



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Orr

Respondent: Brief Therapy Support Services Limited

Heard at: Manchester

On: 4 September 2018

Before: Employment Judge Grundy

REPRESENTATION:

Claimant: In person

Respondent: Mr J Dable of Counsel

JUDGMENT having been sent to the parties on 12 September 2018 and reasons given orally in ex tempore form on 4 September 2018, 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. The issues were identified previously in the Case Management Order of Regional Employment Judge Parkin, in particular at paragraph 9.2:

“The preliminary issues to be determined are whether the claimant was employed under a contract of employment, as defined at section 230 of the Employment Rights Act 1996, or a contract of employment or a contract personally to do work, as defined at section 83 of the Equality Act 2010. If the Tribunal has jurisdiction to consider any of the claimant's claims it will proceed to make Case Management Orders and to list a final hearing.”

2. It follows that the claimant has to jump the hurdles in respect of status before the Tribunal would have jurisdiction to deal with the claims.

3. So far as today's hearing is concerned, I have heard evidence on oath and read the written evidence of the claimant and Mr Scott Lord, who is the Managing Director of the respondent, and I have read the bundle of documents, and during the course of the hearing I have been shown an invoice on the laptop of the respondent.

4. The claimant is a counsellor and is in the field of specialist autism counselling, which is in itself a specialism. The respondent is a company providing counselling services in the Lancashire area with its main contract being with the NHS.

5. The respondent did not call Vicky Bliss, who is a psychologist with the respondent, who set up the business, as I understand it, at the time that the claimant's relationship began more fully with the respondent company working one day a week.

6. I have also been referred to a bundle of documents. I have to say most of that deals with the substantive claims themselves but I have been referred to certain pages of the bundle.

The Law

7. So far as the law is concerned, I have considered section 230 of the Employment Rights Act 1996. Specifically as follows- s230(1) Employee means an individual who has entered into or works under (or where the employment has ceased worked under a contract of employment). Section 230 (2) Contract of employment means a contract of service or apprenticeship , whether express or implied and (if it is express) whether oral or in writing and section 230 (3) " Worker " means an individual who has entered into or works under (or where the employment has ceased , worked under)- a) a contract of employment or b) any other contract whether express or implied and (if it is express) whether oral or in writing whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

8. The discrimination provision of section 83 (2) of the Equality Act 2010 provides " employment means a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"

9. I have considered the authorities on the issue of employment status and how they have developed, specifically Ready Mixed Concrete (South East) Limited v Ministry of Pensions and National Insurance [1968] 2 QB 497,
Carmicheal v National Power PLC [1999] ICR 1226
Montgomery v Johnson Underwood Ltd [2001] ICR 819
Secretary of State for Justice v Windle and Arada [2016] EWCA Civ 459
Pimlico Plumbers [2018] UKSC 29

10. I have asked myself questions in respect of the following matters:

(1) Where the terms of the contract are to be found, if at all;

(2) What the terms of the contract are, if at all;

(3) How I characterise the relationship between the claimant and the respondent.

11. I have considered the multiple test, the control test and the integration or organisational test, so far as that is applied in relation to employment status, and the economic reality test. I have directed myself that control is not decisive, and I have

also considered the mutuality of obligations, which would be regarded as a necessary element of a contract of employment. I have considered whether the "irreducible minimum requirements" are met.

12. I have also considered that personal performance can lead to an employment relationship but that that is not decisive.

13. I have looked at financial considerations, the tax and national insurance position and considered the intention of the parties.

14. I have also considered whether carrying out work for others may point to self-employment and I have looked at the fixing of times for the claimant to work.

15. In relation to personal service, in regard to section 83(2)(a) the fact that an individual is providing work personally does not necessarily mean that they are employed under a contract, they can be self-employed, and in that regard I have considered more directly the dominant purpose of the contract between the claimant and the respondent. I have also considered the issue of substitution and delegation.

Findings of Fact

16. So far as my findings of fact are concerned relevant to the preliminary issue, and these are pursuant to the matters I have to decide rather than the totality, there was no written contract of employment and, on the evidence I have heard, the claimant had never requested one. There was no pension provision, no sickness absence procedure, which the claimant followed. The claimant gave evidence relating to having been absent once in relation to having shingles. Everything seemed rather informal in that respect. No sick pay was paid.

17. The claimant had no holiday pay to which she directed the Tribunal's attention. It was never requested, and when I asked her particularly she was not sure about that.

18. I accept that the claimant used her own laptop on which the company system was installed, and I accept that the respondent controlled the password and could lock the claimant out. I also accept that later the respondent issued the claimant with an Apple Mac. I take notice of the nature of the data that the claimant would be using and that the respondent would be holding. It must be the case that that is extremely sensitive and therefore requires a high level of protection by those involved, so I do not find that to be determinative. I find it was reasonable of the respondent acting in providing a contract to the claimant to provide services to act in that way in relation to the nature of the data.

19. I find that the claimant obtained bookings for her services from the respondent. That was under the branding of the TSS Limited, the respondent, and that came via the NHS largely. The respondent provided work for the claimant on a Tuesday. She was asked to work in terms of that day depending on how much work was available. She was not required to attend at 9.00am unless a person required her services at that time.

20. I accept that there was accommodation, and that is the word that is used, required for the Thursdays at some point within the relationship between the claimant and the respondent. I find that the respondent clearly did not require the

claimant to work exclusively for them. Although the claimant seems to have done that, other than some training it was not a requirement the respondent insisted upon.

21. The claimant was involved in projects concerning the autistic local community some of which were as a volunteer.

22. I accept also that the claimant was invoicing the respondent for payment, and although I was shown an invoice, which the claimant did not accept in the "ideas" logo, if I can call it that, for November 2014, I cannot find that that was manipulated on the evidence that I have heard. I do not place a great deal of weight on that particular document. What I do place weight on, and what I do find, is that the claimant accepted that the general set up of her invoices with her own name on was similar to the one that I was shown, and it was not challenged that at the end of that invoice it said, "thank you for your business", that was the way in which the claimant was paid, monthly, the differing amounts depending on the number of clients she had seen on the day of work that was usually Tuesday and later became Thursday.

23. It seems to me that "thank you for your business" would be indicative of a relationship of contractor rather than employee. I do find that the claimant herself was obliged to provide that service. No substitute would be acceptable, and the reason for that is that clearly counselling services require a therapeutic relationship to be built between the counsellor and the participant and it would not, in those circumstances, be reasonable to consider a substitute could be sent. That does not end the story.

24. The claimant was responsible for her own tax and national insurance payments. The respondent did not pay those. As I have said, the claimant usually worked on a Tuesday but if she was required later she went later.

25. I accept that other individuals in the company were said by Mr Lord to be employees, but at the time of his employment he made clear to the Tribunal that they were people who were on the payroll. The claimant was not, at any time as I understand it, on the payroll.

Submissions

26. The parties made oral submissions to the Tribunal and in brief the respondent submitted the claimant was not an employee nor was she contracted to provide personal services. It was submitted that the "badges of employment," so to speak, were not present. Mr Dable submitted to me that the claimant was free to do other things, that it was reasonable for the respondent to have the level of data control in place, that the other elements to which I have alluded (pay, tax, pension, sickness, holiday) were not indicative of an employee relationship, and he relies on the invoice styling I have mentioned in terms of "thank you for your business" to show that the claimant was not an employee. He did assert that others could provide the personal service so that the claimant would fall outside the jurisdiction of the Tribunal in relation to the Equality Act claims.

27. So far as the claimant's submissions were concerned, she submitted that the Tribunal should find that she had been an employee although she was not on the payroll throughout. It was a small business when Vicky Bliss started the business. She was guaranteed work one day a week and that was what caused her to give up other avenues. She could not send a substitute. She had very little control and she

believed, as she was included on emails to all that she was an employee on those round robin emails. She also asserted given the level of control of the laptop and data that she was an employee.

28. I do not seek to do justice to the extent of the submissions. I am merely summarising them to show that I have reconsidered them, as I have been considering and finally deliberating.

Conclusions

29. There was no written agreement here between the claimant and the respondent so I have to fall back on any oral discussions and the conduct of the parties and the elements that have been brought to my attention.

30. I do not have the sense that there was reciprocity regarding the claimant's assertion that she was an employee. She did counsel people and that occurred once a week. The character of that relationship as between the claimant and the respondent could fall into either camp of employee or provider of services, but the respondent had specifically indicated that the payroll position was never a formal matter so far as the claimant being on the payroll. The claimant was paid, as I have said, no holiday pay, sick pay or pension benefits, and paid all her own tax. She was content to be paid in that way.

31. The claimant's evidence was specifically that she thought she might have a claim for unfair dismissal after the relationship between the claimant and the respondent went sour. It appeared to me that she had not questioned the relationship during the course of the time that she was providing counselling services.

32. I accept that the control element that the respondent had in respect of performing duties relating to data was of a high level but I find that that was reasonable and not indicative of an employee necessarily, given the nature of the relationship and that being for counselling services. It is not unreasonable that an independent contractor would have an email system booking appointments and further funding letters to be provided by the respondent in those circumstances. It is not sufficient, in my judgment, to found employment status.

33. The claimant largely came and went as she pleased. She could do other work, indeed she volunteered, and she has given evidence about "ideas" in relation to her other work. There was no requirement of exclusivity dictated by the respondent. It may be that the nature of her skills, were so specific that there was no competition but I do not have the sense that there was a relationship of employer/employee in this regard.

34. The claimant changed her days in terms of the "accommodation". Those words, in my judgment, have again the feel and flavour of a contracting relationship rather than an employer/employee relationship. Given the nature of the service provided, as I have already indicated I do find that personal counselling would require no substitution and that personal services would therefore be what is being offered by the claimant, and although that does not get the claimant over the hurdle of being an employee in my judgment it does satisfy the wider definition provided by the Equality Act.

35. In my judgment the claimant was good at providing specialist autistic counselling services. She did provide a personal service in that role. The nature of the role would usually dictate a personal service, and it follows that the Tribunal therefore allows the discrimination claims to go forward, the claimant having jumped the hurdle that I talked about earlier, but that the unfair dismissal will not proceed because the Tribunal does not have jurisdiction as the claimant was not an employee at the time the contract ended.

Employment Judge Grundy

Date: 30 September 2018

REASONS SENT TO THE PARTIES ON

22 October 2018

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