Employment Status (again): Worker, employee or self-employed?

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Stuart Delivery Limited v Mr Warren Augustine (UKEAT/0219/18/BA)

(Decision date: 5th December 2019; Published: 9th December 2019)

The Facts

1. R describes itself as a technology platform connecting "courier partners", such as C, with clients or users via a mobile app, in order to facilitate the movement of goods around large urban areas offering couriers maximum freedom and flexibility of work.

2. C signed up to R via its website to become a motorbike courier, which involved a 10 minute interview and a 90 minute 'on-boarding' session following which he was given access to the app. He was told that R offered the "freedom to become your own boss; no minimum shift or working hour requirements – ever".

3. Couriers could choose what R described as "Complete freedom: log on anytime, anywhere and get paid for each delivery job completed" ('ad hoc' deliveries) and / or "Commit to being online in certain places, for certain amounts of time, for a guaranteed minimum payment" referred to as "slots" (typically 3 hours). They could therefore mix and match between slots and ad hoc deliveries as they wished.

4. The 'slot' system enabled R to have a guaranteed pool of couriers available at times of high demand. A courier who signed up for a slot would be guaranteed a minimum rate of £9 per hour for the duration of the shift irrespective of deliveries carried out. However, s/he was required to remain within the zone for the entire slot (unless the delivery took him/her beyond the zone). If s/he logged off for more than 6 minutes, or refused more than 1 job during the slot, the slot would not qualify for the minimum hourly payment.

5. If a courier signed up for a slot, s/he could subsequently send a "Release Notification" which then made it available to other couriers to accept on a first come first served basis. The courier releasing the slot would not know the identity of the courier who had accepted the slot in his or her stead. Slots could only be released via the Staffomatic app. If no-one accepted the released slot, the original courier remained liable for completing it or taking the consequences and potential penalties of missing it. Two missed slots a week made a courier ineligible for delivery rewards (a form of performance related bonus) and detrimentally impacted on the Courier Performance Score. If the courier's score or rating fell below a reasonable average, couriers were given a brief period in which to improve and R reserved the right at its discretion to suspend his or her access to the services.

6. When C sought to bring claims for unauthorised deductions and holiday pay, among other things, the ET had to consider his employment status during the time that he was undertaking 'slot' deliveries. One of the key issues was whether C was under an obligation to perform services personally, as required for 'worker' status under s.230(3)(b) ERA, or whether his ability to 'release' a slot via the Staffomatic app detracted from any obligation of personal performance.

7. R relied on General Conditions of Use ('GCU'), a tripartite written contract between R, the User client and the courier, to establish the contractual terms between the parties. But the ET applied the approach of Autoclenz Ltd v Belcher & Ors [2011] UKSC 41 and examined all the realities of the day to day situation alongside the GCU to establish the entire and true nature of the agreement and concluded that the GCU did not accurately reflect the reality of the agreement between the parties.

The ET decision (EJ Stewart at London Central ET)

8. The ET found that in relation to the periods when couriers were working slots they were not their own bosses and did not have freedom. They could not leave the zone, they could not reject jobs and they could not undertake courier jobs for other delivery companies.

9. Accordingly, it held that the release procedure did not amount to an unfettered right of substitution[1] such as to undermine the obligation of personal performance. It noted that C would only be released from his obligation to undertake the slot himself if another courier signed up for it and that he had no control over whether this happened.

[1] Paragraph 31 of the Judgment.

10. In its view, this limited right of substitution fell into the 5th category identified by Sir Terence Etherton MR in the Court of Appeal in Pimlico Plumbers Ltd and anor v Smith [2017] EWCA Civ 51, where he said (paragraph 84) that *"…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"*[2].

11. Therefore C was engaged in the capacity of a 'worker' when undertaking fixed hours "slots" for R.

12. The ET stated that, in C's case, the other courier would have the 'absolute and unqualified discretion' to withhold consent. R appealed to the EAT.

The EAT *(HHJ Stacey)*

13. The EAT dismissed R's appeal.

14. It accepted that the ET had misunderstood the identity of the person whose consent is required. Sir Terence Etherton MR could not have been referring to the proposed substitute, but to the employer or person for whom the work will be done.

15. On the facts as found by the ET, R had an absolute and unfettered right to withhold consent, since only the couriers it had accepted onto their pool could use the Staffomatic app to sign up for slots a fellow courier wished to relinquish. C had no control whatsoever over who, if anyone, would accept a slot he had signed up for and no longer wished to work. The ET's primary finding was correct – it is not a right of substitution at all. It is merely a right to hope that someone else in the pool will relieve you of your obligation. If not, you have to work the slot yourself. You cannot, for example, get your mate to do it for you, even if s/he is well qualified. All you can do is release your slot back into the pool[3].

[2] Paragraph 40 of the Judgment.
[3] Paragraph 62 of the Judgment.

Comment

16. It was said to be common ground between the parties that an unfettered right of substitution is generally fatal to establishing employee status and that there must be a sufficient degree of control and mutuality of obligation.

17. However, note that a request for a preliminary ruling by the Court of Justice of the European Union has been made by the ET in the case of B v Yodel Delivery Network Ltd (Case No: 2411079/2018), in particular asking "*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…*?"

18. This ECJ reference coupled with the likely appeal to the Supreme Court in the Uber v Aslam & Others [2018] EWCA Civ 2748 (which is likely to be principally based upon the dissenting judgment of Underhill LJ) means that the law relating to the issue of 'employment status', particularly in relation to the so-called 'gig economy', is far from settled and this uncertainty is likely to continue for some time yet.

19. It is suggested that a further indication of the ongoing uncertainty in this area of the law and the need for the government to clarify the law on employment status, was provided in a reserved judgment in the case of **(1) M Dewhurst (2) D Marchant (3) F McQuade v (1) Revisecatch Ltd (t/a Ecourier (2) City Sprint (UK) Ltd (Case No: 22101909, 2201910, 2201911/2018)** (Judgment sent to the parties on 27th November 2019), in which EJ Joffe sitting at London Central ET held that a 'worker' within the meaning of section 230(3)(b) of the ERA 1996 and regulation 2(1) of the Working Time Regulations 1998 is an 'employee' within the meaning of regulation 2(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. Whilst only a 1st instance decision and therefore not binding on other ETs, the fact that a Judge has gone as far as to say that a 'worker' is effectively the same as an 'employee' is confusing for individuals and businesses alike.

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