EMPLOYMENT TRIBUNALS

Claimant: Mr M Gleave

Respondents: 1. Rochdale Training Association
2. Jill Nagy
3. Michelle Greenwood
4. Kevin Beck
5. John Huxley

HELD AT: Manchester **ON:** 5 July 2017

BEFORE: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: Mr K Grogan, Lay Representative
Respondents: Miss J Gould, Solicitor

JUDGMENT having been sent to the parties on 13 July 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented to the Tribunal on 2 January 2017 Mr Gleave claimed that he was unfairly constructively dismissed, when he resigned from his employment on 10 October 2016. He also alleged he was discriminated against on the grounds of sex. The respondents resisted the claims.

2. The matter has been considered three earlier preliminary hearings, and following the latest of those which took place on 19 April 2017 before EJ Holmes the respondents applied for the claims to be struck out as having no reasonable prospect of success or that the claimant be ordered to pay a deposit.

3. The two claims, of unfair dismissal and discrimination were distinct although the events around them all relate to the ending of the claimant's engagement with the respondent.

4. I record simply that I saw the documents in the bundle. I have heard the oral evidence of Mr Gleave in relation to the first part of the claim concerning his employment status. I heard submissions in relation to that, told the parties what my decision was and that I would give judgment and set out the legal and factual basis of that at the end of the hearing.

5. I then heard the argument for and against the ordering of a strike out of any of the allegations of discrimination or the making of a deposit. I refused the application to strike out the allegations of discrimination but I ordered deposits. For completeness I record that the claimant subsequently failed to pay the deposits and those allegations, save one, were struck out subsequently for that reason.

6. The remainder of these reasons concern my judgment that the claimant was not an employee for the purposes of bringing a claim of unfair dismissal.

7. I was assisted by a skeleton argument from the respondents which identified the relevant authorities.

8. I was satisfied on the balance of probabilities that the claimant was not an employee of the first respondent. I was satisfied that he did not have at any stage a contract of service which is the statutory test that has to be applied. My reasons for that finding are as follows.

9. The first respondent provides a variety of training and assessment opportunities. The claimant appears to have joined the organisation in the late spring or the summer of 2014. There was no written document of the basis of his engagement at that stage. He elected for his own purposes, in relation to a tax difficulty that he had, to be paid on presentation of invoices. Again, for tax purposes apparently asked for the payment to be made to his partner's bank account. Nothing turns on the ownership of the receiving bank account.

10. The claimant wrote an email to Mr Beck, his line manager, on 1 September 2014 (page 81A) indicating what he needed and how he could earn money having regard to the possibility he might be made bankrupt because of action by HMRC. It turns out that HMRC has lost an appeal that Mr Gleave made and so his position financially is much more secure than it was.

11. There were presented to me a series of invoices which indicate the sort of sums he was earning. He was paid a fixed rate per hour. It was originally £15 an hour and then latterly £20 an hour. I was also provided with an analysis (page 101A) of Mr Gleave's hours between June 2014 and October 2016.

12. In the first three or four months up until October 2014 he was working not at the first respondent's premises but on a peripatetic basis providing assessment and training for apprentices, teachers, and those whom the first respondent served, and the hours that he worked were relatively limited, ranging between 12 and 33 hours a month. Thereafter the number of hours he worked increased and looking

through the information, and I exclude the month of October 2016 because he did not work a full month, the hours were a minimum of 77 hours and in one month he worked as many as 153 hours. The claimant worked four days a week.

13. There was a discussion about which hours he would work, but essentially it was a demand led business, and that is evidenced by the agreement into which the parties entered in July 2015 signed by Ms Nagy for the company and by Mr Gleave who was described as the "associate".

14. It is clear from that agreement that there was no obligation on the company to offer work of any particular kind or at any particular time, and there was no obligation upon the claimant to accept the offer of work.

15. A number of other indications are present in the document. There was a requirement that the associate disclose all other providers for whom they are working and any new workthey obtain. There is no requirement exclusively to serve this company. It is clear that no part of the work to be carried out under the agreement could be subcontracted, given that it was subject to Ofsted inspection and there were regulatory requirements as to the performance of the work and delivery including, I understand it, DBS vetting. There was also an undertaking by the associate to indemnify the company against any liability, loss or damage arising from any negligence but no requirement to have in place insurance to support that. There was a non-solicitation clause and there was provision for termination. But there was no reference to employment, continuity of employment, or the start date of employment. Nor were any of other indications of employment such as notice in accordance with statutory provisions or for payment in respect of holidays.

16. It is the first respondent's case, and it was seriously disputed by the claimant, that some people are engaged by it under contracts of employment and some on this "associate" basis.

17. It was further the claimant's evidence to me that although he would not in practice have refused work, because he was only working he tells me from June 2014 to the end of this contract for this company, he had in the past worked for others and he has subsequently worked for others.

18. He had a LinkedIn page which suggested he was running a business, or at least acting on his own account, but he accepted in evidence that had he chosen to do so, when asked to take on a particular aspect of training he could have done so.

19. In November 2015 there was email correspondence suggesting that he might if he wished take a contract, by which was understood a contract of service. He specifically declined that opportunity. It was financially advantageous to him not to do so.

20. Those essential facts, relied upon in the first respondent's argument, point to a finding which I now make that the irreducible minimum of mutual obligation, namely the obligation to provide work and the obligation to perform the work, were missing in this case.

21. In my judgment, although he chose only at this time to work the Rochdale Training Association, this claimant was, so far as the definition of an employee is concerned in the Employment Rights Act 1996, not an employee because he did not work under a contract of service. For that reason the claim of unfair dismissal was struck out.

Employment Judge Tom Ryan

Date 4 October 2017

REASONS SENT TO THE PARTIES ON

.5 October 2017

FOR THE TRIBUNAL OFFICE