EMPLOYMENT TRIBUNALS

Claimant: **Mr Golding**

Respondent: **DPD Group Limited**

Heard at: **London South Employment Tribunal (by videolink)**

On: **27.02.2024**

Before: **Employment Judge Dyal**

Representation:

Claimant: **in person**

Respondent: **Ms Jennings, Counsel**

JUDGMENT UPON PRELIMINARY HEARING

1. The Respondent's application to strike-out the Claimant's claim is refused.

REASONS

Introduction

1. This hearing was listed to determine the Respondent's applications to strike out the Claimant's claim / for a deposit order.

2. The claim form is in a narrative style. The boxes are checked for:

    2.1. Race discrimination and religion and belief discrimination;
    2.2. Other payments. A number of financial matters are alluded to, from being denied work on particular days to charges in respect of vehicles that are said to be improper. These appear to be complaints of breach of contract and/or unauthorised deduction from wages and/or discrimination.

The applications and the background to them

3. The Respondent is a well-known delivery company. The Claimant was engaged by it pursuant to three documents each titled 'Franchise agreement'. One of the Respondent's business model is a franchise model. That is not the only model it has; it also employs drivers under express contracts of employment.

4. The Respondent's application was made in an email dated 8 June 2023. It avers that the Claimant has no/little reasonable prospect of satisfying the tribunal that he had employee/worker status. In particular, the Respondent says there was no requirement for personal service.

5. On 10 July 2023, there was a Preliminary Hearing (PH). There was confusion as to whether or not the Respondent's applications were on the agenda. The Claimant was not in a position to deal with them then and the judge postponed the applications to another occasion. It is plain that he explained the gist of what the Respondent was getting by at in its applications to the Claimant and this is also reflected in his detailed case management orders.

6. The hearing of the application was further delayed when a lack of judicial resources caused a postponement of the Preliminary Hearing listed to deal with the application last year. The matter came before me today with a 3 hour listing.

Documents

7. A hearing bundle was prepared in advance of the PH last year. Unfortunately it did not find its way to me until just before the hearing started. However, I had seen and read all the documents in it other than the Claimant's franchise agreements with the Respondent. I had only been able to quickly scan those agreements in advance of the hearing commencing. I indicated I would take time to read them in detail after the submissions.

8. The Claimant was sent the bundle last year. However, he did not have it immediately to hand so it was resent to him at the start of the hearing.

Respondent's submissions

9. Ms Jennings indicated that the Respondent's submissions would only take about 5 minutes. I was keen for the case to be argued fully and invited her to make her submissions fully and in the event she took a little longer than that.

10. The Respondent's case was put shortly. The tribunal was directly bound by the decision of the EAT in *Stojsavljevic & another v DPD Group UK Limited.* Ms Jennings submitted that in that case Mr Stojsavljevic had contract with the Respondent in identical terms to that which the Claimant contracted with the Respondent. The tribunal found he was not an employee nor a worker. That decision was appealed to the EAT and Ellenbogen J upheld the tribunal's decision *(*UKEAT/0118/20OJO) in a judgment running to 57 pages. Since the terms of the contracts were identical to the Claimant's, and since the part of the decision that related to the interpretation and meaning of the contract was a matter of law, the tribunal was quite simply bound by the EAT's decision to find that the Claimant's contract did not include any element of personal service.

11. I was also referred to two first instance decisions that came after *Stojsavljevic* (*Patel* and *Adegbite*).

12. Ms Jennings further noted that the Claimant had referred to himself as 'self-employed' a few times. She correctly accepted that this was not dispositive of anything, not least the Claimant being a litigant in person, but submitted it was an indicative factor.

13. During submissions, I double checked with counsel whether the Respondent's position was that the terms of the Claimant's franchise agreements were <u>identical</u> to those of the claimant in *Stojsavljevic* - she said that it was. I indicated that my experience was that there were often updates to agreements of this kind – so asked for clarity on whether the agreements in this case and *Stojsavljevic* were identical. I was told that they were identical.

The Claimant's submissions

14. The Claimant submitted that:

    14.1. He had protected characteristics and he had been discriminated against because of them – the tribunal should hear his complaints. He suggested that the Respondent was trying to 'override' the Equality Act 2010 and that I would be if I allowed the application. I explained a number of times that the tribunal does have the power to hear complaints of discrimination under the Equality Act 2010, but that there were limits to its power. The tribunal did not have the power to hear *all and any* complaints of discrimination. In a case like this the tribunal only had the power to hear the claim if the Claimant was an employee of the Respondent's within the meaning of s.83(2) Equality Act 2010.

    14.2. When he worked for the Respondent his work was controlled in various ways. For instance, he was required to follow the Respondent's routes,

there were penalties for things like lateness, and he was required to comply with the Working Time Directive.

14.3. He could not simply get someone off the street and get them to do the driving. There were many hurdles that needed to be cleared before someone else could do so and that included having the same training and checks that he had. In essence, using my own words now, he was saying that the right of substation was fettered.

14.4. The franchise agreements were just a clever way of taking away people's rights. Although this argument was not developed in detail the Claimant was essentially saying that they did not reflect the reality of how things really worked.

Law

15. Rule 37 provides:

> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*

16. Cases should not, as a general principle, be struck out on when the central facts are in dispute. There are limited exceptions to this principle (see e.g. ***Ezsias v North Glamorgan NHS Trust*** [2007] EWCA Civ 330, [2007] IRLR 603, [2007] ICR 1126; ***Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly*** [2012] CSIH 46, [2012] IRLR 755.)

17. Central facts include not only issues such as what happened but also *why* they happened (this is obvious but if authority is needed see e.g. ***Romanowska v Aspirations Care Ltd*** UKEAT/0015/14.)

18. Upon a strike-out application generally the Claimant's factual case should be taken at its reasonable highest.

19. All of these principles apply with the greatest force in discrimination claims because there is a particular public interest in them being heard. As Lord Steyn said ***Anyanwu v South Bank Students' Union*** [2001] IRLR 305:

> *"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."*

20. In ***Mechkarov v Citibank*** NA UKEAT/0041/16, [2016] ICR 1121, Mitting J summarised the law as follows at [14]:

(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.'

21. 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.

22. In ***Van Rensburg v Royal Borough of Kingston-Upon-Thames****,* UKEAT/0096/07 at [24 – 27], Elias P (as he was) made clear that when applying the 'little reasonable prospect' test the tribunal is not limited to legal matters alone. Elias P also made clear that there was more scope for exercising the power to order a deposit because of the improbability of essential facts being established than when exercising the power to strike out for that reason. For instance, he said:

    [27]… *the tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim or response.*

Substantive law

23. The definition of an employee or a worker, so far as these claims are concerned, are in Section 230 of the Employment Rights Act 1996 and section 83 of the Equality Act 2010, extension of jurisdiction order.

24. Section 230 provides: -

(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; and any reference to a worker's contract shall be construed accordingly.

25. Section 83(2) provides: -

"Employment" means—
(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

26. There must be some requirement of personal service for an individual to be an employee or a worker within the meaning of these provisions. If there is not, they are neither an employee nor a worker.

Discussion and conclusion

27. The hearing was listed for 3 hours. The submissions finished at 11.25 am and I indicated I would give my decision at 1pm.

28. During my deliberation, I had the opportunity to read the Claimant's franchise agreements more closely. The franchise agreements of Mr Stojsavljeic were not in the bundle, nor was the operating manual that applied to him and nor was the operating manual referred to in the Claimant's franchise agreement (which may or may not be in like terms to Mr Stojsavljeic's). However, some of the terms of Mr Stojsavljeic's agreement with the Respondent are quoted in the judgment of the EAT (e.g. at paragraphs 6 and 71).

29. Carrying out such comparison as I was able to with such documents as had been put before me, it became immediately clear that the terms of the Claimant's franchise agreements were not identical to the agreements under consideration *Stojsavljeic*. For example, based on the judgment of the EAT, clause 2 of the agreement under consideration there said:

'GeoPost appoints the Franchisee to operate the Business in the Territory in accordance with the System upon the terms and conditions set out in this Agreement. For the avoidance of any doubt, GeoPost is under no obligation to provide work for the Franchisee pursuant to the terms of this Agreement.'

30. Clause 2 of the Claimant's Franchise agreements said:

2. Your Promises to Us

2.1 We will rely upon the information you have given to us in your application form in deciding whether to enter into this Franchise Agreement with you. You promise us that the information in your application form is true and not

misleading and that you have not failed to disclose any information which might affect our decision to enter into this Franchise Agreement with you.

2.2 You also promise that if there is any change in the information which you gave to us in the application form, you will tell us immediately so that we can decide whether it affects your ability to operate the Business. You understand that if any of the information in your application form is subsequently found to be incorrect, untrue or misleading, whether the information was incorrect, untrue or misleading at the date that you signed the application form or afterwards, we may terminate this Franchise Agreement immediately by giving you written notice.

2.3 You understand that if any of the information in your application form is subsequently found to be incorrect, untrue or misleading, whether the information was incorrect, untrue or misleading at the date that you signed the application form or afterwards, we may terminate this Franchise Agreement immediately by giving you written notice.

31. I was not able to make a full comparison of the Claimant's franchise agreement and the agreements under consideration in the EAT because the latter were not in front of me and neither was the Operating Manual (or as the case may be Operating Manuals). However, it was plain that there were many differences to both the structure and wording of these agreements. Far from being identical they were obviously different.

32. In light of that, I do not accept that the decision of the EAT is binding *in the way the Respondent submits* in this case – quite simply the EAT was construing a different agreement. That was a very complex exercise that involved an extremely close analysis of the terms of a differently structured and differently worded agreement (that I have not been shown). Words matter when it comes to contracts.

33. Since the contract I am considering is different to the one the EAT construed and analysed, I do not accept that what the EAT said in that case is *without more* dispositive of the outcome in this case (albeit that it is undoubtedly true that there is a great deal of wisdom in that judgment of obvious relevance in this case).

34. Perhaps because the Respondent put the case today simply on the basis that the decision of the EAT was binding because the contract in issue there was <u>identical</u> to the Claimant's, I have not had the benefit of any detailed argument about the Claimant's franchise agreements. No exercise – analysing the meaning and terms of the agreement - comparable to that carried out in the *Stajsavljevic* litigation was attempted. In argument I was simply referred to the definition of a driver (clause 1) and to the clause 3 (the appointment of drivers). There were no submissions, for instance, to the effect that, although the wording/structure between the Claimant's agreements and Mr Stajsavljevic's agreement are different, in these respects the meaning/outcome is the same.

35. Striking out is a draconian step that must not be taken lightly. In this case, I do not think it would be right or proper to strike-out the case. I cannot be satisfied it has no reasonable prospect of success:

    35.1. The basis for strike-out which was pursued has failed;
    35.2. I have not had the benefit of anything like full argument on the detail of the Claimant's actual agreement;
    35.3. I have not seen the operating manual and I do not know whether it is in the same terms as those considered in *Stajsavljevic* (and which occupied a good deal of the argument and analysis in the EAT). The Claimant's franchise agreements make extensive reference to it;
    35.4. Although he did not develop the argument in much detail, there was some suggestion from the Claimant that the express contractual arrangements were just a way of depriving people of their employment rights rather than reflecting the reality of the situation. This hearing was not a suitable vehicle for determining what the terms of the agreement between the Claimant and the Respondent truly were (and whether they were different, and if so in what way, to the terms of the written Franchise Agreements). There is at least some element of core factual dispute.

Little reasonable prospect

36. It is convenient to set out my reasons for making a deposit order here since the above background is all relevant.

37. I am satisfied that there is a proper basis to conclude that the claims have little reasonable prospect of success. None of the claims can succeed unless there was some requirement of personal service.

38. Taking account of all the material that is in front of me:

    38.1. I think the chances of the Claimant satisfying the tribunal that there was some requirement of personal service are very slim;
    38.2. It will be an issue of fact what the real terms were of the agreement between the Claimant and the Respondent and the identification of those terms will be the starting point for analysis. Having read the Claimant's claim form and heard from the Claimant today (and always bearing in mind that he is a litigant in person) there was little to suggest that the tribunal would find that the real terms of the agreement were different to the written terms. I think there is a high chance, then, of the tribunal finding that the terms of the franchise agreements were indeed the real terms.
    38.3. There is good reason to believe that the Respondent will lead powerful evidence that the right of substitution was genuine (that is the right of franchisees to send someone else to do driving, rather than to do that or anything personally). It has done so successfully in the past and there is nothing to suggest the position has changed.
    38.4. Reading the Claimant's franchise agreements and comparing it in so far as I can to the agreements considered by the EAT in *Stajsavljevic,* at the very least, it can be said that the models are very similar. I think there is a very

strong chance that ultimately much the same analysis will apply in the Claimant's case as applied in Mr Stajsavljevic's.

39. I therefore think that the Claimant's case that the tribunal has jurisdiction (i.e., the power) to hear his claims have little reasonable prospect of success. I think it is right that a deposit order is made to underline that message.

40. I deal with the amount of the deposit order under separate cover.

41. I suggested that the Claimant take legal advice and told him I would send him some information about potential free sources of advice. I repeat my suggestion.

Employment Judge Dyal
Date 27.02.24

SENT TO THE PARTIES ON
1st March 2024

FOR EMPLOYMENT TRIBUNALS