



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Kevin Bijou

**Respondents:** DHL Parcel UK Ltd

## Record of an attended Full Hearing heard at the Employment Tribunal

**Heard at:** Nottingham

**On:** 4-5 July 2022 (Reading days) 6,7,11,12,13,14,18,19,20,21,25,26,27,28  
July, 2,3 August 2022 (Hearing days) 4, 5 August 2022 (Reserved Judgment)

**Before:** Employment Judge Hutchinson

**Members:** Mr J Akhtar Mr C Tansley

### Representation

**Claimant:** Francis Mortin, Counsel **Respondent:** James Boyd,  
Counsel

## RESERVED JUDGMENT

1. The unanimous Judgment of the Tribunal is that the Tribunal does not have jurisdiction to hear the Claimant's claims of Race Discrimination and they are dismissed.

# RESERVED REASONS

## Background to this Hearing

1. The Claimant presented his claim to the Tribunal on 10 December 2020 having entered into Early Conciliation with ACAS. He notified ACAS of his claim on 11 September 2020 and they issued their certificate on 28 September 2020.
2. He claimed that he had been working for the Respondents at their East Midlands Area Distribution Centre from November 2014 until 7 September 2020 as a subcontractor.
3. His claim was of race discrimination only.
4. In his claim form he said that he had worked for the Respondent under a subcontractor agreement dated 6 November 2014 and that the Respondent had terminated his services on 7 September 2020.
5. He relied on the protected characteristic of race and described his ethnicity as Jamaican Indian.
6. He said that he had been subjected to abuse, acts and omissions of unfair treatment, harassment and victimisation.
7. He said that he had suffered the above throughout, what he described as, his employment, but the earliest specific complaint is on 16 October 2017 involving a colleague [REDACTED]. His complaint was of continuous discrimination right up to the termination of his contract on 7 September 2020. He said that his contract had been terminated by the Respondent because, as his Counsel described, *“he had become too big a problem for management to deal with as he did not shy away from complaining of discrimination and as a result of his race he was treated differently at the depot, as were his drivers”*.
8. In their response the Respondents said that the Claimant had originally been engaged under a sub-contractor agreement dated 10 November 2014, but that agreement terminated in January 2017.
9. On 17 January 2017 the Respondents entered into a contract for the supply of courier services with Knight Rider Express Courier Services Limited (“Knight Rider”).
10. They said that the Claimant was the sole statutory Director of Knight Rider and they denied he was an employee of the Respondent.

11. At that stage they said that the Tribunal does not have jurisdiction to consider the claim for loss of profits by Knight Rider and that any compensation be limited to his loss of salary or payments made personally to him by Knight Rider. They also complained that many of the claims were out of time and it would not be just and equitable to extend time. They also denied all the allegations of discrimination.
12. At a Case Management Preliminary Hearing held by my colleague Employment Judge Ahmed on 29 March 2021 he identified the claims being made by the Claimant. At that hearing the Respondents accepted that pursuant to section 41 of the Equality Act 2010 (EA) the Claimant was entitled to bring these proceedings.
13. They did ask for a Preliminary Hearing to consider two other points namely;
  - 13.1 The issue of whether the Tribunal had jurisdiction to hear some of the claims because they were out of time.
  - 13.2 The statutory defence issue.
14. This application was refused by Employment Judge Ahmed because there was a danger of the Preliminary Hearing becoming a mini trial which was to be avoided if the Tribunal was being asked to make discreet findings of fact where there were overlapping issues.
15. He described a real possibility that a Preliminary Hearing may ultimately conclude that it needed to hear all the evidence before it could determine whether to extend time on just and equitable grounds and there would be no saving on time and costs would be wasted.
16. The parties agreed that the matter should be listed for a 20-day hearing to include time for reading and deliberation and it would deal with liability only.
17. It was also agreed the parties would agree a draft list of issues in the form of a Scott Schedule to assist the Tribunal.
18. Almost 12 months later 10 February 2022 the Respondents wrote to the Tribunal and asked for the matter to be listed for a one-day Open Preliminary Hearing to consider whether the Claimant was “in employment” for the purpose of section 83(2)(a) EA and whether therefore he was entitled to make his claim under section 41 of that act.
19. In that application they described that since the Preliminary Hearing there had been *“a much closer inspection of the way in which the Claimant operates his Company Knight Rider which had caused them to reassess the position.”*

20. They acknowledged that at the Case Management Preliminary Hearing they had conceded the Claimant's status to make his claims, but they wished to contend by reference to the applicable legal test that the Claimant did not have the qualifying employment/worker status to bring his claims.
21. They acknowledged and apologised for the delay in making the application but said that it would be in accordance with the overriding objective for their application to be acceded to. They said that if the Claimant was not an employee or worker and the Tribunal had no jurisdiction to hear his claims the lengthy hearing could be vacated which would represent a significant saving in relation to judicial resources, costs and time saved to all concerned.
22. By a letter dated 16 February 2022 the Claimant objected to the Respondents application. They contended that a Preliminary Hearing was not needed to determine this issue. They pointed to the concession made by the Respondents at the earlier Preliminary Hearing and said that it would not be fair or reasonable to permit a further separate hearing to determine the conceded point. They contended that it was clear that the Claimant was protected by the Equality Act and that there was no reasonable requirement for further determination on this point by way of a separate hearing.
23. They pointed out that to hold a further Preliminary Hearing would unnecessarily incur time and resources of the Employment Tribunal and that it would inevitably lead to delay in dealing with these proceedings. They described the request as "an abuse of process" and said they would seek the Claimant's costs of preparing for and attending a Preliminary Hearing.
24. The application was considered by my colleague Employment Judge Clark who decided to refuse the application for an Open Preliminary Hearing. He pointed out that the final hearing of the case had a full day set aside for reading in and the suggestion that the status/jurisdiction issue could be dealt with in one day and an extempore judgment given, or reserved judgment given in time to maintain the remaining Case Management if needed was optimistic.
25. He pointed out that in any event the Tribunal was unable to list such a hearing in the timescale required.
26. He did point out that the issue of jurisdiction was a matter of law and "it was not a matter for the parties can convey on the tribunal by acquiescence or express consent and it will be a live issue for the final hearing to determine." The fact that the Respondent had changed its position conceded at the preliminary hearing that the facts engaged section 41 of the Equality Act 2010 may give rise to other case management consequences but does not convey jurisdiction if it does not otherwise does not exist.

27. This Tribunal can understand and concur with Employment Judge Clark's views. Having now heard the case an open preliminary hearing on the jurisdiction point would have required a lengthy hearing in itself and evidence called about the way the Claimant conducted his business and the interaction between himself, his drivers and the Respondent.
28. Knight Rider's contract had been terminated by the Respondents in September 2020 and the Claimant had made his claim in December of that year. Some of the events that were being cross examined on occurred 6 years ago and any further delays needed to be avoided at all costs. I raised the point with the parties at the commencement of the hearing as to whether we should deal with status as a preliminary point, but it was agreed by everybody that we needed to hear the evidence and we therefore decided that we would hear all the evidence and make the first issue that we would deal with that of jurisdiction.
29. As can be seen from the above judgment we have found that the tribunal does not have jurisdiction to hear this complaint. We have, as a result of that finding not made any further findings of fact about the allegations. We are satisfied that is the appropriate course of action under the circumstances of this case. If we are wrong on that point, we have heard all the evidence and can make our findings of fact in respect of the allegations of race discrimination.

### **The Preliminary Issue**

30. The first and most important matter that we had to deal with was whether the Claimant had standing to bring the claims and the Tribunal jurisdiction to hear the claims under section 41 of the EA. This was agreed in the list of issues in the combined Scott Schedule produced by the parties prior to the hearing.
31. In making our decision in respect of that we have particularly considered the evidence of the Claimant and that of his drivers not to mention the evidence for the Respondents in particular of Gary Hope but also the other evidence of the Respondents witnesses in particular their Management Team about the way in which the Claimant conducted his business. There was also an agreed bundle of documents and where we refer to page numbers it is to document in the bundle.

### **Relevant Facts**

32. DHL Parcel is one of the largest express delivery companies in the UK delivering mail, packets and parcels and collecting the same around the world. It operates a national network of over 50 depots in the UK.

33. One method of collection and delivery is by self-employed sub-contractor/owner drivers. These sub-contractors own or independently hire and drive their own vehicles and provide services to the Respondent themselves and/or via persons. Those who engage personnel are known as Core Non Route drivers (“CNR”) or Core Route drivers (“CR”). These operate generally as limited liability companies and that is how the Claimant operated, other sub-contractors operate as sole traders albeit with the same right of substitution.
34. Mr Bijou is the sole Director of Knight Rider Express Couriers Limited (“Knight Rider”). The Company Registration number is 10391323 and it is registered for VAT under number GB171 753582. It was incorporated on 23 September 2016 (pages 96-102 of the bundle).
35. Mr Bijou had originally been engaged by DHL Parcel as a sub-contractor under an agreement dated 10 November 2014 (pages 49-75). That agreement was terminated in January 2017 because the Claimant decided to trade by his own Limited Company Knight Rider.
36. On 17 January 2017 the Respondent entered into a contract for the supply of courier services with Knight Rider under a subcontractor agreement (pages 7695). That agreement was terminated on 7 September 2020.
37. Mr Bijou signed the sub-contractor agreement and the schedules to it on behalf of Knight Rider in his capacity as the Director of the Company.
38. Mr Bijou operated his Company out of the Respondents East Midlands Depot. The site receives deliveries of freight each night from other hub warehouses and these deliveries are by HGV vehicles and their drivers are employed by the Respondent.
39. The vehicles are then unloaded by other employees of the Respondent and the parcels are sorted into groups operated by the service partners/sub-contractors and placed in loading bays at the site. Each route is determined by postal codes areas.
40. The sub-contractors tend to arrive at the site between 5.00am and 6.30am although Mr Bijou was often there well before then.
41. The sub-contractors and their personnel are issued with a scanner and they then scan and load the parcels onto their vans in the order they choose. If there are any discrepancies or anomalies these will be resolved following which the subcontractor/their personnel will leave the site and commence the deliveries.
42. If they are unable to deliver a consignment the sub-contractor must arrange for the consignment to be taken out the following day and make a further attempt at delivery.

43. The sub-contractors also arrange for the collection of parcels from some customers. The sub-contractor would either make the collection themselves or arrange for a member of their own personnel or a third party to make the collection and deliver the parcel back to the depot.
44. At the time of termination of the agreement with Knight Rider there were 80 drivers based at the East Midlands site. At that time there were 9 core drivers who operated their own routes and they engaged between 1 to 7 additional drivers. There were also 5 CNR's who engaged between 1 to 4 drivers. Core drivers and CNR's operate routes via their own directly engaged personnel. Some CNR's do not drive their own operated routes although the Claimant did sometimes drive a route and would frequently act as a substitute for his own personnel and other subcontractors.
45. The Respondents have other employees who drive electric vehicles at other sites and employed drivers provide their services personally under a contract of employment.
46. Mr Bijou operated as a CR driver running 5 routes with usually 9 drivers who were all engaged by Knight Rider. We were shown the details of the drivers on a statement of charge dated 31 January 2020 (page 1066).
47. We have seen the statutory accounts for Knight Rider for its financial year ended October 2020 (page 1050). Those accounts show one employee (page 1054). The only employee is Mr Bijou. He was paid a salary which is at page 1060. His tax return for April 2020 is at page 1082 and indicates that he was paid a salary of £8626 and received dividends for the tax year ending April 2020.
48. The accounts for the financial year ended 31 October 2020 show at page 1064 that Knight Rider engaged 9 drivers as self-employed sub-contractors and not employees. The drivers themselves were paid a flat fee as a daily rate and they were responsible for their own tax and National Insurance contributions.
49. We have considered the sub-contractor agreement between the Respondent and Knight Rider which starts at page 76 of the bundle. It is dated 11 January 2017 and the status of the sub-contractor and personnel are set out at clause 4.1 which states;

*"You accept that you are in business on your own account, either as a sole trader, or in a partnership, or are part of a company, which provides a service to UK Mail. You expressly acknowledge that neither you nor any of your partners, or employees, are employed with UK Mail."*

50. It goes on to say;

*“4.2 As such you are not obliged to have to perform the services in a personal capacity. You can use your own personnel (“personnel”) providing the services to us, we will require that you ensure such personnel are adequately vetted and are qualified, and competent to provide the services. This is because of security reasons as the services will include the collection and delivery of high value goods.”*

51. 4.3 provides;

*“We also expect, and you acknowledge and agree, that you will be fully liable to us for the actions or omissions of your employees as we would expect you to be fully liable to us for your own acts and omissions whether they are negligent or otherwise and even if those acts or omissions arise from fraud or your personnel’s part.”*

52. 4.4 provides;

*“You acknowledge and agree that you are fully responsible for your personnel. You will make clear to your employees they work for you and not for UK Mail, and it is you who pays your personnel, and not UK Mail. You agree to indemnify UK Mail for any losses it suffers or incurs in relation to the personnel.*

53. 4.5 says;

*“As you can either perform the services yourself, or use your own personnel, we expect the services to be performed without interruption and to a consistently high standard, as our customers expect the same high standards and continuity from us.”*

54. Finally, 4.6 provides;

*“Where there is a failure to provide any part or all of services, you will not be paid for services not performed. We reserve the right to step in and appoint a third party service provider to perform the services and recover from you either an administration charge of £75 each day or the additional cost incurred by having to step in and appoint a third party service provider to perform the services not performed on a particular day.”*

55. It can be seen from the above and in particular clause 4.2 that the sub-contractors are free to use their own employees, agents or sub-contractors to provide the services and the agreement provides for an unfettered right of substitution.

56. The only restrictions on the sub-contractors’ personnel is that the sub-contractors must personally vet anyone whom they themselves engage to provide the services. The reasons for this are as follows;

56.1. To ensure that the individuals have appropriate driving qualification.



- 56.2. To ensure that they will not adversely affect the integrity of the mail the Respondents carry.
  - 56.3. To ensure compliance with statutory obligations.
57. The vetting is set out in clause 2.2 of the 2<sup>nd</sup> schedule to the agreement and it comprises;
- 57.1. DBS check duly completed.
  - 57.2. Details of all entries on the Disclosure Barring Service.
  - 57.3. Personnel details that may be required by UK Mail including proof of residence, age, competency to provide the services, contact details, next of kin details and,
  - 57.4. Any other information that UK Mail may reasonably require.
58. The costs associated with the vetting of personnel engaged by sub-contractors are paid for by the sub-contractor themselves.
59. These are normally undertaken prior to any of the sub-contractors' personnel providing services but occasionally this will not be possible and sub-contractors are able to appoint substitutes at short notice and those substitutes then operate under what is called a "Temp Badge". This will last for up to 4 weeks whilst vetting is undertaken. This gives further flexibility for a sub-contractor to use substitutes.
60. As can be seen from the above the sub-contractors are responsible for the services that those individuals provide to the Respondent. They are not engaged or contracted directly with the Respondent in any way.
61. Knight Rider was responsible for managing its own personnel. The Respondents management always dealt with Mr Bijou if there were any service delivery issues, and it was then a matter for Mr Bijou to deal with his own personnel. The only time the Respondents would be involved in the management of his personnel was if they were investigating issues such a potential theft.
62. If sub-contractors were ever unable to provide the services that they were scheduled to undertake the sub-contractor was required to provide suitable cover and there was a penalty if they failed to do so.

63. Under the terms of the sub-contractor agreement the sub-contractor was required to provide his own vehicle and insurance in respect of risk arising from the performance of his duties. This is dealt with in clause 12 of schedule 1 at page 82b.
64. Mr Bijou provided vehicles for all his drivers. In accordance with the service agreement, they had to have DHL livery which was paid for by Knight Rider and all his vehicles also contained his own livery with the Knight Rider motif. The vehicles also had personalised number plates comprising the name Bijou.
65. It was a requirement that the vehicles were not more than 5 years old. There was an issue when Mr Bijou sought to use vans that were more than 5 years old as spare vehicles, and he was told by Mr Chadburn Tennyson to remove them from the site. Apart from these conditions a sub-contractor was responsible for all operating costs including fuel, repair, vehicle upgrades and road tax. The Respondent does not supply vehicles for the sub-contractors or provide a replacement if their own vehicles breakdown.
66. The livery is provided through approved providers at the cost of the subcontractors and sub-contractors cover any fixed livery with plain magnetic panels if they wish to undertake other work for their own or other companies.
67. Apart from providing vehicles for his own drivers, Mr Bijou also provided vehicles for other drivers particularly if there was a breakdown.
68. Sub-contractors were also required to have a mobile phone so that they could be contacted at any time and they paid all associated costs in respect of that.
69. Mr Bijou and all his drivers were required to and did wear the Respondents uniform including caps and high viz jackets. The sub-contractor was responsible for the cost of this for both themselves and their personnel and they chose uniform items from a list at their own cost and discretion.
70. Knight Rider was paid for the services provided by its personnel in accordance with the terms of the sub-contractor agreement at the rate that was set at any time. These rates changed from time to time and was signed by Mr Bijou on behalf of Knight Rider.
71. It can be seen from the agreement there are two main elements to the payment namely a consignment fee and an items fee.
72. Billing was undertaken through what is described as the OPSYS data system and that was used to generate invoices to pay the sub-contractor. The data was used to calculate fees due to a sub-contractor based on all services provided by the sub-contractor carrying out the deliveries or their personnel. A sub-contractor could query any anomalies at the month end and the company issued a self-bill.

We have seen examples of the Claimant's self-bills at page 130 of the bundle. A copy of the self-billing agreement is at page 86 and we note the parties to that agreement are the Respondent and Knight Rider.

73. The Respondents never pay a sub-contractors' personnel directly. Knight Rider was paid for all those engaged by Knight Rider. It can be seen in the documents that in June 2020 Knight Rider received total payments of £20,349 of which £15,033.48 related to work undertaken by its personnel which comprised 4 drivers and 2 temporary drivers, at page 1043.
74. The amount that Knight Rider received varied month to month depending on the volume of work available. There was no entitlement to any level of work and as we had described to us the level of work varied depending on the season. The peak season is between October and January. Sub-contractors are able if they so wish to provide services to other companies although there is no evidence in this case that Knight Rider did so.
75. Knight Rider and all other sub-contractors were responsible for their own taxes and National Insurance contribution in respect of themselves and any of their personnel.
76. In Mr Bijou's case he was paid a salary by Knight Rider at just under the level that would require National Insurance contributions be deducted. The rest of his income was received through dividends.
77. None of his personnel were employed by Knight Rider and they were all responsible for their own tax and National Insurance payments.
78. Knight Rider was registered for VAT and that was arranged personally by Mr Bijou directly with the HM Revenue and Customs.
79. The Claimant and Knight Rider's personnel were not entitled to any holiday pay, company or statutory sick pay or other National Insurance liabilities. They are not subject to the company's procedures whether it be grievance or disciplinary. The agreement is terminable on 30 days' notice from either party. If the Respondent terminates an agreement, they do not go through any process, in particular any disciplinary procedure. This is because none of the sub-contractors are employed by the respondent and the provision for termination provides two reasons, namely for convenience or material breach.
80. Knight Rider's agreement with the Respondent provides for Knight Rider to provide services on routes depending on volume in a set of postcode sectors. The

routes are always variable and subject to change to reflect operational needs and fluctuations and volume. There was no right to any route.

81. Whilst Knight Rider's sub-contractors all had regular routes it was a matter for Mr Bijou to decide who undertook those routes and he could change the routes at any time. Indeed, he explained when the discussion took place about multiple scanning that some of the routes were allocated to several of the scanners. So, he could choose which driver he used to make deliveries or collections. Whilst Mr Bijou would be expected to inform the Respondents if he could not make a delivery on a particular day it was a matter entirely for him how he undertook that and which of his drivers he used.
82. There was no entitlement to any route for Knight Rider at any time. An example of this was in respect of the NG17 route in June 2019 when the allocation of a new route was discussed between him and Mr Andrew Chadburn Tennyson the Regional Director. He accepted that he had no entitlement to a particular route.
83. Mr Bijou was free to determine how he organised matters for himself and his personnel as I have mentioned above. He could change route, collections and deliveries and organise himself the best way that he wanted to. He was able to choose which parcels were scanned to which of his personnel and once the scanning was complete, he and other drivers could optimise their route and choose in what order they delivered items so long as they complied with the service level requirement as some parcels had to be delivered by certain times.
84. Mr Bijou's Company operated 5 routes and had 9 drivers that he allocated the work to and he allocated work to himself from time to time and substituted for any of his driver's during holidays or sickness absence. He would also be responsible for managing his drivers and would normally be on site to check them out and to check them back in again. He managed his Company's drivers on an unfettered basis.

## THE LAW In Employment

85. Section 83(2)(a) EA defines employment as "*Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*". As Mr Mortin described to us the scope of section 83 is analogue to the concept of work in section 230(3) of the Employment Rights Act 1996 (ERA). There is no presumption a contractual document contains the whole of the agreement or the true agreement because an individual has signed it.

86. In this respect Mr Mortin referred us to the cases of;

- ***Pimlico Plumbers v Smith [2018] UKSC29.***
- ***Uber BV v Aslam [2021] UKSC5.***
- ***Sejpal v Rodericks Dental Limited [2022] EAT91.***

87. We have considered the case of Sejpal in which the EAT summarised the authorities in this area and reminded us that we are to focus on the purpose of the legislation that conveys such rights to individuals.

88. We were referred to the quotation from Lord Leggatt in the Uber case who said that;

*“the correlative subordination and/or dependence was a level of control exercised by the employer, thus considering the level of control is an important way to make the assessment as to status.”*

### **Contract Workers**

89. Section 41 EA provides protection for contract workers. In particular it says;

*“(1) A principal must not discriminate against a contract worker—*

*(a) as to the terms on which the principal allows the worker to do the work;*

*(b) by not allowing the worker to do, or to continue to do, the work;*

*(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*

*(d) by subjecting the worker to any other detriment.”*

90. Under the subsequent subsections the principal must also not harass or victimise a contract worker and has a duty to make reasonable adjustments.

91. It then goes on to describe the definitions of principal contract work and contract worker;

*“(5) A “principal” is a person who makes work available for an individual who is—*

*(a) employed by another person, and*

*(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).*

*(6) "Contract work" is work such as is mentioned in subsection (5).*

*(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b)."*

92. Mr Mortin referred us to the following cases;

- ***MHC Consulting Services Limited v Tansell [2000] IRLR387.***
- ***UK Mail Limited v Creasey UK EAT0195/12/ZT.***
- ***Uber BV v Aslam [2021] UKSC5.***

93. He also reminded us of the guidance in the EHRC's Employment Code of Practice at 11.2 to 11.8. In particular he referred us to 11.6 which states;

*"The worker must work wholly or partly for the principal, even if they also work for their employer, but they do not need to be under the managerial power or control of the principal."*

94. Mr Mortin submitted to us that section 41 EA is designed to protect individuals from discriminatory behaviour in the workplace when they do not directly contract with the entity running the said workplace. He referred us to the explanatory notes in the Bill for the EA;

*"164. This clause makes it unlawful for a person (referred to as principal) who makes work available to contract workers to discriminate against, harass or victimise them..."*

*165. This clause is designed to replicate the effect of provisions in current legislation, while codifying case law to make clear that there does not need to be a direct contractual relationship between the employer and the principal for this protection to apply."*

## **The Contract**

95. In their response to the claim the Respondents did place reliance on the decision in Creasey. Mr Mortin says to us; *"that the test of determining the status has moved on. But Creasey had held that the contract was a starting point of the agreement, and this should be interpreted in accordance with normal contractual principals."*

96. Mr Mortin tells us that the case was *"emblematic of the issues that Uber seeks to overcome."* That rights conveyed by statute to protect individuals in cases of unequal bargaining power should be considered. He referred us to the contract of employment and provided us with examples of what he says amounted to a

contract in this case which placed most of the risk with the contractor and offered little reward in return.

97. What sections 39 to 41 of the EA tell us is that the protection of the Equality Act is only given to those in employment of some sort. It applies to employees, workers, applicants and contract workers but it does not afford protection to those who are genuinely in business on their own account and not engaged in any form of employment.
98. The main thrust of Mr Mortin's argument is that Mr Bijou was employed by Knight Rider and that he carried out work made available to him in furtherance of the contract. Mr Mortin agrees that there is no written contract of employment between Mr Bijou and Knight Rider, and he says that we need to consider the realities of the working relationship and infer the terms of that arrangement and whether Mr Bijou was engaged under a contract of employment or a contract for personnel services.

### Implied Terms

99. We were referred to the case of ***Carmichael v National Power Plc [2000] IRLR43*** which confirmed that in many employment cases the parties do not intend the whole bargain to be contained purely on the documentation and in such a case it may be necessary to look (for the whole agreement) to several sources, such as letters, oral exchanges at interviews or elsewhere and even the conduct as time goes by.
100. Mr Mortin urges us to interpret the bargain made between Mr Bijou and Knight Rider and says that a contract may be implied between Mr Bijou and Knight Rider by virtue of his conduct over an extended period and on the basis of the relationship as necessary for the contract between Knight Rider and the Respondent to work properly.

### Director/Shareholder Status

101. Mr Mortin referred us to a number of cases namely;

- ***Trussed Steel Concrete Limited v Green [1946] CH115.***
- ***Folami v Nigerline (UK) Limited [1978] ICR277.***
- ***Secretary of State for Trade and Industry v Bottrill [1999] IRLR 326.***
- ***Clark v Clark Construction Initiatives Limited [2008] IRLR 364.***
- ***Secretary of State for Business Enterprise and Regulatory Form v Neufeld [2009] IRLR 475.***

102. The Court of Appeal in Bottrill confirmed that there was no rule of law that a person who is a sole or majority shareholder in a company cannot be an employee for the purposes of employment protection legislation. It is a question of fact in each case to be determined in accordance with the law of employment generally. In that case Mr Bottrill had a contract of employment with the company that he was the majority shareholder of. What we must do is to consider whether there was a genuine contract between the company and the shareholder, the circumstances in which the contract came into existence and what the parties actually did in accordance with the contract. That is different to this case because there is no contract at all between Mr Bijou and Knight Rider Limited.
103. As Mr Mortin described to us the Clark case set down guidance on deciding whether the contract of employment of a majority shareholder should be given effect. In particular ;
- 103.1. The onus is on the party denying a contract where an individual has paid an employee's tax and NI, prima facie he is entitled to an employee's rights. This does not reverse the burden of proof; the employee may still need to satisfy the ET as to status.
- 103.2. A majority shareholding (or de facto control) does not in itself prevent a contract arising.
- 103.3. Entrepreneur status does not in itself prevent a contract arising.
- 103.4. If parties conduct themselves according to the contract, that points towards employment.
- 103.5. If their conduct is inconsistent with (or not governed by) the contract that points against employment.
- 103.6. The assertion that there is a genuine contract will be undermined if there is nothing in writing. However, if conduct tends to show a true contract of employment the ET should not readily seize on the absence of a written agreement to justify a rejection of the claim.
- 103.7. The taking of loans from the Company (or them guaranteeing its debts) are not intrinsically inconsistent with employment.
- 103.8. Although majority shareholding and/or control will always be relevant and may be decisive that fact alone should not justify a finding of no employment.



### Dominant Purpose

104. In his contentions on this issue Mr Mortin described the dominant purpose of the contract between the Respondents and Knight Rider was that the consignment orders would be fulfilled by Knight Rider. A failure to do so was met with a penalty. He said that this was the case in the original sub-contractor agreement that Mr Bijou had entered into personally with the Respondent prior to Knight Rider's incorporation.
105. He submitted that the obligations on Mr Bijou did not change once the contract was made with Knight Rider and that he was still providing personal services to the Respondent by delivering and collecting consignments for them.

### Personal Performance

106. Mr Mortin again relied on the Sejpal case saying there was no requirement of mutuality of obligations incumbent on a contractor to establish an individual is a worker pursuant to section 230(3)(b) ERA.
107. He says that the wording of the contract was not as determinative as perhaps it had been in the days of the decision of Creasey and that the key issue for us was whether there was a requirement for Mr Bijou to personally carry out any work for the Respondent.
108. He referred to the terms of the contract and also referred us to the case law referred to above together with that of ***London Borough of Camden v Pegg UKEAT/0590/11***.

### Professional Business Undertaking

109. Mr Mortin referred us to the case of ***Hospital Medical Group v Westwood [2012] ICR 415***. In support of his contention that both elements needed to be present to exclude an individual from protection.

### Integration

110. Mr Mortin referred us to the case of ***Cotswold Developments Construction Ltd v Williams [2006] IRLR 181***. Mr Mortin reminded us that Smith LJ had held in that case that influence and/or control may well assist in establishing that an individual is a contract worker albeit it need not be demonstrated in all cases. What there needs to be is an element of control exerted by the Respondent on the manner in which the Claimant Mr Bijou carried out services for it to be consistent with there being a relationship of subordination and dependence.

### **Control**

111. In this respect Mr Mortin referred us to several matters which he submitted amounted to there being control. In particular we were referred to,

111.1. The requirement to attend training

111. 2. The allocation of scanners that were preloaded with deliveries for that day

111.3. The allocation of delivery routes and daily deliveries paperwork

111.4. The requirement to provide mobile phones

111.5. The requirement to wear uniform

111.6. The requirement to have the respondent livery on their vehicles

7. The requirement for vehicles to be less than 5 years old

112. He said that an employment relationship could be readily implied by looking at the realities of the working relationship between the claimant and Knight Rider and that he should be protected under S41 EQA.

### **Our Conclusions**

113. In this case Mr Bijou had been engaged as a sub-contractor between November 2014 and January 2017. It was entirely Mr Bijou's own choice that the arrangement changed on 17 January 2017 when the company that he was the sole shareholder of which had been incorporated in 2016 entered into a contract with the Respondent for the supply of courier services. At that point the only contract was between Knight Rider and the Respondent and to make a claim under the Equality Act the Claimant would have to establish that he was a contract worker and thus given protection under section 41 EA.

114. We have taken into account all the circumstances of this case in determining whether there is any contract between Knight Rider and the Claimant or indeed whether he was in effect a worker in some way for the Respondent. We set out below our conclusions as to whether there is any protection available to Mr Bijou.

115. There is no written contract of employment between Mr Bijou and Knight Rider. And we have to therefore examine the realities of his working relationship and decide whether to infer that the terms of that arrangement amount to some form of engagement by the Claimant either under a contract of employment or a contract for personal services.
116. We are satisfied in this case that not only is there no written contract of employment but that we are not prepared to imply that he was engaged under a contract of employment or a contract for personal services.
117. It is a factor that we take into account that not only was there no contract of employment between himself and Knight Rider but that he was the Managing Director and sole shareholder of the Company.
118. In this case it can be seen from the accounts of Knight Rider that the majority of the Claimant's earnings were in the form of a dividend. The payment of a salary was simply described as Directors fees.
119. We are satisfied that not only was Mr Bijou a sole shareholder he operated as an entrepreneur negotiating with the Respondents for a number of routes that he undertook for them as the owner of his business. Nothing in his behaviour towards the Respondent gave any indication that he considered himself other than the owner of Knight Rider and operating that business.
120. We emphasise that the fact that he was the sole shareholder is not the only fact that we have taken into account in deciding that he was not engaged with Knight Rider in any way either under a contract of employment or a contract for personal services.
121. In this case the only contract that we have seen is that between Knight Rider and the Respondent. Whilst Mr Bijou signed that contract, he signed it on behalf of the Company. In our view the fact that he had previously had a personal contract with the Respondent is of little significance.
122. The dominant purpose of the contract between the Respondents and Knight Rider was that of Knight Rider providing courier services. As described by Mr Bijou himself that contract had been a fruitful one for him. He had been initially allocated the NG17 route and then allocated several additional routes because of the excellent service Knight Rider provided to the Respondents.
123. By 2020 Knight Rider ran 5 separate routes and engaged a total of 9 drivers. Although Mr Bijou himself did some driving his primary purpose was running the business.

124. As he described to us, he was often the first to arrive at site in the early hours of the morning and was solely in charge of his own drivers. He would choose which drivers did which routes and could change the routes if he thought it was convenient. He was responsible for checking out his drivers and seeing them back in.
125. Whilst we acknowledge that the Claimant was registered as being an employee of Knight Rider, the salary he received was below the National Insurance limit and he did not therefore pay any tax or National Insurance as an employee. The majority of his income was paid as dividends and the pay that he received was simply described as Director's salary.
126. The Claimant did not have regular hours of work. As we have said he often arrived as early as 4.00am in the morning and would be there until all his drivers had completed their deliveries and collections and returned to the depot.
127. As can be seen by the contract document between Knight Rider and the Respondent none of the obligations in the contract are personal to Mr Bijou. All the obligations are upon the Company. We are satisfied that the reality of the working relationship did not require Mr Bijou to personally carry out any work for the Respondent nor could it be inferred that there was any working relationship between the Claimant and Knight Rider.
128. The routes that I have described above were all assigned to Knight Rider and not to Mr Bijou himself. He negotiated these routes on behalf of his Company and he was not required to carry out any work personally for the Respondents at all.
129. Whilst from time-to-time Mr Bijou did carry out work on the routes this was done on an occasional basis, but the nature of the business was that as a general rule the routes were undertaken by other drivers and he was responsible as the owner of Knight Rider for looking after his business.
130. The obligations regarding performance of the contract were all obligations of Knight Rider. It was Knight Rider that was responsible to ensure that the key performance indicators were hit.
131. As the owner of the business, Mr Bijou clearly had an interest in ensuring that Knight Rider performed its obligations, but it was no more than him being interested as the owner of the business. The fact that the operations team often telephoned Mr Bijou if they had any issues rather than deal with individual drivers that he managed was a clear indication of the reality of the situation on the ground. Similarly, the fact that he would always be on hand at the depot to assist his drivers in preparing parcels to be delivered each day scanning those and loading those on to the vehicles. He was also responsible for collecting the scanners and then decided which of his drivers would undertake which particular routes. This all

indicates that Mr Bijou was running the business that he owned in the way that many businesspeople do.

132. In this case we were referred to clause 4 of the agreement between Knight Rider and the Respondent which identifies that Knight Rider was a business on its own account and there was no obligation of personal performance. The reality of the situation in this case is there was no obligation for personal performance, and this is a different scenario to that in the case of Uber.
133. In this case Mr Bijou hired his own drivers and they all entered into contracts with Knight Rider as self-employed operators themselves.
134. Knight Rider was responsible for ensuring that those drivers were vetted but that was to ensure that the drivers were in fact qualified to undertake the work that Knight Rider was contracted to do. It did not amount to any limitation on Mr Bijou to substitute drivers in accordance with his own wishes. The requirements were to make sure as described in the contract that all drivers were *“adequately qualified, trained, experienced and met the screening vetting procedure.”* This did not amount to the Respondent retaining discretion to refuse any driver provided that the driver complied with the requirements.
135. In this case we have no doubt that Knight Rider which was owned by Mr Bijou was a business undertaking and that the Respondents were a customer of that business. Knight Rider invoiced the Respondents for the courier services provided and the Respondents paid those invoices to Knight Rider, not the Claimant.
136. Whilst we are satisfied that there is no evidence that Knight Rider operated for anyone else during the period there is no evidence that they could not have done so if they wished to do so. Mr Bijou clearly thought that his business, Knight Rider, had plenty of work to do undertaking the routes for the Respondents. The routes did change from time to time and there was evidence that Mr Chadburn Tennyson had had a conversation with the Claimant with regard to a route that he hoped Knight Rider would have. Mr Bijou had acknowledged in that conversation that he had no entitlement to any routes.
137. It is acknowledged that many of the Knight Rider drivers undertook regular routes. The paperwork for those routes would be produced by the Respondents employees and would be handed to Mr Bijou who would distribute this amongst Knight Rider’s drivers. This does not amount to control but simply a procedure whereby the paperwork was issued each day to the Knight Rider drivers.

138. During the day sometimes the Respondents Management Team would telephone the Claimant with additional instructions and changes to collections or deliveries. Mr Bijou dealt with these queries and was responsible for ensuring that the Knight Rider drivers did undertake all its deliveries and all its collections. The contract between Knight Rider and the Respondent provided for the drivers to wear the Respondents uniforms whilst carrying out the services and the cost of this was borne by Knight Rider. Mr Bijou himself wore the uniform. This was simply a service requirement of the Respondents to ensure that when parcels were delivered to or collected from their customers, they could identify that they were an agent of DHL.
139. A further indication of the nature of Knight Rider's business was that Knight Rider owned all its own vans. Whilst there was a requirement for them to display the livery of DHL whilst they were undertaking the business of DHL the responsibility for payment of the livery was with Knight Rider. It was applied through the Respondents partners at the depot. This was a service requirement to ensure that the vehicles could be identified as delivering DHL's parcels. Similarly, the requirement that vehicles needed to be less than 5 years old did not amount to any direction to require Knight Rider to change its vehicles. It was to ensure that the vehicles that were delivering on behalf of DHL were well kept and reliable.
140. We noted that not only did Knight Rider own its own vehicles it also had other vehicles which were used by other drivers on a contract basis. This is a further indication of the business that was operated in this case by Knight Rider.
141. Not only did Knight Rider provide its own vehicles but they also provided and made their own arrangements for insurance and they were responsible for not only comprehensive motor insurance but also employers liability insurance and product and public liability insurances.
142. Knight Rider was also responsible for all its own operating costs including fuel, repair, vehicle updates and road tax.
143. Whilst there is the requirement for drivers to have a mobile telephone the cost of provision of that telephone is entirely the responsibility of Knight Rider and his contractors.
144. For all the reasons set out above this Tribunal is satisfied that Mr Bijou was not engaged in any way as either an employee or a worker for the Respondent and that he was not a worker or employed by Knight Rider. He was an entrepreneur who owned and managed his own business Knight Rider. Whilst there were contractual obligations that Knight Rider had with the Respondents, they did not amount to any control of his business and the way it operated. We are also satisfied that he was not employed by Knight Rider or engaged in any way by that company. It was his company which he ran for his own benefit and he was not under the control of anyone in respect of that. For these reasons, the Tribunal are satisfied that it does not have jurisdiction to hear his claims of discrimination and they are therefore dismissed.

---

Employment Judge Hutchinson

Date: 13 October 2022

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.