



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105561/2022

5

Held via Cloud Video Platform in Glasgow on 5 January 2023

Employment Judge M Robison

Mr F Mulvaney	Claimant
	In Person
Airdrie Taxis Limited	Respondent
	Represented by
	Ms K Splavaska -
	Litigation Consultant

10

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Employment Tribunal does not have jurisdiction to hear the claim, which is dismissed.

20

REASONS

1. This preliminary hearing took place remotely by CVP. The sole issue for determination was the question of employment status.
2. The claimant was a taxi-owner and shareholder of the respondent, which operates a taxi business. The claimant's relationship with the respondent terminated on 23 June 2022. The claimant confirmed during the hearing that he is claiming unfair dismissal only. Although in the claim form the claimant ticked boxes claiming notice pay and holiday pay, there was no supporting narrative relating to those claims, and the claimant confirmed that he does not pursue such claims.
3. This meant that the question for the Tribunal was whether the claimant was an employee, and there was no need for the Tribunal to consider whether the

25

30

claimant was otherwise a “worker”. The claimant can only claim unfair dismissal if he was an employee, rather than self-employed or a “worker”.

4. The Tribunal heard evidence from the claimant and from Mr J Wood, director for the respondent. The respondent had lodged a witness statement for Mr Wood, but no witness statements had been ordered. Consequently, the Tribunal heard oral evidence from Mr Wood.

5. The Tribunal was referred to a file of documents prepared by the respondent but accepted as a joint bundle, which is referred to in this judgment by page number.

10 Findings in fact

6. Having heard evidence, the Tribunal makes the following relevant findings in fact.

7. The claimant holds a public hire vehicle licence, issued by North Lanarkshire Council. The claimant had been involved with the respondent for over 36 years, in different capacities. The claimant was one of the founding directors of the respondent, and was a director from July 1998 until May 2014.

8. The respondent is in business as a taxi operator. The respondent is a private company limited by shares. The company currently has four directors, including Mr John Wood. The company currently has 94 shareholders. These are all taxi owners, and those with two, three or four taxis have a share for each taxi owned. The majority are also taxi drivers, who drive their own taxis or engage others to drive their taxis.

9. Because of issues operating with articles and memorandum of association, a “management committee” was established to run the business. Each shareholder has a role in decision-making and is described as a “member of the association”. The chairman, treasurer, secretary, system manager and advertising manager are elected by the shareholders, and also serve as directors of the respondent. When the claimant resigned as a committee member in May 2014, he was not re-elected and therefore no longer served

as a director. This change did not alter the work which the claimant did, which continued as described below.

10. In 2009, each taxi owner entered a minute of agreement with the respondent setting out terms to which each shareholder/taxi owner should adhere (page 33). The claimant signed such an agreement in or around 2009.
11. The terms of that agreement evolved into what is now termed “working rules and conditions” (page 42) supplemented by “general rules” (page 45) and “discipline rules” (page 48), the latest versions being dated July 2021.
12. The relevant “working rules and conditions” state, inter alia, that:
 - a. a copy of the rules and conditions will be issued to every member at the AGM and will be signed for to acknowledge their acceptance of the rules until the next AGM;
 - b. the rules can be amended by a majority of the members;
 - c. members must be able to “prove to the membership that they have no interest of any kind in a public or private hire licence on any other system”;
 - d. vehicles must be clean, roadworthy, presentable, properly insured, taxed and tested by North Lanarkshire Council and “the association will have the right to take all necessary steps to ensure this is so”;
 - e. “all radio equipment must only be fitted, maintained or repaired by contractors approved by the committee and the member’s radio equipment in the car will be the responsibility of the member and not the association”;
 - f. “owners will be responsible for ensuring that the correct interaction between meter, sign and computer system is kept working as per installation. Any tampering found will render the owner and driver liable to disciplinary procedure and the car will be booked off until the fault is rectified”;

- g. “any new driver or owner must have their name on the board for 7 days and will not be allowed to drive during that period on a probationary basis pending objections”; and
- h. “uniforms must be worn at all times. First offenders will be given a warning, re-offending drivers will be expelled from the company...all clothing garments must have the company logo”.
- 5
13. The relevant numbered general rules including the following:
3. “all owners and drivers must sign on and off the system with their own pin number, anyone who allows someone to work with their pin number will result in both parties being suspected and liable to disciplinary proceedings. All drivers must sign off when on a tea break etc”.
- 10
4. “all personnel must give an accurate location if asked by control”.
7. “no owner or driver will be allowed to have personal contracts, whether through a third party or not”.
- 15
8. “all return journeys, if booked through the driver, must be passed back to the office”.
9. “only the owner of the car has the right to give shifts to another driver”.
10. “radios and data heads must be switched on at all times when the car is working. Failure to do so will result in disciplinary proceedings”.
- 20
12. “all cars and drivers must be kept clean and tidy at all times, drivers will be subject to a dress code, decided either by the membership or North Lanarkshire Council”.
13. “all cars must display Airdrie Taxis advertising to the rear of the vehicle, the size and format of which will be decided by the committee”.
- 25
15. “any car not working must keep the meter and data head turned off, failure to do so will result in disciplinary proceedings”.

16. “as soon as a hire is picked up, the meter must be engaged to allow the computer system to operate properly. Anyone found abusing this rule will be considered to be false locating and will be penalised on that basis”.
- 5 19. “no argument over the air about any subject will be tolerated. Persistence in this will result in the individual being booked off the air for 7 days”.
28. “cars not on the system for 08.15 am on school days will not be allowed to book until 12 noon unless they have notified the office beforehand”.
- 10 30. “if any driver is asked to go into Morrisons they must do so. Any driver who refuses will be subject to disciplinary proceedings”.
31. “any driver who refuses three hires will be booked off the system for hours”.
32. “all drivers must plot into their destination. If three unspecified are
15 identified the driver will be booked off the system for three hours”.
14. Discipline rules stated that, “In the event of a complaint or report against any driver, the following procedure will come into play: the disciplinary committee will make an initial examination, speak to those concerned if required. They will then decide to either take no further action, offer an option to pay a £20.00
20 fine, or order the person to appear before the full disciplinary committee”.
15. The respondent employs 12 full-time employees in the office and one part-time. Their role is to answer the telephone and connect callers to available drivers. The respondent employs 23 part-time school escorts. The four current directors are also “on the payroll”, that is they are employed by the
25 respondent, and are paid £45 per week (page 56).
16. All taxi owners, including the claimant, supply their own vehicle which was fitted with a meter and taxi sign. The car required to have an “Airdrie Taxi” logo on it. Taxi owners, including the claimant, were provided by the

respondent with a mobile phone in order to gain access to the system which provides a link with the office.

17. All taxi owners, including the claimant, pay a weekly fee to the company, currently £96, in return for using the respondent's system, which supplies the drivers with work contacts. This is described in the rules as a "subscription",
5 Where a member fails to pay a subscription on the pre-designated day, all benefits will be suspended until it is paid in full.
18. The claimant chose to work each week day from around 6.30/7 am until around 4 or 5 pm. He worked an average of 10 hours per day. He did not work
10 at the week-end unless he (unusually) had a contract to fulfil. The claimant would inform the office that he would not accept "big" jobs after 4 pm because of his intended finishing times. These were the hours which suited the claimant; he could however have worked more or less hours or alternative hours.
- 15 19. Of the work which the claimant undertook, 70-80% related to contracts and accounts work secured by the respondent following tenders; around 15% through telephone calls and hires booked through the respondent's system; and around 5% from picking up customers from the street, or from a public rank, which he was permitted to do because of his NLC licence. No personal
20 contracts or agreements were permitted. If he accepted contract jobs, then he would be expected to fulfil them.
20. The claimant was able to charge full fare only for picking up from the street or the rank. For other hires sourced through the respondent's system, the claimant required to give 20% discount on the full fare.
- 25 21. With regard to the contracts/account work, taxi owners would put themselves forward to be available for such work. The contracts would be allocated on a weekly rotational basis. This included school contracts, other council contracts, and NHS contracts as well as private company contracts. The respondent took a percentage share of the payments for these contracts,
30 which varied between 10 and 15%.

22. The claimant received payments each week through bank transfer for the contract work which he had undertaken. Taxi owners were obliged to take card payments. The claimant would receive any card payments direct to his bank account. The claimant also retained any cash payments in full.
- 5 23. The claimant's income fluctuated on a daily, weekly and monthly basis. The claimant engaged an accountant. The claimant completed self-assessment and made payment of tax and national insurance to HMRC.
24. The claimant would be expected to inform the respondent if he was going on holiday or taking sick leave or other forms of leave, or if the vehicle was going
10 to be off the road for a service.
25. Taxi owners were permitted to allow other drivers to use their taxis. Such drivers would require to fulfil certain conditions, including being insured and completing enhanced disclosure. Any arrangement regarding payment was
15 between the taxi owner and the taxi driver and the respondent had no involvement in that arrangement. There are currently around 235 drivers registered.
26. Although the claimant was permitted to allow other drivers to utilise his car, he rarely did so. On occasion when he was not using it on Saturdays, he would permit an acquaintance, who was a young single mother, to utilise his
20 vehicle although he made no charge for this.
27. The claimant and other drivers would periodically undertake training on a one to one basis which took place in the office. This included driver operational control, the purpose of which was "to ensure that normal activities at Airdrie Taxis are controlled to maintain delivery of a high quality of service" (page
25 36). This set out responsibilities as follows: the management committee has a responsibility to ensure that all employees are following procedure; the disciplinary committee has responsibility to ensure that drivers are operating in compliance with this procedure; the inspection committee has responsibility to perform required number of checks on car cleanliness and to ensure that
30 drivers are in correct uniform; drivers are responsible for following all specified requirements at all times.

28. The general driver requirements included interaction with customers; drivers general behaviour and attitude; the requirement to wear the designated uniform; to keep contact with the office to a minimum and carry it out in a reasonable manner; to keep the taxi vehicle clean at all time; and failure to
5 comply with the above would result in disciplinary action being taken.
29. During the “driver awareness” course, to “ensure an effective quality management system”, general driver requirements were stated to be as follows: “you must go to all hires accepted from the system; only in exceptional circumstances will passing back the hire be considered. If you feel it is an
10 exceptional circumstance contact the office to discuss; if they decide you should complete the hire, you must do so; if you continue to refuse it will be noted in the disciplinary book for further action; log off the system if you are leaving the car for more than a few minutes”.
30. Under “driver’s general behaviour and interaction with the customer”, it was
15 stated: “your attitude on shift reflects on the company. Refrain from acting in a disorderly manner during the shift, including road rage; treat the customer with respect at all times. Make conversation and promote the use of Airdrie Taxis whenever possible; provide assistance to the customer (eg with shopping bags or a buggy) if required”.
- 20 31. Elsewhere it is stated, under uniform, that “the driver must wear designated uniform at all times”; under cleanliness: “the taxi vehicle must be kept clean at all times...the disciplinary committee will perform random spot check”; under contact with the office, “keep contact with the office to a minimum; contact should be carried out in a reasonable manner”; and under “discount”
25 that “the discount must be given where appropriate; the discount must be given on all telephoned hires (including mobile) over £3.00”.

Relevant law

32. In order to claim unfair dismissal, the claimant must be an employee (section 94(1) of the Employment Rights Act 1996).

33. Section 230(1) of the Employment Rights Act defines an employee as “an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. Contract of employment is defined in section 230(2) as “a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing”.
34. Beyond that, “contract of employment” is not further defined. Case law indicates that employment tribunals must adopt the multiple factor test to determine whether or not an individual is employed under a contract of employment (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 2 QB 497). Tribunals must weigh up all the relevant factors to determine whether the relationship between the parties is governed by a contract of employment.
35. Subsequent case law has also indicated that in order for a contract of employment to exist, there are four irreducible minimum requirements, namely that there must be a contract; an obligation on the worker to provide work personally (i.e. not be entitled to delegate the work to another); mutuality of obligations (i.e. that the employer must provide work and the employee must be obliged to accept the work); and an element of control over the work by the employer.
36. Other factors to be weighed in the balance include whether the individual provides his own equipment, the degree of financial risk taken by the individual, whether the individual is an integral part of the business and the intentions of the parties.
37. Legislation provides for a hybrid category of “workers” who although not entitled to claim unfair dismissal, are entitled to other rights such as holiday pay.
38. Individuals who are neither employees nor workers, but are engaged under a contract for services, are categorised as self-employed or independent contractors, and have no right to claim unfair dismissal, notice pay or holiday pay from those who engage them.

Tribunal deliberations and decision

39. I heard evidence from the claimant and from Mr John Wood. I accepted their evidence as credible and reliable. There was little dispute about the background facts.
- 5 40. The only dispute appeared to be the percentage take on contracts, which the claimant believed was 20% but Mr Wood said varied from 10 to 15% and in some cases was nil. I preferred the evidence of Mr Wood as a serving director. There was also a dispute about whether the claimant was required to accept work and whether there were penalties for not accepting work, but this was it
10 seemed to me a dispute about the interpretation of the facts, which is discussed further below.
41. The key question is whether the claimant is employed or self-employed. As discussed above, there was no requirement for the Tribunal to consider whether he was classed as a “worker” because this claim relates only to unfair
15 dismissal. If the claimant is found to be employed, then he would be entitled to pursue his claim for unfair dismissal. If on the other hand, he was self-employed, he would not have the right to pursue any claims in this Tribunal.
42. Reference was made by Mr Mulvaney during submissions to the *Ready Mixed Concrete* case, which is still relied on and confirms that the test for
20 determining employee status is the so-called “multiple test”, discussed above. During submissions, Mr Mulvaney accepted that the *Uber* case focused on whether the drivers were “workers” or not. Further, he accepted that the *Autoclenz* case focused on what actually happened in practice, rather than the wording of the contract, whereas in this case the claimant seeks to rely on
25 the wording of the agreement. Indeed, Mr Wood’s evidence was that although there were a number of clauses setting out rules which members had voted to include, these were rules which had never been put into practice.
43. It should be noted too that Ms Splavaska for the respondent relied on the most recent case of *Johnson v Transopco UK Ltd* 2022 ICR 691 EAT, which
30 concerned a London black-cab driver who would use an app to access work,

but again the question which the tribunal considered in that case was also whether the claimant was a “worker” rather than an employee.

44. The test to establish whether the claimant was an employee obliges the Tribunal to look at all relevant factors, both those which point to an employment relationship and those which do not. It is not however a tick box exercise, and the Tribunal is required to make an assessment in the round whether the claimant is an employee or not.
45. Before considering the matter in the round, I considered each factor in turn, and took account of the fact that no one factor necessarily has more weight than another, which depends on the particular circumstances,
46. The first question I considered is whether or not there is a contract. I accept that there was a contract in this case, that being the minute of agreement. The question remains whether this is a contract of employment notwithstanding its terms.
47. Consideration requires to be given to whether there is an obligation on the worker to provide work personally (i.e. not be entitled to delegate the work to another), often called “the substitution question”. The rules stated in terms that “the owner of the car has the right to give shifts to another driver”.
48. The claimant advised that he did not as a rule ever make an arrangement with another driver to use his car. He did however accept that he had made an arrangement with an acquaintance to use his car on Saturdays when he was not using it. It is further clear from Mr Wood’s evidence, and indeed from the claimant’s evidence overall, that he was entitled to provide a substitute for his services. There was no doubt that in practice he was entitled to make an arrangement with other drivers to use his car. It was clear that this was a very common practice given there were 94 taxi owners and 253 drivers registered.
49. Turning to the question of “mutuality of obligations”, which is that the employer must provide work and the employee must be obliged to accept the work, the claimant’s position was that there was certain work that he was obligated to accept, otherwise he would suffer a penalty. In this regard he relied on certain

rules which he was obliged to follow, failing which he would not be entitled to be offered jobs for a certain period. He relied on the fact that the respondent required to know his whereabouts and destination at all times.

50. It seemed that the claimant in this regard relied on rules that he was obliged
5 to follow when he was on shift; but rather the question is whether he was obliged to undertake work at all.

51. The respondent's position was that drivers were not obliged to accept work when it was offered. Mr Wood developed this point in his oral evidence. He explained that he meant that when a customer calls into the office, the job is
10 offered to the driver of the closest car, and the driver can either accept or decline that job, but if he declines there will be no penalty. Mr Wood's further evidence was that the claimant could work five hours or 50 hours a week, and that it was a matter for him. He was free to log on and log off and work as few or as many hours as he wanted and he was not given instructions about when
15 to start or complete work.

52. The claimant's evidence essentially supported that position. The claimant confirmed that he chose his hours. He said that he was "religious" about putting in the hours and that it was his choice to work from 6.30 am each day; to take on contract work; and that he would work until around 5 pm each day.
20 He also said in evidence that he would let the office know not to offer him any so-called "big" jobs after 4 pm. This was because it was his decision to finish work around that time. He chose not to work week-ends unless he had accepted a contract job (which was unusual). There was, according to the claimant himself, no obligation on him to do a particular amount of work. This
25 was his choice. I concluded therefore that there was no mutuality of obligations.

53. The Tribunal however must also consider the element of control. The claimant relied in particular on this factor to support his argument that he was an employee rather than self-employed.

30 54. He focused on the rules of the agreement between the respondent and its taxi owners (and drivers). In this regard he relied on the rules which stated that if

5 he did not log on the system by 8.15 on school days drivers would not be allowed to work until 12 noon; and the rule that a driver asked to attend at Morrisons must do so, and that those who refuse three hires will not be entitled to take work for three hours; and the fact that drivers were to plot their destination, otherwise again they would not be entitled to work for three hours.

10 55. Other rules which the claimant was obliged to adhere to (and in respect of breach could be subject to disciplinary proceedings) included the requirement to: sign off when on a break; give an accurate location if asked; not engage in personal contracts; pass all return journeys back to the office; keep the radio on when the car was working; keep cars clean; have the company logo on cars and uniforms; give discounts to passengers booked through the respondent's system. Further, the respondent regulated driver behaviour, attitudes and conduct through the management committee, the disciplinary committee and the inspection committee.

15 56. The claimant in his evidence stressed this element of control and he relied on this in particular to seek to establish that he was an employee. It is important to note however that this relates to controls when the claimant was actually working on shift. It does not detract from the fact that the claimant was not in fact obliged to undertake work for the respondent at all. So long as he paid the fee, and advised that he was not available for work, then he could log on for as much or as little work that he wanted.

20 57. This distinction can be illustrated in the case of *Knight v Fairway & Kenwood Car Servies Ltd* UKEAT/0075/12, which Ms Splavaska relied on in submissions. This was also a case involving a minicab driver who was claiming unfair dismissal, that is he asserted that he was an employee. The background facts and arrangement between the claimant and respondent were similar to the facts of this case. The Tribunal concluded that the claimant was under no obligation to work at all, provided he paid the "rent" and gave suitable notifications he could work or not as he wanted with no adverse consequences. I noted that in that case the EAT was prepared to accept that while the claimant was actually working a shift, that there was a contract of employment, but it could not be said overall that the contract (described as an

25

30

umbrella contract) was a contract of employment in respect of which the focus is on whether the claimant was obliged to accept some minimum or reasonable amount of work.

58. Here the claimant need do no work at all for the respondent: he could have
5 done no shifts at all in his taxi, but engage another driver on whatever arrangement was agreed. This was clearly the case with others in his position who had three or even four taxis and where they made arrangements with other drivers to work the relevant shifts.

59. Ms Splavaska also relied on *Mingeley v Pennock & Ivory* 2004 EWCA Civ 328
10 which is an even older case but which was a decision of the Court of Appeal. This also concerned a private hire taxi driver who in that case sought to rely on the Race Relations Act. The Court of Appeal determined that the claimant was not employed under “a contract personally to execute any work or labour” in circumstances where there was no mutual obligation to offer or accept work
15 where the obligation was only to pay a fee and work within the requirements of the arrangement. This provision has been essentially replicated in the Equality Act, where the scope of protection is in any event broader than that of the Employment Rights Act, but still that provides no protection to an individual in circumstances similar to the claimant.

20 60. I then turned to the other factors to be weighed in the balance. On the question of provision of equipment, the claimant provides his own car and other equipment such as the meter, with the respondent now only providing a mobile phone connected to their system.

61. The claimant wore a uniform, and I accepted that the rules in this regard were
25 quite strict, although the clothing was provided by the claimant (or the driver) who had to make arrangements to have the respondent’s logo on shirts at least.

62. On the degree of financial risk taken by the individual, the risk lay with the
30 claimant. The claimant was not paid a wage or salary. The claimant paid a fee to the respondent and he could work as many hours as he chose which thus dictated his earnings and the extent of his profit.

63. The claimant was paid directly (full price) when he picked up passengers “off the street”; otherwise the claimant required to give passengers a 20% discount for jobs sources through the respondent’s system; all card payments for passengers identified through the respondent’s system would now go directly to the claimant; the claimant was paid on a monthly basis for any contract work which he chose to engage in. The claimant engaged an accountant, completed self-assessment and paid his own tax and national insurance to HMRC.
64. I noted that the claimant could chose to accept contract work or not (although if he did accept such work then he would be subject to the respondent’s rules). I noted that these payments were paid to the owner/shareholder, not the driver. Mr Wood’s evidence was that many owners would rent out their cars for a “weigh in”. It is the owner who gets the payments for contracts and who would make their own arrangement with any driver engaged. The respondent would have no input into the agreement. Although the claimant expressed concerns about profits made by the respondent from these contracts (which he had understood was 20%), I accepted Mr Wood’s evidence that it was less than that. His unchallenged evidence was that the respondent made no profit from these contracts, with the percentage retained paying for the running of the office system, and at end of year any surplus from such contracts was handed out as a Christmas bonus to shareholders.
65. Another factor to be considered in the mix is the intention of the parties. It seems clear to me that the intention of the parties in this case was that owners and indeed drivers would operate on a self-employed basis. It seemed to me that is what the claimant also understood for the 36 years that he was engaged with the respondent. He now seeks to argue otherwise to support his claim for unfair dismissal.
66. Thus considering all factors in the round, I conclude that the claimant was not engaged by the employment under a contract of employment, but rather he was under a contract for services, that is he was self-employed.

Conclusion

67. The conclusion of the Employment Tribunal is that the claimant was an not
employee within the meaning of section 230 of the Employment Rights Act
1996 and therefore is no entitled to pursue claims of unfair dismissal. This
5 claim must therefore be dismissed.

Employment Judge: Muriel Robison
Date of Judgment: 18 January 2023
10 Entered in register: 18 January 2023
and copied to parties