Case No: 2302314/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr P Patel

Respondent: DPD Group UK Ltd

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The respondent's application that the claim is struck out as having no reasonable prospect of success under Rule 37(1)(a) succeeds.

2. Rule 37 deals with the situations in which a claim or response may be struck out:

    (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;

        (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

        (c) for non-compliance with any of these Rules or with an Order of the Tribunal;

        (d) that it has not been actively pursued;

        (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response;

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

3. In deciding whether to strike out a claim the Tribunal must have regard to the overriding objective.

4. Strike-out is a draconian step that should be taken only in exceptional cases (Mbuisa v Cygnet Healthcare Ltd [2019] 3 WLUK 652).

5. There is no dispute of fact in this claim. The respondent's opening note records at paragraph 5:

> The Claimant's representative accepts the Claimant's status and that of Stojsavljevic are the same, however it is argued that issues of training and emergency cover within substitution were not considered by the EAT. The following is noted from the Claimant's representative's email to the Tribunal dated 21 March 2022:
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> a. It is accepted that the Claimant's circumstances were the same as Mr Stojsavljevic (the franchise agreement, the way he worked, the fact he chose to hire a vehicle from the Respondent, the ability to substitute, the fact he did substitute, the fact he declined offers of employment etc.)
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> b. It is accepted that the EAT determined there was a valid substitution clause in the franchise agreement.
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> c. Nonetheless, it is argued that the Claimant's case should be advanced because the tribunal (and the EAT) in Stojsavljevic did not consider the *"extent of training needed by a prospective substitute to be accepted by DPD and or how emergency cover was sourced".*
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> 6. The Claimant is wrong. The issue of providing substitutes (including the express requirement for training and how emergency cover was managed) was considered in detail and concluded upon by the tribunal in Stojsavljevic (and upheld by the EAT). The following is noted:
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> a. Paragraphs 59-62, 92 and 93 of the tribunal reasons plainly show training was considered regarding whether there was a fetter on any right the claimant had to substitute drivers.
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> b. Paragraph 102 of the tribunal reasons concluded that the Respondent only stepped in to provide training where the franchisee had failed to do so and that this was a matter of business efficacy, not obligation. It was held that this *"was not such as to amount to a fetter on the claimants' contractual entitlement to engage a driver of their choice."*
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> c. Paragraphs 56-59, 62-65, of the tribunal reasons plainly show the arrangements as to cover drivers were considered regarding whether there was a fetter on any right the claimant had to substitute drivers.
>
> d. Paragraphs 103-104 of the tribunal reasons concluded that the arrangements for cover did not amount to a fetter. It was held *"where the franchisee was contractually entitled to provide such individuals of their choice as drivers, despite the claimants' practices of utilizing other ODFs [owner driver franchise] and ODFs' drivers, this does not detract from the true terms of the Franchise Agreement, enabling the franchisee to substitute personal performance to a person of their choice."*

7. On the Claimant's case, the only issue the Tribunal is being invited to consider is the right of substitution and, specifically within that, the

issues of training and cover. These matters have already been determined in Stojsavljevic.

6. In the claimant's response to the respondent's application he criticises the decision of the EAT in Stojsavljevic and Turner v DPD Group UK Ltd EA-2019-000259-JOJ, yet that is a matter for an appeal against that Judgment, not for this Tribunal. It is not possible to 'read into' this claim, where the claimant contends the EAT has gone wrong. In an email of 21/3/2022, the claimant sought to distinguish his case from that by reference to the training of substitutes and how emergency cover was sourced. The Tribunal does accept Ms Jennings submission that those matters were considered by the Tribunal and were therefore before the EAT.

7. The claimant also referred to the modern purposive approach to statutory interpretation and to legislation protecting vulnerable workers. The claimant submitted that the use of substitution clauses excluding personal service, has been called into question in Sejpal v Rodericks Dental Ltd [2022] EAT 91. The claimant also submitted that there was here a fetter on the right to substitute, presumably the actuality as opposed to the contact.

8. The EAT accepted that the Franchise Agreement reflected the true agreement between the parties (paragraph 69). Or to put it another way, it was not a sham.

9. The parties to the Franchise Agreement in this claim are the claimant and respondent. It is noted that in some cases the franchisee was a limited company (a legal entity not a natural person).

10. Under the Agreement, the Franchisee (in this case the claimant) is obliged to 'operate the Business'. The 'Business' is means the franchise business of supplying a Driver and Service Vehicle with Service Equipment to perform the Services in accordance with the System (the defined terms are contained in the Franchise Agreement page 95). 'Driver' 'means the employee, agent, sub-contractor, partner or otherwise of the Franchisee who:- (i) has all appropriate qualifications to drive the Service Vehicle in the Territory including a full and not a provisional licence; and (ii) who is not under the age of 21; and (iii) who has undergone training by GeoPost[1] or the Franchisee (as the case may be) in the standards, procedures, techniques and methods comprising the System; AND 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;'.

11. There is therefore no element of personal service under the Franchise Agreement. It is not correct therefore to refer to the claimant having the right to substitute. The respondent referred the Tribunal to the first instance case of Adejbite v DPD Group UK Limited (2600073/2022) and to a Judgment of Employment Judge Clark in the Leicester Tribunal, who noted that in the context of that claim, the use of the terminology 'substitute' is somewhat 'inept'. This Tribunal agrees.

12. The claimant was obliged under the Agreement, to provide a Driver to the

[1] The respondent's predecessor.

respondent, who complied with certain standards (was of a certain age, had a driving licence, etc). The respondent had no veto over the Driver the claimant proposed, as long as the Driver met the requirements. The obligation on the claimant, besides providing the Driver and the vehicle, was to ensure delivery of the packages and to maintain in all areas the standards which the respondent had set. He did not have to deliver the packages himself.

13. There was no obligation on the claimant himself to 'be' the Driver. There was no obligation on the claimant to drive the vehicle and therefore there was no element of personal service.

14. The claimant cannot therefore fall within s.230(3)(b) of the Employment Rights Act 1996 as there is no requirement under the Agreement for him to personally perform any services for the respondent. That the claimant chose to do so, apart from odd occasions, does not undermine the obligations under the Agreement, which the EAT has found to reflect the true agreement between the parties.

15. It is noted that there has been no application to amend the claimant's claim and his pleaded claim does not reflect the submission now being made. The Stojsavljevic case was heard by the Watford Tribunal in October 2018 and the Judgment is dated 9/1/2019. It was reconsidered on 10/9/2019 with a Judgment dated 25/9/2019. This claim was presented on 9/6/2020. The EAT heard the Stojsavljevic appeal on the 9/3/2021 and 10/3/2021 and the Judgment is dated 21/12/2021. The Sejpal appeal was heard on 10/5/2022 and Judgment is dated 16/6/2022.

16. The claimant's pleaded claim is therefore what was presented on 9/6/2020. There is no reference in his claim to the proposition that the training of substitutes alters the position, nor to how emergency cover is sourced. The Tribunal allowed Ms Forsyth to make her submission, however she was in fact giving evidence, which she herself noted. There is no pleading that this claim is distinguished from the Stojsavljevic case due to those factors, despite what is now submitted. There is no evidence or pleading from the claimant about him training drivers. In any event and even if that were the case (that it took five days to train a driver in the respondent's policies), that does not rescue the claimant from the finding that there is no requirement that he personally provides any services to the respondent. As such, it is irrelevant. Notwithstanding that, the Tribunal has taken the claimant's claim at its highest and has assumed it is possible for the claimant to differentiate himself from the Stojsavljevic authority.

17. As there is nothing pleaded to distinguish this case from that decided by the EAT, that authority applies. As the finding is that there was no requirement of personal service, the claimant is not a worker under the ERA. As he is not a worker, his claim has no reasonable or indeed any prospect of success. The respondent's application to strike out the claim therefore succeeds.

Employment Judge Wright

Date 12/12/2022