Case No: 1401898/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Swain

Respondent: Mercedes Benz South West

Heard at: Exeter **On:** 15 October 2020

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: Mr Watson of counsel, instructed by MILS

JUDGMENT

1. The claimant was not an employee of the respondent.
2. The complaint of unfair dismissal is dismissed.

REASONS

Introduction

1. This is a preliminary hearing to decide on Mr Swain's employment status, whether he was employed by Mercedes Benz South West as he claims, or whether he was a casual worker. He worked as a driver, delivering new cars as required to customers around the country.
2. It is well established that the irreducible minimum for a contract of employment to exist is:
    a. control by the employer,
    b. personal performance, and
    c. mutuality of obligation, i.e. an obligation by the "employer" to provide work and an obligation on the part of the "employee" to accept it.
3. The question of 'control' by the employer is now more often a question of the extent to which the individual is integrated into the business. But all of the circumstances have to be considered, including the contractual paperwork, the stated working arrangements and how things were operated in practice. A tribunal has to assign each aspect its proper weight in order to assess the reality of the situation rather than simply adopting a checklist approach.

4. The main element of relevance in this case is the question of mutuality of obligation. The company accepts that there was an obligation on the part of Mr Swain to carry out his work personally, but they say that little control over him and no mutuality of obligation.
5. I heard evidence from Mr Swain and, on behalf of the company, from Mr Yetman. He is their Sales Director and oversees the drivers in Mr Swain's position. Mr Swain's case was supported by two other witness statements, one from Mr Fowler who attended the hearing, and one from a Mr Nelson, both of whom are senior and experienced ex-police officers who were also involved in the same work, and both of whom give glowing character references as to his work for the company. I explained to Mr Fowler however that that would not help me on the question of employment status and so he did not give evidence. I should add that Mr Swain has prepared his case extremely professionally and it is clear from his witness statement (which refers for example to the *Ready Mix* case) that he has gone into the relevant law in some detail.
6. Having considered that evidence and the submissions on each side I make the following findings of fact.

Findings of Fact

7. Mr Swain was one of a group of over 80 delivery drivers and at busy times of the year they may need to make 40 deliveries a day. He began working for them in 2008, originally in the service team, collecting and returning cars for maintenance or repairs. In 2010 he transferred across to the customer delivery side, and at no time did he have a written contract of any sort. He simply had a driving test to show that he was a careful and competent driver and was allowed to proceed.
8. Things have therefore evolved over that period of ten years. Over the last four years things are managed largely by group text messages. The office will contact the drivers for their dates of availability, usually for the month ahead, and drivers are then booked in about a week ahead. In the past this was all done by phone and email, and there may have been more scope for individual contact. Clearly in order to be fair to everyone it is better to communicate with the whole group. Unfortunately the group texts have not been saved by either side and so the few examples produced of communications between Mr Swain and the office in Exeter are in the form of emails from 2016.
9. The actual hours of work involve a routine start at 7.00 a.m. when all the drivers needed for that day assemble at the office and collect their cars, although if a customer needs it at a particular time they can start earlier by agreement. The driver will then select his own route and return by train or public transport, again working out his own route. Some of the newer drivers may be given guidance about that but that was never necessary for Mr Swain.
10. There were some rules about how they did their work. Each had a uniform which they had to keep smart and they had a delivery pack to hand over with

the vehicle. They would then show the customer the vehicle before making their way back. There were then rules introduced over time dealing with claiming back expenses, such as a requirement to get good value by buying split train tickets for the journey back to Exeter. These were pragmatic steps taken as the need arose. By and large however the driver was a free agent from the time they left with the vehicle until they got back. No monitoring of their whereabouts took place. And the hours for which they were paid was calculated on a formula based on the length of the journey, so they did not have to clock in when they got back.

11. Mr Swain operated a fairly regular pattern compared with other drivers. He preferred to work on Mondays and Fridays. The data presented showed that 47% of his work was done on those days, although that is not an overwhelming proportion given that Mondays and Fridays occupy 40% of the working week. He preferred not to work on Tuesdays, when he played squash, and he had other commitments including playing the violin with a folk group and sitting on the local council. He chose the days that accommodated all these activities, usually for two or three days a week. Each time he would have to confirm his availability, and it would never be assumed for example that he was free on any given Monday or Friday.

12. There was in existence a casual worker contract, the first version of which appeared in 2013. Needless to say, the contract states that the driver is a casual worker and that there is no obligation on the part of the company to offer any work and no obligation on the part of the driver to accept any. Mr Swain never signed or even received it. He was not even aware of it until the start of these proceedings. That may reflect his long service and the fact that they came in after he began. Its relevance is limited therefore, save that I am satisfied that it was issued to most of the drivers and reflected the company's view of their status and of how the working arrangements were supposed to operate. There was one signed copy in the bundle, from a driver Mr Swain recognised.

13. As with any casual or zero hours arrangement of this sort, it is a two-way street. The work provider will want the worker to offer their services regularly and the worker will want to be offered regular work. The worker will be concerned that if he or she does not do so that the work may dry up. They may even be dismissed. Some colour was given to that view by the text messages in the bundle showing threats to dismiss drivers who, for example, ask their customers for a lift back to the station, or park the vehicle at their home first without permission. Those threats are a real concern and may have had an intimidating effect, but they do also relate to breaches of company rules, and those rules are limited to the way in which the assignments are carried out. There is no direct evidence of any sanction or recrimination for a driver who is not available for one reason or another, or who turned down work. Mr Swain was not able to point to any such incident in his case.

14. At certain times of the year, when the new car registrations come out and sales go up, there was increased pressure on drivers to offer themselves for work. The emails show drivers being exhorted to make themselves available but do not go any further than that, and there is no hint of any repercussions.
15. At the start of his work Mr Swain was also doing the same kind of work for Porsche. He did that on a Friday, at any rate on one day a week on a regular basis for a year or two until he found it too difficult to juggle his various commitments. Porsche knew about his driving for Mercedes Benz however, and vice versa. It was never a problem for either, and he always felt that he could do work for other people if he wished.
16. Payments were made monthly in arrears and deductions made in the pay slips for tax and national insurance where appropriate.
17. An element of holiday pay was included in these payments. No actual holiday was booked or taken separately. Such "rolled-up holiday pay" is considered to be a breach of the Working Time Regulations for those with fixed hours of work but would not be unlawful for a casual worker.
18. As to sickness absence, Mr Swain's evidence was that he was never off sick, although he understood that some people had been paid when off work. Mr Yetman said that there was no formal sick pay scheme but that if people were booked and then off sick they may get a discretionary sick payment. (That may reflect the fact that statutory sick pay only arises after three days absence.)
19. There was no pension scheme either, and generally speaking the terms and conditions for employed staff did not apply to this group. There is a company handbook, which provides for the usual range of policies such as flexible working, leave for family reasons, sick pay, disciplinary and grievance processes, whistleblowing and the like. According to the claim form, Mr Swain was not aware of this handbook until he began these proceedings, although there was an email to him from his manager on 28 September 2018, towards the end of his work, which attaches a copy. An appendix to the handbook sets out rules for delivery drivers, and the email sets out those rules in full. It does not state in terms that the handbook, or the rest of it, applied to Mr Swain. Mr Swain does not seem to have noticed or read this attachment, quite possibly for the common sense reason that it did not seem to apply to him.
20. There is one caveat however, which concerns a loyalty bonus. Mr Swain was the first delivery driver, as far as he knew, to reach ten years' service, and he was surprised and pleased to receive a letter from the directors, including Mr Yetman, awarding him £250 in vouchers, in recognition of his long service, "as per your employment handbook." Asked about that, Mr Yetman said that it was a standard letter ought to have been checked. That does seem to me the most likely explanation, and I do not infer from this one reference that the rest of the provisions were meant to apply to the drivers. To illustrate that fact, the disciplinary policy was clearly not followed in his case when he was dismissed.

Conclusions

21. Applying those facts to the relevant tests, it seems to me that there was little control exercised over Mr Swain and the other drivers in the way in which they carried out their duties, certainly no more than necessary to allocate them work and ensure that it was carried out.

22. But my essential conclusion is that there was no mutuality of obligation here. Indeed, in his own evidence Mr Swain accepted that "there were an immense number of days each year when they [the company] were not under an obligation to give him work". It was not clear to me in fact why he felt (if true) that there were days when they were under such an obligation.

23. The company appears to me to have operated squarely within the terms of the casual worker contract, albeit not issued to Mr Swain. Drivers said that they were available. Work was offered. Drivers were, even then, free to accept or refuse it, and that arrangements suited both parties. The fact that it went on for many years does not suggest that it was any sort of sham, or even that a fixed pattern had developed which was more akin to an employment relationship.

24. That view is reinforced by other decisions in this area. *Hellyer Brothers Ltd v McLeod and ors; Boston Deep Sea Fisheries Ltd v Wilson and anor* 1987 ICR 526, CA, concerned a number of trawlermen, many of whom had worked for the same employer for the whole of their working lives. They would be taken on for each voyage, the duration of which would vary from several weeks to several months. The period of time in between voyages also varied but was often not more than a few days. At the end of each voyage they were discharged by mutual consent. In January 1984 the employer decommissioned all its trawlers and the trawlermen subsequently claimed redundancy payments. The Court of Appeal held that the men had never placed themselves under a legally binding obligation to make themselves available for work in between crew agreements or to refrain from seeking or accepting employment from another trawler owner during such periods. Nor was there a continuing obligation on the employer to offer work to any of them.

25. Similarly in *O'Kelly and ors v Trusthouse Forte plc* 1983 ICR 728, CA, nine wine butlers in a large hotel were known as 'regular casuals'. They were given preference in the work rotas over other 'casual' staff and had no other work. Nonetheless, the Court of Appeal agreed with the tribunal that they were not employed under contracts of employment, either in the sense of there being a global contract in place or in the sense that each stint of work was carried out under a contract of employment. Although the relationship had many characteristics of an employment contract, one essential ingredient was missing, namely mutuality of obligation. The workers had the right to decide whether or not to accept work and were free to obtain work elsewhere: the fact that it would not have been in their interests to do so was another matter. Nor was the employer under any contractual obligation to provide any work,

although in fact it regularly did so. The Court concluded that the workers were hired under successive contracts for services.

26. Those two cases are of high authority and on facts which are more akin to employment status than those of Mr Swain, and so my conclusion has to be the same. In my view too there was no global or umbrella contract here, and even while working on a particular assignment, it does not appear to me that there was sufficient control, in the absence of any contract or written commitment, to amount to a period of employment (even for a day) although as accepted by the company Mr Swain was doing work personally and so comes within the broader definition of worker.

27. It follows that for all the above reasons the tribunal has no jurisdiction to hear a complaint of unfair dismissal and so the claim must be dismissed.

Employment Judge Fowell

Date 19 October 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON
4th November 2020
By Mr J McCormick

FOR THE TRIBUNAL OFFICE