EMPLOYMENT TRIBUNALS

Claimant: Mr Bela Virag

Respondent: Smart Services Logistics UK Ltd

Heard at: London South by MS Teams **On:** 8 November 2023

Before: Employment Judge Jones KC

Appearances:

For the claimant: In person
For the respondent: Mr Marc Ramsbottom, Consultant

DECISION

1. The Claimant is a "worker" for within the meaning of **Employment Rights Act 1996**, **s. 230(3)(b)**; and

2. The Claimant I a "worker" within the meaning of **Working Time Regulations 1993**, **Reg 2**.

REASONS

Introduction

1. The Respondent describes itself as a logistics/delivery company. The activity that they are engaged in is an increasingly familiar one. One strand, by way of example, is that members of the public buy goods online. The online retailer will then entrust the items to a delivery company. Sometimes that company is a national organisation. Sometimes that delivery company will sub-contract to a smaller operation ("the Courier Business"). That Courier Business will very often then at least purport to further sub-contract to an individual driver.

2. Disputes commonly arise as to the employment status of the individual driver. The Courier Business asserts that the driver is in business on their own account and is neither an employee nor a worker for the purposes of the definitions in the **Employment Rights Act 1996** and elsewhere. The driver will contend that they are either an employee or, at least, a worker.

3. It is common to find that the driver has signed a contract which has been drafted by the Courier Business. The contract will contain at least one clause which either records an agreement that the driver is not an employee or worker, asserts that they are an independent contractor, or does both. More often than not there is a clause allowing an employee to use a substitute to fulfil his duties.

4. In order to underscore the driver's independent contractor status, he will be paid against invoices. However, almost invariably, those invoices will have been drawn up for him by the the Courier Business. In other words, they effectively invoice themselves. Sometimes (as was the case in the **Uber** litigation) the individual driver may never even see the invoice.

5. Usually, the individual driver will not have been much troubled about their status until the relationship breaks down. They may well have been taking advantage of the tax treatment of their income afforded to independent contractors. However, when the relationship does break down, the question of their status becomes critical to their ability to invoke the statutory protections for employees and workers. In such circumstances, the Tribunal has to step in and examine the relationship in order to determine whether or not the driver can avail themselves of the protections. This is one such case.

The Hearing

6. By an order dated 10 February 2023 a one day open preliminary hearing was listed in order to consider the following issue:

> "• Whether the claimant was a worker ERA
>
> Whether the [claim] [complaint of] should be dismissed because the claimant is not entitled to bring it if they were not a worker of the respondent as defined in section 230(3) of the Employment Rights Act 1996."

The OPH was conducted using CVP on 8 November 2023. The Claimant, Mr Virag, who is Hungarian, attended and gave evidence. The Tribunal was greatly assisted by Ms Fowler, who acted as interpreter. The Claimant was unrepresented but was assisted by his wife. The Respondent was represented by a Mr Ramsbottom, who is a litigation consultant. I heard evidence from Mr Marco Pires who is a director of the Respondent and its Business Manager. At the end of the hearing, I reserved my decision. Although the question listed for determination related on its face only to the **Employment Rights Act 1996**, it was clear that the Claimant was contending that he was owed holiday pay and that that might raise a question as to whether he was a worker for the purposes of the **Working Time Regulations 1998**. In the judgment below, therefore, I have also considered that question although a determination of whether the Claimant was a worker for the purposes of the 1996 Act would, in practice, inevitably determine the question for the purposes of the 1998 Regulations in any event.

Findings of Fact

7. The Claimant began to work for the Respondent in March 2021. He had previously been a driver for Amazon. He was, he accepted, an experienced delivery driver. Before starting to work with the Respondent he had a discussion with a Mr Paulo Pinto and the terms were outlined. There is a live dispute between the parties as to what the Claimant was told he would be paid. The Claimant says that he was to receive (by way of guarantee) £110 a day and that for every delivery he performed thereafter he would receive another pound. The Respondent's case is that he was on what was, in effect, a piece rate of one pound for every delivery. In practice, the Claimant very often performed fewer than 110 deliveries a day and was, so far as it is possible to tell from the documents produced for the hearing, never paid a guarantee sum. The Claimant's inability to earn at the level he believed he had been promised is the reason the working relationship broke down.

8. The Respondent put in evidence a document which it says is the contract that governed the working relationship. At the very top of the document there appears a date: 8 September 2021. That is almost six months after the Claimant began to work for the Respondent. At the very bottom of the document is another date: 21 February 2021, which is several weeks before the Claimant says he began to work for the Respondent. The Respondent says that the latter date is the correct one. The Claimant says that he only signed the document in September. Both parties agree, however, that the Claimant signed the document and neither of them suggests that there was any material change in how their relationship operated in practice in September 2021. The Claimant says that the terms of the contract do not reflect reality.

9. The document is headed, confusingly, "Sub Contractor" (which points away from employee status, but not necessarily worker status) but also "Contract of Service" (which points towards an employment relationship, "contract of service" being part of the definition of "contract of employment" at **Employment Rights Act 1996**, **s. 239(2)**)

10. As is commonplace, the terms appear to have been drafted with an eye on excluding the possibility of employee and/or worker status. There is the familiar clause recording an agreement that there should be no contract of employment:

> "24. Both parties consider and intend this agreement to be a contract for services and not a contract of employment. The sub-contractor is therefore responsible for making his own arrangements for payment of tax and national insurance, VAT, public liability and other insurances and pension. The sub-contractor will not be entitled to receive any company benefits at all (including sickness and holiday payments)."

The clause could, of course, be consistent with worker status, as workers are engaged under a contract for services, albeit that the contract must be one pursuant to which the worker 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" (**ERA 1996**, **s. 230(3)(b)**).

11. No doubt with the statutory reference to personal performance in mind, clauses 2 and 3 of the contract provide:

> "The sub-contractor is not required to provide the services personally and is entitled to send a fully skilled and competent substitute or delegate at his/or her absolute discretion to undertake the services to be provided. Any minimum qualifications for

> persons providing services shall be specified in the schedule and the sub-contractor will only provide persons with these minimum qualifications.
>
> The sub-contractor is entitled to hire assistance at his/her own expense as long as the meet the companies [sic] requirements."

If the schedule referred to exists, I was not shown a copy of it. However, Clause 22 of the Contract says:

> "Minimum qualifications for persons carrying out services under this contract. Full and current driving licence appropriate for the type of vehicle to be driven."

12. The Claimant does not appear ever to have sent a substitute in to do work in his stead. Mr Ramsbottom put to him in cross-examination that if the Claimant could not work, the Respondent would find someone to do it. The Claimant accepted that proposition and under-scored it in his answers to questions that I asked him. In his witness statement he says:

> "On some days I had too many parcels to deliver that I was always told I couldn't employ anyone to help (I would have employed and paid someone to help me) but I was told by the company this was not possible because the work had to be done by another employees. So another driver would be given the parcels and the money would be taken off my wages and paid to that driver."

I find that notwithstanding the substitution clause, the reality was that if the Claimant was unable to work (or to finish his round) he was not free to pay someone to perform the services in his place. The Respondent would identify someone to do it and would pay them the money that they would otherwise have paid the Claimant.

13. The statutory definition also looks at whether the individual is carrying on a business undertaking in their own right. A number of contractual terms are aimed either at emphasising or perhaps creating the impression that the Claimant is a discrete business undertaking. For instance, Clause 10 provides that:

> "The company will pay the sub-contractor upon submission of the appropriate invoice or other documentation for claiming payment as required by the company."

Business undertakings invoice clients. However, although invoices were drawn up in this case, they were drawn up by the Respondent and not by the Claimant. They are on the Respondent's headed note paper. The Claimant's name appears under the rubric "bill to":

> "**SSLYodelCL7**
>
> Bela Virag"

No-one is suggesting that the Respondent was invoicing the Claimant. No-one was able to explain what "SSLYodelCL7" meant. However, it is clear that the Respondent was paying out against invoices that it had itself drawn up.

14. Clause 8 required the Claimant to have a policy of public liability insurance in place. However, in practice, he was required to purchase that insurance through the Respondent. The Respondent then made a charge which was offset against the money the Claimant had earned.

15. Clause 5 requires the Claimant to "provid[e] plant and equipment". It seems that the Claimant might have used a van of his own had he had one. However, he did not own one so, in practice,

he used one of the Respondent's vehicles. A charge was made which, again, was offset against the money that that the Claimant had earned.

16. A series of clauses makes the Claimant financially responsible for "defective services" and company or customer property being lost or damaged. It is not clear who the "customer" is. That is significant in relation to another clause that I will turn to momentarily. The Claimant did suggest that in practice he was at risk of being charged penalties.

17. Clause 18 of the Contract sets out a non-solicitation and non-dealing covenant:

> "The sub-contractor agrees that (s)he will not directly canvass, solicit or accept orders from a customer of the company with whom the sub-contractor has had contact by virtue of this contract either during this contract or within 6 months of its termination for whatever reason either on his own account or for another contractor or sub-contractor."

It is not clear who is meant by "customer". It does not seem likely that it is the person who receives the parcel, since the Respondent has no contract with them. They are providing their services to the consignor of the parcels (or an agent of the consignor) and not the consignee. This clause would prevent the Claimant from taking on his own contract with the consignor or, for working for another contractor, notwithstanding that the Respondent does not, as I understand it, have any kind of exclusive arrangement with the consignor.

18. Another traditional indicator of an employment relationship is the mutual obligation in respect of provision and performance of work. Again, the contractual terms seek to exclude that possibility:

> "1. The company is under no obligation to offer or provide opportunities for services to be provided by the sub-contractor but may in its absolute discretion offer them when and as it sees fit."

19. There was no suggestion in the evidence that there were days on which the Respondent had deliveries to be performed but asked someone else to perform them instead of the Claimant. There was, however, some cross-examination aimed at establishing that there were days when the Claimant did not work. The invoices suggested that there were such days. The only specific example explored related to September 2021. The Claimant accepted that the invoice dated 5 September 2021 suggested that there had been days in the week covered by the invoice when he had not worked. His recollection was that he had been attending a CPC course. It was put to the Claimant that he was entirely free to decide whether or not he took the course or worked for the Respondent – he had not had to seek permission. The Claimant's evidence was that he had been required to seek permission. He had had to give the Respondent adequate notice of the fact that he would not be working and that, if he had not done so, he would have been penalised. He accepted that he had never received a penalty for non-attendance, but said that that was because he had always worked when he had been needed. I concluded that the true position was that both parties thought that the Claimant was obliged to work on the days agreed unless he gave notice that he would not be doing so. Failure to give that notice might result in a penalty. I do not conclude that permission for non-attendance was required if adequate notice was given.

The Law

20. The Claimant alleges that:

    (1) There was a failure to pay him in lieu of accrued but untaken holiday at the date of termination of his employment (this is brought both as a claim under **Working Time Regulations 1998**, **Reg 30(1)(b)** and as a claim in respect of an unlawful deduction from wages contrary to **Employment Rights Act 1996**, **s.13**;

    (2) The was a failure to pay him other sums, which failure amounts to an unlawful deduction;

    (3) A failure to provide written terms and conditions

21. In order for the Tribunal to consider a claim under the **WTR 1998**, the Claimant must be a "worker". That term is defined at **Reg 2** as follows:

> " 'Worker' means an individual who has entered into or works under (or, where 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 to 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."

22. In order for the Tribunal to consider a claim under **ERA 1996**, **s. 13**, the Claimant must be either an "employee" or a "worker". Those terms are defined at **ERA 1996**, **s. 230** as follows:

> "(1) In this Act 'employee' means an individual who has entered into or works under (or, where 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 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 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."

23. Because being an employee or worker is a jurisdictional condition (i.e. the Tribunal only has jurisdiction to hear claims by claimants who can establish that they fall into one of those

categories) the terms have been the subject of a great deal of guideline authority including, most recently, the decision of the Supreme Court in **Uber BV v Aslam** [2021] UKSC 29. The following points of guidance arise from the Supreme Court's decision:

1. Determining whether someone is an employee or worker is, principally, a question of statutory rather than contractual interpretation; it is the statutory provision and not the contractual provisions that should be the starting point;

2. A Tribunal should approach that task by adopting the "modern approach" which is to "have regard to the purpose of [the] particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose";

3. The general purpose of employment legislation is to "protect vulnerable workers". The Supreme Court determined that that was specifically true in respect of the **WTR 1998** but it is, of course, no less true of **s. 13** of the **ERA 1996**;

4. The contract is not irrelevant (the statutory tests themselves define worker and employee status by reference to the contracts entered into):

> "The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded." [**Para 85**]

5. 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."

24. The Respondent drew my attention to **Sejpal v Rodericks Dental Ltd** [2022] EAT 91 in which HHJ James Tayler sets out some (typically) helpful guidance in the wake of the Supreme Court's decision in **Uber**. The need to "focus" on the "statutory language" is re-emphasised:

> "Concepts such as "mutuality of obligation", "irreducible minimum", "umbrella contracts", "substitution", "predominant purpose", "subordination", "control", and "integration" are tools that can sometimes help in applying the statutory test, but are not themselves tests." [**Para 7**]

Tribunals are advised to approach the task with a degree of "robust common sense". The learned judge cites Baroness Hale DPSC (as she then was) in **Bates van Winkelhof v Clyde and Co LLP** [2014] UKSC 32 on how to distinguish between self-employed persons with their own profession or business undertaking providing services to clients and those who are intended to benefit from the protections afforded to workers. The former are "people who carry on a profession or a business undertaking on their own account and enter into contracts with

clients or customers to provide work or services for them" whereas the latter are "people who provide their services as part of a profession or business undertaking carried on by someone else".

24. One feature of the **Uber** case was that the drivers were not obliged to work on any particular occasion. It was a matter for them whether they turned on the app and accepted rides. They also decided when and for how long they worked. That was not a bar to them being workers. The question was what their status was when they were working. This point is amplified in **Sejpal** in which the learned judge develops a line of reasoning that certain familiar touchstones including that of irreducible minimum obligation are really about whether a contract existed at all and are of little assistance once it is clear that there is:

> "Just as the concept of the irreducible minimum does not assist in considering worker status during the period that a person is working pursuant to one of a series of engagements, it does not assist in considering the position of a person working under a single engagement." [**Para 26**]

25. As the learned judge in **Sejpal** notes, substitution clauses are often relied upon by respondents seeking to establish that the right to substitute either means that there is no "irreducible minimum" level of obligation[1] or that if any obligation does exist, it is not one of personal service. The learned judge cites the analysis of the Master of the Rolls in **Pimlico Plumbers Ltd v Smith** [2017] EWCA Civ 51. That analysis identifies two cases. In the first, there is an unfettered right to substitute. Such a right would be inconsistent with an obligation to provide personal service. The second case is where the right is fettered in some way. Then the question whether there is an obligation of personal service will turn on the facts. Etherton MR gives three examples:

    (1) a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance;

    (2) a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance; and

    (3) a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

    However, as with all contractual provisions in the context of Employment Law[2], the first question is to be sure that what appears in the contract represents the reality of the arrangement between the parties. The question of the weight to be given to substitution clauses which have not, in practice, been exercised was the subject of consideration in **Manning v Walker Crips Investment Management Ltd** [2023] EAT 79. In the course of his reasoning Michael Ford KC, sitting as Deputy, emphasised that the fact that a substitution clause had never been exercised did not mean that it might not be genuine, but that that

[1] That means, it seems to me, that the relevance of arguments about irreducible minimum cannot be strictly limited to the question whether there is a contract at all, as substitution clauses can only operate where there is a contract in existence.

[2] At least as it is to be understood in the light of **Autoclenz Ltd v Belcher** [2011] UKSC 41 and **Uber.**

might be a highly relevant factor in determining whether a claimant had a right never to do any work.

Discussion and Conclusions

26. Applying the legal principles set out above to the findings of fact that I have made, I have concluded that the Claimant is a worker within the meaning of **WTR 1998 Reg 2** and **ERA 1996**, **s. 230**.

27. In order for the Claimant to be a worker, the following conditions must be met:

    (1) There must be a contract;

    (2) The Claimant must undertake to do or to perform personally any work or services for the Respondent; and

    (3) The Respondent's status must not, by virtue of the contract, be that of a client or customer of any profession or business undertaking carried on by the Claimant.

28. Whilst there is considerable dispute as to whether or not the contract document relied upon by the Respondent accurately reflects the real nature of their relationship, both parties agree that their relationship was governed by a contract and that it created legal obligations.

29. I find that the contract obliged the Claimant personally to perform work or services. There are two main arguments to the contrary. The first is that the Claimant was free to work or not as he wished. That argument fails on a number of grounds. First, I do not think he had that freedom. He was required under threat of financial penalty to attend work unless he had given the Respondent notice of his need to be absent. Second, even if that were not so, this is simply a version of the argument that failed in **Uber**. The question is not whether he had some degree of freedom as to when he worked, but rather did he have the status of worker when he did so. The second argument is that the parties had agreed a substitution clause with the effect that there was no obligation to perform work personally. In practice, however, the Claimant was not free to send a substitute to do his work. He was forbidden even to pay someone to assist him when he had too many parcels to deliver. If he needed help or was absent, the Respondent would identify someone to step in. It was not treated as the Claimant's right or responsibility to find his own cover. The substitution clause is included, I find, not in order accurately to record the obligations which the Claimant was to undertake but to try to avoid the Claimant having the status of employee or worker. In the light of the reasoning in **Uber**, I disregard that provision.

30. Was the Respondent a client or customer of a profession or business undertaking carried on by the Claimant? I find that it was not. The Claimant was not, I find, in business on his own account. His position is well described using the language of Baroness Hale in **Bates**. He was a person who provided "services as part of a profession or business undertaking carried on by someone else". He delivered parcels as part of the Respondent's business. I have taken into account each term of the contract and the related findings about how matters operated in practice. The provision for payment against invoice, for example, would, on its face suggest that the relationship was intended to be one where the Claimant's operated a business on his own account. However, it was the Respondent that drew up the invoices and the Claimant had no input into their production and no influence over the rates that were paid. The Respondent was, in effect, invoicing itself. By way of further example, the Claimant could, he accepted, have used his own van, however in practice he needed to "hire" one from the

Respondent. That is a factor that might point to the Claimant being in business on his own account, but I find that, even combined with the other factors identified and relied upon by the Respondent, they are ultimately an insufficient basis for a conclusion that the Claimant was, in reality, running his own business undertaking discrete from that of the Respondent.

EJ Jones
4 January 2024