EMPLOYMENT TRIBUNALS

Claimant Mr. H. Karagyozov

Respondent (1) Mr. Y. Krumov (2) Linkdel Ltd

v

Heard at: Watford **On**: 30 May 2019
Before: Employment Judge Heal

Appearances

For the Claimant: Ms Macey, counsel
For both Respondents: Mr. Y. Krumov, company director and in person

JUDGMENT

(1) The claimant was both a worker and an employee of the second respondent.

(2) The claim against the first respondent is dismissed.

(3) There will be a further hearing listed for half a day on a date to be fixed to determine liability for the claims and remedy if appropriate.

REASONS

1. By a claim form presented on 23 October 2018 the claimant made complaints of unfair dismissal, unauthorised deductions from wages and a failure to provide a written statement of terms and conditions of employment. The complaint of unfair dismissal was rejected by the tribunal because the claimant did not have 2 years' service.

2. I have added the second respondent to the proceedings with Mr Krumov's consent.

3. I have had no bundle and have seen no documents at all save for a copy of an advert, most of which is in Bulgarian. The parties agree however that most of the salient parts of the advert are those written in English.

4. There have been no witness statements. The particulars in the claim and response forms have stood as evidence in chief. I have heard oral evidence from the claimant and from Mr Yordan Krumov, company director of the second respondent.

5. The issues are these:

5.1 Was the claimant an employee within the meaning of section 230(1) of the Employment Rights Act 1996? (He must be an employee to qualify for a right under section 1 of that Act to a statement of initial employment particulars.)

5.2 Was the claimant a worker within the meaning of 230(3) of the 1996 Act? (He must be at least a worker to qualify for a right not to suffer unauthorised deductions from wages under section 13 of the 1996 Act.)

5.3 If the claimant was an employee or a worker, with whom did he make his contract: the first or the second respondent?

5.4 If the claimant does qualify to make his claims:

5.4.1 Was the claimant entitled to be paid for the 14 days: 7-8, 11-15, 21-22 and 25-29 June 2018. He says that he was doing a full-time job on those days and was entitled to be paid. He accepts that for the first week he was told that he would not be paid but says he was told that after the first week, he would be paid. He was told that his wages would then be held back for the first 3 weeks in case he damaged his vehicle.

5.4.2 The claimant says that he worked for those days. The respondent says that the claimant was training, observing and getting used to the procedures, but not working. The respondent says that there was a verbal agreement that the claimant would be present but not paid.

5.5 Was the claimant further entitled to be paid for 3 days on 18,19 and 20 June when he was not able to work because he was not covered by insurance to drive the van because of his age?

5.6 There is no dispute that the respondent(s) did not give the claimant a written statement of employment particulars. The defence is that the claimant was not an employee.

6. Given the limited time available for this hearing, I decided to determine the first issue of employment status as a preliminary issue. In fact, there was time only to deal with evidence and submissions on that issue. It was not possible for technical reasons to fix a further date and so the parties have agreed to write to the tribunal within 7 days of today with their dates to avoid.

Facts

7. I have found the facts on the balance of probability as follows.

8. The second respondent is a limited company which owns two or three vans. The first respondent, Mr Krumov, together with his wife, is a director and owner of that

business. Mr Krumov started in the delivery business in around 2012 as a courier driver and has slowly expanded little by little.

9. The second respondent works as a sub-contractor to Express Courier London Ltd ('Express'). Express have a contract with TNT to make parcel deliveries on certain routes. All the drivers making TNT deliveries have to wear a TNT T-shirt, whichever company they are in fact contracted to. This is for historical security reasons to prevent fraudulent collections being made by unauthorised 'drivers'.

10. The second respondent supplied one Vladimir to make deliveries on behalf of TNT on one route. Vladimir is an experienced and competent courier driver. The second respondent was then looking for a further driver to make parcel deliveries for that same route.

11. Accordingly, in June 2018 Mr Krumov placed an advert seeking a driver. It said:

'We are looking for EXPERIENCED, RESPONSIBLE, ACCOUNTABLE, HARD-WORKING AND SELF ORGANISED parcel delivery/multi drop drivers on self-employment basis. …

Good English language

Monday to Friday, Saturday if available, Sunday if available.

Rates of pay starting from £80 per day, if you proof yourself to be trustworthy and bring value to the service we provide for our clients, your rate of pay will be raised after 4 weeks.

Weekly payments bank transfer (every week Friday), after 3 weeks deposit period

We supply vans, pay for diesel, insurance, and maintenance.

Long term contracts can be offered to successful candidates.

If you are interested and for more info, please call Yordan Krumov on [number] Monday to Saturday 09.00 to 19.00.'

Amongst the Bulgarian on the first page of the advert there appears the words, 'LINKDEL LTD' together with what I am told (and the parties agree) says, in Bulgarian, 'registered in October 2016'.

12. Although the advert before me is not the exact advert seen by the claimant, I find that it is the same wording. The claimant accepts that it is 'quite likely' that the advert he saw did contain the words 'self-employment'.

13. The claimant had been working as a labourer and wanted other work. He can read English and could read the advert. He did not notice the words 'Linkdel Ltd'. He called Mr Krumov on the number given.

14. Mr Krumov answered the call just saying, 'hello', not giving a company name. Indeed, the number given is that of his personal telephone.

15. During the conversation that followed Mr Krumov did not mention the name of Linkdel Ltd or that he was acting on behalf of a limited company.

16. The first the claimant knew of the existence of Linkdel Ltd was when he was aware of a small card with the name Linkdel Ltd on it a few days into his time working with Vladimir.

17. The claimant asked if the position was still available and Mr Krumov said that it was. The claimant said that he was not the right age (the advert stipulated a minimum of 24 years of age, for the purposes of fleet insurance.) Mr Krumov said that he was not sure whether the insurance would cover the claimant, but he agreed to let the claimant try the work out. The claimant asked a lot of questions during the conversation: about pay, what kind of job it was and what he would be doing. Mr Krumov liked the fact that the claimant asked a lot of questions.

18. They discussed payment terms. Mr Krumov told the claimant that the first week was free because he was training, and the next three weeks would be 'deposit' which the claimant would get back. The claimant would be paid £80 per day and after the deposit was paid, he would be paid every week. There was no discussion about tax and national insurance.

19. The claimant says that Mr Krumov said £80 *net* per week. I consider this is unlikely: Mr Krumov has shown himself in this hearing to be intelligent and commercially well informed. Whatever the reality of the agreement, I consider it unlikely that Mr Krumov would have said the word 'net', given that he is likely to have been fully aware of the implications of the word and given that he at least intended the relationship to be one of self-employment.

20. Nothing was said about employment status apart from what was said in the advert.

21. On 7 June 2018 Vladimir collected the claimant on a street near his flat. The claimant was expected to bring his own 'Hi Vis' vest and safety boots. Vladimir did give the claimant a Hi Vis jacket as they loaded the van. The claimant did not know who supplied that Hi Vis jacket; he thinks that Vladimir had it as an extra. They went straight to the TNT depot. The claimant asked Vladimir questions: he wanted to be sure that the job was 'stable, profitable and long term.'

22. Vladimir told the claimant that the job was good, but he had to get used to the pressure and the time limits for deliveries. He said that he was working for 'the company' and the claimant assumed that meant TNT because Vladimir was wearing a TNT T-shirt.

23. For the first three weeks that claimant acted as Vladimir's assistant: he would meet Vladimir at a point close to his house at around 6.15 am. They would go to the TNT depot for about 7.10am. The claimant was learning the job so that he could do it on his own, but he was doing more than merely shadowing Vladimir. The claimant helped with loading the van and the delivery of packages, although he did not drive. When

they finished the route, at about 4pm, they would head back to the depot to unload some of the packages. Then they signed documents and Vladimir gave the claimant a lift home so that he was home between 4.10 and 4.30pm.

24. In this context, it is clear that the claimant was expected to turn up to work every day and to comply with Vladimir's instructions. There is no evidence or suggestion that he was providing work or services to anyone else during this period.

25. The claimant was never given a TNT T-shirt. He never reached the point where he was making deliveries on his own. TNT were never aware of his name or involvement as a courier driver. When he asked at the depot, someone from TNT told the claimant that there was someone responsible for hiring drivers: TNT themselves did not have direct relations with that person and told the claimant to 'google him'. They did not take responsibility for hiring drivers. The claimant never knew the nature or detail of the contractual relationship (or the hierarchy of contractual relationships) between Mr Krumov and TNT.

26. Vladimir himself is described by the respondents as working on a 'self-employed' basis.

27. Vladimir could send a hypothetical 'John' in his place. "John' could not be just anyone: he had to be above the minimum age for insurance and he had to be known to Mr Krumov; he had to know what he was doing, but 'John' could be sent as a substitute instead of Vladimir. Vladimir did not have to drive the route or undertake the deliveries himself, although any substitute would have to wear the TNT T shirt. The parties therefore expected that the claimant too would work on this basis, once he was trained.

28. Linkdel Ltd owns the vans used by its drivers. Some courier drivers hire them: and if they do so, they are paid at a different rate. This is the chance to be paid a higher rate referred to in the advert. Once a courier driver finishes his training, he might take either approach. Which course the claimant might have taken is wholly unclear. Linkdel Ltd insures the vans using fleet insurance. It is more economical to arrange insurance this way than for the drivers to insure the vans individually. The insurer needs to be told the registration number of the van and stipulates that drivers must have a clean licence and be over 24, but otherwise it does not need to know the identity of the drivers.

29. The depot is controlled by TNT. TNT supplies the parcels to the route for Vladimir to deliver. The route is set by TNT. There is a period within which the parcels must be delivered. TNT set that time period. Vladimir generally arrives at the depot at 7.15am or so. He drives the same route each day and makes generally the same deliveries. Some parcels carry labels stipulating that they must be delivered by a particular time. TNT labels the parcels.

30. It is then down to Vladimir to plan his own route. There are 'Apps' available to enable drivers to plan routes. Mr Krumov has an App which he paid for. He allowed Vladimir access to this App to enable Vladimir to test it and see if he liked it.

31. The claimant spent his first two weeks with Vladimir. What he did was at first very limited, not least because he had no experience as a courier driver. He helped to load the van and deliver the parcels. Vladimir drove. Vladimir planned the route.

32. Vladimir was training the claimant. Vladimir had conversations with Mr Krumov about how the claimant was doing.

33. At some point the claimant asked Mr Krumov if he could have a written statement of terms but Mr Krumov declined on the basis that the claimant was self-employed.

34. During his training the claimant would not have been able to send a substitute to do his work: it was of course the nature of his training that he himself had to be present to be trained, so that he personally absorbed the knowledge and experience. However, if Vladimir had wished to send a substitute in his stead to drive the route, then as long as the substitute was over 24 and was known to and acceptable to Mr Krumov, then he could do so.

35. In time an arrangement was made with the fleet insurer to insure the claimant to drive a van even though he was under the usual age limit. The claimant drove the van for a couple of tests and then undertook deliveries. He had to wait for three days without working while the insurance was arranged. During these three days Mr Krumov offered him £20.

36. On 21 and 22 June Mr Krumov supervised the claimant.

37. Mr Krumov decided that the claimant's driving was not good enough for him to continue. Mr Krumov was concerned that the claimant was not very experienced on English roads.

38. On the claimant's final day, Mr Krumov told him that he could not continue. He offered the claimant £150 as a goodwill payment.

Concise statement of the law

39. Section 230 of the Employment Rights Act 1996 provides

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

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

(3) "worker" …means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract

that of the client or customer of any profession or business undertaking carried on by the individual;

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

40. Ms Macey referred to 'The Uber case' although she did not supply me with a copy of that judgment. She did not rely on any principle of law arising out of the judgment but submitted that if the drivers in 'the Uber case' were employees, then so should be the claimant in this case. I think a better approach is to apply the law to the facts of this individual case.

41. Usually a tribunal's starting point has to be the written terms of the various agreements and in particular the agreements between the claimant and the respondents or any one of them. Here there is no written agreement. I consider that I should start with what appears to have been expressly agreed between the parties. Where one party asserts that the express agreement does not reflect the true contract between the parties, then I may look at the parties' conduct so as to establish what the parties themselves have, in reality, agreed.

42. Without the irreducible minimum of mutuality of obligation there can be no contract of employment and no worker's contract. (A worker undertakes to perform or do personally any work or services for the other party to the contract.) However, if the mutuality of obligation does exist, that is not conclusive, in either case.

43. To decide whether an individual is an employee, I then have to look at the other factors (control, organisation, economic reality, whether any other factor is inconsistent with the existence of a contract of employment and whether the claimant was in fact in business upon his own account) to determine whether or not this was in fact a contract of employment. The key is to determine what the parties had in fact agreed, not what the relationship *looks like*.

44. If an individual is not an employee, he may nonetheless be a worker. The test here is more simple and wider. If he is in fact a professional or is in business on his own account and providing services to the alleged 'employer' in circumstances in which the 'employer' is in reality his client or customer, then he is not a worker.

Analysis

46. I consider that the claimant made a contract with Linkdel Ltd through Mr Krumov acting as its agent. I find this because the advert did name Linkdel Ltd. Mr. Krumov was in fact acting in his role as director for Linkdel and not in his personal capacity. Although the disclosure of his principle was not very prominent, he was nonetheless acting as an agent for a disclosed principal.

47. I find that there was a contract made between those two parties, the claimant and the second respondent. That contract, though never reduced to writing, was expressed to be one of self-employment. This was what the advert said, and the claimant saw that it said this. Therefore, on its face, this was what he applied for, was offered and accepted. I find that the parties intended the payment of £80 to be made (when it was eventually made) gross, that is without any obligation on Linkdel Ltd to

pay tax and national insurance. The claimant had been 'self-employed' before and had some idea of what it involved.

48. However, the claimant says that the true nature of the contract was one of employment or as a minimum, that he was a worker.

49. So, I look at the conduct of the parties to discover what they in fact agreed.

50. Was there the 'irreducible minimum' of mutuality of obligation? I have not found this straightforward. There was a single contract which involved the claimant undergoing a period of training. The expectation of the parties was then that he would be allowed out to take responsibility for the route on his own, in the same manner as Vladimir was allowed to take responsibility for the route. It is possible, on the facts, that the nature of the relationship might have changed after training so that the claimant would have changed his employment status. There was no dispute however that the claimant had personally to be present during his training: otherwise of course he could not learn. If tasks arose during the training which the claimant had to carry out, it follows that he personally had to do them.

51. Vladimir was not subject to a mutuality of obligation. He could send a hypothetical person – called in evidence 'John' - in his place. "John' could not be just anyone: he had to be above the minimum age for insurance and he had to be known to Mr Krumov; he had to know what he was doing, but 'John' could be sent as a substitute instead of Vladimir. Vladimir did not have to drive the route or undertake the deliveries himself, although any substitute would have to wear the TNT T shirt. The parties therefore expected that the claimant too would work on this basis, once he was trained. This was not an unfettered right of substitution but was subject to the substitute being able to do the work. It may have been the case, once the claimant was trained, that he would not be subject to mutuality of obligation, but I do not have to decide this point because the claimant never reached that stage and the contract was never varied to remove the expectation that he would perform services personally.

52. So, this is an unusual situation in which the claimant was subject to mutuality of obligation for the period while he actually trained with the respondent, although he may well not have been, had he continued past his training period.

53. I find that the claimant was a worker providing services to the second respondent for the period 7 to 29 June set out in paragraph 5 above. I do so because there was a contract between the claimant and the second respondent. There was, during this period, mutuality of obligation. The claimant was actually providing work and following instructions: he was more than a mere work shadow. He was expected to show up on time, to do what he was told and to carry out certain tasks of loading parcels and making deliveries, albeit he did not perform the full courier driver role. He was integrated into the second respondent's business, providing services to the second respondent's clients and indirectly, to their clients: he was not working for anyone else and was not providing services to the second respondent as a client or customer of any profession or business undertaking carried on by the claimant. It would be unusual for the client or customer to provide training to an independent professional or person running his own business. The claimant had no pre-existing courier driving business before his relationship with the second respondent. The van

was not his and he did not hire the van. Especially while learning, he could not be said to be providing services to the second respondent as a client or customer of his own business or undertaking.

54. I find therefore that the claimant was a worker and entitled to be paid for the period of his employment.

55. Was the claimant also an employee so as to entitle him to a written statement of employment particulars?

56. I find that he was. There was a contract and, for the relevant period, mutuality of obligation between the parties. I have dealt with this above. The agreed wage was gross, so it appears that the claimant was to be liable for tax and NI. This is a factor against there being an employment relationship, however the tax situation is not conclusive. The advert expressly stated that the claimant was to be self-employed, but I have to look at what was the real nature of the relationship between the parties: what does their conduct show that they in fact agreed?

59. The claimant did not supply the van. The second respondent supplies the van to Vladimir, who hires it. The second respondent is responsible for the van and its insurance.

60. The claimant was expected to supply his own boots and Hi Vis vest (although in fact Vladimir provided the latter.) This too weighs against an employment relationship.

61. Vladimir trained the claimant and controlled the claimant's daily tasks, and for these purposes, Vladimir was acting as agent for the second respondent, even if he was himself said to be self-employed.

62. The depot, route, parcels, timings and (had the claimant passed his training) requirement to wear the TNT T shirt were all imposed by a third party, TNT; however, through the chain of contracts they were then passed on to the claimant via the second respondent. As part of his work for the second respondent, the claimant had to submit to the control of TNT. That element of control was imposed on the claimant as part of the nature of the work he was doing for the second respondent. Certainly, he had no control over it.

63. The second respondent acting through Mr Krumov, had a right of dismissal, which was used. Mr Krumov felt a responsibility for the risk of allowing the claimant out to drive on the road when he was (in Mr Krumov’s opinion) not safe to drive. This was his decision, not the claimant’s.

64. At this stage the claimant was not in business on his own account, even if the circumstances might have changed later.

65. Although not all the factors I have considered are in favour of employment status, the weight of the factors set out above is in favour of employment. I consider, taking the factors above altogether, the conduct of the parties shows that they had in fact agreed that the claimant was an employee.

66. Therefore, the claimant was entitled to a written statement of employment particulars.

67. Accordingly, unless the parties inform the tribunal that they have resolved matters, there will be a remedies hearing on a date to be fixed.

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Employment Judge Heal

Date: ……05.07.19……...

Sent to the parties on: .....11.07.19..

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For the Tribunal Office