EMPLOYMENT TRIBUNALS

Claimant: Brian Parker & Ors
Respondent: BCA Logistics Ltd
Heard at: Birmingham
On: 30, 31, January and 1, 2, 3 February 2023
Before: Employment Judge Meichen (sitting alone)
Appearances
For the claimants: Ms K Monaghan KC, barrister
For the respondent: Mr C Jeans KC and Ms S Belgrove, barristers

JUDGMENT

The claimants were "workers" for the purposes of section 230(3)(b) Employment Rights Act 1996, regulation 2(1) Working Time Regulations 1998 and section 54(3)(b) National Minimum Wage Act 1998.

REASONS

Introduction and the issue

1. There were 422 claimants in these proceedings at the time of this preliminary hearing. More have subsequently been added. The claimants are or were engaged by the respondent as drivers to undertake vehicle collection, inspection, delivery, and transport services. They have brought claims that their wages have been subject to a series of unauthorised deductions contrary to s. 13 Employment Rights Act 1996 ("ERA"), that the respondent has failed to afford them annual leave contrary to reg. 13, 13A, 14 and/or 16, Working Time Regulations 1998 ("WTR") and that they have not been paid the National Minimum Wage contrary to s. 1 National Minimum Wage Act 1998 ("NMWA") and the National Minimum Wage Regulations 2015 ("NMWR").

2. These claims depend upon the claimants being "workers" within the meaning of the relevant statutory provisions. Accordingly, this Preliminary Hearing was listed by me to determine the following issue: Were the claimants' "workers" for the purposes of section 230(3)(b), ERA, regulation 2(1), WTR and section 54(3)(b) NMWA?

3. The WTR and NMWA define worker in the same terms as the ERA. Most of the authorities I was referred to focus on the ERA and so I will do that too.

4. The claims are being managed together under Rule 36, Employment Tribunal Rules of Procedure ("Rules"). Pursuant to Rule 36, lead cases have been

selected for the purposes of determining the preliminary issue. Those agreed lead cases are the claims of Ian Williams (claim no. 3312382/2021) and Tristram Moulton (claim no. 3312362/2021). Mr. Williams has been engaged by the respondent as a driver since August 2020 and he remains engaged by them as a driver. Mr. Moulton was engaged by the respondent as a driver between November 2019 and April 2021.

5. While all employees are workers, not all workers are employees. For the purposes of these proceedings, it is not necessary for the claimants to establish that they were employees of the respondent. The claimants do not concede that they were not employees, and I am not determining whether they were or not.

This hearing and the evidence

6. This was an in person hearing over 5 days. The first day was a reading day. The evidence concluded in the morning on the final day. Submissions were then heard in the afternoon and were not finished until 4.30 pm. Judgment was reserved (the parties had requested a reserved judgment in any event).

7. The documentation provided to the tribunal for this preliminary hearing included:

   7.1 Opening skeleton arguments from both sides.
   7.2 An authorities bundle with 25 authorities in it.
   7.3 A main bundle with 4974 pages.
   7.4 A core bundle with 1909 pages[1].
   7.5 Written closing submissions from both sides.

8. In addition, there were 7 witness statements. The lead claimants both provided witness statements and gave oral evidence. They also provided witness statements from two additional witnesses. These were George Kitchen and David Graham. Mr Graham was engaged by the respondent as a driver between September 2015 and September 2022. Mr Kitchen was engaged by the respondent as a driver between January 2021 and April 2021. Mr Graham gave oral evidence, but Mr Kitchen did not. The reasons why Mr Kitchen did not give oral evidence were that he was in Nicaragua, and it was not possible to arrange permission for him to give evidence from there. Mr Kitchen had through oversight booked a trip to Nicaragua without realising it was on the dates of the tribunal hearing. He explained this and offered his apologies in an email to the tribunal. Mr Kitchen emphasised that he would have been willing to give evidence remotely. However, because his oversight only came to light at a late stage it was not possible for the necessary permission to be obtained in the time available and this meant he could not give oral evidence.

9. I had to decide what to do about Mr Kitchen's statement at the start of the hearing. There was insufficient time for alternatives such as written questions to be explored and neither party suggested the hearing should be postponed. The claimants said his statement should be admitted into evidence but the weight to be attached to the statement should be a matter for the tribunal taking account

[1] Neither party made much use of the core bundle. Therefore when I refer to page numbers in this judgment, which I will do using [ ], this refers to pages in the main bundle.

of the fact that the witness was not available to give evidence. The respondent said I should exercise my discretion not to admit his statement into evidence.

10. I will explain more about this in my findings but at this juncture it is relevant to note that the key part of Mr Kitchen's evidence concerned an email request he made to appoint a substitute which was not responded to favourably by the respondent. There was a similar email request by another claimant – Andrew Allison – which also did not receive a favourable response. However, Mr Allison did not provide a statement to the tribunal. Both of these requests and the responses provided could be seen in email chains in the bundle. The respondent's position on the requests was that they were, as described by Mr Jeans, a "set up" because they were deliberately sent to the wrong place and so the senders knew they would not get a favourable response. This was explained in the respondent's witness statements. The respondent's main concern was about Mr Kitchen's statement being admitted whilst they were deprived of the opportunity to test this part of his evidence via cross examination.

11. I decided to admit Mr Kitchen's statement into evidence, but I made it clear that the weight to be attached to the statement should be a matter for the tribunal taking into account the fact that the witness was not available to give evidence, and the parties would be entitled to make submissions as to this. I considered that this approach was most consistent with the overriding objective. I did not consider that this prejudiced the respondent as the issue was already in the evidence through the documents and the respondent was plainly in a position to deal with it as they had addressed it in their statements.

12. The respondent provided witness statements from three witnesses: Craig Slammon, Mark Dugmore and Hafeez Khan. All of these witnesses are currently employed by the respondent. Mr Slammon is the Driver Operations Team Leader, Mr Dugmore is the Head of Operations and End of Contract and Mr Khan is the Team Leader Driver Planning. Mr Khan was formerly engaged by the respondent as a driver between September 2017 and March 2018.

13. The lead claimants gave detailed evidence about the working arrangements and practices of the drivers. Their evidence was supported in some specific respects by the other witness evidence relied upon by the claimants. I found that the claimants' evidence was also consistent in some key respects with the contemporaneous documentation.

14. In contrast, a striking gap in the respondent's witness evidence is that they did not call any witnesses who are currently engaged by the respondent as a driver or any witnesses who have recently been engaged by the respondent as a driver. Mr Khan had only been a driver for a period of about 6 months about 5 years ago. Mr Dugmore was the lead witness for the respondent.

15. Overall, I found the claimants' evidence to be more cogent and credible than the respondent's on the crucial issue of how the drivers operated in practice. I found that some features of the respondent's case were not supported by the documentary evidence and did not match my perception of the realities of the

situation. I will give examples of this in my findings below. Furthermore, I had some concerns about the reliability of the respondent's lead witness Mr Dugmore's evidence. I will give examples of this below aswell. For these reasons I generally found it harder to accept the respondent's case than the claimants'.

16. I should note that Mr. Dugmore gave evidence in his witness statement (paragraph 200 – 202) about difficulties the respondent had faced in obtaining witness evidence from drivers. He suggested that a number of drivers are supportive of the respondent because they *"do not want their "status" to be interfered with".* According to Mr. Dugmore however when those drivers were approached to give evidence they declined because they were scared as the claimants had been aggressive in seeking support for their cause and abusive towards those who did not want to join it. He said the drivers were *"fearful of the backlash"* if they were to give evidence and they had therefore refused. Mr. Dugmore did not give any specifics as to who was involved in this or what had happened. Ms. Monaghan pointed out, in my view quite fairly, that the claimants could not test this evidence in view of the lack of specifics. Mr. Jeans did not put what was suggested to any of the witnesses and he did not seek to rely on what Mr. Dugmore had suggested in his submissions. For these reasons I did not attach much weight to this aspect of Mr. Dugmore's evidence.

17. An issue arose during the hearing regarding disclosure. The background is that the respondent records calls with drivers and a number of transcripts of calls were disclosed and were in the bundle. I was not provided with all of the correspondence, but the parties were communicating with one another about this aspect of the disclosure exercise. The claimants were informed (and this was demonstrated by an email which is in the bundle at [4893]) that the respondent does not record outbound calls and therefore no outbound calls had been disclosed. Mr. Jeans repeated the point about outbound calls not being recorded during the hearing.

18. However, Mr. Jeans later disclosed a new document and applied to add it to the bundle. This was a transcript of a recording of a call between a driver, Samantha Kinsey, and a Driver Operations Team Leader, Owen Goulding. The call took place on 30 January (i.e. the first day of this hearing) and the potential relevance was that it was said to show a substitution query being responded to favourably by the respondent. But the transcript indicated quite clearly that the call was an outgoing one.

19. Mr. Jeans had to take further instructions. He then clarified that it was incorrect to say that outgoing calls were not recorded. In fact, the respondent records all calls between the drivers and "driver facing teams". He apologised on the respondent's behalf for the misinformation. I should mention that there was no suggestion that Mr. Jeans had done anything other than act in accordance with his instructions at all times.

20. This issue affected another part of the evidence as well. At paragraph 28 of his witness statement Mr. Graham reported an incident in a call on 26 September 2022 where he alleges that he was told that if he refused to deliver a car, he would not be given work for 4 or 5 days afterwards. That call was also an

outgoing one. The respondent's position was that the call did not take place as Mr. Graham alleged. Consistent with the respondent's earlier position no recording had been disclosed of the call as it was an outgoing one. During the hearing however Mr. Jeans clarified that in fact a call to Mr. Graham had been recorded on 26 September and he said it did not show what Mr. Graham had alleged. However, no recording or transcript of that call was disclosed. Mr. Jeans explained that the respondent's position was that all relevant calls had been disclosed, notwithstanding the error in stating that outgoing calls were not recorded.

21. The claimants were unhappy about these developments. They complained that they had been misled over what calls were recorded and were concerned that potentially relevant calls had not been disclosed because of the mistaken belief that outgoing calls were not recorded. The situation with Mr. Graham was an example of that. They pointed out that the respondent only changed its position on what calls were recorded when they wanted to rely on an outgoing call because they believed it helped them. The claimants suggested that there must be other outgoing calls which were relevant but had been missed because of the mistaken belief that outgoing calls were not recorded. The claimants considered they were entitled to disclosure of other outgoing calls, which may help them.

22. After taking time for instructions Ms. Monaghan said the claimants did not wish to apply for the hearing to be adjourned to allow further disclosure to take place. However, she said that I should exercise my discretion to refuse to admit the transcript of the call with Samantha Kinsey and that she would invite me to draw an adverse inference against the respondent because of what she described as concealment and a failure to disclose. Ms. Monaghan also made it clear that she would be inviting me to draw a specific adverse inference against Mr. Dugmore as he had been present when Mr. Jeans incorrectly stated that outgoing calls were not recorded yet he had not taken any steps to correct the misinformation. She reserved the claimants' position on costs.

23. Mr. Jeans' riposte was that matters were being blown out of proportion. An erroneous statement had been made but there was no problem of substance. Excluding the transcript of the call with Samantha Kinsey would be unwarranted and Mr. Dugmore should not be exposed to cross examination about an immaterial mistake. Mr. Jeans also took the time to provide an account of what had happened during the hearing with his misstatement being corrected. This involved instructions being given to his junior, Ms. Belgrove. I am satisfied from this that that both counsel for the respondent acted entirely properly at all times.

24. I took some time to think and gave a short oral decision. The respondent's approach had clearly been unsatisfactory. The claimants and the tribunal had been misinformed. I could understand why the claimants were concerned that potentially relevant calls may not have been disclosed. Furthermore, more care should have been taken to ensure that what took place in the call with Mr. Graham on 26 September was disclosed and in the evidence. However I considered that the approach which was most consistent with the overriding objective was to admit the transcript of the call with Samantha Kinsey into evidence. On the face of it that evidence was relevant and had been disclosed

promptly. I considered that I should not act punitively by refusing to admit relevant evidence because of an earlier disclosure error. The new evidence in fact related to an existing issue. The issue was that the respondent relied on a few recent examples where they said a substitution request had been made and responded to favourably. The claimants' position on that was already clear – they said the responses to the requests were suspicious and not genuine especially as they had come so close to the hearing. Ms. Monaghan was ready to deal with that issue and so I did not consider there was any prejudice to the claimants in admitting the new evidence relating to Samantha Kinsey. I therefore decided to add the transcript of the call with Samantha Kinsey to the bundle.

25. When I made my decision, I also made it clear that the claimants were permitted to invite me to draw adverse inferences about what had taken place and they could ask relevant questions about that and make submissions. Equally I also made it clear that the respondent would be entitled to respond to whatever accusations might be made. Both parties did that and I have considered the points made. On balance I do not draw an adverse inference against Mr. Dugmore personally in respect of his failure to correct Mr. Jeans or the respondent generally on the basis of concealment. The reason for that is that the evidence presented at this hearing does not clearly establish either that there has been deliberate concealment or that Mr. Dugmore was personally at fault. I remain however of the view that the respondent's approach to this aspect of the evidence was unsatisfactory for the reasons I have explained. This is particularly the case in relation to the call with Mr. Graham and, as I will explain, this has impacted how I assessed that specific part of the evidence.

The law

Introduction

26. Section 230(3) ERA defines a 'worker' in two ways: "limb a" and "limb b". A limb a worker is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. A limb b worker is an individual who has entered into or works under (or, where the employment has ceased, worked under) any other contract, whether express or implied and (if 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.

27. As I have already mentioned the claimants do not assert for the purpose of this litigation that they worked under a contract of employment. I do not therefore need to consider whether they are a limb a worker. The issue is whether the claimants are limb b workers. Breaking the statutory definition down, the following factors are necessary for an individual to fall within the definition of limb b worker:

    37.1 there must be a contract,

37.2 that contract must provide for the individual to carry out personal services, and

37.3 those services must be for the benefit of another party to the contract who must not by virtue of the contract be a client or customer of the individual's profession or business undertaking.

38 It can therefore be seen that a limb (b) worker is defined in the legislation and Lady Hale said in Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening) 2014 ICR 730 that *"there can be no substitute for applying the words of the statute to the facts of the individual case"*. Lady Hale drew a distinction between self-employed 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 (who are neither workers nor employees), and self-employed people who provide their services as part of a profession or business undertaking carried on by someone else (who are limb (b) workers under the ERA).

39 The policy behind including limb (b) workers within the scope of the statutory provisions relating to national minimum wage and working time has been described as follows, it: *"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."* (Byrne Bros (Formwork) Ltd v Baird and others [2002] ICR 667, paragraph 17(4), cited in Uber BV and Ors v Aslam and Ors [2021] ICR 657, paragraph 71).

The significance of the written contract

40 It is agreed that there was a written contract between the parties. An important part of the claimants' case is that the respondent has deliberately used written contractual terms which do not reflect reality but, if taken at face value, would be incompatible with worker status. The claimants argue that these terms are caught by the contracting out provisions in the legislation (s.203(1), ERA, s.49(1), NMWA and reg. 35(1), WTR). In other words, they are terms which seek to exclude or limit the claimants' statutory protections by preventing the contract from being interpreted as a worker's contract. As such it is said they are of no effect and must be disregarded.

41 This type of scenario was considered in Autoclenz Ltd v Belcher and ors 2011 ICR 115. Lord Clarke considered that the question in every case is *'what was the true agreement between the parties?'*. He held that, in cases with an employment context, *'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'.*

42 Lord Clarke supported the approach set out by Mr Justice Elias, then President of the EAT, in Consistent Group Ltd v Kalwak and ors 2007 IRLR 560. In particular he emphasised the following three points from Elias P's judgment:

42.1 The first was a warning that *'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'.*

42.2 The second put across his view that '*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'.*

42.3 The third contained guidance that '*tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance'.*

43 The scope of Autoclenz was considered further in Uber BV and ors v Aslam and ors 2021 ICR 657. In Uber the Supreme Court dismissed Uber's appeal against an employment tribunal's decision that Uber drivers are limb b workers. The tribunal relied on Autoclenz to look beyond the written documentation that purported to show that the drivers were independent contractors. The Supreme Court pointed out that determining whether a contract is a 'worker' contract is not to be determined by applying ordinary principles of contract law. The rights asserted by the claimants were not contractual rights but were created by legislation. The task for the tribunal was primarily one of statutory interpretation, not contractual interpretation. That interpretation should give effect to the purpose of the legislation, which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work.

44 The focus should therefore be on the practical reality of the working relationship. The key question should be whether the relationship is one of subordination and dependence, having regard to the legislative purpose of protecting those who have little or no influence on the terms under which they work. As it was put in Uber: "… *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."

45 The EAT's judgment in Ter-Berg and ors v Simply Smile Manor House Ltd [2023] EAT 2 was delivered during this hearing. Mr Jeans placed some reliance on it in his closing submissions. In particular he drew my attention to paragraph 66 of the judgment where HHJ Auerbach said that the stated intention in the contract to create a self-employed relationship is relevant and can be "decisive" where the position might otherwise be uncertain. Ms Monaghan suggested that caution should be exercised here because HHJ Auerbach had referred to some Court of Appeal authorities and appeared to place more weight on the written contract than had been suggested in the leading Supreme Court authorities of Uber and Autoclenz.

46 In Simply Smile HHJ Auerbach considered that the Supreme Court's decision in Uber did not intend to state an absolute principle that any and every provision in a contract seeking to exclude an employment relationship must as matter of law be regarded as irrelevant. Following Autoclenz such a clause should be given no weight if the tribunal concludes that it is not a true statement of the parties' intentions because it has the object and purpose of thwarting the statutory regime, but that is not the same as saying that the clause is irrelevant in every case. So, HHJ Auerbach said at paragraph 67 of his judgment:

"… if an agreement has all the factual features that make it in law a contract of employment, then a clause denying that will be ineffective. But in a scenario where the parties could properly have chosen to form a non-employment relationship, and there are factual features that may be said to point both ways, then a clause of that sort should not automatically be regarded as of no weight at all, in the tribunal's evaluation of the overall picture.".

Personal performance and substitution clauses

47 To be a limb (b) worker an individual must undertake 'to do or perform personally any work or services for another party to the contract'. Determining whether a contract includes an obligation of personal performance is a matter of construction. It is not necessarily dependent on what happens in practice. It does not necessarily follow from the fact that work is done personally that there is an undertaking that it be done personally.

48 Since an undertaking to personally perform work or services is fundamental to limb (b) worker status, a 'substitution clause' - i.e. a clause that allows the work to be done by someone who is not a party to the contract - may mean that the contract did not include an obligation of personal performance. Accordingly, substitution clauses have meant that claimants have been found not to be limb b workers in a number of important recent cases. For example in Stojsavljevic and anor v DPD Group UK Ltd EAT 0118/20 the claimants were contractually entitled to engage a substitute driver of their choice. Although this was subject to the requirements that the driver held a valid driving licence and was trained in DPD's standards, procedures and techniques, this did not amount to a fetter on the right of substitution. The right of the claimants to substitute personal performance for a substitute driver of their choice was inconsistent with limb (b) worker status, even though the substitute had to meet certain conditions.

49 However, the mere presence of a substitution clause in the written contractual documentation is not necessarily determinative. A tribunal may conclude that the substitution clause does not reflect the reality of the working relationship. This is clear from Autoclenz, Kalwak and Uber. The presence of a substitution clause in the written contractual documentation is unlikely to prevent a finding of worker status if there is no evidence of such a clause being operated or intended to operate in practice. This is because in those circumstances the purported substitution clause is unlikely to form part of the true agreement.

50 Mr Jeans emphasised in his submissions, and I accept, that whether there is an obligation to do the work personally depends on the terms of the contract, not on whether or how often any substitution right is exercised. This was confirmed in Autoclenz, in particular at paragraphs 19 and 20 of the judgment: *"…If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement… The essential question in each case is what were the terms of the agreement".*

51 It is also notable that at paragraph 31 of the judgment in Autoclenz Lord Clarke quoted this approvingly from the Court of Appeal judgment in the same case: *"the true position, consistent with Tanton, Kalwak and Szilagyi, is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right . . ."*.

52 The Court of Appeal made a similar point in R(CAC) v IWGB IP Deliveroo [2022] ICR 8430. In that case the right of substitution of the Deliveroo riders defeated the claim to worker status, even though most riders did not use substitutes at all *("a few, if that"*) and substitution was *"rare".* Underhill LJ giving the leading judgment stated at para 78: *"We are, necessarily, concerned with legal relationships and any test other than what the parties' (genuine) rights and obligations are would be unacceptably uncertain. It cannot be the case that whether riders working on identical terms fall to be treated as workers depends on how often they choose to take advantage of the right to do the work through substitutes."*

53 Therefore as the EAT has recently confirmed in Simply Smile it is *"established law that whether a given clause has implications for the individual's status will not be affected by whether or with what frequency it has been exercised".* Further, Uber does not *"displace or materially modify"* the Autoclenz approach and should not be read as reformulating it. The *"quest"* is still to *"ascertain what was in truth and reality truly agreed by the parties".*

54 The cases also show that some substitution clauses are compatible with an obligation of personal performance. This occurs where the right to substitute was "fettered". In other words, that it was limited in some way. For example, in Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667 carpenters were able to use substitute labour where they were unable to provide the services themselves, subject to the express approval of the contractor. The EAT held that the carpenters were workers because they were obliged to provide the carpentry services personally and did not run their own individual business undertakings. The EAT considered that the power to delegate under the contract was exceptional and limited: when the carpenters were unable to work, they could provide an alternative worker but only with the express approval of the contractor.

55 Similarly, in Pimlico Plumbers v Smith [2018] ICR 1511 the Supreme Court said that the employment tribunal had been entitled to find that there was a limited right of substitution that was not inconsistent with an obligation to perform services personally. The substitute had to be another operative of the respondent – i.e. somebody who was already bound by an identical suite of heavy obligations. This was the converse of a situation in which the employer is genuinely uninterested in the identity of the substitute, provided only that the work gets done.

56 An express or implied requirement that the substitute is suitably qualified even if accompanied with a procedure for establishing the substitute's qualifications does not amount to a fetter. This is clear from the authoritative statement about personal service and substitution which Sir Terence Etherton MR gave in Pimlico Plumbers at the Court of Appeal stage ([2017] ICR 657). He said:

"In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the

nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

57 The Court of Appeal clarified the status of the above guidance in Stuart Delivery Ltd v Augustine 2022 IRLR 56. It is a summary of the principles to be drawn from existing case law and not a rigid classification or strict rules as to what does or does not amount to personal performance.

58 Ms Monaghan referred to the fact that in Pimlico Plumbers the Supreme Court held that it was helpful to assess the significance of the claimant's right of substitution by reference to whether the "dominant feature" of the contract remained personal performance. The requirement for personal service can still be met where the dominant feature of the contract remains personal service. However in Pimlico Plumbers there was no express right of substitution at all but plumbers were in practice allowed the "limited facility" to swap engagements between each other. The Supreme Court stressed that the dominant feature question did not supplant the statutory test. Therefore, and as Mr Jeans in my view correctly submitted, an unfettered right to substitution is not "trumped" if personal performance is a dominant feature of the contract. The principle remains that an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally.

59 During the hearing I asked about the risks which appeared to be significant if a substitute were to be appointed by the claimants. On that point Mr Jeans drew my attention to the Deliveroo litigation. The CAC ([2018] IRLR 84) made extensive observations about the risks Deliveroo were taking in allowing substitutes, which the CAC said included the risk of prosecution. The CAC nevertheless concluded that the "almost unfettered" right of substitution was genuine because it was accepted that the company had decided to take the risks. Simler J in the Administrative Court ([2018] IRLR 911) approved the CAC's approach.

Client or customer exception

60 If a person provides services or performs work for somebody who is a customer or client of his or her business or profession, he or she is not a limb b worker.

61 In Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, the EAT explained that drawing this distinction in any particular case will involve all or most of the same considerations as when distinguishing between a contract of employment and a contract for services but with the boundary pushed further in the putative worker's favour. The basic effect of limb (b) is to "lower the pass

mark", so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless reach that necessary to qualify for protection as workers. Factors to consider could include 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 supplied and the level of risk undertaken. Factors such as the individual having business accounts prepared and submitted to HM Revenue and Customs, being free to work for others, being paid at a rate that includes an overheads allowance and not being paid when not working, can all be relied on to support the view that he or she is running a business and that the person for whom the work is performed is a customer of that business.

62 The EAT has recently emphasised (in Johnson v Transopco UK Ltd [2022] EAT 6) that businesses often have to deliver a service to specifications set by the client or customer. This was not, said the EAT, consistent only with worker status; it was equally consistent with a business-client/customer relationship. HHJ Auerbach said at paragraph 93 of the judgment: *"The terms on which independent sub-contractors do work may often be wholly determined by the client. Any business has an interest in protecting its brand, and the adverse effects which a poor customer experience delivered by the provider may have on it".*

Possible umbrella contract

63 It was submitted on the claimant's behalf that they performed their services under what is called an "umbrella" or "overarching" contract - in other words, a contract where they undertook a continuing obligation to work. It is said that they are in consequence working, for the purposes of their legal entitlements, during the periods when they are subject to that obligation. However even if the claimants are entirely free to work or not, and they owe no contractual obligation to the respondent when not working that does not preclude a finding that they are workers, at the times when they are working. This is explained in Uber at paragraph 90 and 91 of the judgment. In Pimlico Plumbers the Supreme Court found that the tribunal had been entitled to find that there was an umbrella contract between the claimant and the respondent.

64 In Nursing and Midwifery Council v Somerville 2022 ICR 755 the claimant was a fee-paid panel member on the respondent's Fitness to Practise Committee. The respondent was not obliged to offer the claimant a minimum amount of sitting dates and he was free to withdraw from dates he had accepted. An employment tribunal found that the claimant was a limb b worker because there was a series of individual contracts that arose each time that he agreed to sit on a hearing and also an overarching contract in relation to the provision of his services. The Court of Appeal observed that the services agreement which governed the claimant's appointment stopped short of requiring the claimant to do or perform personally any work or services. However, each time the respondent offered a hearing date and the claimant accepted it, an individual contract arose where the claimant agreed to attend the hearing and the respondent agreed to pay a fee. Under each individual contract, the claimant had agreed to provide his services personally, and the respondent was not the client or customer of a profession or business carried on by the clamant. The fact that the claimant could withdraw from the

agreement to attend a hearing even after he had accepted did not alter his worker status. The claimant had entered into a contract to provide personal services, which existed until terminated. Furthermore, the fact that the parties were not obliged to offer, or accept, any future work was irrelevant.

65 Following Autoclenz and Uber the tribunal should disregard written terms which do not reflect the reality of the working relationship. This includes clauses which state that there is no obligation to provide work and no obligation to accept it. This is demonstrated by Addison Lee Ltd v Lange and ors 2019 ICR 637. In that case an employment tribunal accepted the claimants' argument that there was an overarching agreement providing for mutual obligations to offer and perform work, despite the contrary provision in the contract. The tribunal found that the drivers had a realistic expectation of being offered work when they logged on to the app in that case. It also ruled that, if it were wrong on the overarching agreement, the drivers were workers at least during the time that they were logged on. This was because when they logged on, they were undertaking to accept driving jobs allocated to them and perform services personally. These findings contradicted the contractual documents but the tribunal disregarded those documents on the basis that they did not reflect reality. The EAT upheld the tribunal's conclusion that the drivers were workers. It found the tribunal had appropriately applied Autoclenz by adopting a 'realistic and worldly-wise' approach. The tribunal was entitled to come to its view that the contractual provisions did not properly reflect the true agreement between the parties.

Findings

The respondent

66 The respondent provides services within the car retail industry. Amongst other activities, the respondent arranges the inspection of cars and their delivery to and from locations specified by the respondent's customers. Delivery is achieved by driving the car to its destination. Some of the vehicles inspected and delivered by the respondent are high value and the respondent works with some premium brands, like Mercedes. The respondent's customers include manufacturers, vehicle leasing companies, car dealerships and trade buyers.

67 The respondent has Service Level Agreements ("SLAs") with its customers. The service to be provided by the respondent's drivers is defined by the specifications of the respondent's customers. The respondent and its customers expect that service to be delivered in accordance with the SLAs.

68 The respondent is clearly very concerned to ensure that all its drivers perform their activities in compliance with their customers' expectations and requirements as set out in the SLAs. The respondent's customers' requirements are stringently set out in the SLAs. An obvious example of this is the timescales for vehicles to be delivered from one place to another. By the terms of its SLAs with its customers the respondent faces a penalty if vehicles are not delivered within a certain timeframe [544].

69 As Mr Dugmore explained in his witness statement an SLA, amongst other things, can require the respondent to:

69.1 Ensure the collection / delivery of a vehicle on a specific day and within a specific time frame;
69.2 Provide and maintain records of proof of collection / delivery of the respondent's customers' vehicles;
69.3 Ensure the movement of the vehicle does not incur any unreasonable excess mileage to the vehicle;
69.4 Ensure that customers are notified in advance (within certain time frames) of vehicle collections / deliveries;
69.5 Request a driver is smartly dressed and does not smoke, eat or drink in a customer's vehicle;
69.6 Request a driver carry a form of identification; and
69.7 Ensure drivers are contactable by the respondent, the respondent's customer or the customer of the customer.

70 The respondent arranges for some of the inspections and deliveries to be carried out by a team of employed drivers. The respondent also engages what it describes as "self-employed contractors" or "self-employed drivers" to do some of the inspections and deliveries. The claimants all come from this group. I will refer to them as self-employed drivers in this judgment, but ultimately I have to determine whether they were in fact workers.

71 In his statement Mr Dugmore explained that the respondent describes the employed drivers as the "Employed Model" and the self-employed drivers as the "Self Employed Model". At the time of his statement the respondent employed 907 drivers and it engaged 1204 self-employed drivers. At the time of the initial response to these claims the respondent employed 664 drivers and it engaged 1566 self-employed drivers [252]. Furthermore, Mr Dugmore explained in his oral evidence that there is a very high turnover of self-employed drivers with as many as 15 to 20 leaving each week. This gives an idea of the numbers of drivers.

72 I asked Mr Dugmore when the respondent introduced the two-model system. He said 1998. This led to Ms Monaghan suggesting the following day that the system must have been introduced to avoid the effect of the national minimum wage legislation which was introduced in that year. Mr Dugmore was recalled so that point could be put to him. He explained that there had been a misunderstanding. In fact, the respondent had used self-employed drivers since at least 1995 and the employed model was only introduced in 1998 as a result of a request from one of the respondent's customers. I therefore do not find that the self-employed model was only introduced to avoid the effect of the national minimum wage legislation in 1998. It is notable however that the self-employed model has been operated by the respondent for circa 25 years and thousands of self-employed drivers must have been engaged by the respondent in that period given the high turnover of self-employed drivers.

73 Self-employed drivers have no knowledge of the SLAs. They are reliant on the respondent to instruct them as to how, when and where to perform their work so

as to meet the requirements of the respondent's customers and the commitments the respondent has made to its customers under the SLAs.

74 The respondent kept detailed records on the self-employed drivers, known as a Manpack. It was a system that resembled a digital personnel or human resources file. It included, among other matters, personal details, skills and complaints [2913-2921]. It also includes records on pay and jobs performed [2926].

The recruitment of the claimants

75 The respondent openly advertised for the claimants' roles. Some of the adverts used to recruit the claimants refer to candidates being able to *"commit to work for a minimum period of 3 consecutive days per week including a Monday or a Friday"* [509 – 510, 1220, 1256].

76 The claimants applied through an online resourcing portal. They were interviewed. Mr Williams was recruited during the covid pandemic and he was interviewed by phone. Mr Moulton was interviewed at a job centre. His point of contact was a "Recruitment Consultant". His invitation described the interview as an assessment. It said: *"The assessment is scheduled to last approximately 40 minutes and will take the form of a one-to-one assessment of your suitability for the position. It will also give you an opportunity to find out more information and put forward any questions you may have."*

77 Mr Khan said in his evidence that his interview *"felt very much like a two-way conversation, not an interview, where both the Driver Resourcing Team and I were exploring a mutual opportunity".* I do not accept that. Even the respondent's own documentation makes it clear that the primary purpose of the interview was a one-to-one assessment of the applicant. Although the respondent does not like to use the word interview that is plainly what it was. It was not something akin to two businesses exploring a mutual opportunity.

78 The claimants were required to bring certain documents to the interview. These included: proof of right to work in the UK, driving licence and two proof of address such as a bank statement. Mr Dugmore was asked in his evidence about why the claimants were asked to confirm they had a right to work in the UK if the respondent was merely a customer of the self-employed driver. He did not have a satisfactory answer for that.

79 The claimants were required to have held a UK driving licence for more than 3 years, to have no more than 9 points on their licence and not to have been charged with any serious motoring offences. The respondent used an external verification company to check the claimants' driving licenses for authenticity and points.

80 The claimants were also required to provide a photograph of themselves, and to confirm that they had private (i.e. off road) parking to store a vehicle. This was because the claimants were often required to take vehicles home at night and deliver them the next day. This was known as a "carry over job". I was told at the hearing that the respondent has recently relaxed the requirement for private

parking but at the time the claimants were recruited it is clear they were required to confirm they had private off-road parking.

81 Nothing in the recruitment process identified the respondent as a client or customer of the claimants.

82 The claimants were told they had been successful in their applications. The working arrangements and in particular the fees payable were set by the respondent without negotiation from the outset. For example, Mr Williams received an email following his successful application which confirmed the following [3106]:

"• Dependent on the type of appraisal required, jobs can be paid at either £20 or £28 for the first 60 miles, then 20p per mile thereafter.

• On average drivers normally complete 1-3 jobs per day (this dependant on job distances, however if you finish your jobs early then you may call your coordinator and ask for additional local jobs).

• As we are so busy at the moment, we are currently offering weekend Jobs when available (Saturday £30 per job and Sunday £40 per Job).

• Start/Finish times vary on a day-to-day basis.

• Some postcodes are qualified for daily extra allowance called 'regional weighting time' – this is paid for every day that you collect a vehicle and is added automatically to your weekly remittance.

• We also have something called 'waiting time' (not to be confused with regional weighting time mentioned above). This is paid at £7.50 per hour and is payable when delays occur e.g. having to wait for a customer or delays at dealerships. Please note that you will have to contact your coordinator in these instances and they will sort this for you.

• All self-employed contractors are required to pay £6.50 for insurance per week full time, £3.50 per week part time, and a £5 fee per week for administration services which covers EVO, iPad and Trade Plates. You will find more information in your Operating Agreement when issued at your practical seminar.

• Whilst contractors are responsible for the cost of travel between jobs, BCA will consider any claims on a case-by-case basis.

• The company provide fuel cards that can be used at BP, Total and Texaco.

• Your training will be paid £45 per day and may vary 2-3 day but this will be confirmed with you shortly by our Onboarding Department.

• If you would like any more information on becoming self-employed, please visit the government website using the following link - https://www.gov.uk/working-for-yourself."

83 As can be seen from the above the fees for each job and the hourly rates were set by the respondent with no facility to negotiate. As to travel expenses the claimants were told that these had to be authorised in advance. The process for claiming travel expenses was covered in the training course attended by the claimants, which I will explain later. It involved prior authorisation and providing receipts.

84 The claimants were asked to confirm whether they would work part-time (3 days per week, Mon to Wed or Wed to Fri) or full-time (5 days per week). There was no other option; the claimants were required to agree to work either 3 or 5 days per week. I accept the evidence of the lead claimants on that and in fact that there did not appear to be any dispute about it, other than Mr Dugmore's evidence was that it was a suggestion as opposed to a requirement. I did not accept that part of Mr Dugmore's evidence. The respondent's own adverts made it clear that the claimants were expected to commit for at least 3 days ("*a minimum period*"). Furthermore, when the cost of insurance was explained to the claimants, the cost depended on whether it was to cover "full time" or "part time"; there was no other option. As I shall explain the way in which the respondent's business operated meant they needed to be able to rely on the claimants to provide work, there was plenty of work available and in practice the self-employed drivers were committed to working for the respondent for 3 or 5 days a week.

Training

85 The respondent requires its self-employed drivers to undergo a thorough training course. The respondent does not like to use the description training course but that is clearly what it is. The respondent has referred to the training as an "induction session" or "practical seminar" and it now prefers to describe it a "technical session". Mr Moulton's training course took place over 4 days and Mr Williams' training course took place over 3 days. Four days is the norm. Mr Williams' course was shorter as it took place during the pandemic and so was online. Nowadays the training takes place in person over 4 days. The materials relating to the training course were in the bundle and they included things like presentations, handouts, slides and tests of the claimants to check their understanding. It was a detailed training course to fully instruct the claimants as to how they should carry out their work for the respondent.

86 It is notable that the training included the details of the respondent's customer relationships. It identified the customers of the respondent. It did not suggest that the respondent was a customer or client of the claimants'.

87 The claimants were informed that the *"dress code applies during training"* [1120]. The training was compulsory but the claimants were only paid for their attendance if and when they completed 40 jobs for the respondent [3114].

88 The training included guidance on matters relating to health and safety. This was picked up on by Ms Monaghan in cross examination. The context was that in his witness statement Mr Dugmore had compared the self-employed drivers to a window cleaner who cleans the windows at his house. This was an inapt comparison. The way in which the claimants worked was nothing like Mr

Dugmore's window cleaner. One example of that is that Mr Dugmore would obviously not expect to train his window cleaner on the health and safety of cleaning windows. Ms Monaghan's cross examination quickly exposed this aspect of Mr Dugmore's evidence to be inaccurate.

89 After the initial period of training further extensive guidance, feedback and updates were provided to the claimants. This is clear from the email correspondence in the bundle and the evidence of Mr Moulton and Mr Williams. It was agreed at the hearing that much of the ongoing guidance was provided in the same way to both employed and self-employed drivers. In addition the self-employed drivers were subject to audits where their work was checked and assessed (for example [3667]).

90 An important part of the work the claimants performed for the respondent is the inspection of vehicles. It is obviously important to the respondent and the respondent's customers that damage to vehicles is properly identified and assessed through the inspection. This was a key part of the initial and ongoing training of the claimants. Indeed, Mr Dugmore explained in his witness statement that if an inspection was not carried out properly a self-employed driver would be provided with feedback to identify what had gone wrong and they may be offered the opportunity *"to refresh their knowledge on how to carry out an inspection".* If they still fail to meet the required standard they may not be offered further inspection jobs.

91 In addition to the initial and ongoing training the claimants were provided with a driver's manual. This is also detailed and thorough. It is 74 pages long. It is notable that the manual included a dress code. This was described as "recommended guidelines". It set out the type of clothing which the claimants were expected to wear (e.g. dark trousers, smart shirt, dark jacket) and what would not be acceptable (e.g. shorts, t -shirts, hoodies). Part of the dress code was an ID badge and hi vis vest.

92 The training, the updates, the audits and the manual amounted to a comprehensive set of instructions as to how the claimants should carry out their work for the respondent. This demonstrated a high degree of control by the respondent over how the claimants carried out their work.

Equipment

93 The ID badge and hi vis vest which the claimants were expected to wear as part of the dress code set out in the driver's manual were part of the equipment provided to the claimants by the respondent. They were both branded with the respondent's name. The ID badge identified the claimants as contractors working on behalf of the respondent. Wearing the ID badge is compulsory because it is a requirement imposed on the respondent through the SLAs with its customers.

94 In addition to the ID badge and hi vis vest the claimants were provided with other items of equipment by the respondent. These included a phone and charging cable. The phone came with the respondent's app downloaded on to it. The claimants were trained on how to use this. The training included how the app was

to be used for “clocking in” and “clocking out”; for notifying a driver of their next job; for displaying jobs; for recording jobs; for calculating the price of damage following inspection, and for recording fuel, waiting time and “authorised expenses”. This was explained in Mr Williams and Mr Moulton’s evidence and was apparent from the training material in the bundle [713-5].

95 The claimants were also provided with an I-Pad and charging cable, a fuel card, paint gauge, tyre gauge, magnetic markers, zebra board, envelopes, paperwork, an equipment bag and PPE [547]. During their training the claimants were informed that jobs for the respondent must be completed via the equipment provided by the respondent [2232].

96 Much of the equipment provided to the claimants by the respondent was branded with the respondent’s name. Mr. Williams brought his equipment into tribunal and showed it during his evidence. This demonstrated how much equipment was provided to him by the respondent and how much of it was branded with their name. Mr. Williams provided it to the respondent in the hearing so they could check it but he was not challenged over the fact that the respondent had provided him with that quantity of branded equipment. Mr. Dugmore suggested that the equipment including the hi vis vest provided to the claimants was unbranded. In the circumstances I have outlined I found the claimant’s evidence, particularly Mr. Williams’ evidence, much more credible and I preferred it.

97 In addition to being required to use the equipment provided when undertaking jobs for the respondent the claimants are also required to use the respondent’s fuel cards when purchasing fuel while working for the respondent. This was set out in Mr Williams evidence, it was accepted by Mr Dugmore and it was apparent from the training given to the claimants [717].

98 A crucial part of the equipment provided to the claimants by the respondent which was necessary for the claimants to do the work was “trade plates”. These were explained in Mr Dugmore’s statement. They are like a numberplate, although they are used in addition to rather than instead of a vehicle’s existing numberplates. Displaying a trade plate allows an individual to drive an unregistered or untaxed vehicle for the purpose of a business movement. As a business, the respondent applies for and pays for a “trade plate license” from the DVLA. The respondent requests and is issued with a certain number of trade plates under this licence in consideration for a fee paid by the respondent. In turn the respondent then issues a trade plate to a self-employed driver. The trade plates are the property of the DVLA licensed to the respondent and signed out to a self-employed driver. It was not suggested that a driver could obtain a trade plate on their own.

99 In summary, all of the equipment which was necessary for the claimants to do their work for the respondent was provided by the respondent. The claimants did not make an investment in equipment in the way in which somebody in business on their own account probably would. Furthermore, much of the equipment provided to the claimants by the respondent was branded with the respondent’s name and the key pieces of equipment which would be visible to customers and any other person (hi vis jacket and id badge) were branded with the respondent’s

name. Amongst other factors this would, I think, give rise to a clear impression that the claimants were part of the respondent's workforce.

Insurance

100 The respondent has trade insurance cover. The respondent was required to evidence this when it applied for trade plates. Although the written contract included a term saying that self-employed drivers could arrange their own insurance cover it was agreed at the hearing that in practice all self-employed drivers were insured under the respondent's trade policy. It is uncertain whether an individual self-employed driver could obtain the necessary insurance cover privately. I consider that in reality there was no expectation that a self-employed driver could obtain their own insurance. This is consistent with the information provided to Mr Williams, for example, that self-employed drivers were "required" to pay to be insured under the respondent's group policy.

101 The respondent's insurance policy which all self-employed drivers were insured under set out that self-employed drivers were regarded as employees of the respondent and they were insured, but only while working under the respondent's control. Therefore unless a self-employed driver was working under the respondent's control they would not be insured. The reality is that the self-employed drivers were insured because they were working under the respondent's control.

The written agreement

102 There was a written agreement between the claimants and the respondent. This is called the Operating Agreement. Different versions of the agreement exist but it was not suggested that there are any material differences. The agreement was provided to the claimants by the respondent. The terms were not negotiated and were not negotiable. The respondent did not suggest otherwise.

103 Mr. Williams' agreement was in the bundle at [2893] and can be taken as an example. In the agreement Mr. Williams is identified as "the Contractor" and the respondent is identified as "the Company". There is a recital which records as follows: *"The Contractor agrees to provide driving services to the Company by which the Contractor will deliver, collect and inspect vehicles for the Company and/or its customers and/or its supplier and/or its partners Services from 14.9.20 unless and until this Agreement is terminated as provided for at clause 12".*

104 Part 1 of the agreement then provides as follows:

"1.1. The Contractor will provide the Services in each instance on an ad hoc basis.

1.2. The Contractor agrees to provide the Company with a forecast of his/her availability for the provision of the Services.

1.3. The Company will offer the Contractor a vehicle delivery/collection job ("Specified Job"). The Contractor may accept or refuse the offer of any Specified Job.

1.4. Once the Contractor has accepted the offer of a Specified Job he/she is responsible for the completion of that Specified Job.

1.5. The Contractor agrees that he/she will assess the condition of any vehicle subject to a Specified Job at the time the Contractor takes control of such vehicle and agrees that he/she is responsible for identifying and reporting any defects to the Company prior to commencing the Specified Job.

1.6. Other than as provided for at clause 1.8 nothing under this Agreement will prevent the Contractor from offering his/her services to other companies and/or from being engaged in or employed by any other business or undertaking at any time.

1.7. The Contractor may provide a substitute contractor to undertake the Services and/or a Specified Job. The Contractor is wholly responsible for the payment of any fee to the substitute contractor as may be agreed between the Contractor and the substitute contractor. The Company will have no contractual, financial or legal relationship with the substitute contractor. The Contractor should ensure that any substitute contractor meets and complies with the Company's insurance and driving licence requirements, have obtained a copy of the substitute contractor licence and make such driving licence available for inspection on request by the Company. The Contractor will provide details of any substitute contractor in advance of the Contractor using such substitute contractor. The Contractor should inform the Company at the earliest opportunity of any changes to his/her nominated substitute contractor or contractor.

1.8. The Contractor agrees not to carry out any task, job or engagement whatsoever for any other person, firm or company whatsoever whilst engaged in the provision of the Services.

1.9. The Contractor is not entitled to any holiday pay or sick pay.

1.10. The Company is not in any way responsible for any pension arrangements for the Contractor.

1.11. The Company provides no car tools for the Contractor other than those that are available in any vehicle.

1.12. The Contractor is responsible for payment of all his/her own expenses.

1.13. The Contractor is personally responsible for any accident or incident whatsoever which may befall him/her in the provision of the Services.

1.14. The Contractor agrees to indemnify the Company in full for any and all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) which it may incur as a result of the

Contractor failing to fully perform and/or acting in breach of clause 1.4; clause 1.5; and/or clause 1.8."

105 I note the provision relating to holiday pay. However as Ms Monaghan pointed out it is for the Tribunal to determine whether the claimants are entitled to holiday pay and not the respondent. In light of the arguments presented at the hearing I shall have to determine whether the substitution clause at 1.7 is genuine.

106 Part 2 of the agreement set out the equipment provided to the claimants by the respondent which I have already explained. The equipment is valued and the agreement then goes on to say:

"2.6. The Contractor acknowledges receipt of and agrees that the trade plates, fuel card, Inspection Kit and EVO mobile Device and Kit ("BCA Equipment") have been provided to him/her by the Company in order that the Contractor and/or any substitute contractor can provide the Services to the Company and in order that the Contractor can procure payment of the Fee from the Company.

2.7. The Contractor agrees that an administration charge of £5.00 per week will be payable to the Company in consideration for the administration services provided to the Contractor by the Company which are facilitated through the BCA Equipment used by the Contractor in the provision of the Services.

2.8. The Contractor agrees to indemnify the Company in full for any and all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) which it may incur as a result of the BCA Equipment being lost, stolen, damaged or not returned to the Company immediately on request. The Contractor agrees that this indemnity may be settled in full or in part by the Company retaining any fees due to him/her at any time.

2.9. The Contractor agrees that he/she will report any lost, stolen faulty or damaged BCA Equipment to the EVO Support Desk immediately.

2.10. The Contractor agrees and undertakes to return the BCA Equipment promptly to the Company on its demand at any time and immediately on the termination of this Agreement. The Contractor agrees to be responsible for any and all costs incurred in returning the BCA Equipment to the Company."

107 Part 3 of the agreement deals with fees. It provides as follows:

"3.1. The Contractor will receive a fee ("the Fee") for each Specific Job accepted and completed.

3.2. The Fee offered by the Company for a Specified Job may vary from time to time. The Contractor may reject a Specified Job or seek to vary the Fee offered. Such offer may be accepted or rejected by the Company. Acceptance of a Specified Job by the Contractor is acceptance of the Fee offered.

3.3. The mileage applicable to be driven on a Specified Job will be calculated by the Company's computer system.

3.4. Any mileage system for the Specified Job Excess Mileage is prohibited. If a Contractor subsequently incurs Excess Mileage any cost to the Company as a result of this must be paid for by the Contractor and/or refunded to the Company and/or will be deducted from the Fee unless the Excess Mileage is specifically negotiated by the Contractor and agreed with the Company in advance.

3.5. In the event that a Specified Job cannot be completed as a result of the vehicle in transit breaking down (where the Contractor has not caused such breakdown) and/or following the commencement of the Specified Job, as a result of the cancelation of that Specified Job by the Company, the Company may still pay the Fee to the Contractor.

3.6. Should the Contractor incur waiting time during a Specified Job, which is due to the fault of the Company's client/customer, on the production by the Contractor of written confirmation from that client/customer that such waiting time has been incurred by the Contractor at the client/customer's own fault, an additional fee may be offered to the Contractor.

3.7. When a second vehicle is taken by the Contractor from the delivery point of a first vehicle back to the collection point of the first vehicle an additional fee may be offered to the Contractor. This additional fee is subject to negotiation depending on the type of vehicle that is required for the return journey.

3.8. All Fee payments will be processed weekly on Fridays and will be paid by electronic bank transfer. All such payments will be made subject to the Company's Contractor billing procedures and payment authorisation procedures.

3.9. The Company has the right to deduct any charges or penalties and/or settle any liabilities or payments owed to it by the Contractor from any Fee due to the Contractor without further reference to the Contractor."

108 Section 4 of the agreement deals with disbursements. The company agreed to reimburse the contractor for reasonable disbursements incurred in the provision of the Services. It was not very clear what was meant by that or whether it was ever used in practice. Mr Dugmore suggested it might refer to things like bridge and toll fees.

109 Section 5 of the agreement deals with the status of the contractor under the written agreement. It provides as follows:

"5.1. The parties agree that the Contractor is self-employed and in business on his/her own account.

5.2. In the event of the status of the Contractor being questioned by any Third Party, the Contractor should make it clear to that Third Party that he/she is providing the Services to the Company on a self-employed basis and is not an employee or worker of the Company.

5.3. The Contractor is wholly responsible for the payment of his/her own income tax and National Insurance Contributions."

110 Once again, I note these provisions but I recognise that following Uber I must look at the reality of the arrangement between the parties and if I consider the provisions are intended to deprive the claimants of worker status and the associated statutory protections then they are of no effect.

111 By part 6 of the agreement the Contractor warrants that they hold a full UK driving licence and they indemnify the Company for all losses which it may incur as a result of not holding a full UK driving licence.

112 Part 7 of the agreement deals with insurance. It provides as follows:

"7.1. The Contractor must at all times have in place adequate insurance in order to provide the Services.

7.2. The Company has block motor insurance ("the Insurance Policy") which allows the Contractor to drive any vehicle (subject to the terms and conditions of the Insurance Policy from time to time in force) in the control or custody of the Company. The Contractor may take advantage of the Insurance Policy. In order to do so the Contractor is required to pay an insurance fee of £6.50 (providing services 5 days a week), £3.50 (providing services 3 days or less per week) to the Company for each period that the Contractor requests that he/she is covered by the Insurance Policy.

7.3. Where the Contractor provides the Services under the Insurance Policy should there be an accident or incident which is the Contractor 's fault and results in a claim under the Insurance Policy and/or amounts to uninsured loss, the Contractor agrees to pay the first £100 (or at the current rate applicable) of any excess under the Insurance Policy or of any other cost the Company may incur.

7.4. The Contractor may provide the Services under his/her own qualifying insurance cover (the "Qualifying Insurance"). In this instance the Contractor will warrant to the Company that Qualifying Insurance is fit for purpose and provides sufficient cover so as to allow the Contractor to lawfully provide the Services. The Contractor agrees to make a Qualifying Insurance certificate available for inspection by the Company on request.

7.5. The Contractor will indemnify the Company in full for any and all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) which it may incur as a result the Contractor not holding appropriate insurance cover.

7.6. The Contractor is responsible for the provision of his/her own Public Liability Insurance and Personal Injury Insurance."

113 As I have already observed in reality all self-employed drivers were insured under the respondent's group policy. Clause 7.4 has never been used.

114 Parts 8 and 9 of the agreement refer to confidential information and data protection, as follows:

"8. CONFIDENTIAL INFORMATION

8.1. The Contractor agrees not to use or disclose to any person either during or at any time after his/her engagement by the Company any confidential information about the business or affairs of the Company or any other company in its group or any of its business contacts, or about any other confidential matters which may come to the Contractor knowledge in the course of providing the Services. Confidential information means any information or matter which is not in the public domain and which relates to the affairs of the Company or any other company in its group or any of its or their business contacts.

8.2. The provision in clause 8.1 does not apply to:

8.2.1. any use or disclosure authorised by the Company or as required by law; or
8.2.2. any information which is already in, or comes into, the public domain otherwise than through the Contractor unauthorised disclosure.

9. DATA PROTECTION

9.1. The Company will collect and process information relating to the Contractor in accordance with the privacy notice which is provided to the Contractor.

9.2. The Contractor agrees to comply in full with all and any relevant Data Protection legislation, from time to time in force, in respect of any personal data, for which the Company is the Data Controller that he/she is required to process in the provision of the Services.

9.3. The Contractor agrees to ensure that any substitute contractor will comply in full with all and any relevant Data Protection legislation, from time to time in force, in respect of any personal data, for which the Company is the Data Controller that the substitute contractor is required to process in the provision of the Services.

9.4. The Contractor agrees to indemnify the Company in full for any and all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) which it may incur as a result of the Contractor failing to fully perform and/or acting in breach of clause 9.2 and/or clause 9.3."

115 Clause 10 of the agreement deals with security and in particular the requirement on the Contractor to ensure any vehicle in his or her charge is secure at all times and when it is located at the Contractor's home address it must be parked off road.

116 By Clause 12 of the agreement the Company was entitled to terminate this Agreement with immediate effect with no liability to make any further payment to the Contractor (other than in respect of any accrued fees or disbursement as at the date of termination).

117 Clause 13 of the agreement stipulated that the agreement may only be varied by a document signed by both the contractor and the company.

118 Clauses 14 to 16 deal with third party rights, governing law and jurisdiction and neither party referred to those sections at this hearing.

The services provided by the claimants

119 As Mr Dugmore explained in his statement the services provided to the respondent by the claimants are comprised of two elements which are classified internally as a “Standard Trade Plate” move or an “Inspect & Collect” job.

120 A Standard Trade Plate move requires the claimant to collect the respondent’s customer’s vehicle from a particular location and deliver it to another location within the parameters set by the SLA in terms of, amongst other things, date, time and reasonable mileage. The claimant is also required to undertake a standard appraisal of the vehicle. A standard appraisal involves the identification and recording of all visible damage to the vehicle as well as a check of the vehicle’s core safety features including its power, oil, water and electrics.

121 An Inspect & Collect job requires the collection and delivery of a customer’s vehicle, as with a Standard Trade Plate move. However, when the vehicle is collected the claimant must also carry out an inspection of the vehicle. An inspection is an in-depth review of the customer’s vehicle which is undertaken to identify any issues / damage to the vehicle. The respondent’s customer stipulates that any damage must be recorded prior to collection being completed. An inspection is a specific service requested by a customer of the respondent. It is not carried out on every vehicle. The method of the inspection and the parameters of what must be inspected are set by the respondent’s customer and imposed on the respondent as part of the SLAs. This is why a significant part of the initial and ongoing training of the claimants was related to how to carry out inspections for the respondent’s customers.

122 Once the claimants completed the training the respondent’s Co-ordination Team produced and populated a calendar specific to each claimant. The calendar was populated with the self-employed driver’s days of availability. It was based on whether each claimant had agreed to provide services part time (3 days a week) of full time (5 days a week). If it was known that a claimant was unavailable on a particular day this was entered on to the calendar. For example, Mr Graham explained that he was only available on Friday mornings because he has a caring responsibility in the afternoon and this was entered into his calendar.

123 The calendars are then uploaded onto a system known as the “Traffic Pad”. The Traffic Pad is a resource used by the respondent’s Driver Planning Team which shows the availability of all the claimants. The Traffic Pad was then used by the

Driver Planning Team when planning what jobs to offer to the claimants on any given day. In short, if a claimant was shown on the calendar as available to work, the planning team put together a set of jobs to offer to them. Drivers are generally notified by email the night before, and sometimes by telephone, of the jobs for the following day and these are also recorded on the phone app. Normally, if a claimant was being offered jobs, they would be offered 1 - 3 jobs on any given day.

124 The self-employed drivers generally have no choice as to the location, number and type of jobs offered to them. However if a claimant had a particular objection for example to a particular customer or to a particular type of vehicle, they could request that this is inputted into the Traffic Pad as a Driver Operational Ban (or DBAN). A DBAN is a note on the Traffic Pad which shows the Planning team that certain jobs should not be offered to a certain self-employed driver.

125 As was apparent from the training provided to the claimants by the respondent the claimants were expected to plan their work for the following day in the evening when they received the details of the jobs for the next day. Mr Dugmore accepted that the claimants were expected to plan their day the night before in his oral evidence. This was therefore not the type of situation when the claimants were working only when they were logged on. The claimants were not paid for the time which they were expected to spend planning the night before.

126 The app allows the claimants to accept or reject a job. A refusal of a job will result in the entry of a specific code in the calendar which indicates either “sick”, “rejection” or “AWOL”. It was not suggested by the respondent that AWOL meant anything other than its standard meaning (Absent With Out Leave). Recording absence in this way meant that in the ordinary course of events the respondent would expect that the claimants would obtain leave for absence.

127 The training provided by the respondent to the claimants made it clear that they are required to provide *“48 hours’ notice for leave (except illness)”* [1120]. There is an obvious tension between this and Mr Dugmore’s evidence that *“Self-Employed Drivers are free to make themselves unavailable on any given day or for any given period, with or without notice to BCAL, for whatever reason, should they choose to do so.”* In my view the better evidence as to the reality of the respondent’s requirements of the claimants is contained in the training materials rather than what Mr Dugmore says now. After all, the very point of the training was to let the claimants know what the respondent’s requirements were.

128 I find that the claimants were obliged to undertake work offered on the days that they were marked available. I consider this is evident from the following factors in particular:

128.1 The claimants were required to give 48-hours’ notice if they did not wish to work on days when they were normally available, unless they were sick.

128.2 The respondent expected contact and an explanation from the claimants if they did not accept work on available days. Their reason for not working was then recorded on the calendar. If the claimants failed to give an explanation they were recorded as AWOL. This can only realistically have

been done because the respondent's expectation that the claimants work had not been met - and the respondent wanted to know why.

128.3 The respondent monitored the claimants' work patterns and in particular kept records of when jobs had been rejected on the days when they were meant to be available for work [1422 – 1487, 2900 - 2912]. The significance of this evidence, especially when considered in conjunction with the records relating to AWOL, is that it indicated an obligation on the claimants to be available to work. A failure by the claimants to make themselves available ("without leave") reflected a breach of that obligation and that was why the respondent wished to have records of who had refused work and why.

128.4 There is evidence of a practice of the respondent punishing drivers who refused work on days when they were meant to be available (the so called "naughty step" - I consider this in more detail below).

128.5 It was accepted at the hearing that if one of the claimants refused work and the respondent had not received an explanation then the claimant would not be placed on the traffic pad for at least the following day. Further the claimant could face not being on the traffic pad for longer unless they were able to contact a coordinator to explain the situation. This could be a problem because the coordinators had lots of drivers to service and they could be difficult to contact. It would not be unusual to have to wait an hour to get through. This was a clear negative consequence of refusing work. It reflected the reality of the situation which is that the claimants were in practice expected and obliged to accept work if it was offered.

128.6 In reality the way the respondent's business operated meant that if there was work available, the claimants were obliged to do it. This is because of the SLAs which the respondent has with its customers which set specific requirements that the respondent had to meet including timescales for deliveries which would attract financial penalties if they were not met. As Mr Jeans summarised the respondent's evidence in his written closing submissions: *"getting a high proportion of cars promptly delivered was key to the service level agreements. This is a "volume business"".* The respondent was reliant on the drivers, including the self-employed drivers, to meet the demands of its customers. The respondent recruited the right number of drivers to ensure the demands could be met and a failure by the claimants to work when agreed risked a breach of the all-important SLAs.

Working arrangements

129 The working arrangements for the drivers who I heard evidence from was as follows:

129.1 Mr Williams worked 5 days a week for the respondent and he often worked weekends too. He found that the demands of the job with the respondent were such that he would not have had time to work for anyone else, even if this was an option.

129.2 Mr Moulton worked 5 days a week for the respondent until mid-2020. He then requested to go down to 3 days a week. Mr Moulton believed he was punished for reducing his hours as he was not given the kinds of job he had been doing previously (such as weekend work). So by the end of 2020 he went back to working 5 days a week. He too often worked weekends. In the past Mr Moulton has worked as a software developer and when he was first engaged by the respondent, he wished to continue doing IT work in the evenings and at weekends. However he soon found he did not have sufficient time for the IT work and so he worked exclusively for the respondent.

129.3 Mr Khan worked 5 days a week for the respondent. He did not work anywhere else. However he said he was aware that he could if he wanted to work for other businesses and he said other drivers did so. The respondent did not provide any evidence from any self-employed driver who worked for anybody else.

129.4 Mr Graham worked at least 5 days a week for the respondent. He tended to work extremely high hours (up to 70 or 80 hours per week) when he first started working for the respondent. This continued for about 2 – 3 years but then he tended to work 5 days a week. He worked exclusively for the respondent.

130 It is notable that the experiences of all the drivers who I heard from were consistent with the claimants' case that they were in practice obliged to commit to working for the respondent for 3 or 5 days a week. Further, I consider that the best evidence available to me as to the self-employed drivers working arrangements comes from the drivers themselves (including the respondent's own witness, Mr Khan). Their evidence all indicates that in practice the self-employed drivers were heavily committed to working for the respondent and they relied on the respondent for their living.

Pay

131 The essential fact is that the fees payable to the claimants for each job were set by the respondent with no negotiation with the claimants. Enhanced fees were available for weekend work and these were also set by the respondent with no negotiation. Travel expenses were available but only if the claimants followed the respondent's process of obtaining authorisation and providing receipts. The claimants were informed that no claim for expenses would be processed without a "travel authorisation code" and they only had 24 hours to make a claim. Claims would then be assessed by the respondent and a contribution made "if possible" [1120]. Payment for waiting time was available in certain circumstances (decided by the respondent) and the rate of pay for that was also set by the respondent.

132 I have already observed that the documentation provided to the claimants at the start of their engagement told them what the fees and rates were without negotiation. This was confirmed in the training and the fees set by the respondent for each job were also included within the drivers manual [419]. During the covid pandemic the respondent unilaterally decided to increase the fees payable so as

to encourage the self-employed drivers to come back to work. They then unilaterally reduced the fees to pre lockdown levels when they considered it appropriate to do so. These decisions were made without any negotiations with the drivers [2462].

133 The claimants did not submit invoices. They were paid on the same day each week and provided with a remittance statement that was generated automatically by the respondent. The claimants paid an administration fee of £5 and Mr Dugmore explained in his statement this was to cover the provision of the remittance statement. This was deducted from the claimants' earnings each week along with the cost of insurance which was either £6.50 or £3.50 per week depending if the claimant worked full or part time. I do not consider that these deductions represent the sort of financial investment and risk as somebody in business on their own account would probably make.

134 Although the written agreement stipulated (at clause 1.12) that the claimants were responsible for payment of all their own expenses this did not reflect reality because in practice travel expenses could be paid by the respondent. This was made clear in the training where it was explained that in order for travel expenses to be paid, they would have to be pre authorised and receipts would need to be provided (for example [909]).

135 The lead claimants gave cogent and credible evidence about the lack of any ability to negotiate on pay. I consider that their evidence about that was supported by the documentation and was consistent with my perception of the realities of the situation. I therefore accept the lead claimants' evidence in this respect.

136 The respondent's evidence was that the claimants could negotiate an increase in the fees payable for a particular job. I did not find this aspect of the respondent's evidence credible. It was not in my view supported by the documentation and it did not reflect the reality of the situation. The respondent provided examples of where it was said that the lead claimants had negotiated an increase in their fees for a particular job, in particular at paragraph 82 of Mr Dugmore's witness statement. These were explored by Ms Monaghan in cross examination and on the whole they did not stand up to scrutiny.

137 Many of the examples related to expense authorisation and not an increase in fees. There were also examples relating to the claimants seeking authorisation for waiting time. Waiting time was stipulated by the respondent as being payable when delays occur. The hourly rate for waiting time was again set by the respondent. The claimants were advised that they had to contact their coordinator if a delay occurred so that waiting time could be sorted out. Like travel expenses I do not consider that this is really a negotiation over fees, rather it was the claimants seeking authorisation for a payment on the respondent's terms; as they had been instructed to do by the respondent and at a rate set by the respondent.

138 I should mention that one matter that came out in the evidence was the concept of internal waiting time. This is payable where delays occur that cannot be attributable to the respondent's customer and therefore the charge cannot be passed on to the customer. This gave the respondent greater flexibility over when this type of waiting time could be paid and exceptionally it could be used to cover

circumstances outside of waiting. There was some evidence of discussions about that. However these scenarios were unusual. Moreover I do not see this as a genuine negotiation over fees either; it was another request for authorisation of a specific payment that the respondent decided was payable in certain circumstances and at a rate set by the respondent.

139 There was in my view a striking paucity of any evidence showing a genuine negotiation over fees. In particular there was a lack of any evidence of occasions when self-employed drivers had sought to vary the fee offered for a job by way of counter offer of what the fee would be. That was the sort of negotiation which the written agreement identified could take place and it is the sort of negotiation that one would expect to see if the parties both had real bargaining power. That sort of negotiation did not take place and the parties did not seriously anticipate that it would. This demonstrates the lack of bargaining power which the claimants had in reality, and it is an example of the written agreement not reflecting what was in reality agreed.

Punishment for not accepting jobs – "the naughty step"

140 Part of the claimants' case is that they were punished if they refused work by not accepting jobs on days they were meant to be available. They claim this practice was widespread and it was known amongst them as being placed "on the naughty step". The respondent denies such a practice has ever existed. The lead claimants explained the practice in their statements and gave examples of when they were penalised for not working when they have indicated availability by not being assigned work for a period, resulting in a reduction in remuneration.

141 There was an important piece of documentary evidence which I consider strongly supports the claimants' case in relation to this issue. This was an email which Mr Dugmore sent to members of his team on 11 May 2018. The body of the email reads as follows:

"I need you to make this very clear to all of the Operational Team.

Under no circumstances should we be penalising drivers for refusing work, It appears that if driver refuses work we are then blocking the drivers calendar out for maybe the week or even longer as some way of punishment, this practice has to stop immediately by doing this you are threatening the Self-employed status of the driver. As a self-employed driver they have the right to refuse work and we cannot be seen to be punishing them in this way.

If a driver consistently refuses work your staff need to raise this with the team leader and we can discuss what the issues are and what options we have but under no circumstances deny the driver access to work by blocking the calendar out and telling the driver "you are being stood down".

Failure to take this on board could lead the whole business model to be challenged in court with potentially disastrous consequences.

I want comms out to the staff immediately to address this issue please."

142 In his witness statement Mr Dugmore said that he sent this email because he became aware that a *"rogue element"* of the coordination team were marking the self-employed drivers unavailable after they rejected jobs. He said this was *"definitely not a practice that takes place at BCAL".* Then, in his oral evidence Mr Dugmore reiterated that there was no practice of punishing drivers for not accepting work on days when they were available and he said that in fact his email had been written as a result of the actions of just one individual who had for their own reasons been punishing the drivers in this way.

143 I do not accept Mr Dugmore's evidence in this respect. His evidence to me now is in my view impossible to reconcile with the email he wrote at the time. The email is simply not written in a way that would suggest Mr Dugmore was concerned just about one individual. The email is in fact written in terms that suggested there was a widespread practice rather than just one rogue individual (for example: "*It appears that if driver refuses work **we are** then blocking the drivers calendar out").* Mr Dugmore even used the word practice in his email to describe what was going on. This is not consistent with his suggestion now that it was just one person. The actions of just one person would not realistically be described as a practice. Finally, I cannot see the logic of Mr Dugmore sending this email and making it clear he wanted the message passed on to all of the Operational Team if it was just one person who was doing this for their own reasons. If that was the case then surely it would make more sense to address the problem with the individual rather than the whole team. In summary, the evidence does not suggest that Mr Dugmore's email was sent because of one bad apple; rather it reflected a systemic practice.

144 I consider that the practice of punishment is likely to have come about because of the way the respondent's business operated. As I have observed the SLAs which the respondent has with its customers set specific requirements that the respondent had to meet including timescales for deliveries which would attract financial penalties if they were not met. This meant that the respondent had to perform a certain number of deliveries on each day. The business model would not work effectively if the claimants were regularly turning down work and so it is not surprising that this was discouraged by way of this practice of punishment.

145 The other thing which jumps out from Mr Dugmore's email is that he was concerned about the consequences if the respondent's business model was challenged. It seems likely that Mr Dugmore remains concerned about that and this is why he gave his evidence in the way that he did - even when it was quite clearly not consistent with the contemporaneous document that he had created himself. This was a particular factor which led me to question the reliability of Mr Dugmore's evidence.

146 The claimants' position was that the practice of punishing drivers for not accepting work continued after 2018 and the lead claimants gave credible evidence to that effect. There was also a clear example of this being done on the respondent's own documentation. In July 2021 it was recorded that Mr Moulton was to be given no weekend work as he had too many failed jobs in a week [1489]. Failed jobs occur when jobs are rejected or just not done by the driver. The punishment given to Mr Moulton was a ban on weekend work which the respondent intended to

impose for a year [2481]. Weekend work attracted premium rates so this was a clear example of a punishment.

147 The evidence of the lead claimants was also supported by Mr Graham. At paragraph 28 of this witness statement Mr Graham explained that he was told on 26 September 2022 that if he refused work the respondent would refuse to give him work for 4 to 5 days afterwards. He said he quit as a result of that. The claimants were proceeding on the basis that this call was not recorded because it was outgoing. However at the hearing it was said that there was a call recorded with Mr Graham on 26 September 2022 and the recording did not support what Mr Graham had alleged. The respondent did not disclose a recording or a transcript at any stage and as I explained earlier the misinformation about outgoing calls not being recorded was only corrected at the hearing. The respondent's approach to this aspect of the evidence was unsatisfactory. The respondent could have checked the correct situation of what calls were recorded, produced evidence to explain the checks which had been made of the calls on that day and disclosed the recordings of any calls with Mr Graham.

148 I consider the evidence of the lead claimants and Mr Graham on this matter was clear and credible. As I have explained I found Mr Dugmore's evidence unreliable. The claimants' position was also supported by some significant contemporaneous documentary evidence. The respondent's approach to an important aspect of the relevant evidence was unsatisfactory. I therefore accept the claimants' case that there was in reality a practice of punishing those who refused work on days they were meant to be available.

Substitution - introduction

149 As I have already noted there was a substitution clause in the claimants' written contract with the respondent at clause 1.7. In addition, when jobs are offered to the Self-Employed Drivers on the respondent's app it specifically states, *"If you are now unable to complete the work accepted by you, you have the option to provide a substitute. . ."* [561]. A key battleground in this case is whether there was in reality a genuine right of substitution. The claimants said there was not. The respondent said there was.

150 No claimant or any self-employed driver of the respondent has ever used a substitute. This is a striking fact when one takes into account that the respondent has used self-employed drivers for at least 25 years and thousands of self-employed drivers must have been engaged by the respondent in that period. In his submissions Mr Jeans emphasised the potential utility to the self-employed drivers of using substitutes. I agree the potential benefits are obvious if this is a genuine right. However to my mind the fact that the purported right is so advantageous makes it all the more striking that it has never been used.

151 The respondent's extensive training course for self-employed drivers does not include any information about how to appoint and use a substitute. There is no information about that in the handbook either. This is particularly significant because the nature of the respondent's business means that a substitute could not just turn up to do a self-employed driver's work – they would have to be insured, be trained and have equipment such as trade plates for example.

152 Although some of the respondent's witnesses suggested that the claimants were trained in how to appoint or use a substitute the training materials did not support that. I consider the more reliable evidence as to what the training covered is the training materials, especially since they were so extensive. I therefore do not accept that aspect of the respondent's evidence.

153 Apparently, the respondent now provides self-employed drivers with a "substitute appointment notification" form at the same time as it provides the operating agreement [365]. Drivers are asked if they wished to confirm the appointment of a substitute and if so, they are asked to provide their details. However, it was not suggested that this was provided to any of the claimants. Furthermore, I don't think it really assists the respondent anyway because (a) it is already pre filled in with the answer "No" to the question of whether you wish to confirm the appointment of a substitute and (b) it too contains no details as to how to go about using a substitute or how one could be appointed at some later date.

154 The claimants relied on the fact that the substitution clause had never been used in practice and the lack of training or procedure about how to appoint and use a substitute, which they suggested showed that in reality nobody expected the substitution cause to be used. They also presented other evidence to try and demonstrate that the substitution clause was not genuine. The respondent presented evidence to try and demonstrate that the substitution clause was genuine, even though it had never actually been used. I will explain the competing evidence and some of my analysis of it in order to illustrate how I reached my conclusion on this crucial issue.

Substitution – the claimants' evidence

155 Mr Williams never attempted to use of a substitute. However, he questioned how it would work in reality. He pointed out that he has to drive with trade plates that are personally assigned to him by the respondent and these are not transferable.

156 Mr Moulton was not aware of the right to use a substitute; it was not mentioned at his training course and the contract terms were not explained to him. Rather, he was told not to allow anyone else to drive a car he was responsible for. He too pointed out impracticalities in using a substitute. In addition to the trade pates issue a substitute would not be insured and nor would they have been trained as they would not have undergone the four-day training course.

157 Mr Graham attempted to arrange a substitute driver on several occasions. Whenever he did that the respondent refused and instead took the job off him, without even asking who the proposed substitute was. The respondent would not provide any reason as to why the request was refused. It seemed that those he was speaking to had no awareness of the clause in the Operating Agreement and he was left with the impression that substitutes were not encouraged or allowed.

158 Mr Kitchen was formerly a claimant in these proceedings and it appears in the initial stages he was a driving force behind the litigation. He understood the substitution clause could be an important consideration in the case. He viewed the

idea of the claimants being able to substitute someone else to do their work as completely impractical. He pointed to the thorough training process which the claimants had to go through, the vetting of the claimants in relation to things like off road parking and the extensive equipment which was provided by the respondent to the claimants in addition to the trade plates and insurance issues.

159 As a result of his scepticism as to the genuineness of the substitution clause Mr Kitchen decided to "test" whether it could in fact be used in practice. On 27 March 2021, he sent an email to the respondent using the inbox bcaldriverqueries [505 to 506]. He asked about using a family member to fill in occasionally for him on some of the jobs assigned to him. He confirmed that the family member was a full clean UK licence holder, which was consistent with the requirements of the substitution clause. He asked about the process, including what information he would need to provide to the respondent, how much notice he would need to give and whether the substitute could use his trade plates and device log ins. His request was very open – it allowed for the respondent to explain the substitution process.

160 Mr Kitchen received a response from Karen Shakespeare, Administration Clerk, on 31 March 2021, which said as follows*:*

"I have asked the question and have been informed that as a self-employed driver only you are authorised to use BCA vehicles and under no circumstances should your trade plates and equipment be used by any other person. If you are unavailable to work you need to inform your coordinator who will then arrange for work to be covered by other drivers" [505].

161 Ms Shakespeare's response was clear and unequivocal. It is notable that she had obviously escalated Mr Kitchen's query, presumably to somebody more senior (*"I have asked the question…")* and she had received the response in the terms above. Karen Shakespeare's response also points out some of the practical difficulties identified by the claimants in using a substitute – in particular that in reality nobody else was permitted to use their trade plates and equipment. It also supports the claimants' evidence that if they could not do a job, it would in practice be taken off them and given to someone else rather than them being permitted to send a substitute.

162 Finally, the claimants relied on documentary evidence relating to Andrew Allison. Mr Allison is a claimant in these proceedings but he was not called as a witness. On 1 April 2021 he sent an email to the respondent using the bcaldriverqueries inbox. The body of the email read as follows:

"I wondered if you can help me? My family circumstances have changed slightly and I have had difficulty with child care arrangements. Can I ask any other another person, family member or friend to perform the work on my behalf if and when I can't get child care?"

163 I observe that this was another open query about substitution which gave the respondent the opportunity to explain the process if the right genuinely existed. Mr Allison received a response from another Administration Clerk, Leanne Downes, which said as follows: "*I don't believe this would be possible but I have sent this to the relevant department to advise you on".*

164 It is not suggested that there was any further response to Mr Allison about his query. The answer he received is consistent with the claimants' case that in practice there was no awareness of any right of substitution. It is also salient that Leanne Downes also indicates that she too had escalated the query (i.e. to *"the relevant department*") but it was not suggested by the respondent that this resulted in any more positive response to Mr Allison.

Substitution – summary of the respondent's evidence

165 The respondent relied primarily on the point that it is not necessary to show that the substitution right was invoked in practice, regularly or at all, in order for it to be genuine. In addition however the respondent relied on what Mr Jeans described in his skeleton argument as *"evidence of nascent interest in substitution at BCAL".* In truth, the evidence relied upon by the response to show that the substitution clause was genuine was extremely thin, especially when one considers the length of time which the respondent has operated with self-employed drivers (at least 25 years) and the fact that the only real evidence has come out during these proceedings. The respondent's evidence was as follows.

166 Mr Slammon said he was "aware" that self-employed drivers have the absolute right to appoint a substitute. He suggested that if a self-employed driver wanted to use a substitute, all the respondent would require is that they contact the Co-ordination Team to discuss the nomination and registration process. The self-employed driver would then simply need to provide the name and address of the substitute and confirm they were over 21, have held a UK Drivers Licence for at least 3 years, have the right to work in the UK and have been fully trained by the self-employed driver. He said the Co-ordination Team would then register the substitute, and the self-employed driver would be able to use that substitute whenever they deemed appropriate. He said he had spoken to a self-employed driver, Colin Brown, about appointing a substitute. Mr Brown did not in fact appoint a substitute, he did not provide a witness statement and I was not referred to any documentary evidence relating to any steps he may have taken in relation to substitution.

167 Mr Khan also said he was aware that as a self-employed driver he had the right to appoint a substitute. He said this was explained during his "Technical Session". He accepted he did not utilise the right at any stage but said he could have done if he wanted to, by contacting the Co-ordination Team. He suggested that anyone he appointed as a substitute could have used his equipment and trade plates.

168 The key evidence the respondent relied upon came from Mr Dugmore. Mr Dugmore said the right to use a substitute was explained in the Technical Session. He emphasised that the claimants had a completely free right to use a substitute and the respondent has no contractual right, or indeed any desire, to prevent a claimant using a substitute. According to Mr Dugmore the only request the respondent would make is for the claimants to ensure that their substitute is *"qualified to carry out the Services in accordance with the obligations placed on BCAL under the SLAs and UK legislation".* It was not clear how such a qualification could be assessed or checked in practice. Mr Dugmore's evidence

was that the process would involve the claimants ensuring their substitute is over 21, has had a UK Drivers Licence for at least 3 years and has the right to work in the UK. The claimants would also be expected to ensure their substitutes have been *"fully trained by the Self-Employed Driver on how to carry out the Services".* It was not suggested that a substitute could be trained by the respondent.

169 Mr Dugmore further explained that the self-employed driver is responsible for ensuring that the substitute performs the services and they are responsible for agreeing any payment terms with the substitute. He said that the respondent will engage only with the self-employed driver including paying any fees due to that self-employed driver only and the respondent has *"no contact or relationship with the substitute whatsoever".*

170 I do not accept Mr Dugmore's evidence that the respondent would have no relationship with a substitute whatsoever as, even on the respondent's own case, a substitute would be driving and inspecting its customers vehicles whilst using the respondent's trade plates and other equipment and driving under the respondent's group insurance. It is not realistic in those circumstances to suggest that the respondent would have no relationship whatsoever with a substitute.

171 Mr Dugmore identified two self-employed drivers who had appointed or enquired about appointing a substitute to support the respondent's case that the right of substitution was genuine:

171.1 Kieran Pratt. Mr Dugmore explained that Mr Pratt appointed a substitute named Ramishka Siriwardena in October/November 2021. Documents relating to the appointment were in the bundle. They show that Mr Pratt's request was referred directly to Mr Dugmore. There was no explanation as to why the request needed to be referred directly to the Head of Operations. Mr Dugmore confirmed on 12 November 2021 that Mr Siriwardena was insured under the respondent's policy and a set of trade plates would be sent out to him [1342]. Mr Siriwardena has never been used as a substitute. There is no explanation as to why Mr Pratt apparently went to the trouble of appointing a substitute, arranging trade plates and insurance but then has never actually used the substitute. There was no evidence about whether and if so how Mr Pratt trained Mr Siriwardena. There was no evidence about whether and if so how Mr Siriwardena was assessed to be qualified to carry out services in accordance with the obligations placed on the respondent under the SLAs and UK legislation.

171.2 Hussein Mohamed. Mr Dugmore explained that in February 2022, Mr Mohamed raised a query about appointing a substitute named Ahmed Hussein. This was again passed directly to Mr Dugmore to action. Again there is no explanation as to why that was necessary. Mr Dugmore sent an email to Mr Mohamed on 24 February 2022 to advise him that he would call him to discuss the next steps in relation to appointing Mr Hussein as his substitute [1344]. Mr Dugmore said he spoke to Mr Mohamed on 24 February 2022 and told him what he needed to do to appoint a substitute including providing the necessary training. Mr Mohamed did not appoint a

substitute or take any further steps to do so. There is no evidence about why he did not progress his enquiry any further.

172 Neither Hussein Mohamed nor Kieran Pratt provided evidence to the tribunal. Mr Siriwardena and Mr Hussein did not provide evidence either.

173 It is notable that both of these apparently positive responses to substitution queries only came about after this litigation had been started. Indeed it was after Mr Dugmore had learned of the damaging evidence obtained by Mr Kitchen, and I explain more about his rather strange actions at that stage below. The respondent did not produce any evidence of a positive response to a substitution request which predates these proceedings and that is striking when one takes into account that the respondent has used self-employed drivers for at least 25 years. Furthermore it is strange that both the requests were dealt with directly by Mr Dugmore. There is no reason why a simple substitution request would need to be dealt with by the Head of Operations, if there was a genuine right of substitution which anyone could utilise.

174 All in all I do not believe that the responses provided to Mr Mohamed and Mr Pratt reflect reality. They are not the responses that would have been obtained were it not for this litigation. The reality of the situation is reflected in the responses obtained by Mr Kitchen and Mr Allison. I consider that Mr Dugmore was attempting to obtain evidence to assist the respondent's case. As Mr Dugmore's approach to Mr Kitchen shows he was evidently concerned about the evidence obtained by Mr Kitchen and I found this was part of his attempt to undo the damage, as he saw it, caused by that evidence. This was a further matter which led me to question the reliability of Mr Dugmore's evidence.

Substitution – the respondent's criticism of the claimants' evidence

175 Mr Dugmore also attempted to discredit the evidence obtained by the claimants about how substitution requests were in reality treated (Mr Kitchen and Mr Allison). Mr Dugmore criticised Mr Kitchen and Mr Allison for having contacted the BCAL Driver Queries email address. He said this was the generic email account of the Driver Administration Team, which deals with administrative matters concerning the self-employed drivers especially fees. He said it was not a point of contact for any queries regarding operational matters and is entirely the wrong point of contact to ask about the appointment of a substitute. The correct point of contact would be the Co-ordination Team. This is consistent with what drivers were told on the app.

176 Mr Dugmore suggested that Mr Kitchen and Mr Allison must have deliberately chosen to contact the wrong part of the business in the hope that they would get an answer that could be used to their advantage in this litigation. This was the point which Mr Jeans referred to as the "set up" and as Mr Jeans quite fairly pointed out he did not have the opportunity to cross examine either Mr Kitchen or Mr Allison about this. Mr Jeans also pointed to the similar timing of Mr Kitchen's and Mr Allison's requests and the oddity of Mr Kitchen's trip to Nicaragua which made him unavailable for this hearing as further factors which should lead me to question this aspect of the claimants' case.

177 I considered this aspect of the evidence carefully. I had particular regard to the fact that the respondent has not had the opportunity to cross examine either Mr Kitchen and Mr Allison. After reflection I have decided that none of the points raised lead me to disregard the evidence obtained by Mr Kitchen and Mr Allison. I reached that conclusion for the following reasons:

177.1 The point about Mr Kitchen and Mr Allison using the wrong point of contact carried little weight for me because the respondent did not clearly explain to the claimants any particular process that they should use if they wished to appoint a substitute. The evidence referred to by Mr Dugmore was a reference on the app to discussing substitution with a coordinator. This falls far short of identifying any particular process which the claimants should use to appoint a substitute. It seems to me that the suggestion that Mr Kitchen and Mr Allison used the "wrong" process to try and appoint a substitute is not a very good point because the respondent has never clearly explained to the self-employed drivers what the "right" process would be.

177.2 Furthermore, even if Mr Kitchen or Mr Allison had approached the wrong person with their query it is quite clear from the responses that the people they contacted escalated the queries to somebody who they thought was more suitable to answer. Leanne Downes even indicated that she had passed on Mr Allison's query to the "appropriate department", which I would assume would mean the coordination team if Mr Dugmore is correct that they are the appropriate people. The response still remained negative (or non-existent in Mr Allison's case).

177.3 I agree it is likely from the timing of the requests that Mr Kitchen and Mr Allison were planning or coordinating their actions. Mr Kitchen was in fact quite open in his witness statement about the fact that his intention was to "test" whether the substitution clause was genuine with an eye on this litigation. The point is that at the time the respondent did not know that; they thought they were responding to genuine substitution queries. For that reason the evidence is in my view valuable.

177.4 Although I agree it is quite odd that Mr Kitchen is in Nicaragua when he should have been at this hearing, I am satisfied that it is most likely that this came about because of an oversight on his part. I am aware that there were efforts made by the claimants' solicitors to obtain permission, with Mr Kitchen's consent, for him to give evidence remotely from Nicaragua. Therefore I do not think there was any attempt on Mr Kitchen's part to deliberately avoid giving evidence. If he had wanted to avoid giving evidence there were much easier ways to do that, such as phoning in sick, rather than going to Nicaragua.

177.5 I consider it is inherently unlikely that Mr Kitchen and Mr Allison would have risked raising these queries to the wrong person if they knew that a favourable response would be obtained if they raised them to the right person. The obvious risk there, from the claimants' perspective, is that if a

genuine right existed the person receiving the queries would simply have passed them on to the right person to action. I consider that is likely what would have happened if there was a genuine right of substitution which everyone anticipated could be utilised. I consider it is much more likely that Mr Kitchen and Mr Allison raised these queries because they were confident that the responses would expose the substitution clause as not reflecting reality.

177.6 Mr Dugmore has taken it upon himself to attempt to repair the damage caused by Mr Kitchen's query. I explain the circumstances around that below. I found the attempt was contrived and unconvincing.

177.7 In my view the queries raised by Mr Kitchen and Mr Allison were only a "set up" in the sense that the respondent was caught unawares and the responses were given freely without any appreciation of how that might affect this litigation. In my judgement therefore the responses received are significant evidence demonstrating how a substitution request would in reality be treated.

178 Mr Dugmore said in his statement that after finding out about the response given to Mr Kitchen he asked the respondent's Finance Director, Mr Layal, to speak to Ms Shakespeare to understand why she had answered Mr Kitchen in the way she had, including who she had asked about the query. According to what Mr Dugmore said that Mr Layal said Ms Shakespeare said, Ms Shakespeare explained she had spoken to another of the Administration Clerks in the Driver Administration Team. I do not feel I can attach much weight to that evidence. The respondent did not call either Mr Layal or Ms Shakespeare who might have been able to better explain the situation. It would not make any sense for Ms Shakespeare to ask another Administration Clerk. It is quite clear from the way her email is written that she had escalated the query to somebody more senior, as she says she had "asked the question". In my view the whole point of asking the question would be to escalate the query to somebody more senior so that a definitive answer could be obtained. In fact the answer given was expressed in a definitive and unequivocal way ("under no circumstances") so Ms Shakespeare plainly felt confident in giving it, which would be consistent with her having checked the query with somebody more senior.

179 Mr Dugmore also suggested that Ms Downes had not in fact passed on Mr Allison's query. Again Ms Downes was not called so that the situation could be explained. Once again, I must say that I find Mr Dugmore's evidence unreliable because it is not supported by the contemporaneous documents. Ms Downes' email did not say what Mr Dugmore said it did at paragraph 130 of his statement. In particular Ms Downes' email did not say that the query "will" be passed on to the relevant department. The email clearly says that she has already passed the query on to the relevant department *("I have sent this…").* There was no reason for her to mislead Mr Allison about that and I find that the contemporaneous email is the much more reliable evidence about what took place.

Substitution – Mr Dugmore's reaction to the evidence obtained by Mr Kitchen

180 I think Mr Dugmore's actions after he learned of the response to Mr Kitchen's enquiry and his obvious appreciation of the negative impact that was likely to have on the respondent's case in these proceedings merit further consideration.

181 Mr Kitchen left the respondent on 7 April 2021 and commenced early conciliation via ACAS on 6 May 2021. ACAS confirmed to the claimants' solicitors that they were about to make contact with the respondent about his claim on 20 May 2021. On 19 May 2021 an article was published in the Independent about the claimants' claims [4452 – 4458]. Mr Kitchen provided information in relation to that. The article contained negative comments about the respondent's treatment of the claimants and its prospects of success in this litigation. On 28 May 2021 Mr Kitchen received a call from the respondent's head office. The call was received at around 6:10pm on a Friday evening. Mr Kitchen did not answer the call but it transpired that it was from Mr Dugmore and Mr Dugmore had left a voicemail message. Mr Kitchen did not know who Mr Dugmore was at the time. A transcript of Mr Dugmore's voicemail was in the bundle [4586]. Mr Dugmore said that Mr Kitchen had been fed some "incorrect information" about substitution which he wanted to discuss. He said there was a right to substitute within the contract and he would talk through that option with Mr Kitchen.

182 Mr Dugmore said in his statement that he became aware of Mr Kitchen's query via Mr Layal, who reported it to him. He did not explain why it was referred to him at that particular time or indeed why it was referred to him at all. I consider the most likely explanation is that Mr Dugmore was taking the lead in defending these claims and the respondent had realised the potentially damaging impact of the response to Mr Kitchen to its defence.

183 I find that the timing of Mr Dugmore's call to Mr Kitchen is suspicious. It was a long time after Mr Kitchen had raised his query and in fact it was a long time after he had stopped working for the respondent. It was around the time that the respondent was learning of Mr Kitchen's claim and potentially damaging negative publicity was starting to come out about the claims. It would be unusual in the ordinary course of events for a single substitution request to be referred directly to the Head of Operations and for the Head of Operations to take such a keen interest as to phone the individual driver outside of normal working hours. Given that Mr Kitchen had in fact left the respondent by that point there was in fact no reason for Mr Dugmore to contact him at all, other than to try and repair the damage that he thought the response to the query may cause to the respondent's case.

184 Mr Kitchen responded to Mr Dugmore's voicemail by email on 27 June 2021 [4588]. The tone of his response is one of surprise that the Head of Operations, who he did not know, had contacted him directly about his request. I think this surprise was understandable for the reasons I have already explained. Mr Kitchen acknowledged the voicemail. He pointed out that Mr Dugmore would be aware both of the damaging evidence in relation to substitution and also the email from 2018 referring to a practice of punishment which he was aware of. He said that he would be happy to discuss if Mr Dugmore wished to reply to the email. Mr Dugmore did not respond.

185 I consider it extremely likely that Mr Dugmore's response to Mr Kitchen was not a genuine response to his query but was instead a reaction to these claims and the adverse publicity. In the same way as his evidence to me on the substitution email from 2018 Mr Dugmore's concern was to try and protect the respondent's position in this litigation as much as possible. This was a further factor which led me to question the reliability of Mr Dugmore's evidence.

Substitution – the respondent's evidence about equipment and trade plates

186 Mr Dugmore suggested that the claimants' argument that substitution was not a genuine right because the substitute could not use their trade plates or equipment was based on a "misunderstanding", even though it was supported by Ms Shakespeare's email. Mr Dugmore's evidence was that in fact the claimants would have been free to pass all of the equipment provided to them by the respondent to a substitute to use, including trade plates.

187 It is unclear how a substitute could use the ID badge since that is obviously unique to the self-employed driver. It was not suggested that substitutes would be given their own ID badge. As I have mentioned all drivers were expected to wear an ID badge so this is an issue one would have expected the respondent to make arrangements for if it was seriously expected that a substitute could be used.

188 Mr Dugmore acknowledged that trade plates are issued by the respondent to a specific self-employed driver so that the respondent knows where the trade plates are being held under the terms of its licence with the DVLA and that the trade plates remain the responsibility of the self-employed driver during their engagement. He nevertheless asserted that trade plates may be used by a substitute appointed by a self-employed driver.

189 Mr Jeans' submissions showed that the relevant legislation enabled anybody to use trade plates as long as they were doing so for the purpose of the respondent's business. However it seems to me the issue here is what the reality of the situation was and in particular whether there was any serious expectation that trade plates could simply be passed on to substitutes, rather than what is technically permitted by the legislation.

190 I do not think the respondent would realistically be content for the trade plates to be passed to a substitute so that it would lose control over where the trade plates are and who uses them and when. This flies in the face of what the claimants were told at their training about the importance of keeping their trade plates themselves – *"Trade plates must remain with you at all times"* [983]. The claimants were also warned that that if they left their trade plates on a particular job, they would not be offered any more work until they were recovered. This supports my impression that trade plates were not intended by the respondent to be something that could be passed around between drivers.

191 Mr Dugmore further suggested that in the alternative a new set of equipment and trade plates could be issued to a substitute. A new set of trade plates was issued for Mr Pratt's substitute. It is not clear to me why that was done if the respondent was really content for a substitute to simply use the self-employed driver's plates.

Furthermore, I do not think the respondent would realistically issue new trade plates for substitutes as a general practice. There would be a cost associated with that and the respondent would lose control over the trade plates.

Substitution – the respondent's evidence about insurance

192 Mr Dugmore firstly suggested that a substitute could be insured under a self-employed driver's own insurance. Considering no self-employed driver had their own insurance this was in reality not an option. Secondly, Mr Dugmore suggested that a substitute could be added to the respondent's own group insurance. That was what was done when Mr Pratt appointed a substitute.

193 The basis on which the respondent obtained insurance for Mr Pratt's substitute is unclear. In July 2021 the respondent made enquiries with its insurers as to whether substitutes could be insured under the respondent's group policy. Again, I note that this was only done after this litigation was commenced. The response from the insurers was that they were happy with the substitute drivers system based on the substitute drivers being subject to the usual self-employed driver checks and procedures and the substitute driver having their own identification number "once approved".

194 Although this evidence has seemingly been obtained in view of this litigation, I don't think it is very helpful to the respondent. Mr Dugmore accepted in his evidence that substitute drivers would not in fact be subject to the same checks and procedures as self-employed drivers. For example, it was not suggested that substitutes would have their licences verified in the same way as the respondent did for self-employed drivers. In fact on the respondent's case substitutes would be subject to few if any checks and procedures. In addition it was not suggested that a substitute would be given their own identification number (as the respondent did for its self-employed drivers but did not do for Mr Pratt's substitute). Further, the respondent did not suggest in their evidence that there was any need for substitutes to be "approved". That would have been problematic for the respondent in this case because a need for a substitute to be approved would suggest a fetter. Yet the respondent's insurer appears to understand that substitutes will be approved.

195 It therefore seems to me that the respondent has explained the system of substitution differently to its insurers as it was explained to me. It is not clear to me if a substitute would in fact be insured under the respondent's group policy given that the expectations of the insurer as to how substitution works would not be met. Furthermore as I explained earlier the terms of the respondent's group insurance policy stipulate that drivers are insured while working under the respondent's control. Given that Mr Dugmore's evidence was that the respondent would have no contact or relationship whatsoever with a substitute it is difficult to see how a substitute could possibly work under the respondent's control. Mr Dugmore was not able to satisfactorily explain how a substitute would be working under the respondent's control.

196 The respondent appears to have obtained specific insurance for Mr Pratt's substitute as an individual case but for the reasons I have explained it seems

clear to me that the respondent does not have an adequate system in place for ensuring substitutes are insured. This would be a vital system to have in place if it was seriously anticipated that substitutes could be used.

Substitution - data

197 Ms Monaghan cross examined Mr Dugmore about the data concerning the respondent's customers which would necessarily have to be passed to the substitute if one was used. By the terms of the written agreement between the self-employed drivers and the respondent the self-employed drivers agreed to comply with data protection legislation. However there would be no such agreement between the respondent and any substitute. By the terms of the written agreement the self-employed driver agreed to ensure that any substitute would comply with data protection legislation. It was unclear how this could work in practice. Mr Dugmore accepted the respondent would not provide any training on data protection. He could not satisfactorily answer how the respondent would ensure data provided to substitutes would be processed consistently with data protection law. Again this is the type of issue which one would expect to have been considered if it was seriously anticipated that substitutes would be used.

Substitution – Samantha Kinsey

198 The final piece of evidence which the respondent relied on regarding substitution was a transcript of a telephone call between a self-employed driver, Samantha Kinsey, and a Driver Operations Team Leader, Owen Goulding. Neither Mr Goulding nor Ms Kinsey provided a statement or gave oral evidence. The transcript arrived during the hearing and for the reasons I have already explained caused a bit of a furore.

199 The call between Ms Kinsey and Mr Goulding took place on 30 January 2023 (i.e. the first day of this hearing). It was initially suggested that this was evidence of another substitution enquiry but on analysis it transpired that Ms Kinsey did not actually enquire about substitution. She was concerned about having time to do the volume of work she was being provided with. There was a discussion about working in teams with other drivers from the respondent. Ms Kinsey was wrongly informed by Mr Goulding that would entail her paying the other drivers. Towards the end of the conversation Mr Goulding raised the possibility of Ms Kinsley working on what he called a sub-contractor basis so that Ms Kinsley could manage her workload by sub-contracting work to other drivers. The following day, 31 January, Mr Goulding sent an email to Ms Kinsey with the subject "SUBSTITUTE". This was the first time the word substitute had been used. The email said that Ms Kinsey was able to provide a substitute, the respondent would require "some details" of the substitute and Ms Kinsey would be responsible for paying and training the substitute. Later the same day Mr Goulding forwarded his email directly to Mr Dugmore.

200 I have to say I am very sceptical about the evidence relating to Samantha Kinsley. It was not a response to a genuine query from a self-employed driver. Rather the suggestion of substitution came from a member of Mr Dugmore's team and I find it suspicious that this was done on the first day of the hearing. In the ordinary

course of events one would expect a substitution issue could be dealt with by a Team Leader rather than referred directly to the Head of Operations. Mr Dugmore accepted in his evidence that the email was forwarded to him because it was relevant to this case. It therefore seems likely that Mr Dugmore's team knew he had an interest in obtaining evidence helpful to the respondent's case on substitution. Once again, I am not satisfied that the evidence relied upon by the respondent represents the reality. I doubt Mr Goulding would have pushed the agenda of substitution were it not for this hearing and the perceived need to obtain evidence that might be helpful for the respondent.

Substitution - risk

201 Mr Dugmore's evidence was that *"there are no restrictions as to who a self-employed driver can use as a substitute"* and no restrictions as to when a substitute can be used. He further suggested that the respondent had no right or desire to prevent a self-employed driver using any substitute. I consider that if the self-employed drivers really were permitted to appoint substitutes in the very free way which the respondent asserts is the reality, then the risks to the respondent would be serious and manifest.

202 Under its purported system for substitution the respondent would not be involved in training substitutes and would not even have any contact with them. The respondent would therefore have no way of knowing if a substitute had been appropriately trained by a driver, or even if they had been trained at all. It beggars belief to suggest that the respondent would go to the time, trouble and expense of thoroughly training its self-employed drivers over a 4-day initial training course and ongoing feedback/updates/audits but then allow them to use a substitute who may have been inadequately trained or not have had any training at all.

203 The respondent is obviously greatly concerned to ensure that the drivers provide their service in accordance with the stringent SLAs which the respondent has with its customers. The respondent would have no way of ensuring that a substitute provided their services in accordance with its customers' requirements. I do not think it is realistic to suggest the respondent and its customers would be content with that risk.

204 In reaching that view I have taken into account in particular the fact that the work performed by the claimants was not as simple as delivery. In addition to driving cars from one destination to another as they were also responsible for carrying out inspections of the vehicles. As the training, audits and updates show it was of paramount importance to the respondent that the inspections were carried out in a particular way in compliance with the respondent's customer's expectations. Yet if a substitute was used the respondent would have no way of ensuring that they knew how to do an inspection properly and the risk of something being missed would be high. I do not think it is realistic to suggest the respondent and its customers would be content with that.

205 I doubt whether in reality the respondent would be content for a driver to hand over all their equipment to a substitute who the respondent has no relationship or contact with and knows very little about. Some of the equipment was valuable

(such as the phone and I pad). Much of the equipment was branded with the respondent's name which would make it appear to the respondent's customers and the world in general that the substitute was part of the respondent's workforce.

206 The respondent's case is that a substitute would be provided with its customers cars, some of which are high value, and entrusted to inspect and then drive them on their own from one location to other. Presumably a substitute would also be entrusted to look after the respondent customers' cars overnight if they were doing a carry over job. The respondent would nevertheless have no relationship or contact with the substitute whatsoever. The only details the respondent would have about the substitute is a name and address and a copy of a driving licence which had not been checked or verified. The risks here are significant; cars could be lost, stolen, damaged, crashed or used in criminality and the person responsible would be somebody who the respondent has very little knowledge about. Once again, I do not think it is realistic to suggest the respondent and its customers would be content to take this risk.

207 I have taken into account Mr Jeans' submissions about Deliveroo. However it seems to me that the risks in the instant case are more serious. To my mind this is clear firstly from the stringent SLAs which the respondent has with its customer but it also flows from the nature of the service provided. Deliveroo was about food delivery. That is not really comparable to the services provided in this case which are the delivery and inspection of cars, some of which are high value. Entrusting somebody to deliver and inspect a high value car is more significant and carries with it more risk than entrusting somebody to deliver a hot meal.

208 When I asked Mr Dugmore about the risks involved, he immediately and rather blithely said that the respondent was willing to take the risk. In view of the circumstances I have outlined above I did not accept that evidence. It was another assertion which I found did not reflect the reality of the situation.

Conclusions

209 In my judgement the key characteristics of the relationship between the claimants and the respondent point firmly towards the claimants having limb b worker status. In summary:

209.1 There was a contract (this was agreed).

209.2 By the contract the claimants undertook to personally carry out services for the respondent.

209.3 The written agreement and in particular the purported substitution clause did not genuinely reflect the actual agreement between the parties.

209.4 By the contract the services provided by the claimants were for the respondent's benefit and the respondent was not a client or customer of the claimants.

210 The claimants were subordinate to and dependent on the respondent. They were not in business on their own account. The claimants could not realistically be seen as independent contractors who should be treated as being able to look after themselves. This was evident from the following in particular:

210.1 The claimants had no choice of contract terms and no real ability to negotiate the terms. They had little to no influence on the terms under which they worked.

210.2 The claimants generally had no choice of work; they were generally expected to perform the work provided to them by the respondent.

210.3 In practice the claimants were obliged to work either 3 or 5 days per week and to work on the days they had agreed to be available. They were expected to provide a satisfactory explanation if they were not available. They were heavily committed to and reliant on the respondent.

210.4 The claimants faced the risk of punishment if they did not work when they were expected to without a satisfactory explanation.

210.5 The respondent exercised significant control over the way in which the claimants delivered their services, for example through training and the ongoing update, feedback and auditing systems.

210.6 The claimants did not have any relationship with the respondent's customers. They had no knowledge of the SLAs. The claimants were simply directed by the respondent to perform their services so that the respondent would satisfy the requirements of its customers. It was not suggested that the claimants were ever marketed by name or specifically requested by customers. The business model was that the service was provided to the respondent's customers by the respondent's workforce, which included the claimants. The claimants had no real ability to improve their economic position through professional or entrepreneurial skill.

210.7 The claimants did not face any significant financial risk as they did not make the sort of financial investment as somebody in business on their own account probably would; rather they were simply dependent on being paid by the respondent.

210.8 Pay was set by the respondent and was non-negotiable.

210.9 The claimants were not paid for certain activities they were required to undertake, such as planning the evening before and the training course (unless they completed a certain number of shifts). There was no guarantee that they would be paid for their travel or waiting time; these payments had to be authorised by the respondent and claimed through a procedure set by the respondent. The claimants did not in reality have the facility to negotiate against these practices.

211 I have taken into account the points made by Mr Jeans about DBANs and other freedoms relied upon by the respondent as set out in his written closing submissions and the respondent's evidence. However I found that the freedoms the claimants had were not as extensive as the respondent has asserted. My impression after having heard the evidence was that the claimants were in nowhere near as strong a bargaining position as the respondent suggested. Weighing up all the evidence my findings as to the reality of the claimants' working conditions are as summarised above.

212 Looking at the facts objectively the clause in the written contract to the effect that the claimants were self-employed and in business on their own account had the object of excluding the claimants from the operation of the relevant legislation. It should therefore be disregarded. I find that the facts of the relationship show that the claimants had worker status and they were not carrying on business on their own account. The written contract did not represent what was truly agreed between the parties.

213 The substitution clause was not genuine. Not only was a substitute never used but nobody seriously expected a substitute to be used. The substitution clause was an unrealistic possibility that was not intended to be operated in practice and it therefore did not form part of the true agreement. It did not reflect what the parties realistically expected to occur. I reached this conclusion with reference to my analysis of the evidence on substitution which I have summarised above, and especially the following points:

213.1 The claimants' evidence as to the genuineness of the substitution clause was much more credible than that provided by the respondent. The evidence obtained by Mr Kitchen and Mr Allison showed how a substitution request would in reality be treated and this was supported by Mr Graham. If the substitution clause was genuine this would have been communicated to Mr Kitchen and Mr Allison, at least once the queries had been escalated to more senior/appropriate people, as I find that they obviously were. The respondent's attempt to undermine this evidence, particularly through Mr Dugmore, was unconvincing.

213.2 There are clear practical difficulties with self-employed drivers using substitutes, including difficulties relating to trade plates, insurance, data protection and equipment. What became obvious at the hearing was that the respondent had given little thought as to how these difficulties could be overcome. Even if the issues which I have outlined were surmountable there was no plan or process in place for what would happen in practice. This contributed to my very strong impression that nobody seriously expected a substitute to be used.

213.3 The respondent did not provide any training or guidance on how to engage and use a substitute. There were no processes or procedures in place for this to be done. This supports my strong impression that nobody realistically expected a substitute to be used.

213.4 It is unrealistic for the respondent to suggest it would go to the time and expense of training self-employed drivers over a 4-day course, the

production and distribution of the lengthy drivers manual and ongoing updates and audits but be content for a substitute to be used without the respondent training them at all. It was unrealistic to expect a self-employed driver to pass on that amount of training and it is unclear whether and if so how that could in reality be done.

213.5 It is unrealistic for the respondent to suggest that a substitute, quite possibly with little or no training, could undertake the inspections part of the services to meet the requirements in the SLAs and the respondent's customers' expectations. It is unrealistic to think that the respondent and its customers would be content for a possibly untrained substitute to even attempt that.

213.6 It is unrealistic to suggest that the respondent would take the serious risks involved in handing over its customers' high value cars to a substitute with whom it has no contact or relationship and knows very little about.

213.7 As the respondent has used self-employed drivers for at least 25 years and in that period has engaged thousands of self-employed drivers this case provided ample opportunity to consider how the parties really conducted themselves in practice. No self-employed driver has ever used a substitute, despite the fact it would be of obvious benefit if it was a genuine right. Furthermore the evidence relating to a nascent interest in substitution had only come out during these proceedings and was unpersuasive. In my view the evidence of how the parties conducted themselves in practice prior to the respondent's concern to defend this litigation is persuasive. It creates a strong inference that the practice of never using substitutes reflected the true obligations and expectations of the parties. This supported my overall view that the substitution clause was not genuine.

214 The claimants were not providing a business service to the respondent as a customer by virtue of the contract. In my view it was quite clear that the respondent was not a client or customer of the claimants. This was not something that was suggested in any of the contemporaneous documentation which I was referred to. There was no evidence of the claimants offering their services to the world in general and no direct evidence of any self-employed driver who performed similar services for other clients. The working arrangements of the drivers I heard directly from strongly suggest that it would be unrealistic for a driver to work elsewhere due to the heavy commitment they had to the respondent.

215 The claimants were specifically recruited by the respondent to work as an integral part of its operations. In fact the recruitment of the claimants was very similar to an ordinary job application process, right down to an interview taking place in a job centre. Once appointed the claimants were extensively trained and effectively embedded in the respondent's organisation. The claimants did the work they were assigned by the respondent in the way in which the respondent directed them to.

216 In my view the training provided and the way of working bore all the hallmarks of direction and control which indicates the claimants should be classified as workers. There were comprehensive guidelines about how they must carry out the

role, right down to what sort of clothing would and would not be appropriate. Other factors supported this conclusion, including that in practice the claimants were heavily committed to working for the respondent and they relied on the company for their living, that the claimants were provided with all the equipment and training necessary to do the job by the respondent and much of the equipment including the ID badge and hi vis jacket they wore to identify themselves to the respondent's customers and the world at large was branded with the respondent's name.

217 More fundamentally the arrangements around pay did not suggest that the respondent was a customer or client of the claimants. As I have explained the reality was that the pay was set by the respondent with little to no facility for the claimants to negotiate. The examples relied upon by the respondent as evidencing negotiation were largely payment of travel expenses or waiting time where the claimants requested authorisation of a payment in accordance with a process set by the respondent and at a rate set by the respondent. The respondent decided whether to make such payments in accordance with its own policies and practices and payment would only be made if the respondent considered it was justified. This is consistent in my view with a worker relationship and it falls short of a genuine negotiation over fees in which both parties had real bargaining power.

218 In reality it was the respondent who dictated how much the claimants were paid for the work they did. The term in the written contract to the effect that a negotiation could take place by way of offer and counter offer was a clear example of a term which did not reflect reality. The reality was that the fees were fixed by the respondent. The claimants did not submit invoices; they were simply paid according to the respondent's calculations. I found that this all added to the clear picture that the claimants were not working for themselves but on the respondent's behalf and they were in fact fully integrated into the respondent's business.

219 I would accept the claimants' submission that there is an overarching contract in this case. It seems relatively clear to me that the claimants undertook a continuing obligation to work. This flows from the arrangements at the start of their engagement when the claimants were required to commit to working 3 or 5 days a week. The working arrangements of the drivers I heard from showed that this initial commitment was maintained in practice. This was the nature of the true agreement between the parties. The simple reality is that from that point the claimants were obliged to work on the days to which they had committed, unless they had a good reason like sickness or had agreed leave. This is what happened in practice and realistically it represented what had been agreed between the parties. The realistic obligation to be available for work when they indicated they would be is also evident from the impact of rejecting working on the days the claimants indicated they would be available - for example the use of the AWOL code on the calendar and the practice of punishment.

220 As I have explained the thorough examination of the claimants' working arrangements conducted in this case has revealed that the claimants' work for the respondent did not begin and end with logging on and off the system. In particular the claimants were expected to check their work for the next day the night before and plan it out. I think this is again indicative of the overarching agreement to work

on the days to which they had committed, rather than a more ad hoc arrangement based around logging on and off an app.

221 If I was wrong about the overarching contract, I would agree with the claimants' submission that it cannot sensibly be disputed that the claimants are workers at times when they are actually engaged in work for the respondent.

222 I have considered Mr. Jeans' reliance on Simply Smile to the effect that the stated intention in the written contract to create a self-employed relationship could be decisive where the position might otherwise be uncertain. However when I reviewed my findings, I did not think this was an uncertain, marginal or borderline case. In my view the key factual features of the relationship between the parties pointed one way – i.e. towards the claimants being limb b workers. In my judgement it was in the end relatively clear cut that the claimants in this case were limb b workers and the written contract did not reflect reality.

223 Finally, I should note that Mr. Jeans' final point in his written closing submissions was that a conclusion reached by the Dundee ET in a case called Milne and concerning the same respondent holds good today. The judgment in Milne was in the bundle but I don't think either party referred to it at the hearing. The Judge found that Mr. Milne was a self-employed contractor. It was not suggested that the decision is binding. Milne is a first instance judgment that is nearly 10 years old. It is possible that the working practices at the respondent have changed over that long period. There have certainly been developments in the relevant case law over the last 10 years. Milne was about a single claimant rather than group litigation like this case. It is a relatively short judgment following a relatively short hearing of 1 day and so the Judge cannot have had the benefit of the extensive evidence which I was referred to, including the evidence on substitution some of which has only been produced recently (Mr. Kitchen and Mr. Allison). In Milne the respondent was again represented by an eminent KC, but the claimant was represented by somebody who was inexperienced (see paragraph 19 of the judgment) and this meant the Judge is not likely to have had the considerable benefit which I have had of parity of very high-quality representation and argument by extremely experienced representatives. Crucially, the issue in Milne was not the same as the one I have to consider because the issue there was whether the claimant was an employee. For those reasons I don't think Milne is persuasive in terms of the decision I have to make. It was therefore appropriate in my view to approach this case with an open mind and when I did that, I reached the outcome set out above.

Employment Judge Meichen 3.5.23

Sent to the parties on:

...KAMALJIT SANDHU.....03.05.2023.....

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For the Tribunal:

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