



EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mr. M Stojsavljevic
Mr. T Turner**

v

DPD Group UK Ltd

Heard at: Watford

On: 16 – 19 October 2018

Before: Employment Judge Henry

Representation

For the Claimant: Mr. David Stephenson – Counsel

For the Respondent: Mr. Jason Galbraith-Marten - QC

RESERVED JUDGMENT

1. The claimant Mr Stojsavljevic was not an employee of the respondent, as defined by section 230(1) of the Employment Rights Act 1996.
2. The claimant Mr Stojsavljevic was not a worker of the respondent, as defined by section 230(3)(b) of the Employment Rights Act 1996.
3. The claimant Mr Turner was not an employee of the respondent, as defined by section 230(1) of the Employment Rights Act 1996.
4. The claimant Mr Turner was not a worker of the respondent, as defined by section 230(3)(b), or section 43K(1) of the Employment Rights Act 1996.
5. The claimant Mr Turner was not in employment of the respondent for the purposes of section 83(2)(a) of the Equality Act 2010.

REASONS

1. The claimant Mr. Stojsavljevic, by a claim form presented to the Tribunal on the 10 August 2017, presents complaints for; constructive unfair dismissal, unlawful deductions from wages, holiday pay, sick pay, and a failure to be provided with particulars of employment.

2. Mr. Stojavljevic commenced engagement with the respondent on the 18 September 2013. The engagement came to an end on the 20 September 2017; Mr. Stojavljevic having been engaged for three complete years.
3. The claimant Mr. Turner, by a claim form presented to the Tribunal on the 10 August 2017, presents complaints for; unfair constructive dismissal, unlawful deduction from wages, dismissal and detriment for making a protected disclosure, disability discrimination, a failure to pay statutory sick pay, holiday pay, breach of Health and Safety legislation, and a failure to be provided with particulars of employment.
4. Mr. Turner commenced engagement with the respondent on the 11 July 2013. The engagement came to an end on the 3 April 2017; Mr. Turner having been engaged for three complete years.
5. The matter comes before the Tribunal on the preliminary issues whether;
 - 5.1. the claimants are employees as defined by s.230(1) of the Employment Rights Act 1996, and if not,
 - 5.2. whether they are workers as defined by 230(3)(b) of the Employment Rights Act 1996, or
 - 5.3. whether Mr Turner was a worker as defined by s.43K(1) of the Employment Rights Act 1996, or
 - 5.4. whether Mr Turner in employment as defined by s.83(2)(a) of the Equality Act of 2010.

Evidence

6. The Tribunal received evidence from the claimants themselves, and from the following witnesses on behalf of the respondent:
 - 6.1. Mr. Kamaldeep Minhas – Distribution Centre Manager;
 - 6.2. Mr. Daniel Turner – Associate Director responsible for the Owner/Driver Franchisee Scheme and recruitment of ODFs; and
 - 6.3. Mr. John Cameron – Regional Manager of London.
7. The witnesses gave their Evidence in Chief by written statements and were subject to cross-examination thereon. The Tribunal had before it a bundle of documents; Exhibits R1, R2 and C1.

Material facts

8. The respondent is a Parcel Collection and Delivery Company operating its services via franchise agreements and employed drivers.
9. The claimants commenced engagement with the respondent via franchise agreements, signed by Mr. Stojavljevic, dated 18 September 2013, varied by agreement dated 3 April 2017 - varying the territory specified in the franchise agreement, and by Mr. Turner, dated 11 July 2013, varied by

agreement dated 14 January 2015, - varying rates of payment and commission.

10. For the purpose of the issues arising for the Tribunal's determination, the Tribunal here sets out the material terms from the franchise agreements, as entered in to between the claimants and the respondent. References therein to "GeoPost" is a reference to the respondent prior to a change in name. The agreements provide as follows:

"Parties

- (1) GeoPost UKLIMITED of Roeduck Lane Smethwick West Midlands B66 1BY, whose registered office is at PO Box 6979..... ("Geopost")
- (2) MILAN STOJSVLJEVIC of 85 CAPLE HOUSE..... ("the franchisee")

[THOMAS CARLO TURNER OF 25 SILVERHALL.....("the franchisee")]

RECITALS

- A GeoPost is engaged in the provision of parcel delivery and collection services which business is operated in accordance with GeoPost's distinctive system using certain confidential information, logos, trademarks and standard operational procedures.
- B GeoPost has expended substantial time, effort and money in developing and implementing this system.
- C The Franchisee wishes to obtain the benefit of GeoPost's knowledge, skill and experience and the right to operate GeoPost's business systems subject to the terms and conditions set out in this Agreement.

1. Definitions and Interpretation

- 1.1 In this Agreement, unless the context otherwise requires, the following expressions have the following meanings:

"Brokers" means the Insurance Brokers specified in the Operating Manual or such other insurance brokers as may be notified to the Franchisee by GeoPost from time to time;

"Business" means the franchise business of supplying a Driver and Service Vehicle with Service Equipment to perform the Services in accordance with the System;

...

"Delivery and Collection Services" means the parcel delivery and collection services specified by type in Schedule 1 or such other parcel delivery and collection services as may be notified to the Franchisee by GeoPost from time to time;

"Driver" means the employee, agent, sub-contractor, partner or otherwise of the Franchisee who:
(i) has all appropriate qualifications to drive the Service Vehicle in the Territory including a full and not a provisional licence; and
(ii) who is not under the age of 21; and

- (iii) who has undergone training by GeoPost or the Franchisee (as the case may be) in the standards, procedures, techniques and methods comprising the Systems;
AND who is engaged or employed or otherwise by the Franchisee, to drive the Service Vehicle and who may, if the Franchisee is an individual, include the Franchisee himself;
...
- “Management Fees” means the sum of ELEVEN POUNDS AND FIFTY PENCE (£11.50) plus VAT per four-week period and pro rata for any period of less than four weeks payable in arrears by the Franchisee to GeoPost on each of the Payment Days in respect of the Management and other services to be provided by GeoPost pursuant to clause 7;
- “Operating Manual” means the written description of the method, operational procedures and directions to be observed and implemented by the Franchisee or the Driver and by any employee, agent, sub-contractor or partner of the Franchisee in operating the Business and any amendment or variation to such description notified in writing by GeoPost to the Franchisee;
- “GeoPost Owner Drivers’ Franchise Insurance Programme” the insurance policies effected by the Brokers on behalf of GeoPost’s franchisees in respect of motor, goods in transit, employer’s liability and public liability and more particularly detailed in the master policies which may be obtained from the Brokers;
...
- “Service Equipment” means a cellular telephone and Saturn Route Control Pad as described in Schedule 3 Part 2;
- “Quickstart Services” means the sale by the Franchisee to customers of GeoPost’s, of the Delivery and Collection Services in accordance with the Quickstart Procedures described in the Operating Manual;
- “Service vehicle” means a delivery van which meets the vehicle specification contained in Schedule 3 Part 1 and which is liveried in GeoPost’s livery as described in the Operating Manual;
- “Services” means the parcel delivery and collection services described in the Operating Manual to be performed by or on behalf of the Franchisee in accordance with the terms of this Agreement and the instructions given to the Franchisee by GeoPost from time to time and which for the avoidance of doubt includes the Quickstart Services;
- “System” means the distinctive business format and method developed and implemented by GeoPost using the Logos and Marks and certain standard operational procedures and directions described in the Operating Manual as modified by GeoPost from time to time;

“Territory” means the Territory described in Schedule 2 in which the Franchisee may operate the Business;

“Vehicle Hire Agreement” means GeoPost’s standard form Vehicle Hire Agreement from time to time in force relating to the hire of the Service Vehicle.

...

2. Appointment

GeoPost appoints the Franchisee to operate the Business in the Territory in accordance with the System upon the terms and conditions set out in this Agreement. For the avoidance of any doubt, GeoPost is under no obligation to provide work for the Franchisee pursuant to the terms of this Agreement.

...

4. Territory

4.1 The Franchisee shall be entitled to operate the Business only in the Territory, but this shall not prevent GeoPost from appointing other franchisees to operate the Business in the Territory nor from providing the Services or selling the Quickstart Services in the Territory itself.

4.2 GeoPost may at any time change the area comprising the Territory by giving to the Franchisee not less than one calendar month’s notice in writing and on the date specified in that notice the definition of the Territory shall be altered as specified in the notice.

5. Service Vehicle

5.1 The Franchisee may, at its option either:

5.1.1 supply the Service Vehicle itself: or

5.1.2 enter into a Vehicle Hire Agreement with GeoPost.

5.2 If the Franchisee elects to supply the Service Vehicle itself:

5.2.1 the Franchisee shall at its own expense prior to the Commencement Date provide licences for the Service Vehicle under the Vehicles (Excise) Act 1971 or the equivalent licences applicable in Northern Ireland;

5.2.2 the Franchisee shall at its own expense prior to the Commencement Date arrange for the Service Vehicle to be liveried in GeoPost’s colours by one of the nominated vehicle repairers specified in the Operating Manual.

5.3 Where the Franchisee enters into a Vehicle Hire Agreement GeoPost will supply the Service Vehicle to the Franchisee no later than one working day prior to the Commencement Date.

6. Initial Obligations of GeoPost

6.1 Within fourteen days of the date of this Agreement GeoPost will supply to the Franchisee for the term of this Agreement:

- 6.1.1 one copy of the Operating Manual;
- 6.1.2 a uniform to be worn by the Driver when performing the Services;
- 6.1.3 an identification card to be carried by the Driver when performing the Services;
- 6.1.4 the Service Equipment.
- 6.1.5 (once the Franchisee has undergone training in the sale of Quickstart Services) a Quickstart pad;

6.2 To enable the Franchisee to operate the Business, GeoPost will prior to the Commencement Date provide initial training of not less than two, nor more than five days to the Driver in the standards, procedures, techniques and methods comprising the System. The time and place of such initial training shall be specified by GeoPost. The Franchisee shall bear the cost of travel and subsistence of its Drivers in connection with such training.

7. Continuing Obligations of GeoPost

During the continuance of this Agreement GeoPost will:

- 7.1 permit the Franchisee to operate and promote the Business under the name "GeoPost" in accordance with the terms of this Agreement;
- 7.2 provide the Franchisee with advice and guidance relating to the management and promotion of the Business the methods of the operation to be employed in connection with the System and in relation to any problems concerning the System from time to time;
- 7.3 improve and develop the System and make available to the Franchisee and its Driver at cost, such further training as may from time to time appear necessary in the light of such improvements or developments (the Franchisee shall bear the cost of any travel and subsistence involved in connection with such training);
- 7.4 organise and convene an annual conference for its franchisees to discuss any improvements to the System and GeoPost's proposals for promotional activities and the general operation of the System (The Franchisee shall bear the cost of any travel and subsistence expenses incurred in attending such conference);
- 7.5 sell or procure the sale to the Franchisee of diesel fuel for use in the Service Vehicle at rates to be specified to the Franchisee by GeoPost from time to time, but for the avoidance of doubt the Franchisee shall be under no obligation to purchase diesel fuel from GeoPost but shall be free to purchase fuel from whomsoever the Franchisee chooses.

8. Obligations of Franchisee

- 8.1 The Franchisee agrees with GeoPost as follows:
 - 8.1.1 to provide GeoPost with a written subject Access Information Form or other personal record and prosecution and conviction history obtained from the Police pursuant to the Data Protection Act 1984 no later than 8 weeks after the Commencement Date for each person comprising the Franchisee or, where the Franchisee is a limited company, for each Director of the company

and failure to comply with this obligation shall entitle GeoPost to terminate this Agreement forthwith.

- 8.1.2 to operate the Business strictly in accordance with the Operating Manual and to conform in all respects and at all times with the System as modified by GeoPost from time to time and not when operating or promoting the Business to use any additional trade name or symbol not do or permit to be done anything which is additional to or not in accordance with the System without GeoPost's prior consent in writing;
- 8.1.3 to ensure that the Business conforms with other businesses operated in accordance with the System with regard to quality and service. The Franchisee acknowledges that such conformity is of the utmost importance to the successful operation of the Business and the protection of the goodwill attaching to the Logos and Marks;
- 8.1.4 to comply with all advice and instructions given by GeoPost with regard to the operation of the System and the provision of the Services;
- 8.1.5 to train any Driver who has not received initial training from GeoPost pursuant to clause 6.2 in the standards, procedures, techniques and methods comprising the System;
- 8.1.6 to attend and to procure that the Driver shall attend such further periods of training as GeoPost may require and the Franchisee shall attend GeoPost's annual conference for franchisees (the Franchisee shall bear the travel subsistence expenses incurred in connection with such training and the annual conference);
- 8.1.7 to use only letterheadings, invoices, signs, display materials, promotional literature, equipment and other items in connection with the Business as may have been approved in writing by GeoPost and immediately to stop using or displaying any signs or other items as directed by GeoPost;
- 8.1.8 promptly to pay all suppliers of goods and services sold or provided to the Franchisee for purposes of the Business;
- 8.1.9 to ensure that the Driver and all personnel employed in the Business shall at all times present a neat and clean appearance and render competent, sober and courteous service to customers and comply with any and all directions of GeoPost in this respect relating to dress, appearance and demeanour;
- 8.1.10 to comply with all statutes, byelaws, regulations and requirements of any government or other competent authority relating to the Franchisee and the conduct of the Business including (without prejudice to the generality of the foregoing) any statutory provisions relating to drivers' hours;
- 8.1.11 to ensure that the Driver carries the identification card supplied by GeoPost at all times when performing the Services;
- 8.1.12 to ensure that the Driver wears the GeoPost uniform at all times when performing the Services;

8.1.13 to ensure that the Driver uses Saturn at all times when performing the Services;

8.1.14 to ensure that the Service Vehicle, the Service Equipment and the Driver are available to perform the Services when requested by GeoPost.

8.2 If the Franchisee fails to ensure that the Service Vehicle, the Service Equipment and the Driver are available to perform the Services when requested by GeoPost the Franchisee shall at GeoPost's option pay to GeoPost as and by way of liquidated damages for any loss sustained by GeoPost the sum of £150 per day or £75 for any part of a day that the Franchisee fails to ensure that the Service Vehicle, the Service Equipment and the Driver are available to perform the Services when requested to do so. GeoPost may deduct such liquidated damages from any sums owed to the Franchisee by GeoPost under this Agreement.

9. Restrictions on Franchisee

9.1 During the continuance of this Agreement the Franchisee agrees as follows:

9.1.1 not to use any vehicle or equipment other than the Service Vehicle or the Service Equipment in the performance of the Services provided that the Franchisee may use a replacement vehicle or replacement equipment on a temporary basis in the event that the Service Vehicle or the Service Equipment are undergoing repair or maintenance provided that such replacement vehicle or replacement equipment (as the case may be) meet the vehicle specification or the equipment specification (as the case may be) set out in Schedule 3 Part I and Part II;

9.1.2 not to sell, assign, transfer, charge or sub-licence the Business, the System or the Logos and Marks nor any part thereof without GeoPost's prior consent and in accordance with the other terms of this Agreement;

9.1.3 not to sell any Quickstart Services until the Franchisee has received training in the sale of Quickstart Services and to ensure that neither the Driver nor any other employee of the Franchisee sells Quickstart Services until they have been trained by the Franchisee in the sale of Quickstart Services;

9.1.4 not to sell any Quickstart Services except at the prices stated in schedule 4 from time to time;

9.1.5 not to do or omit to do or permit anything to be done or omitted to be done which may constitute a breach of any insurance policy maintained in accordance with this Agreement;

9.1.6 not by itself or with others to participate in any illegal, deceptive, misleading or unethical practices;

9.1.7 not by itself or with others to do anything which would damage the public interest or the interests or reputation of GeoPost, its business or the System;

9.1.8 immediately on discovering any information which may be of use to GeoPost in promoting the Business or GeoPost's business or in protecting the Business or GeoPost's business from damage by any person to inform

GeoPost thereof and to provide such further information and assistance to GeoPost as GeoPost may reasonably request.

- 9.1.9 not to use or publish any advertisement, signs, or other forms of publicity relating to the Business without GeoPost's prior written approval;
 - 9.1.10 not to purchase those products, materials and equipment required by the terms of the Operating Manual to be purchased from GeoPost from any person other than GeoPost;
 - 9.1.11 not to use any part of the Logs and Marks as part of the Franchisee's corporate or business name;
 - 9.1.12 not under any circumstances whatsoever to employ or use the services of nor allow anyone engaged in the Business to employ or use the services of a child under school leaving age in the Business directly or indirectly;
 - 9.1.13 not to use the Service Vehicle to provide services which are similar in nature to the Services for any person firm or company which operates parcel delivery and collection services in competition with GeoPost, but for the avoidance of any doubt nothing herein contained shall prevent the Franchisee from using the Service Vehicle to provide services which are not similar in nature to the Services;
 - 9.1.14 not to sell parcel delivery and collection services on behalf of any person firm or company which operates parcel delivery and collection services in competition with GeoPost;
 - 9.1.15 not to tamper with in any way whatsoever the Saturn Route Control Pad forming part of the Service Equipment, it being acknowledged by the Franchisee that it would be fraudulent to do so.
- 9.2 The Franchisee acknowledges that the Operating Manual and all other information and knowledge relating to the System is of a strictly confidential nature and accordingly, the Franchisee agrees that it will not and it will ensure that its directors, partners, sub-contractors, agents, employees and Driver shall not at any time without the prior written consent of GeoPost whether before or after termination of this Agreement divulge or use whether directly or indirectly for its own benefit or that of any other person firm or company any of such information or knowledge relating to the System which may be communicated to or otherwise acquired by the Franchisee its directors, partners, sub-contractors, Driver, agents or employees.

10. **Insurance and Risk**

- 10.1 Where the Franchisee has entered into a Vehicle Hire Agreement the Franchisee shall effect insurance in respect of third party, public liability, property damage and loss, and goods in transit liability and shall effect motor vehicle insurance in respect of the Service Vehicle with the Brokers under the GeoPost Owner Driver's Franchise Insurance Programme.
- 10.2 Where the Franchisee supplies the Service Vehicle itself the Franchisee shall:
 - 10.2.1 maintain insurance in respect of third party, public liability, property damage and loss (including loss of or damage to the Service Equipment) and goods

in transit liability throughout the term of this Agreement free from limitation in such minimum sums as may be prescribed by GeoPost from time to time;

10.2.2 ensure that an up to date copy of each of the above policies of insurance or an up to date certificate of insurance is deposited with GeoPost's Franchise Administrator at Roebuck Lane Smethwick Warley West Midlands B66 1BY at all times together with an up to date copy of the registration documents for the Service Vehicle and an up to date copy of the driving licence of the Driver;

10.2.3 supply to GeoPost on request a copy of any insurance policy effected in pursuance of this clause together with a copy of the last premium receipt.

10.3 For the avoidance of doubt all goods will be carried strictly at the risk of the Franchisee and whether or not the Franchisee has effected insurance pursuant to clauses 10.1 and 10.2 the Franchisee will be responsible for payment of any sums due to any third party pursuant to GeoPost's conditions of carriage from time to time in force.

11. Logos and Marks

11.1 The Franchisee acknowledges that the goodwill and all other rights in and associated with the Logos and Marks vest absolutely in GeoPost.

11.2 The Franchisee will notify GeoPost immediately of any and all circumstances coming to the attention of the Franchisee its directors, agents and employees which may constitute an infringement of the Logos and Marks or any suspected passing off.

11.3 The Franchisee shall take such action in relation to the use of the Logos and Marks in the Business as GeoPost may from time to time direct in order to make clear that the Logos and Marks are the subject of patent copyright or trade mark protection.

12. Operating Manual

12.1 GeoPost will provide the Franchisee will full written details of any alterations or variations to the form of the Operating Manual to enable the Franchisee to keep the copy in its possession up to date.

12.2 GeoPost shall keep at its Head Office a definitive copy of the Operating Manual as revised and modified from time to time which in the event of any dispute as to the contents or import thereof shall be the authentic text.

12.3 In the event of any conflict between the terms of this Agreement and the terms of the Operating Manual the terms of this agreement shall prevail.

12.4 The Operating Manual shall at all times remain the sole and exclusive property of GeoPost and the Franchisee hereby acknowledges that the copyright in the Operating Manual vests in GeoPost and the Franchisee will not take and will procure that no other person will take any copies thereof without GeoPost's prior written consent.

14. Sale of the Business

- 14.1 The rights granted to the Franchisee in this Agreement are personal to the Franchisee who shall have the right to assign and sell the Business only with the prior written consent of GeoPost.
- 14.2 The Franchisee agrees not to disclose any of the contents of the Operating Manual to any prospective purchaser and shall procure that no such prospective purchaser shall use the Logos or Marks nor operate the System or any part thereof without GeoPost's prior written consent.
- 14.3 Upon the sale or transfer by the Franchisee of any part of the Business the rights of the Franchisee in respect of such Business shall terminate but without prejudice to the existing obligations of the Franchisee.

15. Termination

- 15.1 GeoPost may terminate this Agreement with immediate effect by giving notice in writing to the Franchisee if:
 - 15.1.1 The Franchisee fails to comply with its obligations contained in clause 8.1.1;
 - 15.1.2 the Franchisee commits any persistent breach of any condition or obligation contained in this Agreement which for the avoidance of any doubt shall include any condition or obligation contained in the Operating Manual;
 - 15.1.3 the Franchisee is in breach of any of the terms and conditions contained in this Agreement which for the avoidance of any doubt shall include any condition or obligation contained in the Operating Manual and the breach is capable of being remedied and the Franchisee fails to remedy the breach within seven days of receiving notice in writing to do so;
 - 15.1.4 the Franchisee is in breach of any of the terms and conditions contained in this Agreement which for the avoidance of any doubt shall include any condition or obligation contained in the Operating Manual and the breach causes or may cause damage to the interests or reputation of GeoPost or any part of GeoPost's business and such damage cannot be remedied to the satisfaction of GeoPost.
 - 15.1.5 GeoPost terminates for cause any other agreement it may have with the franchisee [and/or the Guarantor]
- 15.2 Either party may terminate this agreement forthwith on giving notice in writing to the other party if the other party has a receiver or administrative receiver or examiner appointed of it or over any part of its undertaking or assets or shall pass a resolution for winding up (otherwise than for the purpose of a bona fide scheme or solvent amalgamation or reconstruction) or a court of competent jurisdiction shall make an order to that effect, or if the other party shall enter into a voluntary arrangement with its creditors or shall become subject to an administration order or shall cease to carry on business or be adjudicated bankrupt.

16. Consequences Termination

- 16.1 In the event of termination of this Agreement the Franchisee shall:
- 16.1.1 remove the Logos and Marks from the uniform supplied to the Franchisee by GeoPost or any additional uniforms purchased by the Franchisee;
 - 16.1.2 return to GeoPost all identification and fuel cards, the Operating Manual and Quickstart pads supplied to the Franchisee or its employees;
 - 16.1.3 arrange for the re-livery of the Service Vehicle at the Franchisee's expense by one of the nominated vehicle repairers specified in the Operating Manual so that all decals are removed from the Service Vehicle and the Service Vehicle is repainted to the single colour to be approved by GeoPost;
 - 16.1.4 where the Franchisee supplies the Service Vehicle itself the Franchisee shall return the Service Equipment to GeoPost;
 - 16.1.5 where the Franchisee has entered into a Vehicle Hire Agreement and such Vehicle Hire Agreement continues after termination of the Franchise Agreement the Franchisee shall return the Service Equipment to GeoPost;
 - 16.1.6 where the Franchisee has entered into a Vehicle Hire Agreement and such Vehicle Hire Agreement does not continue after termination of the Franchise Agreement the Franchisee shall return the Service Equipment with the Service Vehicle to GeoPost.
- 16.2 Until the Franchisee has complied with the provisions of clause 16.1 above GeoPost may retain any monies due to the Franchisee under the terms of this Agreement.
- 16.3 Subject to clause 16.2 GeoPost will refund to the Franchisee the balance of the Deposit after deduction of any amounts due to GeoPost pursuant to clause 13.5 and after deduction of reasonable legal and administrative charges incurred by GeoPost as a consequence of termination.

....

18. No Partnership or Agency

- 18.1 For the avoidance of any doubt nothing in this Agreement will render the Franchisee or any employee, agent, sub-contractor or partner of the Franchisee, a partner or employee of GeoPost's. The Franchisee is an independent contractor performing the Services in its own business name and at its own risk.
- 18.2 The Franchisee shall not bind or purport to bind GeoPost to any obligation nor expose GeoPost to any liability nor pledge nor purport to pledge GeoPost's credit save that this shall not prevent the Franchisee from selling the Quickstart Services in accordance with the provisions of this Agreement.

19. No Warranties without Authority

The Franchisee shall not make any promises or representations nor give any warranties or guarantees in respect of the Services or the Delivery and Collection

Services except those contained in the Operating Manual or which GeoPost expressly authorizes in writing.

20. Indemnity

The Franchisee will indemnify GeoPost and keep GeoPost indemnified against any and all losses, claims, damages, costs, charges, expenses, liabilities, demands, proceedings and actions which GeoPost may sustain or incur or which may be brought or established against GeoPost by any person and which arise out of or in relation to by reason of:

- 20.1 the negligence, recklessness or lawful misconduct of the performance of the Franchisee's obligations hereunder;
- 20.2 any unauthorized action or omission by the Franchisee its directors, partners, sub-contractors, driver, agents or employees;
- 20.3 any breach of alleged breach of applicable laws or regulations relating to the performance of the Services in the Territory.

21. Assignment by GeoPost

This Agreement and all the rights of GeoPost hereunder may be assigned, transferred or otherwise dealt with by GeoPost and shall ensure to the benefit of the successors and assigns of GeoPost.”

11. As set out at clause 5.1.2 of the Franchise Agreement, provision is made for the Franchisee to enter into a Vehicle Hire Agreement with the respondent, being an alternative to the Franchisee supplying their own service vehicle. The claimants entered into Vehicle Hire Agreements with the respondent.

12. The Hire Agreement is regulated by the Consumer Credit Act 1974, and provides:

“This is a Vehicle Hire Agreement made between US, GeoPost UK Limited having our registered office at PO Box 6979, Roebuck Lane, Smethwick, West Midlands B66 1BN (and our address for correspondence being the Franchise Administrator, GeoPost, Roebuck Lane, Smethwick, Warley, West Midlands B66 1BY ...) and registered in England under number 732993 **AND YOU** the person(s) identified as Hirer below. Where there are two or more of you, each of you is separately responsible for performing both your own obligations and those of your co-signatories under this agreement.”

13. The Hire Agreement was for a period of five years.

14. By the Terms and Conditions of the Hire Agreement, it provides:

1. Letting

1.1 We are letting, and you are taking on hire the vehicle described in the Schedule upon the terms and conditions set out in this Agreement, including the Schedule, for the Period of Hire and at the Rentals stated in the Schedule.

1.2 You acknowledge that you are taking the Vehicle on hire for the purposes of a business carried on by you.

2. **Your obligations**

You shall:

...

2.3 **User**

Use the Vehicle only for the purpose of the business carried on by you, except that you may permit the Vehicle to be used by you or your employees for social, domestic and pleasure purposes (subject to clauses 2.4, 2.5 and 2.6 below) and in accordance with the conditions of any insurance policy required to be maintained pursuant to this Agreement, and ensure that the Vehicle is used properly and safely and without risk to health.

2.4 **Restrictions on user**

Not use or suffer the Vehicle to be used for hire, driving tuition, racing, pacemaking, speed trials or any other sporting competitions.

2.5 **Driver's qualifications**

Permit the Vehicle to be driven only by a person qualified to do so and holding all necessary current licences and permits in respect of the Vehicle and himself, such licence in respect of the driver to be a full and not a provisional driving licence. Not under any circumstances whatsoever to employ or use the services of nor allow anyone engaged in your business to employ or use the services of a child under school leaving age in your business directly or indirectly.

2.6 **Use within Great Britain**

Not without our prior written consent take the Vehicle or suffer it to be taken outside Great Britain.

2.7 **No overloading**

Not overload the Vehicle or permit the Vehicle to be overloaded.

2.8 **Driver's hours**

To ensure that the driver of the Vehicle complies with any statutory provisions relating to drivers' hours.

...

2.11 **Insurance**

Insure and keep insured the Vehicle under a fully comprehensive policy against loss or damage ... to its full replacement value, free from limitation, with the Insurance Brokers specified by GeoPost from time to time under the GeoPost Owner Drivers' Franchise Insurance Programme. You shall notify us forthwith of any loss of or damage to the Vehicle and hold any insurance money in trust for us. You irrevocably authorize us to collect the insurance monies from the insurers. If a claim is made against the insurers we may, in our discretion, conduct negotiations and effect a settlement with the insurers and you agree to be bound by such settlement. Any insurance money shall be applied as follows at our option:

2.11.1 in making good the damage; or

2.11.2 in replacing the Vehicle by another similar vehicle to which the terms of this Agreement shall apply: or

2.11.3 in compensating us for all loss suffered by us, any surplus being paid to, and any deficiency made up by, you, provided that loss or damage to the Vehicle shall not affect continuance of this Agreement nor your liability for payment of Rentals.

...

2.17 Servicing and maintenance

The rentals are inclusive of routine servicing, maintenance and repairs to the Vehicle by us, but not any repairs necessitated as a result of damage caused to the Vehicle whether by yourself, your driver or a third party. You will deliver your vehicle to one of the vehicle repairers nominated by GeoPost on the date specified by us or the vehicle repairer (as the case may be) to enable routine servicing, maintenance and repairs to be carried out to the Vehicle. Failure to deliver up your Vehicle in accordance with the provisions of this clause 2.17 will constitute a breach of this Agreement.

...

2.22 Return Vehicle

Deliver up the Vehicle in a condition consistent with the performance of your obligations under this Agreement at the end or sooner determination of the Period of Hire, at such of our premises as we shall require.

4. Further stipulations

...

4.2 We may pay Insurance premiums

If you fail to pay any premiums required to be paid in respect of insurance under clause 2.11 above or to pay any sums required to be paid under clause 2.15 above, we may pay them and you will reimburse us on demand. If you fail to reimburse on demand we may deduct the monies from your Deposit.

4.3 Conditions and warranties

You are entitled to the benefit of all conditions, warranties or other terms, express or implied, relating to the Vehicle given by the suppliers or manufacturers of the Vehicle to us (so far as we are entitled to transfer them) but the Vehicle is not let by us with or subject to any such conditions, warranties or other terms, express or implied, all of which are excluded as between us and you save those implied by the Supply of Goods and Services Act 1982 Section 7 (relating to our right to transfer possession of the Vehicle and your right to quiet possession of it).

4.4 Default

We may, upon any breach by you of any of the provisions of this Agreement entered in to by both of us, after due notice terminate this Agreement and upon that happening, this Agreement and the hiring constituted by it shall determine and you will no longer be in possession of the Vehicle with our consent and, subject to our right to take possession of the Vehicle and to recover from you our recoverable losses and to any of your pre-existing liabilities to us, neither party shall have any rights against the other.

4.5 Our expenses

Any expense incurred by us in repossessing the Vehicle under clause 4.4 above, or in recovering possession of the Vehicle on default of delivery by you under clause 2.22 above, will be reimbursed by you to us on demand.

...

4.8 Re-livery

If this agreement shall be terminated prior to the expiry of the Period of Hire for whatever reason you must arrange for the re-livery of the Vehicle at your expense at a vehicle repairer nominated by us so that all decals are removed from the Vehicle and the Vehicle is repainted to a single colour to be approved by us. If you fail to comply with the provisions of this clause we will re-livery the Vehicle and our expense in so doing will be reimbursed by you to us on demand

....

YOUR RIGHTS

The Consumer Credit Act 1974 covers this Agreement and lays down certain requirements for your protection which must be satisfied when the Agreement is made. If they are not, we cannot enforce the Agreement against you without a court order.

If you would like to know more about the protection and remedies provided under the Act, you should contact either your local Trading Standards Department or your nearest Citizens' Advice Bureau."

15. And by an Agreement modifying the Hire Agreement, it provides:

1. You have entered into a Vehicle Hire Agreement with us relating to the hire of a motor vehicle as specified in the Vehicle Hire Agreement. Under the terms of the Vehicle Hire Agreement you are required to pay a deposit to us of £1,000.
2. This Agreement confirms that we will waive the requirement to pay the deposit so long as you have a GeoPost Owner Driver Franchise. If your Franchise Agreement is terminated for any reason, but your Vehicle Hire Agreement is not terminated, the following will apply:
 - 2.1 As soon as we have calculated any monies due to you pursuant to clause 16 of the Franchise Agreement we will transfer those monies (up to the sum of £1,000) to your Vehicle Hire Account with us in order to provide the deposit under the Vehicle Hire Agreement.
 - 2.2 If the monies are insufficient to provide a deposit of £1,000, we will notify you in writing of the amount of the shortfall and you must pay this to us within fourteen days of the date of the notice. Failure to pay the shortfall within this fourteen day period will constitute a breach of the Vehicle Hire Agreement and clause 4.4. of that Agreement will have effect.
 - 2.3 If the monies to be refunded to you pursuant to clause 16 of the Franchise Agreement exceed £1,000, any excess will be refunded to you in accordance with the terms of the Franchise Agreement.
- ...
5. If your Franchise Agreement is terminated for any reason, but your Vehicle Hire Agreement is not terminated, you are required to arrange for the re-livery of the Vehicle in accordance with clause 16.1 of the Franchise Agreement. Provided that your Vehicle Hire Agreement is terminated no later than seven days after termination of your Franchise Agreement we will not require you to comply with the provisions

of clause 4.8 of the Hire Agreement. If the Vehicle Hire Agreement is terminated more than seven days after the Franchise Agreement the provisions of clause 4.8 of the Vehicle Hire Agreement shall apply.”

16. The claimants have satisfied the conditions of the Vehicle Hire Agreement paying all fees and charges and complied with the terms thereof, and no issue has been taken in respect of those terms, save that, the claimants advance that they were thereby furnished with and had use of the respondent's vehicle.
17. It is not in dispute that the claimants, having entered into the Franchise Agreement, operated their franchise as an owner driver, and that for Inland Revenue, and Customs & Excise purposes, the claimants were treated as self-employed contractors. It is also not in dispute that, the claimants attended training provided by the respondent, and as the respondent puts it before the Tribunal, that: *“it is accepted that pursuant to the owner driver Franchise Agreement the respondent exercises a not insignificant degree of control over the way in which the services are provided”* however, they advance that this is typical of a Franchise Agreement and not indicative of an employment relationship.
18. It is also fair to here note that, the operation of Franchise Agreements were integral to the respondent's business, and would on the face of operations, have all the hallmarks sufficient to satisfy the criteria for employee and/or worker status pursuant s.230 and s43K of the Employment Rights Act 1996, and s.83(2)(a) of the Equality Act 2010, to personally do the work.
19. In respect hereof, it was agreed at the outset of the hearing that the issue for the Tribunal's determination was one of personal performance only, namely, whether there was an unfettered right of substitution. Accordingly, while stating the above, the Tribunal has not addressed the further issues as to control, integration, economic reality, neutrality of obligation, financial considerations or organizational factors, relevant to the relationship existing between the claimants and the respondent.
20. It is the claimants' contention that, having applied for a franchise with the respondent, on making their applications, they had from the outset, by their application forms, made it known, and would have advised accordingly when interviewed, that, it was their intention to be the driver under their Franchise Agreements, which fact would then have been known to the respondent and in respect of which, the claimants state they have done nothing that derogates there from, and invites the Tribunal to find, giving regard to the authority of Autoclenz Limited v Belcher [2011] ICR 1157, per Lord Clarke, at para 25, approving the dicta of Elias LJ, then President of the EAT in Kalwak v Consistent Group Limited [2007] IRLR 560 that:

“57: The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.”

that the Franchise Agreement did not then truly reflect the agreement between the parties.

21. The Tribunal here notes the continuation of Elias' J, dicta, that:

“Peter Gibson LJ was alive to the problem. He said this (p697G) ‘Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham, it will want to say so.’

58. In other words, if the reality of the situation is that no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.

59. ... Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance ...”

22. The claimants further place reliance on authority of Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51 at paragraph 3, that:

“A business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor rather than employer and employee or worker.”

and advance that the respondent's business model, where the contract clauses are designed to preclude employee/worker status, should be viewed with suspicion, further advancing dicta of Underhill LJ, at paragraph 144 in Pimlico, that:

“The tribunals will look narrowly at lawyer-drafted documentation which does not appear to correspond to the reality of the relationship.”

23. The claimants accordingly submit that, they contracted with the respondent as individual owner drivers, that they had registered no additional drivers, and were solely responsible for the delivery and collection service personally.
24. The respondent's case can be put very briefly, and it is this; The respondent who engaged drivers both as employees and via Franchise Agreements, had specifically recruited for franchise holders to provide a service requiring drivers, which drivers could then either be the franchisee themselves or any other individual proposed by the franchisee, and that this was a genuine term of the franchise.
25. In respect hereof, the respondent further advance that other franchisees have availed themselves of this facility, furnishing drivers to drive under their Franchise agreement; the franchisee in some instances driving under their

franchise in addition to their additional drivers as furnished, or otherwise not driving at all, the driving function then being undertaken by their nominated drivers. Accordingly, the respondent submits that, to the extent that the claimants did not engage additional drivers, this was a personal choice of theirs, and that at all times pursuant to the Franchise Agreement, the claimants had liberty to engage a driver in substitution, a fact explained to the claimants at interview when the Franchise Agreement was explained to them, and that the personal preference of the claimants were immaterial to the right of substitution, which was then unfettered.

26. The respondent further maintains that, in respect of conditions being placed on the driver, these were necessary for business efficacy and were conditions applicable to all the drivers, whether they were owner driver franchisees, or franchisee nominated drivers.
27. The factual matrix on which the case has been presented to the Tribunal is as follows:
28. In or around August 2013 in respect of Mr. Stojavljevic, and June 2013 in respect of Mr. Turner, the respondent advertised for owner driver franchises. Mr. Turner completed his application on the 23 June 2013, and Mr. Stojavljevic completed his application on the 3 August 2018.
29. For completeness, it is here noted that the claimants are not certain whether they made application as a consequence of the respondent's adverts or were otherwise informed of the respondent recruiting via third parties. How the claimants became aware of the respondent's recruitment drive is not however material to the issues for the Tribunal's determination, of relevance being that, an application was made and the nature of that application.
30. By the application form, it is headed "Application for Owner Driver Franchise". The form then has makes provisions for the franchise holders name, address and other personal details. It then provides for the applicant's employment history, by which the Tribunal notes in respect of Mr. Stojavljevic that, for the period from June 2001 to the date of his making application with the respondent, he identifies his employment status as that of self-employed as a courier delivering parcels, stating his reason for change, as, "*money*". Mr. Turner, by his employment history, identifies that between January 2003 and June 2005, he was employed as a Multi-Drop Courier and from June 2005 to the date of application with the respondent, he was self-employed as a Multi-Drop Courier, stating his reason for change, as, "*looking for new opportunities*".
31. The form then provides for the provision of references and financial details of the applicant, to include bank details and outgoings, together with a requirement to set out any debts owing, and in the signature clause it provides:

"The information given in this form is true to the best of my knowledge. I understand and accept that if any of the information given is untrue or misleading GeoPost will be entitled to terminate my Franchise Agreement. I hereby give GeoPost permission to

approach all necessary bodies and government departments to establish and verify my credentials, and the DVLA to release full details of all current and post licences held by me.”

32. The form then makes provision for a reference, stating:

“PLEASE GIVE THE NAMES, ADDRESSES & TELEPHONE NUMBERS OF TWO REFEREES

One referee must be a trade reference or personal friend, and the other must be a professional person, lawyer, teacher, engineer, police officer or other person of similar standing who has known you personally for at least two years.

Neither of the two referees can be a relative.”

33. The application form next provides for particulars in respect of vehicles, stating:

“The GeoPost Franchise Scheme allows you the option of using your own vehicle. Do you intend to use your own vehicle?

Please state yes or no?”

34. The claimants each recorded “no”.

35. There then follows a section in respect of “Driving Licence information,” stating:

“**DRIVING LICENCE INFORMATION** – Declared Licence will be subject to verification by the DVLA

THIS INFORMATION IS REQUIRED FOR ALL INTENDED DRIVERS UNDER THE FRANCHISE AGREEMENT.

PLEASE CONTINUE ON A SEPARATE SHEET IF NECESSARY”

36. There is then provision for particulars of the particular licence held for the disclosed driver, to include details of motoring offences and suspension of licence, together with details of accidents and insurance claims.

37. The form then asks the following question:

“DO YOU INTEND TO RUN ANY OTHER BUSINESS OR UNDERTAKE ANY OTHER SERVICES WHILST RUNNING THE GEOPOST FRANCHISE? PLEASE STATE YES OR NO. IF YES, PLEASE SPECIFY:”

38. Both claimants here record “no” on their application forms.

39. The form concludes with a further signature statement, similar to that above referred.

40. The application form then makes provision for self-billing accounting, whereby the applicant accepts the respondent’s self-billing accounting system for “*collection and delivery services and associated sales commissions*” whereby invoices are prepared on the franchisee’s behalf by the respondent’s administration department. The form then makes provision for the franchisee’s name, address and postcode, and authorised signatory.

41. A copy of the respective claimants' application forms are at R1 page 456 to 461 and 592 to 600.

42. The Tribunal was also taken to the respondent's prospectus, a copy of which is at R1 page 243 to 254, which details are provided on the internet. The document is entitled:

“Drive yourself to a better future with DPD As a DPD Owner Driver Franchisee”

43. The prospectus sets out the rudiments of the scheme and benefits, and under the section, headed *“What’s great about being an ODF?”* it sets out testimonials from franchisees, and then provides the following:

“Grow your business to £140-£170k turnover in just 3 years
We can show you how to grow your business to achieve a turnover of between £140k-£170k in just three years. It’s dependent on you delivering a fantastic collection and delivery service, but totally achievable.”

44. It then provides three boxes providing the captions: Year 1 “ODF or ODF Lite; Year 2 Add a 2nd Route; Year 3 Add a 3rd Route.”

45. There then follows a section headed *“We’ll support you every step of the way”* setting out a five-week training programme, week 1 being stated as “Business Start” and provides:

“Our On the Job Trainers (OJTs) guide you through your first week, covering everything you need to know to be successful as an ODF. You’ll have fellow Franchisee share their experiences with you, and you’ll also meet your depot team and be assigned a Shift Manager, who will be there as a mentor throughout your first five weeks.”

46. By week 5 of the programme, the prospectus states, “You’re a collection and delivery expert” and provides:

“You’ll be close to your full potential. We’ll start the week again with a further review with your Depot Manager. Remember we will be by your side supporting you all the time through your journey, getting you to a point where you can earn and meet your potential with your ODF franchise.

Take your first step to running your own franchise

Visit www.dpd.co.uk/careers to download an application form.”

47. The claimant's having completed their applications, attended an interview at which the franchise and its operation were discussed. The Tribunal here accepts the evidence of Mr. Cameron, the then General Manager, and the person who had interviewed Mr. Stojavljevic, who set out the discussions had at the meeting, at paragraph 8 of his statement. Whilst the Tribunal acknowledges the claimant's challenge to Mr. Cameron's evidence as to his not being able to recall specifically that which was discussed at the meeting, the tribunal accepts Mr. Cameron's evidence as to the format that he follows, being the same format and procedure that he has adopted at such interviews, having recruited approximately sixty ODFs during his

employment at the West London depot, in the six to seven months that he had worked from that depot. The claimants have not challenged this evidence further, albeit they submit that it was their intention to operate their franchise, as they put it, as “sole traders”.

48. The claimants were duly offered a franchise and signed the Franchise Agreements as above referred. The claimants then attended a six-day induction training period. A copy of the course agenda is at R1 page 150A to 150M, and a Business Start Training Checklist, is at R1 page 150N.
49. The Tribunal pauses here, and makes reference to the Owner Driver Franchise Operating Manual, the forward to which, provides:

“GeoPosts’ Values Statement says:

“We aim to understand and satisfy our customer’s requirements by being responsible and by making it easier for them to do business with us.”

This principle holds true with regard to all aspects of our business, including the relationship between GeoPost and all GeoPost Franchisees.

In keeping with our commitment to communicate proactively with all GeoPost Franchisees we have produce this Manual which will provide you with the information and guidance you need, covering the most significant aspects of our Franchise operation.

This Manual will be your first source of reference and as a controlled publication from time to time you will receive amendments and additions, which should be inserted immediately. If you have any suggestions as to the contents of this Manual, please feel free to write to the Franchise Administrator at the Birmingham SuperHub.

Finally, may I take this opportunity to wish you every success with your Franchise business.”

50. The Tribunal has been taken through the Operating Manual at some length, the salient parts of which, I here set out:

“**2. INTRODUCTION**

Your status as a Franchisee will by now have been confirmed to you.

By the time your Franchise commences you must ensure that you and your staff are familiar with the procedures included. The manual can then be referred to when required as a reference guide.

You should bear in mind that: failure to meet the standards required could result in termination of your Franchise Agreement.

...

5. COMMERCIAL

UNIT OF PAYMENT

In all cases GeoPost pays Franchisees by the “stop”. This means that when you/your Driver deliver a number of parcels to the same destination, which are received by the same person at the same time, then only one payment will be made.

...

COLLECTION STOPS

... no payment will be made where a collection has been attempted but where no goods have been received. The only exception is where you arrive at a collection point and there is ‘Nothing to Collect’ and you/your Driver(s) obtain a signature from the Consignor. In this case, a payment equal to the Next Day Delivery rate will be made.

6. ID CARDS

SUPPLY

The Depot will issue you and your Driver(s) with ID Cards, (at the start of the agreement), for which you and your Driver(s) must sign.

WEARING

You and your Driver(s) must carry ID Cards with you at all times whilst performing services for GeoPost as they may be needed to confirm identification.

6. SECURITY

OUT FOR DELIVERY (OFD) ZAPPING

You/your Driver should:

...

- b) Once parcels for your routes have been zapped they are YOUR responsibility. You are therefore advised that you/your Driver should not leave parcels for your routes after they have been zapped and it is recommended that you start loading immediately.
- c) When loading your vehicle you/your Driver should check that all the parcels are for your route.

SECURITY ON THE ROAD

You/your Driver should:

...

NOTE: Failure to follow the security instructions in this section could lead to your Franchise Agreement being terminated.

8. DELIVERY AND COLLECTION PROCEDURES

Your Franchise Agreement requires you to perform parcel delivery and collection services in accordance with GeoPost's conditions of carriage and within the service criteria of any delivery or collection.

It is therefore required that You/Your Driver follow the procedures as laid out in the Quality procedures that follow.

Please note:

Anyone knowingly making a false declaration on the Franchise Daily Services Sheet or Saturn Unit will be committing a criminal offence for which GeoPost may terminate your Franchise Agreement.

DELIVERY AND COLLECTION PROCESS

PRE DELIVERY AND COLLECTIONS

The Saturn Unit allocated to You/Your Driver performs a self-test communications check. If this fails You/Your Driver should report to the Shift Manager for further advice. The Shift Manager will decide whether the driver can use the unit, or is issued with an alternative unit.

You/Your Driver will adhere to the instructions found within the Security section relating to **PARCELS & CONSIGNMENT NOTES** and **OUT FOR DELIVERY (OFD) ZAPPING**

...

18. DRIVERS

Under the terms of your Franchise Agreement you are required to supply a Driver to perform parcel delivery and collection services for GeoPost. It is in YOUR responsibility to inform us of the identify of all Drivers you intend to use.

UNDER NO CIRCUMSTANCES CAN A PERSON EMPLOYED BY GEOPOST BE USED BY YOU AS A DRIVER.

FRANCHISEE'S RESPONSIBILITIES

- a) You must supply the Franchise Department with a copy of the driving licence for each Driver you use ensuring that the serial numbers are visible on all sections.
- b) The Franchise Department will then issue an application form for each Driver and it is YOUR responsibility to ensure that it is returned.
- c) You will not be able to use the services of any Driver until the completed application form for that Driver has been returned to GeoPost and GeoPost have issued a formal letter of authorisation in relation to that Driver.
- c) You will be responsible for any breaches or non-compliance with the Franchise Agreement or this manual by your Driver(s).

This is not applicable for 7.5t ODFs as cover drivers are not accepted.”

51. The Tribunal here notes that the claimant’s franchise was for the 3.5 tonnes ODF Scheme. The tribunal has not seen the 7.5t franchise scheme particulars.
52. The Tribunal also here makes reference to the respondent’s “*Application for Additional Driver*” form, a copy of which is at R1 page 257 to 259. The document is headed “*Application for Additional Driver – Existing Odf*”. The form therein sets out in similar format the information for the Application for Owner Driver Franchise as above referred at paragraph 30-39, namely; the personal details of the driver, the previous employment history, the driver’s Driving Licence information and insurance details.
53. There is then a further form attached thereto, stating:
 - “Documents required and enclosed with this pack – please note that no form will be authorized without having ...” (*the further text of the sentence appears to have been redacted from the copy in the trial bundle*)
54. The form then makes provision for documents as to the paper counterpart and both sides of a photocard, proof of National Insurance, DBS and DVLA checks having been received, and then makes provision to record that the Business Start Training has been received; this similar to that completed by the claimants. The driver and the on-job trainer thereafter record their initials in respect of the training received, with both duly signing the completed form.
55. It is the respondent’s evidence that, this form is the form used for permanent drivers in addition to, or alternative to the franchise holder (ODF).
56. In addition hereto, the respondent retains a further form relevant to drivers, this form being headed “*ODF Cover Drivers at GeoPost UK.com*” and provides:

“Before you send - please ensure the form is fully complete including the DVLA check.

The Driver must be over 21 and hold a full UK Driving Licence for 12 months plus.

No DD or DR convictions will be accepted within 10 years.

A copy of the paper licence and both sides of the card must be sent with the request.

If not the above Driver will not be authorized or insured to drive.

Email from email address not direct from scanner so authorization can be returned.”
57. The form then provides a box for official use to record the applicant’s number and cover driver reference, thereafter, the form then provides sections for the driver or franchisee to complete, to provide; the reason for cover; the Franchise Number; the ODF they are Working For; the ODF’s signature and the period to be covered. There is then provision for the

driver's name, date of birth, ethnic origin, nationality and details of their Driving Licence. The form then provides for a DVLA check to be completed by the respondent's depot, to identify the officer undertaking the check and their signature. There is then a signature statement, stating that the information provided in the form is true to the best of their knowledge, which is to be signed by the cover driver.

58. The respondent maintains that this form is a form used by ODF's, where they seek driver cover for periods up to ninety days; the details in the form then being the only requirement that the franchisee presents for authorization to be given, and that it is the responsibility of the ODF to ensure that the driver is appropriately trained and conversant with the respondent's procedures.
59. In this respect, the Tribunal heard evidence that, where a driver presents at the depot to drive for an ODF, but has not received the appropriate training or completed the form for authorisation, the Depot Supervisor will have the form completed by the driver and submit the same to the ODF Department, and further give the individual driver such training in the respondent's practices and procedures to enable them to undertake the delivery duties for the ODF's franchise that they are to cover. It was explained that, whilst the responsibility remained with the ODF pursuant clause 8.1.5 of the Franchise Agreement, it would be undertaken by the Supervisor out of expediency, to ensure that the service was met. There was not however, any charges made to the ODF.
60. With regards training, the tribunal was referred to the franchisee Mr. Diyan Nikolov, based at the Southall Depot, holding three franchises and using his own vehicles, driving one route himself and using two further drivers who he had himself trained, and did not take advantage of the respondent's Business Start Training facility, in respect of those drivers.
61. The Tribunal also heard from Mr. Minhas, Distribution Centre Manager, in cross-examination that, having run the Southall Depot where the claimants were attached, for eighteen months, he had not been faced with a cover driver who had not been authorised, or otherwise had not received the relevant training.
62. It has been submitted on behalf of the claimants in respect of additional drivers that, the form headed "*Application for Additional Driver – Existing Odf*" was the form applicable to the respondent engaging any driver under a franchise, which application required stringent criteria being satisfied, and satisfied to the respondent's satisfaction, such that it operated as a fetter on any right that the claimants may have had to substitute drivers, and that the further document headed "*ODF Cover Drivers at GeoPost UK.com*" was a document then used where one of the approved drivers, by the "*Application for Additional Driver – Existing Odf*" criteria, were to then drive for an ODF providing cover.
63. The respondent does not accept the claimant's proposition, and state that, the forms operate as stated by their headings, in that, the "*Application for*

Additional Driver - Existing Odf", related to the permanent driver being proposed by the franchisee, this being either the franchisee them self or other individual driver, and that with regard to substitute or cover drivers, the second form headed "ODF Cover Driver" related to temporary cover for up to 90 days, where the particulars required were then just; the driver's name, the franchise for which the driver was driving, and the driver being subject to a DVLA check as to their driving credentials, and as above stated with respect the respondent's procedures, whilst it was the obligation of the franchisee to ensure the driver was appropriately trained, for business efficacy in ensuring a service on the day, the respondent would ensure that the driver was appropriately trained, further informing the tribunal that a failing of the franchisee in this respect, would be reflected in the deliveries made for the day (likely to be reduced from their norm) and for which the franchise would consequently receive a reduced payment for the day.

64. With regards payment to such drivers, it is not in dispute that where a driver drives for a franchisee, the franchisee receives payment according to the Franchise Agreement for deliveries and/or collections, and it is then for the franchisee to pay the driver; the arrangement between the franchisee and driver being independent of the respondent. The claimants accept this to be the case, and indeed, was the case where they had availed themselves of cover drivers.
65. The Tribunal accepts the evidence of the respondent that, the "Application for Additional Driver - Existing Odf" forms relate to those permanent drivers for a franchise, be it the franchisee themselves or additional individual drivers, and that the "ODF Cover Driver" form is the form used by ODF's for the provision of temporary cover of up to ninety days, it not being in dispute that the documents were working documents, and the ODF Cover Driver forms were used for cover drivers; there then being no evidence before the tribunal to challenge the respondent's account of their operation.
66. Each Franchise Agreement is given an identification number known as a Franchise Driver (FD) Number and against which all activities in respect of that franchise is recorded.
67. A Franchise Agreement covers a territory. This is the entire area that a depot covers. The claimants worked at the Southall Depot. The ODF is contracted to provide delivery and collection services within that area. Within the territory, there are routes for which a franchise will provide its services, however, this may change on a daily basis depending on the deliveries and/or collections in the territory on any given day. It is however noted that in practice, the ODF will operate broadly the same route every day. It is further here noted that the ODF does not have the right to any particular route within a territory.
68. Each Franchise Agreement broadly equates to a route. Franchisees may operate multiple routes, each then having its own separate Franchise Agreement. Within the Southall Depot, there were forty Owner Driver Franchise Agreements operating thirty-three multiple routes. In respect hereof, the Tribunal was referred to Diyan Courier Services Limited,

operating three routes from the Southall Depot. The claimants have challenged this position arguing that, Diyan Courier Services Limited are a company whereas the claimants are individuals. The Tribunal notes that the Franchise Agreement is the same in respect of both the claimants and Diyan Courier Services Limited; the respondent draws no distinction between them, their respective relationships governed by the single franchise agreement.

69. With respect franchisees using and operating multiple routes and drivers, the Tribunal was further referred to a number of franchisees holding numerous franchise agreements and engaging numerous drivers, one of which being an individual called Mr. Khan, who operates four routes for the respondent, leasing two vehicles and supplying two vehicles of his own. The Facebook entry for Mr. Khan's company (Mr. Khan being the sole Director), depicts DPD Drivers in DPD uniform, identifying some twenty drivers. The claimants do not challenge this fact; the franchises being held with Mr. Khan as an ODF.
70. The Tribunal was also informed of the ODF, Harpreet Singh Sehgal, operating his own courier company called Sant Couriers Limited, holding six Franchise Agreements with the respondent, for which he contracts with self-employed drivers on all routes, using a mixture of permanent and temporary (ninety day) drivers. The Tribunal was informed that Mr. Harpreet Singh Sehgal, only drives if his drivers were unavailable to do so. Mr. Harpreet Singh Sehgal had four of his own vehicles and leased three vehicles from the respondent, and in respect of which, the respondent states that, he also provided courier services to their competitors; APC and Hermes. The respondent has not been challenged in respect hereof.
71. It is not in dispute that the claimants have availed themselves of substitute drivers, however they maintain that such drivers were respondent approved drivers, being other ODF's or the drivers for other ODFs, and as such, having been previously approved by the respondent, this was a fetter on any right to substitution. In respect hereof, the Tribunal was taken to correspondence evincing the claimants' use of substitute drivers, in the following; in September 2016 Mr. Turner advised the respondent:

“Hi Mark, as discussed yesterday the service break period I require for 2017 will be 4th to 17th of August. I am also informing you that Navpreet has agreed to cover 18th to 25th of August. Thank you very much for your consideration of this matter, could you please confirm as soon as you are able.”

72. And in February 2017:

“To Kam,
I am giving notification that I have arranged cover for Tuesday 21 February as I require this day for personal reasons.
Many thanks
Ta.”

73. The reply from Mr. Minhas recording:

“Ok no probs.”

74. And in March 2015, Mr. Tuner advised:

“Lance,

I have an operation assessment on Tuesday 14 April, I will require the whole day off as it is mid-morning. I will try to arrange cover for this day.

I have a hernia operation on the 14/05/15 the recovery time is two weeks, I will try to arrange cover for one week and will be working with a van boy for the other week.

I will make copies of the letters for the appointments available should you wish to look at them.

Tom Turner”

75. For completeness, the Tribunal was also referred to Mr. Turner’s services being requested via management, to assist another ODF in December 2016, it being submitted that, this is evidence of the internal arrangements for cover drivers, the relevant correspondence providing:

“Tom. Gurpreet has family emergency tomorrow so need U to help take premiums for UB67. Can use new ODF for some next day stuff, really need U to dig in all his stuff thx b early”

76. Mr. Turner responded:

“Speak tomorrow.”

77. It is the respondent evidence in this respect that, whether the cover driver was an ODF or the driver for another ODF, this was not something they directed, submitting that the claimants were free to engage whomever they wished, and where they engaged other ODF’s or an ODF’s driver, or other third party, so long as the nominated driver met the minimum requirement for cover drivers, they could be used.

78. With regards to the claimant, Mr. Stojisavljevic, the Tribunal heard evidence of his attempt to engage a driver of his choice, a Mr. Zorhan Trendov, who was turned down by the respondent. This was presented as evidence of, and supporting evidence for the claimants’ contention that they could only engage substitute drivers as approved by the respondent.

79. In respect hereof, the Tribunal notes that Mr. Trendov had previously been an ODF, whose franchise was terminated on medical grounds, owing to his suffering a bad ankle injury, which no longer allowed him to drive and deliver parcels. The Tribunal here notes that, the parties were unable to be precise as to when the request was made. It was suggested by the claimants that the respondent’s rejection of Mr. Trendov was for reasons otherwise than his medical condition. However, on the claimant giving evidence to the tribunal that Mr. Trendov had *previously* been an approved driver for the respondent, but was not then, when he had sought his services to substitute

for him, the Tribunal finds on a balance of probabilities that the period in question was at a time following Mr. Trendov's termination, and for which his rejection was then more likely than not, premised on his medical condition, as advanced by the respondent.

80. On the claimants signing their respective Franchise Agreement, they paid the Franchise Fee of £300 and were provided with an identification badge in their names, being the intended driver under the franchise, and a uniform. It is noted that, should further identification badges or uniforms have been required, these costs were to be borne by the claimants. They were each allocated a handheld device known as a Saturn Unit and a mobile telephone. On leasing a vehicle from the respondent, the claimants as franchise holders, also availed themselves of a Fuel Card with the petroleum company Shell, which enabled them to buy discounted fuel for their vehicles. The Fuel Card Scheme is operated by the respondent on behalf of Shell, who deduct the cost of fuel purchased under the scheme by the ODF, from sums payable to the franchisee for deliveries. This charge was levied to the claimants for fuel used.
81. With regard to the Saturn Route Control pad, this sends and receives data about consignments from which the respondent can track parcels. The Saturn Unit will scan parcels and work out the best route, a process known as "Optimization," and will prioritise urgent deliveries. The unit will also log specific delivery and collection instructions from customers automatically, depending on customer requirements. The unit is then used to record the recipient's signature on delivery. With regards the optimization information, the driver is not however obliged to follow it, and are free to calculate their route independently, the requirement being that they meet the delivery criteria i.e. specific time slots for delivery ordered by clients. The claimants accept that they were free to vary their routes from that provided by the Saturn route controller.
82. On the claimants attending the depot or any other driver, they are given their scanner, into which they key in the franchise number and route number which will then identify the driver allocated to the franchise.
83. The driver will then complete a carbonated form of four copies, which is then signed by a manager who will retain one copy. The driver retains the further copies.
84. The driver will then load the vehicle scanning each parcel into the scanner which will then optimize the delivery route. The claimant's evidence here is that, "after optimization we could reposition deliveries and enter more time for traffic hotspots etc." The driver would then leave the depot to make deliveries and collections meeting such timeslots as directed for specific deliveries at the customer's request.
85. Once the driver has left the depot and is on the road, should they need support locating an address, this will be provided via the mobile phone from the respondent's control room. Also, should additional collections be booked which can be done on an ODF driver's way back to the depot, the control

room will contact them to ask if they wish to do so. It is not challenged that beyond this, there is no other contact with the driver from the respondent during the day.

86. On completion of deliveries, the driver will return to the depot and return the scanner, which will then be downloaded. The driver completes the further carbonated form, which is signed off by a member of staff from the respondent's office, from which the driver retains a copy, the further two carbonated copies being retained for the respondent's purposes.
87. It is not in dispute that ODFs are not subject to prescribed hours of work, however, in order to maximize deliveries, drivers will seek to leave the depot by 10am to meet timed delivery slots. The claimants would attend the depot arriving between 6am and 7am and finish between 4pm and 6pm. It is further not in dispute that, within the day, the franchise driver is free to apportion their time, subject to meeting premium and precise collection and delivery times, which as the respondent submit, and which has not been challenged, the Odf could run personal errands in between deliveries should they wish, a distinction being drawn between that of employed drivers, who were not permitted so to do.
88. For completeness, the Tribunal here notes that pursuant to clause 8.2 of the Franchise Agreement, the claimants have been subject to a number of charges, by which the claimants states that *"this was a 'punishment' put in place by DPD to make sure that the driver showed up for work. Being fined £150 was a big deal to the drivers and the drivers would do anything to avoid this fine, such as attending work when unfit to do so because of ill health."*
89. The respondent here submit that the charge was not levied as a matter of course, but only made where they did not have resource within the depot to cover the services on the franchisees behalf, for which it was submitted that in 2016, on there being a total of 88,686 days where ODFs did not provide services, a charge was only levied on 5,767 occasions and more particularly, that with regards the claimant Mr. Turner having failed to provide services and breaking the terms of his franchise agreement on seventy-four occasions, he was only charged twice, and in respect of the claimant Mr. Stojisavljevic having failed to provide services breaking the terms of his Franchise Agreement on fifty-eight occasions, he was subject to the charge on only seven occasions. The respondent further informed the tribunal that the charge was only levied where they incurred costs by engaging external bodies, such as taxis' or hire companies, to make the deliveries and collections in respect of the ODF in their absence, which has not been challenged by the claimants.
90. These are the material facts

Submissions

91. The Tribunal received written submissions from the parties which were supported orally. The submissions have been carefully considered.

92. On the issue for the Tribunal's determination being distilled to that of substitution, it is the claimant's principal submission that the Franchise Agreement does not truly reflect the agreement between the parties, reliance being placed on Autoclenz Ltd v Belcher, and for which the relationship should be guided primarily by the facts relating to performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized by that agreement. It is further submitted that the claimants were required to attend work every day and personally perform their delivery and collection services for which, should they fail so to do, they were subject to warnings, sanctions and the threat of termination, and that with regards to personal service, reliance is placed on Pimlico Plumbers Ltd v Smith. It is here submitted that the respondent's business model and contractual clauses having been designed to preclude employer/worker status was to be looked at narrowly, being a lawyer drafted document, which did not then correspond to the reality of the relationship, and in respect of which, the claimants submit they had contracted with the respondent as individual owner drivers, neither of whom had registered additional drivers and who were solely responsible for the delivery and collection services personally, and of which the respondent exercised "extraordinary levels of control," which is further set out at paragraph 29 and 31 of the claimant's outline submissions, amounting to employee status. Alternatively, the claimants submit they were, personally providing services, where they were not carrying out a profession, and the respondent was not a client, such that, should the contract be deemed one of self-employment, placing reliance on the authority of Bates Von Winklehof v Clyde & Co LLP [2014] IRLR 648 per Lady Hale at paragraphs 24, 25 and 31, the claimants submit that they were then workers.
93. The respondent's case is succinctly put on the premise that the Franchise Agreement was a genuine agreement representing the full terms and conditions of the relationship between the claimants and the respondent, and by which agreement there was a genuine right of substitution, evidenced by other Franchise Agreements holding multiple drivers appointed under the direct control of the franchisee, to whom the respondent had no relationship, the terms on which they were then engaged by the franchisee and the remuneration which they received being the sole preserve of the franchisee and the appointed driver; a right enjoyed by the claimants which to the extent that it was not then exercised, was not so exercised because of their individual decisions not to do so.

The law

94. The law relevant to the issues in this case have been succinctly set out by the claimant's written submissions at paragraphs 18 to 21 and paragraphs 31 & 32, and by the respondent at paragraph 4 to 14 of their written submissions, which are adopted as if more particularly here set out.

Authorities

95. The Tribunal was specifically referred to the following authorities:
- 95.1. Autoclenz v Belcher & Ors [2011] UKSC41;
 - 95.2. Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QBD 497;
 - 95.3. Nethermere (St Neots) Ltd v Gardiner & Ors [1984] ICR 612;
 - 95.4. Express and Echo Publications Ltd v Tanton [1999] ICR 693;
 - 95.5. Pimlico Plumbers Ltd and Charlie Mullins against Gary Smith [2017] EWCA Civ 51;
 - 95.6. Pimlico Plumbers Ltd and Charlie Mullins against Smith [2018] UKSC 29;
 - 95.7. Premier Groundworks Ltd v Jozsa [2009] UKEAT/0494/08;
 - 95.8. UK Mail Ltd v Creasey [2012] UKEAT/0195/12
 - 95.9. Independent Workers Union of Great Britain (IWGB) v RooFoods Ltd T/A Deliveroo [2018] IRLR 84 and 2018 IRLR 911;
 - 95.10. Hospital Medical Group Ltd v Westwood [2013] ICR 415;
 - 95.11. Uber B.V & Ors v Haslam & Ors [2018] ICR 453

Conclusions

96. On it being submitted on behalf of the claimants that, on being presented with the Franchise Agreement to be signed, they were not afforded an opportunity to fully read the document before signing, and therefore did not appreciate the full terms thereof, it being further presented at the outset of the hearing on behalf of Mr. Stojsavljevic, that English was not his first language and that the use of language (for the purposes of this tribunal hearing) should be simple, the implication being that Mr. Stojsavljevic had difficulty of language. It has not however been presented to the Tribunal that Mr. Stojsavljevic has difficulty with the written language. It is further here noted for completeness that, the claimants being in possession of the written Franchise Agreement, they had at no time during their engagement with the respondent sought clarification thereof and, have not challenged the respondent's evidence that the Franchise Agreement was explained in detail at their meeting, in respect of the Franchise's operation.
97. On the evidence, this Tribunal is satisfied that the claimants were fully conversant, or otherwise in a position to be fully conversant, with the terms of the Franchise Agreement as signed, and for which this tribunal does not find merit in the claimants' submissions in this respect.
98. On it further being suggested to the Tribunal that the Franchise Agreement was not a valid commercial agreement; the claimants having no bargaining position therein, and that the terms were prescribed and onerous, which the claimants then had to accept. The Tribunal does not find this to have been the case, where the respondent had on offer a choice of engagement, between that of an employee and an ODF. The Tribunal does not find the circumstance to be such that the claimants did not then have a choice in

respect of their engagement with the respondent, there being a genuine choice between the franchise arrangement and a contract of employment.

99. The Tribunal finds that the Franchise Agreement was a commercial agreement which was entered into by the claimants, in the full knowledge that it contained the terms upon which the relationship between them and the respondent lay. The claimants were at all material times, from first interview with the respondent, through the respondent's induction training period and on signing of the Franchise Agreement, aware of the terms thereof, and indeed, the claimants were aware, from the first interview with the respondent that the facility for employment under a contract of employment with the respondent existed, and was distinct from the franchise arrangement they were entering into.
100. The Tribunal finds that the agreement was a genuine agreement representing the terms upon which the claimants' and the respondent's relationship would be found.
101. The Tribunal finds that the Franchise Agreement clearly sets out the body with whom the franchise is agreed, and who is the franchise holder, defined by the parties clause of the agreement, which is clearly then identified as being a separate body from that of the driver, who is defined under the recital clause of the agreement, and who would then drive under the Franchise Agreement.
102. With regards the nominated driver, the Tribunal accepts the claimants' submission as to the degree and formality in respect of permanent drivers, that without further, would suggest a degree of control beyond that of an individual carrying on business in their own capacity, however, to the extent that provision is made for temporary drivers referred to as "Ninety Day Drivers"; the criteria then for the driver to satisfy being that they are conversant with the respondent's practices, which the Tribunal accepts, pursuant to clause 8.1.5 of the franchise agreement, was the obligation of the franchisee, despite the respondent stepping in to provide the necessary training where the franchisee had failed so to do, which the Tribunal finds was directed by business efficacy where this happened, and not by obligation, the further requirements then being that the individual was legally entitled to drive in the UK. The tribunal finds that this was not such as to amount to a fetter on the claimants' contractual entitlement to engage a driver of their choice.
103. The Tribunal finds that the criteria for "ninety-day drivers" was a minimum requirement to enable the service to operate, where the respondent's business required the franchise to operate therein, in providing the wider service to the customer, and was a genuine term for business needs.
104. The Tribunal finds that in these circumstances, where the franchisee was contractually entitled to provide such individuals of their choice as drivers, despite the claimants' practices of utilizing other ODFs and ODF's drivers, this does not detract from the true terms of the Franchise Agreement, enabling the franchisee to substitute personal performance to a person of

their choice, subject to, as the Tribunal has found, the minimum requirements necessary for the service to be delivered to customers, and was not such as to amount to a fetter thereon.

105. With respect the distinction sought to be drawn between a Franchise Agreement entered into where the franchisee is a limited company, and franchisees who are individuals, the Tribunal finds this to be without merit. The agreement entered into is an agreement establishing a franchise, where the agreement makes no distinction between the entities engaging therein with the respondent. The terms and operation of the franchises have no distinction, which operation are not challenged by the claimants as not then evincing a full ability of substitution.
106. The Tribunal accordingly finds that the claimants, Mr. Stojisavljevic and Mr. Turner, were not employees for the purposes of section 230 of the Employment Rights Act, neither were they workers as defined by section 230(3)(b) of the Employment Rights Act. Neither was Mr Turner a worker within the extended meaning defined by section 43K(1) of the Employment Rights Act 1996 or otherwise in employment for the purposes of section 83(2)(a) of the Equality Act 2010; the claimants having the right to substitute drivers under the franchise agreement by which they were engaged, which on the claimants being the specified driver under their respective Franchise Agreement, this was a decision solely within the remit of the claimants who were free to nominate, as they chose.

Employment Judge Henry

Date: 9 / 1 / 2019

Sent to the parties on: 18 / 1 / 2019

.....
For the Tribunal Office