

Case Numbers: 1800575/2017
1800594-1800599/2017
1801037-1801039/2017
1801166-1801169/2017
1801320/2017



EMPLOYMENT TRIBUNALS

Claimants
Ms E Leyland and others

Respondent
Hermes Parcelnet Ltd

PRELIMINARY HEARING

Heard at: Leeds

On: 30 April (reading), 1, 2
and 3 May 2018

Before: Employment Judge Davies

Appearances

For the Claimants: Mr S Jones QC (counsel)
For the Respondent: Mr R Lieper QC (counsel)

JUDGMENT

1. The Claimants are or were workers of the Respondent within the meaning of s 230(2)(b) Employment Rights Act 1996, regulation 2(1) Working Time Regulations 1998 and s 54(3)(b) National Minimum Wage Act 1998.

REASONS

Introduction and issues

- 1.1 These are claims brought by a number of individuals operating as couriers for Hermes Parcelnet Ltd (“Hermes”). There is no dispute that these couriers are self-employed. The issue to be decided at this preliminary hearing is whether they are also workers falling within limb (b) of the relevant statutory definitions in s 230 Employment Rights Act 1996, regulation 2 Working Time Regulations 1998 and s 54(3) National Minimum Wage Act 1998 (“limb (b) workers”).
- 1.2 The Claimants were represented by Mr S Jones QC and Hermes by Mr R Lieper QC. I was provided with agreed bundles of documents and referred to those to which the parties drew my attention. Both representatives also provided extremely helpful skeleton arguments.

- 1.3 The parties agreed on representative Claimants who would give evidence (not formally identified as lead Claimants) and all parties agree that they will be bound by the findings made in respect of those representative Claimants. I heard evidence from three of the representative Claimants: Mr E Cross, Ms K Dunford and Mr D Clarke. Two further Claimants, Mr S Hughes and Mr J Guy, did not give oral evidence but provided written statements. Obviously, less weight could be attached to the evidence of the witnesses who did not give oral evidence. For Hermes I heard evidence from Mr C Ormsby, Head of Courier, and Ms M Scott, Assistant Head of Courier North.

Legal principles

- 2.1 I begin by summarising the relevant legislative provisions and legal principles. Between them, the Claimants bring claims for: the national minimum wage pursuant to the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015; paid annual leave pursuant to the Working Time Regulations 1998; and unauthorised deduction from wages pursuant to the Employment Rights Act 1996.
- 2.2 So far as the claims for paid annual leave are concerned, it is important to remember that this right derives from the Working Time Directive 2003/88/EC. Article 7(1) of that Directive gives a right to 4 weeks' paid annual leave to "every worker." Although the Directive does not define what is meant by "worker", it has an autonomous meaning, which is well-established in the decisions of the CJEU. According to that definition, the "essential feature" of an employment relationship is that "for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration." It is for the national court to apply that concept. The national court must base its classification on objective criteria and make an overall assessment of all the circumstances of the case having regard both to the nature of the activities concerned and to the relationship of the parties involved: see e.g. *Union Syndicale Solidaires Iserre v Premier Ministre and others* C-428/09 [2011] IRLR 84 at para 28 and *Fenoll v Centre d'Aide par le Travail "La Jouvène"* C-316/13 [2016] IRLR 67 at para 27.
- 2.3 Neither counsel submitted that I should adopt a different approach to the question whether the Claimants undertook personally to perform work or services within the meaning of limb (b) for the purposes of the right to paid annual leave, compared with that taken in respect of purely domestic rights.
- 2.4 Turning to the domestic legislation, the relevant definitions provide, so far as material, as follows:

Working Time Regulations 1998

2 Interpretation

(1) In the Regulations –

...

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“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;

...

**National Minimum Wage Act 1998
54 meaning of “worker”, “employee” etc**

...

(3) in this Act “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;

...

**Employment Rights Act 1996
230 Employees, workers etc**

...

(3) In this Act “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 the client or customer of any profession or business undertaking carried on by the individual;

...

2.5 The starting point in determining whether an individual is a limb (b) worker as so defined is to identify the terms of the contract and what they mean. The express terms of a contract are, of course, those expressly agreed, in writing or orally, by the parties. Where there is a written contract, the issue may arise whether it contains the whole of the agreement between the parties. As the Supreme Court made clear in *Autoclenz Ltd v Belcher* [2011] ICR 1157 SC the Tribunal may disregard a written term that is not part of the true agreement. The question is always, “What contractual terms did the parties actually agree?” The Tribunal must consider whether the written term represents the actual legal obligations of the parties. In doing so it must examine all the relevant evidence. That will include the written term itself, read in the context of the whole agreement, but also evidence of how the parties conducted themselves in practice. But Tribunals must bear in mind that the relevance of how the parties in fact

conducted themselves is simply that it is one of the factors that may elucidate what legal obligations were actually agreed at the time. In answering that question, Tribunals are entitled to and should take into account that contracts relating to work or services are often different from commercial contracts between parties of equal bargaining power. Frequently, organisations offering work are in a position to dictate the written terms, which the other party has to accept. The Tribunal must therefore take into account the relative bargaining power of the parties in deciding whether the written terms in truth represent what was agreed. They must be “realistic and worldly wise.” If the reality of the situation is that nobody seriously expects, for example, that a worker will seek to provide a substitute, the fact that the contract expressly provides for this unrealistic possibility will not alter the true nature of the relationship. Equally, if the clause genuinely reflects what might realistically be expected to occur, the fact that the right has not been exercised in practice will not render it meaningless. Tribunals must take a sensible and robust view to avoid form undermining substance.

- 2.6 In this case the principal focus of the dispute is on whether these are contracts under which the Claimants undertake to perform the work “personally.” The Supreme Court gave its decision in *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 after the preliminary hearing in this case. The Supreme Court did not disapprove the decision of the Court of Appeal in that case, in which guidance on the approach to this issue was given. The Supreme Court identified a further test that may be helpful in some cases in answering the question whether the individual undertakes to perform work personally. Accordingly, the following principles apply:
- 2.6.1 The question of personal service is a distinct element of the definition, to be considered separately from the question whether the individual is carrying on his or her own business undertaking: see *Redrow Homes (Yorkshire) Ltd v Wright* [2004] ICR 1126, CA.
 - 2.6.2 The question turns entirely on the terms of the contract: see *Pimlico Plumbers Ltd v Smith* [2017] ICR 657, CA at para 73.
 - 2.6.3 Freedom to do a job oneself or through someone else is inconsistent with a contract of service although a “limited or occasional” power of delegation may not be. An essential feature of a contract of service is the performance of “at least part of the work” by the servant himself: see *Pimlico Plumbers* SC at para 22. An unfettered right to substitute another person to do the work or perform the services is therefore inconsistent with an undertaking to do so personally: see *Pimlico Plumbers* CA at para 84.
 - 2.6.4 A conditional right to substitute another person may or may not be inconsistent with personal performance depending on the conditionality. This will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution. Put another way, it will depend on the extent to which the right of substitution is limited or occasional. 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. On the other hand, 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. 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: see *Pimlico Plumbers CA* at para 84.

2.6.5 In some cases a helpful test to assess the significance of the right to substitute may be to consider whether the “dominant feature” of the contract remains personal performance on the individual’s part: *Pimlico Plumbers SC* at para 32.

2.6.6 A recent example of a case where a claim to limb (b) worker status was defeated by the absence of a requirement to undertake the work personally is the decision of the CAC in *Independent Workers’ Union of Great Britain v RooFoods Ltd (t/a Deliveroo)* [2018] IRLR 84. There the CAC accepted on the evidence that there was a genuine and unfettered right to substitute. Delivery riders were contractually entitled to substitute themselves both before and after they had accepted a particular job. They did so in practice and Deliveroo was comfortable with it. There was no policing by Deliveroo of riders’ use of substitutes.

2.7 The second part of the limb (b) definition concerns the dividing line between those who are truly self-employed, carrying on a profession or business undertaking on their own account and entering contracts with clients or customers to provide work or services for them, and those who, while self-employed, in fact provide their services as part of a profession or business undertaking carried on by someone else. The dividing line was considered by the Supreme Court in *Bates van Winkelhof v Clyde and Co LLP* [2014] ICR 730. Lady Hale emphasised again that there is not “a single key with which to unlock the words of the statute in every case.” The authorities identify a number of tests or approaches, each of which may be useful in seeking to draw the distinction in the individual case. In particular:

2.7.1 In *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 677 the EAT held that 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.

2.7.2 In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 the EAT suggested that a focus on whether the person actively markets his or her services as an independent person to the world in general (a person who will thus have a client or customer) or whether he or she is recruited by the principal to work for that principal as an integral part of its operations, will in most cases demonstrate on which side of the line a person falls.

2.7.3 The EAT in *James v Redcats (Brands) Ltd* [2007] ICR 1006 proposed a “dominant purpose test.” The EAT agreed that whether the individual marketed his or her services to the world in general would “often assist in providing the answer.” However, the difficult cases were those where the individual did not market his or her services at all, nor act for any other customer even though the contract did not prevent this. In some cases the business is effectively created by the contract. The EAT held that in a general sense the degree of dependence is in large part what one is seeking to identify. That must be assessed by a careful analysis of the contract. The fact that an individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party as is the self-employed worker, particularly if it is a key or the only customer. The EAT held that the “dominant purpose test” is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? Its purpose is to distinguish between a worker and the independent contractor who is on business in his or her own account, even if only in a small way.

2.8 For completeness I note that Mr Jones QC for the Claimants referred to the decision of the EAT in *M&P Steelcraft Ltd v Ellis* [2008] ICR 578. If these cases progress further, he may seek to advance an argument that the non-contracting out provisions in the relevant legislation prevent Hermes from using a substitution clause so as to preclude its contractors from being regarded as limb (b) workers. The decision in *M&P Steelcraft* is binding on me and he did not seek to advance such an argument at this stage.

Findings of fact

Credibility

3.1 The main evidence for Hermes was given by Mr Ormsby. As Head of Courier he is a senior member of Hermes management. He reports to the Director of Delivery Experience who in turn reports to the CEO. He has been in the Hermes business 10 years. I found his evidence wholly unpersuasive and in respects implausible. He gave the very distinct impression that he was saying what needed to be said to support Hermes’s case that its couriers are not limb (b) workers, regardless of whether what he said was accurate. In a number of respects it appeared that he was essentially improvising as he went along. For example:

3.1.1 Mr Ormsby was referred to a document entitled “Improving the whole customer experience” found on the Hermes “mycouriersonline” website. It was suggested to him that the document set out a number of requirements placed on couriers. He said that it was, “Guidance to couriers how to improve the customer experience.” The document itself uses the word “requirements” and Mr Ormsby was asked whether that was wrong. He insisted again that it was guidance. He was then taken

through individual bullet points stating, for example, that all parcel deliveries and collections would be completed or attempted on the agreed days, that parcels must NEVER be left in a bin or over a gate unless requested, that they must never be handed to individuals in the street without identification and so on. Mr Ormsby then accepted that each of these was a requirement placed on couriers. Eventually, he accepted that the items set out in the document were things couriers were expected to comply with, yet he had been adamant when the questions were first asked that the document simply set out guidance.

- 3.1.2 It was put to Mr Ormsby that more than once Hermes had withdrawn elements of couriers' pay without negotiation. He said it had not happened to his knowledge. His attention was then drawn to an announcement made in January 2016 that two elements of pay were being removed. He accepted that Hermes had done that unilaterally. He was also referred to evidence about the withdrawal of a bonus for not having too many customer enquiries. He said that the bonus was changed and the money reallocated. It was put to him that Hermes did not seek the agreement of couriers and he said that it was based on feedback. Eventually he accepted that this too was a unilateral change imposed on the couriers. He plainly was aware of those changes and his initial evidence to the contrary was not credible.
- 3.1.3 Mr Ormsby was asked whether Hermes reserved the right to make changes to couriers' rounds without their agreement. He said that they did not. His evidence was that changes to the round required a courier's agreement. He was then referred to evidence given by two of the Claimants about their rounds being changed unilaterally without their consent. He maintained his position that it was standard practice to obtain the courier's consent. He accepted that there was no standard operating policy ("SOP") to that effect. He was then asked how the courier's consent was recorded and he said that currently it would probably be a verbal discussion with the Field Manager. He accepted that there was no record of such a policy in writing and no record of it happening in practice. This was an occasion on which Mr Ormsby seemed to be improvising as he went along, and his evidence was not credible.
- 3.1.4 Mr Ormsby was asked about the substitution clause in the written contracts (see further below). The written term said that couriers had the unconditional right to nominate a substitute. Should they wish to do so they "should advise us of your substitution in writing or telephone details to the company." In his evidence Mr Ormsby adopted a position beyond that. He said in his witness statement that Hermes "requested" round holders notify their Field Manager if they were going to be using a substitute to collect parcels from a sub-depot on a particular day so that the sub-depot could be made aware in advance, but it was not a requirement. Hermes might not even be aware that a round holder was using a substitute and did not have a right of veto over a courier's choice of substitute. The only circumstances in which Hermes would object

would be if the substitute had previously been a round holder for Hermes and his or her contract had been terminated for service level issues. In his oral evidence Mr Ormsby said that couriers did not have to tell Hermes who was acting as their substitute. Hermes would carry out a DBS check of the courier but not any substitute. When pressed about what Hermes would do if it came to their attention that a substitute had serious criminal convictions Mr Ormsby initially said that the substitute would never have had a DBS check done by Hermes so this would not be a ground to object. They, "Absolutely would advise the courier not to use the substitute" but it would be, "Up to the round holder." Eventually Mr Ormsby conceded that if Hermes became aware that a substitute had a serious criminal conviction their duty of care would require them to refuse to allow the use of the substitute, but he had been prepared to adopt an extreme and implausible position until counsel's questions made that untenable.

3.2 These are just some examples. Overall Mr Ormsby's evidence had an air of unreality. He frequently referred to Hermes "requesting" or "advising" its couriers to do things. In the context of his evidence overall the suggestion that many of these things were requests or advice was again unconvincing. Ms Scott's evidence was much more credible, but she dealt only with a limited subject matter.

3.3 By contrast, I found each of the three Claimants who gave oral evidence entirely credible. Each showed a willingness to make concessions and accept many propositions that were put to them that were apparently inconsistent with the idea that they were limb (b) workers. Each seemed to me to be giving a genuine and honest account of his or her understanding and of how the relationship worked in practice.

The Hermes Business

3.4 Hermes is a parcel delivery business. It directly employs approximately 2500 people in its operations across the UK. Broadly speaking, parcels are collected from retailers by Hermes lorries, brought to hubs and sorted by region. They are then driven to regional depots where they are sorted in more detail. They are then sent out to one of 550 sub-depots to be collected by individual couriers for the final stage of delivery. In a minority of cases rather than going to the sub-depot, parcels are delivered directly to the home of the courier, who is referred to as a Solus courier. The country is divided into regions under the direction of a Regional Manager and further subdivided into areas managed by Field Managers. Those areas are broken down into delivery rounds which vary in size depending on the geographical location. There are also Compliance Managers who are responsible for driving improvements to achieve regional service and compliance targets.

3.5 Hermes advertises widely for new couriers using recruitment material that refers to couriers being their "own boss." Candidates are interviewed by Field

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Managers, nowadays using standard questions set out on an iPad. If successful, the applicant will be given a courier number and, subject to availability, assigned a round. Hermes checks that candidates have a driving licence and the right to work in the UK. It also carries out criminal records checks. Candidates must provide their own vehicle and are required to have appropriate vehicle insurance. The vehicle is not required to have Hermes branding.

- 3.6 Hermes has an intranet called mycouriersonline.co.uk to which all its couriers have access. Indeed, they are expected to access it. It contains a range of material (see further below). New couriers are given a starter pack entitled "Courier Network Information", which is also available on mycouriersonline. They are also given a hand held terminal ("HHT") and a guide to its operation. There is no obligation to wear a Hermes uniform. Branded clothing is available to buy if a courier wishes.
- 3.7 If the courier is a Solus courier, parcels will be delivered to the courier's home on each agreed delivery day. The courier has no control over the time the Hermes lorry delivers the parcels. If the lorry is late the Field Manager has discretion to authorise an inconvenience payment of £10. Other couriers must attend the sub-depot to collect parcels on each delivery day. If it is a busy sub-depot, the courier will have to attend at a time agreed with the sub-depot controller. Parcels may be manifested – on the list of parcels the courier is expecting to receive and in the system – or unmanifested - not on the list. The courier is expected to deliver both. There may also be collections to be made from customers on the round. The manifest is downloaded by the courier on the HHT. The courier "receipt scans" the parcels using the HHT. The courier plans the delivery route for the day and must set ETAs on the HHT, i.e. two hour delivery windows for each parcel delivery and parcel collection. For some of Hermes's clients, such as Next, there are pre-set delivery time bands chosen by the customer, which the courier must take into account. Otherwise, it is for the courier to choose the ETAs according to how he or she wishes to plan the route and the day.
- 3.8 When a courier delivers a parcel the parcel is scanned on the HHT to confirm delivery and the customer signs on the HHT. If a parcel is posted through the letterbox or left in a safe place, the courier is now required to take a photo of this using the HHT. Couriers cannot continue with deliveries using the HHT until they have taken the photo. At the end of the day the courier logs off from the HHT and carries over any parcels they were unable to deliver that day along with any collections they have picked up. The courier is required to log out of the HHT by 8pm. Although Hermes suggested that this was incorrect, it was supported by the Claimants' evidence and copies of numerous messages in the documentation from Field Managers to couriers reminding them of the need to logout by 8pm. Indeed, failure to logout by 8pm is one of the specified grounds for issuing an Improvement Notice (see below).
- 3.9 Collections arise when a householder has requested that a parcel be picked up from their home. Cards are available, which couriers can use to promote the

collections service. Under the terms of the written contract (see below) they are required to do so. Hermes also provides calling cards to inform customers that their delivery has been left with a neighbour or in a safe place or that the courier has tried to make a delivery without success and will try again. The courier must use the Hermes calling cards.

The Written Agreement

3.10 The written agreement between couriers and Hermes is entitled "Self-employed couriers contract for services." It provides as follows:

Provision of Service

- (a) the Courier is engaged by the Company to make deliveries and collections on behalf of the Company and the Courier agrees to provide this service upon the terms and conditions of this agreement.
- (b) The Courier may during this agreement carry out a similar service or act in any other capacity for any other individual, firm, partnership or company.
- (c) Nothing in this agreement shall oblige the Company to provide items for the Courier to deliver or collect, or oblige the Courier to accept items to deliver or collect on behalf of the company and it is expressly intended that there is no mutuality of obligation between the parties.
- (d) The Courier will receive shipments directly from the Company and, immediately upon receipt, ensure that all items set out on any delivery note have been received.
- (e) The Courier will notify the Company immediately of any shipment discrepancy, unusual delivery problems, unusual incidents with customers or any theft or damage to any item.
- (f) The Courier will immediately contact the Company if he/she is unable or unwilling to accept deliveries or collections under this agreement.

Fee

- (a) The Company shall pay to the Courier a fee calculated on a variable tariff as advised to include VAT, if appropriate and to be paid on the advised dates.
- (b) The Courier will not be paid sick pay or holiday pay.
- (c) All payments made by the Company to the Courier will be gross of any income tax liabilities and/or National Insurance or similar contributions.

Self-Employed Status

- (a) The Courier is not an employee of the Company and accepts and agrees that he/she provides the services to the Company as a self-employed person.
- (b) This agreement is not a Contract of Employment. This agreement is a Contract for Services, the dominant purpose of which is the delivery of parcels and catalogues.
- (c) The Courier will be responsible for all income tax and National Insurance contributions in respect of any fees paid to the Courier by the Company
- (d) On signing this Agreement the Courier may be asked to give the Company such documents to show his/her self-employed status.

Substitution

You are not under an obligation to provide the service personally. Accordingly, you have the unconditional right to nominate a substitute to provide the service on your behalf, at any time for any reason.

However, it is your responsibility to ensure that your nominated substitute carries out the service in line with the standards to which you would be subject if you were providing the service.

Should you wish to exercise your right provide a substitute, you should advise us of your substitution in writing or telephone the details to the Company.

General

...

Hermes Parcelnet is responsible for the value of goods in transit. The Courier is responsible for their own appropriate vehicle insurance and for ensuring that any substitute has the necessary insurance.

The Courier is responsible for the self-promotion of the returns collection service by advertising a telephone contact number.

- 3.11 Mr Ormsby accepted that this courier agreement was in a standard form drafted by Hermes. There was no negotiation with couriers about the obligations in it; their options were to sign or not to work for Hermes. It would not be open to a courier to propose his or her own terms to Hermes. Further, Mr Ormsby accepted that the substitution clause was in the contract because Hermes wanted it in.

Pay and payment

- 3.12 Couriers are paid at a set rate per parcel or packet, either on successful delivery or after three unsuccessful attempts to deliver. Each round has a "round rate". These vary according to the location, geography and size of the round. The round rate is used to determine the parcel and packet rate for different weights of parcels on that round.
- 3.13 Mr Ormsby's evidence was that couriers can request a review of their round rate, either through mycouriersonline or through their Field Manager. Round rates are also monitored by Hermes and if a round falls below a notional hourly rate an automatic rate review is triggered. Hermes uses a mapping tool called Geoplan and a tracker system as the basis for setting round rates. This information is provided to a Regional Planner who makes a recommendation for the round rate, which is submitted to Mr Ormsby for approval. In his witness statement Mr Ormsby suggested that the outcome was communicated to the Field Manager who would liaise with the courier to "agree the approved proposal." He suggested that there was then an opportunity for further "negotiation." Mr Ormsby then gave specific evidence about Ms Dunford who had applied for a rate review in both February and October 2017. He said in his witness statement that neither of these reviews was "approved." That was because according to Hermes's modelling the average hourly rate she was receiving after expenses was higher than £8.50. Mr Ormsby said that the notional hourly rate is simply a level below which courier pay should not fall and that many existing rates will be higher than the notional hourly rate.
- 3.14 In cross-examination it was suggested to Mr Ormsby that in reality the rate of pay was set by Hermes. He disagreed and said that it was agreed with the courier on the round. Mr Ormsby agreed that it was not the normal practice that Field

Managers would negotiate the rate of pay at the interview. He said that there were instances where an applicant would request a higher rate to do a round. There was some anecdotal evidence of that happening on one occasion and I accept that it may exceptionally have happened. However, I find that the normal practice was that there would not be pay negotiation at the interview stage. Mr Ormsby's suggestion that Field Managers were told to have a discussion with applicants about their pay expectations lacked credibility, given that the standard questions on the iPad did not include any reference to this and there was nowhere on the iPad for the candidate expectations to be recorded. Plainly round reviews did sometimes take place subsequently. Mr Ormsby said in cross-examination that when that happened the amount determined by the Regional Planners' modelling gave a range at which Hermes could negotiate. He said that it was a "guideline" and a "starting point to negotiate."

- 3.15 Ms Dunford gave evidence about how the pay rates were set on her round. When she started, she was told what the rates were. There was no negotiation and she was not provided with any data. Ms Dunford said that she asked for her rate to be reviewed in around December 2016. Mr Flint came out on her round with her in February 2017 to help consider her request. On 25 February 2017 she was told by him that she would not be allowed a rate increase because she was on the top rate for the rounds in her area. She was told that she was earning considerably more than the national minimum wage. She was not told how this was calculated and no breakdown was given to her. Mr Flint wrote to her on 21 March 2017 to confirm the outcome of the round review. He wrote, "There are regular round rate reviews which take into account the round geography, volume of parcels, activity content and the revenue produced. After checking the delivery rates for the round we confirm that the current rate is correct. We will continue to monitor the activity on the round." Ms Dunford said that as a result she had to accept that the rate would not change. Over the next few months she was more concerned about her earnings when her parcel numbers decreased. She considered she was earning below the national minimum wage and made a second request for a rate review in October 2017. She spoke to the Regional Planner, Mr Cook, on 29 November 2017. He told her that "the Hermes system would not allow an increase in rate" for her round. He told her that the system looked at the volumes for the round over a six-month period and averaged them out. The system calculated that her rate was correct. No breakdown or calculation was provided to her. Her experience was that the system determined her rate of pay and there were no negotiations. Ms Dunford then submitted a complaint to the Hermes complaint panel. Her Field Manager went out with her one day and reported back. The outcome of her complaint was sent to her in February 2018. She was told that the panel had concluded that there were no additional factors affecting her round and that her rate did not warrant an increase. She was told that her rates were "fair and in line with Hermes model and took into account the geography and structure of the round." No breakdown or calculations were given, nor was she told the hourly rate that Hermes calculated she was being paid.

- 3.16 Ms Dunford was not asked about that part of her witness statement. Mr Ormsby was. His attention was drawn to the letter sent to Ms Dunford telling her that her delivery rate was “correct”. He agreed that that tended to suggest that a model had been applied to produce a figure and that there was not an individual negotiation. Mr Ormsby was not in a position to disagree with what Ms Dunford said she had been told. It was suggested to him that none of what she described was a negotiation, it was a mechanical figure produced by a model. He said that that was not the practice on the ground. However, it was put to him that that was the very practice Ms Dunford had encountered and he agreed.
- 3.17 So far as the round rate is concerned I did not accept Mr Ormsby’s evidence that this was a matter for negotiation and agreement with couriers. While they might request a round review, and there might be rare exceptions, the essential process was that a computer model was used to determine the round rate. The rate was set by Hermes and there was no meaningful negotiation with the couriers. That was consistent with Ms Dunford’s evidence and the letters sent to her.
- 3.18 In addition to the round rate, various bonuses are available. One of these is called the speed of service (“SOS”) payment. Hermes operates service levels which it expects its couriers to meet. Details of the service levels are set out in mycouriersonline. One of those is that couriers will attempt delivery of 97.5% of parcels on the date of receipt. If a courier attempts delivery of 97.5% of their parcels on the day of receipt, calculated on an average basis over the month, and carries forward no more than 10% of the parcels, he or she is entitled to an SOS bonus payment of £2 per day. This appears as “HSP” (“Hermes Service Payment”) on the courier’s monthly invoice.
- 3.19 There is also a bonus related to ETAs. The courier sets the ETAs and can change them during the day. If couriers set an ETA for 95% of their parcels, attempt delivery of 95% of those parcels and modify fewer than 12% of their ETAs during the day, an ETA bonus of £2 per day is payable.
- 3.20 There are other bonuses, including an enhanced service payment (“ESP”) payable in respect of deliveries or collections made for Next. There is also a CSAT bonus, based on the scores received from completed customer surveys over a six-month period.
- 3.21 The evidence of the Claimants was that Hermes often changed the bonus payments without consulting couriers. Examples included in October 2016 removing the bonus that was previously payable to couriers who did not have too many customer enquiries against their name and on another occasion removing a payment that was payable to some couriers for attending the sub-depot. The documents included a number of announcements made by Hermes essentially informing couriers of changes to particular payments. As already indicated, when particular examples were put to him, Mr Ormsby accepted that the changes were made unilaterally by Hermes. I have no hesitation in finding that Hermes

determined what bonus payments should be made and that this was not open to negotiation.

3.22 Couriers are paid monthly for work done. Hermes generates a “Courier Service Invoice Payable” for them which they access via a website. The invoice provides a summary of the total deliveries and collections made in that month and the amounts payable for each round a courier has worked. It provides a breakdown of adjustments added or deducted – for example bonus payments or deductions for QBE insurance. The evidence of the Claimants was that it was difficult to ensure that their pay was accurate because they did not generate the invoice or hold the relevant information. There were regularly deductions from their payments with no explanation given. I accepted their evidence.

3.23 Couriers are responsible for their own tax and National Insurance. They cover their own expenses including petrol, insurance and other vehicle costs.

Field Managers

3.24 As set out above, there is a network of Field Managers. The extensive documentation included many examples of their contact with couriers by text or through the HHTs. They regularly issue reminders and instructions and ask for information from the couriers. Hermes has a number of SOPs, which set out the standard processes for Field Managers dealing with a range of matters relating to round management.

3.25 There is an SOP dealing with Standard Service Reviews. That envisages that the Field Manager will carry out a standard review with each courier every six months. It sets out a range of matters to be discussed and is said to be an opportunity to recognise good service and support the courier in making further improvements. There is also an SOP dealing with Round Performance Reviews. It provides guidance on how to perform reviews where it is identified that performance on the round is falling below agreed service levels, or where the courier is not complying with the Code of Conduct or Hermes processes. As far as service levels are concerned, the SOP indicates that a weekly KPI report is reviewed by Compliance Managers. A score between 45 and 40 will lead to a discussion with the Field Manager, a score below 40 may lead to a Round Performance Review. The SOP lists the expected service levels: e.g. Standard Day 98.5%; Next Day, day 1 98.5%; ETA set 95%; ETA met 95% 2 hours and 98% 4 hours; QvD enquiries under 0.4%. The Compliance Manager or Field Manager will hold a meeting with the courier to discuss the issue, and may identify a training need or a need to issue an Improvement Notice.

3.26 There is an SOP dealing with Improvement Notices. These are issued to couriers when their service delivery falls below Hermes’s expectations. The SOP makes clear that an Improvement Notice resulting from the delivery of services by a substitute (see below) will be recorded against the courier. The SOP sets out a range of reasons for issuing an Improvement Notice, e.g. failing to set accurate ETAs, not logging out of the HHT by 8pm, poor attitude, not accessing

mycouriersonline, having a high number of queries or claims and the Field Manager having to source cover for a down round. The Improvement Notice is recorded on the Hermes system and remains live on a courier's file for six months. Training and monitoring may follow. A third Improvement Notice inside six months will trigger the process for removing a courier's round. There is a separate SOP dealing with that.

- 3.27 Mr Cross was subject to service reviews, had had some round performance reviews and had once been given an Improvement Notice. That was for a variety of reasons, including downloading his manifest late and not meeting delivery time bands. Part of the reason was also that his Field Manager wanted to meet him one Thursday and Mr Cross wanted the meeting to take place the following Tuesday, when he was less busy. He said that his Field Manager told him that he would not send him any more parcels until he had had the meeting and that is what happened. He said that his HHT was removed from him and he described himself as being "suspended." Ms Dunford had had one service review. She had not had a round performance review or been issued with an Improvement Notice, but she knew that they were issued. When he was unwell and unable to source cover, Mr Clarke was told that his line manager was not issuing an Improvement Notice at that stage but would have to look into it.
- 3.28 Hermes says that its couriers are able to develop their own businesses in a number of ways. Mr Ormsby referred to Mr Jones, who at one stage was paid as much as £20,000 per month at peak times. Before he left Hermes, he held four rounds and was paid between £6,000 and £8,000 per month. Mr Ormsby also said that approximately 5% of couriers charged VAT, which pointed to a particular level of turnover.
- Business Development*
- 3.29 Mrs Scott said that, while it was relatively rare, some couriers also delivered parcels for competitors of Hermes. At one sub-depot, the sub-depot controller also had a contract with Yodel, and some couriers did deliveries for both. This was not an issue for Hermes. Ms Dunford had done deliveries for both Yodel and Hermes for a time. I accept her evidence that this only lasted a week – she explained that her Hermes round was then transferred to her husband but the Field Manager did not put it through on the system – but that was her choice. There was no dispute that Hermes had no difficulty with her doing deliveries for Yodel and Hermes at the same time. Ms Dunford also described her experience of working as an employee for two different companies at the same time – e.g. working part-time in residential care and part-time as a youth worker.
- 3.30 Hermes placed emphasis on the ability of couriers to increase their revenue by promoting the collections service, which the written agreement required them to do. Ms Dunford had a stamp and gave out cards with her number on. She agreed that this was to encourage more people to ask for collections with the intention that she would make more money. It was put to her that when delivering for both

Yodel and Hermes, she was working for both as part of her own business. She said that she was working for both companies.

3.31 Mr Cross said that although Hermes promoted the collection service as a way for couriers to grow their own business, in his view it was to promote Hermes's business only. The collection cards were Hermes branded. Mr Cross was asked about this in his oral evidence. He had never seen the collection cards before these proceedings. He used to use yellow stickers provided by Hermes and put them on all parcels. People on his round knew him personally. They used to come to his house and drop parcels off. He once had some fridge magnets made to promote the service when it was Parcelnet. He had to stop because people were trying to return parcels that had been delivered. They assumed that they could just return the parcels, when Hermes did not have a contract for returns with all its customers. If a customer did arrange a collection, Mr Cross said that he would apply a barcode and the parcel went on the van. As far as he knew that would trigger a payment for the courier. He agreed that this could be a way of building up the courier's profits. He said that he would book his collections on myhermes. The parcels would have to be manifested for him to collect because that is how payment was triggered. He was not able to negotiate a rate for collections directly with the customer. There was "no way" that he would have felt able to deliver the parcel himself to another local address and leave Hermes out of the loop.

3.32 In his cross-examination, Mr Ormsby agreed that a courier could not just take a call and pick up a parcel; it would have to be through the Hermes network. It was put to him that the courier was generating work for Hermes, and he eventually accepted that the courier was generating work for him or herself and Hermes.

Other Features

3.33 Since 2016, Hermes has had a Code of Conduct, setting out the key expectations of the couriers and the standards by which Hermes can be expected to abide. This is backed by a complaints panel and ultimately an ombudsman.

3.34 A whole range of material is on mycouriersonline. It includes guidance and instruction to couriers, for example the document on "Improving the whole customer experience" referred to above, containing requirements for relating to deliveries and collections. Hermes uses it to issue reminders, for example about how to conduct collections. When Hermes wants to run a "full network" on a Sunday at peak times (referred to as a Super Sunday) it puts notices on mycouriersonline asking couriers to tell their Field Manager if they can support deliveries on those dates. Updates, news and other material are placed on the site. It is a means of communicating with couriers and they are expected to access it. Failure to do so is one ground for issuing an Improvement Notice.

3.35 There was limited evidence that couriers received training from Field Managers or others. Rather, there was written information about how to perform tasks, how

to operate the HHT and so on. If a problem was identified, advice or training might be provided.

Key terms of the contract

- 3.36 Against the background of those findings I turn to consider what the contractual terms are. I find that the written contract was not a true or full reflection of the contractual agreement between Hermes and the couriers. I deal with two particular terms in detail below, but I begin with the context for those terms and the circumstances in which the written agreement was signed by the couriers. I consider that the whole written agreement has the hallmarks of being designed with the principal purpose of presenting the couriers as falling outside the terms of limb (b) rather than its principal purpose being to set out fully and accurately the contractual agreement between them and Hermes. It is strikingly brief. It says remarkably little about what might be thought to be the important part of the agreement: what the courier is required to do and what he or she will get in return. A significant proportion of the document is devoted to terms plainly designed with the purpose of ensuring that couriers do not satisfy the requirements of limb (b), for example the right to substitute or to work for competitors and the purported lack of mutuality of obligation. Indeed, the contract says that the courier is required to ensure that a substitute meets the standards that would be expected of the courier, yet it does not say that the courier him or herself is obliged to meet such standards. The obligation in the written agreement to “self-promote” a returns collection service is in the written agreement because Hermes wants it there. That is unusual, given that it is purportedly to grow the courier’s business. That, too, suggests a concern more with form than substance.
- 3.37 Plainly, it is open to both parties to agree such terms with the express intention of creating a contract for services. However, I find that that is not what occurred in this case and that the written terms do not represent the actual legal obligations of the parties. This is, of course, a situation of unequal bargaining power. Hermes decides the terms and the choice for the couriers is to sign or not to work for Hermes. That does not necessarily mean that the terms are not an accurate reflection of the agreed legal obligations, but it is a matter to be taken into account in considering whether they are. In this case, the terms of the written agreement as a whole and the circumstances in which it is signed are both consistent with the written agreement not being a true or full reflection of the legal obligations. The way in which the parties conducted themselves in practice on key aspects also points to a difference between the actual, agreed legal obligations and the written terms. Indeed, the evidence of the witnesses on *both* sides in some respects reflects a different understanding of the legal obligations from those set out in the written agreement.
- 3.38 In that context, I deal with the evidence about two particular terms of the written agreement: mutuality of obligation and substitution.

Mutuality of obligation

- 3.39 In general couriers are assigned a particular round. Some couriers may have more than one round. As set out above, the written agreement says that there is no obligation on Hermes to provide items for delivery and no obligation on the courier to accept items to deliver. It says that it is expressly intended that there is no mutuality of obligations. In fact, Hermes did not argue in its closing submissions that there is no mutuality of obligations. On the evidence before me, for the reasons set out below, I have no hesitation in finding that there is. Once a round has been assigned to a courier Hermes is expected to send the parcels on that round to that courier for delivery on every day of the week for which the courier is responsible, and that courier is responsible for ensuring that the parcels are delivered and for dealing with any collections. On this fundamental matter, the written agreement is therefore inconsistent with the actual legal obligations, as understood by the witnesses on both sides.
- 3.40 For the most part rounds are for six days a week. Indeed, the Courier Network Information document says that couriers are “required to offer a delivery and collection service six days per week, Monday to Saturday.” There was some evidence that rounds might sometimes be formally split between two round holders, so that each was contractually responsible for particular days. However, the general pattern is a six day round. That means the round holder has a contract with Hermes to arrange for parcels to be delivered on his or her round six days per week. If the round holder is unable to deliver the parcels on a particular day it is his or her responsibility to ensure that they are delivered by someone else (save in exceptional circumstances: see below). Mr Ormsby said in his witness statement that it is the responsibility of round holders to ensure that parcels on their allocated round are delivered and to arrange a substitute or cover when they are unwilling or unable to deliver the parcels on the round themselves. He said that if a courier fails to secure a cover or substitute in such circumstances Hermes may ultimately remove the round from them and bring the contract to an end unless there are exceptional circumstances. Ms Scott accepted that it was the round holder’s responsibility to ensure that parcels were delivered. She said that in exceptional circumstances Hermes would “look to support.”
- 3.41 There are two SOPs for Field Managers concerned with Round Management, dealing with the Round Cover Process in cases of Advanced Notice and Short Notice respectively. They are both premised on it being the round holder’s responsibility to source cover or a substitute if he or she is unable or unwilling to deliver the parcels on a particular day. Indeed the Advanced Notice SOP does not appear to allow for the possibility of the round holder not sourcing cover or a substitute. The Short Notice SOP deals with situations where a courier is unable to deliver parcels at short notice. Save in “exceptional circumstances”, the SOP makes clear that it is for the round holder to provide cover for their round in the first instance. It is only if the round holder is unable to do so that the SOP envisages the Field Manager will arrange for the round to be covered. Furthermore, the SOP advises that an Improvement Notice should be issued if a

courier fails to provide service with outsourcing cover or a substitute on three occasions within a six-month period.

- 3.42 Mr Cross's evidence was quite clear. His round was for six days a week. He said that he had been told that if he did not provide cover the round would be taken off him and he explained how that expectation operated in practice. Although at the outset of her cross-examination Ms Dunford accepted the proposition that Hermes had no obligation to deliver parcels to her and that she had no obligation to deliver or collect them, that was inconsistent with the remainder of her evidence. For example, it was put to her later in cross-examination that on a day when her cover courier was unavailable she was the round holder and had ultimate responsibility for ensuring that it was completed. She agreed. Further, when being asked about "Super Sundays", Ms Dunford said that her understanding was that it was her responsibility to sort cover for the rounds on those Sundays.
- 3.43 Mr Clarke gave evidence about difficulties he had experienced in sourcing cover at a time when he had been very unwell he said, "It's a given. We have to find cover. If you can't you contact your Field Manager." Mr Clarke gave detailed evidence about the difficulties he faced in the peak period in 2017 and in early 2018. He described being put under pressure to work Super Sundays, put under pressure to work when he was ill for the first time in 21 years, and being threatened with an Improvement Notice and the removal of his round. Mr Clarke accepted in cross-examination that during those events, his Field Manager agreed that if he worked some Super Sundays that he was unwilling to work, she would source cover for his round for some dates after Christmas. He accepted that he had "negotiated" this. But the general thrust of his evidence, which I accept, is that he had to ensure that deliveries were made on his round. If he could not make them himself, he had to find someone to do it, even if he was unwell and he was subjected to pressure from his Field Manager to make sure that somebody delivered the parcels every day, including Super Sundays.
- 3.44 Looking at all the evidence, the written term does not reflect the actual legal obligations of the parties. All the evidence points to a mutual understanding and agreement that once a round is assigned to a courier, all the parcels to be delivered on that round will be provided to that courier for delivery, and that courier is obliged to ensure the delivery and collection of all parcels on the round. There is mutuality of obligation in that respect. The courier is contractually required to offer a delivery and collections service six days per week (or on the relevant days).
- Cover and Substitutes*
- 3.45 As set out above, the written contract says that couriers are not obliged to provide the service personally and have the "unconditional" right to nominate a substitute to provide the service on their behalf, at any time and for any reason. Should they wish to do so, they should advise Hermes of the substitution in writing or by telephone.

- 3.46 There are two ways in which couriers may arrange for their deliveries to be undertaken if they are unable or unwilling to do so themselves. The first is to provide a cover. That is a person who is already a Hermes courier with a courier number. The second way is to provide a substitute. That is a person who is not already a Hermes courier. If a cover is used, Hermes will assign the round to that person on the day in question. That person will perform the deliveries using his or her own HHT just as if he or she were the round holder. The cover contracts directly with Hermes, is responsible to them in the normal way, and is paid directly by them. If a substitute is used, that is arranged between the courier and the substitute. The substitute will use the courier's own HHT and the courier will be held responsible for any shortcomings in the substitute's work. Hermes will pay the courier and the payment of the substitute is a matter between the courier and the substitute.
- 3.47 Mr Ormsby's evidence, to which I have already referred, was that the right to use a substitute or cover is "unfettered". He said that although the written agreement said that couriers "should" advise Hermes of a substitution this was simply a "request". He said that this was just so that the sub-depot could be made aware that someone different would be coming to collect the parcels. Mr Ormsby said that Hermes did not have a right of veto over a courier's choice of substitute, but went on to say that if it became clear to Hermes that a substitute was someone who had previously worked for Hermes and had their contract terminated for service level issues, Hermes would "object." Mr Ormsby gave evidence that many couriers have more than one round in their name and that it would not be physically possible for one person to do all of those deliveries. In his witness statement he said that one of the Claimants in these proceedings, a Mr Jones, had a number of rounds assigned to him. He requested additional HHTs so that his father and brother could help with deliveries and they were provided. All payments went directly to Mr Jones, in some months at peak times as much as £20,000. Mr Ormsby said that because of the private nature of the agreement between courier and substitute Hermes did not have any statistics as to the level or frequency of substitution across the courier network. He said that his own experience in Northern Ireland was it that it was very common.
- 3.48 He was asked about this in oral evidence. So far as Mr Jones was concerned, Mr Ormsby accepted that Hermes knew exactly who was assisting him and that each had their own HHT. He said that Hermes only knew who the people were because Mr Jones had told them and that he did not have to do so. Later in his evidence Mr Ormsby suggested that using a substitute was as common as using cover. He was asked what the evidence for that statement was and he said that it was his "experience." He had been a Regional Manager in Northern Ireland, seen the way it operates, seen substitutes in depots and spoken to couriers. He accepted that he had never gone to find out how many couriers were using substitutes; he might happen across information. He referred to a conversation with his own local courier recently.

- 3.49 Mr Ormsby said that couriers were free to make cover arrangements between themselves and did so. He gave examples relating to Ms Dunford and Mr Hughes.
- 3.50 I heard evidence about the use of cover or substitutes in relation to Mr Cross. He initially started with Hermes by working as a substitute for his parents, who were also Hermes couriers. It was suggested to Mr Cross that the arrangement was between him and his parents and was nothing to do with Hermes. He said that the only part where Hermes was involved was that his parents had to inform Hermes that he was going to be doing the parcels. Around 2007 when additional couriers were being taken on in the area he asked for his own courier number and he ended up with his own round in 2007 or 2008. I note that Mr Cross's parcels continued (and continue) to be delivered to his parents' house at his request.
- 3.51 Mr Cross accepted in cross-examination that he had signed the written agreement and understood what it said about substitution to be the position. He agreed that "on the whole" it still was the position, but he said that things had changed. He also said that he never used a substitute he only used cover. He knew colleagues who used substitutes but it was fraught with problems that he did not need. He agreed that he could do it but he did not like the idea of it. Mr Cross said that the suggestion that the right to nominate a substitute was "unconditional" did not reflect his experience of working for Hermes. On one occasion he had used a substitute. That was because Hermes refused to use the person he had found as cover, a Mr Gallagher. Mr Gallagher was a round holder with a courier number, but Hermes refused to allow Mr Cross to use him because he had been issued with an Improvement Notice. Mr Cross therefore wanted to use Mr Gallagher as a substitute. Mr Cross said in his witness statement that he did not believe that using a substitute was "unconditional" – he still had to ask Hermes for permission and await their response before proceeding. In oral evidence he explained that when he was not permitted to use Mr Gallagher as cover he was desperate because he had a medical appointment. He therefore rang his Field Manager and asked if there was a chance of any other cover. There was not. Then he said that the only other option he had was to use Mr Gallagher as a substitute. His Field Manager tried to persuade him not to. She said that they had more trouble with couriers landing in trouble with substitutes than any other problem. He said that they knew Mr Gallagher could do the job and the Field Manager said he still had an Improvement Notice. Mr Cross then said that he had "no other option" and the Field Manager then "conceded." Mr Cross said later in his evidence that he understood that if he used a substitute he had to tell Hermes the name and address. Had they had any problems Hermes would have come back to him. If the Field Manager had said no he would not have felt he could still use Mr Gallagher. Hermes submitted that Mr Cross knew he could simply substitute Mr Gallagher and that is why he advanced it as a fallback position with his Field Manager. I have considered his evidence as a whole. I do not accept that it reflects an understanding that he could simply substitute Mr Gallagher at will. Indeed, if that was his understanding, he would

not have needed to raise this with his Field Manager at all. I also note that the Field Manager's refusal to allow Mr Gallagher to act as cover arose in circumstances beyond those in which Mr Ormsby said that Hermes might veto a choice of cover.

- 3.52 Mr Cross had only ever himself been a substitute once. He did not think the other courier paid him the correct amount. After that he only acted as cover. He had covered all the other rounds in his area at one time or another. Mr Cross sometimes helped out his parents and sister who were round holders locally. Some deliveries on their rounds were on difficult rural terrain and he had a better vehicle, so he would do those deliveries. He explained in oral evidence that that came about in discussion with his Field Manager who asked him to go down the tracks. If there was a problem with a bigger parcel or a rough track the Field Manager would ring Mr Cross and eventually it got to the stage where he helped out. Ms Scott gave some evidence in her witness statement about the way Mr Cross and his family operated their rounds. She accepted in oral evidence that when Mr Cross was helping out with difficult deliveries on their rounds, this was to begin with at the request of his Field Manager as he described.
- 3.53 Ms Dunford's evidence was that if she was unable or unwilling to do the deliveries on her round, she was only ever covered by existing couriers. Her husband was a Hermes courier and sometimes covered for her. She did not think it would be possible to find someone willing to act as a substitute on her round. In addition, she was aware that if a substitute made a mistake on her round she might be punished with the withdrawing of her work and she did not use substitutes for that reason. She had had difficulties in trying to use cover. Hermes had refused to allow her to use two separate cover couriers to cover her round on Saturdays, in one case because of a concern that the cover courier already had a round and would be taking on too much work and in the other because Hermes wanted to use the cover courier to cover different rounds. Ms Dunford expressed the view that it was "ridiculous" for Hermes to suggest that they allowed couriers the opportunity to grow their business when they were preventing them from taking on work as cover because they were unhappy with the volume of work they would be taking on. In oral evidence Ms Dunford accepted that she understood she had a right to say she was going to use a substitute at any time but said that she never used one. She agreed that nothing would have prevented her from training a friend up and using them as a substitute but said that in practical terms that was not how it worked. It was put to her that she could do it and it was no concern of Hermes. She said, "We had to make them aware. I don't know I've never used one."
- 3.54 Mr Clarke was asked about the arrangements he had made to have the deliveries made on his round so that he could give evidence. He said that he had arranged cover and had obtained approval from his Field Manager. He said that he spoke to his Field Manager to tell him who would be covering and his Field Manager said, "Yes, that's fine, I've loaded it to Pete." Mr Clarke had never used

a substitute in 21 years. That was because there were two other couriers locally with whom he was able to agree cover arrangements.

- 3.55 The written witness evidence also dealt with cover and substitutes. Mr Hughes said that he had used cover but not substitutes. He suggested that the whole cover process was managed by Hermes. He referred to text messages from his Field Manager, for example stating that she required at least 4-5 days' notice of holiday and cover arrangements of more than a day or two, so that she could load it on the system. There was another text message from this Field Manager telling couriers that they were not allowed to hand parcels to another courier for delivery. Mr Hughes also said that after he left Hermes, he offered to help out the courier who had replaced him as round holder on Thursdays and Fridays. That courier told him that the Field Manager had refused to allow him to do it.
- 3.56 Mr Guy had worked for Hermes and then left. He described returning and being given a round that had been removed from the existing round holders (of twenty years) because the cover they had arranged for their holiday let them down on the evening of their flight, leaving them unable to arrange alternative cover. When Mr Guy took on the round, there was somebody else doing the Saturdays, so he only did five days per week. When that person left, he was told by his Field Manager that as round holder he was required to work the Saturday as well. Mr Guy told his Field Manager that he wanted to use the previous round holders as cover on the Saturdays. His Field Manager told him, "No, they cannot work for us. They are not allowed." Mr Guy therefore asked if he could exercise his right to substitute them and his Field Manager said that they could not work for Hermes and were not allowed in the depot. When Mr Guy had a new Field Manager, he asked again about using the former round holders and wrote down their names and address. The Field Manager said that she would go away and check. Subsequently she too said that they were not allowed in the depot. Mr Guy's view was that because Hermes asked for the substitute's details first, they were able to withhold consent. The final decision rested with Hermes. The evidence from Mr Guy and Mr Hughes was untested and was not put to the Respondent's witnesses in cross-examination (equally, they did not address it in their evidence). In any event, less weight can be attached to it. However, it is consistent with the picture painted by the other witnesses and provides some support for it.
- 3.57 Mr Ormsby was asked about his evidence that Hermes merely requested its couriers to let it know if they were going to use a substitute. He insisted that when the written agreement said that they "should" advise Hermes of the substitution that was not an obligation merely a request.
- 3.58 Mr Ormsby was asked about the Round Management SOP "Round Cover Process - Advanced Notice." The stated purpose of that SOP is to provide guidance to Field Managers on the correct process to follow if a courier is unable or unwilling to provide services. The document begins by restating that couriers have the unconditional right to nominate a substitute. The SOP also sets out

definitions. It defines a “Substitute” as a person who provides services on behalf of the courier at the courier’s sole discretion without prior knowledge to Hermes. The SOP then sets out a flow chart and a written process for Field Managers to follow. The underlying premise of the process is that where a courier is unable to provide services for any reason he or she will give notice of that to the Field Manager and will explain what arrangements are in place to handle the deliveries. The written process does not distinguish at that initial stage between cases where the courier is going to use a substitute and those where he or she is going to use a cover. Once notice has been given, the process says that if the courier has a substitute lined up and is simply informing the Field Manager of this, no further action is required by the Field Manager. The “Short Notice” SOP again begins by reiterating that the written agreement states that a courier does not have to provide services personally, but has the unconditional right to “nominate” a cover or substitute.

- 3.59 Mr Ormsby was asked about the SOPs. He suggested that the Advanced Notice SOP only requires notice of the use of cover. This is not required in the case of a substitute because the courier does not have to provide the name of the substitute at all. He accepted that in the SOP flow chart it was the same process for both cover and substitutes. In the case of the Short Notice SOP, Mr Ormsby said that the reference to “nominating” a substitute means “putting forward anyone they want” to do the round. He agreed that this meant a specific person, but said that in practice they would not need a name. They would for a cover courier. He agreed that the SOP suggested that it was the same process for both but said that in reality it was not. It was put to Mr Ormsby that his evidence was that the SOP did not mean what it said and he agreed.
- 3.60 Drawing this evidence about cover and substitution together:
- 3.60.1 I have already found that the couriers are contractually obliged to ensure that parcels are delivered on their rounds six days a week (or on the days for which they are responsible.) The parcels will be delivered to them and they must either deliver them themselves or provide somebody else to do so. That is inconsistent with the terms of the written agreement relating to mutuality of obligation.
- 3.60.2 On the question of substitution and cover, again I find that the written agreement does not reflect the true agreement between the couriers and Hermes.
- 3.60.3 The courier may arrange for the deliveries to be carried out by a cover. If so, they are required to inform Hermes who the cover is. On the evidence, I find that Hermes retains the right to refuse a courier’s choice of cover. Of the three witnesses who gave live evidence, two had been told by their Field Managers that they could not use cover they had proposed. That was the end of it – they could not use those people as cover. Both of the witnesses who only gave written evidence described similar experiences. Notwithstanding the terms of the written agreement, I find that this is the contractual position. Hermes retains the right to veto a courier’s choice of cover.

- 3.60.4 Alternatively, the courier may use a substitute. If they do so, I find that they are required to inform their Field Manager of the details of the substitute. That was the understanding of the Claimants, and is consistent with the words in the written agreement and the processes set out in the SOPs. Mr Ormsby's insistence that this was merely a request was not plausible. The definitions at the start of the SOPs seemed to me to be inconsistent with the actual processes they outlined. I find that the processes they outlined more closely reflected reality. The definitions and introductory parts came across as repetition of a mantra relating to an unconditional right to substitute, consistent with a wholesale attempt to portray the couriers as not satisfying limb (b).
- 3.60.5 Further, I find that the understanding of the couriers and of the Field Managers, notwithstanding the terms of the written agreement, was that the Field Managers could veto a courier's choice of substitute and that this reflected the contractual position. Mr Cross's evidence taken as a whole reflected an understanding that he needed his Field Manager's permission. If his Field Manager had said no he could not have used Mr Gallagher. The Field Manager had given permission (at least implicitly) for him to help his family members with their rounds. Ms Dunford had never used a substitute. Her understanding was that she had to make Hermes aware but she did not know much about how it worked. Mr Clarke and Mr Hughes had never used substitutes. Mr Guy had tried to do so and his Field Manager had refused permission. Even Mr Ormsby acknowledged that Hermes would "object" to the choice of substitute in one situation. That itself is inconsistent with an "unfettered" right to substitute. I did not find Mr Ormsby's evidence about the widespread use of substitutes compelling. Having said in his witness statement that no statistics were kept, he appeared to be improvising in his oral evidence. In any event, his evidence did not assist with the question whether permission was required or Hermes retained a right of veto over the choice of substitute. Given his lack of credibility generally, I was not satisfied that his evidence about Mr Jones could support a finding that Mr Jones used family members as substitutes without the knowledge or permission of Hermes. Mr Ormsby did not give evidence about what had been discussed between Mr Jones and his Field Manager and I was not prepared to infer that no permission had been given. The SOPs did not suggest that the Field Manager's permission was required or that they could veto the use of a substitute. However, even if that is the position, it would be surprising if the SOP recorded it, given that it is inconsistent with Hermes's insistence on an unfettered right to substitute. On balance, I am satisfied that, under the terms of the contract, the Field Manager can veto the choice of substitute and indeed that the Field Manager's permission (express or implied) is required.
- 3.60.6 If a courier uses a substitute, the courier must ensure that the substitute meets the standards the courier would be expected to meet, for instance in relation to setting ETAs, attempting deliveries and so on. If there are deficiencies on the part of the substitute, the courier will be held

responsible and may be issued with an Improvement Notice or, ultimately, have their round removed. The obligation to ensure that the substitute meets the appropriate standards is a positive contractual obligation imposed personally on the courier, with consequences for the courier if he or she fails to do so.

Application of the law to the facts

- 4.1 Against those detailed findings of fact, I turn to the question whether the Claimants are limb (b) workers. The first question is whether they undertake to do or perform personally any work or services for Hermes under their contracts. I find that they do.
- 4.2 The principal focus of the arguments before me was on the nature of the right to substitute somebody else to perform the deliveries/collections, but the case advanced for the Claimants was not limited to that. Mr Jones QC submitted that there were two elements to the obligation personally to perform work. The couriers were required *either* to deliver the parcels themselves *or* to source somebody else to do so and, if that person was a substitute, to ensure that the person performed the deliveries to the appropriate standard. It was not simply a case of being *permitted* to substitute somebody, but of being *obliged* to find somebody else to do the work every day for which they were responsible (save in exceptional circumstances). That seems to me to be the appropriate starting point.
- 4.3 As explained in detail above, in this case a courier is regarded as a round holder and is expected to ensure that the parcels on his or her round are delivered every day for which he or she is responsible, week in week out, unless and until the contract is terminated. That is different from the starting point in many of the authorities to which my attention was drawn. In the *Uber* and *Deliveroo* cases, the individuals are not required to provide services at any particular time. They can choose when to sign in. In *Pimlico Plumbers* the Claimant was allowed to turn jobs down and could say when he was available for work and when he was unavailable. In many of the cases involving building contractors, there was no obligation on the individuals to work on any particular day. In *James v Redcats* the courier could decline work. It was not her responsibility to ensure that parcels were delivered on the round every day. Each of these situations is in marked contrast to the Hermes couriers. What the couriers are required contractually to do is to provide a delivery and collections service Monday to Saturday (or on the days for which they are responsible) on their round, as the Courier Network Information document says. That entails either delivering the parcels themselves or sourcing somebody else to do so. If that person is a cover, they will then contract directly with Hermes. If the person is a substitute, the courier must ensure they meet the relevant standards and will be held responsible if they do not. The courier will be paid by Hermes and will pay the substitute. The courier will communicate with the Field Manager if covers or substitutes are to be used.

- 4.4 I consider that the provision of a delivery and collections service on the round in this way is the work or service that the courier undertakes personally to perform.
- 4.5 When the nature of the work to be performed by the courier is understood in that way, the focus on the nature of the right to provide a substitute to deliver the parcels on any particular occasion assumes less importance. If the couriers could simply inform Hermes of the days on which they were available to provide delivery services, the question of whether and in what circumstances they could instead send a substitute to carry out those deliveries would indeed be fundamental to deciding whether they undertook personally to perform the work. But where the contract obliges the courier more broadly to provide a delivery service every (relevant) day, whether by delivering the parcels him or herself, or by sourcing somebody else to do so, the question is whether the courier undertakes personally to perform *that* work. I have no doubt that under the terms of the contract the couriers are obliged personally to do that work.
- 4.6 The test identified by the Supreme Court in *Pimlico Plumbers* may be a helpful tool for analysis in this case. If one asks what the dominant feature of the contract is, the findings above indicate that it is the provision of a delivery and collections service by the courier for his or her round. But the same answer is arrived at by applying the previously established legal principles to the findings above.
- 4.7 On this issue – whose responsibility it is under the contract to provide the service on the round six days per week – as explained with reference to mutuality of obligation above, the witnesses on both sides essentially spoke with one voice. It is the round holder’s responsibility. The SOPs reflect that, as does the system of Improvement Notices. Failure by the appointed courier to ensure that a delivery service is provided on each relevant day will trigger an Improvement Notice and, ultimately, termination of that courier’s contract. There may be the ability to nominate a substitute to perform the actual deliveries/collections on a particular day in the circumstances set out above, but there was no suggestion that anybody but the round holder could source the cover or substitute, communicate with the Field Manager about that, or supervise the substitute. These are therefore contracts that require at least part of the work to be carried out by the courier him or herself and as such they are contracts under which the courier undertakes personally to perform that work.
- 4.8 I have made detailed findings about the nature of the contractual entitlement to use a substitute to perform the deliveries. If these had been contracts for the performance of deliveries on particular agreed days, rather than contracts for the provision of a delivery service every day as described above, the question of personal service would have been less clear cut. On the basis of my findings, there plainly is not an unfettered right to substitute. The courier can only use a substitute after informing the Field Manager and obtaining the Field Manager’s permission. Such permission is sometimes withheld. On the other hand, a substitute can be used for any reason, and there is evidence of their use over

substantial periods of time – Mr Cross when he first operated as a substitute for his parents, and Mr Jones’s use of his family members. The “dominant feature” approach is less helpful here, because it necessarily involves disregarding a part of the contract that I have found to be of fundamental importance. On balance, having regard to the guidance from the Court of Appeal in *Pimlico Plumbers*, in particular the suggestion that a right to substitute only with the consent of another person who has an unqualified discretion to withhold consent will be consistent with personal performance, I would have found that these cases fell on that side of the line and were contracts for personal performance. However, it is not necessary to determine the case on that basis.

- 4.9 That brings me to the second element of limb (b), the question whether under the contract Hermes is the client or customer of business undertakings carried on by the couriers. I have no hesitation in finding that it is not. On the basis of the detailed findings of fact above, the couriers fall by some margin within the category of providing services as part of a business undertaking carried on by Hermes rather than being truly self-employed.
- 4.10 For the reasons set out below, these are workers whose degree of dependence is essentially the same as that of employees rather than people with a sufficiently arm’s length position to be able to look after themselves: *Byrne Bros*. They do not actively market their services to the world in general, but are recruited by Hermes as an integral part of its business: *Cotswold Developments*. The fundamental essence of the contract lies in the field of dependent work relationships, not in the field of two independent business undertakings: *James v Redcats*.
- 4.11 Of course, many of the features of the contract and working relationship may be consistent with either true self-employment or limb (b) status: the payment of tax and National Insurance for example. Equally, I remind myself of what the EAT in *James v Redcats* said about those cases where the independent business is effectively created by the contract. It may not have many of the hallmarks of an independent business – e.g. marketing to the world at large and freedom to negotiate rates of pay – but that does not mean that it is not truly an independent business. However, in this case, looking at all the factors in the round, these seem to be to be clear cases of limb (b) worker status rather than true self-employment. In particular:
- 4.11.1 Couriers are appointed to a round and are responsible for it (normally) six days per week, every week. They are not free to say on which days they are available to provide a delivery and collections service on the round. They must do so every day for which they are responsible. They are appointed on terms determined by Hermes, essentially without negotiation. Mr Leiper QC identified limited evidence of what he termed “negotiations” – for example Mr Cross’s arrangement to have parcels delivered to his parents’ home and Mr Clarke’s agreement that his Field Manager would source the cover on a particular occasion. Such limited elements of negotiation are equally consistent with limb (b) worker

status. Indeed, true employees may well reach agreements of that kind with their employer.

- 4.11.2 Hermes sets the rate of pay, collects the relevant information, prepares the invoices and makes the payments. It decides what bonuses are payable and can withdraw them unilaterally. Any element of pay negotiation is limited and exceptional. That might also be true in a case where the contract effectively creates the business, but the pay arrangements here have all the hallmarks of dependent worker status rather than independent business undertakings.
- 4.11.3 Hermes closely controls the way the service is provided, through written instructions, management by Field Managers, messages on the HHT, oversight by Compliance Managers and a system of Improvement Notices with the ultimate sanction of termination of the round. The HHT itself is set up so as to ensure that couriers comply, for example, with the requirement to take safe place photos. The grounds on which Improvement Notices may be issued illustrate the detailed extent to which the couriers are monitored and controlled. They extend to the time couriers logout of the HHT, whether they have accessed mycouriersonline, their attitude and a whole range of matters. Couriers are subjected to standard service reviews (albeit not necessarily every six months as the SOP requires). The labels may be different, but these processes are fundamentally no different from line management, appraisal and disciplinary processes.
- 4.11.4 Couriers are required to meet SOS levels and performance standards relating to ETAs. Bonuses are payable for meeting the levels and Round Performance Reviews and Improvement Notices may be the consequence of a failure to do so. These might be regarded as analogous to KPIs in a contract for services, but again the whole way the targets are imposed and managed is akin to the way in which an employee's performance against standards would be managed and rewarded.
- 4.11.5 Couriers' freedom to plan their day is in truth limited. They are dependent on the arrival time of the Hermes lorry, or, in some cases, their agreed pick-up slot at the depot. The ETAs they must set are influenced by any time banded deliveries and by the geography of their route. They are required to logout of the HHT by 8pm. This is a relatively neutral factor – there might be such constraints on a truly independent delivery business, and a limb (b) worker might have that degree of freedom.
- 4.11.6 Couriers are free to work for a competitor at the same time as Hermes although it is relatively rare. That is one factor pointing towards true self-employment, but it is not itself decisive. Employees too may have more than one job.
- 4.11.7 Couriers can increase their revenue by marketing the collections service. But collections must still be dealt with through the Hermes system, with Hermes setting the rates and dealing with the invoices. Hermes benefits equally from the increased revenue. There is no question of the courier leaving Hermes out of the loop and developing a separate collections

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business. The findings here do not point to independent business undertakings developing and building their business or marketing it to the world at large in the way that they deem fit. An employee might increase his or her pay by making more sales or selling an add-on so as to increase commission. Given the obligation on couriers to market the collections service, that seems a more apt analogy.

4.11.8 Couriers provide their own vehicle and are responsible for their own expenses. They pay their own tax and national insurance. These are neutral factors, given that the issue is what type of self-employment this is.

4.11.9 There is some Hermes branding – in the calling cards for example – but couriers do not wear a uniform or have liveried vehicles. These factors are relatively neutral.

4.12 Taking all these factors, and notwithstanding Mr Leiper's able submissions to the contrary, the terms of the contract and the way in which the parties operate in practice point overwhelmingly to the fact that these are contracts that fall within the field of dependent work relationships. The Hermes couriers undertake personally to perform work and Hermes is not a client of a business undertaking of theirs. They are properly regarded as limb (b) workers.

Employment Judge Davies

Dated: 22 June 2018