# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr J Edwards**

**Respondent:** **Trg Logistics Limited**

**Heard at:** **East London Hearing Centre**

**On:** **8 June 2017**

**Before:** **Employment Judge Russell**

**Representation**
**Claimant:** **In person**
**Respondent:** **Mr J Davies (Head of Human Resources)**

# JUDGMENT

**It is the judgment of the Employment Tribunal that:-**

1. **The Claimant was not an employee within the definition of section 230(1) Employment Rights Act 1996. The claims of unfair dismissal and breach of contract fail.**

2. **The Claimant was a worker within the definition of section 230(3)(b) of the Employment Rights Act 1996. The claim for accrued but unpaid holiday pay succeeds.**

3. **By agreement, the Claimant is entitled to holiday pay in the sum of £1,020.22 (net of deductions for tax and National Insurance).**

## REASONS

1. By a claim form presented to the Tribunal on 5 February 2017, the Claimant brings claims of unfair dismissal, breach of contract and for accrued but unpaid holiday. The Respondent resisted all claims. The Issues to be determined were the Claimant's employment status (employee for unfair dismissal and breach of contract) or worker (holiday pay) and, thereafter, whether he had been unfairly dismissed without notice by reason of conduct on 4 December 2016 and with accrued holiday still due on termination.

2. I heard evidence from the Claimant on his own behalf. For the Respondent, I heard evidence from Mr C Akerman (Contract Manager) and Mr S Chaplin (Regional Manager). I was provided with an agreed bundle of documents. At the outset of the hearing, the Claimant adduced a further document which was included in the bundle. During the course of the hearing, the Respondent adduced copies of two contracts signed by the Claimant in 2013 and 2014 and a further internal document relating to driver unavailability. Mr Davies also sought to adduce from his witnesses in chief, evidence about whether there was a right of substitution. As the supplementary evidence and the additional documents adduced by the Respondent were directly relevant to the core issue of employment status, I decided that they were admissible and permitted the Claimant to give further evidence about the issue in order to minimise any prejudice caused to him. The regrettable consequence of this late submission of relevant evidence by the Respondent meant that the issue was not explored as thoroughly as it might have been. Any prejudice caused to the Respondent as a consequence, however, was entirely of its own making in failing properly to address such a central part of the case.

**Law**

*Employment Status*

4. The Employment Rights Act 1996, section 94 gives the right not to be unfairly dismissed only to an employee, as defined within s.230 Employment Rights Act 1996. This requires the claimant to establish that he worked under a contract of service or apprenticeship, whether express or implied, and (if express) whether oral or in writing.

5. There can be no contract of services without there being an irreducible minimum of obligation on both sides, **Nethermere (St Neots) Ltd –v- Gardiner** [1984] IRLR 245. Mutual obligations are necessary for there to be a contract at all. If there is a contract, the Tribunal must then determine what type of contract it is, having regard to the nature of the obligations. Control alone cannot determine employment status; the contract must also necessarily relate to mutual obligations to work and to pay for (or provide) it, **Cotswold Developments Construction Ltd –v- Williams** [2006] IRLR 181.

*Worker status*

6. Section 230(3) of the Employment Rights Act 1996 defines a worker as an individual who has entered into or worked under a contract of employment or:

**(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another part of the contract his status is not by virtue of the contract that a client or customer of any profession or business undertaking carried on by the individual.**

7. It follows, therefore, that there are two parts to the section 230(3)(b) worker test. First, whether or not the contract is an undertaking personally to perform work. Second, whether or not by virtue of the contract, the recipient is a client or customer of a business undertaking carried on by that individual.

8. I drew the attention of the parties to the Judgment of the Court of Appeal in **Pimlico Plumbers Ltd v Smith** [2017] EWCA Civ 51, a copy of which I provided to

each. At paragraph 66 Etherton MR set out the three types of people for employment purposes, as drawn by Lady Hale in **Clyde & Co LLP v Bates Van Winklehof** [2014] UKSC 32, namely: (i) those employed under a contract of employment, (ii) those self-employed people who are in business on their own account and undertake work for their clients and customers and (iii) an intermediate class of workers who are self-employed but do not fall within the second class. Mr Davies conceded that, subject to the personal performance requirement, the Claimant fell within the third category. The answer to this issue turns entirely on the terms of the contract between the parties, see **Pimlico Plumbers** at para 73.

9. At paragraph 84 of **Pimlico Plumbers**, Etherton MR summarised the principles to be applied when considering whether there is a requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work is inconsistent with a requirement for personal performance. Secondly, a conditional right to substitute may or may not be inconsistent depending upon the degree of conditionality and will depend upon the precise contractual arrangements affecting the nature and degree of any fetter, in other words the extent to which the right to substitute is limited or occasional. Etherton MR then considered three possibilities by way of example: substitution only where unable to carry out work; substitution limited only by the need to show that the substitute is qualified; and substitution only with the consent of a person who has absolute discretion to refuse. Mr Davies submits that the Claimant falls within the second example which is said to be inconsistent with personal performance (the other two examples being consistent with personal performance).

**Findings of Fact**

10. The Respondent provides drivers to carry out deliveries for its client, Tesco, acting in essence as an employment agency. Tesco provide the vehicles, details of the route to be followed, require that drivers pass its security and assessment standards and generally exercise a great deal of control over the way in which the deliveries are undertaken. The Respondent provides the services of about 145 drivers to Tesco, a large number of whom are PAYE but some are engaged on a self-employed basis. I accept the Respondent's evidence that it prefers to engage its drivers on an employed basis as it gives them greater control and ability to plan workforce levels.

11. The Claimant started working as a driver for the Respondent on 22 February 2013. His initial contracts, dated 21 February 2013 and 25 April 2014, were agreed to be ones of employment under which the Claimant was paid with deductions for employee National Insurance and tax under the PAYE scheme.

12. Under the 25 April 2014 contract, the Respondent guaranteed a minimum of 337 hours work per annum and a minimum of at least one hour's work per week. Where assignments were cancelled at short notice, the employee was entitled to pay. Employees are entitled to 5.6 weeks' basic paid holiday per year and a prescribed period applied to leave requests, which the employer reserved a right to refuse. In practice, a formal holiday request had to be made in advance for anything other than occasional days off.

13. In March 2016, the Claimant and Mr Akerman spoke about whether or not the Claimant should move from employed status to provision of his services via a limited company on a self-employed basis. There is a dispute as to who proposed the change

and whether it was something which Mr Akerman had pressed improperly upon the Claimant. I found both the Claimant and Mr Akerman to be truthful witnesses doing their best to give the evidence as they recalled it. I find on balance that there was no improper pressure from Mr Akerman upon the Claimant. Mr Akerman explained that the Claimant would benefit from an increased hourly rate and the ability to deduct expenses but that he would need to account for his own tax and make allowances for his holiday. Mr Akerman explained to the Claimant that he would be leaving his employment and would not be an employee.

14. In supplementary evidence to the Tribunal, Mr Akerman stated that he had gone through the forms applicable to self-employed drivers including, one entitled Dates of Unavailability. This was the document provided very late during the course of the hearing but I accept that it is a standard document used generally by the Respondent; it is not a sham produced for the purposes of this hearing. It includes the following:

> "**Will you be providing a substitute driver Yes/No (if yes please detail below)**
>
> **Name of Substitution: _____**
>
> **Signed:_____ Print Name: _____**"

15. On the Respondent's case, this permitted a driver operating through a limited company to provide a substitute driver, so long as they possess the appropriate license and be a person assessed as appropriate by Tesco.

16. The Claimant's evidence was that he had not been shown this document during the conversation with Mr Akerman and was not aware of any right to substitute and that he knew of no situations in which it had happened. It was not in dispute that the Claimant had never exercised a right to substitute. On balance, I am not satisfied that the Claimant and Mr Akerman discussed a right to substitute, what was meant by the form above or how it would operate in practice. Mr Akerman's witness statement sets out carefully what was discussed about the changes following termination of employment. If there had been discussion and agreement about substitution, I consider that it would have been set out in his statement. It may well form part of the terms of an agreement with other drivers providing their services through a limited company but it was not a matter brought to the Claimant's attention, far less agreed with him.

17. The Claimant set up his own limited company and provided his services through the same with effect from 26 June 2016. I find that this amounted to a consensual termination of the 2014 contract of employment and that the Claimant knew, and expressly agreed, that his status changed thereafter. There was no written agreement recording the terms upon which the Claimant now provided his services to the Respondent.

18. After 26 June 2016, the Claimant's delivery work and the way in which he performed it changed very little. There were changes in the administrative arrangements after that date. Whereas the Claimant had been rostered to work three days per week, now he provided in advance his dates of unavailability for work. He would be sent a text message giving assignment details on days when he had said that he was available. He was asked to confirm acceptance by replying "OK" or "NO". I

find that the Claimant had no obligation at all to accept any particular assignment, although in practice he generally accepted what had been offered. Whilst I appreciate a natural concern that if he refused an assignment, further assignments may not be offered I find that this was a subjective concern of the Claimant and not based in anything said or done by the Respondent. The extent of the Claimant's right to decline work is evidenced by his text messages in November 2016 and December 2016 in which he told the Respondent that he would not be working. I find that such texts are consistent with an ability to cancel work at will without disciplinary sanction.

19. It was not in dispute that after 26 June 2016, if a shift were cancelled at short notice of under four hours and the Claimant was prepared to work, he would be entitled to payment. Other than that, it was agreed that the Respondent was not under any duty to provide a minimum number of guaranteed annual or weekly hours of work. Before 26 June 2016, the Claimant was paid through payroll with appropriate deductions, after that date he was paid according to information included in a self-billing invoice (that is an invoice prepared by the Respondent on his behalf from records of the hours worked). There were no deductions for tax or National Insurance.

20. On 4 December 2016, the Claimant and another colleague were informed by text at 6.18am of the cancellation of their shift due to start at 11.30am. The Claimant attended work in any event but was sent away. There is a dispute as to whether the Claimant responded aggressively when sent away and/or whether he then completed a timesheet purporting to show that he had in fact worked. Given my conclusions on employment status below, I do not need to resolve this dispute.

21. On 5 December 2016, a Transport Manager at Tesco complained to Mr Chaplin about the conduct of the Claimant the day before. As a result, the Claimant was informed that his services were no longer required. No disciplinary procedure was followed and no notice of termination given.

22. On termination, the Respondent completed a Limited Company/Driver Removal form. It asked, as two separate questions, whether the limited company was still providing services and whether the driver was still providing services. Mr Davies submitted that this shows that the Claimant did not need to provide service personally as another driver could do so on behalf of the company, in other words that there was an unfettered right of substitution. I do not agree. The form records the Claimant as the only named driver for his limited company. The form was completed to record the termination of the Claimant's services and, at the same time, the services of his limited company. This is consistent with an interpretation that the Claimant was the only authorised driver for that company and if he did not provide his service personally the contract, his company would no longer be permitted to do so. In other words, it is more consistent with a requirement for personal service than the contrary.

## Conclusions

23. I have found, for the reasons set out above, that the April 2014 contract of employment was terminated by consent with effect from 26 June 2016. There was no written agreement between the parties after that date. The contract between the parties was verbal and its terms were those agreed between Mr Akerman and the Claimant on 11 March 2016 and any terms which may properly be implied. The Respondent would be well advised to ensure in the future that the terms of its

agreements with drivers operating other than as PAYE employees are recorded in writing.

24. Based upon my findings of fact, I conclude that after 26 June 2016 there was no obligation upon the Respondent to offer work and no obligation upon the Claimant to accept any work which was offered. The irreducible minimum of obligation was missing for this to be a contract of employment. This was consistent with the way in which the parties understood and agreed that the relationship was to be different after termination of the contract of employment and the Claimant's tax arrangements changed as a consequence. The Claimant was not an employee for the purposes of section 230(1) Employment Rights Act 1996. His claims for unfair dismissal and breach of contract fail and are dismissed.

25. As for worker status, as set out above, Mr Davies concedes that the Claimant is an "intermediate" or limb (b) worker as identified in **Pimlico,** subject to the question of whether there was sufficient requirement to provide personal service. For reasons set out above, I have found that there was no express term agreed between the Claimant and Mr Akerman about substitution after 26 June 2016. The parties simply did not turn their mind to it far less reach an agreement. It may well be the case that for other drivers, there is an agreement about substitution as the Respondent submits but it was not reached on the facts of this case where no right to substitute was agreed at all.

26. As for implied terms, I do not accept that there is sufficient evidence from which I could conclude that an unfettered right to substitute was a term implied either by custom and practice or for business efficacy. The limited right to suggest another driver, who would have to be licensed and assessed by Tesco, appears to require more than simple proof of qualification (for example the driving licence) and more akin to a shift swapping scenario and therefore not properly within the second example given in **Pimlico Plumbers**. In any event, I have not attached any great weight to this possibility due to the deeply unsatisfactory way in which the evidence came out. There is no adequate evidence of a right of substitution being exercised by drivers as a matter of common practice or that this was a right which was generally so well-known as to be notorious. Indeed, I have found that the content of the Removal form tends to suggest the contrary.

27. I make it clear that this case has turned entirely upon the facts as found as to the oral agreement reached between the Claimant and Mr Akerman, in the absence of any written agreement. Nothing set out in the Reasons should be taken to have more general application to other drivers engaged by the Respondent through a limited company.

28. Having concluded that the Claimant was a worker during the period from 26 June 2016 until 3 December 2016 (his last assignment), he continued to accrue holiday entitlement under the Working Time Regulations. It is common ground that due to the misconception about his status, such entitlement was not paid in lieu on termination. By agreement, the Claimant's weekly gross pay was £482.95 (the total sum of £3,380.75 dived by the seven-week period 16 October to 4 December 2016). It was agreed that the payment would be made by the Respondent after deduction for tax and National Insurance. The parties have now confirmed that the sum due is **£1,020.22.**

29. The Claimant was granted remission in full for fees and as such no order is made in this regard.

Employment Judge Russell

09 June 2017