EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Stojsavljevic **Mr T Turner**	**v**	**Dpd Group UK Limited**

Heard at: Watford **On**: 10 September 2019 (on written submissions)

Before: Employment Judge Henry

Appearances

For the Claimant: Ms McGuigan – Solicitor – written submissions
For the Respondent: Mr Galbraith-Marten QC – Counsel – written submissions

DECISION ON AN APPLICATION FOR RECONSIDERATION

pursuant to rule 71

The claimants' application dated 1 February 2019, for reconsideration of the Judgment sent to the parties on 18 January 2019, is refused.

REASONS

1. There is no reasonable prospect of the original decision being varied or revoked because the interests of justice do not require such a reconsideration

2. The claimants' grounds for reconsideration are premised on their disagreement with the tribunal's findings. The findings of the tribunal were found on a consideration of the respective cases put forward on the agreed issues, by the claimant and respondent. Due consideration was given thereto, and upon which the tribunal made its determinations. The tribunal would further state, giving particular reference to the grounds for reconsideration, the following:

Ground 1

1. On the issue being raised by the claimant that he had not been free to nominate a driver of his choice on Mr Trendov being rejected, where the claimant accepted in gross examination that Mr Trendov had previously been an ODF but was no longer an ODF at the time he sought to use his services. It was then open to the respondent to give their explanation why Mr Trendov was not then suitable, where it appeared that they had acted to restrict Mr Stojsavljevic's choice of driver. On the respondent giving an explanation for their refusal being that of his franchise having been ended due to his ability to drive and carry out deliveries, a fact that was not then challenged by the claimant, of relevance was the reason for the respondent's rejection of Mr Trendov as a substitute driver for the claimant, which in circumstances where that reason was not challenged, the fact whether Mr Trendov did or did not have the requisite medical condition was not an issue requiring further examination by the tribunal in addressing the question why the respondent did not accept Mr Trendov as a substitute.

Ground 2.

2. Whether Mr Trendov was or was not medically fit to drive, it was not challenged by the claimant that Mr Trendov's franchise had impermissibly been terminated on such grounds. Accordingly, for the respondent's purposes, he was then a driver that did not meet the requirement to drive under a franchise. It was the knowledge of such incapacity as a driver, particular to Mr Trendov's specific circumstances, that was considered, which did not apply to the franchisee's general right to substitution, where such medical knowledge of the substitute driver would not be known; there being no requirement of that information to be furnished for the temporary 90-day cover drivers. The tribunal finds there to be no inconsistency in its reason.

Ground 3.

3. In respect of the tribunal's findings at paragraph 105 of the judgment, to the extent that the claimant sought to draw a distinction between the operation of the franchise in the collection and delivery of parcels, as between a franchise held by a limited company and a franchise held by an individual, where it was not in dispute that the franchise operations were the same in respect of each entity to the franchise agreement; beit a limited company or individual, the tribunal's funding is factually correct on the evidence presented to the tribunal, for which the respondent's correspondence to HMRC does not affect.

Ground 4.

4. Of the criteria for 90 days being a fetter on the claimant's right to substitution of drivers, the tribunal does not accept the claimant's submission in this respect as there was no suggestion that after 90 days, the driver could not

then be further utilised and there was no evidence or otherwise suggestion, that a driver had been refused for that reason. This was not a case presented to the tribunal and does not arise from new facts that were not before the parties for the hearing.

Ground 5.

5. It was agreed with the parties at the outset of the hearing, that the principal issue for the tribunal's determination and which would be determinative of the issues, was the question of substitution. The case was then presented to the tribunal on that basis. Issues going to the criteria of control, integration, economic reality, mutuality of obligation, financial considerations or organisational factors, whilst acknowledged, was then not a matter for determination, which, on the tribunal considering the factors going to substitution and on the tribunal satisfied that as a fact the claimant had an unfettered right to substitution, it did not then afford the further consideration of the claimants being employees or workers because of the further factors of control, integration, economic reality, mutuality of obligation, financial considerations or organisational factors.

Ground 6.

6. The tribunal restates its reasons as for ground 5 above, and accepts the submissions of the respondent at paragraph 16 and 17 of their response to the application for reconsideration..

Ground 7

7. The tribunal is asked to make express findings on whether pursuant to section 83(2) of the Equality Act 2010, Mr Turner was a worker giving regard to European Law, in that in European Law, of relevance is the hierarchical relationship between worker and their employer, assessed on the basis of all the factors and circumstances characterising the relationship, and that there was "no requirement for there to be a contract in order to attain worker status", reliance being had to Directive 2003/88 at paragraphs 7a,b,and c, of the reconsideration application, and Directive 2008/104 by the claimants' additional submissions of 1 February 2019. These were not arguments presented to the tribunal at hearing and the tribunal has not received considered submissions thereon. Despite this, the tribunal having been referred to the authority of the Supreme Court, in Pimlico Plumbers Ltd v Smith [2018] IRLR 872, per Lord Wilson, the tribunal observes that there is no authority that equates "employee under the Equality Act, to any extent different from that of worker under s230(3) of the Employment Rights Act 1996, which would require the tribunal to deviate from its findings as set out at paragraph 106 of its judgment.

8. The Claimants' application for reconsideration is refused.

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Employment Judge Henry

Date: 25 / 09 /2019

22 November 2019

Sent to the parties on: ....

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For the Tribunal Office