IN THE COURT OF APPEAL(CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
UKEATPA/0807/16/DA (HHJ EADY Q.C.)

BETWEEN:

(1) UBER B.V. ("UBV")
(2) UBER LONDON LIMITED ("ULL")
(3) UBER BRITANNIA LIMITED
(together referred to as "Uber")

Appellants

(1) YASEEN ASLAM
(2) JAMES FARRAR
(together referred to as "Claimants")

Respondents

APPELLANTS' REPLACEMENT SKELETON ARGUMENT

A. Summary of the Appeal

1. The Claimants in these proceedings are drivers who use the Uber mobile telephone application ("the Uber App"), and provide transport to passengers ("riders") who also use the Uber App.

2. This appeal raises the following questions:

   2.1. Whether the Employment Tribunal and the EAT erred in law in concluding that the Claimants were employed by Uber as workers within the meaning of section 230(3)(b) of the Employment Rights Act 1996 ("ERA"), regulation 36(1) of the Working Time Regulations 1998 ("WTR"), and section 54(3) of the National Minimum Wage Act ("NMWA"); and

   2.2. If the Claimants are employed by Uber as workers, whether their hours of work are to be treated as including any period of time during which they are in the territory within which they are authorised to drive, with the Uber App switched on, and are "able and willing" to work, as the ET and EAT held, or as including only those periods during

which the Claimants are actually driving trips for Uber riders.

3. Uber submits that the ET and EAT erred in law in determining the terms of the agreements and nature of the relationship between the Claimants and Uber. In particular:

3.1. The tribunals wrongly disregarded the written contracts in which the parties' agreements were recorded, when they ought to have regarded them as strong evidence of the intentions of the parties, and the terms agreed between them, which described the nature of the relationship, and were consistent with the reality of the situation, and which accordingly should have been taken to represent the true contractual rights and obligations agreed by the parties;

3.2. The ET erred in disregarding the characterisation of the relationship in the relevant written contracts as one in which both riders and drivers, including the Claimants, contract with Uber BV for access to and a licence to use the Uber App, and where the contract for driving services is entered into between an individual driver and rider, through ULL acting as the driver's agent.

3.3. The ET wrongly treated as "*absurd*" features of the relationship (such as the fact that the driver was unaware of the rider's full name) that were unremarkable in the context of agency, in a situation in which the written contracts provided for that relationship, and in which the agency model has been used in the private hire industry for many years, with the knowledge and approval of HMRC. Applying that erroneous approach, the ET wrongly found that the Claimants were in reality providing driving services to Uber, which was contracting as principal with riders for the provision of such services.

3.4. The EAT wrongly treated the ET judgment as if it had considered and rejected the agency analysis, when, in fact, the ET had wholly failed to address it. On the proper legal approach, the characterisation of the relationship in the written agreements was consistent with its operation in practice. The ET and EAT ought to have concluded that the parties intended to, and did, contract on that basis;

3.5. The ET and EAT erred in law in treating as indicative of an employer/worker

relationship, or as inconsistent with agency, features which were regulatory obligations which Uber was required to implement under legislation which was not intended to mandate either a worker/employer relationship or an agency relationship. Such features ought to have been treated as neutral;

3.6. The ET and the EAT erred in law in treating the Claimants as being under an obligation to work for Uber when they satisfied conditions including (1) that the App was switched on, and (2) (as a separate condition) that they were able and willing to work. This finding is internally contradictory, since the Claimants' obligation to work was found to arise only when they were ready and willing to do so.

3.7. At paragraph 92(4) of its Reasons [CB/13/210], The ET made a perverse finding of fact, which was moreover in contradiction to the finding set out at paragraph 3.4 above, to the effect that the Claimants were obliged to work for Uber when the App was switched on. This finding was said to be based on the fact that, if the Claimants refused to accept a number of trips or cancelled a number of accepted trips while the App was switched on, as they were contractually entitled to do, Uber could switch the App off for two minutes[1], so that they were for that period of time treated as unavailable. The only proper and lawful inference to draw from these facts was that they demonstrated that Uber had no contractual right to require the Claimants to accept trips or not to cancel trips when the App was switched on, and the Claimants had no corresponding obligation to do so.

3.8. The EAT further erred in finding that the ET had relied in support of the conclusion at paragraph 92(4) [CB/13/210] on a further finding that Uber required drivers to accept at least 80% of trips when the App was switched on. The ET neither made nor relied on any such finding. Had it done so, its reliance would have been perverse. The only evidence concerning such a requirement related to the USA. There was no evidence before the ET that any such requirement has ever been imposed by Uber in London or the UK.

[1] The ET decision wrongly referred to a period of 10 minutes.

B. The finding that the Claimants were employed by Uber as workers

4. By section 230(3)(b) ERA (and equivalent provisions in the WTR and NMWA), a "*worker*" is defined as an individual who works (or worked) under:

> "*any other contract [than a contract of employment], 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*".

5. The crucial questions in this case were: (a) whether the Claimants performed any services "*for*" Uber, as opposed to performing services for riders, who were the client or customers of their driving businesses, through the agency of Uber; and (b) whether, if the Claimants were performing services "*for*" Uber, they had contractually undertaken (and were thus obliged) to do so.

6. The ET concluded at paragraph 86 of the Reasons [CB/13/207] 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 as long as those conditions are satisfied, working for Uber under a 'worker' contract and a contract within each of the extended definitions*".

7. In making that finding the ET erred in law as set out below.

(1) Error of law in disregarding the written contracts

8. The written agreement between riders and each of the Appellants contains the following express terms.

   8.1. As regards London, clause 3 of Part 1 [SB/9/41] provides that ULL shall accept private hire bookings "*as disclosed agent*" for a driver "*as principal*". Such acceptance is stated to give rise to "*a contract for the provision of transportation services*" between the rider and the driver, with ULL acting "*as intermediary*".

   8.2. Clause 2 of Part 2 [SB/9/45] provides that Uber allows riders access to the App in order "*to pre-book and schedule transportation, logistics, delivery and/or vendor services with*

independent third party providers of such services", who are not employed by Uber.

8.3. Clause 4 of Part 2 [SB/9/50] provides that Uber will facilitate payment by the riders to drivers, "*as disclosed payment collection agent"* on behalf of the drivers.

9. The written agreement between drivers and UBV contains the following express terms.

9.1. The preamble [SB/4/14] records that UBV provides the driver with access to the App (under a licence granted in clause 5) "*for the purpose of providing lead generation"*.

9.2. Clause 2.2 [SB/4/16] provides that, when logged in to the App, the driver may accept trip requests made by riders "*either directly or through an Uber Affiliate [in this case ULL] acting as agent*" for the driver.

9.3. Clause 2.2 also provides that the driver must "*provide all necessary equipment, tools and other materials, at [his] own expense, necessary to perform Transportation Services*". Hence, drivers are responsible for providing, insuring, fuelling and maintaining their own vehicles, at their own expense.

9.4. Clause 2.3 [SB/4/16] provides that the driver's provision of transportation services to riders "*creates a legal and direct business relationship*" between those parties, "*to which neither [UBV] nor any of its Affiliates in the Territory is a party*".

9.5. Clause 2.4 [SB/4/17] confirms that the driver has "*the sole right to determine when and for how long"* he uses the App, and that he has complete discretion to "*decline or ignore*" any rider trip request. It also prohibits the driver from displaying Uber livery on his vehicle, or wearing any uniform featuring Uber branding.

9.6. Clause 2.6.2 [SB/4/18] provides that the driver should log off the App if he does not wish to provide transportation services, because repeated failure to accept rider trip requests "*creates a negative experience*" for riders.

9.7. Clause 4.1 [SB/4/20] provides for UBV's appointment as the driver's "*limited payment collection agent*" for the purpose of collecting fares from riders.

9.8. Clause 4.4 [SB/4/21] provides for the driver to pay UBV a "*service fee*", in consideration of his access to the App, calculated as a percentage of rider fares.

9.9. Clause 13.1 [SB/4/27] provides that, save for the driver's appointment of UBV as limited payment collection agent, the relationship between the driver and UBV is that of "*independent contractors*".

10. The relationships described in these agreements are typical of the private hire industry, and have been for many years. Many mini-cab companies operate a business model under which drivers are self-employed, own their own cars, and bear the risk of their own expenses. The drivers use the mini-cab firm as their agent to book their trips with passengers, and pay commission to the mini-cab firm for that service. The contract for driving services is entered into between the driver and passenger. Such relationships have long been recognised in case law rejecting the alleged "*employment*" status of mini-cab drivers: see, for example, *Mingeley v Pennock (t/a Amber Cars)* [2004] ICR 727 CA, *Khan v Checkers Cars* UKEAT/0208/05/DZM. Such relationships are also expressly contemplated by HMRC, since they are relevant to the incidence of VAT: see *VAT Notice 700/25: taxis and private hire cars*, paragraph 3.3, *Lafferty v Revenue and Customs Commissioners* [2014] UKFTT (TC) (ET Judge Cornwell-Kelly), *Khalid Mahmood v Revenue and Customs Commissioners* [2016] UKFTT 0622 (TC) (ET Judge Thomas), and *Carless v Customs and Excise Commissioners* [1993] STC 632 (QBD, Hutchison J).

11. Uber is unusual not because of the nature of these relationships, but because the Uber App enables it to operate on a much larger scale than traditional mini-cab companies.

12. The ET wrongly found that the written contracts entered into between the Claimants, Uber and riders "*did not correspond with the practical reality*" (paragraphs 90 and 91 [CB/13/209]), and could accordingly be disregarded in their entirety (paragraph 96 [CB/13/212]).

13. The ET erred in law in concluding that any of the facts or matters on which it relied at paragraphs 87 - 96 [CB/13/207-212] were inconsistent with a conclusion that the written contracts, properly construed, reflected the true relationship and terms of the agreements between the parties.

14. As set out below, a number of the reasons given in those paragraphs did not even purport to be findings as to the actual nature of the parties' relationship. They were instead legally irrelevant (and pejoratively expressed) commentary on Uber's own descriptions of its business model in other contexts and for other purposes. To the extent that the ET's conclusions were legally relevant, they demonstrated a misunderstanding of, and consequential failure to apply, relevant legal principles.

15. The EAT, in upholding the ET's decision, erred in law in treating *Autoclenz Ltd v Belcher* [2011] ICR 1157 as establishing a special approach for the characterisation of putative relationships of employment, in which written contracts are relegated to no more than one piece of a broad factual background, and are not even to be taken as the starting point for identifying the intentions of the contracting parties. This was a misinterpretation of *Autoclenz*, and inconsistent with established principles of contractual interpretation.

Errors in the ET's reasons

16. The first reason given by the ET for disregarding the written contracts (in paragraph 87 [CB/13/207]) was that language used in the written contracts and in Uber's witness evidence justified "*a degree of scepticism*". That conclusion was unjustified: there is no legal principle to the effect that carefully or professionally drafted contracts should be given less weight.

17. The ET's second reason (in paragraph 88 [CB/13/208]) was that certain of Uber's marketing materials and public statements contained language that was, in the ET's view, consistent with the Claimants' case. That observation was not a finding of any legally relevant obligation on the part of the Claimants. It was expressed as no more than a further reason for "*scepticism*".

18. The ET's third reason (in paragraph 89 [CB/13/208]) was that "*it is, in our opinion, unreal to deny that Uber is in business as a supplier of transportation services*". By appeals to "*simple common sense*" and "*self-evident*" truths, the ET considered that the only service that Uber could be marketing was its own transportation service. However, that reasoning (or, more

accurately, assertion) failed to address Uber's case that, in accordance with the contracts, it was marketing its services as the agent of drivers who provide transportation services directly to riders. Moreover, the question whether Uber is a provider of transportation services is irrelevant to the legal question at issue in these proceedings.

19. The ET's fourth reason (in paragraph 90 [CB/13/209]) was that it struck it as "*faintly ridiculous*" to regard a driver as being engaged in a "*small business*" that consisted of "*a man with a car seeking to make a living by driving it*", or that there could be 30,000 such businesses operating in London through the Uber App. That conclusion was wrong in law as well as factually perverse. There are many thousands of such businesses in the private hire industry throughout the UK.

20. The ET's fifth, and critical, reason (in paragraph 91 [CB/13/209]) was that the contract between driver and rider in respect of each journey is a "*pure fiction*". In so holding, the ET misunderstood or failed to apply basic principles of agency law. The ET made no reference in its reasons to agency, and did not attempt to consider the reality of the relationship in that light. The ET failed to appreciate that an agent with appropriate authority can bind his disclosed but unidentified principal to carry out a particular task for a third party: see *Bowstead & Reynolds on Agency* (20th edition, 2016) at 1-005. In particular, an authorised agent can bind his principal to carry out a task: (1) in a particular way (e.g. by driving a third party on a recommended route, to a destination that may only be disclosed to the principal when the journey is about to start); (2) for a price negotiated or calculated without consultation with the principal, and collected directly by the agent; and (3) without either the principal or the third party being provided with any particular information about the identity of the other. The ET misunderstood or failed to have any regard to these legal principles, and consequently and erroneously characterised the position under the written contracts as "*absurd*".

21. The ET then sought to justify its apparently intuitive and erroneous reaction to the contracts by hypothetical speculation, which was irrelevant and involved further errors of law. In particular:

21.1. It suggested that Uber was obliged to argue that, if it became insolvent, drivers would have a right to sue riders. On standard legal principles, that would theoretically be the case. However, the ET failed to appreciate that this situation would be extremely unlikely to arise in practice, since, under the rider agreement, Uber holds the rider's credit or debit card details, and the rider pays Uber automatically at the end of each journey, as the driver's agent (under clause 4 of Part 2 of the rider terms: see paragraph 8 above). Moreover, the ET made no finding of fact that, if such litigation were necessary, Uber would not provide the rider's name to the driver. In fact, Uber's agreement with riders incorporates by reference Uber's Privacy Policy, which expressly allows it to use rider information "*to investigate or address claims or disputes relating to your use of Uber's services*", and to share information with third parties "*in the event of a claim or dispute relating to your use of our services*".

21.2. The ET suggested that, if there were a contract between driver and rider, the rider could be "*exposed to potential liability as the driver's employer under numerous enactments such as, for example, NMWA*". That speculation was both irrelevant and incorrect. The relationship between a self-employed taxi or private hire driver and a passenger is that between a business and client or customer. No such liability would arise. The ET treated as bizarre or absurd normal relationships widespread in the industry.

21.3. The ET suggested that, if there were a contract between driver and rider, Uber would be under no obligation to indemnify the driver for the non-payment of a fare, and asserted (again without explanation) that such a situation would be "*manifestly unconscionable*". Once again, the ET's claim is both unreasoned and incorrect, and fails to consider basic principles of agency law. There is no reason why Uber should not agree to indemnify drivers in such a situation. An agent may or may not agree to indemnify his principal against non-payment by a third party. Those agents who provide such an indemnity are sometimes known as *del credere* agents: see e.g. *Bowstead & Reynolds*, Article 2(5). In fact, as the ET acknowledged, it is Uber's policy to bear the loss of certain fraudulent actions by riders. There is no inconsistency between that policy and a relationship of agency.

22. The ET's sixth reason (in paragraph 92 [CB/13/210]) was that *"it is not real to regard Uber as working 'for' the drivers"* and *"the only sensible interpretation is the other way around"*. The alternatives expressed in that passage were wrongly defined. The ET failed to address Uber's case that drivers contract with riders, through Uber as agent.

23. A proper direction as to agency principles was thus crucial to a proper analysis of whether drivers work "*for*" Uber at all (whether as workers or otherwise). However, the ET instead wrongly focussed exclusively on the question of control, so as to enquire whether Uber could be viewed as a "*client or customer*" of the driver. Hence the ET's reliance on *Hospital Medical Group Ltd v Westwood* [2013] ICR 415: a case where it was common ground that the doctor was subject to an obligation to work "*for*" the medical group, and the only issue was whether the medical group was his "*client or customer*". If drivers are not in fact providing services to Uber at all, the question of control is beside the point.

24. As to the sub-paragraphs to paragraph 92 [CB/13/210]:

24.1. Sub-paragraphs (1), (3), (5), (6), (9), (11) and (12) reflect the ET's failure to engage with principles of agency law, as set out above. Each of the facts and matters referred to in these sub-paragraphs is consistent with the position where an agent is authorised to conclude bargains and to conduct negotiations with third parties on behalf of a disclosed but unidentified principal. As to the potential for agents to be authorised to act independently of their principal, see e.g. *Bowstead & Reynolds* at paragraph 1-017. The Supreme Court has confirmed that it is consistent with a relationship of agency (particularly where the agent has greater bargaining power) for the agent to reserve to itself functions such as dealing with complaints and compensation without reference to the principal: see *HMRC v Secret Hotels2 Ltd* [2014] UKSC 16 at [45] – [46].

24.2. Points (2), (4) (which is challenged as a perverse finding of fact, discussed further below), (7), (8) and (10) also reflect a failure to engage with principles of agency law. These include that an agent is free to select the principals for whom he will act; to agree payment terms; and to make his ongoing representation subject to conditions. Had the ET directed itself properly, it ought to have concluded that it is perfectly permissible for

an agent to make clear that he will only continue to represent a principal whose standards and conduct preserve his own business reputation and relationships with third parties. Actors' and models' agents provide obvious examples of this type of agent: so do the proprietors of traditional minicab firms. Again, the Supreme Court has held that it is consistent with an agency relationship for an agent to require the principal to conduct itself in a particular way when providing services to end-users: see *HMRC v Secret Hotels2 Ltd* at [39] – [41].

24.3. Point (13) is legally irrelevant. Any type of contract may include provision for unilateral amendment by one party. Such a provision is not an indicator of a sham.

25. The ET's seventh reason (in paragraph 93 [CB/13/210]) was the conclusion that "*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*". For the reasons set out above, that conclusion was vitiated by the ET's error of law in failing to address the relationship of agency or direct itself properly on the principles of agency law. Taxi and private hire drivers carry passengers for reward. The question which the ET failed to address was whether it was unrealistic to regard them as doing so pursuant to a bargain with the rider, who pays the fare ultimately received (net of Uber's flat-rate service charge) by the driver: the relationship described in the written agreements. Without addressing that question, the ET was not in a position to conclude that the agreements did not reflect the reality of the situation.

26. The ET's eighth reason (in paragraph 94 [CB/13/211]) was that the relationship was of the type characterised in the authorities as one of a "*dependent work relationship*", where a worker is an "*integral component*" of an organisation. That conclusion was again vitiated by the ET's failure to direct itself to consider whether the situation could properly be characterised as one of agency. A principal may be viewed as "*dependent*" on his agent to obtain work, and as "*integral*" to his agent's business as an agent (see, for example, the cases of *Stringfellows* and *Royal Hong Kong Golf Club* considered below). Neither of the authorities cited by the ET (*Cotswold Developments v Williams* [2006] IRLR 181, and *James v Redcats (Brands) Ltd* [2007] ICR 1006) involved the disregarding of contracts between the putative worker and the end-

user of his services, or any suggestion that such contracts were arranged by the defendant as agent.

27. The ET's ninth reason (in paragraph 95 [CB/13/211]) purported to distinguish authorities relied on by Uber which strongly support the conclusion that drivers using the App are self-employed, and that Uber is acting as their agent. There was no legal basis to distinguish those cases.

28. First, the ET wrongly distinguished *Stringfellow Restaurants v Quashie* [2013] IRLR 99 (table dancers) and *Cheng Yuen v Royal Hong Kong Golf Club* [1998] ICR 131 (golf caddies) on the basis that those cases concerned individuals who were providing services "*ancillary*" to the principal service provided by the putative employers. That conclusion is dubious on its own terms: the services of dancers are not merely *"ancillary"* to an unspecified *"principal service or facility"* offered by Stringfellows. In any event, it is legally misconceived. The reasoning in these authorities did not turn on that question. The ET failed to appreciate the fact that these were both examples of cases in which appellate courts had found that individuals were to be treated as self-employed businesses providing their services to customers through an agent, although they appeared to be dependent on and integral to the agent's operation.

29. Secondly, the ET failed to give any explanation at all for its assertion that the facts in the private hire driver cases of *Mingeley* and *Khan* were materially different from those in the present case. In fact, the reasoning in *Mingeley* and *Khan* is equally applicable to the present case. As set out below, in various respects drivers who use the Uber App are in fact more independent than the drivers in those cases.

30. The ET's tenth reason (in paragraph 96 [CB/13/212]) was the suggestion that the present case is one of unequal bargaining power leading to unreal contracts. As a general observation, it is correct that unequal bargaining power may be exploited to produce sham contracts. However, it is an error of law to suggest that because there is unequal bargaining power, the written contracts should be disregarded. The same flawed reasoning was exposed by the Supreme Court in *Secret Hotels2*. For the reasons set out above, the ET ought to have found that the written contracts in this case were consistent with the reality of the

relationships. Accordingly, there was no proper basis for disregarding them, and the ET erred in law in doing so.

Errors of the EAT

31. When considering this issue on appeal, the EAT wrongly held that the ET had "*reject[ed] 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 driver*" (paragraph 116 [CB/9/163]).

32. As at out above, this contention was not rejected by the ET. It was never considered. At no point in the ET's decision was Uber's submission that the booking was entered into by ULL as agent of the driver either addressed or rejected. Not only did the ET's reasons make no reference to agency, but the ET wrongly treated normal agency arrangements as inherently absurd.

33. Further, the EAT erred in rejecting Uber's submission 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*" (paragraph 109 [CB/9/159]). The EAT relied in this regard on *Autoclenz*. It effectively treated that decision as a mandate for Employment Tribunals to reach their own, independent view as to the correct characterisation of contracts made in circumstances of unequal bargaining power, with the written contracts constituting no more than one background factor to be considered (see paragraph 105 [CB/9/157]), without carrying any particular weight. That was a misreading of *Autoclenz*, and an error of law.

34. *Autoclenz* is authority for the principle that "*labels*" for the nature of their relationship used by the parties in written contracts are not conclusive, and may be rejected where the Court finds that they do not reflect the reality of the parties' intentions. The "*essential question in each case is what were the terms of the agreement*" (*Autoclenz* at [20]).

35. In the context of alleged employment relationships, the Court should be especially alive to the danger of employers inserting clauses "*as a matter of form*", where "*the reality of the situation is that no one seriously expects*" them to be implemented (*Kalwak* at [57]-[58], quoted with approval in *Autoclenz* at [25]). However, this concern with form over substance is not

unique to alleged employment contracts, and the SC in Autoclenz did not suggest that it is. Instead, the "*critical difference*" between putative employment contracts, and arm's-length commercial contracts, is simply that in the former type of case: "*In practice … 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*" (Aikens LJ in the CA in Autoclenz at [92], quoted with approval by the SC at [34]).

36. The right approach is to start with the written agreements, and to regard them as an accurate description of the terms of the parties' agreement unless it is shown that "*the documents did not reflect the true agreement between the parties*" (Autoclenz at [38]).

37. This approach is not different in principle from that applied by the SC in Secret Hotels2, in the directly relevant context of an internet platform which the Court found to be acting as agent for the sale of services (accommodation) provided by hotels to customers. As the Court held at [32], mere labels in a relationship governed by a written agreement are not conclusive. However, the proper starting point is to construe any written contracts, and then to ask whether the reality is inconsistent with them. As stated in Secret Hotels2 at [35]: "*one must identify the relationship between [the parties] 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*".

38. The same approach has also been applied by the SC in the employment sphere: see Lord Sumption in Preston v President of the Methodist Conference [2013] 2 A.C. 163, which concerned the question whether a Methodist minister was an employee, at [12]: "*The question is whether the incidents of the relationship described in [the written] documents, properly analysed, are characteristic of a contract and, if so, whether it is a contract of employment*".

39. The EAT's error (see, in particular, paragraphs 105 [CB/9/157] and 109 [CB/9/159]) was to consider that wherever there is an inequality of bargaining power, and specifically in the employment sphere, written contracts are relegated from the starting point of the analysis to merely being part of an overall factual background, from which a Court or Tribunal may reach its own view as to the most appropriate characterisation of a relationship. There is no

warrant for that approach. Indeed, *Secret Hotels2* itself was a case of unequal bargaining power. The SC found in that case that the inequality of power between the parties in fact *explained* certain factors which might at first glance have appeared inconsistent with the relationship of agency expressed in the documentation. This conclusion demonstrates the importance of treating the written contracts as the starting point for determining the parties' intentions, unless there is evidence that demonstrates that their true intentions are inconsistent with the documentation.

40. Here, the EAT did not start from the written agreements, or identify evidence of true intentions which was inconsistent with them. Instead, it started by analysing various facts which were capable of being viewed as indicative of a relationship of employment (though they were not inconsistent with agency), then used those facts to justify a conclusion that the written contracts could be disregarded. That was a legally erroneous approach, which if upheld would: (1) have important consequences for the freedom of parties to regulate their relationships by written contracts; and (2) create legal uncertainty, since the circumstances in which the supposed special principle of construction should apply are unclear.

41. The legally flawed results of the ET's approach are apparent from the facts of this case. Riders who enter into the rider contract believe and intend that they have agreed that they will be contracting with individual drivers, through the agency of ULL. It is not suggested that these contracts, which do not engage any "*employment*" sphere, are to be subject to the *Autoclenz* principle as the EAT has interpreted it. And yet the effect of the EAT's decision is that these written agreements are also to be disregarded, and riders are to be treated as having entered into completely different contracts, of which there is no evidence, and the terms of which are entirely unclear. Such an approach runs contrary to basic principles of contract law, which seeks objectively to ascertain, and not to subvert, the intentions of the parties when they entered into an agreement.

42. The scope and extent of the EAT's approach is also unclear. No principle is identified to assist a tribunal in deciding whether a contract, which is claimed by a Respondent *not* to be an employment or worker contract, should be treated as engaging the special *Autoclenz* rule

as interpreted and applied by the EAT. The application of the principle appears to assume in the Claimant's favour the very matter (that the relationship is in the "*employment sphere*") that is the subject of the dispute between the parties, and which the burden is on the Claimant to prove.

(2) Error of law in relying on regulatory requirements as indicia of an employment relationship

43. The ET further erred in law in taking into account, as indicia of a relationship of employer and worker, a number of factors which were required of ULL as part of its regulatory obligations as the holder of Private Hire Vehicle Operator's Licence, pursuant to the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000 ("the Regulations"), and other legislation.

44. Examples include the following:

44.1. Paragraph 39 [CB/13/193]: The fact that the right to use the App was personal to the driver and not transferable (paragraph 39). This was required of ULL under Regulation 11.

44.2. Paragraph 92(1) [CB/13/210]: Uber's *"assertion of sole and absolute discretion to accept or decline bookings"*. This was required of ULL under section 2(1) of the Private Hire Vehicles (London) Act 1998.

44.3. Paragraph 40 [CB/13/193] and paragraph 92(2) [CB/13/210]: *"Uber interviews and recruits drivers"*, and required them to *"present themselves and their documents personally"*. As a licensed operator, ULL was legally obliged to ensure that drivers had all necessary documents, including a driver's licence, private hire licence, national insurance number, insurance certificate, vehicle licence and MOT: Regulation 13.

44.4. Paragraph 92(3) [CB/13/210]: *"Uber controls the key information (in particular, the passenger's surname, contact details and intended destination) and excludes the driver from it"*. ULL was required to obtain and keep this information pursuant to Regulation 11.

44.5. Paragraph 92(6) [CB/13/210]: *"the fact that UBV fixes the fare, and the driver cannot agree a higher sum with the passenger"*. This was required of ULL under Regulation 9(3).

44.6. Paragraph 92(12) [CB/13/210]: "*The fact that Uber handles complaints by passengers, including complaints about the driver*". This was required of ULL under Regulations 9(7) and 14.

45. The ET ought to have found that these factors were neutral, and could not assist in the proper characterisation of the contractual relationship between the parties. The regulatory regime was enacted in the context of a long-established recognition that private hire operators may employ drivers or merely act as their agents. Parliament did not intend to mandate or preclude either business model. In those circumstances, features of the parties' relationship derived from regulatory obligations could not weigh either for or against the characterisation of ULL as simply the agent of the drivers. They would by legal obligation have to be present in *any* arrangement between a private hire operator and drivers.

46. The intention behind the enactment of the regulatory regime was not to require drivers and operators to be in an employment relationship, of a type that had never previously been required. It was to address concerns of passenger safety. Indeed, the regulatory scheme[2] is predicated on the separate regulation of operators and drivers, with distinct and independent requirements applying directly to each of them. Where an operator breaches a requirement imposed on it, an offence is committed by it rather than the driver, and *vice versa*. Such a scheme would not have been necessary if Parliament had regarded individual drivers as being, necessarily, the employees of operators.

47. Further, the ET's reliance on these regulatory factors was inconsistent with its express statement (in paragraph 97 [CB/13/212]) that Uber *"could have devised a business model not involving them employing drivers"*. If that is the case (as it is), then the ET could not logically have held against Uber its compliance with minimum regulatory requirements imposed on all private hire operators.

[2] Both under the Private Hire Vehicles (London) Act 1998 (which governs private hire in London) and the Local Government (Miscellaneous Provisions) Act 1976 (which governs private hire outside of London).

48. For its part, the EAT erred in considering that regulatory obligations formed "*part of the factual matrix for the ET to assess*" (paragraph 112 [CB/9/161]). They could not form part of the relevant "*factual matrix*", because by definition they had to be complied with even if a driver was clearly self-employed and the private hire operator clearly acting only as his agent. Accordingly, weighing them in the scales as factors in favour of "*worker*" status would wrongly skew the resulting balance.

49. Further, the EAT erred, in paragraph 113 [CB/9/161], by: (1) adding to those scales, as factors in favour of "*worker*" status, elements of the purported "*factual matrix*" which the ET had found did not pertain at the time under consideration (i.e. a "*guaranteed earnings scheme*", which the ET found had been discontinued) or which the ET did not find to exist at all (i.e. a requirement on drivers to accept at least 80% of trips, discussed further below); while (2) disregarding facts consistent with the parties' own characterisation of the relationship in the documentation (including the factors described in paragraph 60 below).

(3) Errors of law and internally inconsistent and perverse findings of fact in concluding that the Claimants were required to work for Uber

50. The ET wrongly held at paragraph 92(4) [CB/13/210] that, when the App is switched on, Uber "*requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements*". The ET's statement at paragraph 92(4) was inconsistent with its finding at paragraph 86 [CB/13/207], that, in order to be regarded as working for Uber, the driver must *both* have the App switched on *and* (as a separate condition) be ready and willing to work. It was also inconsistent with the findings of fact which it had made, including at paragraphs 15, 48, 51 (to the extent that that paragraph found, correctly, that "*a driver is nominally free to accept or decline trips as he chooses*"), 52 and 53.

51. This finding was not based on any evidence capable of sustaining it.

52. Those paragraphs made it clear that drivers including the Claimants were not under any contractual obligation to take trips when logged in to the App. If Uber had had the power

under the contract to compel the Claimants to take trips when logged on to the App they would have had no reason to seek to persuade them to do so, as those paragraphs showed that they did.

53. The only action which the ET found could be taken by Uber when drivers repeatedly ignored trip requests (or repeatedly cancelled trips without good reason after they had been confirmed) was to log them off the system for a short period, on the basis that their behaviour was an indication that they were unavailable. Uber has an obvious interest in avoiding drivers remaining logged on to the App when unavailable, as its procedure involves waiting for a response in turn from each logged-on driver in the vicinity of a rider requesting a trip (paragraph 15 [CB/13/184]). The presence of logged in but unavailable drivers on the system will therefore cause undesirable delay in finding a driver for a prospective rider, and also be detrimental to other drivers who are available and seeking a rider.

54. A driver is free to ignore or refuse potential trips while logged on as often as he likes, but he will be aware that repeatedly doing so will result in Uber regarding him as unavailable and requiring him actively to log back on to the system a short while later. There is thus no "*obligation*" to accept trips, but simply an operational procedure that responds to a driver's apparent lack of interest in leads by a temporary removal of the lead-generation service provided to him by Uber. Uber has no contractual power to require the driver to carry out a booking. The ET did not find that a driver's failure to confirm any trip would be a breach of contract on his part, for which Uber could seek damages if riders went elsewhere. Any such interpretation of the relationship would be unsustainable.

55. Once again, the ET's approach to this issue reflected a failure to consider matters from the perspective of agency. Where an agent acts for multiple principals, seeking to put them in touch with paying customers, he will have an interest in his principals responding promptly during periods when they have indicated they are available for assignments. Where there is urgency in allocating assignments (as there is in the case of Uber's App), the agent will naturally not wish to waste time contacting those of his principals who are unresponsive.

Such an agent might well say to his principals: 'If you ignore three calls on a day that you have told me you are available, I won't try again but will instead email you to say that you will need to re-confirm your availability the next day'. It is not unknown for barristers' clerks to act in this way. The result would not be to oblige the principal to accept work, still less to convert a relationship of agency to one of employment.

The EAT's further error regarding a purported obligation to accept 80% of trips

56. The EAT compounded the ET's errors, set out above, by relying on a supposed factual finding that the ET did not in fact make, or rely on at paragraph 92(4) [CB/13/210]: *viz*. that "*there was a requirement for drivers to accept 80% of offers of work*" (EAT paragraph 89 [CB/9/150]) and that "*a driver's account status would be lost if there was a failure to accept at least 80% of trips*" (EAT paragraph 115 [CB/9/162]).

57. The EAT referred in this regard to the ET's paragraph 51 [CB/13/195]. However, that paragraph did not make a relevant finding of fact, instead merely noting that the ET had been shown a document to that effect. The ET was correct not to make such a finding of fact. Uber's witness had explained to it that the document in question was from a US website, and that no such policy had ever been applied in the UK. There was no evidence before the ET to the contrary. Accordingly, the ET did not purport to rely on any such finding in reaching its conclusion at paragraph 92(4) [CB/13/210]. As set out above, the ET relied only on the policy of logging off, for a short period, drivers who repeatedly refused trips. The Claimants on appeal did not seek to rely on the purported finding of a requirement on drivers to accept 80% of trips until they raised it in their oral submissions to the EAT. Their entitlement to do so was challenged by Uber, on the basis that it had not previously been raised. This was not disputed by the Claimants.

58. The points above were made at the EAT hearing, and repeated to the EAT after the draft Judgement was circulated [SB/4/181-184]. The Claimants, in their responsive comments to the EAT, conceded that the ET "*did not (expressly) purport to rely on the document mentioned in its paragraph 51 when reaching the conclusion in paragraph 92(4)*" [SB/35/185]. In fact, it did not rely on it at all.

59. If the Claimants had at any time prior to their oral submissions sought to contend there was such a finding, or reliance on such a finding, by the ET, Uber would have contended that any such finding, if it had been made, would have been perverse, and would have put the relevant evidence before the EAT. In these circumstances, the EAT's conclusion was both procedurally unfair and one which was not open to it, and the EAT erred in law in relying on it.

(4) Failure to take account of relevant considerations

60. The ET failed to take into account, in its analysis at paragraphs 85 – 97 [CB/13/207-212], further facts which were inconsistent with the existence of any relationship of employer and worker between ULL and the Claimants, but, rather, strongly indicated that the Claimants were carrying on a business undertaking on their own account. These included the following:

60.1. The Claimants paid a flat-rate service fee in respect of the use of the App, and otherwise retained all fares charged to riders (paragraphs 19 [CB/13/185] and 21 [CB/13/186]);

60.2. The Claimants chose and supplied their own vehicles, and were responsible for all costs incidental to owning and running the vehicles (paragraphs 43 - 45 [CB/13/194]);

60.3. The Claimants were responsible for funding their own private hire licences (paragraph 63 [CB/13/197]);

60.4. The Claimants were under no obligation to undertake any minimum number of trips in any given period (paragraph 43 [CB/13/194]);

60.5. The Claimants were free to work for or through other organisations, including direct competitors operating through digital platforms or traditional radio systems (paragraph 61 [CB/13/197]). They were free to do this even when logged on to the App. A driver could accordingly be logged on to a number of delivery or private hire apps simultaneously, including the App, and take trips at will from amongst them, as he chose;

60.6. The Claimants treated themselves as self-employed for tax purposes (paragraph 65 [CB/13/197]);

60.7. The Claimants were not provided with any uniform, and were discouraged from displaying Uber branding (paragraph 66 [CB/13/197]).

61. As well as being supportive of a conclusion that the written contracts indeed reflected reality, those findings of fact were inconsistent with the ET's conclusion at paragraph 92(11) [CB/13/197] that Uber "*accepted the risk of loss which if the drivers were genuinely in business on their own account would fall on them*". On the ET's own findings, the drivers accepted the economic risk of loss, albeit that Uber was prepared to assist in certain marginal cases involving rider fraud or vehicle soiling (then seek to recover all or part of such sums from riders). Moreover, drivers were in a position to take steps to manage their own costs of doing business, e.g. by deciding which type of car to use, whether and how to buy or rent it, etc.

62. Further, those findings of fact were of broader relevance to various of the ET's other findings, on which it relied.

62.1. They were relevant to the ET's consideration of whether transportation services are provided by Uber or by individual drivers (paragraph 89 [CB/13/208]). The ET rejected out of hand the proposition that individual drivers provide transportation services, without making any reference to the fact that the cars are selected, owned or rented, maintained, and fuelled by the drivers rather than Uber.

62.2. They were relevant to the ET's consideration of whether "*a man with a car seeking to make a living by driving it*" can be said to be in business on his own account (paragraph 90 [CB/13/209]).

62.3. The lack of any obligation for a driver to log on at any particular time, or at all, is a factor pointing towards self-employed status, which the ET should have taken into account (see e.g. *Secretary of State for Justice v Windle and Arada* [2016] IRLR 628, per Underhill LJ at [23] – [24]).

62.4. They were relevant to the ET's consideration of whether the facts of the present case could be distinguished from *Mingeley* and *Khan*. In truth, when those facts are taken into account, it is apparent that drivers using the Uber App are in several respects more independent than the drivers in those cases. For example, in *Mingeley* the driver was required to wear a uniform, and was not permitted to work for any other operator. Indeed, traditional minicab firms typically require drivers to 'rent' radio equipment for a fixed weekly or monthly fee, and frequently allocate them 'shifts': features which are not part of Uber's more flexible relationship with drivers.

63. The EAT failed to deal with Uber's submissions on the points above at all.

(5) Error of law in applying the extended definition of employment

64. The ET further erred in law at paragraph 99 [CB/13/213] in concluding (*obiter*) that if the drivers were supplied by UBV to work for ULL, claims would lie against UBV by virtue of section 34 NMWA, regulation 36(1) WTR and section 43K(1) ERA. That conclusion was based on the erroneous finding that there was no contract between the Claimants and riders. For the reasons set out above, on a proper interpretation of the written agreements in the light of the facts as found, there was such an agreement, under which the rider was a customer of the Claimants. The EAT declined to address this point in its judgment (see EAT paragraph 4 [CB/9/120]).

C. When are drivers working at Uber's disposal?

65. The ET erred in law at paragraph 122 [CB/13/219] in concluding that a driver is working at Uber's disposal and carrying out his activity or duties for the purposes of regulation 2(1) WTR when he is within his territory, has the App switched on, and is "*ready and willing to accept assignments*" (whether or not he is actually on a confirmed trip).

66. As set out above, when actually on a trip, the Claimants were providing services to the rider, rather than to or "*for*" Uber. They were not otherwise providing services to anybody.

67. In the alternative, to the extent that it is found that a driver does provide services to Uber as

a worker, he could only be doing so while he is actually on a trip.

68. The Claimants were at liberty to decide when and whether to log on; and to take on or refuse work as they chose while logged on. They were at liberty to cancel trips already confirmed; and they were at liberty to undertake other work, including work for or through the apps of competitors of Uber, while they were logged on to the Uber App. In those circumstances, they were not at Uber's disposal, or working for Uber except (at the most, and if Uber's primary arguments above are rejected) while actually driving a confirmed trip.

69. This reflects the legal requirement that there must be a minimum mutuality of obligation in order to establish a contract at all (whether as a worker or an independent contractor). Without *"an irreducible minimum of obligation"* there is simply no contract: see e.g. Elias LJ in *Stringfellow* at [10] - [14]. In the present case, there is no such obligation simply by virtue of a driver indicating that he is available to confirm trips.

70. The absurd result of the ET's finding was that Uber drivers would be entitled to be paid the minimum wage while logged on to the Uber App and able and willing to work, even if they were also logged on to the competing apps of other operators. On this logic, drivers might be entitled to claim the minimum wage from two or more app operators in respect of the same period of time.

71. The EAT confessed that this was a "*difficult*" question (paragraphs 119 [CB/9/164] and 124 [CB/9/166]), which had "*troubled*" it (paragraph 120 [CB/9/164]). In order to resolve it, the EAT was forced to rely on the purported factual finding that drivers were required to accept at least 80% of trips (paragraphs 121 [CB/9/164] and 124 [CB/9/166]). For the reasons set out above, there was no such finding and, if there had been, it would have been perverse. Alternatively, the EAT suggested that the ET had in fact found that simply being logged on to the App involved an obligation to accept trips (paragraph 124 [CB/9/166]). This was not a sustainable basis to uphold the ET's conclusion, since it would render redundant the ET's dual requirement for the Claimants' working time, *viz*. that they are both logged on and "*able and willing*" to accept trips. These were clearly stated to be separate conditions. In truth, the concept of a worker being at his employer's disposal only as and when he is

subjectively "*able and willing*" to work is self-defeating. Where a supposed obligation is entirely conditional on the supposed obligor's willingness to fulfil it, it is no obligation at all.

D. "Unmeasured work"

72. The ET erred in law at paragraphs 125 - 128 [CB/13/220-221] in concluding that the Claimants were engaged in "*unmeasured work*" for the purposes of regulation 30 NMWR, and that the relevant hours were the hours spent by the Claimants within their territory with the App switched on.

73. This analysis was wrong for the reasons set out above.

E. Disposal of the appeal

74. For all the reasons set out above, the only legally proper conclusion on the facts found by the ET was that the Claimants were not employed as workers by Uber. Uber accordingly invites the Court to set aside of the ET's Judgment, and to substitute an order dismissing all the claims, on the basis that the Claimants are not workers employed by Uber within the meaning of the relevant legislation.

75. Alternatively, Uber seeks remittal for a rehearing to a differently-constituted tribunal. Given the strong, adverse and erroneous views expressed by the ET about the status of Uber's contracts and the nature of its witness evidence, remittal to the same Tribunal would be inappropriate.

DINAH ROSE QC
FRASER CAMPBELL
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Blackstone Chambers
Temple, London EC4Y 9BW
clerks@blackstonechambers.com