**Case No: 2408469/2022**

# EMPLOYMENT TRIBUNALS

**Claimant:** Ferdinand Stefanov

**Respondent:** Patchelle Limited

**Heard at:** Manchester Employment Tribunal **On:** 7th November 2023

**Before:** Employment Judge Cline (sitting alone)

**Representation**

Claimant: In person (assisted by a Bulgarian interpreter, Miss Mariela Spirdonova)
Respondent: Mr Pat Crossley (director)

**JUDGMENT** having been sent to the parties on 13th November 2023 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

**Introduction and the Issues to be Decided**

1. The Claimant, Mr Ferdinand Stefanov, was, for a period of 4 or 5 weeks in August and September of 2022, a delivery driver carrying out work for the Respondent. For the purposes of this claim, the Respondent was a company acting, in effect, as a subcontractor for DHL, allocating courier work on DHL's behalf to various drivers, one of whom was the Claimant.

2. By way of his ET1 claim form, received by the Tribunal on 19th October 2022, the Claimant asserted that he worked for the Respondent from 8th August to 2nd September 2022 as a delivery driver but was never paid; he therefore claimed for those unpaid wages by way of unauthorised deductions. In their ET3 response form dated 7th November 2022, the

Respondent confirmed that the Claimant worked for them (albeit for a slightly different period from 8th August to 9th September) but did so on a self-employed basis, leaving on 9th September "without finishing his expected duties and gave no notice or ever returned".

3. At a hearing on 15th February 2023 (which was initially listed as the final hearing but was converted to a case management hearing) Employment Judge Benson set out the issues to be decided at the final hearing as follows:

***1. Employment status***

*1.1 Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?*

*1.2 Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?*

*The respondent says that the claimant was self-employed. If the Tribunal finds that the claimant was a worker or employee, then it will go on to decide the following questions:*

***2. Unauthorised deductions***

*2.1 The respondent accepts it paid no monies to the claimant for the work done by the claimant in the period 8 August 2022 until he resigned from his employment on either 2 August (claimant's case) or 9 September (respondent's case). The respondent says it incurred costs as a result of the claimant's actions which it was entitled to set off against any money owed to the claimant.*

*2.2 Was any deduction required or authorised by statute?*

*2.3 Was any deduction required or authorised by a written term of the contract?*

*2.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?*

*2.5 Did the claimant agree in writing to the deduction before it was made?*

*2.6 If not, how much is the claimant owed? The claimant says he is owed £1000 net for the period he worked.*

4. Employment Judge Benson also noted in her case management summary that the Respondent is a delivery business which has contracts with a number of larger delivery companies and that they have 29 drivers, all of whom are said by the Respondent to be contracted on a self-employed basis. As noted above, it was also highlighted that the Respondent provided vehicles and insurance for the drivers, who are paid on a per-parcel basis, and that there was no written contract provided to the Claimant as he was still within his probationary period. Of significant relevance to the issues to be determined (for the reasons considered below), the Respondent confirmed that the Claimant could not arrange for anyone else to cover his round.

5. At the hearing before me on 7th November 2023 (as at the case management hearing), the Claimant appeared in person with the assistance of a Bulgarian interpreter and the Respondent was represented by Mr Pat Crossley, its sole director. I heard evidence from the Claimant and from Mr Crossley. There was no agreed bundle of evidence. The Claimant did not produce a witness statement or any documentary evidence. Mr Crossley relied upon a small bundle consisting of, amongst other documents, a "chronology" setting out his position (which he adopted as his evidence in chief at my suggestion), extracts from the subcontractor agreement with DHL and selected text messages between him and the Claimant.

6. During the course of the hearing, Mr Crossley said on several occasions that he was concerned that publication of the decision in this matter if the Claimant succeeds would cause reputational damage to his business and harm the prospect of securing further contracts. I explained to him that this was unfortunately not something that can be avoided in such circumstances

but that, if there is indeed an adverse decision, only the judgment itself would be publicly available through the Tribunal's website. When Mr Crossley subsequently requested that written reasons be provided (as he is of course entitled to do), I thought it appropriate to recall his comments during the hearing in terms of publicity and remind him that full written reasons, if requested, would be published on the website. Having been given the opportunity to consider his request again, Mr Crossley confirmed that he did indeed want written reasons to be provided as he felt his position to be unassailable.

**Some General Observations Regarding the Respondent's Case**

7. It is perhaps useful to pause at this stage and set out a number of general observations regarding Mr Crossley's presentation of the Respondent's case so that what comes hereafter can be seen in its proper context. They are not intended in any way as gratuitous criticism of Mr Crossley (who carried the burden of any litigant in person in such a matter to defend himself against a claim which he believed had no merit) but merely to illustrate the manner in which the issues were aired before me and as such, the basis upon which they therefore fell to be determined.

8. First, Mr Crossley repeatedly asserted that the Claimant was self-employed. I explained that this is one of the fundamental issues to be determined by the Tribunal after hearing evidence and legal argument, and will not simply be taken at face value because it is asserted by the Respondent; I suggested that it would be necessary for Mr Crossley to address the principles encapsulated in the relevant legislation and caselaw (as set out below). However, rather than addressing these principles, Mr Crossley opined at length about how unfair it was that people such as him, who help to create opportunity for those who may otherwise remain unemployed, and therefore drive the economy, are set against a system which seeks to undermine them. When I reminded him that this was not a helpful approach to the law, he simply repeated the same argument and did not, at any stage, address the legal principles.

9. Second, and continuing this theme, Mr Crossley asserted several times that, as he understood matters, the decision in the *Deliveroo* case "got round" the *Uber* case (both considered further below). However, when I

asked him to address how this is so on the facts of the Claimant's claim, he simply resorted to his argument on fairness. This notion of "getting around the rules" appeared to be the thrust of the Respondent's case but, when invited to do so, Mr Crossley did not address this in the context of the applicable law. The most telling summary of his position was perhaps to be found in an email that he sent to the Tribunal on 31st October 2023, the second paragraph of which says:

> *I attempted to state previously we work in a self employed environment, deliberately avoiding the restrictions offered by ACAS, Employment Tribunals, petty civil service rules etc. Our entire business model is structured around the concept of the more productive we are, the more we are commissioned. I gather that concept is alien to those in the civil service whom rely on our ability to raise revenue to cover their inevitable sick days, holidays and pensions.*

10. Third, having heard evidence and submissions on the Claimant's employment status, I indicated that, in the absence of any cogent legal argument from Mr Crossley, I was going to find that the Claimant was, for the purposes of this claim, a worker. At that stage, Mr Crossley asked if he had to remain in the hearing as he "knew from social media" what happened and therefore "gives up", commenting that he has a business to run so there is no point in wasting his time by remaining. I told Mr Crossley that he is of course free to leave if he wishes to do so but that, if he does, I will have to proceed to hear evidence from the Claimant on the sum to be awarded to him without Mr Crossley having the opportunity to challenge that evidence. Mr Crossley left.

**Findings of Fact**

11. As noted above, I heard evidence from both the Claimant and Mr Crossley. Each had the opportunity to ask questions of the other but neither asked more than a few questions, none of which appeared particularly relevant to the issues to be determined. As such, there were, in effect, no material factual issues in dispute and, having asked questions of my own whilst taking each witness through their evidence, I was able to make the findings

below in relation to the Claimant's employment status without the need to resolve any evidential conflicts.

12. On 2nd August 2022, the Respondent published an online advertisement for the role in question, which was looking for a "self-employed, multi-drop courier" with no specific rate of pay set out. The next day, the Claimant applied for the role and was accepted to begin his training and probationary period, which he commenced on 8th August.

13. The Claimant was not provided with a written contract of employment. It was apparently expected by both parties that, once settled into the role, the Claimant could earn approximately £4,000 per month; however, there was no specific discussion about rates of pay or even the basis upon which pay would be calculated and the Claimant, in his own words, "had no idea" how much he was actually going to earn.

14. In the absence of any written contract, there was no written agreement in relation to any deductions that could be made from the Claimant's wages. However, the Claimant understood from discussions with Mr Crossley that he was expected to pay £350 per month to rent the vehicle provided to him by the Respondent and that this sum would be deducted from his remuneration.

15. The Respondent intended to pay the Claimant a certain amount per parcel delivered but, as this information is held by DHL and not by the Respondent, there was no record kept by the Respondent of how many parcels the Claimant did in fact deliver. There was also no record kept of how many hours the Claimant spent completing his training save for Mr Crossley's recollection (which the Claimant said he accepted in the absence of any records of his own and his admitted poor recollection) that this lasted for 5 days and was for 5 hours each day.

16. When the Claimant started to carry out deliveries on his own, all the deliveries he was given were for DHL as part of the contract between DHL and the Respondent. The Claimant was told which deliveries he was required to complete by way of a list; the Claimant could, if he wished to do

so, ask somebody else to complete some of the deliveries on this list and, as long as the delivery was completed, it would be counted towards the Claimant's tally. However, the Claimant did not have a free choice as to whom he could ask to carry out deliveries on his behalf and it had to be, as Mr Crossley put it, someone on whom the Respondent had carried out checks such as National Insurance and criminal record. The vehicle used by the Claimant was provided by the Respondent and the routes to be taken were set by an algorithm provided by DHL.

17. It was Mr Crossley's recollection (which, again, the Claimant accepted in the absence of any records of his own) that the Claimant worked for 4 days carrying out deliveries before he handed back the keys to his vehicle and said that he did not wish to return. These 4 days each consisted of approximately 5 hours of work.

18. I heard evidence from both the Claimant and Mr Crossley in relation to the circumstances which led to the Claimant leaving his role. I did not consider this to be pertinent to the issues to be decided so I did not make any findings in this regard; however, there was clearly a breakdown in the relationship between them, with the Claimant feeling that he was being given an impossible number of deliveries to complete and Mr Crossley believing that the Claimant was simply not up to the task and did not work hard enough.

**The Relevant Law**

19. The starting point in relation to considering the employment status of an individual is to consider the wording of the relevant statute. Sections 230(1) to 230(3) of the Employment Rights Act 1996 provide:

*230 - Employees, workers etc.*

*(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

*(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

*(a) a contract of employment, or*

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual…*

20. There is no single test for how to determine a person's employment status. Each case falls to be determined on its own particular facts and there can often be factors pointing in opposite directions which complicate the determination. The correct approach requires the Tribunal to consider all aspects of the relationship and then ask whether the claimant was carrying on a business on their own account (*O'Kelly v Trusthouse Forte plc [1983] IRLR 369 CA*).

21. If therefore follows that the wording of any document and the assumptions made by the parties will only be part of the factual matrix to be considered. The test is not "what was the claimant called", "what do the documents label the parties" or "what did the claimant think they were"; the Tribunal must look behind any contractual documentation to consider how the relationship operated in reality to determine employment status (*Autoclenz Ltd v Belcher [2011] UKSC 41* and *Uber BV v Aslam & others [2019] UKSC*).

22. In the *Uber* case, it was emphasised by the Supreme Court that the purpose of the statutory regime is to provide protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work and that the analysis of their status must be seen through that prism.

23. In relation to whether someone is an "employee" for the purposes of S230(1)(a), the general tenor of the relevant authorities is that that a person will not be an employee without the mutual contractual obligation for the employer to provide work and the employee to do that work which is provided (*Carmichael v National Power Plc [1999] IRLR 43, HL*). This is often referred to in cases as the "irreducible minimum of obligation". Employees who have a contract of employment containing the irreducible minimum of obligation will also be "workers" by operation of S230(3)(a). Such workers are often referred to in cases as "limb (a) workers".

24. A person might however be a "worker" even in the absence of such an irreducible minimum of obligation: the obligations on each party are just part of the discussion about whether someone might be a "worker" (*National Midwifery Council v Somerville [2022] EWCA Civ 229*). These workers may be caught by the definition outlined in S230(3)(b) and are often known as "limb (b) workers". Where the Tribunal finds that a person is not an employee, it is possible that they could be a "limb (b) worker" if they meet the relevant requirements.

25. Those requirements are set out in the legislation itself: (1) there is a contract between the individual and the employer; (2) the individual must be required to work personally for the employer; and (3) the individual must not be working for someone who is in reality their customer or client. This last part is important because it is common for people to provide services under a contract to customers or clients without them benefitting from the protections offered by a "worker" status. If all three elements are present, then it does not matter if the person is, in some sense, operating their own business (*Hospital Medical Group Ltd v Westwood [2012] IRLR 834 CA*).

26. Sections 230(1) and (2) of the Act are fairly self-explanatory. In the usual way, the contract may be written or may be found to have been agreed orally with terms found through the conduct of the parties. S230(3) requires the contract to not allow the person claiming to be a worker the ability to substitute with someone else who would complete the work. An employer-worker relationship is a personal one. If there is a right of substitution, then it tends towards the person not being a limb (b) worker. If that right of

substitution is, in reality, forbidden or excessively curtailed in some way, then it is possible that the person might still be found to be a worker (*Pimlico Plumbers and another v Smith [2018] UKSC 29*).

27. The question of substitution appears to be what separates many of the cases cited above from the *Deliveroo* case referenced several times by Mr Crossley during the hearing. In *Independent Workers Union of Great Britain v Central Arbitration Committee and another [2023] UKSC 43* (also known as the *Deliveroo* case), the Supreme Court noted that Deliveroo drivers had an effectively unfettered right to ask someone else to carry out their deliveries for them without Deliveroo either knowing or approving the person to whom the delivery is delegated. The Court held that such arrangements between the two parties are "*totally inconsistent with the existence of an obligation to provide personal service which is essential to the existence of an employment relationship*". In effect, the presence of an unfettered right of substitution would clearly point away from status as an employee or worker. When I asked Mr Crossley to explain how *Deliveroo* supported his case when his own evidence to me was that the Claimant did not have an unfettered right of substitution, he simply did not engage with the matter and resorted to a monologue about the unfairness of the legal regime for people such as him who drive the country's economy.

28. Turning to the question of unauthorised deductions from wages if the Claimant is found to be an employee or a worker, Section 13 of the Employment Rights Act 1996 provides:

***13.— Right not to suffer unauthorised deductions.***

*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

**Discussion and Conclusions on Status**

29. In light of the legal framework set out above and taking into account the various factual findings set out at paragraphs 11 to 16 above, I found that the Claimant could not be characterised as an employee of the Respondent because of the absence of a clear contract of employment (either written or implied) and because there was such a lack of clarity as to the terms of the Claimant's engagement by the Respondent. However, considering the same factual matrix, I had little hesitation in finding that the Claimant was a worker given, amongst other factors, the following:
    a. The Respondent dictated the Claimant's pay;
    b. The Respondent dictated where and when the Claimant made his deliveries within his hours of work;
    c. The Claimant only carried out deliveries for DHL, for whom the Respondent acted as a sub-contractor;
    d. The Claimant drove a vehicle provided by the Respondent; and
    e. There was no unfettered right of substitution.

30. Focussing on that final element of the right of substitution, I reminded myself of the guidance set out by the High Court in *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497* to the effect that a limited or occasional power of delegation may not be inconsistent with there being a contract of service. In the instant case, as noted at paragraph 16 above, the purported right of substitution was limited to those people upon whom the Respondent had already carried out their requisite checks. Furthermore, there was no evidence from either party that this right had been exercised by the Claimant during the short time that he was engaged by the Respondent. As such, whilst acknowledging that this is an exercise in interpreting the facts on the ground, I found on the evidence before me that the purported right of substitution was not inconsistent with the Claimant being a worker.

31. In reaching my decision, I was especially mindful of the Supreme Court's comment in the *Uber* case, cited above, that the purpose of the legal framework is to protect potentially vulnerable individuals who are in a subordinate and dependent position in relation to an organisation who exercises control over their work. It seemed to me that the relationship

between the Claimant and the Respondent in the instant case fell entirely within that scenario, all the more so when this was the only job that the Claimant was doing at the relevant time and, as such, was highly dependent on the Respondent for his livelihood. I was fortified in this approach by considering Mr Crossley's express view, which he did not appear to consider is in any way problematic, that the rules are there to be circumvented in order to generate profit.

**Unauthorised Deductions**

32. The Claimant having been found to be a worker, the fact that he was not paid anything by the Respondent leads to the inexorable conclusion that there were unauthorised deductions from his wages for the purposes of Section 13 of the Employment Rights Act 1996 unless the Respondent can point to a lawful basis for any deduction. Mr Crossley asserted that there were various costs to be offset against the Claimant's wages (such as vehicle rental and insurance, road tax, petrol and parking fines) but he provided scant evidence of how the figures claimed were reached save for simply asserting them within his chronology (coming to a total of £1,410).

33. More fundamentally, Mr Crossley agreed when giving his evidence that there was no written contract of employment and no other written agreement with the Claimant that such deductions could and would be made. This falls foul of the requirement at Section 13(1) of the 1996 Act that any such agreement must be in writing and, therefore, no deductions were authorised. In short, the Respondent is not entitled to make any such deductions from the Claimant's wages so any argument regarding set-off against wages otherwise due to the Claimant must fail.

**What Sum is the Claimant Owed?**

34. As noted above, the evidence from both the Claimant and the Respondent in relation to the basic question of how many days (and how many hours per day) the Claimant worked for the Respondent was, to say the least, scant. However, I am obliged to make findings on the basis of the information available and, as such, I did so as set out at paragraphs 15 and 17 above to the effect that the Claimant worked for the Respondent for a

total of 45 hours, consisting of 25 hours (5 days) of training and 20 hours (4 days) of deliveries.

35. The Respondent asserted that the Claimant was to be paid per parcel delivered but Mr Crossley made no attempt whatsoever to set out what this amount would be (as opposed to telling me how much the Respondent received from DHL per parcel for the work completed by the Claimant). In any event, having found that the Claimant was a worker, the only appropriate approach, in my judgment, is to apply the prevailing National Minimum Wage at the time for a person of the Claimant's age, which was £9.50 per hour gross. 45 hours at £9.50 comes to a total of £427.50.

36. For the reasons given above, I found that:
    a. The Claimant was not an employee of the Respondent;
    b. The Claimant was a worker;
    c. The Respondent made deductions from the Claimant's wages by not paying him for any of the period for which he was engaged by them;
    d. The Claimant was owed wages of £427.50;
    e. None of the purported deductions was authorised.

Employment Judge Cline

Date: 11th February 2024

REASONS SENT TO THE PARTIES ON

Date: 4 March 2024

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FOR THE TRIBUNAL OFFICE