Appeal No. UKEAT/0154/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 & 4 December 2017

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR P NAYAK — APPELLANT

(1) LUCENT ADVISORS (UK) LIMITED (DEBARRED)
(2) LUCENT ADVISORS LIMITED (DEBARRED) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SEAMUS SWEENEY (of Counsel)
For the Respondents	Respondents debarred from taking part in this appeal

SUMMARY

JURISDICTIONAL POINTS - Worker, employee or neither

JURISDICTIONAL POINTS - Continuity of employment

The Appellant claimed unfair dismissal. The Respondents served ET3 responses which denied that he was an employee, but thereafter took no part. Following a Preliminary Hearing on the issue of his employment status the ET held that he had been self-employed at all times. The EAT accepted that the ET had asked itself the right questions but that in answering them there had been errors of approach (see paragraph 25). The issue was remitted to the ET for fresh consideration in the light of the Judgment.

The ET also held that the Appellant did not have two years' continuous employment, so that it had no jurisdiction to entertain the claim in any event. The EAT held that this was not an issue in the Preliminary Hearing; that it had not been raised by the Respondents; and that in any event the point did not go to jurisdiction.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal, pursuant to permission granted by Kerr J, against the Decision of Employment Judge Johnson dated 11 October 2016 at a Preliminary Hearing, that the Appellant (Mr Nayak) was not an employee of either the First or Second Respondent and that accordingly his claim for unfair dismissal must be dismissed. Mr Nayak also appeals against the Judge's further conclusion, albeit not contained in an Order, that he did not have the requisite two year period of continuous employment by either Respondent: section 108(1) **Employment Rights Act 1996**.

2. The Respondents each served an ET3 in response to the claim but took no part in the hearing below. Having served no Answer to the appeal they were, by Order dated 7 August 2017, debarred from taking any further part in the appeal.

3. Counsel for Mr Nayak, Mr Seamus Sweeney, told me at the outset of the appeal hearing (on 1 December 2017) that his understanding was that the two Respondent companies were now in liquidation. However he had no further details. Although the consequence might be that success in the appeal and, if remitted, any further hearing would be financially fruitless, Mr Nayak wished to pursue the appeal as a matter of principle.

The Essential Background

4. The narrative can be taken from the Judgment. Mr Nayak specialised in the project management of major land developments and had particular experience in acquisition finance planning and development. Until mid-November 2013 he was employed by Morgan Sindell Investments Limited under a contract of employment at a six-figure salary.

5. In mid-2013 he was approached by Mr Charles Flynn of the Second Respondent, with a view to joining in some capacity. The Second Respondent was concerned in potential joint venture projects with two local authorities. The authorities were seeking to develop council land sites and sell them onto end users/operators or developers. Mr Flynn and the Second Respondent wished to draw on Mr Nayak's expertise for this purpose. Lengthy negotiations ensued between Mr Nayak and the Second Respondent through Mr Flynn.

6. In September 2013 there was discussion about proceeding via a "*self employed company*". However on 17 October 2013 Mr Flynn sent Mr Nayak a letter headed as an "*Intent to offer employment*". By email dated 16 November 2013 Mr Nayak advised that he had handed in his notice to Morgan Sindell and sought confirmation of his position. Shortly thereafter, Mr Nayak was sent a proposed consultancy agreement between him and "*Lucent Lincolnshire Lakes SARL*" dated 18 November 2013. As the Judge observed, this was not a contract of employment. He accepted Mr Nayak's evidence that he did not sign it. A subsequent document dated 18 June 2015 and purporting to appoint Mr Nayak as Director of the First Respondent Company was not signed by Mr Nayak or on behalf of either Respondent. The First Respondent Company did not come into existence until August 2014.

7. Mr Nayak's evidence, accepted by the Judge, was that he worked for the Second Respondent from November 2013 until August 2014 and thereafter for the First Respondent until the arrangement terminated in January 2016. The question was whether he did so in the capacity of employee under a contract of employment.

8. The Judgment records the arrangements during the overall period November 2013 to January 2016 whereby Mr Nayak raised invoices for his services in a form addressed

throughout to the Second Respondent. These were headed "*Service Invoice*", and after registration had a VAT registration number. Mr Nayak accounted to HMRC for VAT thus received. Advised by his accountant, he submitted annual tax returns as a self-employed person under Schedule D.

9. As to the nature and extent of the control exercised by the Respondents, and by Mr Flynn in particular, over Mr Nayak's work, the Judge concluded,:

> **"16. I accepted the claimant's evidence that the work he did for the respondents could only be done by himself, was in fact always done by himself and there were no circumstances where he could arrange for someone else to undertake work on his behalf for either respondent. I accepted the claimant's evidence that he did not undertake any work whatsoever for anyone other than the two respondents during this period of time. I accepted the claimant's evidence that he was at all times answerable to Mr Flynn, whom the claimant described as a "control freak". Mr Flynn required the claimant to attend meetings at places and at times as directed by Mr Flynn and to keep his diary up to date at all times, so that Mr Flynn was always aware as to where the claimant was or had been, whom he was meeting, was due to meet or had met with. Mr Flynn frequently required the claimant to involve himself in tasks that the claimant would ordinarily have considered to be outside his normal duties. The claimant made it clear to Mr Flynn that he was somewhat intimidated by him. I accepted the claimant's evidence that he was throughout this period answerable to Mr Flynn in respect of all of the services which he provided."**

10. As to equipment expenses and benefits the Judge concluded:

> **"19. During the relevant period, the claimant was provided with a mobile phone and laptop computer, which remained the property of the second respondent. On his invoices to the second respondent, the claimant reclaimed the cost of accommodation and travelling. The claimant did have the benefit of private healthcare for the benefit of himself and his family, the cost of which was borne by the second respondent."**

11. The relationship deteriorated and by letter dated 20 January 2016 Mr Nayak was removed from his position in terms that "*you are to be removed from the project team forthwith*".

12. In answer to questions from the Judge, Mr Nayak accepted that there was no transfer of undertaking from the Second Respondent to the First Respondent.

13. At paragraphs 21 to 26 of the Judgment the Judge set out his summary of the law on the issue of what is required to establish the status of employee under a contract of service. Amongst other things the Judge set out the classic formulation of the questions as set out by McKenna J in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 2 QB 497 at page 515C-D. Adapting his words without any material change to their substance, the Judge identified the three conditions to be fulfilled for a contract or service to exist as:

> **"(a) did the worker agree to provide his or her own work and skill in return for remuneration?**
>
> **(b) did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?**
>
> **(c) were the other provisions of the contract consistent with its being a contract of service?"**

14. The Judge cited the Supreme Court decision in **Autoclenz Ltd v Belcher** [2011] UKSC 41. In that decision Lord Clarke of Stone-cum-Ebony reaffirmed McKenna J's three conditions as "*the classic description of a contract of employment*" (paragraph 18). The Judge noted the "*vast*" case law on the question. He cited Sir John Donaldson MR in **O'Kelly v Trusthouse Forte plc** [1983] ICR 728 where he approved the Tribunal's direction that it must:

> **"… consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person is carrying on business on his own account."**

15. Having considered **Ready Mixed Concrete**, **Autoclenz** and other cited authorities, the Judge summarised the "*necessary constituents of a contract of employment*" as:

> **"Firstly, there must be a contract between the employer and the employee.**
>
> **Secondly, that contract must contain mutual obligations which are related to work.**
>
> **Thirdly, the employee must be subject to the control of the employer, at least insofar as there is room for such control. It may need to be emphasised that it is the power to control which is essential - the demonstrated exercise of that control is not.**
>
> **Fourthly, the employee must be obliged to perform the work personally to the employer.**
>
> **Finally and fifthly, the contract must not contain terms which are inconsistent with it being a contract of employment. There will of course be contracts under which work or services are**

performed by one party to the contract for the benefit of the other, which do not create a relationship either of employee or of worker."

16. In further observations as to the question of control, he stated:

"25. … With regards to control, there must always be some room for the exercise of the power of control, but what matters is the authority and not the demonstrated exercise of it."

17. The Judge finally considered the potential conflict between the benefits and burdens of being an employee and a self-employed contractor. On this he cited Lawton LJ in the case of **Massey v Crown Life Insurance Company** [1978] ICR 590, where he stated at page 596E-F:

"In the administration of justice the union of fairness, common sense and the law is a highly desirable objective. If the law allows a man to claim that he is a self-employed person in order to obtain tax advantages for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then, in my judgment, the union between fairness, common sense and the law is strained almost to breaking point. The applicant is asking this court to adjudge that he is entitled to make claims with two different voices. …"

18. The Judge then recorded his acceptance of Mr Nayak's evidence that he had initially hoped or intended to become an employee of the Second Respondent. However he had not insisted on that and had throughout the whole period raised invoices to the Second Respondent for the services provided. He had throughout remained responsible for his own income tax, VAT and national insurance. The Judge considered that this may have been a temporary arrangement with the intention on both sides to have the relationship of employer and employee at a later date, but this had never happened. The Judge's conclusions on these issues must be set out in full:

"28. In the claimant's case, I am satisfied and find as follows:

(a) Mr Nayak agreed to provide his own work and skill in return for remuneration;

(b) Mr Nayak was subject to control of Mr Flynn in terms of which work was to be performed, where and when. However, there was no control over the claimant as to how he would perform his duties. The provision of a computer and mobile phone could not be said to be the provision by the second respondent of those tools necessary for the claimant to perform his duties.

The other provisions of the "contract" were wholly inconsistent with it being a contract of service. In particular, the claimant had elected and agreed to provide his services on a self employed basis, at least until the time came when he could be taken onto the books as an employee. The procedure for invoicing as is described above shows that the claimant was fully

> **aware of the difference between a contract of service and a contract for services. He had elected to provide his services as a self employed contractor, he elected to be taxed for income tax purposes on that basis, he registered for VAT and paid VAT on that basis. Those are terms wholly inconsistent with a contract of service.**
>
> **29. The claimant himself today accepted that the precise nature of his working relationship with either of the respondents remained unclear. It may well have been left deliberately murky by either or both of the respondents. I am satisfied that the claimant's employment status was not regulated to the extent that he could fairly and properly be described as an employee of either the first or second respondent."**

19. There is no challenge to paragraph 28(a) which essentially represents the Judge's answer to the first of the three questions posed by McKenna J in **Ready Mixed Concrete**. However, Mr Sweeney - who did not appear below - challenges the Judge's reasoning in paragraph 28(b). On the face of it, this is the Judge's response to McKenna J's second question on the issue of control. This requires the Court or Tribunal to decide whether there was an express or implied term of the contract to that effect.

20. Mr Sweeney points to the decision in **White v Troutbeck SA** [2013] IRLR 286 - to which the Judge was not referred - in which His Honour Judge Richardson emphasised the contractual question thus: "*Firstly, the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day-to-day control of his own work*" (paragraph 40; see also paragraph 41). As to the Judge's statement that "*However, there was no control over the claimant as to how he would perform his duties*" (paragraph 28(b); also the second sentence of paragraph 29), Mr Sweeney pointed to His Honour Judge Richardson's observations at paragraph 42:

> **"42. Secondly, all aspects of control are relevant to this question. It was once thought that for a contract of employment to exist the master must be empowered to direct not only what is to be done but also the manner in which it is to be done. But many kinds of employee - such as the surgeon, the captain and the footballer discussed by Somervell LJ in *Cassidy v Ministry of Health* [1951] 1 All ER 574 at 579 - are engaged who exercise their own judgment as to how their work should be done."**

21. Mr Sweeney submits that the Judge fell into error on the issue of control in two ways. First, he did not in terms answer the question as to whether there was an express or implied

A term of the contract which subjected Mr Nayak to a sufficient degree of control for the relationship of employer and an employee. Whilst acknowledging that the Tribunal must, for the purpose of the contractual enquiry in the circumstances of these informal arrangements, take account of the practice of the parties in the course of their day-to-day relationship, he submits that the Judge did not ultimately focus on, or therefore determine, the contractual question. Secondly, he submits that the apparent weight given by the Judge to the absence of control over how Mr Nayak performed his duties was at odds with the law as identified in the case of **White** at paragraph 42. As demonstrated by the evidence as set out and accepted in the first sentence of paragraph 16 of the Judgment - "*I accepted the claimant's evidence that the work he did for the respondents could only be done by himself, was in fact always done by himself and there were no circumstances where he could arrange for someone else to undertake work on his behalf for either respondent*" - Mr Nayak was just such an employee.

22. As to McKenna J's third question, Mr Sweeney challenged the Judge's response in the second half of paragraph 28 in two linked respects. First, the Judge had not approached the question on the basis of first identifying the other contractual terms and then considering whether they were inconsistent with the contract of employment. Secondly, that insofar as he had found Mr Nayak to have "*elected*" and agreed to provide his services on a self-employed basis and to make his income tax and VAT arrangements accordingly, this (1) was not a term of the contract, and (2) in any event fell into the error of treating the label applied by the parties or one of them as determinative. Alternatively, he had thereby given that factor undue weight.

23. In this respect Mr Sweeny cited Lord Denning MR in **Massey v Crown Life Insurance**, where he said: "*The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that*

relationship by putting a different label upon it" (page 594E; see also **Young & Woods Ltd v West** [1980] IRLR 201, per Ackner LJ at paragraph 30).

24. Mr Sweeney also referred to the Judge's earlier citation of Lawton LJ in **Massey**. It was not clear from the absence of further reference in the Judgment, whether the Judge had taken Lawton LJ's observations into account. However they were not apposite to the facts of this case where, as the Judge had found, Mr Nayak had been reluctant to have this form of legal relationship. He also referred to the decision of the Employment of Appeal Tribunal in **MJ Quinn Integrated Services Ltd v Jones** UKEAT/0301/16/JOJ where His Honour Judge Hand QC, citing **Autoclenz**, had identified a "more nuanced" and "multifactorial" approach than in the three questions identified by McKenna J.

25. In this case the Judge faced a particularly difficult task. The fact and terms of the contractual relationship between Mr Nayak and the First and/or Second Respondents had to be ascertained essentially from the conduct of the parties. I remind myself of the need to avoid undue textual analysis of a Judgment. Furthermore, if the essentially correct legal test has been identified in a Judgment, the starting point must be that it has been thereafter borne in mind and applied.

26. However I am persuaded by Mr Sweeney that the language of the Judgment demonstrates errors of approach in the following respects.

> First, that in reaching his conclusions on the issue of control, the Judge did not ultimately focus on and determine the contractual issue which he had identified in paragraph 22(b) and, in its emphasis on the power to control, in paragraph 24. In reaching that decision it was of course necessary to take account of the day-to-day

practice, but paragraph 28(b) did not take the next step of determining the contractual issues.

Secondly, that the Judge's particular reference in paragraph 28(b) to the absence of control over "*how*" Mr Nayak would perform his duties implies that he treated this as a significant factor against the status of employee. The weight of that factor is likely to have been diminished if Judge Richardson's summary of the law in **White** had been cited to him.

Thirdly, in respect of the issue of inconsistent terms I accept Mr Sweeney's submission that the Judge should first have identified the other contractual terms - express or implied - and then considered whether or not they were inconsistent with the status of employee. I am not satisfied that the Judge's analysis took that course.

Fourthly, I also accept that the Judge should have taken account of the cautionary words, notably in **Massey**, concerning the label applied by the parties to the relationship. In consequence he may have given undue weight to Mr Nayak's agreement to provide his services on a self-employed basis. This was compounded by his earlier reference to the observations of Lawton LJ in **Massey**.

27. My conclusion is that the Judge's decision on the preliminary issue should be set aside. Mr Sweeney submits that in the light of these factors there is only one answer, namely that Mr Nayak had the status of an employee. He submits that I should therefore so hold: **Jafri v Lincoln College** [2014] ICR 920. I disagree. In arrangements of this informality there clearly may be more than one answer. Furthermore the issue was determined on the basis of documents which rightly have not been put before me and oral evidence from Mr Nayak which evidently went beyond that contained in his witness statement.

28. Subject to the further point on continuity of employment, the preliminary issue must be remitted to be reheard afresh.

Continuity of Employment

29. By Notice to the parties dated 18 July 2016, the Judge directed that the hearing listed on 3 October 2016 was to be converted to a Preliminary Hearing to determine the following issue: "*to consider whether the claimant was an employee, or worker or a self employed contractor*".

30. I am told that at the outset of the hearing the Judge raised the question of whether Mr Nayak had the requisite two years' continuous employment. Mr Nayak's ET1 had been issued against the two Respondents and stated that the employment began on 6 November 2013 and ended on 20 January 2016. The Particulars of Claim stated that he "*was an employee of the First and/or Second Respondent*". The two Respondents each submitted an ET3 with one combined response. This denied that Mr Nayak was employed by either company and referred to both Respondents "*and their Group companies*" as "*Lucent*". It did not challenge the dates of employment in the ET1 and did not challenge continuity of employment. Mr Nayak's witness statement (27 September 2016) referred throughout to his relationship with the "*First/Second Respondent*".

31. Having heard Mr Nayak's evidence, the Judge found that:

> **"17. The first respondent (Lucent Advisors (UK) Limited) did not come into existence until August 2014. The claimant's evidence to me today was that he worked solely for the second respondent until August 2014 and thereafter he worked for the first respondent. The claimant was appointed as a director of the first respondent shortly after its formation. He remained a director until after he was "dismissed" in early 2016.**
>
> **…**
>
> **20. The claimant's evidence to me today was that he carried out work for the second respondent from November 2013 until August 2014 and that he carried out work for the first respondent from August 2014 until January 2016. His invoices were always submitted to and paid by the second respondent. Mr Nayak accepted today that there was never a "transfer of undertaking" from the second respondent to the first respondent. There was never a transfer**

> **of an undertaking or business from the second respondent, nor was there ever a service provision change between those parties."**

32. Having reached this conclusion on the employee issue, the Judge continued:

> **"30. Furthermore, an employee does not have the right to present a complaint of unfair dismissal unless he has been continuously employed for a period of not less than two years by his employer (S.108(1) Employment Rights Act 1996). The claimant has not shown that he was continuously employed for a period of not less than two years by either the second or first respondent. He could not have been employed for that period of time by the first respondent, as that company had not existed for two years by the time the relationship with the claimant was ended. If the claimant's working relationship with the second respondent ended when the first respondent was formed in August 2014, then the claimant would not have two years continuous service with the second respondent either.**
>
> **31. For those reasons, I find that the claimant was not an employee of the first or second respondent and does not have the right not to be unfairly dismissed."**

33. Mr Sweeney's first submission is that the Judge should not have taken this point when (1) it had not been raised by the Respondents, (2) the Preliminary Hearing had been instituted to determine one issue, namely Mr Nayak's employment status, and (3) the condition of two years' continuous employment did not go to the jurisdiction of the Tribunal: see **Leicester University Students' Union v Mahomed** [1995] ICR 270. I agree on each count. However, the Judge did not make any Order on the point and appeals are against Orders not Reasons. As the "*Judgment on Preliminary Hearing*" makes clear, it was confined to the identified preliminary issue of whether he was an employee of the First or Second Respondent.

34. If the issue had arisen for decision, I would have accepted Mr Sweeney's further submission that, in the absence of challenge from the Respondents, Mr Nayak enjoyed the presumption in section 210(5) of the **Employment Rights Act 1996** that "*A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous*". It is unnecessary to deal with the further prospect that Mr Nayak could have relied on the "associated employer" provision in section 218(6) of the **Act**.

35. As to disposal, Mr Sweeney does not dispute, correctly in my view, that remission should be to Employment Judge Johnson to consider the preliminary issue afresh in the light of my Judgment and such submissions as are advanced on behalf of Mr Nayak. I see no need for any further evidence.