Case Number: 2411079/2018

IN THE WATFORD EMPLOYMENT TRIBUNAL

BETWEEN

B

Claimant

And

YODEL DELIVERY NETWORK LIMITED

Respondent

REQUEST FOR A PRELIMINARY RULING BY THE COURT OF JUSTICE OF THE EUROPEAN UNION

REFERRING TRIBUNAL

Employment Judge Andrew Clarke QC at the Watford Employment Tribunal,

Radius House,

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United Kingdom

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CLAIMANT'S REPRESENTATIVE

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Ref: YOD510-1340835

QUESTIONS REFERRED

1. Does Directive 2003/88/EC concerning certain aspects of the organisation of working time preclude provisions of national law which require an individual to undertake to do or perform all of the work or services required of him, 'personally' in order to fall within the scope of the Directive?

2. In particular:-

   2.1. Does the fact that an individual has the right to engage sub-contractors or 'substitutes' to perform all or any part of the work or services required of him mean that he is not to be regarded as a worker for the purposes of Directive 2003/88/EC either:-

      2.1.1. at all (the right to substitute being inconsistent with the status of worker); or

      2.1.2. only in respect of any period of time when exercising such right of substitution (so that he is to be regarded as a worker in relation to periods of time actually spent performing work or services)?

   2.2. Is it material to a determination of worker status for the purposes of Directive 2003/88/EC that the particular claimant has not in fact availed himself of the right to sub-contract or use a substitute, where others engaged on materially the same terms have done so?

   2.3. Is it material to a determination of worker status for the purposes of Directive 2003/88/EC that other entities including limited companies and limited liability partnerships are engaged on materially the same terms as the particular claimant?

3. Is it material to a determination of worker status for the purposes of Directive 2003/88/EC that the putative employer is not obliged to offer work to the individual claimant i.e. that it is offered on a 'when needed' basis; and/or that the individual claimant is not obliged to accept it i.e. it is 'subject always to the Courier's absolute right not to accept any work offered'?

4. Is it material to a determination of worker status for the purposes of Directive 2003/88/EC that the individual claimant is not obliged to work exclusively for the putative employer but may concurrently perform similar services for any third party, including direct competitors of the putative employer?

5. Is it material to a determination of worker status for the purposes of Directive 2003/88/EC that the particular claimant has not in fact availed himself of the right to perform similar services for third parties, where others engaged on materially the same terms have done so?

6. For the purposes of Art. 2.1 of Directive 2003/88/EC how is a worker's working time to be calculated in circumstances where the individual claimant is not required to work fixed hours but is free to determine his own working hours within certain parameters e.g. between the hours of 7.30am and 9pm? In particular how is working time to be calculated when:-

    6.1. The individual is not required to work exclusively for the putative employer during those hours and/or that certain activities performed during those hours (e.g. driving) may benefit both the putative employer and a third party;
    6.2. The worker is afforded a great deal of latitude as to the mode of delivery of work, such that he may tailor his time to suit his personal convenience rather than solely the interests of the putative employer.

FACTS

7. The Claimant applied for a role with the Respondent as a Neighbourhood Courier delivering parcels. The Respondent accepts that its Couriers are its public face and expects them to act professionally and courteously.

8. The Claimant attended a presentation in respect of the Courier role and was then interviewed for a short period . He subsequently spent approximately four hours over two sessions shadowing an experienced courier and learning how to use a handheld device ('HHT'). He has been issued with a detailed reference guide to the HHT. The HHT provides a means for the Respondent to both issue instructions and monitor service performance. Performance is tracked throughout the working day and anomalies can be raised with Couriers by a representative of the Respondent.

9. On appointment the Claimant was allocated a unique identification number.

10. The Claimant accepted a position with the Respondent and began delivering parcels in July 2017. He is still engaged by the Respondent and has been assigned to two specific postcodes.

11. At the relevant time the Respondent engaged Neighbourhood Couriers on standard terms set out in a Courier Services Agreement (attached), which expressly provides that such couriers are self-employed independent contractors and not employees or workers.

12. However the Claimant does not accept that this is an accurate categorisation or description, in law, of his employment status. He does accept that he is self-employed for tax purposes and accounts for his business expenses (such as the cost of fuel and depreciation).

13. To deliver parcels Couriers use their own vehicles and mobile phones alongside the HHT provided by the Respondent. He does not carry any form of identification provided by the Respondent, wear a uniform or have any Respondent branding on his vehicle. The HHT is branded.

14. Couriers are required to have adequate 'business use' insurance cover to drive their vehicle whilst delivering parcels. The Respondent opts Couriers into its own group

insurance policy for the sum of £3 per week but they are free to opt out of that policy and arrange their own insurance cover. The Claimant has not done so and is covered under the Respondent's policy.

15. The Courier Services Agreement expressly provides that a Courier is not obliged to render services personally but is expressly permitted under the terms of the Courier Services Agreement to engage subcontractors (sometimes referred to as 'substitutes') to perform all or any part of the courier services he has contracted to provide.

16. An internal presentation to the Respondent's managers indicates that any substitute or delegate appointed by the Courier must meet at least the same/equivalent basic level of skills and qualification as is required of the Courier and that the Respondent has a right of veto if that standard is not met. Other than this the right to use a substitute is unfettered.

17. The Courier Services Agreement also provides that it is personal to the Courier who shall not assign or transfer or purport to assign or transfer to any other person any of its rights or obligations; and that the Courier is personally liable for any acts or omissions of any appointed sub-contractor.

18. The Courier Services Agreement further provides that a Courier is not required to perform services exclusively for the Respondent but is free to perform similar services for any other individual, firm, partnership or company ('third parties').

19. As a consequence of the fact that Couriers are not required to work exclusively for the Respondent, they may be carrying out work for more than one entity at one and the same time e.g. if carrying parcels for a third party whilst on route to deliver parcels to customers of the Respondent.

20. The Claimant has not in fact, since the commencement of his engagement by the Respondent, used a substitute or otherwise sub-contracted any of the services he has contracted to provide. Nor has he provided similar services to any third party, though he does run a separate business selling secondhand vinyl music records. The Claimant estimates that the bulk of his income derives from the Respondent (c. 80%).

21. However, other Neighbourhood Couriers, engaged on materially the same terms as the Claimant:

    21.1. do sub-contract work and/or use substitutes; and

    21.2. do provide similar services concurrently to third parties.

22. Some of those Neighbourhood Couriers operate as limited companies and partnerships, marketing their services to third parties and engaging their own staff to discharge their contractual obligations to the Respondent.

23. Under the terms of the Courier Services Agreement the Respondent is not obliged or required to send any parcels to the Claimant for delivery; and nor is he obliged or required to accept any parcels to deliver. Delivery and collection work is provided on a 'when needed' basis and the Courier has an absolute right not to accept it. He can put a 'cap' i.e. a limit on the number of parcels he is willing to deliver.

24. However the Claimant was told at the time of his engagement that the Respondent operated on six days a week (Monday to Saturday). The Respondent has in fact made such work available to the Claimant on those days and in general he has accepted that work. The Claimant has on occasion notified the Respondent that he is not available to deliver parcels without offering, or being asked to provide, a reason.

25. The Respondent has set a fixed rate of payment per successfully-delivered parcel. This varies according to geographical location. The relevant rate has on occasion been the subject of negotiation by individual couriers.

26. The Claimant's one attempt to negotiate a revised rate was unsuccessful.

27. Couriers are paid on fixed days: payments are supplemented by remittance advice notes.

28. Couriers can be asked to accept and deliver parcels between the hours of 7.30am and 9pm however within those times they are free to plan their own working time, practices and route such that they may tailor their time to suit their personal convenience rather than solely the interests of any putative employer. They are not required to make themselves available or to perform services throughout that period.

29. Couriers must respond to telephone calls and messages from customers but can turn off their phone when not actually 'working' and respond when convenient to them. They are not required to remain at or within any particular geographical location.

30. On a day-to-day basis, parcels are delivered to the Claimant's home each morning for him to deliver to the Respondent's customers. If he accepts the parcels he is required to register them using the HHT.

31. Certain of the parcels (e.g. for schools and businesses) must be delivered within core business hours; and '24 hour','48 hour' and '72 hour' parcels must be delivered within the relevant time period. Subject to those parameters, the Claimant is free to decide when to deliver parcels and by which route. If requested to do so, the Respondent can provide assistance and support in helping a Courier to plan an appropriate route.

32. In the event that the Claimant is unable to successfully deliver a parcel he is required to leave a calling card branded with the Respondent's logo and which includes a number of reasons why "your local courier" may have been unable successfully to deliver the parcel. Customers are invited to complete satisfaction sheets in which they are asked to comment on the attitude of the driver.

33. Pursuant to the contract of carriage entered into by the Respondent with its customers, some parcels are accompanied by special instructions (e.g. they must be signed for) and such instructions are communicated to the Claimant and he must comply with them. From time to time specific instructions are also issued through the HHT. At the point of engagement applicants are notified that the "MUST follow delivery instructions on HHT".

34. Couriers are required to comply with the Respondent's Health, Safety, Environmental and Quality policy. The policy forms part of a document headed 'Non-Employee Factsheet' which applies to all persons present on any Respondent site, or working for or contracted to the Respondent (including independent contractors and visitors).

RELEVANT EU AND NATIONAL LAW

UK Withdrawal from the European Union

35. Section 6(1) of the European Union (Withdrawal) Act 2018 provides, on a date to be appointed, as follows:

'(1) A court or tribunal –

(a) Is not bound by any principles laid down or any decisions made, or onr after exit day by the European Court, and

(b) *Cannot refer any matter to the European Court on or after exit day.'*

36. The EU Withdrawal Agreement provides by Art. 86 as follows:

'Pending cases before the Court of Justice of the European Union

1. *…*
2. *The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.*

Working Time Directive and National Implementation

37. Council Directive 2003/88/EC concerning certain aspects of the organisation of working time (the WTD) has been transposed into domestic law by the Working Time Regulations 1998 (WTR). Whereas the WTD does not include a definition of the term 'worker' regulation 2 of the WTR includes the following definition;

'In these Regulations

"worker"… means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

1. *(a) a contract of employment, or*
2. *(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.'

38. It is worth noting that this definition is very similar to that contained in Section 83(2) Equality Act 2010 defines employment in the following material terms:-

(2) "Employment" means

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work …

39. The Equality Act 2010 implements the UK's obligations under, amongst other things, Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

40. Despite the slightly different statutory language, it has been held that they are essentially the same, see the decision of the Supreme Court in the case of Pimlico Plumbers Ltd v Smith [2018] ICR 1511 to the effect that the two may be equated**.**

41. The leading UK authority on the interpretation of these provisions is the decision of the Supreme Court in the case of Bates van Winkeholf v Clyde and Co LLP [2014] 1 WLR 2047 (SC), per Baroness Hale at [24]-[25] and [31]-[32]-

'24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.

25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind 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. The arbitrators in Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or

business undertaking carried on by someone else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2013] ICR 415 , who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b)[1] of the 1996 Act…

…

31. …(E)mployment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class. Discrimination law, on the other hand, while it includes a contract "personally to do work" within its definition of employment (see, now, Equality Act 2010, section 83(2)), does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route.'

The Requirement to Provide 'Personal Service' in UK Law

42. A necessary requirement for 'worker status' under UK law is that the individual 'undertakes to do or perform personally any work or services' for the putative employer. Lord Clarke, in the decision of the Supreme Court in the case of Autoclenz Ltd v Belcher [2011] ICR 1157 set out the law thus:

'18. As Smith LJ explained in the Court of Appeal [2010] IRLR 70 , para 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgment of MacKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C:

> *"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*

[1] Which contains a materially identical definition of the term worker as that contained in reg. 2 of the WTR

contract are consistent with its being a contract of service … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …"

19. Three further propositions are not I think contentious: (i) As Stephenson LJ put it in Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 , 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service." (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express & Echo Publications Ltd v Tanton [1999] ICR 693, 699G, per Peter Gibson LJ. (iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see e.g. the Tanton case, at p 697G.'

43. The decision of MacKenna J. in the Ready Mixed Concrete case is frequently cited before UK courts and tribunals and has become firmly established as a correct exposition of UK law. It was cited with approval most recently by the Supreme Court in the Pimlico Plumbers case (at para. 22).

44. Whether or not an individual undertakes personally to do perform any work or services for the putative employer depends, under UK law, entirely on the terms of his or her contract with the putative employer. Knowledge of a right to sub-contract or substitute another in the performance of the work or services (and, by extension, actual exercise of the right) is immaterial.

45. Furthermore, it has been held that a limit on the right to substitute that goes only to the relevant qualifications or capability of the substitute, does not prevent it being a genuinely unfettered right: Premier Groundworks Ltd v Jozsa (EAT, unreported, judgment given on 17 March 2009) and UK Mail Ltd v Creasey (EAT, unreported, judgment given on 26 September 2012). Both cases were cited by Sir Terence Etherton MR in the Pimlico Plumbers case, when summarising the position in UK law:

84. … Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, 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. Fourthly, again by way of example, 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. Fifthly, again by way of example, 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

46. That an individual provides his services through a limited liability company (known as a 'personal services company') or partnership, or that the contracting party is a limited liability company or partnership, is frequently relied on by Respondents, and is relied on in this case, as demonstrating that the individual is not required to do work or perform services personally, however there is no national caselaw which definitively considers the relevance of such circumstances.

47. The 'all or nothing' effect of a genuine substitution clause can be seen in the decision of the Central Arbitration Committee in Independent Workers' Union of Great Britain (IWGB) v Roofoods Limited T/A Deliveroo [2018] IRLR 84:

'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 ...

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.'

48. In the light of that finding the CAC felt it unnecessary to even consider the other features of the contractual relationship between Deliveroo and its Riders as they were *'insufficient to compensate in the Union's favour in light of the substitution finding'*.

Exclusivity

49. Another requirement of worker status under UK law is that the other party to the contract is, not, by virtue of the contract, 'a client or customer of any profession or business undertaking carried on by the individual'.

50. As noted by Baroness Hale in the Bates van Winkelhof case, above, worker status does not extend to those 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.'* In reaching that conclusion she cited from the decision the first-tier appellate tribunal, the Employment Appeal Tribunal, in Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, at para 53:

'… a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.'

51. Thus the fact that an individual is entitled, under the terms of their contract, to do work, or perform services, for a number of different 'clients' is inconsistent with worker status.

The Potential Inconsistency with CJEU Authority

52. UK law focuses on the contractual rights and obligations of the putative worker and employer. Moreover, absent a contractual obligation to provide 'personal service' an individual cannot be regarded as a worker. Put another way, a general and unfettered right to sub-contract the performance of the work or services – even if unexercised by a particular claimant – is fatal to a claim of worker status.

53. This may not be compatible with EU law and in particular the interpretation given to the term 'worker' in the caselaw of the CJEU. In Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328: [2004] ECR I-873 the European Court of Justice was concerned with whether a college lecturer who was ostensibly self-employed could nevertheless be a 'worker' for the purpose of an equal pay claim. The court held, at para 67, following Lawrie-Blum v Land Baden-Württemberg (Case 66/85) [1987] ICR 483; [1986] ECR 2121:

'there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.'

54. In Fenoll v Centre D'Aide par le Travail [2016] IRLR 67 the CJEU said -

(A)ny person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.'

55. See also Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH C216/15, judgment given on 17 November 2016, at para. 27 in which the court observed that the legal characterisation under national law, and the form of the relationship, as well as the nature of the legal relationship between those two persons, is not decisive.

Calculation of Working Time

56. Art.2 WTD defines working time as *"any period during which the worker is working, at the employer's disposal and carrying out his activities and duties, in accordance with national laws and/or practice."* This has been transposed by reg. 2 WTR in the following terms:-

"working time" in relation to a worker, means –

(a) any period during which he is working, at his employer's disposal and carrying out his activity or duties;

(b) any period during which he is receiving relevant training, and

(c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement,

and "work" shall be construed accordingly.

57. The guidance in Federación de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL and anor [2015] ICR 1159, ECJ is uncontroversial and recognised in domestic authority: Edwards and anor v Encirc Ltd [2015] IRLR 528 (EAT). The authorities – whether domestic or CJEU – do not, however, directly address the problems associated with computation of working time in the present case.

REASONS FOR THE REFERENCE

58. The approach of UK law to the determination of worker status may be incompatible with that of the CJEU as explained above. The questions posed (save for the last) are intended to enable the CJEU to determine whether there are such inconsistencies and to give further guidance on the proper interpretation of the term 'worker' in EU law in the light of the facts of this case.

59. The facts of the case, ones typical in the case of those working in the so-called 'gig economy', also give rise to problems associated with the computation of working time which the CJEU has not yet been called upon to address and which cannot be answered by inferences from existing case law.

Dated……..