



Case Number: 2301777/2017
& 2301779/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Mrs Francesca Booth &
Mr Paul Booth

and

Respondent

Columbia International SA

Held at Ashford on 14 November 2017

Representation

Claimants:
Respondent:

Ms L Mankau, counsel
Ms T Barsam, counsel

Employment Judge Wallis

RESERVED JUDGMENT

1. The Claimants were employees of the Respondent company;
2. The claims may proceed.

REASONS

ISSUES

1. By claim forms presented on 5 July 2017 the Claimants claimed unfair dismissal, unpaid wages and breaches of the Working Time Regulations. The Respondent contended that the Claimants were neither employees nor workers. This was a preliminary hearing to consider the employment status of the Claimants.

DOCUMENTS & EVIDENCE

2. There was an agreed bundle of documents prepared by the Claimants; written statements from the witnesses; and written submissions from Ms Mankau and Ms Barsam. Ms Mankau produced a copy of the EAT and Court of Appeal decisions in Pimlico Plumbers Ltd and anor v Smith 2017 IRLR 323 ; Ms Barsam produced a copy of Bamford and anor v Persimmon Homes NW Ltd EAT/0049/04.
3. I heard evidence from Mr Booth, Mrs Booth, and Mr Murray, who was described as the authorised representative of the Respondent.

FINDINGS OF FACT

4. On 10 May 2013 an advertisement appeared in the 'The Lady' magazine, placed by the Respondent. It read 'Concierge couple for Wealden estate providing house maintenance and keeping – heating, water, light, pool, garden. Work with whole estate team, duties can fit your skills. One must always be on site 24/7 unless relieved by another staff member. Contact Box 15550.'
5. The Claimants, Mr and Mrs Booth, applied and were successful. They signed what was described as a 'consultancy agreement'. The parties were the Respondent and the Claimants. It is useful to set out the terms of the agreement.
 - a) Scope of activities: the consultants are engaged as guardians for security and general services of Bedgebury Estate in Kent, UK.
 - b) Description of duties: general services including maintenance of heating, plumbing, electricity, security, driving, gardening, cleaning and house decoration assistance.
 - c) Place of work: Bedgebury Estate.
 - d) Beginning and duration: the Consultants shall take up their duties on 17 June 2013. The Consultants relationship is concluded for the duration of six month (sic) with a possibility of renewal. During this period, the Consultants relationship may be terminated any time including any renewal period, subject to a 30 days notice.
 - e) Working hours: The Consultants' working hours shall be at the Columbia's discretion taking into account a twelve hours rest per day and according to plans made from time to time under mutual agreement, consistent with the total security of the estate.
 - f) Retainer: The Consultants shall receive a monthly retainer of GBP 1,700.00 paid onto (sic) bank account as shall be indicated by the Consultants, or paid by check (sic) or cash, not later than at the end of each month of services, subject to any deduction provided in this agreement. In addition, the Consultants will be provided guest housing including electricity, gas, water and tax charges covered, starting 17 June 2013.
 - g) It is specified and agreed by the Consultants that their guest housing does not constitute a lease or right to occupy, as it is not paid for, and hereby the Consultants agree that they have no license to occupy under any statutory right of occupation or renewal of occupation. Columbia has the right at any time to change the location of the guest

house as appropriate to the development of Bedgebury Estate, and its use.

- h) The Consultants agree to keep the designated guest housing clean and tidy and clear of rubbish and to leave the same in clean and tidy condition not materially worse than existing at the day of the termination of their relationship.
- i) Visitors: All visitors to the guest house and Bedgebury Estate must be pre-approved by Columbia.
- j) Taxes and Insurance: The Consultants certify that they are acting on a freelance basis and that they do not consider to be bound to Columbia by and (sic) employment agreement for a fixed or indefinite period. The Consultants certify that they pay all their obligations under public law, particularly their taxes and insurance premiums, including health and accident insurance and national health contributions, Columbia being fully discharged therefrom (sic).
- k) If Columbia is legally bound to pay for such duties and taxes on behalf of the Consultants, or to withhold part of their retainer to this end, any payments made by Columbia for this purpose shall be deducted from the Consultants' retainer.
- l) Discipline: the Consultants shall personally and loyally perform the tasks entrusted to them pursuant to the agreement, and shall constantly see that the interests of Columbia and of the persons in the service of whom they are consulting be protected. The Consultants shall strictly comply with the internal rules and regulations of each of their places of work.
- m) Non-competition: the Consultants have a full-time contract and may not enter into other consultancy agreements or perform other activities affecting their working capacity for the duration of this agreement.
- n) Confidentiality: for the duration of this agreement, and for thirty years thereafter, the Consultants shall keep strictly secret any facts, information or documents of which they may be aware during their agreement.
- o) Retainer assignment: Columbia already rejects any assignment or pledging of retainer by the Consultants.
- p) Reference: all points declared in the CV, supporting documents and references are hereby declared by the Consultants as true and any discovery to contrary (sic) would be considered gross negligence and render this agreement immediately nil (sic) and non-valid without prior

notice. This agreement is, furthermore, subject to satisfactory references.

- q) Amendments: any amendments or changes of this agreement shall be subject to a written agreement.
 - r) Jurisdiction and law: this agreement is governed by the laws of (the) United Kingdom and all disputes that might arise will be resolved exclusively by three arbitrators.
6. I noted that the agreement has a flavour of being drawn up by someone who was not used to drawing up such documents, or perhaps not familiar with English law and tax/NI contributions. Notwithstanding that, we have to look at what the facts of the matter show was the true nature of the relationship.
 7. I noted that the agreement was silent about any obligation on the part of the Respondent to offer work, or the Claimants' entitlement to refuse it. I found that the wording of the agreement suggested that it was common ground that the work was there to be done by the Claimants, and that they would be paid for doing it 'at the end of each month of services'.
 8. Mr Murray tried to be helpful when giving his evidence, but he accepted that he only visited the estate when the owner attended, which he suggested was about once every six weeks, and occasionally visited the estate without the owner. The main house was being converted from a private school back to a dwelling, so work was being carried out there throughout the relevant period by contractors. I found that Mr Murray relied upon the estate manager Mr Fletcher to liaise with staff, including the Claimants, and his evidence was largely based on what he said Mr Fletcher had told him.
 9. In passing there was a dispute about how often the owner, who apparently lives in Switzerland, took his children to the estate. Despite it being put to the Claimants in cross examination that they visited for about 14 days in three years, Mr Murray confirmed that the 14 days related to the family staying in the house itself, and that in fact they visited each year during the school holidays for Christmas, Easter and a couple of weeks in the summer, staying in one of the guest houses because of the work being carried out in the main house. This confirmed the Claimants' evidence, and in particular the evidence of Mrs Booth.
 10. I found that Mr Murray had no first hand knowledge of the events on the ground at the estate, and I preferred the evidence of the Claimants. I accepted that Mr Fletcher had reported some problems to Mr Murray, and that Mr Murray drew up an organisation chart in January 2016 to show the reporting lines and to try to 'relieve tensions', because staff were not getting along. The chart did not show Mrs Booth. Mr Murray said that the reason for this was that he had heard that she did not work. I accepted Mrs Booth's evidence that she cleaned the guest houses and prepared them for the

- guests. She organised the shipments of the owner's belongings. She also looked after the owner's children on occasions. One of her most important roles was supporting Mr Booth in respect of security. I found that the Claimants were obliged to unlock the gates each morning for the workmen to attend, and lock up at night and set the alarms. If an alarm went off at night, which apparently happened frequently, the Claimants would attend and ensure that security was not breached.
11. The chart showed four 'authorised representatives', including Mr Murray, at the top of the tree. Below them was Mr Fletcher, the estate administrator. Reporting to him was Mr Booth 'House and Security Manager' and Mr Boswell, the gardener. Mr Buss the maintenance person reported to Mr Booth. Ms Wootton, described as 'house help/gardener' reported to Mr Boswell. I found that this indicated that Mr Booth was an integral part of the team. I found that Mrs Booth should have been shown on that chart, as she was also part of the team. I found this for three reasons.
 12. Firstly, as set out above, she did carry out various duties. Secondly, the advertisement was clear that either Mr Booth or Mrs Booth were required to be on site 24/7. Mr Murray confirmed that this was the case, for security. He said in evidence that if the Claimants wanted holidays, or be absent from the estate, they would have to arrange security cover, and that the Respondent might still refuse any holiday request. The Claimants' evidence was that they were never able to persuade other members of staff to provide cover for them. In fact, the Claimants took separate holidays, on only two occasions, so that one of them was always on site. I noted that an email in the bundle from Mr Fletcher to Mr Booth dated 5 November 2015 points out that 'you are employed as maintenance and security manager, you live on site and are paid to work weekends. ...I am instructing you to open the gates on Saturday and Sunday as part of your weekend duties.'
 13. Thirdly, the job description in the bundle set out a long list of specific tasks for Mr Booth to 'create and execute a plan for scheduled, preventative and responsive maintenance of the buildings' and so on, and then stated 'The job holder's partner will be called upon to help the owner and his family with a variety of duties when they are in residence and also to complete other tasks as and when asked to by the owner and his family. She will report her activity to the estate manager by email'. I found that this clearly indicated that Mrs Booth was required to carry out those duties when required, in addition to her role in security as one of the Claimants on site '24/7'.
 14. I found that the owner would tell Mr Fletcher what he wanted to be done (Mr Murray said that he was 'very deadline-oriented'), and that would be conveyed to Mr Booth. In addition, Mr Booth would make recommendations as to what needed to be done, and that would be put to the owner by Mr Fletcher for a decision, which would then be conveyed to Mr Booth. The owner would have to agree any expenditure on materials and provide funds. I found that Mr Booth had a relatively free hand as to when he carried out each

- task, subject to any deadline. The number of hours that he worked each day will be a decision for another time.
15. The Respondent suggested that Mrs Booth had set up her own business called 'Dandylion Teas'. There was no dispute that she had done so, but there was a dispute about when she had done so. I noted that there was no evidence to suggest that, whenever she had set up the business, it had impinged upon her availability to assist Mr Booth when required, either by cleaning the guest houses ready for occupation by visitors, or in respect of security.
16. In addition, I accepted Mrs Booth's unchallenged evidence that in October 2016 she had secured a temporary job with Marks and Spencer. One of the authorised representatives, Ms Propeck, had agreed that this was acceptable. However, when Mrs Booth was offered a permanent role, Ms Propeck told her that 'she was not happy with this and if I took the job (Mr Booth) would be fired'.
17. The Respondent suggested that Mr Booth ran a business called PB Projects. His evidence was that he had used that name as an email address. I noted that there was no evidence that he was in fact working elsewhere. I found that he devoted his time to the estate. He reported to the Respondent by email, setting out the tasks that he had carried out.
18. Mr Murray suggested that he had heard that Mr Booth had on one occasion refused to clean the gutters. Mr Booth denied this and said that he and the team cleaned the gutters. As Mr Murray had no first hand knowledge of this, I accepted Mr Booth's evidence. Notes of a meeting in the trial bundle showing that he had told Mr Fletcher that he would not do a particular job will have to be examined in context at a later time.

A BRIEF SUMMARY OF THE LAW

19. Section 230(1) of the Employment Rights Act 1996 defines "employee" as an individual who entered into or works under a contract of employment. Sub-section (2) defines "Contract of Employment" as a contract of service or apprenticeship, whether expressed or implied, and whether oral or in writing.
20. In order for a person to obtain payment from the Redundancy Payments Office under section 166, 167 and 182 of the Act, that person must be an employee.
21. There is extensive case law on the question of who is an employee. As early as 1968 the case of Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance constructed what has become known as the multiple test. This has been developed over the years and the concept of an "irreducible minimum" has been introduced. This approach was endorsed by

- the House of Lords in the case Carmichael v National Power plc 2000 IRLR 43.
22. In the case of Montgomery v Johnson Underwood Ltd 2001 IRLR 269 the Court of Appeal held that mutuality of obligation and control are the irreducible minimum legal requirements for the existence of a contract of employment. The Court of Appeal confirmed that the guidance in Ready-Mixed Concrete, as approved in Carmichael, was the best guide to be followed by Tribunals.
23. That guidance requires three conditions to be fulfilled. Firstly, that the individual agrees that, in consideration for a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer; “mutuality of obligation”. Secondly, the individual agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree, “to make that other master”. Thirdly, the other provisions of the contract are to be consistent with its being a contract of service.
24. The Tribunal must consider the whole picture to see whether a contract of employment emerges, although mutuality of obligation and control must be identified to a sufficient extent in order for a contract of employment to exist.
25. Terms conferring mutual obligations cannot usually be implied into a contract contrary to obvious express terms; however, Tribunals must be alive to the possibility of a ‘sham’ term; see Autoclenz Ltd v Belcher and ors 2011 IRLR 820.
26. In Stephenson v Delphi Diesel Systems Ltd 2003 ICR 471 Elias J said ‘The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.’
27. The case of Byrne Brothers (Formwork) Limited –v- Baird and Others [2002] IRLR 96 considered the definition of worker. That case focused on labour only sub-contractors. It was decided that self- employed labour only sub-contractors in the construction industry were a good example of the kind of worker who may well not be carrying on a business undertaking and for whom the category of worker was designed. Factors such as working exclusively for the company at one site for a significant and indefinite period, working under the close direction of the company and being paid on a time basis, should be considered.
28. The definition of worker was also considered in 2007 by the Employment Appeal Tribunal in the case of James –v- Redcats (Brands) Limited. That was a case under the National Minimum Wage Act although the definition of

'worker' is the same under both Acts. It was decided that in order for the individual to be a worker, there must be a contract to perform work or services; there must be an obligation to perform that work personally; and that work must not be carried out as part of the individual's own business for which the Respondent is a client. With regard to mutuality of obligation, it was decided that this must be decided with regard to periods when the individual was at work; the position when he was not working was not relevant. The Employment Appeal Tribunal said that if casual and seasonal workers were to be denied worker status when actually working because of their lack of any such status when not working, that would remove the protection of minimum wage and other basic protections from the groups of workers most in need of it. The Employment Appeal Tribunal therefore recommended that the focus be on the situation when work is being performed.

29. More recently, the definition of 'worker' has attracted attention in the 'Uber' cases and in Pimlico Plumbers Ltd and anor v Smith 2017 IRLR 323, which reached the Court of Appeal in February 2017. The Employment Appeal decision helpfully draws together the relevant case law on employees and workers. The Court of Appeal confirmed the decision, in particular with regard to substitution, performing work personally, the Tribunal's consideration of the degree of control, and the practice of standing back and asking the overarching question about the nature of the working relationship, having made findings of fact.
30. The Supreme Court decision in Bates van Winkelhof v Clyde & Co LLP 2014 UKSC 32 also gave guidance in respect of the definition of 'worker', and emphasised the need to apply the words of the statute to the facts of the individual case.

SUBMISSIONS

31. On behalf of the Respondent, Ms Barsam referred to her written submissions and added that the mutuality of obligation test was not satisfied here as the agreement did not refer to payment of a particular sum to one or other of the Claimants. Either of them could carry out the work, and either of them could be paid. It was up to the Claimants who carried out the work. As a couple, she submitted that they were in a similar position to the gang of bricklayers in Persimmon.
32. With regard to control, she submitted that there was not a great degree of control over the Claimants. There was limited control over the nature of the tasks to be done.
33. There were factors that were inconsistent with employment. Mrs Booth was free to set up her own business, and did so. The Claimants were referred to as consultants. There was no obligation for Mrs Booth to work and no

- obligation to pay her in the agreement. There was no obligation to carry out work personally.
34. On behalf of the Claimants, Ms Mankau referred to her written submissions and added that Mr Murray had been placed in an invidious position, and had no direct knowledge of what the Claimants did.
35. The Persimmon case reminded Tribunals that when considering whether an individual was in business on their own account, is a question of fact and degree for the Tribunal in each case, which has to be looked at in the round. The Claimants were not a business unit.
36. She submitted that there was a clear contract of employment here; they lived on site and were paid a monthly wage. The control exercised by the owner was to give instructions about which tasks to do. He could refuse a request for holidays. The Claimants received a monthly retained come what may; there was no financial risk on their part.
37. Mrs Booth was referred to in the job description drawn up by the Respondent. Her role was more ad hoc than Mr Booth's, but she was to provide support, particularly in respect of security.
38. If they were not employees, clearly they were workers, because the agreement itself requires personal commitment.

CONCLUSIONS

39. Having made the findings of fact set out above, and having reviewed the relevant law, I drew these conclusions about the Claimants' employment status.
40. I concluded on the facts that there was no doubt that they were workers. They had signed an agreement which stated in terms that they would carry out certain duties; that their hours of work were to be at the Respondent's discretion, not their own; that they were to be paid on a monthly basis, without reference to what they may or may not have done; and that they were to perform the tasks 'personally and loyally'. There was no possibility of substitution, the agreement with the Respondent 'already rejected any assignment or pledging' of the retainer. I concluded that there was clearly mutuality of obligation to the extent that the Claimants would live on site and carry out the tasks, and the Respondent would pay them.
41. The Claimants were a married couple, not a business unit. They provided their services in accordance with the agreement, the job description and the advertisement. They did not advertise their services. They were not operating a business; the Respondent was not a customer. They were integrated into the business, as shown by the chart drawn up by Mr Murray.

42. The more difficult question was whether they were employees. I began by noting that all relevant circumstances should be taken into account, and that as a starting point the factors here that indicated a worker relationship could also indicate employment.
43. I then considered mutuality of obligation. I noted that the Claimants had agreed to live in the house on site and carry out the tasks set by the Respondent; in return, the Respondent agreed to pay them. I noted Mr Murray's evidence that it was not an option for the Claimants to delegate their roles to others, 'certainly at the start, and possibly not later, although it was never raised'. In any event, the terms of the agreement prohibited that.
44. Whilst there was no specific term that indicated an obligation on the Respondent to provide work, or indeed any term which said that work may not be available and therefore may not be provided, I concluded that it was clear from the evidence that the Respondent expected and required the Claimants to provide the services referred to in the job description, including security '24/7', on a full-time basis. The security was an ongoing responsibility, and in that sense was work that was 'provided' by the Respondent. In return, the Respondent agreed to pay the Claimants. I concluded that this was sufficient to indicate mutuality of obligation; the Claimants could not, either expressly under the agreement or in fact, refuse, at the very least, the security work; the Respondent could not, under the terms of the contract, refuse payment, as the payment was not specifically linked to any particular duty.
45. The next question was whether there was sufficient control to indicate a employment relationship. The agreement provided that the Claimants' working hours would be at the discretion of the Respondent, although apparently no specific hours were set. Accordingly, the Claimants could not, on the face of the agreement, set their own hours. However, the facts of the case indicated that they had some discretion as to when some of the tasks were done. There could be no doubt that the tasks set by the Respondent had to be done; to a significant degree the Claimants could not pick and choose what to do. An email in the bundle demonstrates that Mr Booth was required to work over the Easter weekend in 2016. Although Mr Murray said in evidence that he had heard that they had refused to carry out certain duties, he had no first hand knowledge of this and the Claimants vehemently denied this. The context of any alleged refusal may well be pertinent, in respect of the claims themselves, but was not in evidence before me, and I accepted the Claimants' evidence.
46. The Claimants were required to obtain the Respondent's approval for any visitors to the estate. They were required to perform their tasks 'personally and loyally'. They were expressly prevented from entering into other agreements that affected their 'working capacity'. The evidence suggested that on occasion deadlines for particular tasks were set by the Respondent, and that towards the end of the relationship Mr Booth was required to report what he had done on a daily basis. At least one of the Claimants was required

- to be on site '24/7' for security, regardless of whether any other work was done. Mrs Booth was refused permission to take on a permanent job away from the estate. Mr Booth had to obtain consent for the jobs that he proposed to do around the estate, and did not himself purchase any materials required for those jobs. They were obliged to seek consent for holidays and, according to Mr Murray, consent could be withheld.
47. I concluded that although there was some ability of the Claimants to decide when (but not whether) certain tasks were carried out, the overall picture was that they were under the control of the Respondent to a significant degree.
48. The third limb of the test was to consider whether other provisions of the contract were consistent with a contract of service. The Claimants paid their own taxes and NICs, although that was not determinative. There was no disciplinary or grievance procedure referred to, but the agreement could be terminated with 30 days notice. As mentioned above, there were no specific hours of work, although the agreement provided that working hours were 'at the discretion of' the Respondent. The Claimants had signed an agreement that suggested that they were working on a 'freelance basis'.
49. I concluded that none of those matters appeared so inconsistent with a contract of employment such as to defeat a decision regarding that status, when one had regard to the Claimants' evidence about how the agreement actually worked in practice.
50. Finally, I considered the overall picture. I concluded that the picture that emerged was one of employment, with a significant degree of mutuality of obligation and control. The Respondent was to provide a house and pay all of the bills, together with a monthly fee or salary. In return, the Claimants would carry out all of the tasks in the job description, and more particularly the tasks required by the owner and Mr Fletcher to be done, and would report what they had done. They could not take holidays without permission, and one of them had to be on site '24/7'. Mrs Booth was not allowed to take on another job.
51. I concluded for all of those reasons that the Claimants had been employees of the Respondent. The claims will therefore proceed to hearing. A telephone case management discussion will be arranged in due course to agree directions.

Employment Judge Wallis
28 November 2017