EMPLOYMENT TRIBUNALS

Claimant: Mr G Sharrock

Respondent: PPF Limited

HELD AT: Liverpool **ON:** 7, 8 & 9 November 2018

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr S Brittenden, counsel
Respondent: Mr M Pauline, counsel

JUDGMENT

The judgment of the Tribunal is that the Claimant was not a limb (b) worker under the Working Time Regulations 1998 and his complaints of unlawful deductions from wages, holiday pay, and a claim brought under Agency Workers Regulations 2010 are dismissed.

REASONS

Preamble

1. This is the reserved judgment with reasons following a preliminary hearing held to determine the worker status of the claimant and whether the Tribunal has jurisdiction to entertain the claimant's complaints in respect of unlawful deductions from wages, holiday pay, and a claim brought under Agency Workers Regulations 2010.

2. In a claim form received on the 2 November 2017 (ACAS Early Conciliation Certificate issued 9 October 2017) the claimant brought complaints under of unlawful deductions from wages, holiday pay, and claims under Agency Workers Regulations 2010. It is notable in the grounds of complaint the claimant pleaded at paragraph 3 that he had been "informed by individuals already working for the…respondent

that…he would have to agree to be contracted through his own limited company" in order to work for the respondent. At paragraph 4 it was pleaded "it is important to stress that the…respondent does engage employees on a PAYE basis but that the claimant was not afforded that option."

3. This preliminary hearing has been listed to determine whether the ET has jurisdiction to entertain Claimant's complaints in respect of unlawful deductions from wages, holiday pay. The agreed issue to be decided is whether the claimant is a worker.

4. The respondent denies the claimant is a worker, maintaining the claimant was an employee for a two-week period, and thereafter set up a limited company, Sharrock Transport Limited, ("Sharrock Transport") which contracted with the respondent to provide HGV driver(s).

Evidence

5. The Tribunal heard evidence from the claimant on his own behalf, in addition to that of Jake Acklam. The Tribunal did not find them to be entirely credible and cogent witnesses. The contemporaneous documentation contradicted Jake Acklam's evidence in that it showed the respondent took on PAYE employees at the time. Jake Acklam's written evidence confirming he had not been dismissed by the respondent was incorrect and the Tribunal found he could not have been confused about this.

6. The claimant was also not found to have given entirely credible evidence, he was an inaccurate historian and he contradicted some of his key evidence on cross-examination. The Tribunal preferred to accept the claimant's evidence and that of Jake Acklam only when it was supported by contemporaneous documentation.

7. The claimant's evidence that he did not discuss contracting with the respondent through his own limited company with other drivers was not credible and the Grounds of Complaint at paragraph 3 sets out the more likely scenario. Under cross-examination the claimant confirmed "all were talking about it. I just listened" and yet he managed to get the name of an accountant and book a meeting with the accountant immediately the day after the 3 October 2016. When questioned by the Tribunal the claimant could not recall when he went to see the accountant, and it was at this point the claimant introduced for the first time (contradicting his original story) that he had been told by Janet Barnes over the telephone prior to the 3 October 2016 that he had to set up a business. The claimant's original version was that he had been told this by Janet Barns and Carley Canny on 3 October, which changed again to being told only by Janet Barnes when it was put to him in cross-examination Carley Canny was not at the 3 October meeting.

8. Given the contradictions between the claimant' s evidence and the contemporaneous correspondence reflecting the claimant had set up Sharrock Transport by 4 October 2016, the Tribunal reached a conclusion on the balance of probabilities that the claimant decided after discussions with other drivers to set up his own company, on the basis that it would be beneficial to him. In arriving at this finding, the Tribunal took into account Mr Brittenden's submission that there was no direct evidence as to what was explained to the claimant about his options, and Jake

Acklam supported the claimant's account thus providing corroboration. The Tribunal accepted there was no direct evidence given by the respondent; however, the claimant contradicted his evidence and Jake Acklam was not in a position to corroborate what had been said to the claimant as he had been dismissed by the respondent previously and possessed no knowledge other than the claimant's say so.

9. On behalf of the respondent the Tribunal heard from Carley Canny, operations manager and the claimant's line manager, and Peter Howitt, HR director and stakeholder in the respondent. It was also referred to the signed written statement of Janet Barnes, operations consultant, in which she confirmed she had no recollection of speaking with the claimant or meeting him in October 2016, although it was possible she did so. Despite her lack of recollection Janet Barnes "categorically stated" she would not have told any driver he must contract with the respondent as a limited company, which was contrary to the respondent's policy. Janet Barnes' evidence did not assist the Tribunal, who gave it minimal weight apart from accepting on the balance of probabilities the respondent did have a policy as described borne out by the contemporaneous documentation set out below in the finding of facts.

10. The Tribunal found Carley Canny and Peter Howitt to be credible witnesses whose key evidence on the respondent's ethos of preferring to employ HGV drivers under PAYE was supported by contemporaneous evidence. It accepted Carley Canny's evidence that the Board of Directors had "always" made it clear to her team (she line-managed Jake Acklam) that they must not get involved in decisions made by the HGV drivers on how best to operate, and whether that be via PAYE, agency or limited company contractor basis. Her explanation as to why the respondent took this approach was logical; it wished to avoid personal liability under the Managed Service Company ("MSCP") legislation. The Tribunal preferred Carley Canny's evidence to the effect that drivers had and continue to have a choice whether to work as employees or through limited companies, evidence supported by contemporaneous documentation as referred to below in the findings of facts. The claimant would not have been able to provide his services as a sole trader as the respondent did not offer this option.

11. In direct contrast to Jake Acklam's evidence that in the last 6-months of his employment, (and possibly even before that) the respondent did not employ drivers on PAYE, Peter Howitt's evidence supported by documentation was that 22 drivers were recruited at Lea Green during Jake Acklam's employment and 9 of those in the last 6-months of it. The employees would have been recruited by Jake Acklam, Carley Canny or Janet Barnes and the Tribunal on balance, did not find Jake Acklam's evidence credible on this point.

12. The Tribunal was referred to an agreed bundle of documents including the additional documents duly marked. Having considered the oral and written evidence, the claimant's opening Skeleton Argument, respondent's written submissions and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has resolved the conflicting evidence and made the following findings of the relevant facts.

Facts

13. The respondent is a large national employer, it is of substantial size and resources describing itself as "one of the United Kingdom's largest agency suppliers of professional LGV drivers specialising in supplying "temporary workers" to the logistics sector. It employees LGV drivers under contracts of employment, agency workers and independent limited company contractors, who the respondent maintains, are in business on their own account and can provide a flexible labour force especially in high periods of demand such as the summer and Christmas. Peter Howitt, the respondent's Human Resources ("HR") director gave evidence that unlike employees and agency workers, independent limited company contractors received at least an additional £1.00 per hour and up to £5.00 per hour depending on the shortage of drivers and amount of work available. Independent limited company contractors would frequently re-negotiate and this caused the respondent some difficulty with its profit margins, and its ability to source sufficient LGV drivers when they were in short supply and working for competitors.

14. The respondent contracts with Wincanton Plc to provide HGV drivers. Wincanton also employ drivers directly on PAYE. It has a number of distribution contracts, including a national distribution contract with the Co-Operative Limited ("Co-Op") which it services from a number of depots including Lea Green in Merseyside. Lea Green lies some 5 to 10 minutes away from the claimant's home.

15. The claimant had been employed at the Lea Green depot previously from 23 September 2012 to 27 January 2014, and prior to that date he had worked for a short period in his own courier business. The claimant was unable to state whether it was via a limited company or not; however, he had taken professional advice and used the same firm of accountants instructed again from 21 October 2016 to provide services for Sharrock Transport Ltd and advise to the claimant.

16. On the 29 May 2015 Peter Howitt emailed employees including Carley Canny, Janet Barnes and Jake Acklam "re-emphasising our message on driver engagement." He wrote; "It is vitally important we keep our distance with how a lorry driver wishes to engage his services. To re-iterate, a driver has a choice when working for us: Employed status…operate on a business to business basis and operate their own limited company…operate with one of our approved and audited suppliers."

17. A list of the audited suppliers was provided. The 29 May 2015 email continued, "it must be driver to decide what is best for him…I'm aware the majority of our drivers do not wish to be employed directly on one of our contracts. Instead, the drivers wish to work more flexibly with a less onerous contract, or no employment contract at all. That said, please continue to offer our contract, and let the drivers know of the above ways they can be engaged if direct employment is not for them. IT MUST ALWAYS BE THE DRIVERS DECISION. PLEASE DO NOT GET INVOLVED WITH HOW A DRIVER WHISHES TO OPERATE THEIR SERVICES IF THEY DO NOT WANT DIRECT EMPLOYMENT." Jake Acklam did not dispute this email had been sent to him, and given the evidence of his line manager Carley Canny to the effect that the email reflected "strict management policy" the Tribunal concluded on the balance of probabilities Jake Acklam had not been instructed to insist that prospective drivers set up their own company and was limited to working 2 weeks as a PAYE employee during the set-up process.

18. The Tribunal found on the balance of probabilities (a) Jake Acklam was aware of this policy and the fact that the HR director who had a stake in the business was making the position on recruitment beyond doubt, and (b) for at least the last 6-months of his employment Carley Canny would not have countenanced the recruitment process described by Jake Acklam in his evidence, a process which the Tribunal did not find to be credible. It is notable Jake Acklam in his witness statement gave evidence to the effect that during the last 6-months of his employment he was asked by the regional director, Martin Bisham, to ensure new recruits were all engaged on the contractor model. Carley Canning was line-managed by Martin Bisham (who is no longer employed by the respondent) and given the figures produced by the respondent setting out Regional Engagement Status, the Tribunal preferred the evidence given on behalf of the respondent confirming the engagement status of employees during Jake Acklam's employment.

19. The Regional Engagement Status confirmed a total of 283 workers had been employed under an umbrella contractor described by Jake Acklam as a supply solution that uses multiple agency workers but with accountable order point for all bookings, 304 employees operating under contracts of employment with the respondent and 328 independent limited company contractors in business on their own account. The analysis includes the relevant dates, and it is notable PAYE employees in addition to independent limited company contractors had joined, undermining Jake Acklam's evidence on this point. Given the evidence before it, the Tribunal found as a matter of fact that during Jake Acklam's period of employment the respondent employed drivers under contracts of employment and there was no persuasive evidence that it only offered the independent limited company contractor model.

20. Carley Canny had been the line manager of Jake Acklam before he was dismissed in November 2015. Jake Acklam had no dealings with the claimant, and was not party to any of the conversations or meetings that subsequently took place. In his written statement signed and dated 17 October 2018 Jake Acklam denied being dismissed by the respondent, maintaining that Peter Howitt had informed him he would need to terminate his contract of employment by mutual consent if he wished to attend a HGV course. Under cross-examination Jake Acklam conceded he had been dismissed for being absent from work without authority, and the Tribunal found he had contradicted himself on a straightforward fact; he had been dismissed and the attempt to explain why the respondent's evidence to this effect was not "strictly accurate" was less than straightforward and not believable. Jake Acklam was in no doubt he had been dismissed, and his attempts at tailoring this evidence brought into question his credibility. The Tribunal concluded it would accept Jake Acklam's evidence only when supported by other evidence. On the balance of probabilities the Tribunal preferred the evidence of Carley Canny to that of Jake Acklam that during the 12-years of her employment with the respondent the board of directors had made it "very clear" to her and the operations team (which included Jake Acklam) that they would not get involved with how the drivers wished to contract with the respondent as the choice was theirs if they elected not to be PAYE employees, due to a concern that the respondent may somehow become liable under the Managed Service Company legislation. This was the position when the claimant first approached the respondent in or around September/October 2016 and so the Tribunal found.

21. In or around late September 2016 the claimant in his witness statement described how he contacted Janet Barnes by telephone and a meeting was arranged with her and Carley Canny to discuss work. In the claimant's witness statement, he described the initial conversation with Janet Barnes which was different to that given in oral evidence when the claimant explained he thought he may have been told during telephone conversation that he could only join the company if he set up an independent limited company contractor model. In the witness statement the claimant makes no mention of this, maintaining he had been told by Carley Canny and Janet Barnes at a meeting on 3 October 2016 he could only be employed on a two-week temporary employee contract whilst he was setting up a business account, and thereafter, work would only be offered on an independent limited company contractor basis. The claimant is incorrect in his evidence; Carley Canny was not at the meeting on 3 October 2016 and the claimant's evidence, on cross-examination, was less than credible when dealing with when and who had informed him he would only be offered work through his own limited company. In short, the claimant gave contradictory evidence in respect of what transpired when he first approached the respondent, had it been the meeting on 3 October 2016 by 4 October 2016 the claimant had met the accountant referred to him by other drivers working for the respondent through a limited company, and he had set up his own company within less than a 48-hour period.

22. Under cross-examination the claimant denied he had communicated with other drivers, which was clearly not the case and the Tribunal found on the balance of probabilities he had spoken with other drivers about setting up as limited company contractor. The evidence before the Tribunal is as follows; at paragraph 3 of the Grounds of Complain the claimant pleads; "he had been informed by individuals already working for the…respondent that…he would have to agree to be contracted through his own limited company" in order to work for the respondent. At paragraph 20 of the claimant's witness statement he wrote; "My clear understanding was that I have no other choice but to engage on that basis; it was what the other lads on the Lea Green site told me was the case, and I was aware they were doing the same thing." Finally, it was the "lads" who referred the claimant to an accountant, one that they had used, to set up their limited company. The claimant's oral evidence that "there was no friendly chat" and he never discussed the limited company contractor basis of working, the only question he asked was about the accountant and "all were talking about it I just listened" was not credible. On the balance of probabilities, the Tribunal found the claimant had discussed setting up a limited company and contracting with the respondent on a limited company contractor basis, with other drivers, he had obtained the name of an accountant for the express purpose of doing so, made an appointment and by 5 October 2016, one working day after the meeting held on 3 October 2016, Companies House wrote to the claimant confirming he had been appointed a director of Sharrock Transport Limited. Sharrock Transport Limited was incorporated on 4 October 2016.

23. On the balance of probabilities, the Tribunal found as a matter of fact based on the evidence before it, including that of Carley Canny, the claimant attended a meeting with Janet Barnes on the 3 October 2016 during which he agreed to enter into a contract of employment that took effect from 3 October 2016 with no fixed term. He read the Driver Handbook which he agreed to be bound by. It is undisputed the claimant's actual driving duties did not change between signing the employment

contract on 3 October 2016 and signing an agreement setting out the Terms of Engagement of Limited Company Contractors on behalf of Sharrock Transport Limited on 21 October 2016 and thereafter. However, the method by which the claimant accepted the engagements did change, he was not required to give personal service, was not subject to the respondent's disciplinary and grievance procedures, was not required to guarantee a minimum number of hours (376 per annum), he was not under the threat of dismissal if a suitable assignment was refused without good cause, was not entitled to holiday pay or sick pay and had a fettered ability to substitute.

The contract of employment

24. The Temporary Worker's Contract of Employment was not of a fixed duration, it provided for a 12-month probation period and a number of requirements were set out.

24.1 Clause 11 provided: "the employee is obliged to keep PPF fully and regularly informed of his/her availability to undertake Assignments and must in any case contact PPF at least once every two-calendar week…to update PPF as to his/her availability." 376 hours of work over the course of 12 month was guaranteed as a "minimum," employees were required to accept suitable assignments offered, and **"refusal…without good cause may constitute gross-misconduct under the non-contractual Disciplinary Policy…and may result in termination of the employee's employment without notice."**

24.2 "Assignment" was defined as "a placement of placements whereby the employee is assigned or seconded to the client work largely unsupervised in the capacity for capacities referred to within the Assignment details."

24.3 Clause 11 provides: the employee is obliged to keep PPF fully and regularly informed of his/her availability to undertake Assignments and must in any case contact PPF at least once every two calendar weeks (whether or not contacted first by PPF) to undertake PPF as to his/her availability."

24.4 Clause 29 provides for holidays and statutory sick pay.

24.5 Clause 38 sets out the termination provisions in accordance within statute.

24.6 The claimant confirmed that he understood and accepted its terms and would read the PPF Driver Handbook before starting his first assignment. There was no documentary evidence the claimant had entered into a two-week foxed term contract as he now alleges.

25. A copy of the Driver Handbook was provided to all employees, agency workers and independent limited company contracts who the Tribunal found on the balance of probabilities, were drivers in business on their own account through limited companies. The claimant was provided with a copy of the Driver Handbook which he

read in his capacity as employee. The claimant, who had taken professional advice from an accountant, confirmed he had read the Handbook, and would have thus been aware of the difference in treatment between employees and drivers who supply their services through a limited company, not least the fact that it was a personal choice for drivers operating their own limited companies. The Tribunal has highlighted a number of the relevant provisions as set out below.

The Driver Handbook

26. The Driver Handbook set out a number of provisions for drivers under the title "working with our clients – your customers" that included, for example "You should arrive a minimum of 5 minutes early for your assignment, be smartly and correctly attired in PPF uniform or dark clothing – image is very important. Do not wear jeans. Wear a high-viz vest, protective boots and additional PPE that may be required."

27. The following also applied;

27.1 Under the heading "Working with Us/For Us" it was provided the respondent's "endeavours to fully utilise its register of approved drivers and suppliers, **but no obligation on by the parties to supply or carry out assignments exists, unless otherwise agreed in a separate communication contract of employment.**

27.2 We aim to provide you with **some helpful guidelines**… Regularly confirm your availability with us and in four hours in a timely fashion should your plans change… A number of drivers elected to provide their services companies which allow them to claim legitimate expenses. PPF have a list for their own internal purposes of companies that drivers have such arrangements with, and which people have for this purpose and PPF will do business with. **That said, other than the company being approved by PPF we have no affiliation to any other company and drivers must satisfy themselves personally as their own arrangements…. Some professional drivers decide to establish their own limited company and to supply their services through this company. This is a personal choice and, whilst there can be advantages to this, PPF will only enter into arrangements with legitimate companies and reserves the right to make the necessary checks. Drivers operating their own limited company need to be aware of their added responsibilities in the event of not being available for an agreed shift and should familiarise themselves with the appropriate driver substitution policies."**

27.3 Under the heading "Working with Other Employers" it was provided "save for any express conditions that may be otherwise agreed, drivers supplying services to us have the freedom to work the other agencies and customers. During your registration or contractor approval you will have been asked to provide us with details of other work you typically undertake with other customers or employers. It is your responsibility to regularly update your PPF branch with these details. This is so we can accurately record your working time… You must only accept a shift from us where you are fully legal do so."

27.4 Under the heading "Holiday Pay Policy limited company and self-employed contractors are specifically excluded.

27.5 A grievance and disciplinary procedure is provided only for "workers engaged directly."

Claimant's employment

28. The claimant commenced his employment as a Class 2 HGV driver having entered into a contract of employment to work as a driver in a contract agreed between the respondent and Wincanton who in turn contracted with the Co-Op. The Co-Op provides the vehicles in their own livery, fully serviced and fuelled. The claimant's role was to drive Co-Op goods around stores within the North of England as and when required. Wincanton, who specialises in logistics, employs a number of drivers directly, taking on additional class 1 and 2 drivers as and when required from companies such as the respondent. The claimant worked alongside employees of the respondent, Wincanton and other class 1 and 2 drivers working through their own limited company. There is a great deal of flexibility in the arrangement for the respondent, Wincanton and HGV drivers, especially those who enter into business to business agreements with companies they have set up specifically for that purpose.

29. The claimant, after discussions with other drivers, including those who had set up their own limited companies and entered into business to business agreements with the respondent, obtained the name of an accountant for the specific purpose of setting up his own business. On the balance of probabilities, the Tribunal finds the claimant came to this decision of his own free will. On 3 October 2016 just under 30% of the respondent's workforce were employees.

30. By 4 October 2016 the claimant had seen the accountant and instructed him to set up Sharrock Transport Limited, company number 10410228 as of 4 October 2016. In a letter dated 5 October 2016 Companies House congratulated the claimant on his appointment as a director of the company, and set out his director's obligations, such as filing accounts and confirmation statements. The claimant has not complied with any of his obligations as a director, although during the relevant period he clearly understood their importance and his statutory obligation. The claimant also set up a business account with Santander on 21 October 2016.

Terms of Engagement of Limited Company Contractors

31. On 21 October 2016, more than 2-weeks after the contract of employment was entered into (which suggests it was not for a fixed two-week term as stated by the claimant) the claimant voluntarily entered into Terms of Engagement of Limited Company Contractors, which he signed as director on behalf of Sharrock Transport Ltd.

32. On 21 October 2016 the claimant also entered a 'Limited Company Opt Out Agreement' on behalf of Sharrock Transport Ltd and a 'Self-Billing Agreement' whereby the respondent (described as the customer) agreed to provide self-billing invoices for all services made to them by Sharrock Transport Ltd, which could be outsourced to a third party. The claimant on behalf of Sharrock Transport Ltd agreed

to accept the invoices until 1 November 2017, not to raise its own sales invoices for the transactions covered by the agreement and notify the respondent is they become VAT registered.

33. The claimant signed a 'Limited Company Driver Declaration' form on behalf of Sharrock Transport Ltd which set out the following "whilst I read work other clients, I have committed to inform PPF of other work but I need do, especially when this would impact on my ability to legally start or finish any assignments that PPF make company… During my approval, when asked if I currently undertake any other work my reply was N" [for no]. It is not disputed the claimant's chose to work only for the respondent on the basis that the depot is near his home, and he did not accept any other offers in relation to depots and end user clients based further than Lea Green.

Limited Company Declaration

34. On behalf of Sharrock Transport Limited the claimant signed a 'Limited Company Declaration' on the 21 October 2016 prepared on behalf of the respondent that set out the following as highlighted by the Tribunal:

34.1 "You have chosen to supply your services to PPF via your own limited company. A number of key elements appertaining to this relationship would have been discussed at the time of your approval and some are contained within our driver's handbook which we all have also made available to our contractors. This correspondence reconfirms many of these provisions in one document. **Importantly PPF utilises driver services via a number of mechanisms and should you feel that running your own limited company is no longer your preferred option you should discuss this with your local consultant. Drivers who operate their own company should ideally seek professional advice and no one at PPF is qualified in this area."**

34.2 A number of criteria were set out within the declaration including the requirements that the company must have a distinct business bank accounts and no payments will "knowingly be made" to personal bank accounts. All companies must complete a self-billing agreement, the **"company must have public liability insurance. Proof of this insurance must be supplied**…**The limited company must be able to supply driving services across multiple end user clients. The contractor acknowledges that it has held itself out as a business providing services and as such the employment business is at all times a customer of the contractor."**

Substitution

34.3 There is a reference to substitution and in answer to the question "do I have to do the work myself?" The response was "no, **should you accept an assignment from ourselves, and then not being able to fulfil the obligation, you can substitute yourself with another driver providing that driver is registered with PPF, they have undertaken a client assessment, they are not already on assignments with us, and providing we are notified at least two**

hours before the assignment planned commenced. We would need to be informed if you intend to pay the substitutes or if the substitute worker is to be paid by us."

34.4 In response to the question "Do I have to work a set number of hours if I provide my services to PPF via my own company?" The answer is "no, indeed **no obligation exists on either party to provide or accept a minimum number of assignments."**

34.5 "In response to the question" can payments be withheld from me for any reason?" The answer is "the have been some occasions when we have withheld payments to drivers on assignment via their own limited company. **Company invoices have been rejected if the driver has committed an act of gross negligence resulting in injury to others of the incidents of harassment the members of the public or workers on client sites."**

35. The respondent issued an 'Approval for the Limited Company Workers signed by the claimant.

36. The claimant attempted to unsuccessfully contact his accountant after the company had been set up on 4 October 2016 in respect of registering for VAT, which he was keen to do in the knowledge that there were financial advantages for the company. The claimant was aware from very early on of the tax advantages when working for the respondent through a limited company, particularly given the option of registering for VAT, charging the respondent 20% VAT and paying HMRC 9% thus profiting by some 11%. The accountant did not respond and by 21 October 2016 the claimant had instructed his original accountants, Colin Tunstall Limited, to act as the company accountant. Colin Tunstall Limited have provided a letter dated 2 November 2018 confirming the claimant became a client on 21 October 2016, and in the period 21 October 2016 to 5 April 2017 he drew a director's salary and a director's loan. As a result of the claimant's medical condition Sharrock Transport Limited ceased trading and the accounts were still outstanding.

37. In his written statement the claimant maintains he did "not spend a lot of time considering the documentation I was being asked to sign" and in oral evidence he stated he did not read the documents, and did not see how he could have "possibly have held himself out as a business undertaking when I met the two ladies and was told – in no uncertain terms – that I would only get paid work if I created a limited company. My company was not even in existence at the time I apparently held myself out as one." The Tribunal found the claimant's evidence to be less than credible; he conceded under cross-examination "two ladies" did not tell him "in no uncertain terms" as alleged; at very best it was one and the claimant's evidence is unpersuasive taking into account the factual matrix and events that unfolded after Sharrock Transport Limited was incorporated well before the agreements were entered into and documents signed by the claimant in his capacity as director, contrary to the claimant's written evidence.

38. It is undisputed from 3 October 2016 the claimant drove Class 2 HGV's on behalf of the Co-Op and his method of physically working and driving on routes as required did not change after the transition from employee to director of a limited

company on a business to business agreement. There was a regular stream of work and the claimant was happy given Lea Green's "very close" vicinity to his home. From the outset during his short period of employment the claimant had been provided with a Hi-vis vest (which was plain and did not have the respondent's logo on it). The claimant did not wear a uniform and was required to be dressed in dark clothing and steel toe capped boots. The respondent provided steel toe-capped boots to all employees.

39. At the beginning of each week the respondent contacted the claimant who would confirm his availability. He was not required to work for any set number of hours, unlike the respondent's employees, and he was free to accept or reject any of the work offered, without repercussion. A number of the claimant's colleagues who had contracted with the respondent through a limited company did reject work; their companies contracted with other agencies/companies and some re-negotiated the hourly rate in periods of high demand, such as summer and Christmas. The claimant also rejected offers of work outside Lea Green, and he chose not to renegotiate or substitute. The claimant was satisfied with the amount of work offered, the hourly rate (enhanced when the claimant registered Sharrock Transport for VAT) and the fact that the depot Lea Green was convenient to him. The claimant had refused to carry out work at other sites on cost grounds, he was unfamiliar with the contract and despite other work being offered to the Sharrock Transport by the respondent, and refused, there were no adverse consequences to the claimant. He was free to accept and reject the work offered to him, and did so, making it clear to the respondent those days on which he would be available to work.

40. It is undisputed the claimant was signed in at Lea Green by a Wincanton manager who kept a record of working time in an Agency Driver Daily Timesheet that covered the claimant working through a limited company, and all other drivers (including agency and employees). The claimant cannot refuse the route he is given on the day, having agreed to undertake the work the week before. He can provide a substitute driver if that driver was already registered with the respondent, had undertaken a client assessment and was not already on assignment with the respondent. As the largest supplier of HGV drivers in the country, and the fact the respondent was keen to recruit HGV drivers even to the extent of offering the sum of £100 to existing drivers, it would have bene a straight-forward matter for the claimant to have provided a substitute driver. It was the claimant's choice to drive exclusively on the Co-Op contract and he was happy with driving the routes starting from a depot close to home which minimised his driving to and from work, costs that were recovered through the Sharrock Transport.

41. The claimant's method of driving the vehicle reflected statutory requirements that would apply to all HGV driving, for example, dealing with the paperwork, maximum hours and tachograph compliance.

42. The claimant did not provide a substitute and nor did he seek to do so. The undisputed evidence before the Tribunal was that a number of HGV drivers working through a limited company did employ substitutes, however, there was no contemporaneous evidence before the Tribunal that drivers working at Lea Green on the Co-Op contract had ever used a substitute. On balance, the Tribunal preferred the claimant's evidence that this was the case. It did not accept Peter Howitt's evidence on cross-examination as credible that drivers could substitute part way

through a shift without giving the 2-hours' notice required under the Limited Company Declaration. The reality was that once a driver had started driving the Co-Op vehicle exceptional circumstances were necessary for substitution to take place. The respondent's preference was to forewarn the client, hence the 2-hour notification requirement, and it sought to minimise any delay to the job which a substitution part-way through may have caused. Any independent company contractor providing a substitute could choose whether to pay the substitute directly or arrange payment through the respondent.

43. Peter Howitt's evidence that independent limited company contractors have provided substituted drivers and different services in addition to HGV drivers, was accepted by the Tribunal. The example of Mike Frith was given. Mike Frith is a limited company contractor who also provides training/induction services to the end client, evidencing the contractual freedom under which such a business can work. The Tribunal accepted on the balance of probabilities that it was open to individual limited company contractors to offer a variety of services through their limited company, including HGV driver services across the respondent's client base providing work was available. In contrast to the respondent's employees, limited company contractors are not guaranteed a minimum number of hours, and the clear evidence before the Tribunal was there was no obligation to accept any work. However, once work had been accepted there was a contractual obligation to perform the contract, but there is no requirement for that contract to be personally performed by the director, such as the claimant. An employee has the right to decline a shift, but if a shift is declined the respondent deducts 8 hours from their guaranteed 37.5 hours per week and there is a risk of disciplinary proceedings for gross misconduct and summary dismissal. The respondent will use the shifts booked by the client to meet the guaranteed obligation of employee drivers, who are given priority, and it is only when those obligations are met, the limited company contractors are offered hours. There was no obligation to offer any individual limited company contractor hours, and nor was there any obligation on the part of the company or a director of the company, to accept the work offered and so the Tribunal found as set out above.

44. It is undisputed employees have more regular Wincanton shift patterns in comparison to limited company contractors, who choose as and when to work. Unlike employees, limited company contractors are responsible for their own training costs and maintaining certificates of professional competence.

45. In accordance with the Self-Billing Agreement the claimant through Sharrock Transport did not produce company invoices but relied on the respondent to produce a "Self Billing Invoice" for Sharrock Transport Ltd setting out the quantity of hours, rate of pay and total amount. The document is not a payslip, unlike the claimant's description of it which was disingenuous given the fact the claimant charged the respondent VAT after registration on 1 November 2016.

46. Sharrock Transport was required to have public liability insurance as a matter of contract. The claimant had not taken out such insurance on behalf of Sharrock Transport, unbeknown to the respondent who failed to request any documentary evidence. The Tribunal was concerned that the respondent's failure may point to a possibility that the expectation was for an independent limited company contractor to be covered by the respondent's insurance with no question of indemnity. The

Tribunal accepted on balance, Peter Howitt's evidence that checks were not necessarily undertaken on all drivers, there was an issue of non-insurance in respect of a small number of drivers and this was a failing on his part and by the respondent. He accepted the claimant had not been informed of the minimum insurance requirement of one million pounds and in the event of the claimant being involved in an accident attributable to his own negligence, the respondent would be insured with an expectation that it would be indemnified by Sharrock Transport, and if there was no insurance policy there would be an action for breach of contract. The Tribunal accepted Peter Howitt's undisputed evidence that separate insurance was taken out by the majority of independent limited company contractors, the respondent had failed to pick up those who were in breach of contract until this case and the position was being remedied. The Tribunal found on balance, the fact the claimant did not purchase public liability insurance on behalf of Sharrock Transport is not fatal to the respondent's defence and does not undermine the contractual obligation existed and the claimant was in breach of contract

<u>The 10 February 2017 communication</u>.

47. On the 10 February 2017 the respondent sent a written communication to its drivers and companies who supplied drivers via Driver Messaging titled "Quarter One Opportunities." There is an issue whether the claimant received a copy, the claimant denying he had. The claimant admitted on cross-examination his company had been signed up to the respondent's messaging system. The Tribunal took the view on the balance of probabilities the message had been sent to Sharrock Transport given the respondent was looking for additional drivers at the time. The message informed drivers the respondent had secured a "significant amount" of new business in the early part of 2017. Securing business would have been of interest to all, bearing in mind the respondent's invitation to drivers to extend the sites from which they were prepared to work.

48. The 10 February 2017 document sets out the following relevant matters corroborating the evidence given on behalf of the respondent, a number of which have been highlighted by the Tribunal:

48.1 Traditionally the first quarter of the year was quieter and opportunities would be available "…we are aware that many of you have a preferred location. Being able to work more sites would not alter that preference but give you more options…we have a number of vacancies…

48.2 …**if you introduce one driver that completes just one shift with us you will receive £100…**

48.3 **If any of our suppliers operating their own company would prefer an employment role, we would be happy to discuss this with you. Whilst we appreciate the added freedom and commercial attraction with supplying driving services to us and other companies it may be that circumstances have changed. We understand comparable take home pay may not be as attractive, but you must weigh up the other statutory benefits that employment brings. Our contracts of employment offer a great**

> **deal of flexibility but, at the same time, afford you a high level of guarantee if approved to work at three or more sites."**

49. The invitation to suppliers of an employment contract is contemporaneous evidence supporting that of Peter Howitt that the respondent's preference was to employee on PAYE and not through company suppliers with the objective of having a greater control of the workforce, when they worked i.e. weekends, and avoiding the re-negotiations of hourly rates in periods of high demand. It also supported the respondent's evidence that HGV drivers were in high demand and attracted a £100 payment for new drivers. The claimant did not take up the respondent's offer of employment.

28 February 2017 grievance letter

50. Some 18 days later on 28 February 2017 the claimant together with a number of other drivers supported by the union, raised a collective grievance about the "Status of ADR Drivers at Lea Green." The letter was in the form of a template and followed an earlier collective grievance concerning an equal pay claim. The gist of the grievance was that employees and self-employed drivers working for the respondent and provided to Wincanton on an agency basis, were paid less than Wincanton employee drivers. The letter was received by the respondent on 18 April 2018. There has been no satisfactory explanation for this.

51. In the 28 February 2017 letter reference was made to the following "As you are aware, it will you that demanded I engage you on this basis. The reality of the situation is that this arrangement was was set up purely as a payroll function… In light of the recent judicial decisions… I am employed by you as a worker in accordance with section 230 (3) of the Employment Rights Act and regulation 3 of the Agency Workers Regulations 2010. On this basis I believe I'm entitled to… paid holidays and paid rest breaks, parity pay with Wincanton Drivers."

Respondent's letter 20 April 2017

52. Peter Howitt responded in a letter dated 20 April 2017 refusing to hear the grievance on the basis that the respondent was a client of Sharrock Transport Ltd. He denied the respondent had demanded that the drivers contracted on a business to business basis and confirmed "as is the case within our entire branch network, we offer a choice of arrangements to individuals and businesses that wish to engage with us. **Many do indeed elect to be employed by PPF Ltd. It is also worth noting that only recently PPF Ltd wrote to all of its suppliers to inform them that we have a large number of vacancies due to new business wins that we secured in quarter one of this year. Your company was one of the companies that we wrote."** Pausing there, the Tribunal took the view that if there was any doubt the claimant had not seen the communication of 10 February 2017 he was aware of it by the time he received the 20 April 2017 communication. It is notable that he did not ask for a copy, or claim it had not been sent to Sharrock Transport and the Tribunal concluded on the balance of probabilities, it had been sent and received, the claimant was aware that the respondent had invited him (and others) to become employees and he had not acted on the offer despite his repeated evidence before this Tribunal that all he sought was to become an employee of the respondent.

53. Peter Howitt referred to the tax position as follows; "The reality is that drivers operating with employment businesses often prefer to create their own businesses to take advantage of certain tax benefits, to receive the higher fees that we agreed with the suppliers compared the remuneration we will we reward our employed drivers with, and have the flexibility to pick and choose when your company wishes to undertake assignments for PPF Ltd. Employment with PPF Ltd does not drivers same level of flexibility." It was suggested Sharrock Transport took tax advice and "**it any of your drivers are looking of the benefits that employment can bring, then we can only repeat that PPF Ltd does have vacancies and we would consider any drivers working for Sharrock transport Ltd for these roles. Our team would be happy to talk through our employment contracts with any interested drivers and how that works with regards to requesting time off for holiday etc.**

54. In the respondent's statement in reply to the collective grievance signed by a number of driver's reference was made to the following "we operate to reasonable pricing structure which means the rate we agree with both employees and suppliers can and does change depending on the time of year…. You must be employed by ADR network to raise a grievance with us as your employer."

55. The claimant did not respond to Peter Howitt correspondence and nor did he take up the offer to work for the respondent in the capacity of an employee. The claimant's lack of response flies in the face of his repeated assertions during this liability hearing that all he wanted was an employment contract, thus further undermining his credibility and supporting the respondent's position that the claimant had entered into a business arrangement with it of his own free will. The Tribunal concluded the claimant's position had not changed from 21 October 2016; he had agreed to enter into a business to business contractor relationship and forgone his status as an employee for other advantages upon which he had received expert accountancy advice. Far from being in a position of weakness, the claimant was in a position of strength; he had a valuable commodity to sell as a HGV driver, and rightly or wrongly, took the view that commercially he was best served by trading through a limited company. Had the claimant thought otherwise, he would have seriously considered the respondent's offer of employment and he would not have incorporated a second company further down the line from which to trade.

56. On 26th of September 2017, some five months after Peter Howitt had made it clear that employment contracts offering holidays where available, and seven months after the communication regarding contract of employment offering flexibility, the claimant raised a further grievance on 26 September 2017 in relation to the respondent's alleged failure to pay holiday pay since September 2016 "when I commenced my employment."

57. Peter Howitt responded in a letter of 3 October 2017 as follows "you are well aware you are not an employee or worker of PPF Ltd and therefore not entitled to raise a grievance… PPF Ltd contract with Sharrock Transport Ltd to provide services to us… I am surprised you are raising the issue… When a cursory check on Company's House shows you are a director of Sharrock Transport Ltd and therefore understand not only who engages you but also of the commercial relationship between PPF Ltd and Sharrock Transport Ltd."

58. On 7 November 2017 the claimant wrote to the respondent requesting annual leave via Unite the Union referring to the following: "I understand from a press release issued by Unite on 2 November 2017 that Unite lodged a claim on behalf of Sharrock…" Reference was made to the terms of the contract signed by the claimant as director of Sharrock Transport Ltd.

59. On 20 November 2017 Colin Tunstall Associates emailed the respondent requesting copies of purchase ledger sheets with a view to forwarding a VAT invoice. A further Self-Billing Agreement was entered into on 11 September 2017 and on 4 December 2017 a VAT only invoice prepared by Colin Tunstall Associates was sent to the respondent claiming VAT on invoices dated 29 October 2016 to 2 September 2017. A further invoice was issued 15 December 2017. Both invoices required payments to be made to Sharrock Transport and thanked the respondent "for your business." This suggests that the claimant's accountants perceived the relationship between Sharrock Transport and the respondent to be one of business-to-business.

60. On 28 September 2018 the claimant incorporated Sharrock Transport (NW) Ltd and became its company director. At no stage has he taken up the respondent on its offer that he should consider entering into an employment contract.

The Law

61. Section 230(3) ERA defines a 'worker' as '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'.

62. The Supreme Court in *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*, held that an employment tribunal had been entitled to find that car valets whose contracts specified that they were self-employed subcontractors were, in reality, employees. There existed two clauses that, on their face at least, negated employment status: a clause allowing the 'subcontractors' to supply a substitute to carry out the work on their behalf, and a clause stating that there was no obligation on A Ltd to offer work or on the claimants to accept it. The tribunal found that these clauses did not reflect the reality of the claimants' working situation. They were expected to turn up and do the work provided, were fully integrated into A Ltd's business, and were subject to a considerable degree of control by A Ltd. Lady Justice Smith summed up the correct approach, stating that a tribunal faced with a 'sham' allegation must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.

63. The Supreme Court approved the Court of Appeal's analysis. It endorsed Lord Justice Aikens' warning that, when seeking out the 'true intentions' of the parties, tribunals should not concentrate too much on the 'private' intentions of the parties – ultimately, what matters is what was agreed. The Supreme Court also approved of

Lord Justice Sedley's reference to the fact that while employment is a matter of contract, 'the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's-length commercial contract'. It had to be recognised that when organisations offer work or require services, they are often in a position to dictate the terms on which it is done. Thus, the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in fact represent what was agreed. The true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.

64. As for how that enquiry should be carried out, Smith LJ in the Court of Appeal indicated that the tribunal will have to examine all the relevant evidence, including the written term itself, read in the context of the whole agreement. It should consider evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. Smith LJ noted that there could well be a legal right to provide a substitute worker, and the fact that that right was never exercised in practice would not mean that it was not genuine.

65. The *Autoclenz* decision was also relied on in *Uber BV and ors v Aslam and ors 2018 ICR 453, EAT*, where the EAT upheld an employment tribunal's decision that drivers working for the private hire car service, Uber, were 'workers', despite complex contractual documentation portraying Uber as an agent and the driver as a principal in an agency relationship. The tribunal had found that the written terms did not properly reflect the relationship between the parties; on the contrary, they were designed to misrepresent it. It noted that Uber resorted to 'fictions' and 'twisted language' in its documentation, and found the notion that Uber in London was a mosaic of 30,000 small businesses linked by a common platform to be 'faintly ridiculous'. On appeal, the EAT confirmed that the tribunal was entitled to find that the contractual documentation did not reflect the reality and to go on to determine the true agreement between the parties. The tribunal had been entitled to rely on, among other things, the scale of Uber's business and the fact that drivers were integrated into it and were marketed as such.

66. Another employment tribunal also relied on *Autoclenz v Belcher* in *Dewhurst v CitySprint UK Ltd ET Case No.2202512/16* to find that a bicycle courier was a 'worker' of the courier firm, despite the contractual documents describing her as a self-employed contractor. The tribunal noted that, while the contractual words are 'key pieces in the jigsaw, the bar is low before the true situation can be explored'. Among other things, the tribunal considered it significant that a purported substitution clause was so prescriptive as to who could be a substitute that, in reality, only another CS Ltd courier could fill in. Thus, the clause in practice allowed no more than that D could swap jobs with a colleague. Having regard to the reality of D's working conditions, the tribunal considered it clear that she was in fact integrated into CS Ltd's business. She was expected to work when she said she would; she was given directions throughout the time that she was available for work; she was instructed to smile and wear a uniform; and she was told when she would be paid and how much, according to CS Ltd's calculations. Thus, she was not working for herself but on CS Ltd's behalf.

Conclusion – applying the law to the facts

67. On the balance of probabilities, the Tribunal found the claimant was not a limb (b) worker. To be a worker, he must 'do or perform personally' the work or services required under the contract, and the Tribunal found on the facts before it, the claimant had a right to substitute, the respondent was a customer of Sharrock Transport, a business undertaking carried out by the claimant, and there was no obligation on either party to offer or accept work. Unlike the position in Autoclenze cited above, when looking beyond the words of the contract to the factual matrix as set out in the finding of facts, the contractual documentation did reflect what had been agreed at the inception (discounting any private intentions) the business reality and the true agreement between the parties, despite the anomaly of the respondent's failure to check Sharrock Transport's public indemnity insurance.

68. Mr Brittenden submitted with reference to Pimlico that to unlock the question whether or not the respondent was a client or customer of the claimant required the Tribunal to focus on (1) whether a person markets their services to the world in general (para 44); (2) the degree of control/subordination. These issues have been considered by the Tribunal as set out below.

Substitution

69. Mr Brittenden and Mr Paulin were largely in agreement as to the relevant law, both relying on Autoclenze cited above. In short, both agreed the issue was whether the claimant was a client or customer of the respondent or whether he had agreed to provide a personal service.

70. It was submitted by Mr Paulin that this is not a case where the Tribunal is being faced with courier or sole-trader operating in the gig economy. The claimant was an employee until he operated through a limited company, and Autoclenz supported the respondent's position. The terms of the written contract are important and significant, and the question is "what was the real contractual relationship?" In order to answer this question, the Tribunal was invited to consider the contractual documentation and the evidence before it pointing to whether the claimant had personally undertaken to perform work or whether the respondent was a customer of Sharrock Transport. Mr Paulin further submitted the Tribunal should strike a balance between not diluting the relevance of the written contract and the permutations between the human interactions. It should not take into account the private intention of the parties, but the evidence pre-and post-contractual which does not point to the claimant being a limb (b) worker, but to him trading as a business trying to take "every advantage."

71. The Tribunal accepted Mr Brittenden's submission that there are many instances when individuals have been described as sole traders, independent contractors etc… but have nevertheless been found to possess worker status. Reference was made to Cable & Wireless plc v Muscat [2006] IRLR 354 CA at para 5, Bates van Winkelhof v Clyde & Co LLP [2014] IRLR 641 and the CJEU Judgement FNV Kunsten (considered at para 46 of Pimlico) where it stated: 'It follows that the status of "worker" within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for

tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work… does not share in the employer's commercial risks …' It also accepts the CJEU articulated the important health/social justifications behind paid annual leave: Perada v Madrid Movilidad [2009] IRLR 959.

72. Mr Brittenden submitted this was an important case because it directly engaged with the extent to which it was permissible for the respondent to contract out of basic employment rights; provisions which cannot be contracted out of. Mr Brittenden took the view the respondent had devised arrangements using the law of contract to oust the claimant's worker rights, and those arrangements were void. The claimant had not been paid holiday since 3 October 2016. On the face of it the Tribunal had some sympathy with Mr Brittenden's observations; the claimant was driving heavy good vehicles for the Co-Op via Wincanton through a series of complex contractual documentation prepared by the respondent. It is undisputed he took accountancy advice, and despite the claimant's protestations to the contrary, the Tribunal found he also took into account what other drivers were telling him about the benefits of working through a limited company. The respondent, whose intention was to avoid any dispute on worker status; obtained a contractual indemnity from Sharrock Transport if litigation arose. This is a consideration taken into account by the Tribunal when looking at the entire factual matrix, both before and after the contracts were entered and assessing whether the claimant's description of the contractual documentation as "sham" was correct. Mr Brittenden submitted Sharrock Transport brought nothing other than a payroll function, the respondent could dictate all the written terms and the drivers were not in a dominant position in contrast to the evidence given by Mr Howitt. The Tribunal did not accept on the evidence before it Sharrock Transport was a "shell" company used for payroll purpose only, and whilst it is correct the respondent set out the terms in the contractual document, the respective dominance of the parties was not a straightforward matter. The claimant agreed the terms on behalf of Sharrock Transport in order to provide services to the respondent but that does not mean he had no leverage; other employees did re-negotiate and there was nothing to stop the claimant from capitalising on the shortage of HGV drivers.

73. Mr Brittenden submitted the substitution clause set out in the *Limited Company Declaration* needs to be examined carefully. The claimant was not granted an unfettered right to send a substitute such as to extinguish the requirement of personal service. His assertion that it was impermissible to use a substitute after the assignment begins e.g. half way through, was not entirely correct. Exceptional circumstances were necessary, such as an illness according to Peter Howitt. It was clear to the Tribunal from Peter Howitt's evidence the respondent had not given this possibility much thought, and there were no examples of substitute drivers picking up the assignment half-way through. The Tribunal was vexed by the substitution clause. The business reality between the respondent, Wincanton and the end user client dictated the requirement that a substitute driver should be registered on the substantial list of drivers held by the respondent, the largest UK supplier of HGV drivers, and had undertaken a client assessment. Apart from this and the 2-hour notification requirement, the claimant could substitute as and when, the respondent did not have the "absolute and unqualified discretion to withhold consent," and the evidence before the Tribunal was that independent limited company contractors did substitute, albeit not at Lea Green. There were no suggestion independent limited

company drivers working from Lea Green on the Co-Op contract were treated any differently to other independent limited company drivers working from depots scattered throughout the UK; it was a matter of choice about how the business were run. Mr Brittenden's submission that the substitution clause indicated the dominant purpose of the contract was for the claimant to perform the duties personally, and whilst the claimant was not given a "blanket licence to supply the contractual services through a substitute" the clause reflected the commercial reality and once the substitute driver met the two conditions, the right was unrestricted. On the balance of probabilities, the Tribunal took the view that given the factual matrix in Mr Sharrock's case, the power of delegation was inconsistent with personal service. Unlike Mr Smith in Pimlico Plumbers there was no evidence that either the claimant or any substitute were bound by any "heavy obligations." The Driver Handbook provided "helpful guidelines" to independent limited company contractors and rules for employees, and there were no consequences if the former failed to follow any of the guidelines.

74. It is notable that payment for the substitute can either be through the respondent or limited company and the decision is down to the company providing the driver substitute. In cross-examination it was put to the claimant he could sub-contract as required subject to approval. The claimant did not respondent that he was unable to so; his response was "it did not happen." As indicated above, Carley Canny gave undisputed evidence that substitution of drivers took place, but not by the claimant or other drivers at Lea Green. Peter Howitt gave evidence on cross-examination that it would not be practicable to substitute half way through a driving shift and a 2-hour notification was needed in order to inform the customer. If there was a "plausible explanation" for the need to substitute half way through a driving shift, it could happen but Peter Howitt was concerned about the possibilities of potential delay for the customer.

75. On behalf of the claimant the Tribunal was also referred to Pimlico Plumbers v Smith [2018] IRLR 827 SC at paragraph 42. Pimlico Plumbers can be differentiated to the claimant's case. To qualify as a limb (b) worker, Mr Smith had to have undertaken to "perform personally" his work for the company. The question was whether his right to substitute another company operative was inconsistent with an obligation of personal performance. Mr Smith's right of substitution was assessed by reference to whether the dominant feature of the contract remained personal performance on his part and the right to substitute was regarded as so insignificant as to not be worthy of recognition in the terms deployed in the contract. Mr Sharrock's right to substitute was not so insignificant, and the terms of the 21 October 2016 contract were not directed to performance by Mr Sharrock personally, unlike Mr Smith, and the dominant feature of the contract was not an obligation of personal performance. The limitation of the facility to appoint a substitute was significant in Mr Smith's case: the substitute had to be a company operative bound to the company by an identical suite of heavy obligations (paras 20, 27-28, 31-34). In relation to Mr Sharrock, the substitute had to be registered with PPF, have undertaken a client assessment and not already be on assignment. There were no other obligations. Mr Paulin submitted it was a matter of common sense that given the fact the claimant worked in a "highly regulated environment" the right to substitution could not be completely unfettered, and there was a compliance element that required approval. He persuasively invited the Tribunal to take a realistic view of the commercial reality, and the Tribunal concluded that it was unrealistic for the

claimant to expect any substitute should not comply with the Co-Op's requirement to undertake their client assessment. The respondent's competitors are other agencies, and Carley Canny's undisputed evidence was that limited company contractors will compare the rates offered by the respondent with other agencies in order to re-negotiate a higher rate. Against this commercial background, it is unsurprising the contractual documentation does not provide for an unfettered substitution, and the limitations set out were clearly stated, the claimant could have been under no misapprehension as to what he was agreeing. The written agreement was the actual contractual terms of the relationship, and there was no contract between the respondent and claimant personally.

76. Nothing hangs on the fact that independent limited company contractor drivers exercising their right to substitute where not based at Lea Green. As put by Mr Paulin, geographical location of a limited contractor is not relevant for the present purposes and not in issue; the question is one of contractual interpretation.

Client or customer of the respondent

77. To meet the limb (b) test Sharrock Transport should not be regarded as the respondent's client or customer.

78. On the issue of whether the respondent was genuinely a client or customer of Sharrock Transport the Tribunal found on the balance of probabilities that it was. Mr Brittenden submitted it was "fanciful" to suggest that during the 2-week period of employment the claimant provided his labour for the benefit Wincanton and (notwithstanding that the provision of his labour continued seamlessly thereafter) this changed and the respondent suddenly became *his* client or customer with the status of Wincanton disappearing altogether from the analysis. The Tribunal found from the evidence before it that employees could change to independent limited company contractors and visa-versa, with different contractual responsibilities and obligations. The fact that Wincanton and/or the Co-Op perceived there to be no changes in the relationship was not relevant. Peter Howitt gave undisputed evidence that the respondent's clients were not interested in the employment status of the drivers, the only requirement was for them to be registered with the respondent and had undertaken the client assessment.

79. Mr Brittenden reminded the Tribunal that in Pimlico, the Supreme Court restated that *"there is no single key"* to unlock the question of whether or not one party is a client or customer of the other (para 43). However, two factors might assist in the inquiry: (1) a focus on whether a person markets their services to the world in general (para 44) and (2) the degree of control/subordination (para 45). The Tribunal found the unsurmountable problem for the claimant was that whilst he did not market Sharrock Transport's services to the world at large, other independent limited company contractors did; many worked for competitors of the respondent and there was evidence that some worked directly for the client e.g. providing induction services. The claimant chose not to market his services, but that does not mean he was prevented from doing so by the respondent, to the contrary, the respondent was acutely aware of the difficulties in attracting HGV drivers to work on their contracts, hence their preference for employees. The claimant was not from the outset of the agreement reached between Sharrock Transport and the respondent, recruited to work as an integral part of its operations. He was not under the respondent's

direction and as indicated above, there was no mutuality of obligation which is fatal to the claimant's claim that he was a limb (b) worker. Contrary to Mr Brittenden's submission, the claimant was not subject to the same obligations imposed upon employees; there were stark differences within the terms set out in the Driver Handbook. Mr Brittenden referred the Tribunal to the ET's analysis in Dewhurst v CitySprint (para 79): *'overall, they have little autonomy to determine the manner in which their services are performed and no chance at all to dictate its terms…*' In contrast the claimant had autonomy in which to provide his services, reject work without consequences and substitute as and when he chose.

80. In Pimlico Plumbers it was held the respondent had a contractual obligation to offer work to Mr Smith, but only if it was available. There was no such obligation on PPF in relation to the claimant. Unlike Mr Sharrock, Mr Smith's contractual obligation was to keep himself available to work up to 40 hours on five days each week on such assignments as the company might offer him, without prejudice to his entitlement to decline an assignment and it was found an umbrella contract existed which cast obligations on Mr Smith during the periods between his work on assignments for the company and he was bound by restrictive covenants. In direct contrast to Mr Sharrock, Pimlico Plumbers had tight control over Mr Smith, as reflected by its requirement that he should wear a branded uniform, drive its branded van, carry its ID card and follow the administrative instructions of the control room. The Supreme Court found that severe terms as to when and how much it was obliged to pay him betrayed a grip on his economy inconsistent with his being a truly independent contractor. There was also a suite of covenants restricting his activities following termination. Mr Sharrock had no such restrictions, and was in a position, should he have chosen to do so, to re-negotiate terms as did other independent limited company contractors when the respondent was short of HGV drivers.

81. In short, there was no satisfactory evidence the claimant was in a weak bargaining position as submitted on his behalf. The evidence before the Tribunal was drivers who worked through a limited company were paid more than employees, the amount paid per hour varied depending on how much they negotiated with the respondent, and how much work was available in contrast to the number of HGV drivers available to carry out the work. Fees and travel expenses can be increased depending on the number of locations in which a driver will work. This is in direct contrast with employees who are guaranteed 37.5 hours work per week as a set annual reduced rate. In direct contrast to limited company contractors, employees must meet their 37.5 minimum hours obligation on an annual basis, and their driving statutory requirements, before they can work elsewhere and there is the possibility of sanctions, including dismissal, if this obligation is breached. The respondent's disciplinary and grievance policies and procedures are applicable to employees only.

82. It is notable both employees and limited company drivers can refuse to work a shift, but the consequences of doing so are different. The only occasion on which a limited company driver was expected to complete a shift was when the assignment had been accepted. Carley Canny gave undisputed evidence on cross-examination that the demand for HGV drivers was high and there was nothing the respondent could do if a limited company driver did not accept shifts offered. Once the shift had been accepted by the company, the expectation was that substitutes would be provided and Carley Canny had witnessed this at the Newcastle-Under-Lyme branch. The expectation was that limited company contractors would work for the

respondent and other entities such as competitors, hence the respondent's offer of PAYE employment to them to control the working pattern, particularly at times of high demand and on the weekend. This is also why limited company drivers are able to negotiate the hourly rate, especially if work was carried out in other locations further afield.

83. The Tribunal preferred Peter Howitt's evidence supported by contemporaneous documentation that it was subjected to market forces in respect of HGV drivers who were offering a valuable commodity and driver limited company contracts were typical of how drivers wished to market their services and capitalise on the flexibility of being in a position to work for competitors and re-negotiate contracts. Peter Howitt gave undisputed evidence that the UK was 30,000 short of HGV drivers and the position was only getting worse. It is notable the claimant took the decision to set up a second limited company, Sharrock Transport (NW) Ltd, rather than take up the respondent on its offer of employment, which substantiates Peter Howitt's evidence that as far as limited company contractors are concerned "the market is the market." A number of the respondent's contracts are outsourced to limited company contractors.

84. The Tribunal took into the balance the self-billing agreement and tax position. Peter Howitt explained the HMRC self-billing arrangement entered between the respondent and limited company contractors arose as a result of the different charge rate negotiated for different times of the year based on information provided by Wincanton. It is notable the claimant did bill the respondent, albeit in a document prepared by his accountant, for VAT. The Tribunal recognises that the tax position is not determinative on its own, but it is a relevant consideration to hold in the balance. No accounts were produced by the claimant who confirmed that he had claimed expenses from Sharrock Transport, in addition to the director's loan and other payments. Prior to entering in the contract on behalf of Sharrock Transport the claimant was aware, through his accountant's advice, that he would be paying less VAT that VAT charged to the respondent who was invoiced retrospectively 20% VAT. 9% was paid back to HMRC and when it was put to the claimant in cross-examination that this was an increase in revenue of 10% the claimant's response was "never looked at it that way." This response was not credible; the claimant was keen to recover VAT and the only reason for this was the benefit to Sharrock Transport in financial terms.

85. In arriving at its decision, the Tribunal followed the approach adopted by Lady Justice Smith as set out above, and on the balance of probabilities it was satisfied the words of the written contract represented the true intentions and expectations of Sharrock Transport, claimant as director and respondent at the inception of the contract and throughout until Sharrock Transport ceased trading due to the claimant's illness. There was no evidence of any expressly or impliedly variation of the agreement to consider. In arriving at this decision, the Tribunal considered the terms of the contract (as set out above and highlighted) and the events that unfolded thereafter, particularly the differences between employees and drivers operating through limited companies and the claimant's decision made in or after 10 February 2017 only a matter of less than four months after entering the contract on behalf of Sharrock Transport, not to seek work as a PAYE employee despite the respondent's invitation. In contrast to car valets and bicycle couriers, HGV drivers can dictate the terms on which they can work either as employees or limited company contractors

negotiating higher hourly rates as and when applicable, with no obligation to accept any work offered to the limited company by the respondent and to put in place a substitute driver, albeit this right was not unfettered. The fact that the claimant did not substitute or seek to substitute at any stage does not point to the contractual agreement relating to substitution amounting to a sham. Other limited company contractors did substitute, and the requirement that the substitute HGV driver must be registered with the respondent having undertaken a client assessment and are not already on assignment with the respondent coupled the two hours notification that must be given when a substitute was used, does not undermine the fact that the legal right was genuine. Unlike the substitution clause in City Sprint cited above, this is not the case of the claimant swopping jobs with a colleague, but ensuring the driver was registered with the respondent (he or she could have been working elsewhere or for a competitor) and had passed the Co-Op assessment. The clause in practice was not so prescriptive to limit substitution to such an extent that it could not reasonably have taken place. The evidence before the Tribunal was that substitution was exercised, it did occur in other depots, and the respondent's documents which refer to this provision were genuine.

86. Finally, Mr Brittenden submitted an umbrella contract exists so that Claimant is a worker throughout the course of dealing; or alternatively, when Claimant was on assignment having accepted the job and he did not have any choice but to finish the delivery assignment. The Tribunal struggled with this argument bearing in mind the evidence before it, which the claimant could not dispute, that other independent limited company contractors had provided substitute drivers; the claimant had never attempted to provide a substitute and there was no evidence whatsoever that had he done so the respondent would have refused and insisted he personally finish the delivery assignment after accepting the job.

87. The Tribunal did not find the BIS Agency Workers Regulations Guidance May 2011 assisted it to decide the issues in the case. The claimant repeated throughout his oral evidence that all he wanted to do was be an employee, and yet when the respondent invited him to consider an employment contract he did not take the offer up, and the reason given for this was "I was in the groove working" and it was "working for me" and that was the reality of the relationship. The agreement reached on 23 October 2016 was working for the claimant, who had taken professional advice from independent accountants at various intervals. Contrary to the claimant's evidence, Sharrock Transport was not a "shell" (terminology denied by the claimant despite its inclusion in his witness statement) it was actively trading successfully until the claimant became ill.

88. In conclusion, the claimant was in a strong position, he could market valuable and much sought-after HGV services and run the business as he saw fit, as did other contractor companies who had contracted with the respondent. The claimant chose to limit the services offered to a certain area; it suited him to do so, but there was nothing stopping him from expanding the business within and beyond the respondent. Much has been made by the claimant and Mr Brittenden of the equality of bargaining power, and the Tribunal recognises as a rule that the parties in an employment contract (or a worker's contract) rarely have equality of bargaining power. The same cannot be said for HGV drivers who possess a specialist skill much in demand and they are diminishing in number making the services offered even more valuable. Other HGV drivers possess the power to bargain with the

respondent and the claimant was no different; the fact he chose not to do so is by-the-by. The claimant was happy with the contract agreed between the respondent and Sharrock Transport to such an extent that the offer of a possible employment contract was not an attractive proposition to him. As a contractor working through a limited company he had flexibility over and above that of an employee, in addition to other financial advantages. When considering the entire factual matrix set out above, these point to neither party behaving as if the claimant was employed or a limb (b) worker after the 23 October 2016, demonstrating that the agreement reached on 23 October 2016 was indeed that of business-to-business and not a worker obliged to accept any work offered to him by the respondent and perform that work personally.

89. Given the virtual identical definitions of "worker" set out in section 230(3) ERA, reg.2(1) of the Working Time Regulations 1998 and Agency worker Regulations 2010 the claimant's claims cannot proceed. In conclusion, the Claimant was not a limb (b) worker under the Working Time Regulations 1998 and his claims are dismissed.

30.11.18

Employment Judge Shotter

REASONS SENT TO THE PARTIES ON

11th December 2018

FOR THE SECRETARY OF THE TRIBUNALS