EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
MR RAY	**NOTABLE NOTARIES LIMITED**

Employment Panel
Employment Judge Russell
Members Helen Craik and Jane Holgate

HELD AT: London Central (CVP video audio call and in person) ON: 5-7 MAY 2021

REPRESENTATION:
Claimant: IN PERSON
Respondent: MR. BARKLEM, COUNSEL

Judgement

Unanimous

The Claimant's claim of Race Discrimination under s 13 Equality Act 2010 fails .

Majority Decision

The Claimant was a self-employed independent contractor and not a worker and so his claim for holiday pay under Reg 13 of the Working Time regulations 1998 also fails.

Reasons

Background

The Respondent provides notarial services as well as other associated services including legalisation, translation and process serving services. The Claimant, Mr Ray, whose ethnicity was Black Caribbean, worked for the Respondent from around 20 July 2017 to 14 January 2019. At that time, the Respondent ended their arrangement with the Claimant (they claim he was a self-employed courier, and he had no contract with them of any kind) due to perceived underperformance. The Claimant claimed this was a discriminatory dismissal and that during what he (at least initially) says was his "employment" (where he said he expected to work every Tuesday and Thursday) he suffered race discrimination. Although even by the full hearing the particulars of such complaints had not been adequately provided.

He was also refused holiday pay to which he (again initially) said he was entitled to. His claim for unfair dismissal having been dismissed at an earlier hearing (he had less than two years' service even if he is determined to be an employee) he claimed Race Discrimination and a breach of the Working Time Regulations by being denied holiday pay which turned on his employment status as he would only be entitled to holiday pay (which the Respondent admitted was not paid) if he was an employee or "worker".

The Hearing

Preliminary Matters

There was a slightly confusing start due to the fact that this was a hybrid hearing with the Claimant in

attendance face to face but the Respondent attending via CVP (at the request of the tribunal due to Covid restrictions and the availability of sufficient room in the assigned tribunal) and some difficulty over access to the case bundles. The case (listed for three days for liability and remedy if appropriate) nevertheless then proceeded smoothly and with the Claimant present in the tribunal visible to the Respondent and its witnesses and employment tribunal members also online in the CVP hearing.

Appropriate case management orders had been made at the interlocutory stage and in particular in Employment Judge Khan's order of 28 August 2020 but the Claimant, albeit acting in person and perhaps unsure how to proceed, failed to provide the particulars of his claim requested by the tribunal or an acceptable schedule of loss or (until immediately before the final hearing) any form of written witness statement. This, in part, led Mr. Barklem on behalf of the Respondents to renew his claim (first considered by Employment Judge Khan 28 August 2020) for a Rule 37 strike out of the Claimant's claims highlighting Employment Judge Khan's warning to the Claimant as to non-compliance with tribunal orders. He also asked that the Claimant be barred from giving evidence based on his late witness statement and since the Claimant had still, by the start of the full hearing and to the Respondent's obvious detriment, not identified the specific details of the unfavourable treatment that he claimed to have suffered, still less shown that any such detriment related to his race.

This Employment Tribunal nevertheless determined that the Claimant's race claim, particularly bearing in mind we were all now in attendance at the full hearing, should proceed as normal and evidence should be heard as to that. In addition, we recognised that, although the Claimant's unfair dismissal claim had already been dismissed, he had an outstanding holiday pay to the extent that he was an employee or otherwise a worker. So, the issue of the Claimant's employment status had to be determined anyway. And the race discrimination complaints were largely tied into, and contained within, the narrative that we would have to consider in any event.

In addition, although the Claimant's discrimination claim had still not been particularised to a satisfactory degree some clear issues had been established at the preliminary hearing stage. And proceeding with his claim (also in the expectation the details would become clearer through evidence) was unlikely to prejudice the Respondent who would be given leeway as to further examination in chief needed for their witnesses (the Claimant to give evidence first). So, the Claimant was permitted to rely on his late statement and the parties were directed to schedule B of Employment Judge Khan's case management order 28 August 2020 as to the issues which is reproduced below. The hearing progressed with this summary of the issues in mind.

Issues

Direct discrimination because of race

1. Was the claimant in employment with the respondent for the purposes of section 83(2) of the Equality Act 2010?

2. Did the respondent do the following

2.1 Ignoring an issue the claimant had with station staff at Milton Keynes rail station in that (a) Francesca Rossetto on a date or dates between 31 October and 6 November 2019 suggested that he had not purchased a ticket; and (b) the respondent continued to send him there (in order to pick up / drop off items at the FCO site in Milton Keynes)?
2.2 Stephanie Gregoriadou challenged whether the claimant's travel expenses were genuinely incurred?
2.3 Francesco Meduri reduced the claimant's hours of work (this conduct is agreed).
2.4 Not offering the claimant any holiday (this conduct is agreed).
2.5 Dismissed the claimant?

3. Was this because of the claimant's race? The claimant describes his race as Black Caribbean.

Holiday pay

4. Was the claimant a worker for the purposes of the Working Time Regulations 1998?

5. It is agreed that the respondent did not pay the claimant for any accrued annual leave

Time limits

6. Are any of the complaints out of time?

Remedy

7. If the claimant succeeds in whole or part, to what remedy is he entitled?

Evidence

We first heard evidence from Mr. Ray based upon his late served and, it must be said, slightly confusing statement. After Mr. Barkham on behalf of the Respondent and the employment tribunal panel had asked questions of the Claimant however the Claimant's case became clearer. On day two we heard from the Respondent's five witnesses who were Francesco Meduri, owner of the business, Stephanie Gregoriadou (legal assistant), Francesca Rossetto (legal executive), Daniel Raza and David Parrett. The latter two witnesses were other Respondent couriers both known to the Claimant from a shared love of music and through the Respondent.

Both Mr. Barklem and the Claimant, who was assisted from time to time by the tribunal as an unrepresented litigant in person, gave submissions at the end of day 2 allowing the Tribunal to give its judgment and the reasons on day 3 which the parties agreed to receive as a reserved decision to avoid the need for their attendance on day 3. It was recognised in this respect that if any part of the judgment was in favour of the Claimant this might necessitate a separate remedy hearing which the parties accepted.

Findings of fact

Tribunal Orders

1. The Claimant has materially breached the ET orders including (and in particular) Schedule 5.1 (details of the Milton Keynes incident and allegedly challenged expenses due by 11 September 2020 and never provided), 6.1 (Schedule of Loss due by 28 September 2020 and never provided) and 9.5 (witness statements due by 27 November 2020 and served in the last few days) of EJ Khan's Order of 28 August 2020. However, the Claimant is a litigant in person, has no easily available internet or smart phone and was, we accept, genuinely confused as to what he was meant to provide. And also felt he needed the Respondent's assistance to provide some of the information demanded of him.

Work narrative and employment status

2. The Claimant was a keen musician busking on the South Bank but (he had had various jobs before including other courier work and had been a teacher) sought the opportunity for regular work and income and asked his friend David Parrett (also a musician who worked part-time as a courier with the Respondent) to look out for work opportunities. One such opportunity arose when Daniel Raza, who also gave evidence for the Respondent, ceased working as a courier for the Respondent (due to pursuing opportunity elsewhere also related to music). The Claimant started to work for the Respondent because of this introduction and set aside, his choice, Tuesdays, and Thursdays to provide courier service for the Respondent. He then worked most

but not all Tuesdays and Thursdays for around a year and a half and occasionally on other weekdays where he was requested to work and could do so.

3. Although this work opportunity was communicated to the Claimant by Mr Parrett (who he referred to as Dave) we find that Mr. Parrett first obtained approval for the Claimant to work with the Respondent through what both parties referred to as the "chain of command". Nevertheless, other than a brief meeting with Francesca Rossetto and the natural interaction with Respondent staff when getting his instructions and or submitting invoices the Claimant's only material contact with the Respondent was through Dave who introduced the Claimant to the business. This included an induction day to show him some of the more common destinations where the couriers were asked to drop or collect documents including one of the government's foreign and commonwealth offices (FCO/FCOs) in Milton Keynes. The majority of the Employment Tribunal find that this induction was simply Dave's way of assisting the Claimant and was neither formal or structured or mandated by the Respondent. The minority disagrees for the reasons set out in paragraph 17 to include the fact it was a formal business requirement to have initial training.

4. The Claimant informed his social group and other contacts that he would be working on Tuesdays and Thursdays and that whilst he worked for the Respondent, he was available for courier deliveries and collections from around 10 AM to 6 PM on Tuesdays and Thursdays. However, there were no fixed hours, and he did not always or often work those full hours for those days (or even at all on occasion). Indeed, one of his complaints was that his hours were dramatically reduced (which the majority accept they were) which, given he lost wages as a result, meant that he had to supplement his income elsewhere. He was assisted by the fact that he started another job in gardening in November 2017 albeit this did not involve work on Tuesdays and Thursdays which he continued to keep free in case, the majority say, asked to work on those days by the Respondent. The minority finds that he expected to work on Tuesdays and Thursdays, the Respondent expected him to work those days and he did indeed work very consistently on Tuesdays and Thursdays for the Respondent. The minority also finds that his hours, as evidenced by a summary of his pay over the relevant period on page 73, varied but did not dramatically reduce. His lowest pay was £429.12 in March 2018 and his highest £793.44 in December 2017 but there is no dramatic plunge over his period with the Respondent. His last 2 payments were £594.00 and £561.96 which is not at all out of line with the previous pattern.

5. The Claimant could, if he so wished and was able to find such work, have worked for another courier business (even a competitor and he certainly had no restrictive covenants dictating his obligations during or post his time at the Respondent). He could have done so any day of the week including Tuesdays and Thursdays if he had so wanted. There was never any obligation for him to accept work offered to him by the Respondent even if he remained of the view that, if offered work for Tuesdays and or Thursday, he was likely to accept it.

6. The Respondent's procedure was that the Claimant, as with other couriers, would be called the day before he was asked into work to confirm the tasks, they wanted him to complete. If there was work to hand out, he would then be given a list and some identifying details of each destination address (effectively a map of the location) and was expected to make his deliveries and collections in the right order as best as he could allowing for travel disruption and reflecting the delivery (and occasionally pick up) expectations of the Respondent's clients. But his route of travel, for instance, was up to him. We are clear the Respondent did not control this process and in fact relied on the couriers to assess the time they needed to undertake the tasks given to them, with the scheduling based on that information.

7. If the Claimant had to call in sick then we find that the Respondent would, if no other courier was available, ask one of their permanent employees to undertake the work and if that was impractical, they would hire a commercial courier company to undertake the work such as Addison Lee. Such companies charged by the task not the hour and so were often less expensive than using the Respondent's own couriers, but the Respondents preferred to pay over the minimum wage to their regular couriers to ensure these contractors knew the delivery premises and the procedures to follow on arrival, and the sensitivities of the Respondent's client.

8. If the Claimant could not work he would tell the Respondent. And they would find someone else. If he had committed to working and then been unable to do so then he would attempt to get another courier to cover for him. He did not have to do this however and was never criticised for not finding cover in such circumstances, just as he was permitted to turn down any work opportunity when offered to him.

9. The Claimant did sometimes unilaterally ask another courier to do his assigned list (usually Dave) and did swap work days, and even tasks within work days, with other couriers. But he never brought in a non-Respondent contact to do his work by way of a substitute person. If he was unable or unwilling to work when asked to do so and another courier could not pick up the slack he would let the Respondent arrange an alternative. Although in this respect we find that he expected to work every Tuesday and Thursday (even if he sometimes had to chase them in case there was work to allocate which he had not been contacted about), was available to do so on those days and usually did work then for the Respondent.

10. The Employment Tribunal find that that Daniel Raza had asked his then girlfriend to substitute for him when he was unable to work, last minute, having agreed to do so. The majority find that the Claimant could have done the same, but it is simply that he chose not to. But the minority member finds on balance that this would not have been allowed. This finding of hers, along with her other findings where she essentially disagreed with the majority are set out below under clause 17 for practical purposes to better show , in one place, the areas of disagreement within the panel .The majority find that the reason why seeking a substitute worker was unusual– is – not because of the Respondent's refusal to allow this, but the fact it was not necessary. Because when one courier could not do the work there were others who could from within the Respondent's team or through asking a commercial outside contractor.

11. The Claimant chose to dress "smart casual" for work but there was no requirement on him to wear any company or other "uniform", other than an expectation he would adhere to their client's requirements for e.g., entry into a particular embassy or the Foreign and Commonwealth Office (FCO). He wore/used no company branding or equipment, nor was expected to do so. The minority finds this of little assistance in determining his status. There was, essentially, no equipment needed to carry out the work and no need for a dress code or uniform. The lack of either is not inconsistent with employee, worker or self-employed status. And there was very little instruction from the Respondent as to *how* to go about his duties. In fact, we find this was a source of concern for the Claimant who has constantly referred to what he feels is the lack of communication from the Respondent. He had to learn from and bond with other couriers because he had at no time felt truly integrated into the company. He felt that the Respondents focused on getting the job done to the exclusion of integrating him into the company. He claimed they did not foster any form of collegiate atmosphere. However, the majority find this was not by accident. The Respondent did not treat the Claimant as employee. The Claimant was simply seen as a self-employed contractor coming into work when asked based on his preferred Tuesday and Thursday availability.

12. The Claimant did accept the role on that basis. As a self-employed contractor. This is how Dave and Daniel regarded themselves with the flexibility it allowed them. It is how Dave presented the work opportunity to the Claimant. And during this hearing the Claimant not only accepted that but stated in his closing submissions that he recognised now that he had been a self-employed contractor all along. Though we accept, in saying this, he may still then have been (understandably given that employment status is an issue that has recently been considered by the Supreme Court on more than one occasion) confused as to whether that was the case or not.

13. The Claimant did not have any written contract (because the Respondent categorised him as a self-employed contractor) nor was entitled to receive or give any notice if he ceased to work for the Respondent. He was not subject to any disciplinary grievance procedure or other company handbook provisions. He was paid gross and on the back of timesheets submitted by him at the end of every month (although these were sometimes presented late). He was reimbursed

business travel expenses as and when they were incurred. He was not given payslips there was no company timesheets, and no clocking in or clocking off although he was expected to be at work on time (to pick up his assignments) and ensure his deliveries were too. There were no company timesheets.

14. The Claimant was not on call at any time and could refuse to come to work if he wished to do so without sanction and was wholly dependent upon the Respondent to give him tasks on the days when he expected to work. It was up to the Respondent to offer work to him if they wished. If they did, the Claimant worked only if and when he wanted to. There was no mutuality of obligation. There was no rating of his performance by the Respondent or from its clients and certainly no formal appraisal. Although there was no evidence given that all permanent staff were given appraisals. There was no chance of promotion or permanency to the job or expectation as to future work for either Claimant or Respondent. He did not receive sick pay or holiday.

15. However, he did work most Tuesdays and Thursdays and had the expectation of doing so. He reported into the Respondent's office at the start of a working day (albeit to pick up his documents and list of assignments) and was expected to be prompt to appointments according to a daily list when he was working, which included details of the locations he was to visit. He had to seek reimbursement of expenses from the Respondent. And he was paid by the Respondent at a rate they determined (even if he was happy to agree to it) rather than a rate determined by the Claimant himself and then agreed with the Respondent. He was paid by the hour not by the tasks undertaken (in contrast to say Addison Lee).

16. The majority are of the view that the induction given to the Claimant was an ad hoc arrangement and the Claimant at no time had to work or could have legitimately expected to work any particular day or time, even if a Tuesday or Thursday, or do any task and could have asked someone else to perform it for him if he had so wished—including a person unconnected to the Respondent. The majority find a low degree of control exercised by the Respondent and his complete lack of integration into the business and find his own acceptance of this (along with the evidence of the other 2 couriers in this case who were adamant they were self-employed) persuasive. The Claimant was not (certainly in contrast to, for instance, a zero hours worker, economically dependent on the Respondent (other than by choice) as he had other work on other days of the week and was at liberty to take other jobs at any time even on Tuesdays and Thursdays if he had wanted to do so.]

17. Here we set out the main dissenting findings of the Minority member focusing on where she differed from the Majority.

a) In addition to relying on the agreed finding that the Claimant was paid by the Respondent at a rate they determined (and even if he was happy to agree to it he had no say in this remuneration) rather than a rate determined by the Claimant himself and then agreed with the Respondent, the minority member found this was materially different from the remuneration to Addison Lee who would simply tell the Respondent what the charge was for the task to be undertaken. She found it considerably more likely than not, with knowledge from her own workplace experience, that the arrangement with Addison Lee would be subject to their Terms & Conditions including, for example, a cancellation charge, which was different from the Claimant. This was not evidenced at the hearing. If the Claimant wanted to work for the Respondent, he had to accept their T&Cs.

b) The induction the Claimant had was organised by the Respondent and was a business requirement to ensure initial training was given to newly recruited couriers. The Tribunal heard of 3 couriers – Mr. Raza, Mr. Parrett and the Claimant who had the induction. The couriers had an induction by job role, Addison Lee when asked to do courier work had an instruction by single task. The two are distinct. And the Respondent suggests using Addison Lee was more difficult than using their own regular courier. Ms. Rosetto's oral evidence was that the Respondent "had to have couriers which know the route so that is why we have induction" and that using Addison Lee was "very stressful".

c) The Claimant was economically dependent on the Respondent for his earnings on Tuesday and Thursday and in a subordinated role to them.

d) The Claimant expected to work every Tuesday and Thursday. His oral evidence was that the Respondent phoned him (or he them) on Monday night and Wednesday night about work on Tuesday and Thursday and he was "always available…without fail". This is borne out by the invoice summary at page 73 of the bundle, supported by the detail of those invoices at pages 74-169 which show the dates the Claimant worked. There are very few weeks when the Claimant did not work on Tuesdays and Thursdays in this approximately 18-month period and it was common ground that on a few days there would be no work. The Claimant was asked in cross-examination "the only times you did not work on Tuesday and Thursday was when not given work" to which he replied "correct". The minority member accepts this would account for the few 'missing' Tuesdays and Thursdays.

e) In addition, although this was a difficult point to pin down, the minority member finds that viewing the evidence as a whole, there was mutuality of obligation. This was not itinerant or casual work. The Claimant was obliged to work Tuesday and Thursday after he had agreed to do so. In response to questions, Ms. Rossetto confirmed that if a courier was asked to work and declined at the time of asking (for example if the Claimant was asked to work on a Wednesday), the Respondent would source an alternative but if the courier had accepted to work and then could not, the courier would ask another courier to substitute, only calling the office if that failed. We were not taken to any example where the Claimant had agreed to work and then failed either to do so or to ask Dave to do so.

f) The minority member does not accept that the Claimant could provide a substitute if he was unable or unwilling to work the offered hours to do his work unless this was by making an arrangement with another of the regular couriers, in practice Mr. Parrett. While accepting the evidence of Mr. Raza that he had in 2015 asked an ex-girlfriend to fill in for him, she believes this did not amount to a genuine right of substitution. This substitution had been approved by Ms. Rosetto but there was no mention of it in her witness statement or her oral evidence, and there was no mention of it in Mr. Raza's statement. It was acknowledged that it had only happened once, about 6 years ago. The minority member found that it was an attempt to dredge up an isolated occasion that might support a right of substitution as the hearing progressed. Mr. Meduri said that at the time of engaging the Claimant in July 2017, he "wanted to ensure that if any of the couriers are not available to assist, at least we will have an alternative (subject to their availability)". The minority member finds that by the time of the Claimant's engagement in 2017, only the couriers, the Respondent's employees or Addison Lee provided the services.

g) Since the Claimant started undertaking work for the Respondent, he had only ever substituted Mr. Parrett. Mr. Meduri told the Tribunal in response to a question from the Judge that if the Claimant could not come in, he would "call another courier or AddLee" and that he [the Claimant] "had the choice to say Dave, could you do it". Mr. Meduri then referred the Tribunal to Ms. Rossetto for further information advising that he "was not the one who liaises". The Judge asked "If he chose not to come in our understanding is you would ask another courier or an employee or Addison Lee to fulfil the obligation" in response to which Ms. Rossetto said: "Yes, if a courier could not make it on a certain day, they'd usually arrange with each other to cover so on a day the Claimant was supposed to turn up, he would ask Dave to cover and they would arrange between themselves (the Respondent) would not enter into the arrangement only if either of them could not do it". There was no genuine right of substitution. While recognising there is a difference between the Claimant not ever substituting someone and him not being allowed to do so, the minority member finds in light of all the evidence that the Respondent would not have accepted an unknown substitution to undertake the Claimant's duties. The Claimant could not simply send along someone else to undertake his work.

h) The fact the Claimant and the other couriers described themselves as being self-employed may just reflect their misunderstanding of the true position. This would be the same If they had described themselves as employees or workers.

i) A key finding pointing away from self-employment made by the minority member is that the Claimant provided his services as part of a profession or business undertaking carried on by someone else, the Respondent. He was not genuinely in business on his own account. The recipients of his services were not his clients, they were the Respondents. The Respondents had the entirety of the relationship with the clients, including dealing with any problems arising from the Claimant's delivery of services as was set out by the Respondents, for example "[the Claimant] took the wrong train and did not manage to submit the documents to the FCO in Milton Keynes on time. This created a disaster in the office as we had to contact all our clients…" (Ms. Gregoradou's statement, paragraph 12) and, in describing an incident for a long-standing client in the City in which the Claimant posted rather than delivered a document, Ms. Rossetto stated "my colleagues became aware of the debacle very late in the day when they had to call the client and explain the failure…"(paragraph 11e).

g) Control was exercised by the Respondent not just on wages but also, for example, on working hours. Ms. Rossetto, for example, states "I repeatedly told the Claimant to leave the office at 1pm to go to the FCO" (paragraph 11c) . Given that the work was fairly straightforward – collect and deliver – there was not much 'scope' for control and so the minority member does not find the Respondent can rely on the fact that limited control was evidenced. For example, couriers used their own common sense for route-planning (within the time limits the Respondent required for its clients) but this is analogous with an employee exercising the skill they are paid for; it does not indicate lack of control. Ms. Rossetto's witness statement confirms that the Respondent would "give [the couriers] instructions on where to go and usually which location to attend first."

j) The Respondent provided no substantive evidence that its permanent employees undertook appraisals or were bound by a company handbook. So, the fact the Claimant was excluded from these policies may not be material.

k) It is well established that the fact that an individual is entirely free to work or not and owes no contractual obligation to the person for whom the work is performed when not working does not preclude the finding that the individual is a worker. Although the Claimant was free to choose when he worked (although in practice he regularly worked Tue and Thursday) the minority member finds he was expected to (and did) do work he had agreed to. Dave told us he regularly worked Mon Wed Fri and had done for some years which supports the Claimant's evidence. Their work was not itinerant or casual work. Further the minority member finds the Respondent expected him to ask for and be available for work on Tuesday and Thursday even if the hours to be worked depended on the Respondent's workload.

l) The Claimant was paid on invoice which was the accepted means of getting paid. Submitting invoices for payment is not incompatible with worker status.

m) The minority member finds that the office side of the business and the courier side were viewed very differently but finds nothing remarkable in this. In many organisations office employees and operational employees are often seen almost as 2 separate entities but both are integral to the success of the business. The Respondent's office was in control of the client base and 'helicoptered' the couriers. There is some evidence of limited integration of the Claimant, for example in an email dated 3 July 2017 at page 78 of the bundle, the Respondent refers to the Claimant as the "new guy" and advances him money to renew his passport to facilitate some deliveries. The induction indicates that it would be helpful for him to know the Respondent's business. The Respondents accommodated his request not to return to Milton Keynes for some 2 months at the end of 2018 reflecting a concern for his preferences. These examples are not indicative of self-employment.

n) Ms. Gregoriadou confirmed that if they required time off, the couriers would "always advise us in advance that they will not be available for a specific time". The minority member finds this is much more likely to indicate worker status than be the case if the Claimant was genuinely self-employed.

o) Finally these additional factors point away from genuine self-employment. One, Ms. Rossetto told the Tribunal that "the reason the rate [for couriers] is above the NMW is because we want more security for clients, service counts more than cost". Reference to the NMW tends to show that employment conditions were in the mind of the Respondent, even though not attracting that label. Second, it reinforces the view that the Claimant was not in business on his own account. Dave and the Claimant both spoke of referring to the Respondent's "chain of command" for Dave to get authority to bring the Claimant on board indicating that they saw themselves as somewhere on that chain.

Race Discrimination claims

18. The incident that seems to have sparked his main complaint was related to a business trip the Claimant was asked to make to Milton Keynes at the end of October 2017. Obviously, the Respondent's representative raised issues as to such an event being well out of time but in view of our other findings on this there is no need to consider whether the employment tribunal has jurisdiction to consider such incident (in the context of the Claimant's race claim). The Claimant was wrongly accused by the train operator staff of boarding the train back to London from Milton Keynes (the location of the FCO that the Claimant was visiting on behalf of the Respondent) without a ticket. This dispute which involved the Claimant being (he said and we have no reason to doubt it) manhandled and feeling physically threatened meant that he missed his train and caused him to complain to London Midland and also, when he returned to the office, to the Respondent.

19. The Claimant felt the Respondent did not show support to him although we find they did not willfully seek to misunderstand him and were generally and genuinely confused as to the nature of his complaint. We understand this as even in the Tribunal hearing the Claimant's recollection of events and explanation of his concerns was confused (uncertain as whether there were one or two incidents relating to trips to Milton Keynes). We accept that he was asked by Ms.Gregoriadou whether he had actually bought a ticket, but although this distressed the Claimant, we find that as it was her job to check the genuineness of travel expenses it was legitimate for her to consider if this was the reason he had been stopped by the ticket office/train staff. We do not find that she challenged him in an unacceptable way. And where there was uncertainty now from Ms.Gregoriadou and Ms.Rossetto (who gave the material evidence as to this incident) we accept that this reflects the Claimant's own equivocation and the lapse of time since the events he describes.

20. The Claimant had a grievance too as to an occasion when he got on the wrong train and ended up heading to Warrington when attempting to (once again) visit Milton Keynes. But his complaint as to this incident remains vague and we accept the Respondent's evidence that in fact the Claimant was at fault-not just the "human error" as the Claimant would call it of getting on the wrong train, but a lack of communication with the Respondent leaving them to explain the non-delivery to its client. Once again, we do not find that the Claimant was challenged or treated in an unacceptable way.

21. The Claimant's final claim in respect of the first distressing trip from Milton Keynes appears to be that despite requesting that he wasn't sent to the FCO at Milton Keynes again (until the matter of the fracas at the station was resolved with London Midland) he was asked on more than one occasion to make such a journey. In this respect, we find that even if he had been so asked, that he declined without being criticised for this and didn't return to Milton Keynes until 4 January 2018 when he was content to do so.

22. So, for these reasons, we do not find that the Respondent is at fault at all in respect of either "Milton Keynes incident" and even if the Claimant had been unfairly treated (and he was not, other than perhaps by the station staff and nothing to do with the Respondent) there was no evidence presented of any link to the Claimant's race. Indeed, not only has the Claimant failed to show that any treatment towards him was because of his race, he has not even attempted to make the connection (other than the perception in his mind that was treated unfairly by the

station staff) that this was because he was not supported by the business. We therefore find that even if he had suffered some form of detrimental treatment in respect of either "Milton Keynes incident" it was not because of his race.

23. The only other clear "incident" the Claimant now clearly refers to in support of his discrimination claim, albeit not identified in the list of issues, relates to his frustration at being turned away from the Chinese embassy when seeking to make a delivery because he had an out-of-date passport. We again find no unfavourable treatment bearing in mind the Respondent could not have been aware of this until informed of it and they actually helped him (and advanced him the money for) a renewal of his passport.

24. Nor has the Claimant shown any connection to his race in the reduction in his hours of work (which the majority find did take place) and/or his "dismissal". We accept the Respondent's evidence that the Claimant's hours of work were reduced because of errors and failings in his work. The Claimant initially said that he was unaware of any underperformance, but later accepted that he had made a number of mistakes including getting on the wrong train, mis-delivering a parcel, attending an incorrect embassy (Vietnam when it should have been Taiwan) and other wrong locations on more than one occasion, and sending a document in the post which was meant to be delivered by hand. The Claimant also admitted errors in his invoices (some of which reflected the fact that he purposely kept his watch 10 minutes fast so it showed the incorrect time). And although he denied that he was unreliable and persistently late in leaving the office for appointments as claimed, we find that he did underperform against the Respondent's expectations. There is clear evidence of mistakes in his work as a courier for the Respondent. We do not accept the Claimant's contention that his mistakes were simply normal human errors, did no damage to the Respondent, and could have been easily resolved if the Respondents had wished to do so.

25. We did not hear any evidence at all that the Respondent's actions were based on the Claimant being Black Caribbean and or a person of colour (a phrase he also used to describe himself). When he stated he felt discriminated against we find that what he was referring to was a feeling he had not been adequately listened to. Nothing to do with his race but a frustration at not, in his mind, being heard. But even allowing for his understandable nervousness at being in the Employment Tribunal if his confusion in the hearing is indicative of how he sought to explain his concerns to the Respondent it is easy to see why the Respondent remained unsure as to the details of any grievances that he had or may have had. We find that they were unsure and took no action that should have caused the Claimant to be as upset and offended as he obviously was and still is.

26. The Claimant might be correct in his view that the Respondent could have talked to him more than they did, but there was a disconnect between his expectation of being listened to and involved more in the business and the Respondent simply expecting him to turn up to do his courier work if he wanted to do so, complete the tasks and go home. This is not to criticise either party but just to point out their different perceptions whilst highlighting that the Respondent's belief as to the Claimant's underperformance, which we find did lead to him getting reduced hours and then not being used any more as a courier, was genuine.

27. The Respondent's dissatisfaction grew. We accept that this is because of his performance and conduct and for no other reason when the Respondent decided not to continue his contract. They failed to go through any performance management process, but the majority find this is understandable given they regarded him as a self-employed contractor, and this is not an unfair dismissal case where procedural fairness would be tested. The minority does not find the reason for this is necessarily because he was regarded as a self-employed contractor. Workers, in common with the self-employed, have no entitlement to bring an unfair dismissal claim and even if he had been an employee, he did not have the requisite 2 years' service. The whole Tribunal is agreed that neither the reduction in hours (so far as it existed) or the ending of his contract were in any way connected with his race and nor has the Claimant provided any evidence to the contrary other than his obvious disappointment at not being more integrated into the company

But what he regards as a lack of communication and flexibility in way in which he was judged (in undertaking the tasks given to him) has not been linked to his race, even by him.

Holiday

28. When the Claimant joined the Respondent, Dave said words to the effect "what are you going to do when I go on holiday" and that this later caused the Claimant to wonder if he would receive holiday and/or holiday pay. He further accepted however that when he thought about it Dave's comment to him was principally about ensuring cover in the office rather than any suggestion Dave got paid for holiday and we find none of the couriers did. And in his evidence the Claimant accepted that he was never offered holiday/holiday pay, he was initially under the impression he was not going to get holiday and he did not expect this as a self-employed person. We should highlight this admission because when asked as to holiday he did say that at the start of his work with the Respondent that he viewed himself as self-employed. If and when he changed his view on that is not clear and we appreciate the distinctions are often unclear especially for litigants in person.

29. The Claimant did put some of his errors down to not having holidays and so being stressed. However, the majority found he rarely worked for the Respondent more than a few hours a week, and did not work on anything like a full time basis for any other business and or on his own account. The majority do not accept that his lack of holiday should have contributed to his mistakes. The minority makes no such findings.

Legal findings

Employment Status

Overview

There are three principal categories of employment status: an individual is classed as an employee if he or she has an employment contract from their employer (whether that agreement is in writing or not). Such an individual tends to be provided regular work and must do this due to a mutuality of obligation. This is not the case with the Claimant, and he is not an employee.

In the well-known case of ***Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433,*** McKenna J stated that a contract of service existed if the following three conditions were present:

1. The servant agrees that in consideration for wages or other remuneration, he will provide his own work and skills in the performance of some service for his master.

2. The servant agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

3. The other provisions of the contract are consistent with it being a contract of service.

Where the employer can decline to offer work or a worker can refuse to do the work when it is offered to them, it will be more likely that no contract of employment exists.

This is the case here.

The second category is that of a "worker" if the employment is more casual. Usually a 'contract for services' (to do work or provide a service for a payment or reward), which can be verbal or written means to be employed to do the work personally. For example, a zero hours contract where an

individual is offered work on an 'as and when' basis but has to do work agreed to. If the Claimant is categorised as a worker, he has accompanying employment rights including paid holiday, but not including sick pay. If, however, he is self-employed then he does not. A typical self-employed person works on their own account without employment rights or responsibilities. An independent contractor invoices for work done and they are able to send someone else (substitute) to do the work if they so wish.

But the legal tests for whether someone is a worker and so a dependent contractor or an independent contractor are complex. And the views of the parties as to the contractual relationship are not decisive. Until such time (envisaged by the Taylor Review) the position is made clearer in primary legislation, we rely on secondary legislation and guidance to provide more details and we recognise that Tribunals will often have to grapple with cases where the individual's employment status may not be clear. We therefore feel it is instructive for us to review the salient points of the two most recent Supreme court decisions in this area.

Pimlico Plumbers Case

In the case of ***Pimlico Plumbers Ltd v Smith [2018]*** the Supreme Court focussed specifically on the question of whether a plumber stated to be self-employed in his contract was in fact a worker. It unanimously upheld the decision of all the courts below that Mr Smith was indeed a worker.

However, in that case Mr Smith had to wear Pimlico uniform, drive vans with the Pimlico logo and could only be contacted by customers through Pimlico. Contracts and estimates were issued in the name of Pimlico and payment was made to Pimlico. The movements of the plumbers were monitored via a GPS system on their vans.

There was nothing in the agreement that expressly allowed Mr Smith to substitute another plumber if he was busy elsewhere. Although it was accepted from evidence that Mr Smith could essentially swap shifts with other Pimlico plumbers this was not true substitution. Although he was, on the face of it, entitled to provide his services to others he never did so, and the Court of Appeal found that he would have had difficulty in contacting any customers outside the hours when he worked for Pimlico and would not have been able to use his van.

The following factors were crucial in determining worker status: the high degree of control exercised by Pimlico over Mr Smith; the stringent restrictive covenants in the contracts which sought to prevent him working for any other plumber in the Greater London area for three months post-termination; and the tribunal's finding that Mr Smith was contractually obliged to work at least 40 hours per week.

Mr Smith was obliged to accept work which was within his skills and competency and Pimlico set the standards and procedures of work down to his cleanliness when performing that work. It was clear from Mr Smith's contract, said the Supreme Court, that there were elements of tight operational and financial control; there were fierce conditions on when and how much he would be paid and also restrictions on him competing with Pimlico once he left. Even the contract and handbook used words such as 'wages', 'gross misconduct' and 'dismissal' and provided for strict post-termination restrictions.

Uber Case

An even more recent decision of the Supreme Court was ***Uber BV v Aslam [2021]*** determining that Uber were obliged to pay their drivers at least national minimum wage and allow them to take paid annual leave, as well as offering other protections (such as from unauthorised deductions from pay, discrimination or being subjected to a detriment for being a whistle-blower) albeit not granting them the wider employment protections afforded to "employees".

Uber's main argument for the drivers being independent contractors and not workers was that there was a written contract between Uber and the drivers, and then another separate contract between the drivers and the passengers. The Supreme Court disagreed with Uber's argument and asserted that

Uber did contract with the passengers and engaged the drivers to carry out the bookings. It also held that when determining worker status, the starting point should not be the written agreement, because it is more important to focus on the purpose of the legislation designed to protect workers.

The Supreme Court judgment set out five key factors which underpinned the rationale for the decision that the drivers were workers:

1. Uber has control over how much the drivers are paid for the work they do. Uber sets the fixed fare for each trip and decides the service fee which is deducted from the fares. Uber also has the right to control whether fares are refunded fully or partially following a complaint by a passenger.

2. Uber required its drivers to sign and accept a standard written agreement, which sets out the contractual terms that govern the services performed by the drivers, and the drivers do not have the right to amend this.

3. Uber controls the drivers' choice about whether to accept or decline passenger journey requests once they have logged on to the app. Uber does not inform the driver of the destination of the journey before the driver accepts, so drivers cannot decline requests based on destination. Uber also can penalise drivers for declining or cancelling too many requests by sending warning messages to improve performance. Uber may then take matters further and log drivers out of the app for ten minutes if performance (from Uber's perspective) does not improve.

4. Uber has a significant amount of control over how the drivers deliver their services. For example, Uber guides the driver to the pickup location and sets out a route for the journey. The drivers do not have to follow the specific route but are likely to receive negative customer feedback via the rating if they don't. Uber uses the customer rating to monitor driver performance and where ratings do not meet Uber's standards, drivers' access to the app can be terminated.

5. Uber restricts the communication between the drivers and the passengers to ensure that no relationship develops between passenger and driver beyond the one individual journey. Uber handles all complaints and further interactions.

The Supreme Court considered these five factors together and dismissed Uber's appeal and upheld the original finding that Uber drivers were workers.

<u>The Claimant's position</u>

Whilst accepting that the test of worker status depends on weighing up a number of different factors, it is clear that a high degree of control exercised by the business that engages individuals is critical to a finding that an individual is a worker. The majority of the Tribunal find that degree of control is absent from the Claimant's position as a courier and based on the finding of facts made determine that he is a self-employed contractor. The key cases referred too where worker status has been established highlight clear and fundamental differences to the Claimant's position. In particular, the flexibility he enjoyed and the lack of controls to his work. It would be extending the scope of "worker" far too widely to include him in the circumstances of this case and guided by the Supreme Court gig economy decisions where the "workers" there being considered had far less independence than the Claimant.

The minority member is in disagreement with this. She is of the view that the Claimant was, on the balance of probabilities, a worker. A dependent contractor and not an independent one. The minority member highlights her own findings (not shared by the majority) in clause 17 of the Findings of Fact and , taken together she finds these point clearly to worker status.

The majority are of the view that, on balance, the Claimant was an independent contractor and not a worker. On the basis of the findings made by us all and also the finding of the majority that the induction when he started was an ad hoc arrangement and the Claimant at no time had to work any particular

day or time, even if a Tuesday or Thursday, or do any task, and could have asked someone else to perform it for him any time and if he had so wished. The majority find the low degree of control exercised by the Respondent and the Claimant's complete lack of integration into the business and his own acceptance of this (along with the evidence of the other 2 couriers in this case who were adamant they were self-employed) is persuasive. And have found that he was not dependent on the Respondent but rather the Respondent was dependent on him once it had indicated there was available work to undertake if he was prepared to do it.

Further the majority find that even if the induction day had been a formal arrangement it did not show the Claimant to be a worker, that it is understandable and indeed sensible to have a contractor understand the Respondent's business a little better. We have all noted that when the Respondent ask Addison Lee to assist the driver helping them will always need some information as to the Respondent's clients and locations. And the majority, even if it is correct that the Claimant could not (or could not easily) substitute someone to do his job other than a colleague who was also a courier, this is not enough to make him a worker given all the other evidence pointing to him being self-employed. The Respondent referred us to the case of ***Secretary of State v Windle (2016)*** where the Claimants were interpreters who were engaged by the Respondent on an ad hoc basis to provide interpreting services in courts. They were not entitled to be offered work nor obliged to accept it if it was offered. In other words, there was no 'mutuality of obligation' between assignments. They were paid for work done but received no holiday pay. They were treated as self-employed.

As a tribunal we stepped back at the end of determining our findings and considering factors as to the employment status and attempted to see the true nature of the employment relationship. At that point, the majority were satisfied that the Claimant was self-employed contractor, but the minority member was satisfied, all determinations on a balance of probabilities, that the Claimant was a worker. That the purpose of the Working Time Regulations 1998 and other employment legislation is to protect vulnerable workers where appropriate, and the Claimant's situation was such a case.

Direct discrimination because of Race

The definition of employment in the Equality Act 2010 is significantly broader than under the Employment Rights Act 1996. s.83(2)(a) of the Equality Act 2010 states:

"Employment" means employment under a contract of employment, a contract of apprenticeship or a contract personally to do work. It was not suggested that the claimants were engaged under 'a contract of employment' but it was argued that they were under 'a contract personally to do work'.

On the basis of the majority decision the Claimant is not so employed for the purposes of section 83(2) of the Equality Act 2010. He was not employed under "a contract personally to do work".

The majority of the Tribunal panel have determined that the Claimant could change or withdraw from his shifts, or send a substitute to work in his place and was not obliged to perform services personally. Therefore, his claim under s83(2) cannot proceed.

But, in any event, the findings are that the Respondents did not ignore an issue the Claimant had with station staff at Milton Keynes rail station in late October 2017 or act unfavourably towards him when he got on the wrong train, nor was he unreasonably challenged as whether his Claimant's travel expenses were genuinely incurred. And none of those matters have any connection with his race, or if they did there was no evidence presented to that effect.

We found that although the Claimant's hours of work were reduced there were business reasons for this given the Claimant's poor performance, which also led to any working arrangement being ended.

He was not awarded holidays because he had no contractual or (by a majority decision) statutory entitlement to them. And that none of the decisions taken, including not awarding holidays, were because of the Claimant's race. Indeed, as per our findings we have not heard any evidence that any of the Respondent's actions were based on the Claimant's race.

Section 83 of the Equality Act 2010 does of course link in with s.13 in this case. The Claimant's claim of direct race discrimination. The relevant part of s13 States that

(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

The Claimant has not established any case at all that this or may be the case and for all these reasons his claim of race discrimination fails. For this reason, we have not given further consideration as to whether his claims are out of time or not. They fail in any event.

Holiday Pay

As far as Holiday pay we find the claim is in time. The Claimant's contract ended on 14 January 2019 when we find his holiday claim crystallised and his claim was made on 30 April 2019. He approached ACAS on 4 March however and his early conciliation certificate was dated 4 April 2019 and so he had until 20 May to make his claim. He therefore did so in time, within 3 months (as extended by conciliation) of the alleged breach of the Working Time Regulations 1998.

However, it is by no means clear this claim is still pursued by the Claimant (he stated in the hearing that he now realised he wasn't entitled to holiday pay and that was clear to him) and in any event the majority decision is that the Claimant was not a worker for the purposes of the Working Time Regulations 1998, and so was not entitled to paid holiday.

The minority finds that he was a worker and should be entitled to both holiday pay and under s 38 Employment Act 2002 , and as he has other substantive claims, either 2 or 4 weeks' pay for failure to provide a Written Statement of Terms and Conditions.

For all these reasons (and by a majority decision in respect of his holiday claim) the Claimant's claims fail and are dismissed.

EMPLOYMENT JUDGE- Russell

13 MAY 2021
Order sent to the parties on

13/05/21.

for Office of the Tribunals: