Appeal No. UKEAT/0453/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 8 September 2014
Handed down on 17 October 14

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR G MACALINDEN T/A CHARM OFFENSIVE — APPELLANT

(1) MR T LAZAROV
(2) CHARM OFFENSIVE LTD
(3) MISS E LEDERLEITNEROVA — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL JENNINGS (Solicitor) Bates, Wells and Braithwaite London LLP 2-6 Cannon Street London EC4M 6YH
For the Respondent	MR NICHOLAS MAGGS (of Counsel) Instructed by: Pattinson & Brewer Solicitors 1 Bridge Street York YO1 6WD

SUMMARY

JURISDICTIONAL POINTS – Worker, employees or neither

WORKING TIME REGULATIONS – Worker

NATIONAL MINIMUM WAGE

The Employment Judge did not approach the question of whether the Claimants were "workers" correctly and did not give sufficient reasons for this part of his decision. **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181, **Hospital Medical Group Ltd v Westwood** [2012] IRLR 834 and **Bates van Winkelhof v Clyde and Co LLP and Anr** [2014] IRLR 641 considered and applied.

HIS HONOUR JUDGE DAVID RICHARDSON

1. In March and April 2012 there was a production of David Edgar's play "Pentecost" at St Leonard's Church in Shoreditch. Five actors from that play have pursued claims to the Employment Tribunal for payment of the national minimum wage and holiday pay. They are entitled to make such claims only if they were "workers", as defined in the relevant legislation. Employment Judge Ross heard this question as a preliminary issue on 16 April 2013. He decided that they were workers. Did he approach this question correctly in law?

The Background Facts

2. The proceedings were brought by Miss Choucair-Vizoso, Miss Ramakrishnan, Mr Shameli, Mr Vujat and Miss Yildiz ("the Claimants"). Initially there was another, but he withdrew. The Employment Judge described their work and experience only in general terms. He said:

> **"It is fair to say that the Claimants were inexperienced stage actors and each had varying experience and training. I will not recite it because these facts are not relevant to the determination of the issues. Equally, it is not relevant for me to find how much the Claimants had earned in the past from acting or that some of the Claimants, such as Mr Shameli had earned nothing at all from acting."**

3. The proceedings were brought against Mr Gavin MacAlinden ("the Respondent"), who carried on business in theatre production under the name "Charm Offensive". He was director and producer of the play.

4. The Claimants and other actors responded to an advertisement in "Spotlight", a website which specialises in matters relating to the casting of actors. The advertisement started as follows:

> **"Pay category: Profit share**
>
> **Production dates: rehearsal dates 13 February – 7 March 10am-6pm Monday to Friday**

Performance dates: 8 March – 8 April Wednesday to Sunday at 7:30pm. Possible Sunday matinee. Audition, rehearsal and performance at St Leonard's Church Shoreditch." (quote unchecked)

5. The Claimants were successful at auditions. Each was given a form of contract called an "Actors' contract". Under the heading the text was as follows:

> **"This letter confirms agreement that you will take the part of ... in the theatre production of David Edgar's Pentecost. As you know, this is a low budget production and we are keen to ensure that everyone understands the basis upon which the play is being made. If there is anything about this letter that you do not understand or you wish us to clarify, please do not hesitate to contact us.**
>
> **(1) You agree to be available to work during the rehearsal period from 13 February- 7 March 9:00am to 5.00 pm Monday to Friday.**
>
> **(2) You agree that the rehearsals and the performances will take place in the following location: St Leonards Church Shoreditch.**
>
> **(3) You agree to be available to work during the productions run from performance dates 8 March to 8 April. Wednesday to Sunday at 7:30pm. Possible Saturday and Sunday matinee.**
>
> **(4) You agree to maintain a professional attitude and to refrain from any behaviour damaging church property, disrupting the rehearsal process or in any way harmful to the St Leonard's reputation.**
>
> **(5) For your performance in this production you will receive a profit share – 60% producer's profits split between the cast. Complimentary tickets for industry members will also be provided.**
>
> **(6) We will do our best to ensure your health, safety and welfare during the rehearsal and run periods." (quote unchecked)**

6. The Claimants were asked to express their agreement with those terms by e-mail and did so.

7. The play gained some critical success but did not produce a profit. It was part of the Respondent's case at the Employment Tribunal that it was actually quite plain to all concerned that it would not do so. He said that the church had a maximum 80-seat configuration. There was a cast of 25. He sought no remuneration for himself apart from the profit share and this would have been minute even if every single ticket had been sold. The Employment Judge found, however, that when the Claimants entered into the contract, they considered that there

was “at least a chance” that they would get some profit. They would have realised that it was unlikely that there would be any profit to share once the show got under way.

The Statutory Provisions

8. For the purposes of the **National Minimum Wage Act 1998** “worker” is defined as follows in section 54(3):

> **“(3) in this Act ‘worker’ (except in the phrases ‘agency worker’ and ‘home 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.”**

9. The definition for the purposes of the **Working Time Regulations** is identical except for the first set of words in brackets, which relate to the specific concepts of “agency worker” and “home worker” in the **1998 Act**.

10. The definitions belong to a wider family of definitions of “worker” for various purposes within employment legislation. Another leading example, with which many of the reported cases are concerned, is section 230(3) of the **Employment Rights Act 1996**.

The Employment Judge’s Reasons

11. At the hearing the Respondent represented himself. The Claimants were represented by Counsel, Mr Nicholas Maggs, and were backed by Equity, a well-known trade union for professional performers.

12. The Employment Judge said that he directed himself to the law by considering the relevant statutory provisions and the discussion of the definition of "worker" within the IDS brief handbook "Wages", particularly at pages 192-195.

13. He defined the issues as follows:

> **"10. Thus in order to succeed in (b) the Claimants in this case must show:**
>
> **(i) the existence of a contract;**
>
> **(ii) if a contract exists, who were the parties;**
>
> **(iii) that he/she undertook to perform work or services personally for the other party;**
>
> **(iv) that the other party is not a client or a customer."**

14. As concerns the last of these issues, the Employment Judge said only this;

> **"11. It was clear on the facts of this case that the other party was not a client or customer so that issue falls away."**

15. The Employment Judge went on to consider in some detail whether there was a contract between each Claimant and the Respondent and whether the Claimants undertook to perform their work personally. He found that they did. When he considered whether each Claimant undertook to perform work personally, he said there was "a sufficient degree of mutual obligations on the facts found for the Claimants to be workers".

Submissions

16. On behalf of the Respondent Mr Paul Jennings submits that the Employment Judge did not address the last part of what is commonly known as the "limb (b)" definition to any significant extent. There was material from which the Employment Judge could conclude (and he would say ought to have concluded) that the Claimants were carrying out a profession or business undertaking: acting was at the very least capable of being such a profession. The

Employment Judge did not cite the last part of the definition at all. There was also material from which the Employment Judge could conclude that the Respondent was a client or customer of such a profession or business undertaking. Mr Jennings took me to leading modern authorities on this question, including **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181, **Jivraj v Hashwani** [2011] IRLR 827, **Hospital Medical Group Ltd v Westwood** [2012] IRLR 834 and **Bates van Winkelhof v Clyde and Co LLP and Anr** [2014] IRLR 641. As to what might amount to a profession, he took me to **Currie v Commissioners of Inland Revenue** [1921] 2 KB 332, discussed and applied in **R (BBC) v Central Arbitration Committee** [2003] IRLR 460. He criticised the Employment Judge for relying on the IDS bulletin rather than these authorities. He pointed out that the treatment in the IDS bulletin did not purport to be complete and in fact did not refer to **Cotswold**, nor did it contain any treatment of what might amount to a profession.

17. In answer to these points Mr Nicholas Maggs for the Claimants submitted that the Employment Tribunal sufficiently addressed and dealt with the last part of the limb (b) definition. It was not the focus of the case at the hearing below. It was therefore sufficient for the Employment Judge to deal with the matter in short form: this demonstrated that he had not forgotten the point but, given the limited extent to which it figured at the hearing, no further reasoning was required. In any event, he submitted, it was obvious that the Respondent was not a client or customer of the Claimants. The Claimants were integrated into the play and subject to the direction of the Respondent: there was a subordinate relationship characteristic of a worker. The Employment Judge did not err in law by referring to the IDS bulletin so long as he informed the parties that he was doing so.

18. Mr Jennings took a subsidiary point concerning the Employment Judge's treatment of the requirement to provide personal service. He submitted that the Employment Judge made reference to the concept of mutuality in a way which was confusing and unhelpful: see **Cotswold** at paragraph 54 and **Drake v Ipsos Mori UK Ltd** [2012] IRLR 973 at paragraphs 28-38 (a discussion in the context of employment rather than "worker" status). Mr Maggs replied that, whether or not the Employment Judge's approach to mutuality was confusing, it was plain that the contract was one for personal service.

Discussion and Conclusions

19. Employment law distinguishes between three types of people: those employed under a contract of employment, those self-employed people who are in business on their own account and undertake work for their clients or customers and an intermediate class of workers who are self-employed but do not fall within the second class: **Bates van Winkelhof** at paragraph 31 per Lady Hale. The last part of the limb (b) definition is concerned with defining the second type over against the third.

20. In **Cotswold Developments Construction Ltd v Williams** Langstaff J, in an oft-cited passage, described the distinction in the following way:

> **"54. It is clear that the statute recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that 'other' is neither a client nor customer of theirs – and thus that the definition of who is a 'client' or 'customer' cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. 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 shopowner, 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."**

21. In **Hospital Medical Group Ltd v Westwood** [2012] IRLR 834 the Court of Appeal was concerned with a general practitioner who, as a separate activity, works for an organisation running clinics which provided cosmetic surgery procedures and non-surgical procedures. In that capacity the doctor agreed to provide his services exclusively to the organisation. He did not offer that service to the world in general and had been recruited to work as an integral part of its operations. It was held that he was a "worker". Maurice Kay LJ said:

> **"I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his 'integration' test will often be appropriate, as it is here."**

22. In **Bates van Winkelhof** Lady Hale addressed an argument that subordination was a key ingredient of "worker" status. She said:

> **"39. I agree with Maurice Kay LJ that there is 'not a single key to unlock the words of the statute in every case'. There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of 'subordination' to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in *Redcats*, a small business may be genuinely an independent business but be completely dependent upon and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the 'St Michael' brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in *Westwood*, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a 'worker'. While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker."**

23. To my mind the evidence before the Employment Judge raised a real issue as to whether the Claimants were carrying on a profession or business undertaking.

24. To illustrate this, I think it is helpful to set out a paragraph from the witness statement of Ms Ramakrishnan:

> **"2.2 I am a UK National who first came to the UK in 1996. After a short break in India, I came back to the UK again in 2003 and have lived here as a permanent resident and UK national. Prior to Pentecost, and following the finishing of my studies, I have worked professionally as an actor in a feature film (The DiVicenczo Cose), a few short films (Music Land World, How to Date..., Moving ON), in an episode of the TV show Fake Britain),**

commercials (118,) and a music video. I was working for a very few days on another project at the same [time] as Pentecost rehearsals. This was for the production, 'BaBa Shakespeare', but my part in the project came to an end very soon within a few days. I was paying my own tax and National Insurance."

25. This description is strongly suggestive of a person who has embarked on a profession or business undertaking. She appears to be actively marketing her services as an independent person to the world in general rather than being recruited to work for any individual as an integral part of that individual's operations. She was, no doubt, immersed in the Respondent's play once she had been cast in it; but she was not integrated into the Respondent's theatre production business.

26. The Employment Judge made no findings about the way in which the Claimants carried on their work as actors. He does not appear to have recognised that there was a potential issue in this respect. In my opinion there clearly was. It is no doubt true that some of the Claimants were just starting out on what they hoped would be acting careers. The question, however, still arises: upon what were they embarking? Was it a profession or business undertaking (or both); if they were actively marketing their services as an independent person to the world in general, picking up or attempting to pick up work where available from a variety of sources, this may be a powerful indication that they were not "workers".

27. In my experience Employment Judges generally provide a statement of applicable principles by reference to relevant legislation and case-law rather than a textbook. This is a good discipline. It is usually the legislation and the leading cases which identify with most precision the legal principles which must be applied. Textbooks tend to be more discursive. Sometimes (as in **Chief Constable of Lincolnshire Police v Caston** UKEAT/0530/08) the textbook takes very much a line of its own. In this case the Employment Judge understandably

chose a textbook which was particular to the kind of case he was considering – a national minimum wage case. However the textbook did not purport to be an exhaustive treatment of the question of "worker": it specifically cross-referenced, for a more detailed treatment, to another textbook in the same series. In the result, the Employment Judge did not identify the statement of principle by Langstaff J in **Cotswold**. I think he missed the potential significance of the point. That he did so is also clear from his partial citation of the definition, omitting reference to "profession or business undertaking carried on by the individual" (an omission, I should make clear, which cannot be laid at the IDS handbook).

28. I have asked myself why it seemed so obvious to the Employment Judge that the Respondent was not a "client or customer". He may have thought that these were inappropriate words ever to describe the relationship between a film or theatre production company and an actor. It is true, I think, that the words "client" and "customer" would not usually be used in this way. But this is true in other areas: for example, a doctor may well be in independent practice, but one would not usually describe those whom he treats as his "clients" or "customers": one would describe them as his patients. It is important to look at the definition as a whole and to understand its purpose within employment law as laid down by the cases.

29. For these reasons I conclude that the Employment Judge has not approached the question of worker status correctly and has not given sufficient reasons for his decision. The matter must be remitted for re-hearing. Whether to remit to the same, or to a different, Employment Judge is a discretionary decision for the Employment Appeal Tribunal, taken in accordance with criteria laid down in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. In this case I consider that much the most satisfactory course is to remit the matter to be heard afresh. It would be unsatisfactory for the Employment Judge to attempt to recapture evidence

received at a one-day hearing more than a year ago when he did not make findings upon it at the time. A one-day hearing will be necessary in any event: it is much better that it should start afresh.

30. There are four concluding points to mention.

31. Firstly, Mr Maggs did not take a **Kumchyk v Derby City Council** point: that is to say, he did not argue that the Respondent was unable to take this point on appeal because it had not been taken below. In my judgement he was quite right not to take such a point, and I would have rejected it if he had done so. There are some cases where a principle is so well-established that an Employment Tribunal might be expected to consider it as a matter of course: **Langston v Cranfield University** [1998] IRLR 172. In a case concerned with worker status an Employment Tribunal ought always to consider whether one party is carrying on a profession or business undertaking in which the other is client or customer.

32. Secondly, cases which concern the question whether a particular activity amounts to a "profession" for other legal purposes will be of limited value. The "worker" definition is directed to distinguishing between the "intermediate class of workers" and those self-employed persons who are in business on their own account and undertake work for their clients or customers. These self-employed people may or may not be professional for other legislative purposes.

33. Thirdly, nothing turns in this appeal on the Employment Judge's use of the language of mutual obligations. He was entitled to conclude that the Claimants contracted to perform their work personally for the Respondent.

34. Fourthly, I did not hear any substantial argument on this appeal concerning the contractual provision relating to sharing of profits. Mr Jennings suggested that the willingness of an actor to enter into such an arrangement might be indicative that he was carrying on a profession or business undertaking, but he put it no higher than that. I am inclined to think that he was right to take this approach, but I heard no sustained argument on the question and I express no concluded view upon it.