Case Number: 1400043/2017
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EMPLOYMENT TRIBUNALS

Claimants: **1 Mr Vidmantas Daugvila**
2 Mr Valdas Petrulenas

Respondent: **Expert Logistics Ltd**

Heard at: **Bristol** **On: 15 and 16 June 2017**

Before: **Employment Judge O Harper**

Representation
Claimants: **In Person**
Respondent: **Mr J Lewis, Counsel**

RESERVED JUDGMENT

1. The first claimant Mr V Daugvila was neither an employee, nor a worker as defined by Section 230 of the Employment Rights Act 1996 and therefore is not entitled to pursue claims of unfair dismissal, breach of contract or for outstanding wages due. All claims are therefore dismissed.

2. The second claimant Mr V Petrulenas was neither a worker, nor employee of the respondent and therefore not entitled to pursue claims of unfair dismissal, automatically unfair dismissal, breach of contract or for outstanding wages due. All claims are therefore dismissed.

REASONS

1. The claimants presented claims to the Employment Tribunal on 11 January 2017 alleging unfair dismissal, breach of contract in relation to the notice period and for outstanding wages due. The respondent entered a response denying claims, the principal defence being that neither claimant was an employee nor worker for the respondent.

2. At a Case Management Preliminary Hearing on 22 March 2017 the claims were clarified as being on behalf of the first claimant as a claim for ordinary unfair pursuant to Sections 94 and 98 of the Employment Rights Act 1996, unlawful deduction from wages and damages for breach of contract in relation to the notice period.

3. In relation to the second claimant the claims were clarified as being for automatically unfair dismissal for having made a protective disclosure pursuant to 103A of the Employment Rights Act 1996, breach of contract in relation to the notice period and unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

4. The Judge directed that a two day preliminary hearing be fixed to determine the employment status or otherwise of the claimants in the light of the defence and the parties were directed to agree a list of issues to be determined at the preliminary hearing. The parties in accordance with those directions have agreed the matters for me to determine which are as follows:

Mr Vidmantas Daugvila

Unfair dismissal

(1) Was the first claimant an employee of the respondent (Section 230(1) of the Employment Rights Act 1996)?

(2) If so, when did his employment begin and so (as at 3 November 2016) did he have the requisite two years continuous employment to bring a claim of unfair dismissal (Section 108(1) Employment Rights Act 1996)?

Breach of contract (notice pay)

(3) Was the first claimant an employee of the respondent (Section 230(1) Employment Rights Act 1996)?

Unlawful deduction from wages

(4) Was the first claimant a worker in relation to the respondent (Section 230(3) Employment Rights Act 1996)?

Mr Valdas Petrulenas

Unfair dismissal

(5) Was the second claimant and employee of the respondent (Section 230(1) Employment Rights Acct 1996)?

(6) If so, when did his employment begin and so (as at 3 November 2016) did he have the requisite two years continuous employment to bring a claim of unfair dismissal (Section 108(1) Employment Rights Act 1996)?

Automatically unfair dismissal

(7) Was the second respondent an employee of the respondent (Section 230(1) Employment Rights ct 1996)?

(8) If so, does the second claimant contend that the reason (or principal reason) for his dismissal was the making of a protected disclosure (Section 103A and 108(3) Employment Rights Act 1996)?

Breach of contract (notice pay)

(9) Was the first claimant an employee of the respondent (Section 230(1) Employment Rights Act 1996)?

Unlawful deduction from wages

(10) Was the first claimant a worker in relation to the respondent (Section 230(3) Employment Rights Act 1996)?

5. The relevant statutory provisions are contained in Section 230 of the Employment Rights Act 1996 "ERA". Section 230(1) and (2) defines "employee" Section 230(3) defines "a worker"

Section 230(1)(2)(3) of the Employment Rights Act 1996 Employees, workers etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under):-

(a) a contract of employment, or

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

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

6. For the purposes of the claims of unfair dismissal and breach of contract both claimants are required to have been employees of the respondent in relation to the claim of unauthorised deductions from wages the claimants must be workers as defined by Section 230(3).

7. The case law confirms that for a contract of employment to exist between parties and/or for there to be a worker relationship between parties, there must be a direct contractual relationship between the employer and employee/worker - **James v Greenwich London Borough Council [2008] ICR 545** and most recently - **Smith v Carillion Ltd [2015] IRLR 467**, that there must exist a requirement for personal service -**Express and Echo Ltd v Tanton [1999] ICR 693** and most recently **Pimlico Plumbers Ltd v Smith [2017] IRLR 323**. A contractual relationship can only be implied if it is necessary to do so. The guidance in **Smith v Carillion Ltd [2015] IRLR 467 CA** sets out the principles applicable to whether a contractual relationship can be applied.

8. I heard evidence from the claimants and considered witness statement from Mr Haywood submitted on their behalf. Mr Haywood was not available for cross examination. His witness statement focused on various complaints that he had with regard to his relationship with the respondent and did not assist me in any way in determining the claimants' employment status or otherwise.

9. I heard from Mr Hassan the Regional Manager of the respondent and from Mr Graham Lusty Depot Manager of the respondent's Avonmouth Depot. I found all witnesses to be truthful.

10. I was referred to a joint collection of documents comprising of excess of 340 pages and a number of additional documents were added by the claimants during the hearing and I heard submissions from both parties.

11. I find the following facts proved on the balance of probabilities.

12. The respondent is in the business of logistics warehousing and distribution services. One of its functions is to distribute domestic appliances for commercial clients and customers of those clients. It delivers to residential premises household appliances such as fridges, freezers, cookers and washing machines. Those products are sold via the respondent's associated Company an online retailer AO Retail Ltd. As and when

required by customers the respondent's workers also install the appliances delivered.

13. The respondent employs around 980 employees. The vast majority of its employees are based at the main UK national distribution centre in Crewe in Cheshire. In addition the respondent has twelve regional out bases (known as depots). Local deliveries from the out bases are carried out by contracted drivers.

14. The respondent currently uses around 420 contracted drivers for its home deliveries. The pool of contracted drivers is larger than the number of routes available on each day. Access to this pool of drivers enables the respondent to cope flexibly with variations in demand for its home deliveries. The contracted drivers are free to accept or decline work. They have the opportunity to build their own businesses and can work elsewhere. Each contractor is required to sign an agreement which is set out in a letter format. The contractor is required to read through the document and confirm his or her agreement to the arrangement by signing two copies of the agreement. One copy of the agreement is held by the respondent and the other copy is retained by the contractor.

15. There are 23 numbered paragraphs in the document. The first provides *"Expert wishes to engage you to provide delivery services to meet the requirements of its business partners and customers".* The relevant sections of the agreement for the purposes of my determination today are at paragraphs 2, 7 and 10.

    - Paragraph 2 provides *"This is not a contract of employment but a contract for services. Expert may request you to provide services from time to time without any obligation on expert to do so or on you to accept such request. You are, subject to 2(3) below, free to provide services to any third party. You are self-employed you will not have the benefit of any statutory and other protection afforded to employees".*

    - Paragraph 7 states "*There is no requirement for you, personally, to provide the services under this agreement and you may use other persons to provide the services. However, the services shall be carried out with reasonable skill and care and by appropriately qualified persons. You will agree you will provide (at your own cost) a qualified driver mate(s) to assist at all times, the names of whom are to be provided to Expert on request. You will be liable for all acts and omissions of any other persons you chose to provide the services under this agreement".*

    - Paragraph 10 provides "*It is agreed that you are not an employee of Expert and will be responsible for making appropriate PAYE deductions for tax and National Insurance contributions from the money you pay to other crew members together with your own Income Tax deductions and National Insurance. You agree to indemnify Expert in respect of any claims that may be made by HM Revenue and Customs for any failure to do so".*

16. The agreement also provides that the contractor will ensure that any crew member is appropriately trained and qualified and must comply with the respondent's customer services policies and procedures at all times.

Contractor enters into an agreement for self filling. The rate is fixed by the respondent based on the time it will take to cover the delivery and the contractor is then paid a composite sum which covers the hourly rate of a driver, crew mate and where appropriate a porter (an individual who is not a qualified driver who assists with moving the appliances). It is for the contractor to decide how that sum is to be divided between the crew.

17. The respondent provides its branded vehicles for the contractor and his or her crew to drive, a mobile telephone and uniform for the crew members to wear. Each contractor is issued with a crew number. Each contracted driver indicates to the local base his or her availability to make deliveries over a five day period.

18. On the morning of the day before a delivery day, each depot can see from the computer systems held at head office how many routes are available for delivery from that depot the next day. Staff at the depot then calls the drivers who have previously indicated their availability for that day to ask if they wish to have a route allocated for the following day. If the driver confirms that he or she does want to accept the route, the staff member at the depot uploads the relevant crew number onto the system at head office to show this. If the driver declines the offer for whatever reason, the depot will call another driver who has previously indicated his or her availability. The process is followed until drivers have been found to accept all available routes or until the depot's list of drives has been exhausted. There is no guarantee that a contracted driver who has indicated availability will be offered a route as the pool of drivers is larger than the requirement for routes to be covered.

19. The first claimant Mr Daugvila commenced working in February 2013 as a Crew Member with one of the respondent's contracted drivers Mr John Hazelton. The claimant describes Mr Hazelton as a supervisor. I am satisfied however, having seen the relevant document that Mr Hazelton was a contracted driver for the respondent. Mr Hazelton signed an agreement with the respondent on 28 January 2012 agreeing to provide delivery services as previously described. It appears from further documents that I have seen that Mr Hazelton in fact ran his business as a limited company. This is apparent from a document appearing in the bundle relating to an assessment carried out on Mr Petrulenas headed "TA Hazelton Transport Ltd". Mr Daugvila confirmed that he had received payslips from Mr Hazelton from time to time which he believed had that title printed on the wage slip.

20. Mr Hazelton came to an agreement with the claimant as to his pay. That agreement was that he would pay him the equivalent of the hourly rate for a driver for the runs which the claimant undertook less 10%. The respondent had no involvement in what was agreed between the first claimant and Mr Hazelton.

21. Mr Hazelton did not personally drive delivery lorries for the respondent. In accordance with the agreement which he signed he was able to substitute appropriately trained and qualified crew members which he did. In accordance with the agreement Mr Hazelton provided the respondent with documents confirming that the first claimant had been appropriately trained

and respondent undertook appropriate checks as it was required to do to ensure that the first claimant was appropriately qualified as a driver.

22. Although Mr Daugvila contends that there was no appropriate training took place, it is clear from the training documents which he signed that he certified that he had been documents appropriately trained by or on behalf of Mr Hazelton. The respondent was entitled to rely on that.

23. Although the first claimant would have received directions and instructions from the respondent as to routes and deliveries etc those directions was in accordance with his role as a crew member of the contracted driver (Mr Hazelton).

24. Until 2 November 2015, there was no document which defined any relationship between Mr Daugvila and the respondent. That situation changed on 2 November 2015 when Mr Daugvila signed an agreement to become a contracted driver with the respondent. I will deal with my findings of fact in relation to the period after 2 November later on in these reasons.

Findings of fact in relation to Mr Petrulenas' position

25. The second claimant Mr Petrulenas commenced working as a delivery driver in January 2015 for Mr Saunders, a contracted driver. Mr Saunders was a friend of the second claimant. He told the claimant that he would be working delivering white goods for the respondent and that his hourly rate would be £9.50 for Mondays to Fridays and £11.30 at weekends and bank holidays. He told the claimant that he would be deducting 10% from that hourly rate and pass on the balance to the claimant. He told Mr Petrulenas that he needed to buy all tools required to carry out his job and pay for all damage to the lorry, any damage to customers' property and for all speeding tickets and parking tickets.

26. The arrangement as to payment was something which was agreed between Mr Saunders and the second claimant. The respondent had no influence over that agreement.

27. Mr Saunders had entered into an agreement with the respondent to provide delivery services on 7 August 2013. In accordance with the obligations under that agreement he certified that training by Mr Petrulenas had been carried out as required under the agreement.

28. In addition to working for Mr Saunders, the second claimant also worked for a Mr Maynard another contracted driver who was a Multi Crew Leader. Mr Maynard had contracted with the respondent to provide more than one crew. Mr Petrulenas was paid according to the agreement that he reached with Mr Saunders and Mr Maynard.

29. The contracted driver was free to decide what to pay the drivers who worked for him or her. From the evidence it appears that some contracted drivers agreed different pay arrangements with their crew members. Some contracted drivers agreed a flat rate deduction from pay. Others agreed a percentage deduction from the hourly rate.

30. In addition to the contractor receiving an hourly rate for the delivery service provided, an enhancement was paid if the delivery resulted in a compliment received from the customer. An extra payment to reflect that compliment that was made to the contractor. Contractors were free to decide how to account to the drivers who worked for them for these compliment payments. From the evidence it appears that some contracted drivers retained the compliment fee themselves, whilst others passed on a proportion to the crew members.

31. In or around the beginning of November 2015 Mr Petrulnas and Mr Daugvila came into contact. Mr Petrulenas having decided that he wanted to work directly for the respondent and avoid deduction from the hourly rate suggested that the two of them worked together with one of them agreeing to be the crew leader. Neither wished to take responsibility for being the crew leader because of the financial risk involved ie the liability to reimburse the respondent for any damage caused to the vehicle or to customer property. They therefore decided to toss a coin to determine which one of them would become the contracted driver. As a result Mr Daugvila became the contracted driver.

32. They agreed between themselves that in relation to the payments received from the respondent for deliveries undertaken by Mr Petrulenas that he would be paid the equivalent of the full hourly rate. They came to an agreement with regard to how the cost of any damage would be accounted for and Mr Daugvila agreed to pay any additional payment for compliments to the drivers who earned them.

33. On occasions Mr Daugvila did not drive the route at all. He substituted another driver for the crew. He decided to pay those drivers the full amount of the hourly rate. On occasions Mr Petrulenas drove the vehicle and another driver of the crew was substituted eg Mr Mantas. On at least a dozen other occasions from November 2015 until to the arrangement came to an end on 4 November 2016, Mr Daugvila substituted a driver or crew member in accordance with his right to do so under the agreement.

34. There was one occasion when the respondent queried the substitution of Mr Petrulenas. That arose because a dispute about outstanding costs for vehicle damage had occurred when Mr Petrulenas was involved in an accident as a crew member for another contracted driver Mr Bozea. Mr Daugvila was asked to confirm that he accepted that he would be liable for any damage to the vehicle as provided in the agreement. Upon his confirmation that he accepted that he was liable Mr Petrulenas was accepted as a driver. Mr Petrulenas as well as working in the crew of Mr Daugvila also drove for other crew leaders on several occasions.

35. Mr Daugvila worked as a contracted driver for the respondent until 3 November 2016. On or about that date an incident occurred in relation to failed delivery of goods to a customer. Mr Lusty, the Depot Manager,was advised that the crew had telephoned to say that they were running late and would not finish the deliveries that day. He instructed a member of his administrative staff to tell Mr Daugvila that if the route was not completed that day his services would not be used again. The working arrangement

therefore came to an end on 3 November 2016. I find those to be the relevant facts.

36. In submissions I was referred to a number of relevant cases they are as follows:

(1) *Aslam v Uber BV [2017] IRLR 4 (ET)*

(2) *Autoclenz Ltd v Belcher [2011] ICR 1157 (SC)*

(3) *Dakin v Brighton Marina Residential Management Company Ltd UKEAT/0380/12/SM, 26 April 2013*

(4) *Dewhurst v Citysprint UK Ltd Case No. 2202512/2016*

(5) *Express & Echo Ltd v Tanton [1999] ICR 693 (CA)*

(6) *Guimaraes v Findlater UKEAT/0236/16/JOJ, 31 January 2017*

(7) *Halawi v WDFG UK Ltd [2015] IRLR 50*

(8) *James v Greenwich LBC [2008] ICR 545 (CA)*

(9) *Knight v Fairway & Kenwood Car Services Ltd UKEAT/0075/12/LA, 10 July 2012*

(10) *Lee v Chung and Shun Shing Construction and Engineering Co Ltd [1990] ICR 409 (PC)*

(11) *Ministry of Defence HQ Defence Dental Service v Kettle UKEAT/0308/06/LA, 31 January 2007*

(12) *Pimlico Plumbers Ltd v Smith [2017] IRLR 323 (CA)*

(13) *Premier Groundworks Ltd v Jozsa UKEAT/0494/08/DM, 17 March 2009*

(14) *Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99 (CA)*

(15) *Quinn Integrated Services Ltd v Jones UKEAT/0301/16/JOJ, 25 April 2017*

(16) *Smith v Carillion Ltd [2015] IRLR 467 (CA)*

(17) *Tilson v Alstom Transport [2011] IRLR 169 (CA)*

(18) *UK Mail Ltd v Creasey UKEAT/ 0195/12/ZT, 26 September 2012*

(19) *Windle v Secretary of State for Justice [2016] ICR 721 (CA)*

37. I have considered all the relevant cases and the submissions of both parties in reaching my conclusions.

38. The first matter for me to consider is whether the first claimant was an employee of the respondent. Dealing firstly with the period up to 2 November 2015. I refer to my findings of fact. Until 2 November 2015 there was no direct contractual relationship between Mr Daugvila and the respondent. The only contractual relationship in existence during this period was that between Mr Hazelton (or his limited company) and the respondent. Mr Daugvila worked for Mr Hazelton. Mr Hazelton recruited Mr Daugvila. The respondent had no control or decision over that recruitment. Mr Hazelton decided what he would pay the claimant. He paid the claimant out of payments he received from the respondent and provided the claimant with payslips and was responsible for ensuring that the claimant was appropriately trained to the respondent's requirements.

39. I find that the contractual relationship between Mr Hazelton and/or his company and the respondent was not a sham. The contract operated in practice as the documentary evidence indicates. There is no necessity to imply a contract between Mr Daugvila and the respondent during the period up to the beginning of November 2015 as Mr Daugvila worked for Mr Hazelton. In accordance with the contracted driver agreement Mr Daugvila was supplied by Mr Hazelton (or his company) as a crew member to provide delivery services to the respondent. The fact that during this period Mr Daugvila drove the respondent's branded vehicle, wore a uniform and was issued with a mobile telephone is not inconsistent in these circumstances.

40. The conduct of the parties and the provision of services are adequately explained by the agreement between Mr Hazelton and the respondent on the one hand, and the agreement between the crew leader (contracted driver and the driver's mate) on the other hand. Therefore in accordance with the settled case law there was no direct contractual relationship between the respondent and Mr Daugvila until 2 November 2015. In the absence of any direct contractual relationship between Mr Daugvila and the respondent, he cannot have been either an employee or a worker during this period.

41. After 2 November 2015 there was a direct contractual relationship between Mr Daugvila and the respondent. That relationship was defined by the agreement to provide services. That agreement provided that Mr Daugvila had the right of substitution, provided the drivers which he used were appropriately trained and properly qualified. He had an unfettered right of substitution, subject to the substitute being appropriately qualified and trained. That agreement was not a sham and it operated in practice in accordance with the terms of the agreement. Mr Daugvila substituted other drivers as and when he wished to do so. Other contracted drivers always exercised the right of substitution. They never drove the respondent's vehicles always substituting a crew. Some contracted drivers ran multi crews, effectively running a business providing delivery services to the respondent.

42. Mr Daugvila on occasions exercised his right to substitution by providing Mr Petrulenas together with another driver to provide the delivery service. Without that essential element the obligation to provide personal service the relationship between the respondent and Mr Daugvila, from 2 November

onwards was not that of either employee or worker as defined by Section 230 of the Employment Rights Act 1996. I therefore find that Mr Daugvila was neither an employee nor a worker of the respondent at any time. He is therefore not entitled to pursue his claims of unfair dismissal, wrongful dismissal or unlawful deduction from wages and those claims are dismissed.

43. Turning now to Mr Petrulenas' position. I refer to my findings of fact. There was no direct contractual relationship between Mr Petrulenas and the respondent at any time. He initially worked for Mr Saunders. Mr Saunders in turn worked as a contracted driver for the respondent. The pay arrangements were agreed between Mr Saunders and the claimant. Mr Saunders received a composite fee for the services that that he provided and he passed on a certain amount of that to Mr Petrulenas. The financial risks i.e damage to vehicles and customers' property was that of Mr Saunders. Mr Petrulenas also worked as a crew member for Mr Bozea and Mr Maynard. He reached agreement with those 2 individuals as to his rate of pay. Mr Bozea and Mr Maynard as contracted drivers bore the financial risk of any damage incurred. Mr Petrulenas later agreed a working relationship with Mr Daugvila. There is no necessity to imply any contract between Mr Petrulenas and the respondent because his working relationship is adequately explained by the agreements he reached with Mr Saunders, Mr Bozea, Mr Maynard and Mr Daugvila and their agreements with the respondent.

44. In the absence of an implied contract there was no direct contractual relationship between Mr Petrulenas and the respondent and therefore he was neither a worker nor an employee of the respondent at any time. He therefore cannot pursue his claims of unfair dismissal, unlawful deduction from wages or breach of contract and those claims are dismissed.

Employment Judge O Harper
3 August 2017