mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr A V Mota**

Respondents: **1. PPF Group Ltd t/a ADR Network**
2. Co-Operative Group Ltd

Heard at: **East London Hearing Centre**

On: **Thursday 9 August and Monday - Tuesday 3 and 4 December 2018**

Before: **Employment Judge Prichard (sitting alone)**

Representation

Claimant: (9 August) Mr C Emezie (Chipatiso Associates LLP, London E12)
(5 and 6 December) Mr A Syed-Ali (counsel, instructed by Martins Rose Solicitors)

1st Respondent: Mr K Chaudhuri (Consultant, Chartergate Legal Services, Bletchley, MK3)

2nd Respondent: Mr C Gorasia (Consultant, Analysis Legal, Stockport)

RESERVED JUDGMENT

It is the judgment of the Employment Tribunal on this preliminary hearing that the claimant was not employed by either respondent and his claims are therefore all dismissed.

REASONS

1 The claimant, Mr Adilson Mota, was engaged by the first respondent as an HGV Class 1 driver on their contract with the second respondent, the Co-Op. Co-Operative Food involves distribution by a variety of rigid and articulated trucks to their stores around the South East of England. His base depot was in Thurrock. He drove a Co-Operative Food sign-written vehicle, the property of Co-Op Group.

2 This case has already been to the EAT on a preliminary jurisdiction point relating to section 18A of the Employment Tribunal Act 1996. The claimant initiated proceedings by a reference to ACAS for early conciliation naming both respondents on the same reference. ACAS then issued a certificate with the names of both respondents. The claim was rejected as against both respondents in a judgment to preliminary hearing before Judge O'Brien. That judgment was overturned in the Employment Appeal Tribunal and the case has been remitted for the tribunal to hear the second preliminary point taken by the respondents that the claimant was never in an employment relationship.

3 Unlike much of the recent case law in this area where worker status has been an issue, the only issue at today's hearing is status as an "employee", under section 230 of the Employment Rights Act 1996. If he was not an employee then all the claims will fail and be dismissed. That is the present judgment. The principal claims are for unfair dismissal and notice pay. These can only be brought by "employees".

4 The claimant was engaged between 23 May 2012 until 4 November 2015 when he was "suspended" by Mr Peter Ciszek who was the operational shift manager at the time, working in the transport office at the Thurrock depot. He was a Co-Op manager.

5 The Co-Op employ over 70% of their own drivers. The other 24% are supplied by ADR Network. ADR have a manager based within the Co-Op transport office at a back desk. The front desk is manned by Co-Op managers. That is where drivers sign in and out for their shifts.

6 When his engagement with the respondent started through ADR, the claimant registered to be paid through an umbrella company called Esentual. Esentual is an umbrella company which has an agreement, including a service level agreement, with PPF/ADR that they will provide 500 shifts per week nationwide. Failure to do so will incur a £25 penalty for every shift short of 500. If they fail to provide 100 shifts per week for four or more consecutive weeks, the agreement may be terminated by PPF.

7 It was explained to me that the benefit of an umbrella company was for the drivers so that they are flexible. They can work across several agencies to get shifts. If they work through the umbrella company then the umbrella company will have their tax code on record and they do not have to bother with paying emergency rate tax when starting with a new agency at basic rate week 1 (BRW1), nor do they have to be concerned about deferral of national insurance contributions.

8 But it is right to say that Esentual is more than simply a payroll company. It seems to employ the drivers who work with it, but I cannot be entirely sure of that without seeing more documentation. It seems they will also keep a better overall record of driver's hours spent working for different clients on different contracts, in order to ensure compliance with EU drivers' hours Regulations, and also working time Regulations.

9 They can also monitor licences and any necessary training. For instance, there is the CPC (Certificate of Professional Competence) training. The qualification needs to be renewed every 5 years and renewal can involve a course of up to 35 hours

training. Every commercial driver needs CPC in order to drive.

10 The claimant worked through Esentual and ADR for approximately 3 months at which point he changed the basis of his engagement.

11 On 6 August he incorporated a limited company named CRI ADI TOGETHER LTD ("CAT").

12 On 4 September his company entered a contract with PPF. The contractor is defined as CAT. The employment business was PPF plc. The contract was dated 12 September 2012. There was an opt-out from the Conduct of Employment Agencies and Employment Businesses Regulations 2003 in respect of this agreement. The claimant decided not to register the company for VAT. CAT would be under the threshold for compulsory registration (in the region of £80,000).

13 The arrangement was that the claimant would be paid on invoices. These were self-billing invoices prepared by ADR who cross-checked the claimant's hours with the Co-Op records and raised invoices.

14 The claimant was obliged to take out public liability insurance. ADR were not liable for his acts or defaults in the course of his driving duties.

15 I have seen a circular sent to drivers confirming the different rates of pay. There is a premium for night working, a premium for back shift, a premium for Saturdays and the highest rate of £14.50 per hour applied for Sundays all hours. Those were the rates for PAYE drivers with ADR. Limited company contractors added £1 to the hourly rate for all rates.

16 I have seen the run of the claimant's self-billing invoices from 2015. These are weekly invoices confirming these rates, overtime, back shifts and Saturday and Sunday working. Although the self-billing invoice is raised by ADR, it appears to come from the claimant's limited company at an address in London NW6 which was the claimant's accountant's address, presumably the CAT registered office.

17 ADR witnesses at this hearing confirmed that, in the South East, 70% of their drivers have elected to contract through a limited company like this. Some drivers have been VAT registered as well. This was particularly beneficial when they are accepted by HMRC onto the flat-rate scheme meaning that they were paid 20% output tax by ADR but only had to repay 11% to HMRC. However, they could not claim input tax on purchases. When the rate was at 11% it was extremely advantageous. Later the rate was increased to 16.5%, then the scheme became less attractive. One of the claimant's driver witnesses I heard from, Mr Florin Opera, confirmed that he had de-registered from VAT when this had happened. One of the claimant's witnesses, Mr Queresma, was still registered on the flat rate scheme.

18 Mr Queresma ultimately did not help the claimant's case. He said in the last analysis he was not pushed to enter a limited company contractor arrangement and that even though he does not work for ADR or the Co-Op now, he still trades through his limited company which is the Buceta Ltd. His evidence was of interest and did not help the claimant or support his case at all.

19 Another witness for the claimant had apparently provided a statement stating that he had been forced to incorporate a limited company in order to carry on working with the Co-Op. This was Mr Andrew Sithole, a driver's mate. When he gave oral evidence, he confirmed that this was completely untrue and all the documentation confirmed that he remained an employee not of the Co-Op but of ADR, at work. This did not help the claimant's case either.

20 Mr Queresma had said in his written witness statement that he did not want to set up a company and/or become employed but had to comply with the instructions as he was told if he did not he would not be assigned to the Co-Op any longer. This turned out to be wholly untrue. He completely denied that statement. It is hard to say that these people were lying when they gave their statements. The fault, I suspect, lay with Mr Emezie, the claimant's previous solicitor who probably failed to proof these witnesses properly. He must have and drafted statements on their behalf with what he hoped they might say, according to the claimant's belief. I noted neither of these statements were signed by the alleged deponents.

21 I am not informed why Mr Emezie came off the record and why the claimant now has Martins Rose Solicitors but Mr Emezie's case preparation was, it appears, downright unprofessional. Mr Syed-Ali made a thoroughly conscientious job of taking it over mid-hearing – never an easy task.

22 By contrast, the claimant stated in his witness statement that he was forced to open a company otherwise he could not work for the Co-Op any more. He stated that his 2 witnesses were similarly advised to incorporate companies if they wanted to carry on working. In his statement he said he set the company up under duress and that the arrangement was a "sham".

23 He never originally stated who told him to set up the company. When pressed on the matter he said that Joanne Cline had told him that he would have to incorporate a company. Unfortunately, Ms Cline left the Co-Op and went to work for Tesco where, even more unfortunately, she was run over in the yard and killed. The claimant said that Mr Gory Wallis had just inputted the company information on to the computer. So the trail had gone cold.

24 It was confirmed finally by ADR witnesses that Ms Cline was a driver/shunter of lorries but also carried out administrative work collecting tachographs in the days in the years before the driver Digicard was introduced.

25 The fact that the claimant declined in his statement to give this detailed evidence does not commend its credibility at all. It is completely denied by the ADR witnesses. I can understand why. I saw a circular email dated 29 May 2015 from Peter Howitt, the HR director for PPF across all the companies in the PPF group quoting at some length. The subject heading is:

> "Re-emphasising our message on driver engagement
>
> It is vitally important that we keep our distance with how a driver wishes to engage his services. To reiterate a driver has a choice when working with us:

- Employed status via RBSS or PDA contracts of employment.
- Drivers choosing to operate on a business to business basis and operate their own limited company the normal supplier checks then take place.
- Drivers may choose to operate with one of our approved and audited suppliers. Currently on the list is
- JSA
- Esentual
- Anderson Group
- Nova

All of these companies offer varying benefits and as always it must be up to the driver to decide what is best for him/her.

I am aware the majority of our drivers do not wish to be employed directly with one of our contractors 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 DRIVER'S DECISION PLEASE DO NOT GET INVOLVED WITH HOW A DRIVER WISHES TO OPERATE THEIR SERVICES IF THEY DO NOT WANT DIRECT EMPLOYMENT."

26 Mr Howitt gave evidence to the tribunal as did Mr Bertram the Regional Manager that in the South East the proportions of drivers on limited company contractor status was 70% as opposed to 30% employed. He also stated that PPF wished to equalise those ratios or get the proportion at least to 60/40. Mr Bertram explained that they wanted more control over allocating shifts. They had greater control with employed drivers.

27 Employed drivers under ADR received 28 days' holiday entitlement per annum (as per WTR) and statutory sick pay. They would receive a pension also. Obviously limited company contractors received none of those things. One of the claimant's claims to this tribunal is for holiday pay apparently. I accept that as a true record of ADR's arrangements with drivers.

28 I accept on the evidence that, entirely contrary to what the claimant alleges, there was no duress whatsoever. His agreement to enter into limited company contractor status was wholly voluntary. Looking into the benefits, they were considerable. I have been shown the audited accounts for the company as at year end 2013. This includes one whole year's accounts. In that year he paid his wife £5,600 (her personal tax allowance). The claimant's wife was written down as "Administration expense". I was not told what she actually did to earn that pay. It is a legitimate form of minimising personal liability to income tax if all the income is going into the same household.

29 The claimant also paid himself director's remuneration of £7,000 which I strongly suspect is national minimum wage for the hours worked. The rest of his income was

from dividends paid by the company.

30 In other information from the accountant, it appears in the last 2 trading years the company did not even make a profit so there was no liability to corporation tax. The dividend tax is extraordinarily favourable to those receiving dividends additional allowances, free allowances of £5,000. It is a complicated piece of accounting.

31 I should add, for completeness, that the company accountant's emails with all these details were sent, due to the accountant's error, to the representative for ADR Mr Chaudhuri and not to Mr Emezie, the claimant's solicitor. On the first day of the hearing Mr Emezie implied that he would have consented to these emails being disclosed. When he started to represent, Mr Syed-Ali objected to their admission, by which time it was too late. They had already been incorporated into the bundle and the case was part-heard. Later he did not pursue that objection upon an indication from the tribunal that the case he was relying on *Imerman v Imerman* [2009] EWHC 3486 (Fam) was distinguishable from this situation where disclosure had been made in error and involved no breach of trust by the receiving party. Mr Emezie knew that it was an error because a later email from the claimant's accountant confirmed it was an error.

32 Taken all in all, the financial advantage to the claimant was enormous under the limited company option. I can well understand why the claimant and the majority of drivers chose this option. The hourly rate was higher and the tax was way lower.

33 Quite apart from the flexibility and the clearly stated terms which preclude mutuality of obligation to do any particular shift, or any shift at all, I was told drivers were keen to maximise their hours, often at premium overtime and weekend rates.

34 Ironically, the claimant's accountant heard from somewhere that there was an allegation that the company was a sham. He muddled this and thought that it was the respondent's allegation. Far from it, they are alleging that it is completely genuine. It was the claimant who alleged "sham", presumably having heard this word from Mr Emezie. The accountant ironically stated to Mr Chaudhuri, when he knew he acted for the respondent ADR:

> "I would be happy to discuss certain points with you on the phone in particular your client's claim (sic) that Mr Mota's company is a sham. I can assure you it is not. It has been accepted by Companies House and HMRC".

Termination of the claimant's engagement

35 On 4 November the Co-Op received a report from a store in Leigh-on-Sea that the claimant had been rude to a member of staff there and left several cages sitting on the pavement outside the store. The member of staff was upset. When the claimant returned to the transport office he was "suspended" by Piotr Ciszek, the shift manager. Incidents of this sort are not unheard of. Mr Howitt confirmed incidences of alleged rudeness are quite common.

36 It is important that the Co-Op acts quickly although what is done with respect to the driver is up to ADR. The Co-Op, as client, has a right to exclude identified drivers from their workplaces under the contractual arrangements that exist. There is a

commercial contract between ADR and the Co-Op, then there is a contract between CAT and ADR.

37 The claimant made an attempt by letter of 5 November 2015 to construct an employment relationship between himself and the Co-Op, or at least between himself and ADR. He sent a handwritten letter of complaint dated 5 November 2015. He stated: "Peter should not have suspended me as he is not my employer".

38 Mr Howitt stated that someone who has worked there for as long as the claimant had was likely to be a good driver. It was more than likely that he would wish to redeploy him on other contracts. ADR has many other contracts in that area including Wincanton, DHL/Lidl, NFT, and Morrisons in Sittingbourne. I do not know why the claimant did not take up any alternative driving role.

39 The claimant stated on his ET1 form he started work again on 22 November, presumably with another agency, and he confirmed, although he had not wanted to create a limited company in the first place, he still uses CAT to carry out his driving duties at present. This evidence also suggests that his original incorporation of the company was a voluntary choice which appealed to him.

40 Later, during submissions and reference to case law, we discussed the bargaining power of the parties. I accept the evidence of Mr Howitt that there is a national shortage of HGV drivers. They are a powerful lobby he said. This year the respondent has had wage inflation as a result of that.

41 This is not a sort of unskilled work that was the subject matter in the leading case of *Autoclenz Ltd v Belcher* [2011] IRLR 820 SC.

42 I find as a fact that there were 2 tests the claimant had to complete before he started work for the Co-Op. The first was a test of ADR's considering of some 35 questions and the next was a test devised by the Co-Op involving some 50 questions. This is relevant to the question of "substitution". Clause 4 of the contract between the CAT and PPF provides for substitution as follows:

> "The contractor's obligation to provide his services shall be performed by such member or members of the contractor's employees' officers or representatives (staff) as the contractor may consider appropriate subject to the prior approval of the client. The contractor shall be entitled to a sign or subcontract the performance of the contractor's services provided that the employment business and the client are reasonably satisfied that the assignee or subcontract has the required skills, qualifications, resources, and personnel to provide the contractor's services to the required standard and that the terms of any such assignment or subcontract contain the same obligations imposed by this agreement."

Submissions

43 Submissions on these facts were made by all 3 parties. Mr Chaudhuri preferred written submissions; the second respondent and the claimant oral only. Both sides referred me to *Autoclenz v Belcher*. Understandably it is a hurdle the claimant is committed to getting over.

44 Mr Gorasia rightly stated that logically the first question for me to ask is over the

question of necessity of implying a contract. The modern leading case on this is *Smith v Carillion (JM) Ltd* [2015] IRLR 467, CA, judgment of Lord Justice Elias states:

> "The application of the test means as Mummery J pointed out in *James v London Borough of Greenwich* [2008] IRLR 302 CA that no implication is warranted simply because the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."

45 There is the famous quote from Lord Justice Bingham in the *Aramis* [1989] 1 Lloyd's Reports 231 that a contract must be:

> "…necessary in order to give business reality to a transaction and create enforceable obligations between the parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

46 In this case it is absolutely clear to me that there was no such obligation. So that is the end of the case, as Mr Gorasia rightly submitted.

47 For completeness I should comment on the issue of whether this was a sham contract and whether it would have been a contract of employment. I consider it follows from the *Belcher* judgment both in the Supreme Court and in the Court of Appeal that a substitution clause which is limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not it entails a particular process will, subject to exceptional facts, be inconsistent with personal performance.

48 The lead case of *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367 CA confirms that it is fatal to the existence of an employment contract that there should be an effective substitution clause. In this case I have no hesitation in finding ADR's substitution clause was a valid substitution clause, and not sham.

49 Mr Howitt confirmed in answer to the Tribunal's questioning that substitution did sometimes occur. It was, as one would expect, rare because if the driver was known to PPF and the Co-Op, that driver would probably want to do the shift in his own right. He confirmed that it is helpful when people do substitute as it means the respondent ADR does not have to do it e.g. when drivers are ill. He did also confirm (!) that substitution sometimes occurs to allay the concerns of HMRC, and to show it is truly self-employment.

50 Another strand of reasoning is in an older and well-known case, *Massey v Crown Life Insurance*, judgment of Lord Denning MR [1978] 2 All ER, 576, CA:

> "In most of these cases I expect that it will be found that the parties do deliberately agree for the man to be self-employed or on the lump. It is done specially so as to obtain tax benefits. When such an agreement is made it affords strong evidence that is the real relationship. If it is so found the man must accept it. He cannot afterwards assert that he was only a servant … I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as being self-employed he must lie on it. He is not under a contract of service."

51 As is well-known, employment is defined in section 230 of the Employment

Rights Act 1996:

> "(1) In this Act "employee" means an individual who has entered into or works under … a contract of employment
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

52 I have no hesitation in finding that the limited company contractor contract of the 4 September 2012 was absolutely not a contract of employment and it had considerable financial tax benefit for the claimant. In those circumstances, I must dismiss the claim.

Employment Judge Prichard

25 February 2019