



# EMPLOYMENT TRIBUNALS

**Claimant:** Ivaylo Atev

**Respondent:** Fast Despatch Logistics Limited

**HELD AT:** London South – CVP (video) **On: 9<sup>th</sup> March 2022**

**BEFORE:** Employment Judge R J Atkins

## REPRESENTATION:

Claimant: In person

Respondent: Mamunur Rahman (on behalf of the respondent)

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The name of the Respondent in the proceedings be changed from Fast Despatch Logistics (Peterborough) Limited to Fast Despatch Logistics Limited.
2. The Claimant was a worker within the meaning of s230 Employment Rights Act 1996.
3. At a further hearing on 18<sup>th</sup> May 2022, the Tribunal will decide whether the Respondent
  - 3.1 made unauthorised deductions from wages and
  - 3.2 paid the respondent wages below the national minimum wage.

# REASONS

## Claims and Issues

4. The Claimant, Mr Atev, worked as a delivery driver for the Respondent until 6<sup>th</sup> June 2021.
5. The Claimant claims that the Respondent made unauthorised deductions from wages.
6. The claimant had named the respondent on the claim form as "Fast Despatch Logistics (Peterborough) Limited. Mr Rahman said the company for whom the Claimant worked is Fast Despatch Logistics Limited and requested that the case should be struck out because the wrong legal entity had been named in the proceedings. I applied my powers in Rule 34 of the Employment Tribunal Rules of Procedure as well as the overriding objective in Rule 2 in deciding whether to allow substitution of the respondent, taking into account all the circumstances and balancing the injustice and hardship of allowing the substitution against the injustice and hardship of refusing it. The respondent had received the claim form and had responded to the claim. No confusion had been caused as to who was the correct respondent to the claim. The respondent was ready and able to defend the claim at this hearing. All the contracts and invoices in the bundle provided by the respondent were in the name of Fast Despatch Logistics Limited. The claimant agreed that he had worked for Fast Despatch Logistics Limited. I concluded that there was no hardship or injustice to the respondent in allowing the claimant to amend the name of the respondent whereas, if the amendment was not allowed, the claimant would lose the opportunity to pursue his claims and, if successful, be given a remedy. I considered that the balance of injustice and hardship lay in favour of allowing the amendment. I ordered that Fast Despatch Logistics Limited be substituted for Fast Despatch Logistics (Peterborough) Limited and the claim be allowed to proceed against that respondent. Claims and Issues
7. Having dealt with this preliminary matter, I agreed with the parties the issues for me to decide as follows:

### **Employment Status**

7.1 Was the claimant a worker within the meaning of s230(3)(b) of the Employment Rights Act 1996?

### **Unauthorised deduction from Wages**

7.2 Were the wages paid to the claimant less than the wages he should have been paid?

7.3 Was any deduction required or authorised by a written term of the contract?

7.4 Was any deduction justified? In particular

7.4.1. was there damage to the vehicles

7.4.2 was the Claimant responsible for such damage

### **National Minimum Wage**

7.5 Were the deductions made by the Respondent to be treated as reductions, when calculating what the claimant had been paid, for the purposes of regulation 13 National Minimum Wage Regulations 2015.

7.6 If so, was the hourly rate paid by the Respondent to the Claimant below the National Minimum Wage specified in regulation 4 National Minimum Wage Regulations 2015

### **Remedy**

7.7 How much should the claimant be awarded?

8. I agreed with the parties that I would initially hear arguments in relation to the employment status issue and that I would make a decision in relation to that issue in order to determine whether the Tribunal had jurisdiction to hear the other issues.

### **Procedure, documents and evidence heard**

9. There was a bundle of documents. There was a written witness statement for Mr. Mamunur. The Claimant was the only witness for himself. Mr. Manamur gave evidence for the Respondent.

### **Fact finding**

10. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.

11. The claimant entered into a contract for services with the respondent on 12<sup>th</sup> November 2022 pursuant to which the claimant agreed to provide courier services to the respondent. The company's business is the provision of multi-drop parcel delivery services which it provides to its clients at various UK geographic sites and locations.

12. Shifts were allocated according to a rota. The rota would be sent in the evening for the next day's shifts and the drivers could accept or decline shifts. The claimant's evidence was that if a driver declined a shift for the next day he would not be offered as many shifts in the coming days. The respondent's evidence was that this was not the case; there were usually more drivers available than routes and therefore drivers would be rejected from the rota due to overmanning rather than their acceptance or rejection of shifts in the past. The respondent stated that on the five occasions that the claimant had been rejected from the rota in the evening, he had then been offered alternative routes the following morning. The claimant agreed this was the case. I find that drivers were not penalised for rejecting shifts by not being allocated shifts in the future.
13. There is a right of substitution in clause 13 of the contract for services. Mr Atev had never used the right substitution. Mr Rahman explained that it was only possible to use as a substitute another driver who had passed all the necessary medical fitness requirements. He gave an example of a driver who had been absent for a week and had used as a substitute a driver who was already on the system from another depot. It was only possible to use as a substitute another driver who had already been on boarded by both the respondent and also of the respondent's client. Payment would be made to the driver who had completed the route not the driver who had used substitute.
14. The respondent's principal client Amazon, set a pre-determined route for delivery of a specified and identified batch of parcels. Drivers could not deviate from this route or order of delivery. Drivers were paid a fixed price per route which depended upon the number of deliveries included in that route. They were also paid 15p per mile driven. If they did not complete the route on time, assistant drivers would be used to complete the route and deliver excess parcels. The pro rata cost of the excess parcels which had to be delivered in this way was deducted from the fixed price of the route paid to the original driver.
15. The cost of insurance was included in the vehicle rental fee.
16. The claimant did not receive sick pay or holiday pay.
17. The claimant was not provided with uniform.
18. The claimant was responsible for his own income tax.
19. There was no guarantee of work and the claimant was required to pay the vehicle rental charge whether or not he was allocated shifts that week.

20. The claimant did not provide delivery services for anyone else. If the claimant delivered parcels for companies other than Amazon, this was done on behalf of the respondent.

## Law

21. Under s230(3) “worker” means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

- (a) a contract of employment, or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

22. The element of personal service in s230(3)(b) requires an analysis of the right of substitution in the contract. In *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51, [2017] IRLR 323 (which concerned the statutory definition of 'worker' which specifically requires 'personal service', ) Etherton MR in the Court of Appeal summed up the case law on substitution clauses as follows:

1.1.1. "[84] ... In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, 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 another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

## Conclusions

23. The claimant undertook to provide courier services to the respondent pursuant to a services agreement dated 12<sup>th</sup> November 2020.

24. The respondent submits that those services did not require personal performance in that the services agreement provides for a right of substitution in clause 13.
25. In practice, the right of substitution was limited to colleagues who had been on-boarded by both the respondent and the customer to whom the respondent was supplying the services.
26. I find that this falls within category five of the test set out in *Pimlico Plumbers v Smith*, namely a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.
27. The claimant did not supply courier services to anyone else. He was not in business on his own account. He had no direct contact with the respondent's customers such as Amazon. He had no control over the rate of pay or route he took. I find that the respondent was not a client or customer of any business undertaking of the claimant.
28. I therefore find that the claimant satisfies the definition of worker in s230(3)(b).

Employment Judge Atkins

Date: 9th March 2022

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