EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr M Johnston		**Amazon UK Services UK Limited**
Mr I Codau		**Deva Services Ltd**
Mr Dawson		**Silva Brothers Logistics Ltd**
		GTJ Logistics Ltd

HELD AT: London Central **ON: 27th and 28th February 2023**

BEFORE: Employment Judge F Spencer (sitting alone)

Representation
For the Amazon Respondents: Mr J Galbraith-Marten KC, counsel
For the Claimants: Mr B Cooper, KC, counsel
For the DSPs: Mr D Reade, KC, counsel
For Go Services and In-Sync, Ms Jane Russell, counsel

JUDGMENT

The Judgment of the Tribunal is that

(i) The application by Amazon for the claims against it brought by the three sample Claimants named above to be struck out is refused.

(ii) No order is made for the payment of a deposit

REASONS

Background to the application

1. This Open Preliminary Hearing was listed to consider an application by Amazon to strike out 3 sample claims against them; or alternatively for a deposit order to be made in relation to those claims.

2. By way of background, over 1,400 individual claims have been presented to the Tribunal by drivers who deliver Amazon parcels. Those claims are for holiday pay, national minimum wage, the right to employment particulars, breach of contract and unauthorised deductions from wages. The claims are brought both against Amazon and a number of Delivery Service Providers (DSPs) in the alternative. The drivers claim that they are, or were, an employee or a worker of

Amazon and/or the DSP for the purposes of the Employment Rights Act 1996, and workers for the purposes of the Working Time Regulations and the National Minimum Wage Act 1998. In the alternative the Claimants claim that they are, or were, agency workers pursuant to Regulation 36 of the Working Time Regulations and section 34 of the National Minimum Wage Act. As a final alternative the Claimants claim that they are, or were, a worker of Amazon and/or the relevant DSP for the purposes of section 35 of the National Minimum Wage Act.

3. Amazon is a well-known online retailer. Goods are purchased via the Amazon website and delivered to customers. Amazon works with a range of third-party carriers that deliver goods from the various Amazon distribution centres to customers. Some are large national and international carriers - such as Royal Mail, Evri and DPD. This litigation does not concern those carriers.

4. In addition, other third-party carriers operate via the Amazon Logistics Delivery Service Partner (DSP) programme. DSPs are third party businesses of varying sizes. These claims are brought by drivers who work through a DSP. It is common ground that the Claimants have all entered into written arrangements with various DSPs. In the litigation as a whole more than 70 different DSPs are named. The DSPs have in turn all entered into agreements with Amazon. There are no written agreements between the drivers and any Amazon entity. This strike out application involves three sample Claimants who have each entered into a contract with a different DSP. The three DSPs with whom they have contracted are Deva Services Limited, Silva Brothers Logistics Limited and GTJ Logistics Limited.

5. In addition to suing the DSPs the Claimants all also claim employee/worker status with four different Amazon entities (Amazon EU Sarl, UK Branch, Amazon UK Services Ltd, Amazon Online UK Ltd and Amazon Web Services UK Ltd) and, in the alternative, one (in some cases two) different DSPs. In every case the Claimants allege that they are, or were, an employee or worker of Amazon and/or the relevant DSP for the purposes of the Employment Rights Act 1996, and a worker of Amazon or the relevant DSP for the purposes of the Working Time Regulations 1998 and the National Minimum Wage Act 1998

6. (It is now accepted that the relevant Amazon Respondent to these proceedings is Amazon UK Services Ltd, and the remaining Amazon entities will be dismissed from the proceedings on withdrawal by way of a separate judgment.).

7. The DSPs all deny that any of the drivers are either employees or workers. It is their case that the drivers are self-employed independent contractors, and that written agreements evidence this. Happily for the management of these claims, most of the DSPs are represented by the same firm of solicitors, namely Doyle Clayton. The standard grounds of resistance (e.g. 175, 90) for the DSPs state that the relevant DSP does not understand the basis upon which claims are made in the proceedings against Amazon. Amazon denies any contractual or other relationship with any of the drivers.

8. Amazon now applies to this Tribunal to strike out all the claims against it on the basis that those claims have no reasonable prospect of success. It is their case

that the three sample Claimants have no reasonable prospects of establishing that they have a relevant relationship with Amazon. In the alternative they ask that the tribunal makes a deposit order against the Claimants in respect of their claims against Amazon. The Claimants resist that application. The DSPs remain neutral.

9. I heard extensive submissions from both parties and was referred to numerous authorities and various documents in the bundles. I was provided with a witness statement from a driver D'Andre Usanga-Cummings, but this was provided effectively by way of submission, as he did not give evidence and was not cross-examined. In coming to my decision, I was asked by both parties to make a determination as to how the Supreme Court judgment in Uber BV v Aslam and others 2021 ICR 657 should be interpreted.

The Law

10. The power to strike out is contained in the Employment Tribunals Rules of Procedure 2013, Rule 37 which, so far as material, provides:

> *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 … has no reasonable prospect of success*

11. The rule is permissive. If a tribunal decides that a claim has no reasonable prospect of success it should still consider whether it is appropriate to strike out- though, self-evidently, if the claim has no reasonable prospect of success there will rarely be anything to be gained from allowing a claim that can truly be said to have no reasonable prospect of success to proceed.

12. Numerous authorities stress that striking-out is an exceptional measure and that Tribunals should be particularly careful about claims, which are fact sensitive, and particularly in discrimination and whistleblowing claims. (*Anyanwu v South Bank Student Union [2001]* 1 WLR 638 HL). Even for cases, such as this one, that do not involve discrimination, striking out is said to be draconian and should be exercised only in rare circumstances Nonetheless, in a proper case, the power should be exercised, provided that the demanding language of the rule is met (*Ahir v British Airways* [2017] EWCA Civ 1393 CA). No-one gains by a truly hopeless case being pursued to a hearing.

13. The term 'no reasonable prospect of success' was substituted for the word 'misconceived' in the 2004 Rules, which was introduced in the 2001 Rules to replace the term 'frivolous'. The term 'frivolous' denoted a case that had no substance whatsoever, was utterly hopeless and was bound to fail; by contrast, the term 'no reasonable prospect of success' imposes a lower standard (see Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [2001] EWCA Civ 2097, [2002] IRLR 288, [2002] ICR 646, at para 46. So, a case that is frivolous will, by definition, have no reasonable

prospect of success, but a case that has no reasonable prospect of success may well not be frivolous.

14. If the question of whether a claim has a reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strikeout will be appropriate. It is common ground that in deciding whether to strike out a claim the Claimant's case has to be taken at its highest. For the purposes of this application therefore Amazon accepts the facts as pleaded in the three sample claims.

15. 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.*
> *(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*
> *(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out.*

16. The contention in issue is whether the Claimants have no or little reasonable prospect of establishing that they are either employees or workers of Amazon within the relevant statutory definitions.

17. The relevant definitions of employee or worker are set out in section 230 of the Employment Rights Act 1996, Regulation 2(1) of the Working Time Regulations and section 54 of the National Minimum Wage Act. They are the same in each case. All require there to be a contract, whether express or implied, between the worker and the putative employer.

18. Section 230 of the Employment Rights Act 1996 provides as follows.

> *(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' … 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.

(4) In this Act 'employer', in relation to an employee or a worker, means the
person by whom the employee or worker is (or, where the employment has ceased, was) employed.

<u>The Pleadings and accepted facts.</u>

19. The claims of the 1400 or so Claimants are all largely generic. Mr Johnston, one of the three test Claimants in this case, is no different. In his Particulars of Claim he identifies that he was a driver delivering products for Amazon. The following facts emerge from the pleadings and, for the purposes of today's hearing, are not contested.

a. Individuals apply for jobs as drivers via different media, including job search websites. The role is typically known as "Amazon multi-drop delivery driver" and involves the delivery of Amazon products only.

b. Amazon does not advertise for or recruit drivers directly. Once a driver has been recruited by a DSP, he or she is asked to enter into a contractual agreement with the relevant DSP in which he is identified as a self employed contractor. In Mr Johnston's case he entered into an arrangement with Deva Services Limited via a personal services company HMJ Logistics Ltd.

c. Amazon requires all drivers who deliver Amazon products to pass a DBS check, to attend a training day at an Amazon depot, to wear safety clothing and to carry ID in the depot which identifies them as a sub contractor. Amazon may tell a DSP to prevent a driver from delivering for Amazon.

d. Amazon informs the DSP how many parcels it has been allocated to deliver the next day and what time the drivers should arrive at the Amazon depot to collect them. The DSP then calculates how many drivers are needed to fulfil Amazon's requirements and sends a message to the drivers confirming that they are expected to work the next day and what time the shift will start.

e. Each DSP must provide an on site manager to co-ordinate deliveries.

f. Drivers arriving at the start of their shift at a depot will log into an Amazon app which will be used to (i) locate the parcels for their route (ii) scan the barcodes into the app before loading them into their van and (iii) provide a

delivery route prescribed by the app. The progress of the delivery is then tracked via the app.

20. From the documents now disclosed and to which I was taken during the hearing it is also accepted that:

a. Amazon contract with the DSPs on standard terms. This consists of a standard document called "Delivery Provider Terms of Service" containing overarching terms of service. Secondly it requests services as specified in a Work Order. This too is in standard terms.

b. For the purposes of this hearing there is no material difference between the contracts entered into between the DSPs who have engaged the three sample Claimants and Amazon. These contracts are in standard terms, save that the rates paid by Amazon to the DSPs not identical.

c. Clause 1 of the Work Order provides that the services to be provided by the DSP are the provision of "transportation, collection, delivery and related services to Amazon."

d. Amazon does not guarantee the amount of business it will give to any particular DSP. In its Terms of Service Amazon says it may give projections as to volume, density, and weight, but such protection projections are speculative only."

e. The contractual arrangements with the DSPs provide amongst other things a minimum hourly rate to be paid to the drivers by the DSP. It also specifies that any Incentive Payments paid to DSPs (for example during peak trading periods) should be paid to the drivers without deduction.(704).

f. The mileage rate to be paid by DSPs to drivers is set by Amazon.

g. To some extent Amazon dictate the terms upon which DSPs may engage drivers. DSPs are required by Amazon to enter into written contracts with the drivers. Clause 8.2 of the Work Order requires the DSP to ensure that all personnel assigned to the provision of Amazon deliveries are engaged as independent contractors and do not have employment status. If a driver is not engaged as an independent contractor Amazon have the right to terminate the agreement.

h. In the Work Order DSPs are required to declare that they have a diversified customer basis and will not be considered as dependent on Amazon to maintain their businesses and that their personnel will never be considered as a legal representative, agent or employee of Amazon and its affiliates… (532) (It is evident that at least in the case of GTJ Logistics the requirement to have other customers is not enforced.)

i. The three Claimants who are the subject of this application, spend or spent all of their time while working for the DSP, delivering Amazon parcels.

21. This being a strike out application rather than the full hearing, I would stress that the above is not designed to set out the whole of the picture. Further details of the relationship between the DSPs and Amazon will emerge during the course of the hearing.

22. The DSPs are different sizes. For example, Deva Services Limited engages approximately 55 drivers who provide services on Deva's Amazon account, while Silva Brothers engages between 800 and 1,000 drivers. Deva and Silva say they provide services to other clients, whereas GTJ only provide services to Amazon.

The strike out/deposit order application and Amazon's case

23. It is Amazon's case that the Claimants have no (or little) reasonable prospect of establishing either employee or worker status with it.

24. The DSPs all accept that they have entered into a contractual relationship with the Claimants. Under the terms of the agreement between Amazon and the DSPs, Amazon gives business to the DSP. The business is parcel delivery. Amazon pays the DSP for the services. It does not pay the drivers. Amazon operates by informing the DSP how many parcels it has been allocated for delivery the following day and what time the driver should arrive at the depot to collect them. The DSP then calculates how many of its drivers are required on any particular day to fill Amazon's delivery requirements and then the DSP will tell the drivers if they are required to work.

25. Mr Galbraith Martin submits that at the heart of the definition of employee or worker, at least for domestic rights, is the need for a contract. A contract is also required in respect of the Claimant's breach of contract claims. In relation to EU derived rights (under the WTR) the essential questions are those identified by the CJEU in Allonby v BV Rossendale & Accrington College namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services.

26. He submits that the tripartite nature of the relationship in these proceedings is analogous to that which arises in employment agency cases and with the outsourcing/contracting out of services; and that "*the proper legal analysis of such a situation is now well settled: where there is an express contract between an individual and party A (in our case, the DSP), a contractual relationship with the end user (Amazon) can only be implied where it is necessary to do so. This is so even when the individual is provided by party A to party B on a long-term or even an indefinite basis and where the individual is, for all practical purposes working under the discretion and control of the end user."*

27. He submits that the leading case on such tripartite relationships is the Court of Appeal judgment in James v Greenwich Borough Council 2008 ICR 454. In that well-known case, the Claimant was an agency worker who had been placed by her employment agency with the Respondent Council. She worked for several years for the council and was subjected to a degree of control by the Council which was consistent with an employment contract. It was the Council and not the

employment agency who arranged all her day-to-day instructions. Her claim for unfair dismissal against the Council failed. Mummery J, giving the leading judgment in the Court of Appeal, noted that *"in the absence of an express contract of employment, which may be written or oral, the employment tribunal is faced with the question of whether it is necessary to imply a contract of employment between the claimant and the Respondent."* Mummery J went on to hold in that case that it was not necessary to imply the existence of another contract in order to give business reality to the relationship.

28. Mr Galbraith Martin submits that, given the necessity test, the Claimants cannot succeed against Amazon. He submits that, in those circumstances, the degree of control exercised over the individual by the end user is largely irrelevant, as it was in the case of Ms James. It might simply be a consequence of the fact that the individual has been engaged by party A to carry out services for the benefit of party B. Nor does it matter that the individual is integrated into the organisation of the end user. (See also Tilson v Alstom Transport 2011 IRLR 169.)

29. Mr Galbraith-Marten also submits that the same applies to outsourcing obligations. I was referred to R (on the application of the IWGB) v CAC 2019 IRLR 530. In that case the University of London had outsourced its front of house services to another company (Cordant). The union was recognised by Cordant but also sought recognition by the University. It was accepted that there were contracts of employment between the workers and Cordant. In the High Court Supperstone J proceeded on the assumption that the University substantially determined the terms and conditions of relevant workers, but rejected the appeal against the CACs determination that the University engaged the workers. He did so because of the lack of a contract between the workers and the University. He went on to say "The University has a right to arrange its operations in what it considers to be the most efficient and beneficial manner. Organisations are entitled to adopt outsourcing arrangements, should they wish to do so, as a legitimate means of organising their activities."

30. Similarly, Mr Galbraith Marten submits that Amazon is entitled to organise a business model which did not involve employing drivers. In the recent EAT decision of Ter-Berg v Simply Smart Manor House Ltd HHJ Auerbach said *" this does not mean that it is no longer possible for parties generally and in an informed way to agree that they want to form a working relationship which is neither one of employee, nor one of worker, one consequence of which will be the various statutory employment rights will not apply to the individual who will be doing the work. Nor does it mean that a written agreement might not, in a given case, truly reflect everything that the parties have in fact agreed."*

31. He submits that Uber does not change the necessity test laid down in James, because in that case Lord Leggatt in Uber was not addressing the question of whether there was a contract. He was only addressing the question of whether, if there was a contract, the written contract is determinative and to that end his Judgment was just an extension of the principles in Autoclenz. In other words, the reasoning in Uber does not apply when the question is whether a contract should be implied. He submits that the case against Amazon can only get off the ground if organisations are not permitted to structure relationships in a way that avoids

employing workers, even if there is some control over the way they carry out their work.

32. He submits that a key difference between the Amazon situation and Uber is that the tri-partite relationship in Uber was between Uber London, drivers and passengers. Passengers were the end users in that scenario. In this case Amazon are the end users, and just as the end user could not be the employer in James v Greenwich LBC, the Claimants cannot be employed by the end user, Amazon. It was not necessary to imply a contract between Amazon and the drivers to ensure that Amazon's needs are met. If the DSPs did not ensure their drivers were sufficient to discharge their obligations to Amazon that was a matter for them.

33. He submits the real issue in Uber was not whether there was a legal relationship between drivers and Uber London but the nature of that legal relationship; was it one of employment or agency. Absent an express written agreement between Uber London and the drivers, that fell to be inferred from their conduct. The situation was very different in this case. The only relevant legal relationship with the drivers is between DSPs and drivers; and that is governed by an express written agreement.

34. Applying the necessity test, and taking the Claimants' case at its highest, the Claimants cannot succeed against Amazon.

Submissions on behalf of the Claimants.

35. Mr Cooper, on behalf of the Claimants submits, in essence, that the necessity test as articulated in James v Greenwich Borough Council cannot survive the decision of the Supreme Court in Uber BV and others v Aslam and others. He submits that following Uber, the correct approach to all aspects of the test for employee/worker status – including whether a contract should be implied between the individual and particular employer within a tripartite arrangement, is to apply the statutory concepts purposefully to the substantive reality of the situation and that the tribunal should not apply ordinary common law principles of contract law.

36. In Uber the Supreme Court identified a contract between Uber London and drivers, notwithstanding Uber's case that there was no written agreement of any sort with Uber London. The only written agreements to which drivers were parties were agreements with Uber BV, a Dutch company.

37. The Supreme Court held that, applying ordinary common law principles of contract and agency, it would be necessary to imply a contract between the drivers and Uber London to carry out private hire bookings because otherwise it would have no means of performing its contractual obligations of passengers or of ensuring compliance with regulatory obligations as a licensed operator. James v Greenwich LBC was not referred to in Uber, nor does Lord Leggatt refer specifically to necessity, but plainly on the facts and the rationale, that test was met.

38. However, Mr Cooper submits that the ratio of that case does not end there. Lord Leggett went on to say this;-

> *Given the importance of the wider issue, however, I do not think that it would be right to decide this appeal on this basis alone and without addressing Uber's argument that the question whether an individual is a "worker" for the purpose of the relevant legislation ought in principle to be approached, as the starting point, by interpreting the terms of any applicable written agreements.'*

39. That question was answered in the negative.

40. Mr Cooper submits that following Uber London ordinary common law principles were immaterial to the question of worker employee status. A different approach from the common law test is required for the purposes of the statutory employee/worker definitions. Lord Leggatt went on to hold that a purposive construction of the worker definition required the tribunal to consider all of the circumstances and to determine the true nature of the relationship as a matter of substance and reality, without treating the express written contract as the starting point or applying any presumption that they accurately reflected or defined the relationships. This can be ascertained because Lord Leggett had stated that:-

a. The question is one of statutory non contractual interpretation which required a purposive approach to protect vulnerable workers.
b. The approach required departing from conventional contractual principles.
c. It was important to consider all the circumstances in order to determine the true nature of the relationship for the purposes of statutory definitions, viewing the facts realistically and keeping in mind the purpose of the legislation. The facts might show that the terms were genuinely understood and agreed to be an accurate record of the relationship, but there was no legal presumption to that effect.
d. In applying that approach, the factors which were likely to be of particular importance were (i) the degree of control exercised by the putative employer over the employee (ii) the extent of subordination and dependence of the worker (iii) who has primary control over determining the relevant service and operations, setting remuneration, dictating the terms of the contract and enforcing performance standards.
e. The tribunal was required to look beyond the terms of any agreement so as to give effect to the statutory purpose of protecting vulnerable workers.
f. In doing so the Tribunal should consider whether, in order best to give effect to the substantive reality, a contract should be implied between the individual and the particular putative employer and whether, on objective construction of the facts, any provision of the formal arrangements can be seen to have as their object excluding or limiting the operation of the legislation, in which case those provisions must be disregarded.

41. Although Uber only involves the application of the test for worker status, the same principles should apply to the issue of whether an individual was an employee.

42. Finally, he submits that the James v Greenwich line of cases which insist upon application of the common law test of necessity for employment contract cannot now stand in view of the ratio in Uber.

Conclusions

43. Mr Cooper submits that the second part of Lord Leggatt's analysis is also part of the ratio binding on me, and I regard that as incontrovertible. The harder question is what that means for the facts in this case.

44. The ratio in Uber does not end with its conclusion (at paragraph 56) that it was necessary to imply a contract between Uber London and the drivers to give business efficacy to the arrangement. Lord Leggatt specifically said that he did not think it would be right to decide the appeal *"on this basis alone and without addressing Uber's argument that the question whether an individual is a worker for the purpose of the relevant legislation ought in principle to be approached as a starting point by, interpreting the terms of any applicable written agreements*." I agree that that question was answered in the negative.

45. Having referred to Autoclenz v Belcher 2011 ICR 11576 - also a judgment of the Supreme Court - he says this :

> "T*he judgment of this court in the Autoclenz case made it clear that whether a contract is a worker's contract within the meaning of the legislation is not to be determined by applying ordinary rules of contract law such as the parole evidence rule, the signature rule and the principles that govern rectification of contractual document on grounds of mistake*."

46. He goes on to say this at paragraphs 69 and 70.

> *"Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by statute. Thus, the task for the tribunals and courts was not, unless the legislation required it, to identify whether under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question is one of statutory interpretation, not contractual interpretation.*
>
> *The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. In UBS AG v Revenue and Customs Comrs [2016] 1 WLR 1005, paras 61—68, Lord Reed JSC (with whom the other justices of the Supreme Court agreed) explained how this approach requires the facts to be analysed in the light of the statutory provision being applied so that if, for example, a fact is of no relevance to the application of the statute construed in the light of its purpose, it can be disregarded. Lord Reed JSC cited the pithy statement of*

Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454, para 35: The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

47. So, while the statutory provisions require there to be a contract between the worker and the putative employer, nothing in the above suggest that Lord Leggatt is drawing a distinction between implying the existence of a contract and interpreting one. It follows from the above passages that the test of whether there is such a contract cannot depend upon whether it is necessary to imply a contract of employment in order to give business reality to the relationship between the parties- at least unless one adds the proviso that it must "necessary to imply a contract in order to give business reality to the relationship between the parties in a way which does not avoid the application of the relevant statutory provisions applied in a purposive way." That in turn requires there to be a consideration of all the circumstances, with reference to the touchstones of subordination and dependence.

48. The existence of the contract between DSPs and the drivers is highly relevant to that question, but not in the end determinative.

49. I am of course troubled by the fact that James v Greenwich LBC was neither quoted to the Supreme Court nor referred to in his judgment. The headnote in that case states that the test applies "in cases involving an agency worker." However, the principles express in Lord Leggatt's judgment appear to be of universal application and do not distinguish particular types of case.

50. Lord Leggatt's judgment uses the word "necessary" only in the context of whether it was necessary to determine, as a matter of statutory interpretation, if the claimants fell within the definition of worker in those provisions irrespective of what had been contractually agreed. Lord Leggatt also quotes from Allonby v Accrington and Rossendale College, the ECJ's judgment that. "*There must be considered as a worker a person who, for a certain period of time, performs services for an under the direction of another person in return for which he receives remuneration. The court added that the authors of the Treaty did not intend that the term worker should include "independent providers of services who are not in a relationship of subordination with the person who receives the services."* Lord Leggatt does not refer to the need to imply a contract to give business reality to the situation.

51. At para 87 Lord Leggett says that… "*In applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done… A touchstone of such subordination and dependence is the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control the stronger the case for classifying the individual as a worker who is employed under a worker's contract*." I cannot therefore agree with Mr Galbraith Marten who says that, in a tripartite arrangement such as this, the degree of

control exercised by Amazon is irrelevant to the question of whether or not an individual is a worker or an employee for the purposes of the relevant legislation.

52. Mr Galbraith-Marten's case is that the Autoclenz principle only applies where the question is whether the written contract reflects the reality. He says that it does not apply to the question of whether a contract should be implied at all. Nothing that I have read in Lord Leggett's judgment in Uber supports that distinction.

53. Mr Galbraith-Marten says that the Amazon case is the opposite of the situation in Uber. In this case Amazon is the end user (as was the customer in Uber) and the DSP is in the position of Uber in this scenario. He says that in Uber, as the Employment Tribunal found, there was in fact no contract between the end users (passengers) and the drivers; whereas in this case there is clearly a contract between the DSPs and the end users (Amazon). However, I do not find that comparison helps me resolve the question whether the necessity test should be applied in this situation. The situation is entirely different. There is nothing in the Judgment which suggests the application of a necessity test in determining questions of worker status. In James v Greenwich LBC the Court of Appeal relied on the test in The Aramis, 1989 1 Lloyds rep 213, which concerned a commercial contract. The authorities more recently however have stressed the need to distinguish between employment contracts and commercial contracts.

54. Mr Galbraith-Marten also seeks to distinguish the Amazon situation from the Uber situation on the basis that in Uber, Uber London accepted that it had a relationship with the drivers (albeit not contractual one), whereas in this case Amazon do not accept that it has any relationship with the drivers. However, when deciding whether or not a contract between Uber London and the drivers could be implied Lord Leggatt says this "*In these circumstances the nature of their relationship has to be inferred from the parties conduct, considered in his relevant factual and legal context."* (Para 45) In other words, the court or Tribunal will have to look at what the parties do, rather than what the written contracts provide, or whether or not they accept that they have a relationship with each other.

55. In that context the issue of control is central see paragraph 87 of Lord Leggatt's Judgment quoted above.

56. This is not at odds with the case of Ter-Berg quoted by Mr Galbraith Marten. I do not accept that the Claimant's case against Amazon can only get off the ground if organisations are not permitted to structure relationships in a way that avoids employing workers. In my view it is not the case that the Uber approach prevents parties genuinely agreeing that they want to form a working relationship which is neither one of employee nor one of worker. It remains possible to devise a business model not involving employing workers. But the issue needs to be decided taking into account all the circumstances and the reality of the situation, including the factors referred to in Uber, the written documents being relevant only to the extent that they evidence and accord with that reality. That will be the issue for the final hearing.

Should there be a strike out?

57. It is accepted by Mr Galbraith Marten, that if Mr Cooper is correct as to the proper interpretation of Uber, this case was not suitable for a strike out. That is really the end of the matter as far as this hearing is concerned.

58. The principles are well established. It is not for a Tribunal summarily to determine cases that are fact sensitive. The Tribunal may only strike out a case if it can be virtually certain that the Claimants will not be able to establish that they have a worker relationship with Amazon. While the various relationships may, at first sight, look like a simple outsourcing arrangement, in the absence of further information as to how the relationships work in practice I cannot conclude either that the case against Amazon has no reasonable prospect, or that it has little reasonable prospect of success. I do not accept that this is a case in which the issues of control, subordination and integration are irrelevant, so that there is no need for any further disclosure before being able to make a final determination as to the merits (or rather lack of merit) of the case.

59. The Tribunal will ultimately decide if it is really the case that Amazon has simply outsourced the delivery of parcels to the DSPs, as Amazon contends, or devised a means to engage workers in a way that avoids its statutory obligations. The existence of the written agreements between the drivers and the DSPs, and tripartite nature of the relationship, will be an important part of that determination, but will not be the whole story and will need to be looked at following full disclosure and hearing all the evidence. This is not a case in which Amazon is the only potential employer and, as Mr Galbraith Marten says, it is not enough that the Claimants would rather be engaged by Amazon than by the DSPs. The nature of the tripartite relationship in this case is a step removed from that in Uber given that here we have some 70 or more independent companies in the mix, all of whom accept that they do have a contractual relationship with the drivers. Does it matter that the Claimants did not know which Amazon entity to sue? If Amazon is the employer, what is the position of the DSPs? Can the Claimants establish personal service? Does Amazon know who the drivers are? Those are all questions for the final hearing.

60. For the same reason, it is not appropriate for me to order a deposit. I cannot conclude in the absence of the full story that the Claimants have little reasonable prospect of success. This is very significant litigation. It would not be appropriate to come to such a conclusion without having the full factual matrix.

61. In Uber, the only question was whether the drivers were workers. The drivers were not asserting as here, that they were employees of Uber. The strike out application does not differentiate between the Claimants' case that they are employees and/or workers. The case for employee status is much harder to establish than the case for worker status; but there would be little saving of time or expense to strike out, or order a deposit in respect of that part of the Claimant's case, if there is to be no strikeout or deposit in relation to the worker case, and in any event the test of employee status must now be looked at through the prism of Uber.

62. Finally the Claimant's case is that in the event that the tribunal should find that there is no contract between Amazon and the drivers, then they are to be classed as agency workers pursuant to regulation 36 of the Working Time Regulations (the WTR) and section 34 of the National Minimum Wage Act (the NMWA). These arguments can only be determined if the Claimant's primary case has been decided against it.

63. Regulation 36 of the WTR and s. 34 of the NMWA are in materially identical terms. Regulation 36 provides as follows:

> *(1) This regulation applies in any case where an individual ('the agency worker')—*
>
> > *(a) is supplied by a person ('the agent') to do work for another ('the principal') under a contract or other arrangements made between the agent and the principal; but*
> >
> > *(b) is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal;*
> > *and*
> >
> > *(c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.*
>
> *(2) In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and—*
>
> > *(a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or*
> > *(b) if neither the agent nor the principal is so responsible, whichever of*
> > *them pays the agency worker in respect of the work,*
> >
> > *and as if that person were the agency worker's employer.*

64. The Claimant's alternative case is that the DSPs are agents who supply workers to Amazon as principal. Amazon deny that the DSPs can be said to be supplying workers to Amazon. The contract between Amazon and the DSPs is a contract which requires the DSP to carry out transportation services using its own personnel. It is plain that it is not supplying personnel to Amazon.

65. Whatever the merits or otherwise of this argument, there is little to be gained by a strike out given that, as a result of this judgment, there will need to be a detailed analysis of the relationship between all three parties in any event. The argument only becomes relevant should the Claimant lose their primary argument that they are workers (or employees) of Amazon, using the "ordinary" definition of worker.

I consider these arguments are best determined, at that stage.

66. As to section 35 of the NMWA, the Claimant's put forward a further alternative case that they are "homeworkers" pursuant to section 35 of the NMWA. This does require a contract between the worker and the employer (but not personal service) and is best left until a determination of that issue has been made.

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EMPLOYMENT JUDGE SPENCER
21 March 2023

Order sent to the parties on

21/03/2023

for Office of the Tribunals