Appeal No. UKEAT/0330/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 November 2013

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

BOSS PROJECTS LLP — APPELLANT

MR G BRAGG — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MATT BODDINGTON (Representative) Acumen Legal Services Ltd 13 Challenge House Sherwood Drive Bletchley MK3 6DP
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

JURISDICTIONAL POINTS – Worker, employee or neither

Whether person unequivocally classified in written contract as in business on his own account was a "worker" as defined by the **Working Time Regulations 2008**.

THE HONOURABLE MR JUSTICE MITTING

1. In early 2012 the Claimant, a 55-year-old experienced but unemployed scaffolding supervisor, was looking for work. On 1 March 2012 he was interviewed by senior managers of Mears Ltd for, as one of them put in a letter of 8 October 2012 addressed to the Employment Tribunal, "the position (of) scaffolding supervisor". Mears Ltd provided external planned maintenance to Brighton and Hove City Council. The Claimant later became a direct employee of Mears Ltd, but he was not initially retained as a direct employee. A chain of contracts were entered into. Mears Ltd contracted with Potensis Ltd for the provision of sub-contractors. Potensis in turn contracted with Boss Projects LLP (Boss) for their provision. It is not clear from the Judgment and Reasons of the Employment Tribunal whether Mears paid Potensis and Potensis paid Boss or whether Mears paid Boss direct for the provision of such provisions, but Mr Boddington tells me, and I readily accept, that Mears paid Potensis and Potensis paid Boss.

2. Boss then paid the individuals who performed the services. On the same day as he was interviewed by managers of Mears Ltd, the Claimant signed a contract with Boss. There is nothing in the Reasons of the Employment Tribunal to indicate in precisely what circumstances he came to sign that contract, whether he was told to go and do so by the managers of Mears, whether it was in the same office as they occupied, or whether different arrangements were made. The contract contained the following express terms. In the extracts that I am going to cite, the contractor is Boss, and the sub-contractor is the Claimant.

> **"The Subcontractor is in business on his own account independently and has skills and abilities and can offer services which may be of use to the Contractor in meeting the obligations of the Contractor to its clients (Contractor's Clients) from time to time...**
>
> **2. The Subcontractor agrees to provide independent services to the Contractor's Client on behalf of the Contractor ("the Works") in respect of each Project...**
>
> **4. The Contractor and the Contractor's Client shall not control, or have any right of control as to how the Subcontractor is to perform the Works.**

..

7. The Subcontractor may, at his absolute discretion, send a substitute or delegate to perform the Works. The Subcontractor shall be responsible for providing a suitably qualified substitute or delegate of his own choice with the level of training and skills necessary for the Project.

8. Where a substitute or delegate is sent by the Subcontractor, neither the Contractor nor the Contractor's Client shall have any contractual or financial relationship with the substitute or delegate. The Subcontractor is solely responsible for arranging payments to the substitute or delegate and the substitute or delegate is answerable only to the Subcontractor.

9. The Subcontractor may, at his absolute discretion, hire his own assistance in order to complete the work. Such hired assistance will be answerable solely to the Subcontractor and the Contractor or the Contractor's Client shall have no contractual or financial relationship with the hired assistance. Payments to the hired assistance will be the sole responsibility of the Subcontractor.

...

16. The Subcontractor will not be entitled to receive holiday pay or Bank Holiday pay or special absence pay in any circumstances.

17. The Subcontractor will not be entitled to receive sick pay in any circumstances. The Subcontractor will bear the costs of his own health insurance which he may arrange at his own discretion. The Subcontractor agrees he is not entitled to any employment law rights which may be available to direct employees.

...

33. The Subcontractor is free to undertake other Contracts for Services for other parties at any time either before, after or concurrently with this Contract for Services or any Projects.

34. The Contractor acknowledges and agrees that he does not have first call on the services of the Subcontractor and cannot require the Subcontractor to give the Contractor any priority of another contractor.

...

37. The Subcontractor agrees that as an independent business on his own account he is responsible for his own tax and National Insurance.

...

39. Both parties agree and intend that this legal relationship is one of Contractor and independent Subcontractor and specifically is not a relationship of master and servant or employer and employee.

...

41. Both parties acknowledge that their contractual relationship is governed by this Contract for Services as a legally binding agreement and this Contract for Services is the whole agreement governing the contractual relationship between them.

...

46. In the event that the Subcontractor states, suggests or alleges (directly or indirectly) that he is or was an employee or worker of the contractor then the Subcontractor will indemnify and keep indemnified the Contractor (forthwith, on demand in full and without any set-off, counterclaim or any other deduction whatsoever) in respect of any claims, taxes, damages, liabilities and expenses, interest, penalties or any other costs (including legal fees) that the Contractor may incur or sustain or be put to and which arise or are connected with the Subcontractor making the allegation mentioned above."

3. The remaining terms of the contract which I have not cited are consistent with those terms. The contract also contains a paragraph headed "Self-employed status declaration" in which the self-employed status of the person in the shoes of the Claimant is made plain by his own declaration. Curiously the only operative word not defined in the sub-contract is "client".

4. As is apparent from the terms that I have cited, as far as could be achieved by express contractual terms, this document meant that the Claimant was neither an employee nor a worker as defined by regulation 2(1) of the **Working Time Regulations 1988**. It was, in other words, a watertight contract.

5. In circumstances such as these, however, written contractual terms, however watertight, do not provide a complete or reliable definition of the nature of the relationship between the parties to the contract. In **Autoclenz Ltd v Belcher & Ors [2011] ICR 1157,** a contractually simpler chain, Lord Clarke, at paragraph 34, cited with approval observations in the Court of Appeal in that case by Aikens LJ:

> **"The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in paragraph 92 as follows:**
>
> > **'I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so....'**
>
> **35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."**

6. In his reserved Judgment, after what Mr Boddington tells me, and I accept, was a barely adequate time to hear the case, Employment Judge Emerton adopted the **Autoclenz** approach, as indeed he was bound to do. He expressed his conclusions at paragraphs 17 and 20-21.

> **"In this case, the Tribunal has no hesitation in concluding that the Claimant was not carrying out any profession or business undertaking and that the Respondent was not a client or customer of any such business undertaking. Indeed, the slightly odd method of recruitment and then remuneration arrangements strongly militate against such a conclusion as to client status for the Respondent. The reality is that the Respondent's involvement was to be the vehicle through which the Claimant was paid, and he had no choice but to contract with the respondent business if he was to accept and carry out the offer of paid work; which had been arranged with Mears Ltd. In any event, the Tribunal draws a clear distinction between the reality of the situation compared to what the position would have been had there been a contract with the Claimant's company (which had been wound up 18 months previously) and had the Claimant supplied equipment and used other employees. The reality was that the Claimant was an experienced scaffolder, albeit unemployed and immediately available for work, and had been through a selection process and had been recruited by Mears as an individual who plainly was seen as having the right experience and skill set which matched the requirements which Mears Ltd had for an individual. He did not bring any equipment with him or take any business risk; all equipment and training was provided by Mears Ltd, and all he did was to provide his own labour and skills, as the person Mears had recruited to carry out the task. The Tribunal is confident that that situation falls well outside anything that could be the carrying on of a business undertaking and certainly not a profession.**
>
> **...**
>
> **20. ... The Claimant had personally been selected through a selection exercise and interview by the client, expressly because of his own personal experience and skills. It was abundantly clear from discussions he had with Mears Ltd that he was expected to carry out the work personally, and indeed they acted very much as if there was an employer/employee relationship, and expected him to carry out management instructions within fixed working hours.**
>
> **21. The Tribunal accepts the fact that there was no intention on the Claimant's part to substitute, and more importantly that he accepted that there would in reality be no possibility of him doing so because Mears Ltd wished him to carry out the work personally, and were not prepared to allow anybody else to carry out the work. That being the clear intention of the Claimant and of Mears, the Tribunal considers it flies in the face of commonsense and the evidence to come to the conclusion that the Respondent can ever have intended to rely on a substitution clause which the end-user client would not countenance. There could be no business efficacy in such a term which would necessarily involve (if it was to be relied upon) the respondent, as a commercial contractor, purporting to do something which went against the interests and intentions of the Client."**

7. This led Judge Emerton inexorably to conclude that the Claimant was a worker and so to award him the holiday pay to which that status entitled him. Thus far, it could not sensibly be contended that the Employment Judge erred in law in his approach to the issue or reached a conclusion of fact which was perverse, and Mr Boddington did not pursue that argument. Boss contends, however, that in reaching that conclusion the Employment Judge took into account a

document, the letter from Mears Ltd to the Employment Tribunal of 8 October 2012, which in fairness to Boss he should not have done. As well as describing the Claimant's position as a scaffolding supervisor, as I have already noted, the letter went on to state the following:

> **"He was selected on the strength of his qualifications, experience and perceived ability to communicate with the staff and subcontractors of Mears Ltd and tenants of Brighton and Hove City Council.**
>
> **His work primarily involves first and weekly routine inspections of scaffolding erected for response and planned maintenance of Social Housing. He also carries out post inspection visits on completed repairs.**
>
> **He works fixed hours to a prescribed system and received initial induction training and a full issue of personal protection equipment. It would not be acceptable for him to send someone else to carry out his duties for a position of this specialised and important nature."**

8. In his reserved Judgment and Reasons, the Employment Judge expressly took that letter into account. He did so in a context in which he took it as supportive of the evidence of the Claimant, which he had already accepted as truthful and reliable. He did so in paragraph 11.6 of the Reasons:

> **"The Tribunal accepts the Claimant's evidence and the contents of Mears Limited a letter of 8 October 2012 that he was personally selected to fulfil the role which they seek to fill and that he was expected to work fixed hours carrying out inspections of scaffolding and post-inspection visit on completed repairs. He was not expected to provide any equipment, he received induction training and was issued with equipment by Mears. The Tribunal accepts that Mears, having personally selected the Claimant, would not have found it acceptable for him to send anyone else to carry out his duties."**

9. Before me Mr Boddington has submitted that, because the Claimant did not expressly rely on that document when asked upon what documents he intended to rely by the Employment Judge, so it was unfair of the Employment Judge to take it into account when reaching his decision. In written submissions Mr Boddington contended that because the Claimant did not expressly rely on it, he did not have the opportunity to address or challenge its contents. In my judgment that contention is ill-founded. It was obvious from the start that the **Autoclenz** issue was going to be determinative of this case. The written sub-contract provided, if it was as it stated the entire contract between the parties, a complete answer to the Claimant's

case that he was a worker or employee. It was therefore open to Mr Boddington, had he thought it prudent to do so, to address the letter in his submissions to the Employment Judge. He submits that the Employment Judge should have raised with him the possibility that the letter might be relied upon. I reject that submission. The Employment Judge was given the bundle of documents. He asked the parties to identify those on which he relied, but no-one sought to suggest to him that he was not entitled to take into account any of the documents not so relied upon that were in the bundle given him. He cannot have been expected to have read every page of the documents before he reserved his judgment and reasons. Unless there is an obligation on a judge coming across such a document in the course of writing his reasons to send a letter out to the parties inviting their submissions on it, which there is not, he made no error of law in adopting the course that he took.

10. Further, given that the **Autoclenz** issue was at the heart of this case and if, as appears to have been the case, Boss were running it as a test case as well as a simple ground of resistance to the claim, then Boss should have considered whether or not it should have deployed its resources to present the full commercial picture to the Tribunal. Its own contract with Potensis was not put in evidence. No one issued witness summonses to Mears Ltd or Potensis to produce the contract between Mears Ltd and Potensis, although I am told that an effort to get the author of the letter to attend the Tribunal and he did not. A great deal was left unexplored. What the Employment Judge had to do was to decide, on the basis of evidence about the opposite ends of this chain of contracts, what the reality was, but he would undoubtedly have been helped to reach a conclusion about the true nature of the underlying relationships by having the intermediate contracts produced and explained.

11. Even if it was not right for the Employment Judge to place any reliance on the letter of 8 October 2012, his Judgment and Reasons would not be open to attack. He made it clear that

he was relying on his own commonsense analysis of the nature of the relationship between the Claimant and Boss and that that was substantially informed by the Claimant's own evidence, which he accepted to be true and reliable. That led him to the justifiable conclusion that the Claimant was a worker. Boss, having chosen to argue the case on the basis only of the watertight drafting of its own written contract, in circumstances in which they knew that the law was likely to look elsewhere to discern the true nature of the relationship, cannot now complain when that defence proved flimsy. It is not surprising, given the **Autoclenz** approach, that their resistance to this claim failed. The Employment Judge made no error of law or procedure in reaching the conclusion which he did.

12. For those reasons this appeal is dismissed.