. This is because they are often—although not always—cynically constructed agreements, framed by the employer in order to avoid their legal duties. I do not believe that the common law can successfully deal with them alone. *Autoclenz* allows a court to deal with the cases where the agreement is a sham, but the problems arise when it genuinely reflects the way in which the contract is performed, although the worker would choose that the contract were otherwise. The courts cannot simply ignore express terms or apply some general doctrine of unconscionability to invalidate a contract because of unequal bargaining power."

166. Even if it were open to the Courts to seek to fashion a common law route to affording protection to Uber drivers and others in the same position, I would be cautious about going down that road. The whole question of whether and how to adapt existing employment law protections to the development of the so-called gig economy, and in particular to the use of service-provision platforms such as Uber, is under active review by the Government at present. The Taylor Review (*Good Work – The Taylor Review of Modern Working Practices*) was published last year. It recommended the introduction of a new "dependent contractor" status, broadly but not wholly covering the same ground as the definitions of "worker"; and it also made recommendations on the very question raised by the secondary issues in this appeal – that is, how to calculate working time in the case of workers who obtain work through app-based services. In February this year the Treasury, BEIS and HMRC opened a consultation on a wide range of issues raised by the Review. Chapter 8 of the consultation is particularly apposite in the context of this appeal. Para. 8.5 observes that:

> "… [I]n order to apply the principle of the NMW/NLW [National Living Wage] to innovative business models, it is necessary to consider the concept of 'working time': measuring 'working time' for NMW/NLW purposes can become more complex in this context."

More particularly, paras. 8.13-14 read (so far as material):

> "8.13. … In the context specifically of app-based platform working, one of the issues arising is how time spent waiting for tasks while

> logged into the app is classified. Worker representatives have argued that waiting for tasks while logged onto the app is a necessary part of the job and that time should be paid at the NMW/NLW. Otherwise, the risk of low demand is faced by the worker rather than the employer – what the [Taylor] review called 'one-sided flexibility'.
>
> 8.14. Employers have expressed concerns that such an interpretation is unfair because they could be forced to pay the NMW/NLW to individuals who open multiple apps simultaneously, or who log into an app knowing there will be no tasks available, or where individuals might open the app to receive the NMW/NLW but refuse to accept tasks. …"

A number of questions are asked relating to those issues. These are quintessential policy issues of a kind that Parliament is inherently better placed to assess than the Courts.

167. We were, perfectly properly, not addressed about this wider context, and it forms no part of my dispositive reasoning. I refer to it only because the issue is one of wide public concern, and I believe that it is important to spell out the different roles of the Courts and of Parliament in this context.

ANNEX TO THE JUDGMENT OF UNDERHILL LJ

PARAS. 87-97 OF THE ET'S REASONS

"87. In the first place, we have been struck by the remarkable lengths to which Uber has gone in order to compel agreement with its (perhaps we should say its lawyers') description of itself and with its analysis of the legal relationships between the two companies, the drivers and the passengers. Any organisation (a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator, but (c) requiring drivers and passengers to agree, *as a matter of contract,* that it does not provide transportation services (through UBV *or* ULL), and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of scepticism. Reflecting on the Respondents' general case, and on the grimly loyal evidence of Ms Bertram in particular, we cannot help being reminded of Queen Gertrude's most celebrated line:

'The lady doth protest too much, methinks.'

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

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

technology company and not in the business of providing transportation services. The judgment included this:

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

We respectfully agree.

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

91. Fifth, the logic of Uber's case becomes all the more difficult as it is developed. Since it is essential to that case that there is no contract for the provision of transportation services between the driver and any Uber entity, the Partner Terms and the New Terms require the driver to agree that a contract for such services (whether a 'worker' contract or otherwise) exists between him and the passenger, and the Rider Terms contain a corresponding provision. Uber's case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract (UBV) from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger. Uber's case has to be that if the organisation became insolvent, the drivers would have enforceable rights directly against the passengers. And if the contracts were 'worker' contracts, the passengers would be exposed to potential liability as the driver's employer under numerous enactments such as, for example, NMWA. The absurdity of these propositions speaks for itself. Not surprisingly, it was not suggested that in practice drivers and

passengers agree terms. Of course they do not since (apart from any other reason) by the time any driver meets his passenger the deal has already been struck (between ULL and the passenger). The logic extends further. For instance, it is necessarily part of Uber's case (as constructed by their lawyers) that where, through fraud or for any other reason, a fare is not paid, it has no *obligation* to indemnify the driver for the resulting loss. Accordingly, in so far as its policy is to bear the loss and protect the driver (we were only told of a policy relating to fraud), it must be free to reverse the policy and if it does so, drivers will be left without remedy. That would be manifestly unconscionable but also, we think, incompatible with the shared perceptions of drivers and Uber decision makers as to Uber's legal responsibilities. For all of these reasons, we are satisfied that the supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties.

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

(1) The contradiction in the Rider Terms between the fact that ULL purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings.

(2) The fact that Uber interviews and recruits drivers.

(3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.

(4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements.

(5) The fact that Uber sets the (default) route and the driver departs from it at his peril.

(6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory.)

(7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable

vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties.

(8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.

(9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.

(10) The guaranteed earnings schemes (albeit now discontinued).

(11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.

(12) The fact that Uber handles complaints by passengers, including complaints about the driver.

(13) The fact that Uber reserves the power to amend the drivers' terms unilaterally.

93. Seventh, turning to the detail of the statutory language, we are satisfied, having regard to all the circumstances and, in particular, the points assembled above, that the drivers fall full square within the terms of the 1996 Act, s 230(3)(b). It is not in dispute that they undertake to provide their work personally. For the reasons already stated, we are clear that they provide their work 'for' Uber. We are equally clear that they do so pursuant to a contractual relationship. If, as we have found, there is no contract with the passenger, the finding of a contractual link with Uber is inevitable. But we do not need to base our reasoning on a process of elimination. We are entirely satisfied that the drivers are recruited and retained by Uber to enable it to operate its transportation business. The essential bargain between driver and organisation is that, for reward, the driver makes himself available to, and does, carry Uber passengers to their destinations. Just as in *Autoclenz*, the employer is precluded from relying upon its carefully crafted documentation because, we find, it bears no relation to reality. And if there is a contract with Uber, it is self-evidently not a contract under which Uber is a client or customer of a business carried on by the driver. We have already explained why we regard that notion as absurd.

94. Eighth, while it cannot be substituted for the plain words of the statute, the guidance in the principal authorities favours our conclusion. In particular, for the reasons already given, it is plain to us that the agreement between the parties is to be located in

the field of dependent work relationships; it is not a contract at arm's length between two independent business undertakings. Moreover, the drivers do not market themselves to the world in general; rather, they are recruited by Uber to work as integral components of its organisation.

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

(1) None of the authorities actually turned on the limb (b) test.

(2) They were concerned wholly or very largely with whether there was an 'umbrella' contract between the claimants and the respondents, an issue with which we are not concerned at all. Only one addressed (and then only in a single sentence) the question at the heart of our case of whether, *in performing individual services* (here driving trips), a claimant is working 'for' the putative employer pursuant to a contract.

(3) Two of the cases arise out of facts which have little in common with the matter before us. *Cheng Yuen* and *Quashie* concern arrangements by which individuals were permitted to render to the golf club members and nightclub 'clients' services ancillary to the principal service or facility offered by the proprietors. But there is nothing 'ancillary' about the Claimants' work. It seems to us that there are added difficulties for the putative employer with a defence modelled on *Cheng Yuen* and *Quashie* where the claimants perform the very service which the respondent exists to provide. In such a case it is (as Uber appears to recognise) essential to the defence for the Tribunal to find not only that the claimants contract personally with those who receive the services in question but also that they collectively, rather than the respondent, 'are' the business. In a proper case the evidence warrants such findings but on a careful review of all the material placed before us, our conclusions on both propositions are, for the reasons already stated, entirely adverse to Uber.

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

> In all the circumstances, it seems to us that Mr Reade's arguments in reliance on the authorities he cited cannot prevail in the face of our findings on the evidence.
>
> 96. Tenth, it follows from all of the above that the terms on which Uber rely do not correspond with the reality of the relationship between the organisation and the drivers. Accordingly, the Tribunal is free to disregard them. As is often the case, the problem stems at least in part from the unequal bargaining positions of the contracting parties, a factor specifically adverted to in *Autoclenz*. Many Uber drivers (a substantial proportion of whom, we understand, do not speak English as their first language) will not be accustomed to reading and interpreting dense legal documents couched in impenetrable prose. This is, we think, an excellent illustration of the phenomenon of which Elias J warned in the *Kalwak* case of "armies of lawyers" contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides.
>
> 97. Eleventh, none of our reasoning should be taken as doubting that the Respondents *could* have devised a business model not involving them employing drivers. We find only that the model which they chose fails to achieve that aim."

Note: I have not reproduced the Tribunal's footnotes.

SECTION 4

Hilary Term
[2021] UKSC 5
On appeal from: [2018] EWCA Civ 2748

JUDGMENT

Uber BV and others (Appellants) *v* Aslam and others (Respondents)

before

Lord Reed, President
Lord Hodge, Deputy President
Lady Arden
Lord Kitchin
Lord Sales
Lord Hamblen
Lord Leggatt

JUDGMENT GIVEN ON

19 February 2021

Heard on 21 and 22 July 2020

Appellants
Dinah Rose QC
Fraser Campbell
(Instructed by DLA Piper
(UK) LLP (London))

Respondents (1 and 2)
Jason Galbraith-Marten QC
Sheryn Omeri
(Instructed by Bates Wells
& Braithwaite LLP
(London))

Respondent (3)
Oliver Segal QC
Melanie Tether
(Instructed by Leigh Day
(London))

Respondents:-

(1) Yaseen Aslam
(2) James Farrar
(3) Robert Dawson and others

LORD LEGGATT: (with whom Lord Reed, Lord Hodge, Lady Arden, Lord Sales and Lord Hamblen agree)

Introduction

1. New ways of working organised through digital platforms pose pressing questions about the employment status of the people who do the work involved. The central question on this appeal is whether an employment tribunal was entitled to find that drivers whose work is arranged through Uber's smartphone application ("the Uber app") work for Uber under workers' contracts and so qualify for the national minimum wage, paid annual leave and other workers' rights; or whether, as Uber contends, the drivers do not have these rights because they work for themselves as independent contractors, performing services under contracts made with passengers through Uber as their booking agent. If drivers work for Uber under workers' contracts, a secondary question arises as to whether the employment tribunal was also entitled to find that the drivers who have brought the present claims were working under such contracts whenever they were logged into the Uber app within the territory in which they were licensed to operate and ready and willing to accept trips; or whether, as Uber argues, they were working only when driving passengers to their destinations.

2. For the reasons given in this judgment, I would affirm the conclusion of the Employment Appeal Tribunal and the majority of the Court of Appeal that the employment tribunal was entitled to decide both questions in the claimants' favour.

The parties

3. The first appellant, Uber BV, is a Dutch company which owns the rights in the Uber app. The second appellant, Uber London Ltd ("Uber London"), is a UK subsidiary of Uber BV which, since May 2012, has been licensed to operate private hire vehicles in London. The third appellant, Uber Britannia Ltd, is another UK subsidiary of Uber BV which holds licences to operate such vehicles outside London. In this judgment I will use the name "Uber" to refer to the appellants collectively when it is not necessary to differentiate between them.

4. The claimants, and respondents to this appeal, are individuals who work or used to work as private hire vehicle drivers, performing driving services booked through the Uber app. For the purpose of the decision which has given rise to this appeal, the employment tribunal limited its consideration to two test claimants, Mr

Yaseen Aslam and Mr James Farrar, both of whom were licensed to drive private hire vehicles in London. Like the employment tribunal, I will use masculine pronouns for brevity when referring to Uber drivers in this judgment in circumstances where all the claimant drivers are male.

5. At the time of the employment tribunal hearing in 2016, there were about 30,000 Uber drivers operating in the London area and 40,000 in the UK as a whole. Some two million people were registered to use the Uber app as passengers in London.

The Uber system

6. As described in more detail in the decision of the employment tribunal, Uber's business model is simple. Prospective customers download the Uber app (for free) to their smartphone and create an account by providing personal information including a method of payment. They are then able to request rides. To do so, they open the Uber app on their phone and make a request. In the period considered by the employment tribunal, users did not have to enter their destination when booking a ride through the app, but they generally did so. The Uber app identifies the passenger's location through the smartphone's geolocation system. Using the same technology, the app identifies the nearest available driver who is logged into the app and informs him (via his smartphone) of the request. At this stage the driver is told the passenger's first name and Uber rating (as to which, see below) and has ten seconds in which to decide whether to accept the request. If the driver does not respond within that time, the next closest driver is located and offered the trip. Once a driver accepts, the trip is assigned to that driver and the booking confirmed to the passenger, who is sent the driver's name and car details.

7. At this point the driver and passenger are put into direct contact with each other through the Uber app, but this is done in such a way that neither has access to the other's mobile telephone number. The purpose is to enable them to communicate with each other in relation to the pick-up, for example to identify the passenger's precise location or to advise of problems such as traffic delay. The passenger can also track the driver's progress on a map on their smartphone.

8. The driver is not informed of the passenger's destination until the passenger is collected. At that point the driver learns the destination either directly from the passenger or through the app (if the destination was entered when the ride was requested) when the driver presses "start trip" on his phone. The Uber app incorporates route planning software and provides the driver with detailed directions to the destination. The driver is not bound to follow those directions but departure

from the recommended route may result in a reduction in payment if the passenger complains about the route taken.

9. On arrival at the destination, the driver presses "complete trip" on his smartphone. The fare is then calculated automatically by the Uber app, based on time spent and distance covered. At times and places of high demand, a multiplier is applied resulting in a higher fare. Drivers are permitted to accept payment in a lower, but not a higher, sum than the fare calculated by the app (although, in the unlikely event that a driver accepts a lower sum, the "service fee" retained by Uber BV is still based on the fare calculated by the app). Drivers are at liberty to accept tips but are discouraged by Uber from soliciting them.

10. The fare is debited to the passenger's credit or debit card registered on the Uber app and the passenger is sent a receipt for the payment by email. Separately, the Uber app generates a document described as an "invoice" addressed on behalf of the driver to the passenger (showing the passenger's first name but not their surname or contact details). However, the passenger never sees this document, which is not sent to the passenger but is accessible to the driver on the Uber app and serves as a record of the trip and the fare charged.

11. Uber BV makes a weekly payment to the driver of sums paid by passengers for trips driven by the driver less a "service fee" retained by Uber BV. In the cases of Mr Aslam and Mr Farrar, the service fee was 20% of the fares.

12. Drivers are prohibited by Uber from exchanging contact details with a passenger or contacting a passenger after the trip ends other than to return lost property.

13. Uber operates a ratings system whereby, after the trip, the passenger and driver are each sent a message asking them to rate the other anonymously on a scale of 1 to 5.

Working as a driver

14. To become an Uber driver, a person can sign up online. They must then attend and present certain documents at the offices of the local Uber company (which, for the London area, is Uber London). The required documents comprise a national insurance certificate, driving licence, licence to drive a private hire vehicle, vehicle logbook, MOT certificate and certificate of motor insurance. The applicant must also take part in what the employment tribunal described as "an interview, albeit not

a searching one", and watch a video presentation about the Uber app and certain Uber procedures. This process is referred to by Uber as "onboarding".

15. Individuals accepted as drivers are given free access to the Uber app through their own smartphone or may hire a smartphone for £5 a month from Uber BV configured so that it can only be used to operate the Uber app. The driver has to provide and pay for his own vehicle, which must be on a list of accepted makes and models, in good condition, no older than a specified age and preferably silver or black. Drivers must also bear all the costs of running their vehicles, including fuel, insurance, road tax and the cost of obtaining a private hire vehicle licence.

16. Individuals approved to work as drivers are free to make themselves available for work, by logging onto the Uber app, as much or as little as they want and at times of their own choosing. They are not prohibited from providing services for or through other organisations, including any direct competitor of Uber operating through another digital platform. Drivers can also choose where within the territory covered by their private hire vehicle licence they make themselves available for work. They are not provided with any insignia or uniform and in London are discouraged from displaying Uber branding of any kind on their vehicle.

17. The employment tribunal made a number of findings about standards of performance which drivers are expected to meet and actions taken where drivers fail to meet these standards. For example, the tribunal found that a "Welcome Packet" of material issued by Uber London to new drivers included numerous instructions as to how drivers should conduct themselves, such as "Polite and professional at all times", "Avoid inappropriate topics of conversation" and "Do not contact the rider after the trip has ended". Other material in the Welcome Packet, under the heading "What Uber looks for", stated:

> "High Quality Service Stats: We continually look at your driver rating, client comments, and feedback provided to us. Maintaining a high rating overall helps keep a top tier service to riders.
>
> Low Cancellation Rate: when you accept a trip request you have made a commitment to the rider. Cancelling often or cancelling for unwillingness to drive to your clients leads to a poor experience.
>
> High Acceptance Rate: Going on duty means you are willing and able to accept trip requests. Rejecting too many requests

> leads to rider confusion about availability. You should be off duty if not able to take requests."

18. Taking these three metrics in reverse order, drivers whose acceptance rate for trip requests falls below a set level - which according to evidence before the tribunal was 80% - receive warning messages reminding the driver that being logged into the Uber app is an indication that the driver is willing and able to accept trip requests. If the driver's acceptance rate does not improve, the warnings escalate and culminate in the driver being automatically logged off the Uber app for ten minutes if the driver declines three trips in a row. A similar system of warnings, culminating in a ten-minute log-off "penalty", applies to cancellations by drivers after a trip has been accepted. The driver's ratings from passengers are also monitored and the employment tribunal found that drivers who have undertaken 200 trips or more and whose average rating is below 4.4 become subject to a graduated series of "quality interventions" aimed at assisting them to improve. If their ratings do not improve to an average of 4.4 or better, they are "removed from the platform" and their accounts "deactivated".

19. Uber also operates a "driver offence process" to address misconduct by drivers. This again involves a graduated series of measures, beginning with a "warning" message and potentially leading to "deactivation".

20. In addition, Uber London handles passenger complaints, including complaints about a driver, and decides whether to make any refund to the passenger (sometimes without even referring the matter to the driver concerned). Such a refund will generally result in a correspondingly reduced payment to the driver, though the tribunal found that on occasions, when Uber London considers it necessary or politic to make a refund but there is no proper ground for holding the driver to be at fault, Uber London will bear the cost of the refund itself.

21. Uber will in some circumstances pay drivers the cost, or a contribution towards the cost, of cleaning vehicles soiled by passengers. The employment tribunal noted that it was not suggested that such payments were conditional upon Uber recovering this sum from the passenger.

Written agreements between Uber BV and drivers

22. Before using the Uber app as drivers for the first time, the claimants were required to sign a "partner registration form" stating that they agreed to be bound by and comply with terms and conditions described as "Partner Terms" dated 1 July 2013. In October 2015 a new "Services Agreement" was introduced to which drivers

were required to signify their agreement electronically before they could again log into the Uber app and accept trip requests. The differences between the old and new terms are not material for present purposes and it is sufficient to refer to the new terms contained in the Services Agreement.

23. The Services Agreement is formulated as a legal agreement between Uber BV and "an independent company in the business of providing transportation services", referred to as "Customer". It contains an undertaking by "Customer" to enter into a contract with each driver in the form of an accompanying "Driver Addendum". This arrangement is inapposite for the vast majority of drivers who sign up as individuals and not on behalf of any "independent company" which in turn engages drivers.

24. In the typical case where "Customer" is an individual driver, the nature of the relevant services and relationships as characterised by the Services Agreement is that Uber BV agrees to provide electronic services (referred to as the "Uber Services") to the driver, which include access to the Uber app and payment services, and the driver agrees to provide transportation services to passengers (referred to as "Users"). The agreement states that Customer acknowledges and agrees that Uber BV does not provide transportation services and that, where Customer accepts a User's request for transportation services made through the Uber app, Customer is responsible for providing those transportation services and, by doing so, "creates a legal and direct business relationship between Customer and the User, to which neither Uber [BV] nor any of its Affiliates in the Territory is a party" (see clause 2.3).

25. Clause 4.1 of the Services Agreement states that:

> "… Customer: (i) appoints Uber [BV] as Customer's limited payment collection agent solely for the purpose of accepting the Fare … on behalf of the Customer via the payment processing functionality facilitated by the Uber Services; and (ii) agrees that payment made by User to Uber [BV] shall be considered the same as payment made directly by User to Customer."

Clause 4.1 also states that the "Fare" is determined by Uber BV but describes it as charged by Customer and as "a recommended amount" which Customer may choose to reduce (but not increase) without the agreement of Uber BV. The clause further provides that Uber BV agrees to remit to Customer on at least a weekly basis the fare less a "service fee", calculated as a percentage of the fare.

26. Clause 4.2 gives Uber BV the right to change the fare calculation at any time in its discretion "based upon local market factors"; and clause 4.3 provides that Uber BV and/or its Affiliates reserve the right to adjust the fare for a particular instance of transportation services (eg where the driver took an inefficient route) or to cancel the fare (eg in response to a User complaint).

Written agreements between Uber and passengers

27. In addition to the written agreements between drivers and Uber BV, Uber also relies in these proceedings on written terms and conditions (the "Rider Terms") which passengers are required to accept before they can use the Uber app. The version of the Rider Terms current at the time of the tribunal hearing was last updated on 16 June 2016. These Rider Terms state that they constitute an agreement between the rider, Uber BV and the local Uber company operating in the relevant part of the UK. As mentioned, in the case of London, the relevant company is Uber London.

28. Clause 2 of Part 1 of the Rider Terms states that, as set out in clause 3, "Uber UK" (a term defined to include Uber London) accepts private hire vehicle bookings ("PHV Bookings") made using the Uber app. Clause 3 states:

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

29. Under Part 2 of the Rider Terms, riders are granted a licence by Uber BV to use the Uber app, described in clause 2 as "a technology platform that enables users ... to pre-book and schedule transportation, logistics, delivery, and/or vendor services with independent third party providers of such services, including independent third party transportation providers."

The licensing regime

30. The operation of private hire vehicles in London is regulated by the Private Hire Vehicles (London) Act 1998 and regulations made under it. Under that Act a vehicle may only be used for private hire if both vehicle and driver are licensed by the licensing authority, which is Transport for London. A licence is also required to accept bookings (referred to in the Act as "private hire bookings") for the hire of a private hire vehicle to carry one or more passengers. Thus, section 2(1) provides:

> "No person shall in London make provision for the invitation or acceptance of, or accept, private hire bookings unless he is the holder of a private hire vehicle operator's licence for London …"

Pursuant to section 2(2), a person who makes provision for the invitation or acceptance of private hire bookings, or accepts such a booking, without such a licence is guilty of a criminal offence.

31. At all relevant times Uber London has held a private hire vehicle ("PHV") operator's licence for London. Section 4(2) of the Act places an obligation on the holder of such a licence to secure that:

> "any vehicle which is provided by him for carrying out a private hire booking accepted by him in London is -
>
> (a) a vehicle for which a London PHV licence is in force driven by a person holding a London PHV driver's licence; …"

32. Pursuant to regulation 9(3) of the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000, as originally formulated, it was a condition of the grant of a London PHV operator's licence that:

> "The operator shall, if required to do so by a person making a private hire booking:
>
> (a) agree the fare for the journey booked, or

(b) provide an estimate of that fare."

With effect from 27 June 2016, this regulation was amended to add a requirement that any estimate of the fare must be accurate, in accordance with criteria specified by the licensing authority.

33. The obligations of the operator under the Act and regulations also include keeping records of all bookings accepted and of all private hire vehicles and drivers available to the operator for carrying out bookings accepted by him.

Statutory rights of "workers"

34. The rights claimed by the claimants in these proceedings are: rights under the National Minimum Wage Act 1998 and associated regulations to be paid at least the national minimum wage for work done; rights under the Working Time Regulations 1998 which include the right to receive paid annual leave; and in the case of two claimants, one of whom is Mr Aslam, a right under the Employment Rights Act 1996 not to suffer detrimental treatment on the grounds of having made a protected disclosure ("whistleblowing").

35. All these rights are conferred by the legislation on "workers". The term "worker" is defined by section 230(3) of the Employment Rights Act 1996 to mean:

> "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."

36. A “contract of employment” is defined in section 230(2) of the Act to mean “a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.” An “employee” means an individual who has entered into or works under a contract of employment: see section 230(1). However, the terms “employer” and “employed” are defined more broadly to refer to the person by whom an employee or worker is (or was) employed under a worker’s contract: see section 230(4) and (5).

37. Similar definitions of all these terms are contained in section 54 of the National Minimum Wage Act 1998 and regulation 2(1) of the Working Time Regulations 1998.

38. The effect of these definitions, as Baroness Hale of Richmond observed in *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32; [2014] 1 WLR 2047, paras 25 and 31, is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all “workers”.

These proceedings

39. Following a preliminary hearing, the employment tribunal decided that the claimants were “workers” who, although not employed under contracts of employment, worked for Uber London under “workers’ contracts” within the meaning of limb (b) of the statutory definition quoted at para 35 above. The tribunal further found that, for the purposes of the relevant legislation, the claimants were working for Uber London during any period when a claimant (a) had the Uber app switched on, (b) was within the territory in which he was authorised to work, and (c) was able and willing to accept assignments.

40. An appeal by Uber from this decision to the Employment Appeal Tribunal was dismissed, as was a further appeal to the Court of Appeal (Sir Terence Etherton MR and Bean LJ, with Underhill LJ dissenting). The Court of Appeal granted Uber permission to appeal to this court.

The main issue

41. Limb (b) of the statutory definition of a "worker's contract" has three elements: (1) a contract whereby an individual undertakes to perform work or services for the other party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.

42. This case is concerned with the first of these requirements. It is not in dispute that the claimant drivers worked under contracts whereby they undertook to perform driving services personally; and it is not suggested that any Uber company was a client or customer of the claimants. The critical issue is whether, for the purposes of the statutory definition, the claimants are to be regarded as working under contracts with Uber London whereby they undertook to perform services for Uber London; or whether, as Uber contends, they are to be regarded as performing services solely for and under contracts made with passengers through the agency of Uber London.

Uber's case

43. It is Uber's case that, in answering this question, the correct starting point is to interpret the terms of the written agreements between Uber BV and drivers and between the Uber companies and passengers. Uber relies on the terms of these written agreements quoted above which state that, when a request to book a private hire vehicle made through the Uber app is accepted, a contract is thereby created between passenger and driver, to which no Uber entity is a party and under which the driver is solely responsible for providing transportation services to the passenger. Uber also relies on terms of the written agreements which state that the only role of Uber BV is to provide technology services and to act as a payment collection agent for the driver and that the only role of Uber London (and other Uber UK companies) is to act as a booking agent for drivers.

44. Uber maintains that the approach adopted by the employment tribunal, the Employment Appeal Tribunal and the majority of the Court of Appeal was wrong in law because it involved disregarding, without any legal justification, the clear and unambiguous terms of the written agreements.

Uber London not authorised to act as a booking agent

45. There is a difficulty which, in my view, would be fatal for Uber's case even if the correct approach to deciding whether the claimants were working under workers' contracts with Uber London were simply to apply ordinary principles of

the law of contract and agency. This difficulty stems from the fact that there is no written agreement between Uber London and drivers. In these circumstances the nature of their relationship has to be inferred from the parties' conduct, considered in its relevant factual and legal context.

46. It is an important feature of the context in which, as the employment tribunal found, Uber London recruits and communicates on a day to day basis with drivers that, as mentioned earlier: (1) it is unlawful for anyone in London to accept a private hire booking unless that person is the holder of a private hire vehicle operator's licence for London; and (2) the only natural or legal person involved in the acceptance of bookings and provision of private hire vehicles booked through the Uber app which holds such a licence is Uber London. It is reasonable to assume, at least unless the contrary is demonstrated, that the parties intended to comply with the law in the way they dealt with each other.

47. Uber maintains that the acceptance of private hire bookings by a licensed London PHV operator acting as agent for drivers would comply with the regulatory regime. I am not convinced by this. References in the Private Hire Vehicles (London) Act 1998 to "acceptance" of a private hire booking are reasonably understood to connote acceptance (personally and not merely for someone else) of a contractual obligation to carry out the booking and provide a vehicle for that purpose. This is implicit, for example, in section 4(2) of the Act quoted at para 31 above. It would in principle be possible for Uber London both to accept such an obligation itself and also to contract on behalf of the driver of the vehicle. However, if this were the arrangement made, it would seem hard to avoid the conclusion that the driver, as well as Uber London, would be a person who accepts the booking by undertaking a contractual obligation owed directly to the passenger to carry it out. If so, the driver would be in contravention of section 2(1) of the Private Hire Vehicles (London) Act 1998 by accepting a private hire booking without holding a private hire vehicle operator's licence for London. This suggests that the only contractual arrangement compatible with the licensing regime is one whereby Uber London as the licensed operator accepts private hire bookings as a principal (only) and, to fulfil its obligation to the passenger, enters into a contract with a transportation provider (be that an individual driver or a firm which in turn provides a driver) who agrees to carry out the booking for Uber London.

48. Counsel for Uber sought to resist this interpretation of the legislation on the basis that the legislation was enacted in the context of "a long-established industry practice" under which PHV operators may merely act as agents for drivers who contract directly with passengers. Uber has adduced no evidence, however, of any such established practice which the Private Hire Vehicles (London) Act 1998 may be taken to have been intended to preserve. I will consider later two cases involving minicab firms which were said by counsel for Uber to show that the courts have endorsed such an agency model. But it is sufficient to say now that in neither case

was any consideration given to whether such an arrangement would comply with the licensing regime. The same is true of cases also relied on by Uber (along with a notice published by HMRC in 2002) which are concerned with how VAT applies to the supply of private hire vehicles. That material in my view has no bearing on the issues raised in these proceedings.

49. It is unnecessary, however, to express any concluded view on whether an agency model of operation would be compatible with the PHV licensing regime because there appears to be no factual basis for Uber's contention that Uber London acts as an agent for drivers when accepting private hire bookings.

50. It is true that the Rider Terms on which Uber contracts with passengers include a term (in clause 3 of Part 1, quoted at para 28 above) which states that Uber London (or other local Uber company) accepts private hire bookings "acting as disclosed agent for the Transportation Provider (as principal)" and that such acceptance "gives rise to a contract for the provision to [the rider] of transportation services between [the rider] and the Transportation Provider". It is, however, trite law that a person (A) cannot create a contract between another person (B) and a third party merely by claiming or purporting to do so but only if A is (actually or ostensibly) authorised by B to act as B's agent.

51. Authority may be conferred by a contract between principal and agent. It cannot be said, however, that the Rider Terms establish a contract between drivers and Uber London. There is no evidence that drivers were ever sent the Rider Terms let alone consented to them. In any case the Rider Terms state that they constitute an agreement between the rider, Uber BV and the relevant local Uber company: they do not purport to record an agreement to which any driver is a party. In accordance with basic principles of contract and agency law, therefore, nothing stated in the Rider Terms is capable of conferring authority on Uber London to act as agent for any driver (or other "Transportation Provider") nor of giving rise to a contract between a rider and a driver for the provision to the rider of transportation services by the driver.

52. The only written agreements to which drivers were parties were agreements with Uber BV, the Dutch parent company. No other Uber company was a party to those agreements. In any case, although clause 2.2 of the Services Agreement describes what is to happen if a driver accepts a trip request "either directly or through an Uber Affiliate in the Territory acting as agent", there is no provision which purports to confer the driver's authority on any Uber Affiliate to accept such requests on his behalf.

53. An agency relationship need not be contractual. What is required is an overt act by the principal conferring authority on the agent to act on the principal's behalf. Even if lacking such actual authority, a person (A) who purports to act as agent for another (B) may still affect B's legal relations with a third party under the principle of ostensible or apparent authority, but only if B has represented to the third party that A is authorised to act as B's agent and the third party has relied on that representation.

54. The employment tribunal made no finding that drivers did any overt act that conferred authority on Uber London to act as the driver's agent in accepting bookings so as to create a contract between the driver and the passenger, nor that drivers did or said anything that represented to passengers that Uber London was authorised to act as their agent. Uber's case that Uber London acted as a booking agent for drivers has been based solely on the written agreements referred to at paras 22-28 above - which, for the reasons given, do not support it. When pressed during oral argument on how the alleged agency relationship between drivers and Uber London was created, leading counsel for Uber, Ms Dinah Rose QC, suggested that it was created when a driver attended Uber London's offices in person and presented the documents required in order to be authorised to use the Uber app. So far as I am aware, this was the first time that such a suggestion had been made in these proceedings. Not only is it unsupported by any finding of the employment tribunal but, so far as this court has been shown, there was no evidence capable of founding such an inference.

55. In order to found such an inference, it would be necessary to point, at the least, to a prior communication from Uber London to the individual concerned or other background facts known to both parties which would lead reasonable people in their position to understand that, by producing the documents required by Uber London, an individual who did so was thereby authorising Uber London to contract with passengers as his agent, rather than - as seems to me the natural inference - merely applying for a job as one of Uber's drivers. There is no finding of the employment tribunal that any such communication was made nor that anything occurred during the "onboarding" process which could, even arguably, be construed as an act by the prospective driver appointing Uber London to act as his booking agent.

56. Once the assertion that Uber London contracts as a booking agent for drivers is rejected, the inevitable conclusion is that, by accepting a booking, Uber London contracts as principal with the passenger to carry out the booking. In these circumstances Uber London would have no means of performing its contractual obligations to passengers, nor of securing compliance with its regulatory obligations as a licensed operator, without either employees or subcontractors to perform driving services for it. Considered against that background, it is difficult to see how Uber's business could operate without Uber London entering into contracts with

drivers (even if only on a per trip basis) under which drivers undertake to provide services to carry out the private hire bookings accepted by Uber London.

57. Given the importance of the wider issue, however, I do not think it would be right to decide this appeal on this basis alone and without addressing Uber's argument that the question whether an individual is a "worker" for the purpose of the relevant legislation ought in principle to be approached, as the starting point, by interpreting the terms of any applicable written agreements.

The Autoclenz case

58. In advancing this argument, Uber has to confront the decision of this court in *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] ICR 1157.

59. In the *Autoclenz* case the claimants worked as "valeters" performing car cleaning services which the company (Autoclenz) had contracted to provide to third parties. In order to obtain the work, the claimants were required to sign written contracts which stated that they were subcontractors and not employees of Autoclenz; that they were not obliged to provide services to the company, nor was the company obliged to offer work to them; and that they could provide suitably qualified substitutes to carry out the work on their behalf. As in the present case, the claimants brought proceedings claiming that they were "workers" for the purposes of the legislation conferring the rights to be paid the national minimum wage and to receive statutory paid leave. The employment tribunal held that the claimants came within both limbs of the definition of a "worker" and appeals by Autoclenz were dismissed at every level including the Supreme Court.

60. In the Supreme Court the sole judgment was given by Lord Clarke of Stone-cum-Ebony, with whom the other Justices agreed. In his discussion of the legal principles, Lord Clarke drew a distinction between certain principles "which apply to ordinary contracts and, in particular, to commercial contracts", and "a body of case law in the context of employment contracts in which a different approach has been taken" (see para 21). It can be seen from a passage quoted by Lord Clarke (at para 20) from the judgment of Aikens LJ in the Court of Appeal [2010] IRLR 70, paras 87-89, that the principles applicable to ordinary contracts to which he was here referring were: (i) the "parol evidence rule", whereby a contractual document is treated, at least presumptively, as containing the whole of the parties' agreement; (ii) the signature rule, whereby a person who signs a contractual document is treated in law as bound by its terms irrespective of whether he or she has in fact read or understood them; and (iii) the principle that, generally, the only way in which a party to a written contract can argue that its terms do not accurately reflect the true

agreement of the parties is by alleging that a mistake was made in drawing up the contract which the court can correct by ordering rectification.

61. Whilst stating that nothing in his judgment was intended to alter these principles as they apply to ordinary contracts, Lord Clarke endorsed the view of Aikens LJ that, in the employment context, rectification principles are not in point and there may be reasons other than a mistake in setting out the contract terms why the written terms do not accurately reflect what the parties actually agreed.

62. Beginning at para 22 of the judgment, Lord Clarke considered three cases in which "the courts have held that the employment tribunal should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship". From these cases he drew the conclusion (at para 28) that, in the employment context, it is too narrow an approach to say that a court or tribunal may only disregard a written term as not part of the true agreement between the parties if the term is shown to be a "sham", in the sense that the parties had a common intention that the term should not create the legal rights and obligations which it gives the appearance of creating: see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802 (Diplock LJ). Rather, the court or tribunal should consider what was actually agreed between the parties, "either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded": see para 32, again agreeing with observations of Aikens LJ in the Court of Appeal.

63. After quoting (at para 34) a further statement of Aikens LJ contrasting the circumstances in which contracts relating to work or services are often concluded with "those in which commercial contracts between parties of equal bargaining power are agreed," Lord Clarke ended his discussion of the law (at para 35) by saying:

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

64. Applying that approach to the facts of the *Autoclenz* case, Lord Clarke concluded that, on the basis of findings of fact not capable of challenge on appeal, the employment tribunal was entitled to hold that the contractual documents did not reflect the true agreement between the parties - in particular insofar as the documents

stated that Autoclenz was under no obligation to offer work to the claimants, nor they to accept it, and that the claimants had a right to provide a substitute. The tribunal was entitled to find that the actual understanding of the parties was that the claimants would be available to work, and would be offered work, whenever there was work available, and that they were required to perform the work personally. It followed that the employment tribunal was entitled to hold that the claimants were "workers" working under contracts of employment.

Uber's interpretation of the Autoclenz case

65. Uber submits that what the *Autoclenz* case decided is that, for the purposes of applying a statutory classification, a court or tribunal may disregard terms of a written agreement if it is shown that the terms in question do not represent the "true agreement" or what was "actually agreed" between the parties, as ascertained by considering all the circumstances of the case including how the parties conducted themselves in practice. If, however, there is no inconsistency between the terms of the written agreement and how the relationship operated in reality, there is no basis for departing from the written agreement.

66. Uber further submits that there is no inconsistency in the present case between the written agreements between Uber, drivers and passengers and how that tripartite relationship actually operated in practice. In particular, Uber argues that the facts found by the employment tribunal (or alternatively, which the tribunal should have found) are consistent with the written terms stipulating that the drivers were performing their services under contracts made with passengers through the agency of Uber London and not for or under any contract with any Uber company. Uber submits that there is in these circumstances no legal basis for finding that the terms of the written agreements did not reflect the true agreements between the parties and hence for departing from the classification of the parties' relationships set out in the contractual documentation.

67. This argument was accepted by Underhill LJ in his dissenting judgment in the Court of Appeal. In his view (stated at para 120):

> "It is an essential element in that ratio [ie of the *Autoclenz* case] that the terms of the written agreement should be inconsistent with the true agreement as established by the tribunal from all the circumstances. There is nothing in the reasoning of the Supreme Court that gives a tribunal a free hand to disregard written contractual terms which are consistent with how the parties worked in practice but which it regards as unfairly disadvantageous (whether because they create a relationship

> that does not attract employment protection or otherwise) and which might not have been agreed if the parties had been in an equal bargaining position."

Interpreting the statutory provisions

68. The judgment of this court in the *Autoclenz* case made it clear that whether a contract is a "worker's contract" within the meaning of the legislation designed to protect employees and other "workers" is not to be determined by applying ordinary principles of contract law such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake. Not only was this expressly stated by Lord Clarke but, had ordinary principles of contract law been applied, there would have been no warrant in the *Autoclenz* case for disregarding terms of the written documents which were inconsistent with an employment relationship, as the court held that the employment tribunal had been entitled to do. What was not, however, fully spelt out in the judgment was the theoretical justification for this approach. It was emphasised that in an employment context the parties are frequently of very unequal bargaining power. But the same may also be true in other contexts and inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary principles of contract law, except in so far as Parliament has made the relative bargaining power of the parties a relevant factor under legislation such as the Unfair Contract Terms Act 1977.

69. Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

70. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. In *UBS AG v Revenue and Customs Comrs* [2016] UKSC 13; [2016] 1 WLR 1005, paras 61-68, Lord Reed (with whom the other Justices of the Supreme Court agreed) explained how this approach requires the facts to be analysed in the light of the statutory provision being applied so that if, for example, a fact is of no relevance to the application of the statute construed in the light of its purpose, it can be disregarded. Lord Reed cited the pithy

statement of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454, para 35:

> "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

The purpose of protecting workers

71. The general purpose of the employment legislation invoked by the claimants in the *Autoclenz* case, and by the claimants in the present case, is not in doubt. It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing). The paradigm case of a worker whom the legislation is designed to protect is an employee, defined as an individual who works under a contract of employment. In addition, however, the statutory definition of a "worker" includes in limb (b) a further category of individuals who are not employees. The purpose of including such individuals within the scope of the legislation was clearly elucidated by Mr Recorder Underhill QC giving the judgment of the Employment Appeal Tribunal in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, para 17(4):

> "[T]he policy behind the inclusion of limb (b) … can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."

72. The Regulations referred to in this passage are the Working Time Regulations 1998 which implemented Directive 93/104/EC ("the Working Time Directive"); and a similar explanation of the concept of a worker has been given in EU law. Although there is no single definition of the term "worker", which appears in a number of different contexts in the Treaties and EU legislation, there has been a degree of convergence in the approach adopted. In *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328; [2004] ECR I-873 the European Court of Justice held, at para 67, that in the Treaty provision which guarantees male and female workers equal pay for equal work (at that time, article 141 of the EC Treaty):

> "… there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration …"

The court added (at para 68) that the authors of the Treaty clearly did not intend that the term "worker" should include "independent providers of services who are not in a relationship of subordination with the person who receives the services". In the EU case law which is specifically concerned with the meaning of the term "worker" in the Working Time Directive, the essential feature of the relationship between employer and worker is identified in the same terms as in para 67 of the *Allonby* judgment: *Union Syndicale Solidaires Isere v Premier Ministre* (Case C-428/09) EU:C:2010:612; [2010] ECR I-9961, para 28; *Fenoll v Centre d'Aide par le Travail "La Jouvene"* (Case C-316/13) EU:C:2015:2000; [2016] IRLR 67, para 29; and *Syndicatul Familia Constanta v Directia Generala de Asistenta Sociala si Protectia Copilului Constanta* (Case C-147/17) EU:C:2018:926; [2019] ICR 211, para 41. As stated by the Court of Justice of the European Union (CJEU) in the latter case, "[i]t follows that an employment relationship [ie between employer and worker] implies the existence of a hierarchical relationship between the worker and his employer" (para 42).

73. In *Hashwani v Jivraj* [2011] UKSC 40; [2011] 1 WLR 1872 the Supreme Court followed this approach in holding that an arbitrator was not a person employed under "a contract personally to do any work" for the purpose of legislation prohibiting discrimination on the grounds of religion or belief. Lord Clarke, with whom the other members of the court agreed, identified (at para 34) the essential questions underlying the distinction between workers and independent contractors outside the scope of the legislation as being:

> "whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a

> relationship of subordination with the person who receives the services."

74. In the *Bates van Winkelhof* case at para 39, Baroness Hale cautioned that, while "subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker." In that case the Supreme Court held that a solicitor who was a member of a limited liability partnership was a worker essentially for the reasons that she could not market her services as a solicitor to anyone other than the LLP and was an integral part of their business. While not necessarily connoting subordination, integration into the business of the person to whom personal services are provided and the inability to market those services to anyone else give rise to dependency on a particular relationship which may also render an individual vulnerable to exploitation.

75. The correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration. As the Supreme Court of Canada observed in *McCormick v Fasken Martineau DuMoulin LLP* 2014 SCC 39; [2014] 2 SCR 108, para 23:

> "Deciding who is in an employment relationship … means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. … The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace …"

See also the illuminating discussion in G Davidov, "A Purposive Approach to Labour Law" (2016), Chapters 3 and 6. It is these features of work relations which give rise to a situation in which such relations cannot safely be left to contractual regulation and are considered to require statutory regulation. This point applies in relation to all the legislative regimes relied on in the present case and no distinction is to be drawn between the interpretation of the relevant provision as it appears in the Working Time Regulations 1998 (which implement the Working Time Directive), the National Minimum Wage Act 1998 and the Employment Rights Act 1996.

76. Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written

contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.

77. This point can be illustrated by the facts of the present case. The Services Agreement (like the Partner Terms before it) was drafted by Uber's lawyers and presented to drivers as containing terms which they had to accept in order to use, or continue to use, the Uber app. It is unlikely that many drivers ever read these terms or, even if they did, understood their intended legal significance. In any case there was no practical possibility of negotiating any different terms. In these circumstances to treat the way in which the relationships between Uber, drivers and passengers are characterised by the terms of the Services Agreement as the starting point in classifying the parties' relationship, and as conclusive if the facts are consistent with more than one possible legal classification, would in effect be to accord Uber power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers.

78. This is, as I see it, the relevance of the emphasis placed in the *Autoclenz* case (at para 35) on the relative bargaining power of the parties in the employment context and the reason why Lord Clarke described the approach endorsed in that case of looking beyond the terms of any written agreement to the parties' "true agreement" as "a purposive approach to the problem".

Restrictions on contracting out

79. Such an approach is further justified by the fact that all the relevant statutes or statutory regulations conferring rights on workers contain prohibitions against contracting out. Thus, section 203(1) of the Employment Rights Act 1996 provides:

> "Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports -

> (a) to exclude or limit the operation of any provision of this Act, or
>
> (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal."

Section 49(1) of the National Minimum Wage Act 1998 and regulation 35(1) of the Working Time Regulations 1998 are in similar terms.

80. These provisions, as I read them, apply to any provision in an agreement which can be seen, on an objective consideration of the facts, to have as its object excluding or limiting the operation of the legislation. It is just as inimical to the aims of the legislation to allow its protection to be limited or excluded indirectly by the terms of a contract as it is to allow that to be done in direct terms.

81. Take, for example, the following provisions contained, respectively, in clauses 2.3 and 2.4 of the Services Agreement:

> "Customer acknowledges and agrees that Customer's provision of Transportation Services to Users creates a legal and direct business relationship between Customer and the User, to which neither Uber [BV] nor any of its Affiliates in the Territory is a party. …"
>
> "… Uber and its Affiliates in the Territory do not, and shall not be deemed to, direct or control Customer or its Drivers generally or in their performance under this Agreement specifically, including in connection with the operation of Customer's business, the provision of Transportation Services, the acts or omissions of Drivers, or the operation and maintenance of any Vehicles."

It is arguable that these provisions are in any case ineffective, as it is for the courts and not the parties (still less someone who is not a party) to determine the legal effect of a contract and whether it falls within one legal category or another: see eg *Street v Mountford* [1985] AC 809, 819.

82. If or in so far, however, as these contractual provisions purport to agree matters of fact rather than law, then (leaving aside the fact that the relevant

"Affiliates" including Uber London were not parties to the agreement) Uber would no doubt seek to rely on case law which has recognised a principle of "contractual estoppel" - whereby parties can bind themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue: see eg *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396; [2019] 1 WLR 637, para 47. This would preclude a driver from asserting in any legal proceedings that he is performing transportation services for or under a contract with any Uber company or that he is directed or controlled in connection with the provision of transportation services by any Uber company. The result - which was patently the drafter's intention - would be to prevent a driver from claiming that he falls within the statutory definition of a "worker" so as to qualify for the rights conferred on workers by statutory provisions such as those contained in the National Minimum Wage Act 1998. As such, these provisions in the agreement are just as much provisions which purport to exclude or limit the operation of the legislation as would be a term stating that "Customer acknowledges and agrees that Customer is not and shall not be deemed to be a 'worker' for the purposes of the National Minimum Wage Act 1998" or a term stating that "Customer acknowledges and agrees that, notwithstanding the provisions of the National Minimum Wage Act 1998, Customer shall not be entitled to be paid the national minimum wage." In each case the object of the provision is the same. Consequently, in determining whether drivers are entitled under the provisions of the 1998 Act to be paid the national minimum wage, section 49(1) of the Act renders the clauses quoted above void. The same applies to all other provisions in the Services Agreement which can be seen to have as their object precluding a driver from claiming rights conferred on workers by the applicable legislation.

Applying the definition of a "worker"

83. If, as I conclude, the way in which the relevant relationships are characterised in the written agreements is not the appropriate starting point in applying the statutory definition of a "worker", how is the definition to be applied?

84. In the *Autoclenz* case it was said (at para 35) that "the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part." More assistance is provided by the decision of the House of Lords in *Carmichael v National Power plc* [1999] 1 WLR 2042. That case concerned tour guides engaged to act "on a casual as required basis". The guides later claimed to be employees and therefore entitled by statute to a written statement of their terms of employment. Their case was that an exchange of correspondence between the parties in March 1989 constituted a contract, which was to be classified as a contract of employment. The industrial tribunal rejected this case and found that, when not working as guides, the claimants were not in any contractual relationship with the respondent. The tribunal made this finding on the basis of: (a) the language of the correspondence; (b) the way in which the relationship had

operated; and (c) evidence of the parties as to their understanding of it. The House of Lords held that this was the correct approach. Lord Irvine of Lairg LC said at p 2047C that:

> "... it would only be appropriate to determine the issue in these cases solely by reference to the documents in March 1989, if it appeared from their own terms and/or from what the parties said or did then, or subsequently, that they intended them to constitute an exclusive memorial of their relationship. The industrial tribunal must be taken to have decided that they were not so intended but constituted one, albeit important, relevant source of material from which they were entitled to infer the parties' true intention …"

85. In the *Carmichael* case there was no formal written agreement. The *Autoclenz* case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the *Carmichael* case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.

86. This last point provides one rationale for the conclusion reached in the *Autoclenz* case itself. The findings of the employment tribunal justified the inference that the terms of the written agreements which stated that the claimants were subcontractors and not employees of Autoclenz, that they were not obliged to provide services to the company, nor was the company obliged to offer work to them, and that they could provide suitably qualified substitutes to carry out the work on their behalf, had all been inserted with the object of excluding the operation of employment legislation including the National Minimum Wage Act 1998 and the Working Time Regulations 1998. Those provisions in the agreements were therefore void.

87. In determining whether an individual is a "worker", there can, as Baroness Hale said in the *Bates van Winkelhof* case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract".

88. This approach is also consistent with the case law of the CJEU which, as noted at para 72 above, treats the essential feature of a contract between an employer and a worker as the existence of a hierarchical relationship. In a recent judgment the Grand Chamber of the CJEU has emphasised that, in determining whether such a relationship exists, it is necessary to take account of the objective situation of the individual concerned and all the circumstances of his or her work. The wording of the contractual documents, while relevant, is not conclusive. It is also necessary to have regard to how relevant obligations are performed in practice: see *AFMB Ltd v Raad van bestuur van de Sociale verzekeringsbank* (Case C-610/18) EU:C:2020:565; [2020] ICR 1432, paras 60-61.

89. Section 28(1) of the National Minimum Wage Act establishes a presumption that an individual qualifies for the national minimum wage unless the contrary is established. This is not a case, however, which turns on the burden of proof.

Status of the claimants in this case

90. The claimant drivers in the present case had in some respects a substantial measure of autonomy and independence. In particular, they were free to choose when, how much and where (within the territory covered by their private hire vehicle licence) to work. In these circumstances it is not suggested on their behalf that they performed their services under what is sometimes called an "umbrella" or "overarching" contract with Uber London - in other words, a contract whereby they undertook a continuing obligation to work. The contractual arrangements between drivers and Uber London did subsist over an extended period of time. But they did not bind drivers during periods when drivers were not working: rather, they established the terms on which drivers would work for Uber London on each occasion when they chose to log on to the Uber app.

91. Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: see eg *McMeechan v Secretary of State for Employment* [1997] ICR 549; *Cornwall County Council v Prater* [2006] EWCA Civ 102; [2006] ICR 731. As Elias J (President) said in *James v Redcats (Brands) Ltd* [2007] ICR 1006, para 84:

> "Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work."

I agree, subject only to the qualification that, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status: see *Windle v Secretary of State for Justice* [2016] EWCA Civ 459; [2016] ICR 721, para 23.

92. In many cases it is not in dispute that the claimant is doing work or performing services personally for another person but there is an issue as to whether that person is to be classified as the claimant's employer or as a client or customer of the claimant. The situation in the present case is different in that there are three parties involved: Uber, drivers and passengers. But the focus must still be on the nature of the relationship between drivers and Uber. The principal relevance of the involvement of third parties (ie passengers) is the need to consider the relative degree of control exercised by Uber and drivers respectively over the service provided to them. A particularly important consideration is who determines the price charged to the passenger. More generally, it is necessary to consider who is responsible for defining and delivering the service provided to passengers. A further and related factor is the extent to which the arrangements with passengers afford drivers the potential to market their own services and develop their own independent business.

93. In all these respects, the findings of the employment tribunal justified its conclusion that, although free to choose when and where they worked, at times when

they are working drivers work for and under contracts with Uber (and, specifically, Uber London). Five aspects of the tribunal's findings are worth emphasising.

94. First and of major importance, the remuneration paid to drivers for the work they do is fixed by Uber and the drivers have no say in it (other than by choosing when and how much to work). Unlike taxi fares, fares for private hire vehicles in London are not set by the regulator. However, for rides booked through the Uber app, it is Uber that sets the fares and drivers are not permitted to charge more than the fare calculated by the Uber app. The notional freedom to charge a passenger less than the fare set by Uber is of no possible benefit to drivers, as any discount offered would come entirely out of the driver's pocket and the delivery of the service is organised so as to prevent a driver from establishing a relationship with a passenger that might generate future custom for the driver personally (see the fifth point, discussed below). Uber also fixes the amount of its own "service fee" which it deducts from the fares paid to drivers. Uber's control over remuneration further extends to the right to decide in its sole discretion whether to make a full or partial refund of the fare to a passenger in response to a complaint by the passenger about the service provided by the driver (see para 20 above).

95. Second, the contractual terms on which drivers perform their services are dictated by Uber. Not only are drivers required to accept Uber's standard form of written agreement but the terms on which they transport passengers are also imposed by Uber and drivers have no say in them.

96. Third, although drivers have the freedom to choose when and where (within the area covered by their PHV licence) to work, once a driver has logged onto the Uber app, a driver's choice about whether to accept requests for rides is constrained by Uber. Unlike taxi drivers, PHV operators and drivers are not under any regulatory obligation to accept such requests. Uber itself retains an absolute discretion to accept or decline any request for a ride. Where a ride is offered to a driver through the Uber app, however, Uber exercises control over the acceptance of the request by the driver in two ways. One is by controlling the information provided to the driver. The fact that the driver, when informed of a request, is told the passenger's average rating (from previous trips) allows the driver to avoid low-rated passengers who may be problematic. Notably, however, the driver is not informed of the passenger's destination until the passenger is picked up and therefore has no opportunity to decline a booking on the basis that the driver does not wish to travel to that particular destination.

97. The second form of control is exercised by monitoring the driver's rate of acceptance (and cancellation) of trip requests. As described in para 18 above, a driver whose percentage rate of acceptances falls below a level set by Uber London (or whose cancellation rate exceeds a set level) receives an escalating series of

warning messages which, if performance does not improve, leads to the driver being automatically logged off the Uber app and shut out from logging back on for ten minutes. This measure was described by Uber in an internal document quoted by the employment tribunal as a "penalty", no doubt because it has a similar economic effect to docking pay from an employee by preventing the driver from earning during the period while he is logged out of the app. Uber argues that this practice is justified because refusals or cancellations of trip requests cause delay to passengers in finding a driver and lead to customer dissatisfaction. I do not doubt this. The question, however, is not whether the system of control operated by Uber is in its commercial interests, but whether it places drivers in a position of subordination to Uber. It plainly does.

98. Fourth, Uber exercises a significant degree of control over the way in which drivers deliver their services. The fact that drivers provide their own car means that they have more control than would most employees over the physical equipment used to perform their work. Nevertheless, Uber vets the types of car that may be used. Moreover, the technology which is integral to the service is wholly owned and controlled by Uber and is used as a means of exercising control over drivers. Thus, when a ride is accepted, the Uber app directs the driver to the pick-up location and from there to the passenger's destination. Although, as mentioned, it is not compulsory for a driver to follow the route indicated by the Uber app, customers may complain if a different route is chosen and the driver bears the financial risk of any deviation from the route indicated by the app which the passenger has not approved (see para 8 above).

99. I have already mentioned the control exercised by monitoring a driver's acceptance and cancellation rates for trips and excluding the driver temporarily from access to the Uber app if he fails to maintain the required rates of acceptance and non-cancellation. A further potent method of control is the use of the ratings system whereby passengers are asked to rate the driver after each trip and the failure of a driver to maintain a specified average rating will result in warnings and ultimately in termination of the driver's relationship with Uber (see paras 13 and 18 above). It is of course commonplace for digital platforms to invite customers to rate products or services. Typically, however, such ratings are merely made available as information which may assist customers in choosing which product or service to buy. Under such a system the incentive for the supplier of the product or service to gain high ratings is simply the ordinary commercial incentive of satisfying customers in the hope of attracting future business. The way in which Uber makes use of customer ratings is materially different. The ratings are not disclosed to passengers to inform their choice of driver: passengers are not offered a choice of driver with, for example, a higher price charged for the services of a driver who is more highly rated. Rather, the ratings are used by Uber purely as an internal tool for managing performance and as a basis for making termination decisions where customer feedback shows that drivers are not meeting the performance levels set by

Uber. This is a classic form of subordination that is characteristic of employment relationships.

100. A fifth significant factor is that Uber restricts communication between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride. As mentioned, when booking a ride, a passenger is not offered a choice among different drivers and their request is simply directed to the nearest driver available. Once a request is accepted, communication between driver and passenger is restricted to information relating to the ride and is channelled through the Uber app in a way that prevents either from learning the other's contact details. Likewise, collection of fares, payment of drivers and handling of complaints are all managed by Uber in a way that is designed to avoid any direct interaction between passenger and driver. A stark instance of this is the generation of an electronic document which, although styled as an "invoice" from the driver to the passenger, is never sent to the passenger and, though available to the driver, records only the passenger's first name and not any further details (see para 10 above). Further, drivers are specifically prohibited by Uber from exchanging contact details with a passenger or contacting a passenger after the trip ends other than to return lost property (see para 12 above).

101. Taking these factors together, it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill. From the drivers' point of view, the same factors - in particular, the inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers - mean that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance.

102. I would add that the fact that some aspects of the way in which Uber operates its business are required in order to comply with the regulatory regime - although many features are not - cannot logically be, as Uber has sought to argue, any reason to disregard or attach less weight to those matters in determining whether drivers are workers. To the extent that forms of control exercised by Uber London are necessary in order to comply with the law, that merely tends to show that an arrangement whereby drivers contract directly with passengers and Uber London acts solely as an agent is not one that is legally available.

Booking agents

103. It is instructive to compare Uber's method of operation and relationship with drivers with digital platforms that operate as booking agents for suppliers of, for example, hotel or other accommodation. There are some similarities. For example, a platform through which customers can book accommodation is likely to have standard written contract terms that govern its relationships with suppliers and with customers. It will typically handle the collection of payment and deduct a service fee which it fixes. It may require suppliers to comply with certain rules and standards in relation to the accommodation offered. It may handle complaints and reserve the right to determine whether a customer or supplier should compensate the other if a complaint is upheld.

104. Nevertheless, such platforms differ from Uber in how they operate in several fundamental ways. Notably, the accommodation offered is not a standardised product defined by the platform. Customers are offered a choice among a variety of different hotels or other types of accommodation (as the case may be), each with its own distinctive characteristics and location. Suppliers are also responsible for defining and delivering whatever level of service in terms of comfort and facilities etc they choose to offer. Apart from the service fee, it is, crucially, the supplier and not the platform which sets the price. The platform may operate a ratings system but the ratings are published in order to assist customers in choosing among different suppliers; they are not used as a system of internal performance measurement and control by the platform over suppliers. Nor does the platform restrict communication between the supplier and the customer or seek to prevent them from dealing directly with each other on a future occasion. The result of these features is that suppliers of accommodation available for booking through the platform are in competition with each other to attract business through the price and quality of the service they supply. They are properly regarded as carrying on businesses which are independent of the platform and as performing their services for the customers who purchase those services and not for the platform.

The Secret Hotels2 case

105. A platform of this kind was the subject of *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs* [2014] UKSC 16; [2014] 2 All ER 685, a case on which Uber has strongly relied. In that case a company ("Med") marketed hotel rooms and holiday accommodation through a website. One difference from the typical model described above was that Med reserved many hotel rooms in its own name, for which it paid in advance. The issue was whether, for the purposes of assessing liability for VAT in accordance with Directive 2006/112/EC ("the Principal VAT Directive"), Med was purchasing accommodation from hoteliers and supplying it to customers as a principal or whether Med fell within a category of

persons who "act solely as intermediaries" to whom more favourable tax treatment applied.

106. The Supreme Court held that the correct legal analysis of the tripartite relationship between Med, hoteliers and customers was that Med marketed and sold hotel accommodation to customers as the agent of the hoteliers and was in these circumstances acting solely as an intermediary for VAT purposes. In analysing the relationship, Lord Neuberger of Abbotsbury (with whom the other members of the court agreed) identified the correct approach at para 34 as follows:

> "(i) the right starting point is to characterise the nature of the relationship between Med, the customer, and the hotel, in the light of … 'the contractual documentation', (ii) one must next consider whether that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts, and (iii) if so, the final issue is the result of this characterisation so far as article 306 [of the Principal VAT Directive] is concerned."

107. *Secret Hotels2* was not an employment case: it concerned the classification of a relationship for VAT purposes. In applying the VAT legislation, the proper approach - established by binding decisions of the CJEU cited at paras 22-29 of the judgment in *Secret Hotels2* - is informed by the policy that "taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens", albeit that this is subject to an exception for "abusive transactions": see *Revenue and Customs Comrs v RBS Deutschland Holdings GmbH* (Case C-277/09) EU:C:2010:810; [2011] STC 345, para 53, cited by Lord Neuberger in *Secret Hotels2* at para 24. I have already explained why a different approach is required in applying the employment legislation invoked in the present case, which is underpinned by different policy considerations.

108. That said, even if the relationships in the *Secret Hotels2* case were viewed through the lens of employment law, I see no reason to question the analysis that Med was acting solely as a booking agent for hoteliers. For the reasons given at para 104 above, the manner in which such a platform operates is materially different from Uber's business model. Even the practice of reserving hotel rooms in Med's own name was, as Lord Neuberger pointed out at para 49 of the judgment, consistent with its status as an intermediary: a customer who subsequently booked one of the rooms would not contract with Med, but would contract through Med with the hotelier; and, if not all reserved rooms were booked by customers at the hotel for the season in question, the amount paid by Med was carried forward to the next season.

In short, I do not consider that the decision of this court in *Secret Hotels2* provides any support for Uber's case in the present proceedings.

Minicab drivers

109. I mentioned earlier (at para 48 above) the reliance placed by Uber on two judicial decisions involving minicab firms which are said to have recognised in an employment context that such firms may act as booking agents for drivers who provide transportation services directly to passengers under contracts with passengers and do not work for the minicab firm. Uber contends that its own business model is similar to that of such firms, with the principal differences being only the scale of its operations and the fact that Uber uses software to take bookings rather than doing so by telephone.

110. The principal case relied on is *Mingeley v Pennock (t/a Amber Cars)* [2004] EWCA Civ 328; [2004] ICR 727, in which the claimant driver brought a claim against a private hire vehicle operator trading under the name of "Amber Cars" alleging discrimination on the ground of race. The claimant owned his own vehicle and was responsible for obtaining a PHV driver's licence. He was one of some 225 drivers who paid a weekly fee to Amber Cars for access to what was initially a radio and later a computer system through which trip requests from customers were allocated to drivers. There was no obligation to work but, when he chose to work, the driver was obliged to wear a uniform and to apply a fixed scale of charges set by the operator. He collected and was entitled to keep the full fare paid by the customer. The operator had a procedure for dealing with complaints from passengers about the conduct of the driver and had the power to order a refund of the fare to the passenger.

111. The Court of Appeal affirmed the decision of the employment tribunal that it had no jurisdiction to hear the claim as the claimant was not "employed" by the operator within the meaning of section 78 of the Race Relations Act 1976. Maurice Kay LJ (with whom Sir Martin Nourse and Buxton LJ agreed) regarded it as fatal to the claim that the claimant was "free to work or not to work at his own whim or fancy" (para 14) and held that the absence of an obligation to work placed him beyond the reach of section 78. Buxton LJ gave as an additional reason that, even when working, a driver was not employed by Amber Cars "under … a contract personally to execute any work or labour" as his only such obligation was owed to the passenger.

112. The definition of "employment" and related expressions in section 78 of the Race Relations Act 1976 has been substantially replicated in section 83(2)(a) of the Equality Act 2010, which defines "employment" to include "employment under a contract of employment, a contract of apprenticeship or a contract personally to do

work". Although not the same as the definition of a "worker" and a "worker's contract" in section 230(3) of the 1996 Act, the two definitions have been held to have substantially the same effect: see *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29; [2018] ICR 1511, paras 13-15.

113. It is not necessary for present purposes to express any view on whether the *Mingeley* case was correctly decided. I do not accept, however, that the fact that the claimant in that case was free to work as and when he chose was a sufficient reason for holding that, at times when he was working, he was not employed under a contract to do work for the firm. If that conclusion was justified on the facts of the *Mingeley* case, it would have to be on the basis that the claimant was not to be regarded as working for the minicab firm when transporting passengers in circumstances where the firm did not receive any money in respect of any individual trip undertaken by him. This arrangement was materially different from Uber's business model.

114. The other employment case involving a minicab firm on which Uber relies is *Khan v Checkers Cars Ltd*, an unreported decision of the Employment Appeal Tribunal handed down on 16 December 2005. The facts were that the British Airports Authority had granted the respondent firm ("Checkers") an exclusive licence to provide a taxi service at Gatwick airport. The firm had a fleet of over 200 drivers, one of whom was the claimant, who plied for hire at the airport taxi-rank. Checkers took a commission and imposed numerous conditions on its drivers, including requiring them to charge set fares, use fixed routes and wear a uniform. Drivers were entirely free to choose whether and when they worked but they were not permitted to drive for anyone else. The issue was whether the claimant had a right not to be unfairly dismissed, which depended on showing that he had been continuously employed by Checkers under a contract of employment for a period of not less than two years: see section 108 of the Employment Rights Act 1996.

115. The Employment Appeal Tribunal upheld the finding of the employment tribunal that the claimant did not satisfy this requirement because the absence of any obligation to work other than when he chose was inconsistent with the conclusion that there was any contract of employment which subsisted when the claimant was not working. Langstaff J, however, also observed, *obiter*, at para 32 of the judgment:

> "If it had been material to our decision, we would have been inclined to find that …, on the findings of fact that the tribunal made, the contract went no further than to amount to a licence by Checkers to permit the claimant to offer himself as a private hire taxi driver to individual passengers on terms dictated by the administrative convenience of Checkers and BAA."

Given the extent of the control exercised by Checkers over the manner in which drivers carried out their work, I cannot agree that such a finding would have been justified.

116. In making the observation quoted above, Langstaff J was drawing an analogy with the facts of *Cheng Yuen v Royal Hong Kong Golf Club* [1998] ICR 131. In that case the claimant worked as a caddie for individual members of the respondent golf club. He was issued by the club with a number, a uniform and a locker. Caddying work was allocated to available caddies in strict rotation. They were not obliged to make themselves available for work and received no guarantee of work. The club was not obliged to give them work or to pay anything other than the amount of the fee per round owed by the individual golfer for whom they had caddied. On an appeal to the Privy Council the majority of the Board held that the only reasonable view of the facts found was that the claimant had not been employed under a contract of employment by the club either on a continuing basis or separately each time he agreed to act as a caddie, and that the club did no more than grant him a licence to enter into contracts with individual golfers on terms dictated by the administrative convenience of the club and its members. Lord Hoffmann, who dissented, thought that it was more realistic to regard the claimant as a casual employee of the club, particularly when (as he observed at p 139) "the claimant had to work for the person to whom he was allocated according to the club's system at a rate of pay fixed by the club and in the manner determined by the club". Without expressing any view on the correctness of the decision, I do not consider that this case provides a relevant analogy in determining whether the employment tribunal was entitled to find that the claimants in the present case are workers.

117. In *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735; [2013] IRLR 99 the claimant was a lap dancer who performed for the entertainment of guests at the respondent's clubs. An important factual finding was that the respondent was not obliged to pay the claimant any money at all. Rather, the claimant paid the respondent a fee for each night that she worked. Doing so enabled her to earn payments from the guests for whom she danced. She negotiated those payments with the guests and took the risk that on any particular night she might be out of pocket. The Court of Appeal held that on these facts the employment tribunal had been entitled to find that the claimant was not employed under a contract of employment (either for each engagement or on a continuous basis). Again, the facts were very different from those of the present case and I do not find this decision of any assistance.

The employment tribunal's decision

118. It is firmly established that, where the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is

performed, the question of whether work is performed by an individual as an employee (or a worker in the extended sense) or as an independent contractor is to be regarded as a question of fact to be determined by the first level tribunal. Absent a misdirection of law, the tribunal's finding on this question can only be impugned by an appellate court (or appeal tribunal) if it is shown that the tribunal could not reasonably have reached the conclusion under appeal: see *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, 384-385; *Clark v Oxfordshire Health Authority* [1998] IRLR 125, paras 38-39; the *Quashie* case, para 9.

119. On the facts found in the present case, and in particular those which I have emphasised at paras 94-101 above, I think it clear that the employment tribunal was entitled to find that the claimant drivers were "workers" who worked for Uber London under "worker's contracts" within the meaning of the statutory definition. Indeed, that was, in my opinion, the only conclusion which the tribunal could reasonably have reached.

120. It does not matter in these circumstances that certain points made by the employment tribunal in the reasons given for its decision are open to criticism, nor is it necessary to discuss such particular criticisms, since none of the errors or alleged errors affects the correctness of the tribunal's decision. I agree with the majority of the Court of Appeal that there are some points made by the employment tribunal which are misplaced (see in particular para 93 of the Court of Appeal's judgment). I also agree with the analysis set out at paras 96 and 97 of that judgment of the 13 considerations on which the tribunal principally based its finding that drivers work for Uber. I agree with the majority of the Court of Appeal that those considerations, viewed in the round, provided an ample basis for the tribunal's finding.

Working Time

121. The secondary question which arises in the light of this conclusion is: during what periods of time were the claimants working?

122. The Working Time Regulations 1998 and the National Minimum Wage Regulations 2015 each contain provisions for measuring working time. But before those provisions are applied, it is necessary to identify the periods during which the individual concerned is a "worker" employed under a "worker's contract" so as to fall within the scope of the legislation.

123. As mentioned earlier, the employment tribunal found that a driver was "working" under such a contract during any period when he (a) had the Uber app switched on, (b) was within the territory in which he was authorised to use the app,

and (c) was ready and willing to accept trips. Uber contends that it was not open to the tribunal in law to make this finding and that the tribunal should have found that the claimants (on the assumption that they were "workers" at all) were only working under workers' contracts during periods when they were actually driving passengers to their destinations. Alternatively, Uber contends that the tribunal should have found that a claimant was only working under such a contract from the moment when (and not until) he accepted a trip request.

124. I think it clear - as did all the members of the Court of Appeal, including the dissenting judge, Underhill LJ, if he was wrong on the main issue - that a driver enters into, and is working under, a contract with Uber London whereby the driver undertakes to perform services for Uber London, if not before, then at the latest when he accepts a trip. If the driver afterwards cancels the trip, that signifies only that the obligation undertaken to pick up the passenger and carry the passenger to his or her destination is then terminated. It does not mean that no obligation was ever undertaken. The more difficult question is whether the employment tribunal was entitled to find - as by implication it did - that a worker's contract came into existence at an earlier stage when a claimant driver logged onto the Uber app.

125. Uber argues that it is clear from the tribunal's own findings that drivers when logged onto the Uber app are under no obligation to accept trips. They are free to ignore or decline trip requests as often as they like, subject only to the consequence that, if they repeatedly decline requests, they will be automatically logged off the Uber app and required to wait for ten minutes before they can log back on again. Furthermore, when logged onto the Uber app, drivers are at liberty to accept other work, including driving work offered through another digital platform (see para 16 above). Counsel for Uber submitted that, on these facts, a finding that a driver who switches on the Uber app undertakes a contractual obligation to work for Uber London is not rationally sustainable. Nor can the fact that the driver is ready and willing to accept trips logically alter the position so as to give rise to such an obligation.

126. The fact, however, that an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker and, by the same token, does not preclude a finding that the individual is employed under a worker's contract. What is necessary for such a finding is that there should be what has been described as "an irreducible minimum of obligation": see *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623 (Stephenson LJ), approved by the House of Lords in *Carmichael v National Power plc* [1999] 1 WLR 2042, 2047. In other words, the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work.

127. In the present case Uber London in the Welcome Packet of material issued to new drivers referred to logging onto the Uber app as "going on duty" and instructed drivers that: "Going on duty means you are willing and able to accept trip requests" (see para 17 above). Logging onto the Uber app was thus presented by Uber London itself to drivers as undertaking an obligation to accept work if offered. The employment tribunal also found that the third in the graduated series of messages sent to a driver whose acceptance rate of trip requests fell below a prescribed level included a statement that "being online with the Uber app is an indication that you are available to take trips, in accordance with your Services Agreement." The reference in this message to the Services Agreement must have been to clause 2.6.2, which stated:

> "Customer acknowledges and agrees that repeated failure by a Driver to accommodate User requests for Transportation Services while such Driver is logged in to the Driver App creates a negative experience for Users of Uber's mobile application. Accordingly, Customer agrees and shall ensure that if a Driver does not wish to provide Transportation Services for a period of time, such Driver will log off of the Driver App."

128. Counsel for the third respondent suggested that this clause is inconsistent with clause 2.4 of the Services Agreement, which provided that:

> "Customer and its Drivers retain the option, via the Driver App, to decline or ignore a User's request for Transportation Services via the Uber Services, or to cancel an accepted request ... subject to Uber's then-current cancellation policies."

I do not agree that these clauses are inconsistent. The position both as specified in the Services Agreement and in practice was that, on the one hand, a driver while logged onto the Uber app was free to decline or ignore any individual trip request (and might well, for example, choose to do so if the request came from a passenger with a low rating). But, on the other hand, the driver was required to be generally willing and available to take trips, and a repeated failure by a driver to accept trip requests was treated as a breach of that requirement.

129. Whilst the irreducible minimum of obligation on drivers to accept work was not precisely defined in the Services Agreement, the employment tribunal was entitled to conclude that it was in practice delineated by Uber's criteria for logging drivers off the Uber app if they failed to maintain a prescribed rate of acceptances. Uber seeks to characterise this system as merely a way of seeking to ensure that

drivers do not remain logged onto the app, perhaps through inadvertence whilst away from their vehicle, at times when they are not in fact available to work. However, if that were the only purpose of automatically logging off a driver, it is hard to see why the driver should then be shut out from logging back onto the Uber app for a ten-minute period. It was open to the tribunal on the evidence, including Uber's internal documents, to find that this exclusion from access to the app was designed to operate coercively and that it was reasonably perceived by drivers, and was intended by Uber to be perceived, as a penalty for failing to comply with an obligation to accept a minimum amount of work.

130. It follows that the employment tribunal was, in my view, entitled to conclude that, by logging onto the Uber app in London, a claimant driver came within the definition of a "worker" by entering into a contract with Uber London whereby he undertook to perform driving services for Uber London. I do not consider that the third condition identified by the tribunal that the driver was in fact ready and willing to accept trips can properly be regarded as essential to the existence of a worker's contract; nor indeed did the tribunal assert that it was. But it is reasonable to treat it, as the tribunal did, as a further condition which must be satisfied in order to find that a driver is "working" under such a contract.

131. This brings me to the question of what periods during which a driver is employed under a worker's contract count as working time.

The Working Time Regulations

132. For the purpose of the Working Time Regulations 1998, "working time" is defined in regulation 2(1), in relation to a worker, as "any period during which he is working, at his employer's disposal and carrying out his activity or duties".

133. There is no difficulty in principle in a finding that time when a driver is "on call" falls within this definition. A number of decisions of the CJEU establish that, for the purpose of the Working Time Directive, to which the UK Regulations aim to give effect and which defines "working time" in the same way, time spent on call counts as "working time" if the worker is required to be at or near his or her place of work. For example, in *Ville de Nivelles v Matzak* (Case C-518/15) EU:C:2018:82; [2018] ICR 869 the CJEU held that time spent by firefighters on stand-by at their homes, which were required to be within eight minutes travelling distance of the fire station, was working time.

134. On the facts of the present case, a driver's place of work is wherever his vehicle is currently located. Subject to the point I consider next, in the light of this

case law the tribunal was justified in finding that all time spent by a driver working under a worker's contract with Uber London, including time spent "on duty" logged onto the Uber app in London available to accept a trip request, is "working time" within the meaning of the Working Time Directive and Regulations.

135. The point that - like the majority of the Court of Appeal and Judge Eady QC in the Employment Appeal Tribunal - I have found more difficult is whether a driver logged onto the Uber app in the area in which he is licensed to work can be said to be "working, at his employer's disposal and carrying out his activity or duties" if during such times the driver is equally ready and willing to accept a trip request received from another PHV operator. It was argued with force by counsel for Uber that a driver cannot reasonably be said to be working for and at the disposal of Uber London if, while logged onto the Uber app, he is also at the same time logged onto another app provided by a competitor of Uber which operates a similar service.

136. I have concluded that this question cannot be answered in the abstract. I agree with Judge Eady QC when she said in her judgment dismissing Uber's appeal to the Employment Appeal Tribunal (at para 126) that it is a matter of fact and degree. Like the majority of the Court of Appeal, I also agree with her that:

> "If the reality is that Uber's market share in London is such that its drivers are, in practical terms, unable to hold themselves out as available to any other PHV operator, then, as a matter of fact, [when they have the Uber app switched on] they are working at [Uber London's] disposal as part of the pool of drivers it requires to be available within the territory at any one time. … if, however, it is genuinely the case that drivers are able to also hold themselves out as at the disposal of other PHV operators when waiting for a trip, the same analysis would not apply."

137. So far as this court has been shown, no evidence was adduced at the hearing in the employment tribunal in 2016 that there was at that time any other app-based PHV transportation service operating in London or that drivers logged into the Uber app were as a matter of practical reality also able to hold themselves out as at the disposal of other PHV operators when waiting for a trip. No finding was made by the tribunal on this subject. In these circumstances I do not consider that the tribunal was wrong to find that periods during which its three conditions were met constituted "working time" for the purpose of the Working Time Regulations 1998.

The National Minimum Wage Regulations

138. What counts as working time for the purposes of the right to be paid the national minimum wage is defined by the National Minimum Wage Regulations 2015. These regulations contain complex provisions for measuring hours worked depending on how the work is classified. Before the employment tribunal there was an issue as to whether a driver's working hours should be classified as "time work", as Uber argued, or as "unmeasured work", as the tribunal held. It was accepted by Uber that "time work" could only be the appropriate category if the driver is working only when carrying a passenger and not otherwise. As I have concluded that the tribunal was entitled to reject that contention, it follows that the tribunal was also entitled to find that the claimants' working hours were not "time work". As it was common ground that those hours did not fall within the definitions of "salaried work" or "output work", it further follows that the tribunal was entitled to find that they constituted "unmeasured work", which is a residual or default category. On this point too, therefore, there is no basis for interfering with the employment tribunal's decision.

Conclusion

139. For all the reasons given, I would dismiss this appeal.

Postscript

140. After the hearing of the appeal but before this judgment was handed down, Lord Kitchin fell ill and it was uncertain when he would return to work. With the agreement of the parties, the presiding judge, Lord Reed, gave a direction under section 43(3) of the Constitutional Reform Act 2005 that the court was still duly constituted by the remaining six Justices, all of whom are permanent judges.

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