Neutral Citation Number: [2024] EAT 202

Case No: EA-2023-000052-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 March 2024

Before:

HER HONOUR JUDGE TUCKER

Between:

MR P PATEL

Appellant

- and -

DPD GROUP UK LIMITED

Respondent

- -
- -

Ms S Forsyth (instructed by **South West London Law Centres**) for the **Appellant**
Mr J Galbraith-Marten KC (instructed by **Browne Jacobson LLP**) for the **Respondent**

Hearing date: 5 March 2024

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JUDGMENT

SUMMARY

EMPLOYEE, WORKER OR SELF EMPLOYED

An Employment Tribunal did not err in striking out a claim on the grounds that it had no reasonable prospect of success. The Claimant had signed a OwnerDriverFranchise (ODF) agreement pursuant to which he agreed to provide a service delivering parcels for the Respondent. In previous proceedings concerning other drivers in materially similar positions to the Claimant, and who had signed the same agreement, it was determined that that agreement was genuine and properly reflected the relationship between the parties. That decision was upheld on appeal (**Stojsavljevic & Turner v DPD Group Ltd** [EA 2019] 000259. The Claimant in these proceedings had not identified any facts or circumstances which differentiated his position from those other Claimants. The contract did not require the Claimant to provide the service of parcel delivery personally. Subject to some basic requirements such as adequate training, the Claimant was entitled to provide the service through any other individual doing the relevant work. The Claimant was not an employee or a worker. The modern, purposive approach to statutory interpretation as set out in the Supreme Court's decision in **Uber v Aslam** [2021] UKSC 5, did not lead to the conclusion that the Claimant contended for, that he was an employee or worker of the Respondent company.

HER HONOUR JUDGE TUCKER:

1. This is my decision in an appeal against a decision of an Employment Tribunal, Employment Judge Wright, sitting alone, of the 1st December 2022. By that decision, the Judge struck out the Claimant's claim as having no reasonable prospect of success under Rule 37(1) of the Employment Tribunal Rules and Procedure 2013. The Judgment was sent out separately to the Reasons; the reasons are dated the 12th December 2022. In this Judgment I will refer to the Appellant as "the Claimant", and to the Respondent company, and Respondent to the appeal, as "the Respondent".

2. The Claimant entered into a contract with the Respondent, DPD, through which the Claimant undertook to deliver parcels on behalf of the Respondent company. The Respondent asserted that the terms of that contract did not require the Claimant to provide his services personally to the Respondent; rather, that he had contracted to provide the service of 'parcel delivery', in accordance with the agreement which the Claimant and Respondent had signed. The Claimant asserts that that was wrong, and an error law, and that, applying what was described as the "modern, purposive approach" to statutory interpretation regarding worker or employee status, he was a 'worker employee'; alternatively, for the purposes of this appeal, that the Tribunal erred in striking out the claim without properly investigating the particular circumstances of the Claimant's position.

3. It's common ground that the Claimant was in the same position as a number of other individuals who entered into the same contract with the Respondent, in particular, two drivers called Mr Turner and Mr Stojsavljevic.

The Tribunal's decision

4. The Judgment of the Tribunal set out the Tribunal's conclusions in relation to the

application to strike out in relatively brief terms. At paragraph 10, the Judge stated as follows:

> **"Under the Agreement, the Franchisee (in this case the claimant) is obliged to 'operate the Business'. The 'Business' is means the franchise business of supplying a Driver and Service Vehicle with Service Equipment to perform the Services in accordance with the System."**

The defined terms were contained in the franchise agreement at page 95:

> **"'Driver' means the employee, agent, sub-contractor, partner or otherwise of the Franchisee who:-**
>
> **i) has all the appropriate qualifications to drive the Service Vehicle in the Territory including a full and not a provisional licence; and**
>
> **ii) who is not under the age of 21; and**
>
> **iii) who has undergone training by GeoPost or the franchisee (as the case may be) in the standards, procedures, techniques and methods comprising the System; AND who is engaged or employed or otherwise by the Franchisee, to drive the Service Vehicle and who may, if the Franchisee is an individual, include the Franchisee himself."**

5. It is clear from this passage that, within the contract, the term "driver" was defined differently from the individual who signed the agreement as the Franchisee.

6. The Judge stated as follows:

> **"There is therefore no element of personal service under the Franchise Agreement."**

7. The Judge held that the Claimant had the right to substitute another worker/driver to fulfil the role of delivering parcels. The Judge also considered that the terminology "substitute" in this particular case was somewhat inept, preferring, as set out above, to conclude that, according to the terms of the agreement, there was no element of personal service within it.

8. At paragraph 12, the Judge stated as follows:

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

9. Paragraph 13:

> "**There was no obligation on the Claimant himself to 'be' the Driver. There was no obligation on the Claimant to drive the vehicle and therefore there was no element of personal service."**

The Judge concluded that:

> **"The Claimant cannot therefore fall within s.230(3)(b) of the Employment Rights Act 1996 as there is no requirement under the Agreement for him to personally perform any services for the Respondent."**

The Judge:

> **"That the Claimant chose to do so, apart from odd occasions, does not undermine the obligations under the Agreement, which the EAT has found to reflect the true agreement between the parties."**

10. That latter point in that passage (regarding that which he EAT had concluded) refers to the claims issued by Mr Turner and Mr Stojsavljevic (**Stojsavljevic and Turner v DPD Group UK Ltd** 3325937/2017 and 3325938/2017) and the subsequent appeal. Those cases were determined by a different Tribunal, Employment Judge (EJ) Henry sitting in the Watford Employment Tribunal (ET) in October 2018. In those claims the Judge had concluded that the two drivers, Mr Sojsavljevic and Mr Turner, were neither workers nor employees. The drivers' appeal against that decision was heard in the Employment Appeal Tribunal (EAT).

11. The appeal was dismissed and the Judgment of the Tribunal was upheld. In particular, at

paragraph 79 of her judgment, Mrs Justice Ellenbogen held:

> **"The Franchise Agreement appointed the named Franchisee to operate the Business in the Territory. The Business was defined to include the supply of a 'Driver', a term which was separately defined and was not synonymous with the Franchisee (clause 1.1). The requirements imposed by the definition of a Driver were themselves limited and the further requirements, imposed on the Franchisee in relation to such a person by clause 8.1 of the Franchise Agreement, were to ensure that the Driver had received the requisite training, performed the Services appropriately and was available to perform them when requested by GeoPost. Nothing in that clause, or elsewhere in the Franchise Agreement (or, indeed, in section 18 of the Operating Manual), operated to fetter the right to substitute another Driver at his election."**

12. Significantly, in the hearing before EJ Henry, the Tribunal had concluded that the franchise agreement that was entered into by the Claimants and Respondent in that case, was a genuine agreement, representing the terms upon which the Claimants and Respondents' relationship would be founded. See, in particular, paragraphs 100 to 104 of the ET decision dated 18 January 2019.

13. I note that the position of the Franchisees in that case appeared to be, at least, materially similar to that of the Claimant in this case. However, one point that has been canvassed in some detail in submissions is that the Claimant in this case, because he was required by DPD to use a modern van in order to deliver the parcels, was required to hire that van and did so by hiring it from DPD. As a result, each month he had to account for the insurance of and cost of hiring that vehicle, approximately £800. It was contended that, consequently, the reality was that there was control and direction by DPD: drivers needed to work in order to pay back that sum of money on a monthly basis.

14. Returning to the decision of EJ Wright in the present case, EJ Wright found at paragraphs 16 to 17 that, having regard to the decision in the **Stojsavljevic and Turner** case, there were

no distinguishing features between that decision and the facts of this Claimant's case. At paragraph 16, the Judge stated as follows:

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

15. The Judge then concluded that the Claimant did not have to provide personal service and he was not, therefore, a worker under the Employment Rights Act 1996 (ERA). The Judge concluded that the Claimant's situation was materially similar to that of the two drivers in the **Stojsavljevic and Turner** case which had been considered both at first instance and on appeal. The Judge concluded, at paragraph 6.17 of the Judgment that, as the Claimant was not a worker, his claim had no reasonable or, indeed, any prospect of success and struck the claim out.

The appeal and submissions of the Appellant

16. The appeal today was presented by Ms Forsyth, eloquently and with conviction. She noted that the single issue to be determined today was whether or not the Tribunal erred in deciding that, in the particular circumstances of this case, the claim should be struck out because it had no reasonable prospect of success, where evidence of subordination, dependence and one-sided control, leading to questions of vulnerability had not been investigated and were not, in her submission, answered. It was submitted that it had been wrong to strike out this

claim where no consideration was given to whether those particular circumstances attracted the protection of statute. It was submitted that it was an error to fail to apply what was described as the modern approach of statutory interpretation as set out, in particular, in the Supreme Court decision in **Uber BV and others v Aslam and others** [2021] IRLR 407 at paragraphs 69 to 70:

> **"69. 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 legislation. Thus, the task for the tribunals and the 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 a "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 was one of statutory interpretation, not contractual interpretation.**
>
> **70. 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] UKSC 13; [2016] 1 WLR 1005, paras 61-68, Lord Reed (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 cited the pithy Page 20 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." "**

17. In the **Uber** case, the Supreme Court stated, at paragraph 69, that the task for the Tribunals and courts is not, unless the legislation required it, to identify whether, under the terms of the contract Autoclenz had agreed that the Claimants should be paid at least the national minimum wage or receive paid annual leave. Rather, it was to determine whether the Claimants fell within the definition of a 'worker' within the relevant statutory provisions so as to qualify for those rights, irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation. See in particular the following extract from paragraph 70:

> **"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."**

18. In this case, it was submitted that, because the claim was struck out prior to any evidence being heard about the particular circumstances of this Claimant, the Tribunal was in error: there had not been a proper assessment of the reality of the situation; the strike out decision failed to explore the practical reality of the Claimant's ability to find alternative drivers so as to make a theoretical right to substitution within the contract one which could work and take place in practice. Secondly, it was submitted that there was a failure to explore concepts such as dependency and control. Thirdly, it was submitted that it was an error to put the contract 'centre stage', to the detriment of a proper investigation of those important matters.

19. It was submitted, in particular in the written submissions at paragraphs 8 and 9, that pursuant to the 'modern approach' it was not the job of the Tribunal simply to check the terms of a contract. It was submitted that it is wrong to look at the contract as some sort of authority which then imposes itself as a template through which the Employment Tribunal had to view the facts. That approach, it was submitted, prevented the Tribunal from properly viewing the reality of the relationship and seeing how the transaction between the Claimant and other party to the agreement actually worked on the ground.

20. It was submitted that, free of constraint, if what the Tribunal sees and, by correlation, what an ordinary member of the public would perceive, appears to be a worker/employee transaction, then the Tribunal should disregard whatever the contract says and enforce the relevant statutory employment rights. It was submitted that, as a result of the decision in **Uber**, there had been a move away from an assessment of whether a contract was a 'sham', to

consideration of why the contract, or why a relevant clause, was there in the first place.

21. In the present case, it was submitted that there had not been proper appreciation of the practicalities of the need to train any replacement drivers. It was submitted that the training that was required, as a result of the franchise contract, was detailed, extensive, and could take up to five days and that the Claimant could not provide the facilities or, indeed, the level of training that was required. It was submitted that, looking at the detail of what was required, the Claimant would have had to take time off in order to provide it but that he could not do so because of his requirement to drive, so as, in particular, to meet the cost of repayments on the van which he had hired from DPD. It was submitted that there was no sufficient appreciation of the difficulty of obtaining a replacement driver at short notice if the franchisee who usually drove became ill.

22. My attention was drawn to the fact that fines were levied upon a franchisee who failed to deliver parcels for a day, initially of approximately £150 per day, and more recently through the application of a points/ penalty system where there had been a failure to adhere to certain standards.

23. It was submitted that there was, in fact, some requirement of personal service, in particular at peak times, where there was a prohibition on using replacement drivers.

The Respondent's submissions

24. The Respondent submitted that the law is clear: that the requirement for an individual to provide work themselves personally to another party was an integral and essential component in the definition of and understanding of the legal concept of worker or employee status. It was

submitted that there were no relevant distinguishing features between this case and the EAT's decision in the **Stojsavljevic and Turner** case and that the appeal should, therefore, be dismissed.

Analysis and conclusions

25. The question of worker status is one that has been before this Tribunal on many occasions. It has become an area of significant complexity. It has today been helpful, in particular, to look at the chronology of a number of relevant decisions.

26. The definition of employees and workers is set out in section 230 of the Employment Rights Act 1996 (ERA 1996). That provides as follows:

> **"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;
>
> 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.
>
> (5) In this Act "employment"—

> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
>
> (b) in relation to a worker, means employment under his contract;
>
> and "employed" shall be construed accordingly.
>
> (6) This section has effect subject to sections 43K, 47B(3) and 49B(10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, " worker ", " worker's contract " and, in relation to a worker, " employer ", " employment " and " employed " have the extended meaning given by section 43K.
>
> (7) This section has effect subject to section 75K(3) and (5)."

It is, in my judgment, clear that the definition requires an individual to undertake to do, or to perform personally, work or services for another party.

27. Significant attention has been given to the **Uber** case in the Claimant's submissions. In that case, Uber BV asserted that it only acted as an agent for the Uber drivers, connecting those drivers to their clients. Importantly, it was common ground that there was no contract in place between the Uber company itself and the drivers driving their vehicles on the road. The contract that came into existence was between the people booking an Uber taxi and the drivers themselves.

28. In **Catt v English Table Tennis Association** [2022] EAT 125, Eady J considered the **Uber** decision. She stated that, in her judgment, when considering worker or employee status, the initial focus should be upnon the contract. She stated that that should be the starting point rather than an initial analysis of questions of, for example, vulnerability, subordination and dependency. She observed that, if there is a contract in existence between the two parties said to be in an employment or worker relationship, questions of vulnerability, subordination and dependency may then be relevant to the question of whether or not the contractual document reflects the reality of the relationship between the parties. She noted that that is particularly so

where standard or other documents are provided by the more powerful party to the agreement.

29. A Tribunal or court will be, and always should be, live to situations where a document is said, on its face, to be something that is simply not aligned with the practical reality of that which occurs. It is not, however, right, in my judgment, simply to ignore contractual documents which do exist. Equally, it is not right to ignore the reality of what occurs on the ground. The modern approach, in my judgment, requires proper focus on both.

30. Submissions were made regarding the decision in the decision of the Central Arbitration Committee (CAC), then the Court of Appeal (CA), and the Supreme Court in **Deliveroo** case (**Independent Workers Union of Great Britain v Central Arbitration Committee and another** [2021] EWCA Civ 952. That case began as an application for union recognition. The application was refused because the Deliveroo riders were said not to be workers. Although the legislation at issue in that case was different, (i.e., the issue did not arise within the context of the definition in s.230 of the Employment Rights Act 1996) the provisions which were considered in the case were materially identical. Within that case, at all three stages of the decision, (before the CAC, then before the CA and then before the Supreme Court) it was held that a genuine right of substitution was fatal to the Union's claims that the riders were workers. See, for example, paragraphs 98 to 99, 100 and 100 to 103 of the decision before the CAC.

> **"98. An issue that puzzled the Panel considerably was this: Deliveroo stressed the total flexibility of its Riders' ability to log in to the App as and when they wished, and ability to pass on offers of a delivery, even when logged on; and even to abandon the delivery midway by just ringing the service delivery support desk (perhaps by now this can be done simply via the App without even a phone call). In such circumstances, why would the question of substitution ever arise? Why would a Rider bother to engage a substitute? And why would Deliveroo spend so much time, money and energy selecting and training Riders, when the Riders could then sub-contract the right to use the App willy-nilly? We termed it the substitution conundrum in our deliberations – what would be the point of using a substitute if you were a Rider and why would you let a Rider do it if you were Deliveroo? Mr Hendy submitted that the reason why it was perplexing**

was because there was, in reality, no substitution right and because of the setup of the App system, substitution provisions would be both unnecessary and undesirable. Deliveroo would also be unable to have any control over who was delivering the food and whether they were following the high customer service standards learnt by the Riders in the training videos and on-boarding process. It also made a mockery of the extensive training given to Riders – why would Deliveroo invest in training its Riders when anyone other than what Mr Jeans described as 'a very bad egg' would be able to act as a substitute without any objection from Deliveroo. Why pay for a CRB check for a Rider?

99.Mr Jeans' bland response was that if Deliveroo was willing to invest in training for its Riders, knowing that they could sub-contract whenever they wanted, then that was up to them. If they were willing to risk their Riders sub-contracting to unsuitable types who had not washed their hands in accordance with the training video resulting in the customers being unhappy with the person on the doorstep, then that was their choice. The Panel's role is not to judge the good sense or otherwise of the business model. Even if they did it in order to defeat this claim and in order to prevent the Riders from being classified as workers, then that too was permissible: all that mattered was the terms of the agreement, analysed in the holistic and realistic way set out in Autoclenz. He of course made no concession that either proposition was accurate. Deliveroo's purpose in deciding the terms of the agreement (and there was no question that the Riders had any direct say in the matter) was immaterial – all that mattered was what the terms actually were.

100. The central and insuperable difficulty for the union is that we find that the substitution right to be genuine, in the sense that Deliveroo have decided in the New Contract that Riders have a right to substitute themselves both before and after they have accepted a particular job; and we have also heard evidence, that we accepted, of it being operated in practice. Deliveroo was comfortable with it. We did not find the Deliveroo witnesses to be liars. One answer to the substitution conundrum was given by Mr Munir when he eventually explained that he was engaged in sub-contracting for a 15–20% cut.

101. In light of our central finding on substitution, it cannot be said that the Riders undertake to do personally any work or services for another party. It is fatal to the union's claim. If a Rider accepts a particular delivery, their undertaking is to either do it themselves in accordance with the contractual standard, or get someone else to do it. They can even abandon the job part way having only to telephone Rider Support to let them know. A Rider will not be penalised by Deliveroo for not personally doing the delivery her or himself, provided the substitute complies with the contractual terms that apply to the Rider.

102. Some Riders do few and intermittent jobs for Deliveroo but many Riders do as much work as possible insofar as they can given any other commitments, and to place themselves as close as possible to restaurants so they will be offered work by the Deliveroo algorithm and rely on it as their main source of income. But that is not the applicable test under s 296 of the Act. The delivery has to be undertaken by a person, however it does not have to be the Rider that

> **personally performs it and Riders are free to substitute at will. We also appreciate the high level of trust required in the substitute by the Rider – both because the substitute has to have either the Rider's phone, or Deliveroo passwords to download the Rider's App onto her or his phone, and because of the contractual commitments borne by the Rider on behalf of her substitute (particularly in light of Deliveroo's right to end the contract for any reason on one week's notice), which limits the attractiveness of sub-contracting, coupled with the lack of incentive for doing so. But that does not make the substitution provisions a sham. The factual situation in this case is very different from, for example, that of Uber private hire drivers, or Excel or City Sprint.**
>
> **103. It is therefore unnecessary to dissect the other features of the contractual relationship between Deliveroo and its Riders: they are insufficient to compensate**
> **in the union's favour in light of the substitution finding. Nor do the facts of this case require a more detailed analysis of whether the subtly different wording of s 296 to the worker definition in Employment Rights Act 1996 amount to a distinction without a difference. The Panel was concerned about public safety and food hygiene and the way the New Agreement seeks to place all risk and responsibility on the shoulders of the Riders. The Panel noted the union's extensive submissions on the Food Safety and Hygiene (England) Regulations 2013, SI 2013/2996, the relevant EU provisions and the Health and Safety at Work Act 1974 and associated regulations. Deliveroo did not accept that its hands off approach to overseeing Riders' substitutes placed Deliveroo at risk of prosecution. But the absence of control and supervision of substitutes and the non-delegable health, safety and food hygiene obligations on Deliveroo, does not mean that the substitution provisions are not genuine. By allowing an almost unfettered right of substitution, Deliveroo loses visibility, and therefore assurance over who is delivering services in its name, thereby creating a reputational risk, and potentially a regulatory risk, but that is a matter for them. The Riders are not workers within the statutory definition of either s 296 TULR(C)A or s 230(3)(b) Employment Rights Act 1996."**

31. Subsequent appeals were dismissed by the Court of Appeal and the Supreme Court.

32. That approach, that an element of personal work being done by one party for the benefit of the other, is critical to worker and employee status. It is supported by paragraphs 37-38 of the CJEU's decision in **B v Yodel Delivery Network Ltd** [2020] IRLR 550 decision where the Court held that a genuine right to substitution was suggestive that no relationship of subordination existed between parcel delivery drivers and a putative employer:

> **"37. In addition, it must be ascertained whether it is possible to establish, in the circumstances specific to the case in the main proceedings, the existence of a subordinate relationship between B and Yodel.**
> **38. In that regard, concerning, first, the discretion of a person, such as B, to appoint subcontractors or substitutes to carry out the tasks at issue, it is common ground that the exercise of that discretion is subject only to the**

> **condition that the subcontractor or substitute concerned has basic skills and qualifications equivalent to the person with whom the putative employer has concluded a services agreement, such as the person at issue in the main proceedings."**

33. It is also reflected in the analysis of His Honour Judge Tayler in **Sejpal v Rodericks Dental Ltd**, [2022] IRLR 752. In that case HHJ Tayler focused on the language of the statute in section 230(b) ERA 1996 which makes express reference to the need for there to be some obligation to perform personally work or services for the other party to the contract.

34. The conclusions in those cases, and the passages cited in them resonate with statements of principle set out in much earlier decisions, including, in particular, **Nethermere (St Neots) Ltd v Gardiner and Taverna** [1984] IRLR 240 and **Express and Echo Publications Ltd v Tanton** [1999] IRLR 367. In each of those cases, in different ways, express reference was made to the need for there to be the provision of an individual's own skill and work in the performance of a service and that one consequence of that was that a genuine right of substitution is inconsistent with worker or employee status.

35. In **Nethermere** Lord Justice Stephenson stated as follows:

> **20. The obligation required of an employee was concisely stated by Mr Justice Stable in a sentence in Chadwick v Pioneer Telephone Co, (1941) 1 AER 522 at p.523: 'A contract of service implies an obligation to serve, and it comprises some degree of control by the master:**
>
> > **'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'**
>
> **21. Of (iii) the learned judge proceeded to give some valuable examples, none on all fours with this case. I do not quote what he says of (i) and (ii) except as**

to mutual obligations:

> **'There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill.'**

36. In **Express and Echo Publications Ltd v Tanton** Lord Justice Peter Gibson stated as follows:

> **31. In these circumstances, it is, in my judgment, established on the authorities that where, as here, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom he works is not that of employee and employer. Mr Tanton has submitted to us that, though the personal service to the appellant was a highly material consideration, it was not conclusive. I am afraid that that proposition cannot stand in the light of the authorities.**

37. Applying those principles to this case, my conclusion is that this appeal must fail. The question of whether or not the actual individual is obliged to do the work and to perform the work personally remains pivotal, in my judgment, notwithstanding the **Uber** decision. In **Uber**, there was no issue as to whether or not the drivers themselves were personally required to do the relevant work; they were.

38. Courts will always be astute to the reality of the situation on the ground when considering issues regarding worker status. That is an important part of the so called modern approach to the issue of worker status. It does not follow, however, that a court must ignore the written documents completely. The question the court must ask always is whether those documents reflect reality and are a genuine reflection of the actual relationship. If they do, that which they state is clearly of critical significance.

39. I agree with the observations of Eady J in the **Catt** decision. The significance of questions

of vulnerabilities, subordination and dependency may be particularly important when making that assessment of whether or not the written terms reflect the reality of the agreement between the parties.

40. The difficulty for the Claimant in this case is that an identical contract was considered by a different Tribunal where other individuals were working, as far as can be ascertained, in a manner which was materially similar to this Claimant. In that case, the Tribunal had concluded that the relevant agreement was genuine and that it reflected the relationship between the parties; that decision was upheld on appeal.

41. The Tribunal which considered this Claimant's case determined that there were no distinguishing features between his and the other Claimants. Having listened carefully to the submissions that have been made on behalf of the Claimant, I consider that there has been no error of approach or analysis by the Judge in reaching their conclusion. It cannot said to be a perverse conclusion nor an error of law and it was one which, in my judgment was open to the Judge to conclude on the basis of the evidence before him.

42. The other Claimants, as this Claimant did, hired a van. In addition, the fact that an individual has a right to substitute another driver in their place, but does not do so, either because of their own personal circumstances or because they choose not to, does not detract from the significance and force of the contractual provisions themselves. In this case, the contract has been held to be genuine and to reflect the parties' relationship. There is nothing in this case upon which the Tribunal Judge could properly have distinguished this Claimant's situation. I can discern no error of approach or analysis in the decision taken by the Judge. I dismiss the appeal.