Case Numbers: 2301176/2018, 2301178/2018, 2301180/2018, 2301182/2018 & 2301186/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS sitting alone**

BETWEEN:

Mr S O'Eachtiarna
Mr P Szymonik
Mr K Grundy
Ms S Bartczak
Mr P Weber

Claimants

and

City Sprint (UK) Ltd

Respondent

ON: **25 February - 5 March 2020**
4 & 13 May 2020

Appearances:
For the Claimants: **Mr R Allen QC and Ms S Fraser-Butlin**
For the Respondent: **Mr M Sethi QC**

RESERVED LIABILITY JUDGMENT

1. The claimants were workers for the periods of their engagements up to and including 11 November 2017.

2. The claimants were workers for the periods of their engagements from and including 12 November 2017.

3. A preliminary case management hearing (video) will take place on **13 October 2020** at **10am** to discuss arrangements for a remedy hearing (and for the disposal of the remaining claims). A separate notice of hearing will be sent in due course.

REASONS

Claims and Issues

1. In summary the claimants say that at all material times they were workers and complain that they have not been paid the holiday pay to which they were entitled pursuant to the Working Time Regulations 1998 ('the 1998 Regulations'). The respondent says that either they were not workers or, even in respect of periods where it is conceded that they were workers, they are not so entitled.

2. In more detail, at a preliminary hearing in January 2019, EJ Baron identified and agreed the issues with the parties as follows:

> '1. Are the Claimants workers for the purposes of regulation 2 of the Working Time Regulations 1998 and/or the Working Time directive and cognate legislation, and the national minimum wage legislation?
>
> 2. Have they held the status of worker continuously since the commencement of their engagement? The Respondent maintains that there was change in their terms of engagement with effect from 12 November 2017. The Claimants disagree with that contention.
>
> 3. Are the Claimants entitled to holiday pay dating back to the commencement of their engagement?
>
> a. The Respondent argues that:
>
> i. Case C-214/16 King v The Sash Window Workshop Ltd is not applicable between two private parties.
>
> ii. The Claimants have received rolled up holiday pay since 12 November 2017.
>
> b. The Claimants seek a declaration of each Claimant's rights. The Claimants contend that:
>
> i. King is applicable in this litigation in light of the Working Time Directive and/or Article 31(2) Charter of Fundamental Rights, see Case C-684/16 Max-Planck-Gesellschaft zur Forderung der Wissenschaften e.V v Shimizu ECLI:EU:C:2018:874)
>
> ii Rolled up holiday pay is impermissible: C-131/04 Robinson-Steele v R D Retail Services Ltd and in any event, there have been no additional payments that are transparent and comprehensible.
>
> 4. Are the Claimants entitled to compensation in relation to the failure to pay for holidays taken and or for the failure to allow Claimants to take paid annual leave, within Regulation 30 Working Time Regulations 1998?
>
> 5. Is the following Claimant entitled to the National Minimum Wage:
> - William Gadd'

3. At a further preliminary hearing almost exactly a year later, EJ (now REJ) Freer recorded that six lead cases had been selected (although no rule 36 order was formally made). There are now five lead cases as appear in the heading to this Judgment which do not include Mr Gadd and therefore issue 5 above falls away at this stage. In this Judgment reference to 'the claimants' is to these five lead claimants.

4. In response to an application by the respondent for a stay to await the outcome of the referral to the CJEU in Yodel - see below - Judge Freer ordered that those cases would proceed as listed so that the Tribunal could, at least, determine the relevant facts and the questions contained in paragraphs 2 to 6 of the referral to the CJEU. He anticipated that having heard the evidence and submissions, the Tribunal would then decide whether it feels able to make a decision on the facts as found or to wait for the outcome of the referral.

5. On day one of this Hearing, this approach was discussed with Counsel and then revisited at the end of day eight where it was agreed that written submissions on fact and law on issues 1-3 above (4 being a question of quantum) would be submitted in advance of oral submissions. Those issues have conveniently been referred to as the worker question (issue 1), the continuity question (issue 2) and the entitlement question (issue 3).

6. On 22 April 2020 an Order on the Yodel referral was handed down by the CJEU and accordingly the issue of a stay or otherwise fell away. The oral submissions were slightly delayed to 13 May as the original attempt to hear them on 4 May by video (as a result of the interruption to in person hearings caused by the Covid 19 pandemic) failed due to technological issues. Even on 13 May we were beset by further such issues and, with the agreement of the parties, had to conclude the last hour or so of the hearing by telephone only. This was clearly far from ideal but I am satisfied that I was able to understand fully the parties' submissions and each had a full opportunity to put their position. I appreciate the flexibility and perseverance of all those involved on 13 May.

Background & Preliminary Matters

7. In 2016 Max Dewhurst, a cycle courier with the respondent, brought a claim in the London Central Employment Tribunal claiming worker status and an entitlement to holiday pay. The claim was heard in November of that year by EJ (now REJ) Wade and succeeded. Judgment and reasons were promulgated on 5 January 2017 ('the Dewhurst Judgment').

8. Although the respondent lodged an appeal against that decision, it was withdrawn the day after all the respondent's cycle couriers agreed to terms of a new tender document with effect from 12 November 2017 (the November contract).

9. These claims were lodged on 6 April 2018. On 24 January 2020 the respondent conceded 'for the purposes of these claims and this litigation only that… [the] claimants in this claim were workers … up to the point of the change in tender terms in November 2017' i.e. pre-12 November 2017 but no concession was made for individual liability or quantum.

10. Accordingly there are two parts to these claims. First, the claim for holiday pay for the period pre-12 November 2017 for which the respondent has conceded worker status but has not conceded entitlement and second, the same claim for the period 12 November 2017 to 6 April 2018 referred to in this Judgment as 'the relevant period' (although events outside of that period may be probative).

11. In short the respondent says that the terms of the November contract defeat the claims for holiday pay from 12 November 2017 onwards despite the lack of significant change in operational practices. Because of that position, the parties were unable to agree that I could simply adopt any parts of the findings of fact from the Dewhurst Judgment. In equally short terms the claimants say that the very fact that there has been no change on the ground means that the same factors apply as were discussed in the Dewhurst Judgment and therefore the claimants are workers with an entitlement to holiday pay. That approach however does not recognise that Max Dewhurst's role was, at least in part, as a medical courier , which none of the claimants were, and therefore was different in some significant ways in relation to ID requirements, training and equipment.

Evidence

12. There were significant areas of factual dispute between the parties and a substantial bundle of documents comprising six lever arch files. I read those parts referred to in the witness statements or to which I was expressly taken. As happens too often - especially in a case were all parties have been professionally represented throughout - there were significant last-minute introductions of relevant documents by both sides throughout the Hearing which delayed matters.

13. I read and heard evidence from each of the claimants. Their written statements were in almost identical terms. There were at times significant departures from that written evidence in the claimants' oral evidence. I formed the view that, with the exception of Ms Bartczak, the claimants were not always careful about being accurate. Further, the written evidence had a lack of specificity in some respects.

14. For the respondent I heard from Mr S Baker (Head of Compliance) and Mr K Davis (Operations Supervisor) both of whom had signed a principal and supplementary witness statement. Mr Baker is responsible for compliance with both the respondent's internal rules and the external rules and regulations to which it is subject. He reports to the Finance Director. Mr Baker struck me as a careful and credible witness. Mr Davis supervises the two other cycle fleet controllers and does a certain amount of controller work

himself. He is in the Operations management line. Mr Davis was, on occasion, perhaps too careful in his evidence although I do not agree with Mr Allen's description of him as 'truculent'.

15. There was a dispute between the parties as to whether the claimants had been ordered or had undertaken to provide further particulars. Ms Fraser Butlin had been present at the relevant hearing where this was discussed and was able to assist me in understanding the procedural history. I am satisfied that there was no such order or undertaking. A request by the respondent for information on 5 June 2019 was discussed at the preliminary hearing on 15 January 2020 before Judge Freer. Ms Fraser Butlin at that hearing said that the information sought would appear in the witness statements which were then ordered to be exchanged by 20 January 2020. The order provided that having considered those statements the respondent would then, by 27 January 2020, inform the claimants whether or not it still required a response to the request of 5 June 2019 and if so, that would be provided by the claimants by 3 February 2020 with provision for supplemental witness statements from the respondent thereafter. No such request was made by the respondent although supplemental statements were still served as described above.

16. Notwithstanding this finding, I do agree with the respondent that there is a lack of detail in the claimants' witness statements and the very relevant information requested by the respondent was not fully, or even in some respects, substantially provided to them and is not therefore before me. My decision of course can only be based on the evidence as presented.

Submissions

17. I had the benefit of receiving detailed written submissions from both parties, together with copies of numerous authorities, which were supplemented by very helpful, full and timely oral submissions that were able to address the implications of the Yodel Order.

Relevant Law

18. <u>The worker and continuity questions</u>

19. Regulation 2 of the 1998 Regulations provides as follows:

> "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 a 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;

20. In the present case the claimants accept they were not employees but say they were workers pursuant to limb (b) of that definition.

21. There is voluminous case law, including at the highest level, dealing with what limb (b) means in practice (albeit often in the context of the same wording that appears in the Employment Rights Act 1996). The policy reason for the protection being given was summarised in Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667 (approved in Bates van Winkelhof v Clyde & Co LLP and anor [2014] 1 WLR 2047) as:

> '…to extend protection to workers who are, substantively and economically, in the same position [as employees who are in a subordinate and dependent position vis-à-vis their employers]…the essence of the intended distinction …[is] between…workers whose degree of dependence is essentially the same as that of employees and…contractors who have a sufficiently arm's-length and independent position to be treated as …able to look after themselves…'

22. But as Lady Hale also said in Bates (referred to in more detail below), there is no substitute for applying the words of the statute. There are three parts to that statutory definition.

23. First, the contract. In the present case there was an express written contract - the November contract - which the respondent says properly recorded the terms of the agreement reached and the claimants say did not. The correct approach to resolving that disagreement, in the context of contracts for works and services, was set out by the Supreme Court in Autoclenz Ltd v Belcher & ors [2011] ICR 1157 (with useful subsequent commentary from the Court of Appeal in Uber BV v Aslam [2019] ICR 85) which I summarise as follows:
    23.1. The essential question is what were the true terms of the agreement at the time it was concluded.
    23.2. Answering that question will require an examination of all the relevant evidence, including the written terms, and a focus on the reality of the situation.
    23.3. Tribunals must be 'realistic and worldly wise', take into account to the relative bargaining power of the parties and recognise that there may be several reasons why written terms do not accurately reflect what the parties actually agreed and/or the reality of the relationship.
    23.4. However, if written terms do genuinely reflect what might reasonably have been expected to occur, the fact that rights conferred have not actually been exercised, will not render the right meaningless. Further, Tribunals do not have a free hand to disregard written contractual terms consistent with how the parties worked in practice but which it regards as unfairly disadvantageous and which might not have been agreed if the parties had been in an equal bargaining position.

24. The second requirement of limb (b) is an undertaking by the individual to do work or perform services personally. In Bates, Lady Hale discussed the various ways the EAT have attempted to capture the essential distinction between personal performance and otherwise by reference to different

concepts - integration, subordination, dominant purpose etc - and agreed that there is not:

'a single key to unlock the words of the statute in every case'

and

'there is no magic test other than the words of the statute themselves'.

25. Mr Sethi says that in this analysis Lady Hale ultimately rejected those various tests. Mr Allen says that that is simply wrong and that her conclusion was that although there is no one magic test, all the various tests are still potentially relevant. In particular, he says, it remains valid to look at the extent of integration of an individual into the other party's business. I agree with Mr Allen's interpretation.

26. I was also referred to the Court of Appeal and Supreme Court Judgments in Pimlico Plumbers Ltd v Smith, [2017] ICR 657 and [2018] ICR 1511 respectively.

27. In the Court of Appeal Sir Terence Etherton MR summarised the applicable principles as to the requirement for personal performance, having already said that the issue of personal performance turns entirely on the contractual terms. His first principle was that an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute may or may not be inconsistent with personal performance depending upon the conditionality. He then said, by way of example, that a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work will, subject to any exceptional facts, be inconsistent with personal performance.

28. The Supreme Court upheld the Court of Appeal Judgment without specifically commenting on those findings by Sir Terence Etherton. Lord Wilson, however, when discussing where the boundaries lie between the right to substitute and personal performance, concluded that the question becomes whether the right to substitute was inconsistent with an obligation of personal performance. In the context of the facts of that case (where there was no express right to appoint a substitute in the relevant contract although there was in practice a limited, fettered facility to substitute by another Pimlico Plumber operative) Lord Wilson confirmed that the sole test remains the obligation of personal performance but said that there are cases where it can be helpful to assess the right to substitute:

'by reference to whether the dominant feature of the contract remained personal performance'

and

'The tribunal was clearly entitled to hold… that the dominant feature of [the] contracts… was an obligation of personal performance. To the extent that his facility to appoint a

substitute was the product of a contractual right, the limitation of it was significant: the substitute had to come from the ranks of Pimlico operatives… It was the converse of the situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done.'

29. The third part of limb (b) concerns the status of the party for whom the work is done or services are performed. Are they, by virtue of the contract, a client or customer of any profession or business undertaking of the individual?

30. Again we are in Lady Hale's territory of there being no magic test. It is clear from the case law, and reiterated by the Supreme Court in Pimlico Plumbers, that the answer lies in an analysis of all the relevant factors of the case which can include control, responsibility for provision of equipment, financial risk/ opportunity for reward, how the individual describes and organises themselves, if they are free to and do market their services to the world, whether they are paid when not working, subordination, freedom to reject offer of work and integration.

31. Yodel: I also had the benefit of the CJEU Order in Yodel Delivery Network Ltd dated 22 April 2020 following the referral to it by Watford ET in a case which has a very similar factual basis to this case.

32. The effect of the operative part of that Order is that where a person is afforded discretion:
    32.1. to use subcontractors or substitutes to perform the service which he has undertaken to provide;
    32.2. to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
    32.3. to provide his services to any third party, including direct competitors of the putative employer, and
    32.4. to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,

    he will not be classified as a worker provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of the relationship of subordination between that person and his putative employer. It is for the domestic court taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify his professional status.

33. I agree with Mr Allen that this Order does not add anything particularly new to what we already know from the domestic case law summarised above as to how to approach the question.

34. If an individual is found to be a worker it must also be established whether this was in the course of an over-arching relationship with the respondent or limited to specific engagements.

35. The entitlement question i.e. if/when they were workers, are the claimants entitled to holiday pay dating back to the commencement of their engagement? If so, have they validly received rolled-up holiday pay since 12 November 2017?

36. It is clear, following the CJEU decision in King v Sash Windows Workshop Ltd [2018] ICR 693, that where a worker has not taken holiday to which he or she is entitled because the other party has refused to pay holiday pay, they can carry over and accumulate that holiday. On termination a right to payment in lieu crystallises.

37. Whether that principle is applicable between two private parties was in dispute in the present case. The respondent's position - which Mr Sethi himself said was 'controversial' - was that the otherwise clear finding in Max-Planck-Gesellschaft zur Forerung der Wissenschaffen e.V v Shimiziu [2019] 1 CMLR 1233 CJEU, that it is so applicable is wrong because the relevant right (to paid holiday) is based on the Charter of Fundamental Rights of the European Union and Protocol 30 to the Treaty of Lisbon 2007 limits the applicability of Charter rights to the UK. (The respondent also had an argument based on the effect of the European Union (Withdrawal) Act 2018 but conceded that the relevant date for that purpose was in fact 31 December 2020 and therefore not relevant to this case. In any event, I agree with the claimants' case that there is nothing about the Withdrawal Act to indicate it has any retrospective effect.)

38. The claimants' argument is vehemently the other way. Mr Allen relies on the combined effect of Stadt Wuppertal v Bauer [2019] IRLR 148 CJEU, CCOO v Deutsche Bank SAE [2020] ICR 48 CJEU and Innospec Ltd v Walker [2017] UKSC 47 as well as the terms of the Charter (article 31) and the Protocol (articles 1 & 2) to show that the Charter simply affirmed the relevant fundamental rights and the right to rely on them horizontally is part of our domestic law.

39. I agree with and adopt Mr Allen's analysis. (Mr Allen did concede, in the course of Mr Sethi's submissions that the claimants' arguments on this point could not apply to the rights continued in reg 13A of the 1998 Regulations.)

40. A consequence of that finding is that there is no issue to be resolved regarding whether the claims were submitted in time as even if the respondent is right about the claimants' status from 12 November 2017, the last date of the act complained of had to be 11 November 2017 for the claims to be in time, which it was.

41. As for rolled-up holiday pay, Robinson-Steele v RD Retail Services Ltd [2006] ICR 932, confirmed that previous staggered part payments can be set off against specific holiday pay provided that those payments were made transparently and comprehensively. Further, in Lyddon v Englefield Brickwork Ltd [2007] ICR 1006, the need for a consensual agreement identifying a specific sum properly attributable to periods of holiday was identified.

Findings of Fact

42. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

43. The Respondent

44. The respondent is a national same-day courier business. In London it operates a cycle courier fleet of about 60 (including at least one cargo bike) and 90-100 motorbikes and 350 vans. For these purposes I accept Mr Baker's definition of 'fleet' as those couriers who on any given day or time are providing their services to the respondent.

45. The respondent provides courier services to a range of clients. Some are on an ad hoc, one-off basis but for some it is an ongoing arrangement reflected in detailed agreements. Examples of the respondent's agreements with Mitie, Apple and Bloomberg were dealt with in the evidence. It is apparent that the terms of those agreements may well mean that the respondent would have to know in advance the name of the individual courier delivering to that client on any occasion and that courier may have to carry ID.

46. On the part of its website aimed at prospective couriers the respondent refers from time to time to 'our fleet' and 'our couriers' but also expressly to the fact they are self-employed. In other parts of the website aimed at prospective clients in London the respondent again refers to 'our professional couriers' as well as statements about the recruitment process and the equipment issued to couriers. Some of those statements had been varied by the time of the relevant period. In a further, presumably internal, part of the website the respondent refers to the 'CitySprint team'. In any event I do not find any of the statements on the website that directly relate to couriers to be more than 'puff' and are not helpful in determining their status.

47. Similarly, whilst there are also references on the website to the services offered by the respondent to clients and the corresponding service standards, they are not helpful in determining status. The claimants' argument is that as the respondent offers exacting delivery time commitments to its clients the controllers would put pressure on and control the couriers to meet those standards. Mr Baker said that he was shocked when he read some of the statements that appear on the website as to service standards as they are 'out of step with practice' and he was not sure that controllers would be working towards them. I am not persuaded that statements about service standards on a website, which would of course be subject to detailed terms and conditions, are sufficient to make the claimants' argument in this respect.

48. The cycle courier role in general

49. During the relevant period the cycle courier fleet and work were generally organised as follows.

50. Clients of the respondent book their jobs (i.e. a delivery) through the customer services team. There are different levels of urgency with a variable fee structure attached. A docket is created with all the relevant details including any deadlines. This is sent electronically to the controllers.

51. In the control office there is a team of 3 controllers (including Mr Davis) who between them cover the office from 8am - 7pm. They are paid a basic salary and are not financially incentivised to ensure any specific operational outcomes. The controller sits in front of two screens. One shows incoming jobs in order of priority from customer services and the other shows the fleet mapper programme which gives the location of each active courier and whether they are 'empty' i.e. available to receive a new job. Depending on the number of jobs in play - up to 250 per day - this can be a very intense and sometimes stressful role matching resource to demand with the extra complications of deadlines and other variables. It requires the controllers to think and plan strategically and anticipate the demands of service.

52. There are recognised usual peak times for client demand e.g. Fridays, run up to holidays, budget day. Equally there will be quieter days when the couriers on circuit do not receive as many jobs as they would like. The number of couriers on circuit will also be affected by factors such as the weather, day of the week, holidays, large sporting events etc. There is therefore room for individual couriers to make their own decision about whether to go on circuit at a particular time to maximise their earnings notwithstanding that most rates are in effect fixed.

53. The controller will seek to match the incoming jobs with empty couriers as effectively as possible. Each courier carries a City Trakker - a handheld device which transmits information between them and the controllers in real time. It enables the controller to see where the courier is and if they are empty. When a courier is ready to receive work on any day they will indicate that via their City Trakker; they may also radio into the office. Basic details of a job (from where to where) are sent via City Trakker initially to just one courier who has 8 minutes to accept it before it bounces back to be reallocated.

54. The respondent's 19-page City Trakker manual with multiple screen shots and detailed instructions makes it clear that once a courier clicks on the job to see more details, the job has been accepted. It says:

    'The Controller now believes that you the courier will be making your way to the collection address to collect a package'

    The claimants say that references within this manual to the courier mean only the individual to whom the City Trakker has been issued. Mr Baker's

interpretation, with which I agree, was that it could also mean any substitute of the courier using his/her City Trakker.

55. As Mr Baker also accepted the language expressly used in the manual is of job allocation and that most jobs should be done 'ASAP'. It also expects the courier to follow any order set by the controller and says when they take a break couriers should inform a controller when they are back. Mr Baker said this was a 'guide' but overall the manual does not read as a guide but as an instruction.

56. Under 'Refusing a job' the manual states:

> 'If you do not wish to undertake a job that has been sent to you (sic) Citytrakker please **contact the Control immediately** and inform of your intentions. Do not double touch on the red job as you'll be sending a false update to the Controller. If you've **unintentionally accepted** a new job please contact the control and make sure it is understood you do not wish to undertake the job.' (emphasis as original)

57. Mr Davis's evidence was that if a courier is not going to accept a job they can ignore it or contact the controller. This part of the manual shows however that there is a default assumption of acceptance and if that is incorrect, the courier must inform the controller.

58. Once a job is accepted full details become visible to the courier. If there are insufficient cycle couriers available or willing to take the current jobs the controllers can either negotiate a higher fee with a courier or pass it over to the motorcycle courier team who are controlled separately.

59. Once a courier completes their jobs, they will again show as empty. When they have finished for the day, they will log out of City Trakker. Some may also call the office to let them know they have finished but this is not recorded as log on times are (see below). Mr Baker acknowledged that the controllers ask (but he says do not require) couriers to inform them when they are finished.

60. Ways of working on the ground by cycle couriers have not generally changed following the introduction of the new contract in November 2017 (save for some specific concessions made by the claimants as noted below). In January/February 2018 the respondent ceased its dedicated healthcare work for which special training was required as well as additional instruction and direction (including a requirement for uniform and ID to which I return below).

61. Each courier supplies their own cycle and helmet (if worn, it is not compulsory), is allocated a call sign and an informal nickname e.g. P128 - Thrasher (aka Mr O'Eachtiarna). They are provided with an ID badge and in return for paying an optional weekly fee of £10 they also receive a courier pack which includes uniform, a radio and a City Trakker. If they choose not to take the courier pack they pay a weekly fee of £24 to rent a City Trakker. Fairly obviously, the claimants all chose to pay for and receive the courier pack.

62. In the office there is a blue clipboard and a red book. Both have been used in the office from before the relevant period and remain in use. On the clipboard there is a pre-printed weekly sheet showing each courier by both their call sign and nickname. The controller on the early shift completes for each courier on each day the time upon which they log on ready for work (this contradicted Mr Baker's written evidence that the respondent does not keep a record of when they log on or off). If they do not log on their entry will either be marked 'H' to show they are on notified holiday, 'sick', 'inj'(ured) or '-' if they have not been in contact at all. A notes column also sometimes has information about when a courier is expected back from an absence. Mr Davis said this information was recorded to aid communication between the controllers and couriers, that it was a historical 'force of habit' and that if the controllers knew an individual was off sick or on holiday they would not call to see if they wanted to work.

63. In the red book a weekly record is kept of which couriers have signed in each day and at what time, together with the number of jobs completed on each day individually and collectively. This allows the controllers to monitor work levels and flex the number of riders needed over a period of time.

64. Payment of couriers and other administrative tasks are managed through an online system called iFleet. They are paid by weekly bank transfer according to the number and type of jobs completed all by reference to an invoice generated by the respondent. In the relevant period (and before and since), couriers had the option of producing their own invoices. None of the claimants did however and in practice, given the number of possible variables in how much each individual job will pay, it would not be practicable for any cycle courier to self-invoice. Although there is a price list per type of job it is clear that it does not contain all the relevant information in order to be able to accurately price an individual job.

65. <u>Working Pattern of each Claimant</u>

66. In practice all the claimants have chosen to work hours and days that suit them; some for many years. The variations described below for each claimant were all at their own choosing.

67. Ms Bartczak has, apart from a period of approximately one year in 2008/2009 when she was employed by the respondent and a period of maternity absence in 2015/2016, been a cycle courier for the respondent since 2001 working at least 4 days per week. In the relevant period she was routinely working the main circuit from 8:45am to 5:30pm on Monday, Tuesday, Thursday and Friday but has occasionally covered fixed contracts for short periods.

68. Mr O'Eachtiarna has also been a cycle courier for a long time. He started in 1999 and has been with the respondent from around 2000. In the relevant period he routinely worked on the main circuit from 9am to 7pm Monday to Friday. In previous years his working pattern had varied with him working fewer Mondays and Tuesdays for a variety of reasons (all initiated by him

rather than the respondent). More recently he has reduced his regular hours with the respondent.

69. Mr Szymonik started working with the respondent in February 2015. His working pattern is less regular and has varied with a combination of fixed contract and main circuit work. He confirmed that he chooses a day of the week on which to rest.

70. Mr Grundy has worked with the respondent since January 2002 with a 3-month absence in 2008. Until March 2016 he worked predominantly on the main circuit but then took on a fixed contract. His written evidence was that this required his attendance at the client's office from 1.30pm to 4.30pm but accepted in his oral evidence that he was not in fact required there before 3pm and could go on circuit before then but chose not to. His usual days of attendance in the relevant period were Tuesday-Friday; they have since changed. He is paid a flat daily rate for that contract and is based at the client's office. From the client's point of view any courier could cover the work (subject to its terms - see below) and another courier covers the contract on Mr Grundy's non-working days. If he is not intending to attend on his usual day he will give notice to the respondent so that they can arrange cover. Mr Grundy also, in the relevant period, worked on the main circuit from time to time prior to 1.30pm.

71. Mr Weber worked with the respondent from early 2014 to 5 October 2018 initially as a pushbike cycle courier but in December 2014 moved to a cargo bike. His working hours then significantly reduced. Since 2015 he did not have a regular working pattern. From October 2015 to April 2016 and in the second half of 2016 he did not work at all, at least in part due to health reasons. His attendance in 2017 and 2018 was also low, approximately 20-30%.

72. All the claimants were taxed on a self-employed basis and, although the disclosure of tax records was incomplete, they all appear to have declared typical deductions of the self-employed (business expenses etc).

73. <u>Introduction of the 2017 contract</u>

74. On 1 November 2017 Mr Baker wrote to all cycle couriers in a document headed 'Revised cycle courier tender'. It said:

> 'We are updating and simplifying our self-employed cycle courier tender terms using plain English. This is to clarify our respective positions, paying particular emphasis to the degree of flexibility and lack of control and direction that self-employed cycle couriers enjoy.
>
> The new cycle courier tender on iFleet is an evolution of the existing tender. In many ways it simplifies and reiterates the existing arrangements, but it replaces the existing tender and overrides anything that you may have understood before from that document or its operation in practice.
>
> We would encourage you to please read it very carefully as it will come into effect on 12th November 2017. If you wish to continue to provide services to City Sprint after 12th November 2017, you must have migrated over to the new tender as all existing tenders will

terminate. This means you will be unable to tender your services to City Sprint on the existing tender from 12th November 2017 onward.

Should you have any questions about the new tender agreement then please do not hesitate to contact Simon Baker on … or note your comments on the document. It is important to us that you are satisfied with the new tender so please do flag any issues early before we go live.'

75. I note that the respondent continued to use the terminology of 'tender' despite the fact that this clearly was not any form of commercially recognisable tender process. This was, as accepted by Mr Baker, a take it or leave it situation. If the couriers wanted to continue to deliver for the respondent, they had to accept this change in terms. As Ms Bartczak said when it was put to her that signing the new contract was her free choice - she had a 'free choice to sign the contract to keep the job'.

76. All the claimants received Mr Baker's letter. Some chose to pay more attention to it than others but its terms are clear. Max Dewhurst did reply to Mr Baker and in the exchange that followed made it clear that they believed there was no genuine negotiation, the contract did not reflect reality and was a charade.

77. The new contract, plainly drafted by lawyers, was made available online to all the cycle couriers. It appeared in full within a scrollable window. Below that window, headed 'Questionnaire', was a series of questions that had to be answered in the affirmative, together with some security questions and an electronic signature. Some of those questions were clearly only relevant to non-cycle couriers. Under the signature box was the statement:

'By pressing 'Agree' I confirm that I have read and agree to be bound by the terms and conditions of this Agreement.'

78. The questions that had to be ticked included:

'I am engaged on a self-employed basis and have to account for my own tax, National Insurance and VAT if applicable

I am under no obligation to provide my services and City Sprint UK Ltd is under no obligation to give me any work at any time

I can send a substitute in my place to do my work, so long as they can do the same work I have agreed to do

If I do not work, I will not get paid. As a self-employed contractor I will not be entitled to holiday, sick, maternity payments or any employee benefits.'

79. On Friday 10 November, those cycle couriers that had not already signed, were chased either by text or email and reminded that if they did not sign, they would not be able to provide their services to the respondent from 12 November. They were also denied access to iFleet until they had signed. All the claimants did sign before the relevant cut off point; again, some read the agreement in detail and others not. It is clear however that they all had the opportunity to do so and the agreement itself was written in relatively

plain English that they could readily understand. It was set out (albeit on a screen) in an accessible way. Ultimately all the claimants did agree to the new terms and had the freedom to accept or reject them, notwithstanding that the balance of bargaining power lay very heavily in favour of the respondent. Rejection of course would have meant having to find new work elsewhere and therefore that choice was not a palatable one but was a choice nonetheless.

80. There was no evidence offered of any training given to controllers about the change in the contractual terms from November 2017 although Mr Davis confirmed that he had seen an email with the new terms which he was asked to read and give any comment. He said there was no comment from the controllers and that they agreed with it. It certainly does not seem that there was any effort by the respondent to communicate the change in any sort of focussed way. It seems unlikely therefore that there would have been any particular change by the controllers in their approach before and after the change.

81. Key terms in the 2017 contract and corresponding practice:

82. Preamble

83. This section contains the following statement:

> 'Once accepted, these terms will form the whole of the contract between us. They will replace entirely any earlier discussions, instructions, contracts, understandings, representations, expectations, contracts or commitments by either you or CitySprint in relation to your engagement or any prior services you have provided to us. All of those will cease to apply on the start of this contract.
>
> For the purposes of these terms, a "Job" is the task of making a cycle courier delivery from Point A to Point B within any applicable timescale and obtaining the necessary evidence that this task has been completed. You will know the collection and delivery points and any relevant deadlines and you can ask the Operations team for details of the fee we are offering for each job where this is not stated in the other terms before you choose whether to accept it or not.'

84. The respondent acknowledges that this approach was deliberate to ensure that any - as they saw them - misunderstandings of the couriers that were reflected in the Dewhurst Judgment, were corrected.

85. Status

86. Clause 1 sets out in terms that provision of services as a cycle courier will be as a self-employed person and not as an employee or worker and as such they would not be entitled to various statutory claims including holiday pay and would be responsible for their own tax affairs.

87. Obligations about work & co-ordination and support

88. Clause 2 sets out the obligations about work and states:

'It is to our joint advantage that CitySprint keeps the cycle couriers contracted to CitySprint busy enough to generate the earnings they want. How many jobs we can offer you will depend on where, when, how often and how you offer your services to us… You should rely on your own discretion and experience to tell you when and where most jobs are likely to arise. Please note that:-

(a) We cannot and do not commit to offer you any minimum number of jobs; and

(b) You are not obliged to accept any Job or minimum number of Jobs which we offer to you, however encouraging or pressing the Operations team may be. You can reject any job which is offered to you at any time and for any reason.

The Operations team has no authority to take any action, whether denial of work or otherwise, in response to your rejecting Jobs or to your not working fixed or regular hours except where you have specifically undertaken to do so…' (emphasis as in original)

89. A key issue of fact between the parties is what was the controller doing when he (they were all male at the relevant times) sent a job via City Trakker to a courier. Was he, as the contract says, 'offering' it to them and they are free to refuse with no repercussions (the respondent's case)? Or was he 'allocating' it and if they refused they risked that controller penalising them in some way (the claimant's case)?

90. With the exception of Mr Grundy the evidence of all the claimants was very substantially the same in respect of the process for accepting a job. They all acknowledged that it was possible in theory to refuse a job for no specific reason but said that controllers would then not allocate them any jobs or allocate low paid jobs. No compelling evidence was given of any examples of this happening in practice and indeed Mr Szymonik acknowledged, when asked if Mr Davis would make life difficult for him if he turned down work, that the answer after November 2017 was no.

91. The claimants all acknowledged that when they were on the circuit they wanted as many jobs as possible in order to maximise their earnings. That makes perfect sense. Equally it is clear that there was some pressure on controllers to meet client demand by getting couriers to pick up jobs as quickly as possible. There was therefore a mutual interest in jobs being done as quickly as possible by the most convenient courier available.

92. As for the consequence of rejection, it is clear that there was no formal or written disciplinary, performance management or grievance process applicable to couriers although there was an escalation process that couriers could use if they felt it necessary.

93. No evidence was provided by any of the claimants of work ever being denied to them but, as Mr O'Eachtiarna and Mr Weber pointed out, unless they can see the controllers' screens they do not know if they are being offered their fair share of the work available . Mr O'Eachtiarna also said that he thought the controller did have authority to refuse him work and that if he, Mr O'Eachtiarna, rejected a job he would not be given any more. Mr Szymonik said that despite what the new contract says if the couriers turned down a job the controllers would not give them another one. He had no apparent

basis for making this statement other than that he thought it was 'common sense'. Mr Szymonik also said in his written evidence that in around January 2018 (and therefore within the relevant period) he called in sick and was told 'no problem' but was then called later that day and was 'asked' if he could go in which he agreed to do as he wanted to keep the controller happy. This evidence in itself is inconclusive.

94. Mr Weber's evidence was that he felt under pressure from his controller to work more often otherwise the controller would have to hire more riders and therefore, Mr Weber felt, he would be allocated fewer jobs. He gave an example of when he was working on the cargo bike in early summer 2018 which may not have been strictly in the relevant period but even if not, was very close to it and certainly after introduction of the new contract. He did agree that he had no evidence of him being punished for not rendering his services but also said he had the 'impression' from other couriers that if they do favours for the controllers they receive preferential treatment.

95. All the claimants (except Mr Grundy) also indicated that in practice if the controllers felt that the couriers were unreliable or annoying in some way, there was a risk that they would offer that courier fewer jobs or less well-paid ones.

96. In the absence of any evidence apart from the 'impression' and 'feel' of the claimants of the controllers acting in such a way as opposed to the evidence of Mr Davis that they would not, I find that this was simply assumption or speculation on their part and cannot find it to be a fact. Whilst it seems likely that on occasion controllers may have expressed frustration if a courier did not accept a job, there is insufficient evidence before me to conclude that the relationship between the couriers and the controllers in this respect is other than as described in the November contract i.e. jobs are offered and couriers are free to reject them.

97. The flexibility afforded to cycle couriers in choosing the times that they would work is clearly demonstrated by the different working patterns of each of the claimants descried above which were always at the choice of the individual. In that respect also therefore the contract reflected reality.

98. <u>Working with other people</u>

99. Clause 3 states:

> 'We are happy for you to work with or for anyone else while contracted with City Sprint, even mid-Job provided that this additional work does not affect your performance of the Job for City Sprint. From our perspective you may work at the same time with or for another courier company, yourself or another business doing the same thing or something different. You have no obligation to cycle solely with City Sprint. You may advertise your availability to do work (including cycle courier work) for other people whenever you wish.'

100. None of the claimants have, during the relevant period, worked or sought to work for another courier company (though Mr Szymonik did in early 2019). Some of them have done work for other types of company (e.g. Mr

O'Eachtiarna has worked from time to time in a pub, sometimes regularly) or on their own account (Mr Grundy has had a cat sitting franchise for approximately 8 years on which he works most mornings seven days a week and Mr Weber earnt at least some income in the tax years 2016/17 and 2017/18 from being a cycle mechanic and in 2016/17 from working at heights) but none of them have - during the relevant period - done other work whilst on circuit. Mr Weber had, before November 2017, occasionally delivered salads for another business during his working hours with the respondent (though he logged off from City Trakker to do it and therefore was not on circuit) but found it incompatible and stopped. He had also used his cargo bike to deliver coffee beans for another company but before he logged on with the respondent.

101. The claimants say that working for another company (whether another courier business or not) during their usual working day/hours with the respondent although technically possible under the contract would not be practicable. Particularly in the case of another courier company, they would have to deal with two sets of controllers (both of whom would naturally want them to be available even if not contractually required to be), devices/apps, any uniform/ID requirements and pay two sets of fees. If they are receiving sufficient work from the respondent then it would not make sense for them to do this.

102. That does rather beg the question however of whether it would be worthwhile for them to tackle these challenges if they were not receiving sufficient work from the respondent (as unfortunately I imagine has been the case in recent months). The November contract would certainly allow them the possibility of exploring working for another company at the same time as the respondent which they acknowledged.

103. During the relevant period, however, the practical difficulties of a cycle courier working simultaneously for two courier companies leads me to conclude that the chances of the theoretical possibility of clause 3 operating in such a way were in reality almost nil. It could however work in practice with respect to a non-courier job e.g. if Mr Grundy had to do an emergency cat visit he could do that whilst still logged on and take the chance of missing out on a job or perhaps being offered one that was en route to the cat. It is very clear that couriers could and did work for other businesses (whether their own or others) whilst not logged on. In that respect also therefore the contract reflected reality.

104. <u>Service hours</u>

105. Clause 4 states:

'(a) You may not want to work on a particular day or at a particular time. That is your choice. We do not normally impose any maximum or minimum number of hours per day nor any minimum or fixed days in a week. We do not require any set start or finish times and the hours you offer us are up to you…

(b) For own planning purposes we ask that you tell us if you are discontinuing offering your services for any period, but this is information only - you do not need our consent to stop at any time.

(c) The exception to this rule is where you have agreed to provide your services to us on a time basis, usually a day and usually to meet the Job needs of a particular City Sprint client. In those circumstances you are agreeing to make yourself (or a substitute) available to our client for the whole of that period and then you would not have the same flexibility of hours for that period as you would normally have.'

106. Mr Baker acknowledged that because of the pressures on the controllers, they would regularly ask couriers what their status was, their intentions for the rest of the day and when they finished or would finish. This he says was simply so that jobs can be offered more efficiently and there was no obligation on the couriers to provide the information and if they did not, no sanction was imposed. Mr Baker also said that couriers could choose the hours and days that they work, what sort of trips they wanted and how long to rest.

107. The claimants' evidence varied on this. The written evidence of Ms Bartczak, Mr O'Eachtiarna and Mr Szymonik all contained statements that they were required to inform the controllers in advance if they wanted time off and that they must telephone in if they would be sick or late. The records kept on the clipboard and in the red book support that. Mr O'Eachtiarna and Mr Szymonik also said that there was an expectation that they would work at least 9 hours per day and, for Mr O'Eachtiarna, 5 days per week (unless a good reason not to). Mr Szymonik also said that if he started late there was an expectation that he would recover the time lost to work a full shift. They both said that if they just logged off at the end of the day the controller would be annoyed. All the claimants (apart from Mr Grundy) indicated that at the end of their working period each day they would either 'request to go home', ask for permission to end shift, confirm that they 'could' go home or would be 'let' home.

108. In their oral evidence however the claimants to varying degrees changed their position. Ms Bartczak accepted that in the relevant period it was not necessary in practice to obtain consent to stop at any time. Mr O'Eachtiarna accepted that he had never been told how many hours to work, and further that he could, within reason, come and go as he pleased. He also said, with regard to finishing for the day, that it was common courtesy to inform the controllers that he was finishing and that he would say 'do you mind if I shoot off' but that occasionally they would say 'I've got a job if you want it.' Mr Szymonik acknowledged that he had noticed a difference after November 2017 in that there was not much discussion on the radio with controllers about the hours couriers were working and that the expectation he had referred to on recovering time to make up a shift was not there anymore. He also clarified that from November 2017 he did not have to seek permission to finish at the end of the day, but rather was checking if there were any new jobs.

109. Mr Grundy is in a different position. Because he had an allocated contractual role his core working hours and days were regular. His written evidence was that if he was unable to work on one of those days he needed to inform the controller so that they could arrange cover, he needed to book any time off in advance and if he wanted to go on circuit before his regular job at 1.30 he had to call and ask a controller if that was allowed. In his oral evidence, Mr Grundy accepted that he did not need to ask permission to go on circuit earlier but said he would call out of courtesy and that generally he did not log on before 1.30 because he is engaged with his cat sitting business. He also said that in his opinion he had to ask the controllers when he wanted to change his working days but acknowledged that in fact when he changed from Tuesday to Monday, he told the controller that that was what he wanted and another courier was allocated to cover Tuesdays. He also gave oral evidence about what he had heard controllers say via the radio to other couriers about their working hours but his evidence was not compelling either in what was said or when.

110. Overall I find that the terms of clause 4 accurately reflect the reality of practice.

111. <u>Using others to do Jobs</u>

112. Clause 5 states:

> 'If you want to share your bike, your City Trakker or your Jobs with someone else then you can do so in line with the following:
>
> (a) we need to know who you want to use for this purpose and be happy that, like you, they meet our minimum standards for the right to work in the UK, a clean relevant criminal record, being covered by suitable insurances… and - if they are to do healthcare Jobs or other Jobs with specialist equipment or training work on your behalf - the other person has received the necessary equipment and health and safety training.
>
> (b) therefore anyone you are likely to want to use as your substitute should be pre-registered with City Sprint as soon as possible through iFleet. So long as you are confident in their ability and willing to take proper responsibility for them, that person (or people) need not be another courier engaged for City Sprint, or even a courier at all. You can have as many others set up as substitutes as you wish.
>
> (c) once a person is registered with us as a possible substitute for you, you can have them provide their services to City Sprint in your place whenever you wish, and without notice to us.
>
> (d) when you wish your substitute to provide services in your place, you should give that person your City Trakker … and details of your call sign. We will pay you for any Jobs done by your substitute. It will be your responsibility to pay them for the Jobs which they do for you and to agree what you pay them.
>
> (e) you will be responsible for your substitute's performance of the Jobs they accept or which you give them. If the clients on those Jobs require couriers to wear a City Sprint uniform and/or to carry ID, it is your responsibility to ensure that your substitute has a City Sprint uniform and ID. It is also your responsibility to correct any mistakes made by your substitute and/or make any payments due to City Sprint under paragraph 15 below as a result of your substitute's loss of or damage to any consignment. You will also be

responsible to ensure that your substitute declares their income to HMRC and pays any necessary tax/NI.

(f) if any of the details you register with us for your substitute change at a later date (in particular if he/she acquires a criminal record or loses the right to work in the UK) or if you wish to stop using that person as a substitute then you should please notify us as soon as possible so that we can amend our records.'

Mr Baker agreed with Mr Allen's contention that that clause imposes 12 separate requirements on cycle couriers who may wish to engage a substitute.

113. The questionnaire that the couriers had to answer when accepting the November contract included two specific statements about substitution, namely:

'I can send a substitute in my place to do my work, so long as they can do the same work I have agreed to do.'

and

'If I send a substitute or use a helper, I must pay them myself and no one else but me has any contractual or financial relationship with them.'

114. In around December 2017 a document was prepared by Mr Baker giving further information about the opportunities for substitution with a form attached. Initially that document was a reference document only for the office to use in the event that there were any queries about substitution. It was intended that this would make substitution easier and to address the logistical difficulties that had been argued in the Dewhurst case prevented couriers from using substitutes.

115. The document was different to the contractual position in some important ways.

116. First, it introduced eligibility for a 5% bonus for couriers on any work undertaken by a substitute. To claim the bonus the courier had to:

'simply inform your Service Centre when you are using a substitute.'

117. Second, it introduced on the attachment headed 'Substitution Form' the concept of registered and unregistered substitutes. This document and in particular its layout are not easily understandable. It is also expressly inconsistent with the November contract. The form states that clause 5 of that contract refers to both registered and unregistered substitutes when in fact it does not refer to the latter. This inconsistency stems from the fact that Mr Baker, who drafted the form, had the van courier's contract in mind whereas the form applied to both van and cycle couriers.

118. The form and contract were also inconsistent in that whilst the contract anticipates more than one substitute could be used it also requires couriers to give their City Trakker and call sign to their substitute (implying only one

substitute at a time) whereas the form states - in respect of registered substitutes - that additional City Trakker devices can be issued. In respect of unregistered substitutes it states that ID cards could be provided.

119. The form contained a box which a courier had to fill in with his/her own details in order to be able to use an unregistered substitute. It then talked about registering substitutes who would then be able to do jobs for certain clients who had specific safety and security requirements but did not make it clear how that registration would be effected.

120. Mr Baker accepted that this approach was not compliant with what the respondent tells its clients about vetting their couriers even if 'vetting' simply means knowing the individual's name, address and that they have the right to work in the UK.

121. In short, whilst seeking to make substitution easier, provide useful information and overcome logistical difficulties, the letter and form muddled the position both contractually and practically.

122. It was not until early February 2018 that these documents (or almost identical versions of them) were sent by Mr Baker to the couriers.

123. Notwithstanding these efforts, neither in the relevant period or at any time has any cycle courier used a substitute (not even, as Mr Baker said in his statement, has it been 'rarely used'). He said that that was a product of the work they do rather than any contractual restraint and then gave detailed reasons over 7 sub-paragraphs why that was the case. His own evidence therefore suggests that substitution is simply not practical for cycle couriers in contrast to van couriers who do use substitutes. In addition, Mr Baker accepted that in order to train a potential substitute the cycle courier would in practice need to do so using a City Trakker whether on an actual or dummy job.

124. Each of the claimant's witness statements contained paragraphs regarding substitution that were almost - but not quite - identical. In essence their written evidence was that complying with the contractual position was 'impossible' and that they would not want to use a substitute in any event. They were each cross examined on this topic to varying degrees but again, in essence, each indicated that whilst it may technically be possible to comply with the conditions regarding using a substitute and the objections they had specifically identified in their statements could theoretically be overcome, it was in practice unrealistic and they would not want to. For example, Mr O'Eachtiarna said 'I just don't think in practice I could do it' and Mr Szymonik said 'I feel it wouldn't work' and made the obvious point of why would the substitute not just join the respondent as a courier him/herself. Mr Weber said 'even on paper if could do it, felt it would be mayhem in reality'.

125. The claimant's evidence together with the fact that no cycle courier has ever used a substitute and Mr Baker's own recognition that that is a product

of their work, leads me to conclude that whilst the cycle couriers clearly had the contractual right to use a substitute, it was a theoretical right only and one that was not well thought through (as demonstrated by the December documents) and neither party to the contract seriously expected it to be exercised in practice.

126. Control

127. Under 'Co-ordination and support' clause 6 states:

> 'How you get from pick-up to destination on any Job is up to you. The Operations team may offer advice or guidance on routes if they are aware of roadworks or other reason why you might want to take a particular route or to pick up Jobs in a particular order, but this is by way of suggestion only, not instruction.
>
> Subject to the timely completion of the Jobs you accept, you retain absolute discretion as to the route you take and the order of the drop-offs which you make.'

There was general consensus that the actual route taken is up to the courier and that controllers only give other route information to couriers to assist them in that regard.

128. In general however the claimants' evidence was that when they are given jobs in a certain order they are expected to follow that and are pulled up or over-ridden by the controller if they do not. As Mr Szymonik said the controllers have information that the couriers do not e.g. details about deadlines on specific jobs and where the next jobs will be or are likely to come from. Mr Weber gave an example of controllers instructing couriers to wait at an address for a collection that is not ready whereas the courier may want to press on as he/she has other jobs to complete. The respondent says in these circumstances the controller is merely 'suggesting' what the courier should do. That does not have the ring of truth about it whereas Mr Weber's version does. It is generally to be expected therefore that if the controller suggests an order in which jobs to be done, it makes sense for the courier to follow that order as he or she is more likely to be well placed for those next jobs.

129. Both Mr Baker and Mr Davis's evidence was that this clause operates in practice. Mr Baker also said, when given an example of 3 collections from one building where one is very urgent, that it would still be up to the courier as to which one to collect first. Again, that does not ring true.

130. In clause 18, headed 'If things go wrong', couriers are asked to contact the operations team as soon as possible if anything happens which may prevent prompt completion of any job and that in those circumstances the operations team has authority to advise the courier of the preferred method of resolution but not to instruct him or her in relation to the situation and that the courier is not obliged to comply with the suggested way forward.

131. The claimants' view is of course also supported by the respondent's own City Trakker manual which sets out a standard multi drop process. In terms,

as acknowledged by Mr Baker, this states that the sequence of delivery is stated and if the courier is unsure as to the order to follow they should contact the controller for 'further instruction'.

132. I find that whilst the route to take is a matter for the courier, the order in which jobs are to be done is at times dictated by the controllers and to that extent the contract does not reflect practice on the ground.

133. Other clauses

134. Clause 7(a) states an anticipation that all or most couriers will be experienced in courier work and will not need training in the fundamentals of the task but if the courier has any queries about how any of the systems operate they are to speak to the fleet department or service centre as soon as possible. All the claimants had of course been recruited and trained well before November 2017.

135. Clause 8 (a) states that the starting point for the price per job is available on iFleet but, in effect, that may vary but the fee offered for each particular job is always available on request from the operations team. It also states that no guarantee is offered as to any minimum number or value of jobs which will depend on many factors including supply, demand, physical location, willingness and availability to accept jobs and the speed of job completion.

136. Clause 8(f) repeats the lack of entitlement to holiday pay and pension contributions but also states that the fees paid under the agreement will be deemed to include those entitlements at the minimum statutory rate if at some later stage the courier becomes entitled to either benefit.

137. Clause 9 state that all cycle couriers are required to have public liability and goods in transit insurance to appropriate levels which they may obtain for themselves (and any registered substitute) or can purchase it from the respondent by weekly deduction from fees.

138. Similarly in respect of equipment, at clause 10, the offer is made to provide the City Trakker device for a weekly fee as described above. In reality, given that the City Trakker was the standard method of communication between controllers and couriers at the relevant time, all couriers had to have one (as would any substitute).

139. Clause 10 also provides that there is no obligation to wear or use any respondent branded clothes or vehicle stickers but if couriers do so then they are paid an increased weekly rate. Further, some clients insist on couriers using branded clothes or stickers and therefore if not used the courier is not likely to be offered work for those clients and therefore may have a reduced opportunity for earnings. All couriers, however, are asked to carry their ID at any collection or delivery so that it may be produced if the client demands it. All the claimants confirmed that they always carry their ID.

140. The claimants had varying practice regarding uniforms. All paid the weekly fee for the courier pack and are therefore supplied with uniform and a branded bag but it varied as to whether they consistently and/or fully wore or used it. There was agreement however that in the relevant period they were not required to wear the uniform or use the bag. Mr O'Eachtiarna, Mr Weber and Mr Grundy accepted that any substitute would not be required to wear uniform.

141. Clause 11 deals with the end of the tender and the circumstances in which it will automatically come to an end. It also states that the respondent can decide not to offer any more jobs at any time and similarly the courier can tell them at any time that they no longer wish to offer their services. Certain administrative arrangements are set out in relation to the return of property.

142. Invoicing is dealt with at clause 14 which opens with a statement that as the courier is self-employed the respondent expects him or her to invoice for their services each week in arrears setting out various details including the fee applicable to each job performed and any additional payments or deductions due in relation to equipment/City Trakker. In the alternative the respondent offers to 'self-invoice' for the couriers meaning they will produce each week an automated printout and the final net fee due. The invoices are then made available for review via iFleet. As stated above it would not be practicable for any courier to self-invoice and that difficulty must only be compounded if any of the work has been passed by them to a substitute.

Conclusions

143. The claimants' core argument is that nothing has changed on the ground before and after 12 November 2017 (which Mr Baker accepted), the respondent has conceded worker status before that date and - although not binding - a Tribunal has already found that pre-12 November Max Dewhurst was a worker and therefore worker status logically attaches to the claimants in this case for the relevant period.

144. That approach has an attractive simplicity but, respectfully, overlooks the central importance of the contractual position underpinning the relationship between the parties in the statutory definition of worker (the respondent's core argument). (As an aside, Mr Sethi indicated that the concession of worker status pre-12 November was merely a matter of litigation convenience and therefore of no import. I cannot agree. Whatever the reason for a concession, the respondent has to live with any implications of it. In any event, on these facts I have not relied upon the concession in coming to my conclusion.)

145. On the facts there was a significant change in the express terms of that contractual position and those new terms were agreed by the claimants. In most respects those terms were reflected in reality on the ground in the relevant period. Further, if there had been any misunderstanding (or room for it) as to the terms agreed between the parties prior to 12 November - as

was found to be the case in the Dewhurst Judgment - that cannot have been the case after 12 November as the new contract was written in plain English, was clear in meaning (in particular with regard to matters pertaining to status and the right to substitute) and all the claimants read (or had the opportunity to read) it before agreeing to it. Even recognising the imbalance in bargaining power which led no doubt to terms the claimants were not happy with, I cannot disregard those terms overall.

146. That being the case, and taking the statutory definition of a limb (b) worker in stages, it is clear that the claimants entered into a valid express written contract.

147. That contract expressly did not require personal service and in a number of respects was consistent with that position. In particular it contained a lengthy substitution clause with a conditional right to engage pre-registered substitutes. Those express terms were augmented, but not formally varied, by the later introduction of the concept of unregistered substitutes and the 5% bonus. I have to assess whether that right to substitute was such as to in reality make personal performance a requirement.

148. It is apparent that none of the claimants wanted to use a substitute as they did not consider it practical or financially worthwhile. It also seems unlikely that cycle couriers at large would want to as the role itself (as opposed to for example a van courier) does not lend itself to substitution due to the nature of the work. However, if a cycle courier for whatever reason did want to substitute then the conditions set out in clause 5 of the contract were theoretically capable of being complied with, albeit with a bit of effort on their part (as Mr Weber conceded) and cooperation of the respondent (for example in providing an extra ID badge), in respect of some clients. They could not be complied with however for those clients whose terms precluded the use of substitutes (e.g. Bloomberg under which Ms Bartczak had previously worked).

149. That agreed contractual position was however later muddled by the introduction of unregistered substitutes expressly to make substitution easier (although remaining unacceptable to clients who precluded the use of unregistered substitutes e.g. the Mitie contract under which Mr Grundy worked). It did not have the desired effect however as still no substitution of cycle couriers occurred.

150. There was of course no evidence in the relevant period of a cycle courier unsuccessfully trying to substitute but if one had tried, it is apparent that as early as December 2018 the terms of the November contract were not - in isolation - what the respondent would reasonably have expected to apply. They would also have expected the terms of the December document and the bonus to apply but those provisions had not been issued as a formal amendment to the contract and indeed were not communicated to couriers at large until February 2018.

151. As to the extent of the respondent's interest in the identity of any substitute, clearly they were not wholly uninterested, hence the nature of the conditions but neither were they so interested (as was the case in Pimlico Plumbers) as to suggest in itself that the dominant feature of the contract was personal performance.

152. There were other features of the relationship in practice that did indicate a degree of integration into the respondent's operation (e.g. the clipboard records) and a degree of control (e.g. the controllers on occasion by erecting the order in which jobs should be done and the cycle couriers having to call in for instruction) both of which can indicate a requirement of personal performance.

153. Taking all that into account, I conclude - as per Lord Wilson in Pimlico Plumbers - that this is a case where it is helpful to assess the right to substitute (and therefore the test of personal performance) by reference to whether the dominant feature of the contract remains personal performance. I conclude that on these facts that does remain the dominant feature.

154. I also find that the respondent's status was not that of a client or customer of the claimants' profession or undertaking. Most of the claimants have received income from either other paid employment or their own other efforts of one sort of another at various points whilst contracted with the respondent. Mr Grundy in particular has his cat-sitting franchise. None of them have however provided their services as a cycle courier to another professional courier business (the closest was Mr Weber who for a short period delivered salads/coffee). There is certainly no evidence of any of them marketing their services as such.

155. Mr Sethi in his written submissions exhaustively analysed the potentially relevant factors to this issue and cross referenced each of the principal express contractual terms seeking to demonstrate that they were consistent with the claimants being in business on their own account. However, even whilst recognising that two independent businesses contracting with each other may be very unequal in size, on the facts it cannot reasonably be concluded that these claimants carried out a profession or business undertaking of which this respondent was a client or customer.

156. Accordingly, the claimants were workers for the relevant period. As to whether this was just when they were on circuit or as part of an overarching relationship between circuits, I conclude it was the former. It is clear that there was considerable flexibility available to the claimants as to whether they worked to a consistent pattern. Some did but some did not. When they did not, they did not have to ask permission. When they were ready to work however they contacted the controllers and indicated that and that time was recorded in the office. Until they signed off at the end of the day (and were asked to inform the office at that point) there was a general expectation

by both parties that they were available to accept jobs and would perform them personally.

157. Remedy

158. Given my comments above on the law on entitlement, it may well be that the parties can reach agreement between themselves in respect of the sums owing to the claimants in respect of the pre-12 November period. That can be discussed at the forthcoming telephone case management hearing.

159. As for the relevant period, I find that clause 8(f) of the November contract, whilst consensual, was not sufficiently transparent or comprehensive to satisfy the Robinson-Steele requirement for a valid rolled up holiday pay clause. Neither it nor any subsequent document (e.g. invoices) identified a specific sum referable to holiday pay or period nor how any such sum had been or could be calculated. Again, hopefully this indication will enable the parties to reach agreement in respect of the sums owing to the claimants.

_____
Employment Judge K Andrews
Date: 24 July 2020