

THE INDUSTRIAL TRIBUNALS

CASE REF: 4212/17

CLAIMANT: Thomas Easton

RESPONDENT: Robert Murtagh and Geraldine Murtagh,
t/a R M Distribution

DECISION ON A PRE-HEARING REVIEW

The decision of the tribunal is that the claimant was neither an employee of the respondent nor a worker and that his claim is dismissed.

Constitution of Tribunal:

Employment Judge (sitting alone): Employment Judge Crothers

Appearances:

The claimant was represented by Mr M Quigley, Barrister-at-Law, instructed by Emma Lyons and Co Solicitors.

The respondent was represented by Mr O Friel, Barrister-at-Law, instructed by James Strawbridge Solicitors.

TITLE OF RESPONDENT

1. The correct title of the respondent(s) is shown above, (hereinafter referred to as 'the respondent').

THE CLAIM

2. The claimant presented a claim to the tribunal on 11 July 2017 for unfair constructive dismissal, breach of contract in relation to holiday pay, and further claims relating to an unauthorised deduction from wages and the right to be paid annual leave under the Working Time Regulations.

THE ISSUE

3. The issue before the tribunal was:-

‘Whether or not the claimant was an employee of the respondents or a worker.’

SOURCES OF EVIDENCE

4. The tribunal heard evidence from the claimant and considered relevant documentation in the course of the hearing. The respondent did not give evidence.

FINDINGS OF FACT

5. Having considered the evidence insofar as same related to the issue before it, the tribunal made the following findings of fact, on the balance of probabilities:-

- (i) At paragraph 5.2 of his claim form the claimant claimed that he commenced employment with the respondent in July 2014. In his evidence before the tribunal, he claimed that he commenced employment in June 2014. The tribunal also considered the respondent’s response and is satisfied that the relevant date is in or around July 2014.
- (ii) The claimant had previously worked as a taxi driver for Valu Cabs on a self-employed basis. After spending some time with the respondent to explore the nature of the work, the claimant began to operate as a courier on the basis of five days per week and one Saturday per month. He delivered parcels in the Armagh area. He was supplied with a uniform by the respondent and drove vans with the DPD logo on them. He claimed that he had to wear the uniform supplied, otherwise he would not be allowed to work. His day commenced at 7.00 am.
- (iii) The claimant referred to two specific episodes in April and August 2016 respectively. In April 2016 his daughter was born. He claimed that he was not allowed to take time off to go to the doctor or dentist and was also told by Mr Murtagh that he would be jobless if he did not provide cover during his time off. He subsequently engaged his sister to do so. He was married in August 2016 and sought to take two weeks leave. Again, he provided cover through a friend (Darren) who was familiar with the area to be covered and did not require to be trained up, unlike the claimant’s sister earlier in April 2016. The claimant accepted that it was his responsibility to provide cover during these two periods. He paid both his sister and his friend Darren. The claimant was however paid by the respondent during these two periods in April and August 2016 respectively.
- (iv) The tribunal was shown a document entitled “Receipt of Payment” dated 26 September 2014 and signed by the claimant. It was directed to “Robert Murtagh/R M Distribution” and states:-

“I ACKNOWLEDGE THAT IN ACCEPTING RECEIPT OF CHEQUES FOR PAYMENT IN FULL OF ANY INVOICES ISSUED BY ME, THAT I AM PERSONALLY RESPONSIBLE/LIABLE FOR PAYMENT OF ALL TAXES, NATIONAL INSURANCE, VAT AND ANY OTHER STATUTORY LEVY”.

- (v) The claimant claimed that he was forced to sign this document and that he was told by Robert Murtagh that if he did not sign he would be “out the door”. The claimant alleged that he did not agree with the form itself although he understood the document. He acknowledged that he had been responsible for the payment of all taxes during his time with the respondent.
- (vi) The tribunal was also referred to a sub-contractor’s invoice for August 2016 and an earlier invoice dated 25 January 2016. The claimant was of the view that he should have been allowed to provide his own invoices. He claimed that he objected to the use of the invoice provided to him but had to accept it. It is clear from the invoices that the claimant was paid a gross amount at the end of each month. The arrangement pertained until circumstances arose leading to the claimant’s claim of unfair constructive dismissal on 12 April 2017. The claimant did not have a written contract of employment.

THE LAW

6. (1) Article 3 of the Employment Rights (Northern Ireland) Order 1996 (“the Order”), provides as follows:-

“Employees, workers

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

(a) *in relation to an employee, means (except for the purposes of Article 206) 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 Article has effect subject to Articles 67K and 70B(3); and for the purposes of Part XV so far as relating to Part VA or Article 70B, "worker", "worker's contract" and, in relation to a worker, "employer", "employment" and "employed" have the extended meaning given by Article 67K.]*

(2) In the case of **Ready-mix Concrete (South East) Ltd v The Minister of Pensions and National Insurance (1968) 2QB497**, a threefold test for identifying a contract of service was set out as follows:-

- (a) An agreement exists between the servant and the master for the provision of services personally in return for pay;
- (b) The master has a degree of control over the servant; and
- (c) All the other provisions in the agreement are consistent with a contract of service.

The other provisions may include:-

- Provision of a uniform and/or equipment
- Integration into the business
- Which party bears financial risk
- Whether there is provision for bonuses, benefits or insurance
- Whether holidays and sick days are paid
- How tax is paid on earnings.

(3) In **Carmichael v National Power (2000) IRLR43**, the factor of mutuality of obligation emerged. **Carmichael** recognised that the tribunal must look at the

overall factual matrix.

- (4) In the Supreme Court case of **Autocleanz v Belcher and Others (2011) UKSC 41**, (which involved an allegation that the terms of a written contract were an incorrect representation of the nature of the working relationship) it was held that the correct approach is to discover the actual legal obligations of the parties by assessing all relevant evidence, including the parties' conduct in practice. In some cases the parties' conduct in practice may be determinative in showing that the claimant is an employee or worker, despite being labelled as self-employed.
- (5) The case of **Byrne Brothers (Farm Work) Ltd v Baird (2002) IRL96**, considered the test for identifying a worker as follows:-
 - (a) did the person agree to personally perform work or services? The power to appoint a substitute may, depending on the circumstances, prevent workers' status being found;
 - (b) was the alleged employer actually a client of a business undertaking carried on by the person?
 - (c) was there mutuality of obligation between the parties?
- (6) In **Yorkshire Window Company v Parkes UKEAT/0484/09** the Employment Appeal Tribunal had to consider the concept of "worker" for the purposes of the Working Time Regulations 1998. The following principles emerged:-
 - (a) whether or not a person is a worker engaged under a contract for personal services is a matter of construction;
 - (b) the tribunal must construe the contract rather than addressing matters of policy;
 - (c) whilst an individual may choose to provide a service personally, the issue is whether he is contractually obliged to do so;
 - (d) the existence of a right to provide a substitute does not necessarily preclude the finding of a contract for personal service unless that right is unconstrained;
 - (e) a worker holds the middle ground between an employee and a self-employed person carrying on his own business undertaking.
- (7) The tribunal also carefully considered the additional authorities referred to in the parties' written submissions annexed to this decision together with the Supreme Court decision in **Pimlico Plumbers Ltd v Another (appellants) v Smith (respondent), UKSC2017/0053** (judgement date 13 June 2018).

SUBMISSIONS

7. Respective counsel made short oral submissions at the conclusion of the hearing. These are included in the written submissions, which are appended to this decision.

The tribunal postponed promulgation of this decision pending the outcome of the Supreme Court case in **Pimlico**. The parties subsequently stated that they did not wish to make further written submissions following the **Pimlico** case. However, the tribunal, at its own request, invited counsel to address it further on various matters, including the **Pimlico** Supreme Court decision, and the aspects of personal service and evidence relating to whether the claimant had an unconstrained right to provide a substitute in April and August 2016 respectively.

CONCLUSIONS

8. The tribunal, having carefully considered the evidence before it and having applied the relevant principles of law to the findings of fact, concludes as follows:-
- (1) It is satisfied, and the representatives agreed, that the factual matrix in the **Pimlico Plumber's** case could be distinguished from the present case on the basis that the substitution alleged in the **Pimlico** case related to the distribution of work between other workers in the respondent's organisation. In this case, the claimant substituted individuals who had no connection with the respondent.
 - (2) The tribunal is satisfied, on the basis of the statutory test and the relevant authorities referred to, that the claimant was not an employee of the respondent. In the tribunal's view, the claimant clearly regarded himself as being self-employed when he assumed the role with the respondent. The tribunal also finds that there was a lack of mutual obligation between the parties, and that the claimant also assumed responsibility for Income Tax, National Insurance, VAT and any other statutory levy.
 - (3) Having also had regard to the conduct of the parties, the tribunal is satisfied that the claimant had an unconstrained right to provide two substitutes on two separate occasions. There is no evidence before the tribunal that the respondent had to provide permission in order for the substitutes to be used. On the contrary, and on the claimant's evidence, Mr Murtagh allegedly told him that he would be jobless unless he provided such cover.
 - (4) The tribunal is therefore satisfied that the claimant was neither an employee of the respondent nor a worker as defined in the Order. The claimant's claims are therefore dismissed.

Employment Judge:

Date and place of hearing: 29 November 2017 and 2 August 2018, Belfast.

Date decision recorded in register and issued to parties:

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS AND THE FAIR EMPLOYMENT TRIBUNAL IN
NORTHERN IRELAND

BETWEEN:

THOMAS EASTON

CLAIMANT

AND

ROBERT MURTAGH & GERALDINE MURTAGH T/A RM DISTRIBUTION LTD

RESPONDENTS

SUBMISSIONS ON BEHALF OF THE CLAIMANT

Issue: Whether the Claimant was an employee or a worker of the Respondent's.

The Law

- [1] The issue to be determined by this Tribunal is whether the Claimant was an employee or a worker or neither as defined within Article 3 of the Employment Rights (Northern Ireland) Order 1996:

3.— Employees, workers

(1) In this Order "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 Order "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 Order "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.

Employee Status

- [2] The questions set out in the case of *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 have been established as a starting point for determining whether or not there exists a contract of service:
- (1) Did the worker undertake to provide his own work and skill in return for remuneration?
 - (2) Was there a sufficient degree of control to enable the worker fairly to be called an employee?
 - (3) Were there any other factors inconsistent with the existence of a contract of employment?

Worker Status

- [3] Mr. Justice Langstaff in the case of *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 set out at paragraph 50:

"What is plain is that for an individual to be a worker he must be: (a) subject to a contract; (b) whereby he undertakes to perform work personally (c) for someone who is not a client or customer of a profession or business of his.

...

The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon 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."

- [4] In *v Pimlico Plumbers Ltd & Another v Smith* [2017] EWCA Civ 51 at 84:

"I would summarise as follows the applicable principles as to the requirement for personal performance. 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."

[5] *Byrne Bros (Farmwork) Ltd v Baird* [2002] IRLR 96 at [18]:

"Self-employed labour-only subcontractors in the construction industry are, it seems to us, a good example of the kind of worker who may well not be carrying on a business undertaking in the sense of the definition; and for whom the 'intermediate category' created by limb (b) was designed. There can be no general rule, and we should not be understood as propounding one: cases cannot be decided by applying labels. But typically labour-only subcontractors will, though nominally free to move from contractor to contractor, in practice work for long periods for a single employer as an integrated part of his workforce: their specialist skills may be limited, they may supply little or nothing by way of equipment and undertake little or no economic risk."

[6] Harvey on *Industrial Relations and Employment Law* states at Division A1 paragraph [17]:

"[In] *MacFarlane v Glasgow City Council* [2001] IRLR 7, EAT ... a gymnastic instructor could arrange a replacement from a register maintained by the Council if unable to attend. This did not preclude the arrangement being one of employment. The right was fettered. The individual had to be unable to attend (as distinct from preferring not to); their choice of substitute was limited; the Council had on occasion made the choice and no payment was made to the instructor being substituted for."

Submissions

- [7] There exists no formal written contract between the parties other than the "Receipt of Payment" document dictating responsibility for liability for tax. This is a document which was presented to the claimant some months after his commencement with the respondent and it was his evidence that he was made to believe that he would lose his job if it was not signed. He had no hand in its drafting and no power to negotiate its terms.
- [8] Other than the above document there was no evidence of any contractual terms being discussed other than that of the routes to be taken, the daily rate of payment, dictated by the respondent, and the requirement to at all times wear the uniform, again dictated by the respondent. As such, any and all other contractual terms must be inferred from the conduct of the parties.
- [9] It is accepted by the claimant there exists factors inconsistent with the existence of a contract of employment. Namely, that the claimant was required and did file his own tax returns and submitted invoices for payment.
- [10] However, it is submitted that this is simply one factor to be weighed against the others. The claimant was clearly under the control of the respondent in the uniform he was required to wear and the hours and routes he was required to work. Furthermore, there was no challenge to the claimant's evidence that other couriers had been submitted to disciplinary sanction resulting in dismissal. It is submitted that the logical inference to be drawn here is that the respondent exercised at least some disciplinary power and power of dismissal over the couriers working for them; of which the claimant was one.
- [11] It is also accepted that personal service is key in relation to determining the issue of both employee and worker status. There was no evidence provided in relation to the exact contractual relationship between the parties on this issue and so it falls to be determined by the conduct of the parties. Other than on two occasions within a two and a half year period the claimant worked solely for the respondent. Those two occasions were for his wedding and honeymoon and also for the birth of his daughter. It is submitted that, in line with the reasoning of Langstaff J in *Cotswold Developments* set out above at paragraph [3], that this is not an indication of an individual actively marketing his services as an independent person to the world in general. Further, it cannot be said that the respondent was in anyway a customer or client of the claimant. The respondent dictated all terms, provided all equipment and uniforms and all invoices were created by the respondent and given to the claimant to simply fill in.

- [12] It is submitted that even if the Tribunal holds that those two instances mentioned above do indicate some power of substitution there is no evidence to indicate that it was a true unfettered right of substitution. The claimant's evidence was that on each occasion he was seeking time off for a holiday; something it is the claimant's case he was entitled to do. It was then on encountering difficulties in getting permission for those holidays that the claimant found what was in effect a workaround to enable him to take the time off. He did not at any point work for anyone else during that period of time and at no other point during his employment did he substitute someone else to allow him to undertake a more lucrative piece of work.
- [13] The respondent provided no evidence as to any right of substitution whether for the claimant specifically or for couriers generally and the claimant detailed the difficulties which he had in gaining permission for his sister to provide cover one of the above occasions. It is submitted that this indicates that any power of substitution was limited in nature and subject to the authority of the respondent to deny any request. As such it is the claimant's case that, if the tribunal holds that there does exist some power of substitution, it is nevertheless not inconsistent with an obligation of personal performance and is akin to the power found within McFarlane v Glasgow.
- [14] The claimant submits that the above factors, the dictation of terms, the disciplinary powers, the uniform requirements, are indicative of a contract of employment. Particularly in light of the need to protect employees from being stripped of their employment rights by a classification of their status by their employer which is out of their control. However, if the Tribunal rejects this contention it is submitted in the alternative that the claimant was a worker under Article 3 (3)(b) of the 1996 Order. His working condition is clearly akin to the "labour-only subcontractors" considered within the Byrne Bros case and it is submitted that any existing power of substitution is insufficient in scope to remove the claimant from this categorisation.

Michael Quigley BL
The Bar Library
28th December 2017

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS AND THE FAIR EMPLOYMENT TRIBUNAL IN
NORTHERN IRELAND

BETWEEN:

THOMAS EASTON

CLAIMANT

AND

ROBERT MURTAGH & GERALDINE MURTAGH T/A RM DISTRIBUTION LTD

RESPONDENTS

SUBMISSIONS ON BEHALF OF THE RESPONDENT

Law

Employment Status

1. Article 3 of the *1996 Order* deals with definitions of both an employee and a worker:

3.—(1) In this Order “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 Order “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 Order “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; (My emphasis)

Employee

2. Harvey on *Industrial Relations and Employment Law* states at Division AI, Category 1B(1):

B. Employees

(1) *Definition*

[5]

A satisfactory definition of 'employee' has proved elusive. Even as basic an idea as that the contract is an agreement to trade work for wages is not always crystal clear because the payment of wages as such (although in practice a central part of most

such contracts) is technically not a prerequisite for the existence of employment (see All [142.01]). An employee is one who serves, in the sense that he puts himself and his labour at the disposal of another (his 'employer'), in return for some remuneration in cash or kind. The resulting contract is called a contract of employment. But it is difficult to define absolutely the degree of submission necessary to constitute 'employment'; and in any event not everyone who serves is necessarily an employee in the narrowest sense.

[6]

One way of putting it is this. There are some kinds of workers who enjoy a peculiar status: apprentices, Crown employees, Parliamentary staff, some officeholders and so forth. Leaving those aside, workers may generally (though there are exceptions) be divided into two classes: employee and independent contractors. The employee undertakes to serve; the contractor does not. The employee sells his labour; the contractor sells the end product of his labour. In the one case the employer buys the individual; in the other he buys the job. The law expresses that by saying that the employee enters a contract *of employment*; the contractor enters a contract *for services*.

3. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C** Smith LJ provided the classic description of a contract of employment:
"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. ... 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."

Worker

4. Harvey on *Industrial Relations and Employment Law* states at Division AI, Category 1C(3):
"*Byrne Bros (Farmwork) Ltd v Baird [2002] IRLR 96, EAT* which concerned building workers taken on (by the one employer for whom they actually worked in practice) under a 'subcontractors agreement' which provided that no work was obligatory on either side, the subcontractor could arrange other labour at his own cost, and that no holiday pay was due. The Inland Revenue accepted this as Schedule D self-employment. In practice, however, these individuals only worked for that one employer and did so personally, on a regular basis under supervision, and being paid on a time-worked basis. The EAT upheld the tribunal's decision that they were 'workers' and so entitled to holiday pay when the employer used the common device of laying them off over the Christmas period. The case was notable for having little truck with the arguments that there was no mutuality because they *could* have worked elsewhere and that they were operating 'business undertakings'. Moreover, tax status was said to be only one factor and the EAT's opinion was that the

'intermediate category' created by limb (b) was designed very much for people such as labour-only subcontractors.

...

The EAT judgement in *Cotswold Developments* is worthy of noting for its guidance given to advisers and tribunals when deciding whether an individual is an employee, a worker or neither. Pointing out that one main difference is that the 'employee' definition concentrates on the mutual obligations between employer and employee but the 'worker' definition concentrates on the element of personal service by the individual.

...

Where, however, the question at issue is not mutual obligations but personal service, it must be remembered that the statutory test for 'worker' includes this as a requirement, as does the common law definition of 'employee'; thus, if the element of personal service is missing (as, for example, where a dentist's contract provided an unfettered right to use a locum), and that is not held to be a sham (see para [12] above) the result should be that the individual is *neither* an employee *nor* a worker (*Community Dental Services Ltd v Sultan-Darmon* [2010] IRLR 1024, EAT).

5. In **Cotswold Developments Construction Ltd-v-Williams [2005] UKEAT 0457_05**

"We are concerned that Tribunals generally, and this Tribunal in particular, may, however, have misunderstood something further which characterises the application of "mutuality of obligation" in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is *some* obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. Stevenson LJ in Nethermere put it as "... an irreducible minimum of obligation ..."

6. In **Autoclenz-v-Belcher & Ors [2009] EWCA Civ 1046** Sedley LJ made the following comments:

"In cases where there is a written contract, as Smith LJ pointed out in *Szilagi* at [57], that must be the starting point for determining the terms of the contract and therefore the nature of the relationship between the parties that follows from the contract terms. But, where one party alleges that the written terms do not accurately represent the actual terms agreed, then, with respect, I suggest that the exercise a court or tribunal has to perform is not to find out whether the parties "realistically intended or envisaged" that its terms would be performed as written. What if one party intended or envisaged one thing but one did not? I would prefer to put the matter as Smith LJ has done at [53] in this case, viz. the focus of the enquiry must be to discover the actual legal obligations of the parties."

7. In *Pimlico Plumbers Ltd & Charlie Mullins-v-Gary Smith* [2017] EWCA Civ 51 Etherton MR made the following comments:

“I would summarise as follows the applicable principles as to the requirement for personal performance. 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.”

Submissions

10. Firstly, the Claimant was engaged by the Respondent on the basis that the Claimant was an independent contractor. The Claimant accepts that he entered into the arrangement on the premise that he was self-employed. The Claimant understood the benefits of being engaged on a self-employed basis; namely a daily rate irrespective of how much work or how little he worked; an increased rate of pay given that he did not have the benefit of holiday pay and other statutory rights afforded to employees; ability to conduct his own tax affairs; ability to substitute another person to do the work.
11. Prior to working for the Respondent, the Claimant worked as a self-employed taxi driver. The Claimant was fully aware of the difference between being self-employed and being employed. The Claimant accepted during cross-examination that he understood himself to be self-employed when he entered into the arrangement with the Respondent and he therefore operated on this basis throughout the duration of the arrangement and did not raise any objection to his status as an independent contractor.
12. The Claimant, on his own evidence, fully accepted that there was no requirement from the Respondent that the work must be carried out personally by the Claimant. The Claimant gave evidence that on a number of occasions he arranged for other individuals to cover his work whenever he took time off. Further, the Claimant accepted that he was responsible for arranging other individuals to cover his work, he was free to choose whomever he wanted and in fact arranged for his sister, who had no experience of being a courier, to carry out the work on his behalf. Furthermore, the Claimant accepted that he, in essence, was required to train the individuals who worked on his behalf and if they had any queries they contacted the Claimant rather than the Respondent. Additionally, the Claimant submitted invoices to the

Respondent for the work carried out by the other individuals and he then paid the individuals directly.

13. The glaring absence of the obligation of personal service in the agreement between the Claimant and the Respondent is absolutely fatal to the Claimant's assertion that he was an employee. Further, although it has not been formally pleaded by the Claimant, absence of personal service is also a fundamental requirement of worker status. The *Pimlico Plumbers* case provides helpful guidance on the issue of persona performance. The present case demonstrates an unfettered right of the Claimant to allow any other individual to carry out the work on his behalf. The Respondent took no part in arranging cover and had no responsibility over the individuals who agreed to carry out the work on behalf of the Claimant. In short, the Respondent did not place any restrictions on the Claimant in his ability to substitute his work to another individual. The *Pimlico Plumbers* case can easily be distinguished from the present case on the basis that the substitution alleged in the *Pimlico* case related to distribution of work between other workers within the Respondent's organization, in contrast, the Claimant was able to substitute his work to individuals who had no connection whatsoever with the Respondent's organisation and essentially had no experience or qualifications to carry out the role required.

14. The failure of the Claimant to establish the fundamental requirement of the obligation of personal service means that his case cannot succeed. The Claimant's own evidence is self-defeating and therefore his claims before the Tribunal should be dismissed in their entirety for want of jurisdiction.

OISIN FRIEL BL
BAR LIBRARY
21st December 2017