EMPLOYMENT TRIBUNALS

Claimant: Mr Taiwo Adegbite

Respondent: DPD Group UK Limited

AT A PRELIMINARY HEARING

Heard at: Leicester, in public **On:** 23 August 2022

Before: Employment Judge Clark (sitting alone)

Appearances
For the claimant: Mr Adegbite in person
For the respondent: Mr Galbraith-Martin, One of Her Majesty's Counsel

JUDGMENT

The claims have no reasonable prospect of success and are struck out.

REASONS[1]

1) This hearing was listed by Employment Judge Victoria Butler to determine whether the claimant's claims have little or no reasonable prospect of success and whether they should be subject to a deposit order or struck out respectively.

2) Such an assessment can apply to any of the constituent elements of a particular claim or defence. In this case, however, there is one central issue. That is whether the claimant was an employee or worker falling within section 230 of the Employment Rights Act 1996 or section 83 of the Equality Act 2010.

3) Overshadowing the respondent's contention that Mr Adegbite was neither, and was instead a self-employed contractor working on his own account, is the fact that the franchise agreement that governed the parties' economic relationship has already

[1] *This is the faired written version of the ex-tempore judgment and reasons given at the hearing. It is provided in response to the respondent's application made at the conclusion of the hearing in accordance with rule 62(3) for written reasons.*

been subject to litigation in the case of Stojsavljevic & another v DPD Group UK Limited. In that case, the claimants were found to be neither employees nor workers and that conclusion was confirmed by the Employment Appeal Tribunal in a judgment of Mrs Justice Ellenbogun handed down on 21 December last year. (UKEAT/0118/20OJO).

Preliminary Matters

4) Before dealing with the substance of the hearing, I need to deal with one preliminary point, albeit it arose halfway through the parties' submissions. Mr Adegbite has tentatively sought some form of sanction on the respondent due to its late service of the hearing bundle. He says he only received the final hard copy last Saturday, some 35 days or so after the date ordered. I say tentatively as it was not initially clear what, if any, order Mr Adegbite was seeking. I explained the difference between simply bringing the default to my attention and seeking some order from the tribunal and the implications depending on the prejudice any default might have caused.

5) There was no application to postpone this hearing, which in the end seemed wise as Mr Adegbite was able to make full and extensive submissions on the operation of the agreement. I was not told that any application had been made earlier in the proceedings in respect of the delay, whether for an unless order or otherwise. Mr Adegbite settled on the sanctions available on default under rule 6 and the power to strike out under rule 37 and sought an order striking out the respondent's response and a case management order that the claim proceed to a full hearing.

6) I refused that application. Even accepting Mr Adegbite's account of the delay, such an order would be neither proportionate nor appropriate. The hearing could still be, and indeed was, capable of being fairly conducted and, in any event, the status issue was not a pleading point that would disappear with the response being struck out. It was a matter of jurisdiction that would still require determination by the tribunal.

The Claims

7) Mr Adegbite presented the following claims: -

a) Unfair dismissal, for which he has to be an "employee" within the definition set out at section 230(1) Employment Rights Act 1996
b) Discrimination, for which he has to be in "employment" as defined by section 83(2) of the Equality Act 2010
c) Unlawful deductions from wages, for which he has to be a "worker" within the meaning of section 230(3) Employment Rights Act 1996

8) These claims relate to what are described as unethical management practices in his activities as a driver performing the delivery services himself under the franchise agreement and resulting in what he describes as: -

a) high work stress level,
b) targeted harassment and bullying,
c) financial losses,
d) unfair work treatment,

e) unbalanced healthy life and
f) incurring road traffic penalties,

all arise because of what he says was a disorganised management approach.

The Parties' Submissions

9) This is the briefest summary of the parties' respective contentions. Both made full oral submissions, Mr Galbraith-Martin speaking to a written skeleton argument.

10) The respondent says this franchise agreement puts the claimant in the position of a self-employed independent business, operating the DPD service under franchise. However onerous the contractual terms might be under that franchise agreement, as they often are in high branded franchise agreements, that does not turn Mr Adegbite into an employee or worker. The agreement obliged him to provide drivers and service vehicles, not to do the driving, although that was permitted. The fact he chose to do most of the driving does not alter the nature of the obligations under the agreement. The test for either type of employment status, and their cognate found in the Equality Act, requires an obligation to perform a personal service. There was no such obligation in the agreement for him to perform the driving personally. The only issue is whether that agreement, so far as it provided for the driving services to be delegated to others, was a sham. The claimant faces a substantial obstacle in showing that to be the case for three reasons. First, he cannot undermine the evidence of thousands of "substitute" drivers performing the service for other ODF's, many of which are corporate entities which obviously could not provide personal service. Secondly, he has himself used "substitute" drivers in the operation of his own franchise. Thirdly, the contractual terms at the centre of this case are materially identical to those considered in Stojsavljevic and approved by the EAT, during which it made its own determinations on matters of interpretation of the franchise agreement relevant to this case and on which the ET would be bound as questions of law.

11) For his part, Mr Adegbite challenged the franchise agreement as a whole saying it was a sham in its entirety (i.e., not just in respect of the delegation of driving). That was because he had little control over his work, his times of work, his workload or his routes. He says he had no ability to influence his own profit. He was required to use certain systems and equipment under the franchise. All that had the nature of total control by the respondent and integration in its functions such that his true status was that of an employee or worker and not truly a self-employed independent contractor. He drew attention to how he hired a van from the respondent in place of the van he previously owned. He relied on the fact he was a sole trader and not a limited company and that it had always been his intention to do the driving himself. Against that background he sought to limit the effect of the ability to provide the services through third party drivers on the basis he had only ever employed 4 such drivers and non-worked for more than 30 days.

The Law

12) Rule 37 provides

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

13) Rule 39 provides

(1)Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

14) If my assessment of the case does not fall within either test, the case will simply proceed to its final hearing.

15) There is a great deal of high authority stressing the draconian nature of strike out and the test of "no reasonable prospects of success". Particular caution is to be applied in fact sensitive claims such as those alleging discrimination. (see for example Anyanwu v South Bank University [2001] ICR 391 HL and Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, CA). What those cases do not say is that such claims cannot ever be amenable to strike out, but an order for strike out should be limited to clear cases.

16) The test of little reasonable prospect of success admits more leeway in the assessment of the likelihood that a particular contention will be made out. That test, and the level of deposit that is then imposed, should be achievable in the circumstances as a deposit is not intended to operate as a strike out by the back door.

17) In any assessment of the prospects of success, the tribunal has to have regard to the constituent elements of the claims presented. It is the prospects of them being made out so as to complete the statutory tort in question that is being considered. That assessment is done on the claimant's case viewed at its highest, although some regard can be had to how that case sits in the overall landscape of the case.

18) The definition of an employee or a worker, so far as these claims are concerned, means one has to look to Section 230 of the Employment Rights Act 1996 and section 83 of the Equality Act 2010.

19) Section 230 provides: -

(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
(3)In this Act "worker" (except in the phrases "shop worker" and "betting 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) Section 83(2) provides: -

> ***"Employment" means—***
> ***(a)employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;***

21) It is now well settled that these different statutory provisions actually contain the same essential tests so far as the concepts of employment and worker are concerned (Bates van Winklehoff v Clyde & Co LLP [2014] ICR 730).

22) The tests of identifying employment status and worker status are subtly different. In the circumstances of this case, it is not necessary to examine wider factors such as control and mutuality of obligation and other factors pointing one way or the other such as integration or profit risk. The reason is that both tests also require a contractual obligation to perform work personally. To put it in the words used in the seminal employment status case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, "to provide his own work and skill in the performance of some service for the putative employer".

23) Autoclenz v Belcher and others [2001] ICR 1157, SC makes clear that "a genuine right of substitution negates personal service". The use of the word "genuine" shows that the written documentation is not the be all and end all of the analysis of the parties' relationship. The law of contract, so far as interpreting contractual terms, comes with an important adjustment when the contract is in question is in the employment setting. Written contracts are usually drafted by the employer. The employer usually holds the power in the bargaining relationship. Without deviating from the orthodoxy of contract law, cases such as Autoclenz and Uber B.V. and others v Aslam and others [2021] UKSC 5 make clear that the tribunal should look to the reality of how the contract is operated. For example, by asking what is the true reality of the written agreement in operation?

24) That reality check is to be performed in respect of the particular term itself relevant to the analysis being conducted. In this context that is usually a term relating to 'substitution'. As a matter of law, it is important to distinguish between an unfettered right of substitution per se, and any general restrictions as to the quality of the person that that might sent in substitution.

The issues

25) Whilst the issue is whether either test set out in rules 37/39 is made out, this case unfolds in the shadow of the EAT decision on what is accepted was materially the same contractual relationship. The sub-issues are whether Stojsavljevic is binding on the outcome of this case? If so, what are the prospects Mr Adegbite can distinguish his circumstances on the facts and what effect would that have on the assessment of employment status?

26) A further issue might have been whether the law changed in any material way since Stojsavljevic was decided 9 months ago although neither party has suggested that is the case and I am not aware of any change. That need not be considered further

Background to the relationship

27) This is not a hearing at which I make findings of fact. It is, however, necessary to put the case in some sort of factual context.

28) The respondent is a well-known parcel courier business.

29) Mr Adegbite was engaged as what he himself describes as a "self-employed franchise driver". That is termed an "owner driver franchisee", or "ODF", under the written "franchise agreement" the parties entered into. That franchise agreement defines the ODF as the person or entity licenced to operate a franchise of the DPD services as an independent contractor in business on their own account. Indeed, in furtherance of this agreement it will not be in dispute that Mr Adegbite declared profits and losses to HMRC as a self-employed person and paid tax accordingly. His business was registered for VAT.

30) In September 2021 the claimant says he sought to surrender his franchise back to the respondent. In simple terms, he stopped operating the contract. This led to a service failure in that the franchise obligations were not being met and, ultimately, the franchise agreement was terminated by the respondent on 11 October 2021.

31) There will be no dispute that the respondent's delivery services are provided by three different categories of economic relationship. Some drivers are directly employed and there is no issue they have employment status. Some are directly engaged as "worker drivers" and have some employment rights in return for their personal performance of the contract. Others are engaged through franchisees, (ODF's). Mr Adegbite contracted on the latter category under a franchise agreement.

32) There will be no dispute that there is scope for people to convert between the types of economic relationship with DPD. Employees can take on a franchise. Conversely, franchisees can relinquish the franchise if appointed to an employed/worker position.

33) Key aspects of the terms of the franchise agreement and their undisputed operation in reality are : -

a) Mr Adegbite was a franchise holder and an "ODF"

b) ODFs do not have to do any driving. They hold the franchise. If they do drive, they must meet the same standards as any driver engaged under the agreement. Franchisees are obliged to ensure the drivers they employ or subcontract with to meet the service standards satisfy that test.

c) Those quality standards are: -

i) Possession of a valid driving licence,
ii) They are over 21 years of age
iii) That they have been trained by the franchisee in the DPD systems (or sent on a DPD training programme)
iv) That they are prepared to submit to drug tests and have a satisfactory DBS check.

d) The respondent is not interested in the identity or status of the "substitute" driver, only that they meet the generic standards. They do not already have to be employed or otherwise engaged with the respondent, although some may be. The only requirement is that the respondent is told who is performing the driving before it is performed. This required the franchisee to give it notice of the drivers and that they meet the quality conditions.

e) The franchisee can be a natural person or a legal person (i.e., a limited company). There is no difference in the terms of the franchise agreement according to the legal nature of the franchisee save that, for obvious reasons, if the franchisee is a limited company it cannot also be a driver and has to contract with another for all the obligations under the agreement to be performed

f) In this case, Mr Adegbite contracted as a franchisee in his personal capacity (as a sole trader).

g) The franchise terms are accepted as being fairly onerous. Franchisees must meet the service delivery standards prescribed by DPD. They must comply with strict standards and strict service delivery targets. They must present their corporate identity as DPD agents to the public at large. Failures to meet those standards will result in financial penalties.

34) The franchise agreement does deal extensively with what, in the context of the proceedings before me, would be called personal service or substitution. However, the agreement is framed in the opposite way to that often encountered making the word "substitution" somewhat inapt. This is not a relationship where the claimant is expected to do the work but with a limited right in certain circumstances to send someone else instead. Instead, the arrangement is entirely founded on the expectation that the putative employee may never do any of the driving personally but will simply organise others to do so and invoice for the services provided. For simplicity, however, I have at times retained the phrase "substitution" in my analysis. On that basis, there will be no realistic argument on the following interpretation of the agreement: -

a) That the written franchise agreement provides for others to perform the delivery services.

b) Under the franchise, "the business" being franchised is the supply of driver(s) and service vehicle(s) with service equipment to perform the services in accordance with the System.

c) The term 'Driver' is further defined, so far as relevant, as:

i) The employee, agent, sub-contractor, partner or otherwise of the Franchisee.

And,

ii) who is engaged or employed or otherwise by the Franchisee, to drive the Service Vehicle and who may, if the Franchisee is an individual, include the Franchisee himself.

d) A number of ODFs working with the Respondent do in fact operate their businesses on that basis. Evidence will be put before any future hearing to show there are some 8,598 'substitute' drivers.

e) A significant number of ODFs are party to multiple ODF Agreements and service those agreements by providing multiple drivers to carry out the services required under the agreements.

f) Many ODF's are limited companies.

g) It goes without saying that there was no trigger situation necessary before a franchisee can "substitute". They can delegate the driving obligations to third parties for any reason or no reason at all at any or all times.

35) Mr Adegbite himself will say he had employed four substitute drivers registered and approved for work under his franchise. He says none worked for him for more than 30 days and some for much less than that. He employed them only to get some time off for himself to ease the stress of the work.

36) After the franchise agreement commenced, Mr Adegbite entered into a separate free-standing agreement to hire a van from the respondent in place of the van that the claimant already owned. Mr Adegbite may well be able to show the need for a replacement van arose from the circumstances of his vehicle met the conditions under the franchise agreement concerning the service vehicle. That does not in itself answer why the replacement van was hired from the respondent as opposed to anywhere else. It is consistent with the quality and branding obligations found elsewhere in the franchise agreement.

Discussion and Analysis

37) There will be no dispute that the written franchise agreement provides not only a right to 'substitute' the driving obligations, but that the agreement is in fact structured on the basis that the franchisee need not perform any of the driving obligations at all, which will be delegated to others.

38) I did consider the extent to which the obligation to undertake the franchisee role is itself something that obliges personal performance but reject that. First, it cannot be so where the same agreement is made with a non-natural corporate entity. Secondly, the nature of the claims in this case are in the context of the driving and delivery functions.

39) The first key question is whether the respondent's requirements that the drivers meet certain standards is a fetter on that "right of substitution" so as to set it aside. The law draws a distinction between the right of substitution and the right to place some reasonable conditions on the quality of the third party who is sent to perform the work. In any contractual relationship, it is open to a party to specify its standards of performance. They may be output related, focusing on the result, or may be input related, focusing on the skills and qualifications of the individual performing the role. The general requirements for a driving licence etc are all matters which go to the qualification or general appropriateness of the substitute to drive. I cannot see Mr Adegbite being able to show the requirement to meet those conditions amounted to a fetter on the right of substitution that otherwise clearly exists under the agreement. Beyond meeting those standards, the respondent is not concerned who the franchisee contracts with or the basis on which they contract for the driving duties. It seems to me Mr Adegbite has no reasonable prospects of showing the right to delegate those obligations is fettered so as to strike its validity down as a substitution clause.

40) The next key point concerns Stojsavljevic and the extent to which that EAT decision might define the outcome in this case. I remind myself that determining employee or worker status is essentially a fact-finding task of first instance. In Uber, it was said at paragraph 118 that: -

> ***'118. It is firmly established that, where the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, the question of whether work is performed by an individual as an employee (or a worker in the extended sense) or as an independent contractor is to be regarded as a question of fact to be determined by the first level tribunal.***

41) In isolation, that statement would tend to point away from Stojsavljevic having significant relevance to the task in hand. However, there is no argument to say the contractual relationship between Mr Adegbite and the respondent was in anyway materially different to that between the parties in that case. The analysis behind the decision in that case is, as a minimum, potentially informative. I then consider the extent to which the decision is binding in the sense of legal hierarchy.

42) The EAT was required to determine three grounds of appeal. The third ground concerned the basis of the findings of fact reached by the Employment Tribunal. That is an assessment as to whether or not *that* tribunal approached the evidence before it in a way that showed an error of law. In other words, were they facts it was entitled to find. To that extent, that part of the case is not binding on any future tribunal which could be presented with different evidence and different arguments and, even to the extent the evidence and arguments were the same, might reach different conclusions. However, there is an overwhelming reality in this case that the same evidence will be adduced and the same arguments will be deployed by the respondent, bolstered by the subsequent approval of the EAT. That is particularly so in respect of the fact of delegation being commonplace amongst thousands of its franchisees. In addition, Mr Adegbite's own arguments today have touched on some of the points that the EAT rejected. Whilst that much of the EAT decision is not binding as a matter of law, the prospect of a finding that that the substitution term is a sham or otherwise does not reflect the true position is fanciful and I am unable to conceive a different outcome

could be reached on the central question of whether the ability to delegate the driving functions was genuine or not.

43) The other two grounds of appeal were concerned with the interpretation of the written contractual agreements and the incorporation of an operating manual. The interpretation of written contract and its terms is a question of law (or at least mixed fact and law) and so far as the same or materially similar questions arose in this case, that much is binding on the employment tribunal so long as the underlying factual landscape was the same. That leads me to conclude that what I am really assessing in this application is the prospect that the facts in this case can be sufficiently distinguished from Stojvasljevic to leave open the prospect that a tribunal could arrive at a different conclusion.

44) Mr Adegbite's main argument is that the agreement as a whole is a sham. He has advanced 5 specific areas of challenge which I have considered individually and for their collective total effect.

45) The first is that he was an individual sole trader rather than a limited company although this is perhaps seen more in its relationship with the second point than as a stand-alone argument. To the extent it is a point of challenge, I do not accept there are any reasonable prospects that this provides any basis to arrive at a different conclusion that in Stojvasljevic. The agreement is identical whatever the legal nature of the franchisee. The fact that the franchisee could be (and in many cases is) a non-natural corporate entity incapable of performing the driving obligations other than through an agent itself serves to demonstrates the genuine reality of the agreement.

46) The second related challenge is that Mr Adegbite will say he always intended to do the driving himself and in fact did do almost all of it himself. Even if that intention is accepted as a fact, it did not find its way into the contractual documentation and remained a silent and private intention of one of the parties to the agreement. It cannot have any realistic force as a basis of vitiating any of the written terms. In any event, whether it will be accepted as a fact may be questionable where there will be evidence from Mr Adegbite himself of other drivers being approved for driving on his franchise. Secondly, and more importantly, doing the driving himself is something that would be perfectly permissible under the terms of the franchise contract as it is written. The fact the agreement may have been performed in a way provided for by the parties means it provides no basis for saying the reality was something different to the written agreement. Moreover, it is the genuine ability to 'substitute' that is important, not the fact of whether there was substitution or not. Consequently, I cannot see that point provides any reasonable prospect of changing the path of this case.

47) The third is that Mr Adegbite hired a van directly from the respondent. I cannot see how that separate agreement serves to alter the basis of the franchise agreement. It is a separate, if collateral, arrangement. It is not part of the franchise and is not a condition of it. Whether considered in isolation or as part of the totality of the circumstances of the relationship, I cannot see that this has any reasonable prospects of successfully establishing employee or worker status. In any event, even if it was part of the franchise conditions, it does not have any bearing on the central issue of persona performance. A van can be hired for others to drive just as it can for the franchisee to drive.

48) The fourth challenge is that Mr Adegbite only delegated the driving obligations to four other individuals and, in each case, they were used for no more than 30 days, not permanently, and in some cases much less than that. Clearly this fact arising in Mr Adegbite's own case is a problem for his argument on the delegation provision being a sham. It would not matter if, in fact, Mr Adegbite had never delegated the driving to anyone else as it is the genuine ability to do it which is important, not the fact of having exercised that right. In this case, the fact that Mr Adegbite has deployed substitute drivers is only going to add further support to the conclusion that the clause permitting other drivers to perform the driving obligations was genuine and reflected the reality of the intention of the agreement.

49) The final discrete point raised by Mr Adegbite is that he had no real control over his business, that there was almost total integration with the franchisor's systems and that he had no means to influence his own systems and profit. In this respect he says the agreement as a whole was a sham. He was not really a self-employed owner of an independent business, he was subservient to the respondent in every respect and it was it, and not him, which could control and influence whether he made a profit or not. Rather than seek to set aside the 'substitution' aspects of the franchise agreement, Mr Adegbite attacks the entirety of the agreement as a sham. For its part, the respondent will say he is wrong and that others chose to organise their franchise businesses in ways that allowed them control over who did what and when and that they were able to influence their own results and profit as a result. It accepts, however, that if a franchisee chose to operate the franchise in the very restricted way that Mr Adegbite did by performing almost all of the driving obligations himself, then the opportunities to capitalise on the agreement would be restricted to what he could perform within the daily delivery standards and systems.

50) In this regard, some aspects of Mr Adegbite's arguments come with force, at least to the extent that they might be relevant to other aspects of the applicable tests to determine employment status such as control and integration. If that were the key consideration for me today, they would be very much in the claimant's favour and certainly sufficient to take the point outside the test of little or no reasonable prosects of success. The respondent accepts the agreement contains relatively onerous obligations and conditions, but no more than many other commercial franchise agreements do.

51) All that said, the correct approach is not to weigh essential elements of the test to see if one outweighs another. All essential elements must be made out. It is not enough to say the control is extensive to the extent I no longer need to establish an obligation for personal performance. Personal performance remains an essential element of the test however onerous the other contractual terms are. These points do not go to that question and provide no reasonable prospects of Mr Adegbite successfully establishing personal service.

52) In any event, the latter point raised by Mr Adegbite carries little weight. It may be that undertaking a franchise with a view to performing the driving obligations oneself does mean the ability to increase profit is restricted. That is not how the agreement has to be performed and others perform it under a wholly different model, employing several other drivers to run a number of vans at once.

Conclusions

53) There is a significant degree of control and integration in the reality of the operation of this franchise agreement. So far as that falls to be considered by me today, on its own it is an aspect of the test of employment status which I would easily conclude had sufficient prospects of success to take it out of either threshold test. But I have to consider whether that degree of control is indicative of a tightly drawn commercial bargain, such as might exist with well-known fast-food commercial franchises, or whether it shows the reality of this agreement is not that of a self-employed franchisee, but a worker or employee instead?

54) That question brings me back to the central point of focus in this case and the settled undisputed position that a genuine right of substitution is inconsistent with personal performance. That, in turn, is inconsistent with both employee and worker status.

55) I am not satisfied Mr Adegbite has any realistic prospects of establishing that this agreement, or at last the aspect dealing with delegation of the driving functions, is a sham. I am satisfied that it falls within the category of "little reasonable prospects of success". The only question for me is whether the prospects are actually so poor as to fall within the category of having 'no reasonable prospects of success' and whether this is one of those clear cases where it is appropriate and proportionate to strike out the claim.

56) I have decided that it does fall within that category. There is no realistic basis of saying a different agreement was in operation to that considered in Stojvasljevic. There is no realistic basis to distinguish the facts from those considered in that case. There is no realistic basis of establishing the substitution provisions are a sham because Mr Adegbite's own evidence will show he himself used it; he will not be able to rebut the extensive evidence of widespread use of it by others, including some franchisees who/which base their entire business model on that term; and the term has already been subject to judicial determination and approved at appeal. Although ground 3 of the Stojvasljevic appeal is not strictly binding, there is nothing before me to suggest a different finding of facts might be reached on the central question of whether the delegation provisions were a sham. Even though that is a matter for first instance fact finding, this is not a case where a tribunal has to consider the prospects of proving an event took place at all or in a certain way or that someone said X, Y or Z. It is not a case of assessing whether a claimant will make out a causal link or shift the burden of proof. It is not a case dependant on the credibility of witnesses. This is a narrow issue on a specific part of the legal test which will be resolved on the question of how genuine the ability to delegate was. I am unable to see how the claimant could displace the evidence on that or how a different conclusion could be reached to that already reached in Stojvasljevic.

57) So far as it may be necessary to construe any elements of the franchise agreement, there is binding authority on its interpretation and there is, therefore, no reasonable prospect of a first instance decision interpreting the written contracts differently. The limited areas of factual challenge raised to distinguish this case from Stojvasljevic carry no reasonable prospect of success. The aspects of Mr Adegbite's

submissions which do carry some force do not outweigh any of the other essential elements of the definition of worker or employment. However onerous the control over the way the franchise obligations are to be performed, if there is a genuine unfettered right of substitution, that is inconsistent with employee or worker status. I am satisfied there are no reasonable prospects of showing the delegation provisions were a sham or otherwise set them aside from the reality of the agreement.

58) Overall, I am satisfied this is one of those rare cases contemplated by Anyanwu and other cases where, despite the general caution against strike out, the prospects of success can be assessed with sufficient clarity. However, these are case management decisions and satisfying a threshold test does not necessarily mean the associated order will be made in every caser. It must still be in the interest of justice to do so. That said, I cannot conceive what other factors might persuade me to allow a claim with no reasonable prospects of success to continue. Conversely, allowing one to continue, or even ordering a deposit, may well be viewed as an affront to justice to both parties later down the line if a substantial costs order were to be made.

59) So far Stojvasljevic is binding on this case, Mr Adegbite would have to challenge that decision on appeal and there is some force in me reaching a decision which brings forward the opportunity for any such challenge as there might be. Similarly, so far as some aspects of Mr Adegbite's claim are founded on the contract and payments due under the franchise agreement, this decision does not prevent him from litigating in the civil courts. For those reasons, I conclude the threshold is made out and that it is just and proportionate to make the order to strike out all the claims.

Employment Judge Clark
30 August 2022
Sent to the parties on:

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For the Tribunal:

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