



EMPLOYMENT TRIBUNALS

Claimant: Mr R Surtees

Respondent: Clearly Bottling Ltd

Heard at: North Shields

On: 9th October
Deliberations 24th October

Before: Employment Judge Pitt

Representation

Claimant: Ms Alistari of Counsel

Respondent: Mr Bunting of Counsel

JUDGMENT

1. The claimant was an employee of the respondent from 11th May 2012.
2. Subject to there being a series of transfer he was an employee from May 2009

REASONS

1. This is a public preliminary hearing to determine the status of the claimant; the issue is was he an employee, a worker or a contractor. In effect this hearing will determine whether this Tribunal has jurisdiction to hear claims from the claimant.
2. I read witness statements and heard evidence from the claimant; Christopher Rees, Respondent's Commercial Manager; Maurice Newton, formally the respondent's Sales and Marketing Director. I also read a witness statement from Martin Thornton a consultant working for Respondent, it is not clear in what capacity although on the company Structure he is described as Managing Director; Unfortunately he was able to attend this hearing so where there is a clash in the evidence, his has not been tested before me and therefore carries less weight.

3. I had a bundles of documents from both parties which included the contracts between Edge Sales and Marketing and the respondent; emails between the claimant and the respondent and various other documents.
4. There are 4 separate periods which I need to consider;
 - 1)18th January 2009- 3rd January 2011 contract between Edge Sales and Marketing Ltd and Villa Drinks Ltd;
 - 2)3rd January 2011- 11th May 2012, the contract between Edge and Villa Soft Drinks until 2011 - 2012;
 - 3)11th May 2012- May 2014 Edge contracted with the respondent predecessor;
 - 4) May 2014 to May 2016 when RGS Sales and Marketing contract with the respondent
 - 5)During the period November 2009 - November 2012 Edge had a separate contract with a company named Hartridges.
5. The facts are in the main agreed it is the interpretation of them that leads to this hearing. The claimant was the part owner of a company named Edge Sales and Marketing; this company was initially established by the claimant and a business partner to carry out sales and marketing; in 2007 the claimant's partner left he business. Following that Edge entered into a contract with Villa Drinks Ltd to carry out work as a Sales and Marketing Director. In order to do so the claimant decided that a contract held by Edge to market a ginger beer would be relinquished. It was agreed between Mr Slatcher, owner of Villa and the claimant that that Edge would invoice Villa for the work carried out by the claimant. From November 2013 Edge also carried out work for a company called Hartridges; the claimant told me and there is no evidence to the contrary that Villa, that is to say Mr Slatcher, wished to pursue them as a potential customer therefore it was agreed between the claimant and Mr Slatcher that he could carry out work for Hartridges and receive payments from them. In 2011 Villa appears to have gone into liquidation; it was effectively split into two companies; Villa Soft Drinks Ltd and Contract Bottling Limited who later became the respondent. Edge entered into a contract with Villa Soft Drinks on the same terms as the previous contract plus a 10% equity stake. Edge continued to carry out work for Harrington's
6. In May 2012 the respondent purchased Villa Soft Drinks. At this time the claimant queried if the 12 month notice period in the contract would be honoured as he assumed the contract would be terminated. He was advised his contract would simply switch to CBL. Therefore Edge entered into a contract with the respondent on the same terms as previously and retaining its equity share.
 - 6.1 In November 2012 the contract between Harrington's and Edge was terminated by Harrington's,
 - 6.2 In 2014 the claimant established a new company RGS Sales and Marketing Ltd who contracted with the respondent in the same terms as before with no break in continuity.

6.3 In May 2016 the claimant formally became an employee of the respondent.

7. The claimant's evidence was that he was offered a position, as an employee working in sales, at Villa by Mr Slatcher. It was Mr Slatcher who wanted to pay the claimant through his company Edge. The claimant was to submit invoices monthly and they would be paid the following month. The claimant agreed to this because he felt fortunate to have a job as a result of the recession. He relinquished his other business interests to concentrate solely on working for Villa.

7.1 This role encompassed sales, promotions, new product development. The claimant believed he was an employee. In relation to Edge taking on work for Hartridges the claimant's account was that this was at the insistence of Mr Slatcher. They agreed between themselves that the claimant could offer his services to the company to secure new contracts with supermarkets. Mr Slatcher, the claimant says, was happy for the claimant to receive a commission payment from Hartridges.

7.2 In relation to the transfer to Villa Soft Drinks the situation was as follows; The intellectual property of Villa was purchased by John Hodgson, who was a customer of Villa, he also bought the rights to the contracts between Villa and their major customers; supplying them with drink purchased from the respondent. The respondent, in effect bought the manufacturing side of the business. The claimant entered into a contract with Villa Soft Drinks again using Edge to invoice for his work. The claimant's case is that Hodgson appointed him as the Sales and Marketing Director.

7.3 All parties agree that as from 1st July 2016 a formal contract of employment was entered into between the claimant and the respondent.

Submissions

8.1 Counsel for the respondent set out his submissions in writing and supplemented them orally. Having set out the law the respondent addressed each of the 'tests' to argue why the claimant was not a worker nor an employee.

8.2 Counsel for the claimant similarly addressed me on the 'tests' as to why the claimant was an employee.

The Law

9. The starting point is section 230 Employment Rights Act 1996 defines an employee and worker thus:

An employee 'means an individual who has entered into or works under a contract of employment'

'A contract of employment means a contract of service...'

A worker means

a) an individual who has entered into or works under contract of employment or

(b) Any other contract whereby the individual undertakes to do or to perform personally any work or service for another party to the contract

whose status is not by virtue of the contract that of a client or a customer of any profession or business undertaken carried out by the individual.

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 2QB 497 gives the classic exposition of a contract of service. It cites out three conditions to be considered.

Autoclnz Ltd v Belcher 2011 UKSC41 is the leading authority reviewed the various tests and concluded that the label attaching to the contract is not necessarily the reality; the Tribunal is entitled to look at all the circumstances, including whether there was inequality of bargaining power between the parties.

The other tests which are frequently relied upon are; control; mutuality of obligations; personal service; organisational or integration; economic reality. Factors to be taken into account include whether the contract has to be personally performed; financial risk; provision of equipment.

Discussion and Conclusion

10.1 Personal Performance

None of the contracts refer to personal service or substitution. Throughout the various contracts identified the claimant never asked to or did engage anyone else to carry out the work. It is unclear therefore whether the contract required personal performance. There are two matters which suggest that it may be for personal performance. First, from 2012 it was agreed between Maurice Newton and the claimant that he would be paid half 'pay' for periods when he was on holiday; the agreement was the claimant would stay connected and deal with any queries via his laptop at such times. There is no discussion here about another person taking over the work on behalf of either of Claimant's companies. In addition I note that the invoices simply state 'Management Fee'; none of them refer to who was carrying out work or what hours were being worked; or which project or customer was being worked on. This suggests to me that the respondent knew that only the claimant was carrying out the work and this is what the respondent required.

Mutual Obligation

10.2 That is to say did the claimant provide his own work and skill in performance of service for the respondent and was subject to control of respondent? I have seen the amended contract between Edge and the respondent (page 41) which sets out the roles and responsibilities. This came about as a result of Martin Thornton wishing to 'be clear as to what we both want'. This led to Mr Thornton adding in a section headed Roles and Responsibilities. Stating in a further email 'I think it is important to agree what you are to do.' He adds 'It is also a mirror image of Terry's.

10.2.2. Clearly this amendment is setting out exactly how the respondent want Edge to perform the contract. Interestingly there is reference to Terry Payton's contract who is an employee of the respondent.

10.2.3 Having examined both contracts they are almost an exact copy except that the Edge contract has two additional

responsibilities namely; 'Specific focus is required on CBL margin development for responsible customers' and 'Implement CBL credit control strategy and where relevant take specific action for individual customers who do not adhere to credit guidelines.' The whole way in which this is drafted is suggestive of the respondent being in control; if this were a contract of service I would have expected this to be more broadly framed.

- 10.2.4 Further evidence may be seen in emails from Maurice Newton on 12th Sept 2013, that it is not anticipated that the claimant will work for anyone else '...Martin is under the impression that you are going to dedicate your time to CBL with this kind of package....' although Maurice suggest, 'of course what you get up to in your own time is up to you....'
- 10.2.5 I have considered these two sentences carefully; when read in context of the contract as a whole and noting that the role was substantially the same as an employees'; this appears to be contract to work in a full time role. Whilst it may that the claimant has free to do with as he wished it appears to me that this role would require the entirety of the working week. In coming to this conclusion I have noted clause 9 which reads:
'Edge shall not represent or sell any new product that can be judged to be closely related to CBL products without approval from CBL. If this takes place without written approval CBL has the right to terminate this agreement.'
- 10.2.6 On the evidence I heard the only other work that Edge carried out was the sales and marketing of soft drinks. If this were a genuine contract for services there would be no such restriction. The above term also supports the argument that the respondent was exercising control over the claimant and the work he could carry out. This is further supported by the detailed 'job description' incorporated into the contract. Whilst I accept that the claimant was at liberty to carry out his work at his convenience he clearly would have to carry out many tasks at times convenient to the respondent; e.g. in conjunction with the Sales and Marketing Director, decide pricing and promotional activity.'
- 10.2.7 Further the contract stipulates; 'To carry out additional task which may be required from time to time within the organisation and the overall business objectives of the company.' This is a clear indication that the claimant was subject to the control of the respondent

Financial risk

- 10.3 On all the evidence I heard the claimant was not taking any risk financially when Edge entered into any of these contracts. He was not risking his

capital to carry out his tasks. Mr Bunting on behalf of the respondent points to the contract with Hartridges as one which carried a financial risk; I do not accept it is so simple. The contract with Hartridges paid the claimant on a commission basis; there was no capital outlay and if he carried out the work he received a bonus for it. If all the contracts Edge had were on this basis I might agree but this is not the case.

- 10.3.1 I examined the invoices submitted by Edge to the respondent; from June 2012 until November the claimant submitted invoices for £5000; plus expenses. In December the figure reduced to £2750 until May 13, although during some of this period it is described as 'temporarily reduce management fee'. From Sept 2013 the invoice figure is £4000 plus expenses this is constant until Sept 14 when it becomes £3000 and from Dec 14 it is £4000 plus expenses. These changes seem to coincide with contracts being re-newed.
- 10.3.2 In looking at the invoices the claimant was paid the same sum on a regular basis; other than the variations noted above the invoice figure does not fluctuate on a monthly basis. Therefore I concluded in relation to the contracts between Edge and the respondent and its predecessors there was no financial risk.

Provision of materials

- 10.4 This is a lesser factor to my mind; the only 'materials' were a phone a computer and a mobile phone. Other than the car there is no huge financial outlay. I also take into account that Edge was paid expenses for the claimant's motoring costs. This is unusual for an independent consultant to be able to claim any expenses. If the claimant were truly in business on his own account I would have expected him, as part of that business, to incorporate his expenses into the fee he was charging.

The label

- 10.5 The claimant's evidence was that it was Mr Slatcher who first proposed that the claimant be paid through his company Edge; there is no evidence to contradict this. There would be advantages to both contracting parties if it was accomplished in this way. I accept Mr Bunting's argument that these parties were on an equal footing; that is to say there was no inequality in their positions. Although the argument advanced by the claimant as to why he agreed to the contract are persuasive. It is not uncommon for an individual to contract on this basis in order to obtain the benefits which flow from it.

10.5.1 I also accept that the law suggests it may be a determinative factor where there is doubt; however in relation to the contract dated 13th May 2103, if there was no label this would clearly be a contract of employment; There is reference to the claimant adhering to health and safety policies and carrying out additional tasks plus not representing other companies in the same market place. These all scream out that an individual subject to these terms would be an employee.

10.5.2 There is also an important email (supplemental bundle pg. 1a) from Maurice Newton to the claimant. This sets out the terms that Martin Thornton was happy to offer in July 2013. It starts with the line 'Basis of £40k which Martin is happy that you continue to invoice as 'self-employed' rather than coming onto the payroll. 'The emphasis around self-

employed implies that Maurice, Martin and the claimant all knew that he was in fact an employee. It goes on to offer a number of bonuses and an index linked increase in March 2014. These are all indicative of an employment contract.

10.5.3 I also looked at the evidence surrounding the claimant becoming an employee. The claimant's unchallenged evidence was that the new CEO Finn O'Driscoll had concerns regarding the claimant's status; in fact it was these concerns which led to the claimant becoming an employee. The fears was that the respondent may be penalised by HMRC if it was subject of an inspection. This suggests to me that Mr O'Driscoll believed that the claimant was an employee and wanted to regularise the situation.

Integration

10.6 On the evidence I have heard it is clear that since the first contract with Contract Bottling Ltd the claimant has been integrated into the respondent organisation. He regularly attended meeting with the respondent employees at its offices in the North East. It appears that attendance was not optional; indeed at the conclusion of one of these meetings in November 2014 the claimant was to attend an appraisal with Martin Thornton. Interestingly the claimant was responsible for booking the accommodation for everyone for that meeting. It is agreed that this was not the first time the claimant carried out such a task and when asked why the respondents said it was because he was good at it!

10.6.1 In addition I have seen 3 business cards which the claimant used; one for Villa Drinks Ltd; one for Villa Soft Drinks Ltd and one for Contract Bottling Ltd. He also had an email account on the company server.

10.6.2 It is also agreed that the claimant appeared on the company structure which was on display in the office. This describes him as a sales consultant. I do not attach any weight to this description as many individuals in sales are described as a consultant, especially in a specialised markets where advice is required.

10.6.3 Further the claimant was privy to a substantial amount of confidential information such as the cost bible.

10.6.4 Clearly on the evidence I heard the claimant was fully integrated into this business.

10.6.5 The respondent raised one specific issue and is a series of emails from the claimant to Malcolm Newbiggin in July 2016 as evidence that the claimant was working for others. The claimant evidence on the point was that Newbiggin is a friend who was struggling to put together a power point presentation this was a favour for a friend. He used his personal email account.

11 Where does that leave us in terms of his status? I concluded that from no later May 2013 the claimant was an employee of the respondent. This is because; he was fully integrated into the company; the terms of the contract at that time are more akin to a contract of employment than that of an independent contractor. He was paid expenses and a fixed sum. He was not required to invoice for the hours of work he carried out In addition

he used the company name and email account in his dealings with others; He had access to sensitive information; he was subject to the control of the respondent, as shown by the term requiring home to carry out additional tasks. In addition I note that Mr O'Driscoll appears to have believed that the claimant was an employee prior to the employment contract being signed

12. In looking at the period May 2012 to May 2013; I considered the contract between the respondent and Edge; the terms are almost identical save for the 'roles and responsibilities' set out in the contract may 2013. Having accepted that the claimant is integrated into the company, does this contract change the position Vis a Vis his status. I do not consider that it materially affects the position; the emails which led up to the signing of 2013 contract suggest that the claimant was already working in the manner described by that contract.

12.1 The other difference is that at the time the claimant signed this agreement he was also carrying out work for Hartridges, I assume that the respondent were aware of this and had given approval under the agreement. This contract was entirely separate to the work he was carrying out for the respondent and ended in November 2013; it is this contract which gives me pause for thought. Notwithstanding what the claimant says about it the contract has now been in existence for some 3 years. It has never been discussed with the other owners John Hodgson and the respondent. I cannot see that the argument still holds that the respondent, or predecessor were still intent on trying to sign Hartridges up as a customer after this period of time. I must therefore look at it as a separate part of the business carried out by Edge. Does the existence of this contract contradict the claimant's assertion he was an employee of the respondent. I think it does undermine his position. I have seen no invoices nor was the claimant cross examined concerning the work he carried out for Hartridges. If Edge was carrying out any work for Hartridges, and I am by no means certain it was does this contract mean that the claimant was not an employee of the respondent? On the evidence I had before me, and taking account of the factors rehearsed above I concluded that it did not. The claimant was fully integrated into the respondent company, he had its business card and email address; he had access to sensitive information.

12.2 I concluded that from the period 11th May 2012 the claimant was an employee of the respondent.

13. In relation to the other contracts there is no evidence from the owners of those businesses as to their intention when contracting with Edge; I therefore accept the claimant's evidence that the contract position was in order for all parties to reap the benefits of this type of payment. All the other factors referred to above are also present. I specifically refer to the claimant's evidence in relation to the comments of John Lodge that he would transfer to the respondent. The same conclusions apply to the effect of the Hartridges contract.

- 14 I am satisfied that the claimant was an employee from 18th January subject to there being a transfers of undertakings from Villa Drinks Ltd to Villa Soft Drinks to Contract Bottling Ltd.
- 15 The tribunal does have jurisdiction to hear the claims.
- 16 The parties shall on or before 8th November inform the Tribunal if a full hearing is required. If so the parties shall also provide a time estimate, availability, a list of issues and suggested directions for the final hearing.

Employment Judge Pitt

Signed: 24th October 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

2 November 2017

P Trewick
FOR THE TRIBUNAL OFFICE