EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Ogunsola	**v**	**Pro Rail**

Heard at: Watford **On**: 18 September 2018

Before: Employment Judge Milner-Moore

Representation

For the Claimant: In person
For the Respondent: Mr S Maloney, Director

RESERVED JUDGMENT

1. The claims fail and are dismissed.

2. The claimant is neither an employee nor a worker within the meaning of s.230 of the Employment Rights Act.

REASONS

1. The claimant brings claims of breach of contract and unlawful deductions from wages in relation to the respondent's failure to pay him monies owed for five days work over the period 11 to 15 December 2017. This matter was listed for a preliminary hearing to decide whether the claimant possessed the necessary employment status to bring those complaints. In order to bring a complaint of breach of contract the claimant would need to show that he was an employee and in order to bring a claim of unlawful deduction from wages the claimant would need to show that he was either an employee or a worker as defined in s.230(3) of the Employment Rights Act 1996.

2. The start of the hearing was delayed by the failure of the respondent to attend. Enquiries were made by the clerk and it appeared that the respondent had been unaware of the hearing. Once all parties were in

attendance it was apparent that no mutual disclosure had taken place nor any exchange of witness statements. Indeed, the respondent had produced no witness statement.

3. I considered whether it was necessary to postpone the hearing. However, the parties had only a limited amount of documentary evidence. I therefore adjourned the hearing for a brief period to allow the parties to read each other's documents. I decided that I would treat the ET3 as the respondent's witness statement. Neither party raised any objection to this management of the case. I heard evidence from the claimant and from Mr Maloney. I also received a small bundle of documents from each party.

4. During the hearing, the Claimant received a call from his son's school to say that his son had been involved in an accident. I explained that he could seek an adjournment if he needed to leave to collect his son. However, he preferred to conclude the hearing. However, I reserved my judgment so that the Claimant could leave straightaway following closing submissions.

5. I should also record that the Claimant was indignant that the respondent had not called evidence from a witness who the claimant considered had been responsible for injuring his reputation in connection with an allegation, since disproved by an investigation conducted by Network Rail, regarding the claimant's conduct. I explained to the claimant those matters fell outside the compass of the hearing and it was for that reason that I did not allow evidence or questioning on that point.

Facts

6. In light of the evidence that I heard and saw, I made the following findings.

7. The claimant works in the rail industry and has performed various roles on rail projects including: Banksman, Strapman, and High Voltage Assessor. He runs his own company, Jomaguc Solutions Limited, through which he provides his services. He is a Director of that company and takes a salary from it. The company submits invoices for the services rendered by the claimant. The company is not VAT registered. The claimant has an accountant who deals with the company accounts and ensures correct payment of tax in relation to the revenue received by the company for the claimant's services.

8. The claimant is registered with a Primary Sponsor (Daniel Owens). Those companies which wish to make use of the claimant's services send a request to the Primary Sponsor. The role of the Primary Sponsor is in part to ensure that safe working hours are not being exceeded and to be a single point of oversight about the hours worked by the claimant. The respondent was one of a number of companies which made requests to Daniel Owens for the claimant's services. The respondent produced a shift history for 2016-2017 which showed that the claimant worked for three days during

2016, for one day during the first half of 2017 and for 20 days during the second half of 2017. Although the claimant not remember the precise dates that he had worked, he accepted that the shift history was broadly correct in terms of the number of days worked. He explained that he had elected to work less earlier in 2017 because he and his wife had a new baby to take care of.

9. There was no written agreement which governed the relationship between the claimant and the respondent. The claimant said that he had received a registration pack (he also referred to this as an induction) from the respondent but that was not produced to me in evidence. The claimant did not attend any induction training with the respondent. The induction pack seems to have consisted of a proforma which the claimant was required to complete confirming that he was aware of various Network Rail safety policies. The claimant provided the information requested in the proforma during a phone call with an employee of the respondents.

10. The respondent made requests for the claimant's services by texting or emailing offers of work to the Primary Sponsor. The claimant either accepted or declined the offers, as he wished. The rate of pay offered varied according to the role that the claimant was undertaking. Once the claimant had provided his services he invoiced for them via his company. On some occasions, the work conducted by the claimant for the respondent was covered by the CIS Scheme and, on those occasions, the respondent deducted tax. The claimant was registered in the CIS Scheme both under his company name and on his own name. On other occasions the payment was made gross.

11. When the claimant's services were requested by the respondent it was open to the claimant refuse the work offered, or the Primary Sponsor could decline such work if the claimant had exceeded safe hours of work. There was no obligation for the respondent to offer work to the claimant. The claimant did not need to seek permission to take holiday or other time off; he simply declined work when he wanted to take time off.

12. The claimant had never attempted to provide a substitute to carry out work on his behalf. However, the respondent's evidence, which I accepted, is that, if the claimant were unavailable, the claimant could have proposed a substitute provided the individual in question was appropriately qualified. However, the respondent would always have needed to approve any such substitute.

13. The claimant worked for a number of other organisations and did so under arrangements similar to those which operated when he worked for the respondent. He listed 5 other organisations that he provided services to. The claimant was unable to say how much of his work was done for the respondent. He initially suggested that work for the respondent accounted for 70 per cent of the work that he did but later accepted that this was an overstatement and that he had no idea of the precise proportions.

14. Although the claimant performed work at the respondent's request he was not directly supervised by the respondent in the performance of that work. He was not supplied with equipment by the respondent save that the respondent provided him with a high-vis jacket to wear with its name on when he was performing work on its behalf. The claimant accepted that when he was contracted to work for Carillion, for example, he would wear their high-vis clothing.

Law

15. Section 230(3) of the Employment Rights Act 1996, defines a worker as someone who

> " has entered in to or works under (or where 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 any party to the contract his status is not by virtue of the contract that of a client or customer of any professional business undertaking carried on by the individual."

16. In assessing whether an individual is an employee (working under a contract of employment) or a worker (providing services under a contract for services), it will be relevant to begin by examining any written contract between the parties. Looking beyond the terms of the written document, it is established law that certain factors represent the "irreducible minimum" which is invariably required for a contract of employment to exist (**Ready Mixed Concrete v the Minister of Pensions and National Insurance** [1968 2 QB 497). Those factors are: a requirement to provide personal service on the part of the employee, the exercise of control by the employer over the work performed, and mutuality of obligation (an obligation or the employer to offer work and for the employee personally to perform such work). Other relevant factors which may assist in determining whether the relationship is one of employment include: the label accorded to the relationship by the parties, whether the individual bears any financial risk (e.g. because he receives a rate for the job rather than a wage), whether he provides his own equipment, the extent of the individual's integration into the employer's business, whether the individual is free to provide and/or does provide services to others and whether the individual is free to set their own hours and working arrangements and whether the individual has an unrestricted right to send a substitute to perform the services on his behalf if he wishes to do so. The use of a service company as a vehicle for the provision of services not necessarily inconsistent with there being an employment relationship if in all other respects the relationship appears to be akin to one of employment (**Catamaran Cruises v Williams [1994] IRLR**).

17. In Byrne **Brothers v Baird** the court viewed workers as an intermediate class of persons who, whilst not employees, had a degree of dependence on the employing organization which was similar to that of employee, and who could be distinguished from those who were wholly independent contractors running their own businesses.

    "Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.

    Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc. The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers."

18. In considering whether or not someone has worker status it is relevant to consider whether they have an unfettered right to provide a substitute (which would be inconsistent with a requirement of personal performance) or whether any such right is qualified in a way that means that the contract is still one requiring personal service (**Pimlico Plumbers Ltd v Smith** [2017] EWCA 51). In assessing whether the employing organization is the client or customer of a business undertaking carried on by the individual, it is relevant to consider whether the individual in question provides services to other businesses and/or markets himself to the world at large (**Cotswold Developments Construction Limited v Williams** UKEAT/0547/05).

Conclusions

19. I have concluded that the claimant was not an employee of the respondent. There was no mutuality of obligation. The respondent was not required to offer work to the claimant and the claimant was not obliged, if offered work, to undertake it. Absent mutuality of obligation there could be no contract of employment. Furthermore, a number of other features were inconsistent with that relationship being one of employment; he provided his services to the Respondent and a number of other organisations through a service company and was not subject to control by the Respondent as to how he performed his work.

20. I have also concluded that the claimant was not a worker within the meaning of s.230(3) of the Employment Rights Act. I accept that for the duration of each job, the claimant undertook personally to provide services to the

respondent. Whilst there may in theory have been a qualified right for the claimant to provide a substitute if he was unavailable and if he could identify a suitable individual, the claimant was never made aware of such a right, he never exercised it in practice and any such right was subject to the respondent's approval. The contract was therefore one in which personal service by the claimant was required.

21. However. I consider that the claimant's claim to worker status fails because the respondent was the customer of a profession or business undertaking being carried on by the claimant. I have reached this conclusion for the following reasons. The claimant provided his services via a corporate vehicle and submitted invoices for his services which were usually gross of tax, save on those occasions when he was providing services under the CIS Scheme. The claimant did a limited amount of work for the respondent, only around 20 days in 2017 in total He was not dependent on the respondent. He was providing his services to a number of other organisations during that period. I have concluded therefore, that the claimant was running a business whereby he provided his services to such companies as wished to utilize him to work on projects for Network Rail. He was free to take up work or decline work from those organisations as he saw fit. He was not a worker for the purposes of section 230(3) Employment Rights Act 1996

22. Having so concluded the claims for breach of contract and unlawful deduction from wages must fail.

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Employment Judge Milner-Moore

Date: 14.11.18……..

Sent to the parties on: ..14.11.18.....

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For the Tribunal Office