Neutral Citation Number: [2021] EWCA Civ 1514

Case No: A2/2020/0131

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
HHJ STACEY, MS MILLS AND MRS BAELZ
UKEAT/0219/18/BA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2021

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE LEWIS
and
LORD JUSTICE SNOWDEN

- -

Between:

STUART DELIVERY LTD	**Appellant**
- and -	
WARREN AUGUSTINE	**Respondent**

- -
- -

Bruce Carr Q.C. (instructed by **DLA Piper UK LLP**) for the **Appellant**
The respondent appeared in person

Hearing date: 12 October 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely. The date for hand-down is deemed to be on 19 October 2021.

LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the status of a courier delivering goods by moped. The question on the appeal is whether an employment tribunal was entitled to find that the claimant, Mr Augustine, was a worker within the meaning of section 230(3)(b) of the Employment Rights Act 1996 ("the Act"), and, in particular, that he was a person who undertook to perform work or services personally pursuant to a contract with the respondent, Stuart Delivery Limited. I will refer to Mr Augustine and Stuart Delivery Limited as the claimant and the respondent respectively, as they were in the tribunals below.

2. The employment tribunal, Employment Judge Stewart, held that the claimant was a worker. Once the claimant had signed up for a time slot during which he was to be available to deliver goods by moped, he was required to perform those services personally. Furthermore, the claimant's ability to release a slot to other couriers via the respondent's app was not a sufficient right of substitution to remove the obligation on the claimant to perform his work personally. The Employment Appeal Tribunal upheld that decision.

3. The respondent contended that the employment tribunal erred in its understanding of the principles governing the circumstances in which the ability of a person to appoint a substitute to carry out the work means that the person is not under any obligation personally to perform the work. Consequently, it contended, the employment tribunal failed properly to consider whether the extent of the claimant's right to use a substitute courier for one of his slots meant that he was not required to perform the work personally and so was not a worker for the purposes of the relevant legislation. It contended that the matter should be remitted to the tribunal to re-consider.

THE LEGISLATIVE FRAMEWORK

4. The Act confers certain rights on workers. These include the right of a worker not to be subjected to unlawful deductions from wages (section 13 of the Act) and the right not to be subjected to a detriment on the ground that the worker is, broadly, enforcing his rights under the Working Time Regulations 1998 (see section 45K of the Act).

5. A "worker" is defined in section 230(3)(b) of the Act in the following way:

> "(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."

6. Other rights are conferred upon workers by the National Minimum Wages Act 1998 ("the 1998 Act") and the Part-time Workers (Prevention of Less Favourable Treatment Regulations 2000 ("the Regulations"). The definition of "worker" for that other legislation is materially identical to that set out in section 230(b) of the Act: see section 54 of the 1998 and regulation 1(2) of the Regulations.

THE FACTUAL BACKGROUND

The Arrangements for Couriers

7. The respondent is one of 25 subsidiaries of a French company which operates in the field of logistics delivery and storage. It was formed in 2016 and is responsible for operations in the United Kingdom. It created a technology platform connecting couriers with retailers via an app developed by the respondent.

8. There was a document, the general conditions of use ("the GCU"), which was said to be a contract between the respondent, the courier, and the user. That set out detailed provisions for how the system was to operate. The employment tribunal found a disparity between the written terms and the other evidence as to how the contractual arrangements were operated in practice. It therefore considered all of the evidence regarding the realities of how the system operated, including an examination of the written terms of the GCU, in order to establish the entire and true nature of the agreement between the claimant and the respondent (see paragraph 27 of the employment tribunal's reasons). It found the following material facts relating to the operation of the system.

9. Couriers who entered into arrangements with the respondent were able to accept individual delivery jobs and be paid for that job. The delivery fee was fixed by reference to the distance travelled by the courier and the mode of transport. Couriers could also sign up for one or more time slots via a "Staffomatic" facility on the respondent's app. The slots were released by the respondent to couriers on a Thursday of each week and covered the zones with the highest concentration of users at the times of projected highest demand. Couriers were encouraged to sign up for these slots and approximately 93% of couriers worked on slots.

10. Couriers who signed up for a time slot committed themselves to be in a certain area for 90% of the time comprised within that slot. In return, the courier was guaranteed a minimum £9 an hour for each slot for which he signed up (irrespective of whether he undertook any deliveries). If the courier did not remain within the area for 90% of the slot time, or he if logged off and was not available for more than 6 minutes per slot, or if he refused more than 1 delivery job during a slot, the courier would not receive the guaranteed minimum hourly payment for that slot. In addition, the respondent paid delivery rewards to couriers who achieved a certain number of deliveries a week but, if he failed to take up 2 or more of his slots in a week, the courier would not qualify for the delivery awards.

11. A courier who had signed up for a slot was able to send a notice via the Staffomatic section of the respondent's app indicating that he wished to give up a particular slot that he had signed up for. Another courier, who had a contract with the respondent and had signed up to the respondent's app, could then offer to take up the slot and a message to that effect was sent to the courier offering to release the slot. If no other courier offered to take the slot, the courier had to complete the slot or would face penalties for missing the slot.

12. Once a courier accepted a delivery job, the CGU provided that he could only cancel the delivery in three specified circumstances, namely if the goods exceeded certain specified dimensions, there was no response to the courier's telephone calls when he contacted the client to carry out a delivery, or the courier could not carry out the delivery because of any force majeure event such as an accident.

The Claimant Becomes a Courier

13. On 26 November 2016, the claimant applied on the respondent's website to become a courier. He was invited to a 10 minute interview and asked to provide all vehicle documentation, proof of address and the right to work in the United Kingdom, photographs showing the size of the delivery box on his moped and confirmation that it met the respondent's requirements, and details of his bank account and smart phone. Having passed the interview, he filled in a form to enable criminal background checks to be carried out. He then attended a session lasting about 90 minutes consisting of a power-point presentation setting out how courier arrangements worked. Between about 23 November 2016 and 5 March 2017, the claimant was a courier operating in accordance with the arrangements described above.

The Proceedings.

14. On 9 April 2017 the claimant presented a complaint to the employment tribunal alleging that he had been unfairly dismissed and was owed notice pay, holiday pay, arrears of pay and other payments. He claimed that he was an employee under a contract of employment or was a worker within the meaning of section 230(3)(b) of the Act and other relevant legislation.

15. By an order dated 12 June 2017, the employment tribunal ordered a preliminary hearing to decide if:

    (1) the claimant was employed by the respondent under a contract of employment; if not

    (2) was he a worker within the meaning of section 230(b) of the Act, or

    (3) whether the respondent was a client or customer of any business or profession carried on by the claimant.

The Employment Tribunal's Decision

16. The employment tribunal held that the claimant was not an employee as he was not employed under a contract of employment. The Employment Appeal Tribunal dismissed the claimant's appeal against that finding. Although the claimant sought permission to appeal to this Court against that finding, permission to appeal was

refused. The finding that he was not an employee therefore and so not within section 230(3)(a) of the Act cannot therefore be challenged.

17. The employment tribunal then considered whether the claimant was a worker within the meaning of section 230(b) of the Act. It identified the issue at paragraph 29 of its judgment in the following terms:

> "Having regard, therefore, to the entire factual matrix before the Tribunal, the first element of section 230(3)(b) to be considered is whether or not there was a contract whereby the Claimant undertook to do or perform personally any work or services for any other party to the contract?.... ."

18. It recorded the respondent's two principal submissions as follows:

> "30. The Respondent argues that there is no contractual obligation that the Claimant *personally* turn up and perform any services, even having signed up to cover any given slot, because, (i) even if there are consequences (including what it characterises as the relatively minor risk of being taken off the app), he is still not obliged to turn up and (ii) he is, in any event, free to provide a substitute for any slot which he changes his mind about covering. The Respondent contends: that there was an unfettered right to substitute another person to do the work (the first category set out in the **Pimlico Plumbers case in the Court of Appeal**); failing that, that there was a conditional right to substitute another person (category 2) and in any event the Respondent relies on category 4, that there was a right of substitution limited only by the need to show that the substitute is as qualified as the Claimant to do the work, whether or not that entails a particular procedure."

19. On the first issue, the employment tribunal found that the system of rewards and penalties was intended to ensure that the claimant did turn up for, and work, the slots for which he had signed up. As it said at paragraph 32 of its decision, if the claimant did not turn up for work:

> "… the reality was that the Claimant risked losing financially (performance rewards and the loss of the guaranteed £9 per hour for refusing more than one delivery request during one slot), a poor performance score (missing slots/jobs attracts 30% of the performance rating) potential removal of his right to register for future slots… and eventually off-boarding from the app…."

and further:

> "The entire intention of the Respondent's stick and carrot system of rewards and punishments was to ensure an optimally reliable supply of couriers to meet optimum demand of Users in 'hot zones' at times of highest demand as predicted by very

> detailed market research. The whole business model is predicated upon this precise balancing act. If the rewards and penalties were not real, and not perceived to be so by couriers, it would not work. Couriers would abandon signed-for slots with impunity and the users would not be happy".

20. The employment tribunal then dealt with the second principal contention of the respondent, namely that the fact that the claimant was free to provide a substitute for any slot meant that he was not personally obliged to perform the work. The employment tribunal's analysis, and conclusion, are set out in paragraphs 33 and 34 in the following terms:

> "33. As to the right to substitute another to take over the slot, the Tribunal noted the following factors:
>
> 33.1 There is no reference to a right of substitution in the written contract, the GCU.
>
> 33.2 Strictly speaking, the Release Notification of an unwanted slot for circulation on Staffomatic among potentially interested other couriers with the same mode of transport, is not the right to send a substitute chosen by oneself, even with the proviso of only being able to send a person with all of the correct vehicle and personal paperwork and an up to date background check.
>
> 33.3 Another courier taking up the slot would be unknown to the Claimant and it was not within his right to choose nor put forward a given individual.
>
> 33.4 If no one took up the slot, the Claimant would either have to work it or face the consequences set out above.
>
> 33.5 This system cannot reasonably be described as 'an unfettered right to substitution'.
>
> 33.6 If it constitutes a right to substitution at all, it is conditional upon another courier, already on the Respondent's app and with the same mode of transport as the Claimant, willingly volunteering to take over the slot released. The Tribunal accepted the Respondent's evidence that a large proportion of couriers did take advantage of the Release Notification scheme and that the Claimant himself took up some of the slots released by others. However, it was also the Respondent's evidence that there were often 300 to 500 (about 10%) of slot hours per week left unclaimed by anyone and therefore there was far from any guarantee that a courier would get a colleague volunteering to take over any given unwanted slot.
>
> 33.7 This could be said to fall within the fifth category of the Pimlico Case, absolute and unqualified discretion to withhold

> consent; that the other person who has an absolute or unqualified discretion to withhold consent; that other person being one of the Claimant's fellow couriers with the same mode of transport.
>
> 33.8 It cannot be said to fall within the fourth category of the Pimlico Case since the right is not merely limited by the need to show that the substitute is as qualified as the Claimant to do the work, because it is also limited by the willingness of any of the Claimant's equally well-qualified motorbike courier colleagues to volunteer to take his slot.
>
> 34. Taking all of these factors into account, the Tribunal concluded that, however the slot Release Notification system is defined, it does not fall within the ambit of arrangements which are necessarily inconsistent with the obligation to perform personally. In reality, the Claimant, once having signed up for a slot, was obliged to perform personally because there was a real risk of negative sanctions for not doing so and his right of substitution to remove from him that personal obligation to perform his work personally for the Respondent."

21. The employment tribunal then dealt with the second part of the definition in section 230(3)(b) of the Act, namely whether the status of the other party to the contract (here the respondent) was that of a client or customer of the claimant's own business (in which case, the claimant would not be a worker). It found that respondent was not a client of any business run by the claimant. There is no challenge to that finding of the employment tribunal in this Court. This judgment, therefore, considers only the first part of the definition in section 230(3)(b) of the Act.

22. The judgment of the employment tribunal, so far as material, was that:

> "1. …. the Claimant was a 'worker' of the respondent within the meaning of section 230(3)(b) of the [Act] and other materially identical legislation, while he was working as a moped delivery rider on allocated slots.
>
> "2. The Claimant was not an employee of the Respondent within the meaning of section 230(1) of the [Act]."

The Appeal to the Employment Appeal Tribunal

23. The respondent appealed to the Employment Appeal Tribunal. Only the first ground of appeal is relevant for present purposes. That ground concerned the approach of the employment tribunal to substitution in deciding whether the claimant was under an obligation personally to perform the work or provide the services. The criticisms were essentially twofold. First it said that the employment tribunal had concluded at paragraph 33.6 of its judgment that the right to provide a substitute was conditional on another person being willing to take over the slot. The respondent submitted that that was irrelevant to the existence and nature of the right to substitute and to whether a person was under an obligation personally to perform the work. Secondly it said that

the employment tribunal had misconstrued the guidance given by the Court of Appeal in *Pimlico Plumbers v Smith* [2017] EWCA Civ 61, [2017] ICR 657 that a right to substitute only with the consent of another person could not be relied upon as negativing any obligation to perform the work personally. It said that the employment tribunal had wrongly concluded at paragraph 33.6 and 33.7 that that restriction applied when the consent of the potential substitute was necessary whereas the guidance in the Court of Appeal was intended to be a reference to the consent of the other party to the contract (the respondent here) not the potential substitute.

24. The material part of the Employment Appeal Tribunal's reasoning rejecting these criticisms is set out at paragraphs 62 and 63 of its judgment in the following terms:

> "**Worker status: substitution**
>
> 62. It is common ground that the Tribunal correctly identified the significance of understanding the extent of the Claimant's powers of substitution in deciding the worker point, and it correctly identified the key passages in **Pimlico Plumbers**. Mr Carr accepts that he cannot challenge the finding that the Claimant did not have an unfettered right of substitution. He is right that the Tribunal has misunderstood the person whose consent is required for the fifth category – it cannot refer to the proposed substitute, but refers to the employer or person for whom the work will be done. The difficulty for the Respondent however is that on the facts as found by the Tribunal the Respondent 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. The Claimant had no control whatsoever over who, if anyone, would accept a slot he had signed up for and no longer wished to work. The Tribunal's primary finding is 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.
>
> 63. The Tribunal have therefore not erred in their primary finding that there was no substitution right and, in the alternative, that the ability to offer the slot to others fell within the fifth category identified in **Pimlico Plumbers** albeit for different reasons to those identified by the Tribunal. The ground of appeal therefore fails."

25. The Employment Appeal Tribunal dismissed the appeal.

THE APPEAL

26. The respondent appealed to the Court of Appeal. The grounds of appeal are that:

(1) The employment tribunal erred as it:

(a) misconstrued or misunderstood the guidance given by the Court of Appeal in *Pimlico Plumbers* that the right of substitution could not be relied upon as negativing an obligation of personal performance when its exercise was subject to the consent of another person who had an absolute and unqualified discretion to withhold consent. In paragraph 33.7 and 33.7 of its reasons, the employment tribunal erroneously held that the case fell within the fifth category identified in *Pimlico Plumbers* as the claimant's right to substitute was subject to the consent of the substitute couriers whereas the Court of Appeal intended the reference to be consent on the part of the putative employer, not the consent of the potential substitute; and

(b) wrongly held that the case could not fall within the fourth category in the guidance in the Court of Appeal decision in *Pimlico Plumbers* as the right was limited by the willingness of the substitute to volunteer to undertake the work.

(2) the Employment Appeal Tribunal erred in law:

(a) in upholding the employment tribunal decision on the basis that the respondent had the absolute and unqualified right to withhold consent as only couriers that it had accepted into their pool of couriers could use the respondent's app to sign up for slots. That wrongly confused the question of how the pool of available substitutes came to made up with the separate question of how a substitute came to take the place of the claimant when the claimant did not wish to undertake work that he had signed up to do;

(b) in finding that there was no right of substitution as the claimant could not control the identity of the substitute;

(c) in finding that it was relevant that the claimant would have to work the slot himself if a substitute could not be found; and

(d) in holding that the employment tribunal had made a primary finding that there was no right to substitute at all.

27. At the hearing of the appeal, we had detailed written submissions from Mr Carr Q.C. on behalf of the respondent and from the claimant himself. We heard oral submissions from Mr Carr. It was not necessary to hear oral submissions from the claimant as we decided, in the light of the submissions already made, including the written submissions from the claimant, that the respondent's appeal would be dismissed and our reasons would be given in writing later. These judgments set out my reasons for dismissing the appeal.

SUBMISSIONS

28. Mr Carr for the respondent submitted that the Court of Appeal in *Pimlico Plumbers* had set out guidance as to the categories or examples in which the existence of a right on the part of a claimant to appoint another person to carry out the work would be

relevant to whether the claimant was required to carry out the work personally. He submitted that the relevant reasoning of the employment tribunal was contained only in sub-paragraphs 33.6 to 33.8 of its reasons. In relation to sub-paragraph 33.7, the employment tribunal erred in concluding that the present situation could fall within the fifth category identified in *Pimlico.* There, the Court of Appeal had said that a right to substitute which could only be exercised with the consent of another person who had an absolute and unqualified discretion to withhold consent would be consistent with personal performance. He submitted that the employment tribunal had erred in considering that the case fell within that category because the potential substitute (the potential replacement couriers) had an absolute right to refuse to consent to doing the work. The Court of Appeal had been intending to refer to the consent of the other party to the contract (here the respondent) – not the potential substitute. The employment tribunal had, consequently, wrongly failed to consider whether or not the case did fall within the fifth category. The Employment Appeal Tribunal had identified that error at paragraph 62 of its judgment. But it had wrongly concluded that the error was not material as the respondent had an absolute and unfettered right to withhold consent as the potential pool of substitutes comprised only those accepted by the respondent as couriers and who had access to the respondent's website to sign up for slots a fellow courier wished to relinquish. That was to confuse the composition of the pool of possible substitutes with the question of whether the respondent had an absolute and unfettered right to consent to any potential substitution when another courier elected to take up a slot. The latter exercise involved the right of substitution and the respondent did not have any right to withhold consent to that substitution.

29. Mr Carr further submitted that the employment tribunal erred in its consideration of the fourth category in *Pimlico Plumbers*, namely where a right of substitution was limited only by the fact that the substitute is as qualified as the claimant to do the work (whether or not that entails a particular procedure) that would be inconsistent with an obligation of personal performance. The employment tribunal wrongly considered, at paragraph 33.8 of its reasons, that the present case could not fall within that category because the right of substitution was also limited by the willingness of any of the claimant's equally well-qualified couriers to volunteer to take up the slot. Mr Carr submitted that the willingness of a potential substitute actually to do the work was not relevant to whether the case fell within the fourth category.

30. Mr Carr submitted that the employment tribunal had therefore failed to consider properly, and in accordance with the guidance given by the Court of Appeal in *Pimlico Plumbers*, whether or not the case fell within the fourth or fifth categories identified in *Pimlico*. Those questions were relevant to the question of whether the claimant was under an obligation personally to perform the work. The matter should therefore be remitted to the employment tribunal so that it could consider properly whether or not the claimant was under an obligation personally to perform the work.

31. Mr Carr also submitted that the claimant was wrong in his written submissions in saying that the Supreme Court in its decision in *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] ICR 1511, had held that there would never be a right of substitution which was inconsistent with personal performance where a substitute could only be drawn from a pool of persons approved by the respondent. The Supreme Court had only held that, on the facts of that case, "the tribunal was clearly entitled to hold" that

the dominant feature of the contract was personal performance (see per Lord Wilson at paragraph 34). It was not seeking to lay down a rule that a right of substitution could never negate an obligation to carry out work personally if the right was limited to a substitute drawn from the ranks of the putative employer's operatives

32. Further, Mr Carr submitted that the Employment Appeal Tribunal erred in considering that the fact that the claimant could not control the identity of the substitute or whether a substitute would do the work was relevant. Those factors said nothing about whether the claimant had an obligation personally do the work. Similarly, the fact that a substitute might not be found, and so the claimant might have to do the work, was not logically relevant to whether the right of substitution meant that there was no obligation personally to perform the work. Finally, he submitted that the Employment Appeal Tribunal erred in considering that the employment tribunal had made a primary finding of fact that there was no substitution right at all.

33. The claimant, Mr Augustine, provided detailed written submissions setting out arguments as to why the employment tribunal decision was correct and why, on the facts of his case, he was indeed a worker within the relevant definition.

DISCUSSION

Preliminary Observations

34. In considering the question of the employment status of an individual, it is helpful to start with a reminder of what the relevant issue is. Much of the discussion in the present case had focussed on analysis of what were said to be different categories recognised by the Court of Appeal in *Pimlico Plumbers* and attempts to shoehorn particular facts, or particular findings of the employment tribunal, into what were said to be relevant categories. It is more appropriate to identify first the basic issue and then to consider the decision of the employment tribunal, read fairly and as a whole, to determine whether it identified the correct issue, applied the relevant principles to that issue and whether it reached findings it was entitled to reach on the material before it.

The Issue

35. The issue here is that the Act and the other relevant legislation confer rights on a "worker". Section 230(3) of the Act defines a worker as a person who has entered into or worked under

    (1) a contract of employment; or

    (2) a contract where the individual undertakes to do or perform personally any work or services for another person who is a party to the contract and whose status is not by virtue of the contract a client or customer of any profession or business undertaking carried on by the individual.

36. That reflects a distinction between (1) persons employed under a contract of employment (2) persons who are self-employed, carrying on a profession or a business on their own account and who enter into contracts and provide work or services to clients and (3) persons who are self-employed and provide services as part

of a profession or business carried on by others: see *Bates van Winkelhof v Clyde & Co LLP* [2014] ICR 730 at para. 25. If it is relevant or helpful to talk of categories at all, those are the three categories. The persons in (1) fall within section 230(3)(a) of the Act. The persons in group (3) are those who fall within section 230(3)(b) of the Act. Those in the second group are not workers within the meaning of section 230 of the Act.

37. In the present case, the employment tribunal found that the claimant was not an employee under a contract of employment (and there is no appeal before this Court in relation to that finding). The only question, therefore, is whether the employment tribunal was entitled to find that the claimant fell within section 230(3)(b) of the Act. The employment tribunal found that the respondent was not a client or customer of any profession or business undertaking carried on by the claimant. There is no appeal against that finding. Consequently, in this particular case, the question is whether the employment tribunal was entitled to find that the claimant undertook to do or perform personally any work or services under his contract with the respondent.

38. In that regard, Lord Wilson, with whom the other Justices agreed, observed at paragraph 32 of his judgment in *Pimlico Plumbers Ltd* that:

> "The sole test is, of course, the obligation of personal performance: any other so-called test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of [the claimant] Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part."

The case law

39. It is in that context that the respondent's reliance on the guidance given by the Court of Appeal in *Pimlico* needs to be considered. Sir Terence Etherton MR, with whose judgment Davis LJ agreed, began by referring to the distinction referred to in paragraph 36 above. He noted that the Court had been referred to a number of cases in which the issue was whether a right on the part of the claimant to substitute another person to do the work or perform the services was inconsistent with an undertaking to do so personally. He reviewed that case law and gave the following summary of the principles emerging from that case law (a summary with which Underhill LJ agreed) at paragraph 84 of his judgment:

> "84. Some of those cases are decisions of the Court of Appeal, which are binding on us. Some of them are decisions of the appeal tribunal, which are not. In the light of the cases and the language and objects of the relevant legislation, 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."

40. That is the paragraph on which the respondent places great reliance in this case. In considering that paragraph, however, it is important to bear in mind the following. First, the actual issue for a tribunal is whether a claimant is under an obligation personally to perform the work or provide the services. Secondly, Sir Terence Etherton MR was seeking to summarise the principles to be drawn from existing case law: he was not seeking to establish a rigid classification or lay down strict rules as to what did or did not amount to personal performance or when a right of substitution did or did not negate the existence of an obligation to do work personally. Thirdly, on analysis of paragraph 84, there are only two principles summarised. The first is that if the claimant has what is described as an unfettered right to substitute another person to do the work or perform the services that is inconsistent with an undertaking to do so personally. The second principle is that a conditional right "may or may not be inconsistent" with personal performance depending on the precise contractual arrangements and, in particular "the nature and degree of any fetter on a right of substitution". The third to fifth points made in paragraph 84 are provided, expressly, "by way example", of situations where a contractual right on the part of the claimant may be one indicator that the obligation is or is not one to do the work or perform the services personally. The points made are, in effect, a summary of the earlier decisions (which each involved particular facts) which had been analysed by Sir Terence Etherton MR at paragraphs 76 to 83 of his judgment.

41. Against that background, it would be wrong to seek to treat those five points as setting out definitive categories of what situations do, or do not, involve a right for a claimant to substitute another person to carry out the work sufficient to displace any contractual obligation to perform the work personally. It will usually be unhelpful to try and shoehorn the particular facts of a case into one of the "categories" listed (they are not in fact categories at all) and then to treat that as dispositive of the issue of whether the claimant is contractually obliged to perform the work personally.

42. It is also instructive to note that the Court of Appeal itself did not in fact dispose of the appeal in *Pimlico Plumbers* by applying the guidance set out in paragraph 84 of the judgment. They held that, on a proper interpretation of the contract, the claimant was required personally to perform the work and there was no express contractual

right for the claimant to appoint a substitute (see the judgment of Sir Terence Etherton MR at paragraphs 86 to 88 and of Underhill LJ at paragraph 128). Matters were complicated by the fact that the employment tribunal had found that Pimlico operatives were permitted to use apprentices or assistants, subcontract specialist tasks, and pass whole jobs on to other Pimlico operatives if they were offered a more lucrative job, and that, in practice, Pimlico operatives swapped jobs with other Pimlico operatives, particularly when they had more than one job available (see paragraph 88 of the judgment of Sir Terence Etherton MR). Sir Terence Etherton MR held that the evidence did not establish that there was an implied term in the contract conferring an unfettered right to substitute another operative of the company. He considered that the employment tribunal had found that, at most, there was a limited power under the agreement for operatives to substitute other company operatives. He did not regard that as sufficient to justify a conclusion that the employment tribunal had erred in finding that the claimant was obliged personally to perform the work (see paragraphs 89 to 90). Underhill LJ held that the contract required personal performance, and that the findings of the employment tribunal fell short of justifying the conclusion that there was any contractual right to substitute (see paragraphs 129 and 131). Davis LJ agreed with both judgments.

43. In the Supreme Court, Lord Wilson considered the question of when a right to substitute would be consistent with an obligation of personal performance from paragraphs 23 onwards of his judgment. He observed that the claimant's contract gave him no express right to appoint a substitute to do his work (paragraph 24). He noted that the employment tribunal found that there was a limited facility for the claimant in that case to appoint a substitute, namely if he had accepted a more lucrative job, he would be allowed to arrange for the work to be done by another Pimlico operative. He noted that the Court of Appeal interpreted the tribunal's findings to be that that facility to substitute another Pimlico operative arose not from a contractual right but an informal concession on the part of Pimlico and noted that there was much to be said for that interpretation. However, some of the language used by the employment tribunal did not sit easily with it being only an informal concession and Lord Wilson proceeded on the basis, without deciding, that the claimant had a contractual right to appoint another Pimlico to do particular work where the claimant had subsequently been offered a more lucrative job (see paragraphs 24 to 26).

44. In that context, Lord Wilson observed at paragraph 29 that:

> "29. The judge concluded that the right to substitute another Pimlico operative did not negative Mr Smith's obligation of personal performance. She held that it was a means of work distribution between operatives and akin to the swapping of shifts within a workforce."

45. Having considered the submissions on behalf the respondent in that case, and the caselaw on which it relied, Lord Wilson concluded at paragraph 34 that:

> "34. The tribunal was clearly entitled to hold, albeit in different words, that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance. To the extent that his facility to appoint a substitute was the product of a contractual right, the limitation of it was significant: the

> substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done. The tribunal was entitled to conclude that Mr Smith had established that he was a limb (b) worker—unless the status of Pimlico by virtue of the contract was that of a client or customer of his."

46. The Supreme Court has subsequently reviewed the correct approach to determining whether a person is a worker for the purposes of section 230 of the Act and similar legislation in *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657. See in particular paragraphs 83 to 85 of the judgment of Lord Leggatt with whom the other Justices agreed. Lord Leggatt also re-iterated the established approach to considering appeals to the decisions of employment tribunals in this context at paragraphs 118 to 120 where he said:

> "118. It is firmly established that, where the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, the question of whether work is performed by an individual as an employee (or a worker in the extended sense) or as an independent contractor is to be regarded as a question of fact to be determined by the first level tribunal. Absent a misdirection of law, the tribunal's finding on this question can only be impugned by an appellate court (or appeal tribunal) if it is shown that the tribunal could not reasonably have reached the conclusion under appeal: see *Lee Ting Sang v Chung Chi-Keung [1990] ICR 409, 414–415* ; *[1990] 2 AC 374, 384–385* ; *Clark v Oxfordshire Health Authority [1998] IRLR 125, paras 38–39* ; the *Quashie* case, para 9.
>
> 119. On the facts found in the present case, and in particular those which I have emphasised at paras 94–101 above, I think it clear that the employment tribunal was entitled to find that the claimant drivers were "workers" who worked for Uber London under "worker's contracts" within the meaning of the statutory definition. Indeed, that was, in my opinion, the only conclusion which the tribunal could reasonably have reached.
>
> 120. It does not matter in these circumstances that certain points made by the employment tribunal in the reasons given for its decision are open to criticism, nor is it necessary to discuss such particular criticisms, since none of the errors or alleged errors affects the correctness of the tribunal's decision. I agree with the majority of the Court of Appeal that there are some points made by the employment tribunal which are misplaced (see in particular para 93 of the Court of Appeal's judgment *[2019] ICR 845*). I also agree with the analysis set out at paras 96 and 97 of that judgment of the 13 considerations on which the tribunal principally based its finding that drivers

> work for Uber. I agree with the majority of the Court of Appeal that those considerations, viewed in the round, provided an ample basis for the tribunal's finding"

Application of the law to the present case

47. The employment tribunal correctly identified the relevant issue in paragraph 29 of its decision in the following terms:

> "29. Having regard, therefore, to the entire factual matrix before the Tribunal, the first element of section 230(3)(b) to be considered is whether or not there was as contract whereby the Claimant undertook to do or perform personally any work or services for any other party to the contract?"

48. The employment tribunal identified the two principal arguments made by the respondent on that issue, namely that there was no obligation on the claimant personally to turn up and perform the slots and that he was free to seek to substitute another courier for any slot which he changed his mind about covering. On the first issue, the employment tribunal found, essentially, that the system of signing up for slots in return for a guaranteed £9 minimum payment, together with the use of penalties and rewards, was intended to ensure that couriers turned up for the slots for which they had signed up in order to ensure the optimally reliable supply of couriers to meet demand in zones at times of highest demand as predicted by detailed market research: see paragraph 32 of its reasons.

49. The employment tribunal then turned to the submissions on the right to substitute another courier to take over a slot at paragraph 33 to 34 of its reasons. I do not accept Mr Carr's submission that the tribunal dealt with an unfettered right to substitute at sub-paragraphs 33.1 to 33.5 and then dealt separately with a conditional right of substitution at sub-paragraphs 33.6 to 33.8 so that the only matters it took into account in relation to the conditional right were those specifically mentioned in sub-paragraphs 33.6 to 33.8. It is clear that the tribunal considered all the matters referred to in paragraph 33 when considering the question of whether any right or ability on the part of the claimant to substitute another person was inconsistent with an obligation of personal performance. First, that is what the opening words of paragraph 33 say – the tribunal was noting certain factors when considering "the right to substitution" (not simply the issue of whether there was an "unfettered right of substitution"). Further, the tribunal was describing a system in sub-paragraphs 33.1 to 33.4 and considered whether this "system" amounted to an unfettered right or whether "it" i.e. the system described in sub-paragraphs 33.1 to 33.4, was a conditional right of substitution sufficient to displace an obligation of personal performance. Secondly, that reflects the structure of the tribunal's reasoning as a whole. It set out specific features of the arrangements governing substitution, and then considered whether they amounted to an unfettered right of substitution or a conditional right, and then (at paragraph 34) reached its conclusion on substitution taking "all of these factors into account". Thirdly, it would be artificial in the extreme to read the employment tribunal's reasons as being sub-divided in the way suggested, with the employment tribunal seeking to consider certain features of the arrangements governing substitution when considering if there was an unfettered right of substitution, and then considering only other, and different features, when considering whether there was a

conditional right of substitution sufficient to displace any obligation of personal performance.

50. Against that background, it is reasonably clear what the employment tribunal decided. There was no reference to a right of substitution in the written contract (the GCU). The way the system worked was that the claimant could circulate a notification via Staffomatic on the respondent's app to other couriers who had signed up with the respondent. The employment tribunal considered that that could not be described as a right on the part of the claimant to send a substitute chosen by himself. Any other courier, already approved by and signed up with the respondent, could opt, if he chose, to fill the unwanted slot. The claimant did not know which courier would be taking up the slot and he could not put forward any given individual to take up the slot. If one of the other couriers did not take up the slot, the claimant would have to work it or face the adverse consequences of missing a slot already described by the tribunal

51. In that context, the employment tribunal concluded at paragraph 33.5 that the system could not reasonably be described as amounting to an unfettered right of substitution of the sort that might be regarded as inconsistent with an obligation of personal performance. So far as it was a conditional right of substitution, the tribunal considered that it was conditional upon another courier already on the respondent's app and with the same mode of transport (and, one could add, subject to the same requirements of having to stay in the area for 90% of the time, not logging of for more than 6 minutes an hour, and not refusing more than one delivery job in order to avoid losing the guaranteed payment and suffering other adverse consequences) agreeing to take up the slot.

52. At paragraph 33.7, the employment tribunal did consider what it called the fifth category set out in paragraph 84 of the guidance in the Court of Appeal in *Pimlico Plumbers.* That concerns a situation where there is a right to substitute another person to do the work only with the consent of another person who has an absolute and unqualified discretion to withhold consent. The employment tribunal did, erroneously, consider that the relevant consent was that of the other potential couriers whereas the Court of Appeal was considering the position of the other party to the contract (here the respondent). But, as the Employment Appeal Tribunal held, that was not, on the facts as found by the employment tribunal, material as the respondent controlled who the substitutes could be as it was only couriers accepted onto the respondent's app who could sign up for slots. The claimant had no control over who, if anyone, could take up a slot and he could not chose someone to do the work for him. The employment tribunal was well aware of those facts and essentially set those out at sub-paragraphs 33.2 to 33.3 of its reasons. I do not consider that it is necessary to try and shoehorn the facts into the example (for that is what it is) set out at point 5 of paragraph 84 of the judgment of Sir Terence Etherton MR in *Pimlico Plumbers*). The real issue is whether the obligation was one of personal performance and whether the "nature and degree of any fetter on a right of substitution" was consistent or inconsistent with an obligation of personal performance. The tribunal clearly concluded that the system described at sub-paragraphs 33.2 to 33.4, and summarised again at paragraph 33.6, was not inconsistent with an obligation of personal performance.

53. Mr Carr submitted that the Employment Appeal Tribunal was wrong to consider that the situation fell within the example in point 5 because the respondent controlled the pool of potential substitutes (here other couriers who had signed up on the respondent's app). He submitted that the example in point 5 would only be satisfied if the respondent had an absolute and unconditional discretion to withhold consent over the substitution for a particular slot. The respondent could not do that. Once a courier accepted an unwanted slot, the respondent had no discretion to withhold consent to substitution of couriers for that slot. That argument, to my mind, demonstrates the difficulty, and the unreality, of treating the examples in paragraph 84 as if they were rigid categories and then seeking to analyse subsequent cases by reference to those categories. The real issue is whether the claimant was obliged personally to perform the work or provide the services. One aspect of that issue is was whether the nature and extent of the claimant's right or ability to arrange for the work to be done by others was sufficient to indicate that there was no obligation of personal service. The tribunal identified the relevant issue, it knew the facts, and in particular the nature and degree of the limits on the right to substitute, and expressed its conclusion on that issue in paragraph 34. There is no basis for saying that there was any material error on the part of the employment tribunal in its assessment of the issue.

54. Mr Carr also submitted that the employment tribunal was wrong to conclude that the present case did not fall within the example in point 4 of the guidance in paragraph 84 of *Pimlico*. He submitted that the tribunal erred in concluding that this was not a case where the claimant could send a substitute who was suitably qualified albeit subject to a particular procedure (here the procedure used by the respondent for determining whether the courier met the relevant requirements for being signed up to the respondent's app). He submitted that the tribunal erred in considering that the right was also limited by the willingness of any courier to volunteer to take the slot. That, he submitted, was not relevant to the example in point 4 as it would always be the case that a substitute would have to be willing to do the work. That, he submitted, could not have been intended by the Court of Appeal to be a limiting feature preventing a case from falling within point 4 of the guidance.

55. Again, that demonstrates the difficulty, and artificiality, of seeking to shoehorn the facts of a particular case within the examples given by the Court of Appeal. The example in point 4 appears to refer back to, and be a summary of, earlier cases analysed by Sir Terence Etherton MR. Those included one case where a claimant had an express right under the contract to delegate the performance of services to other persons (whether or not they were his employees) provided that the respondent was notified in advance and provided that the substitute was at least as capable and experienced as the claimant. They also included a case where a claimant could, under the terms of the contract, delegate the performance of the services to any of his agents, employees and other individuals who was approved in writing by the respondent, that consent not to be withheld unreasonably. The factual situations of the cases analysed are different from the facts of the present case. It is unhelpful to attempt to force the facts of this case into the language used in point 4, or to try and analyse it by reference to the language used in point 4. It is more appropriate to focus on the real issue, that is whether the nature and degree of any fetter on the right or ability to appoint a substitute to determine whether that was inconsistent with any obligation of personal performance.

56. Standing back from the analysis, the position is clear. The employment tribunal considered that the system set up by the respondent was intended to ensure that the claimant did carry out the work and, in particular, that he did turn up for the slots that he had signed up for and do the delivery work during those slots. That was necessary for the respondent's business model to work. As the tribunal said at paragraph 34 of its reasons, the limited right or ability of the claimant to notify other couriers via the respondent's app that he wished to release that slot for take up by other couriers:

> "was not, in reality, sufficient right of substitution to remove from him that personal obligation to perform his work personally for the Respondent".

57. For completeness, I note that that conclusion is consistent with the decision of the Supreme Court in *Pimlico Plumbers* . There, too, the Supreme Court held that the employment tribunal was entitled to conclude that the dominant feature of the contract was an obligation of personal performance and that the facility to appoint a substitute subject to a significant limitation, namely that the substitute came from the ranks of Pimlico operatives, did not negate that. The factual situation in *Pimlico Plumbers* is broadly similar or analogous to the position here. Any substitute had to come from the ranks of the respondent's couriers. They too would be subject to the same obligations in reality as the claimant, namely to perform the slot by attending for 90% of the time within the relevant area, not log off the app for more than 6 minutes and not to refuse more than one delivery job or face the consequences of doing so. The respondent was not uninterested in who performed the work. It wanted to ensure that those couriers who took the slot were subject to the same constraints as the claimant to ensure that they actually worked the slots because it wanted to ensure that there were sufficiently reliable couriers available in hot zones at peak time. That is not to say that there is necessarily a "rule" that the right, or ability, to appoint substitutes only from the respondent's pool of operatives is always inconsistent with an obligation of personal performance. It is simply to recognise that the conclusion reached by the employment tribunal here is one that, in broadly similar circumstances, the courts have accepted is a conclusion that employment tribunals can reasonably reach.

58. Finally, I would point out that it is not necessary to reach a conclusion on whether the arrangements relating to substitution amounted to a contractual right on the part of the claimant, or whether they were a practice permitted by the respondent. If necessary, I would be prepared to assume, without deciding, that the limited, or conditional, right of substitution was contractual (as Lord Wilson did in *Pimlico Plumbers*). It may be, in the light of the decision in *Uber*, that the distinction is no longer critical and the question is whether, looking at the contractual terms, and the way in which the arrangements operated in practice, the claimant was under an obligation of personal performance given the extent and nature of any practice of permitting substitution. In either event, it is clear that if the limited substitution arrangements were contractual, or if they were a relevant practice for considering whether the claimant met the statutory definition of worker in section 230(3) of the Act, the tribunal was entitled to conclude that they were not sufficient to displace the obligation on the claimant to perform the work personally.

59. Those conclusions dispose of the first ground of appeal which seeks to challenge the finding of the employment tribunal. They largely dispose of ground 2 which seeks to make four criticisms of the decision of the Employment Appeal Tribunal. For the

reasons already given, the employment tribunal was entitled to reach the conclusion that it did and, accordingly, the Employment Appeal Tribunal was right to dismiss the appeal. For that reason, and the reasons given above, it is not necessary to consider the details of the four criticisms made of the Employment Appeal Tribunal.

60. I would therefore dismiss the appeal. The employment tribunal was entitled on the facts as found by it to conclude that the claimant was a worker within the meaning of section 230(3)(b) of the Act and the other relevant legislation. The tribunal was entitled to conclude that he performed the courier services under a contract to do the work or provide the services personally and that the respondent was not the client or customer of any business undertaking carried on by the claimant.

Lord Justice Snowden

61. I agree.

Lord Justice Moylan

62. I also agree.