



EMPLOYMENT TRIBUNALS

Claimant: Mr N Cox
Respondent: Kent Autoparts Limited
Heard at: Ashford
On: 20 December 2018
Before: Employment Judge Pritchard

Representation
Claimant: In person
Respondent: Mr G Walczyk, Director

RESERVED JUDGMENT UPON A PRELIMINARY ISSUE

- 1 The Claimant was not an employee under section 230(1) of the Employment Rights Act 1996 or under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and accordingly his claims for unfair dismissal and breach of contract (notice pay) are struck out.
- 2 The Claimant's claims for unpaid/underpaid wages and for holiday pay shall proceed. Notice of Hearing will be issued in due course.

REASONS

1. The Claimant claims constructive unfair dismissal, breach of contract (notice pay), unpaid/underpaid wages (section 13 of the Employment Rights Act 1996 read with the provisions of the National Minimum Wage Act 1998 and associated regulations) and holiday pay. In its ET3 Response Form the Respondent resists the claims on the basis that the Claimant was not an employee and asserts that he was a self-employed person throughout.
2. At the outset of the hearing, the Tribunal sitting in private, considered the Claimant's application, made the previous day by email, for the hearing to be held in private. For reasons given at the hearing, that application was

refused and the hearing continued in public.

3. Neither party had complied with the Case Management Order of the Tribunal dated 25 April 2018. The Tribunal decided that the overriding objective contained in Rule 2 of the Employment Tribunals Rules of Procedure 2013 would be best served by proceeding to determine the preliminary issue arising in the case, namely the Claimant's employment status. The parties had no objection to this course of action.
4. The Tribunal heard evidence under oath from the Claimant and from Mr Walczyk. The Respondent referred to invoices raised by the Claimant (which had been sent to the Tribunal in advance and which remain on the Tribunal file). At the conclusion of the hearing, the parties made brief oral submissions.

The issues

5. The issues for determination were as follows:
 - 5.1. Was the Claimant an employee of the Respondent as defined in section 230(1) of the Employment Rights Act 1996? The relevant legislation requires that a Claimant must be an employee if he wishes to pursue claims of unfair dismissal and breach of contract (notice pay) in the Employment Tribunal.
 - 5.2. Was the Claimant a worker of the Respondent as defined in section 230(3) of the Employment Rights Act 1996? The relevant legislation requires that a Claimant is either an employee or a worker if he wishes to pursue claims for unpaid wages and holiday pay in the Employment Tribunal.

Findings of fact

6. The Respondent is a small family run business, Mr Walczyk and his wife being the directors of the company. The Respondent is in the business of dismantling damaged motor vehicles which it purchases, usually those with accident damage leading to insurance write-off, and selling the parts and components through internet sales. The Respondent has five other employees including Mr Marsh, the Manager.
7. In response to an advertisement placed at the Job Centre by the Respondent, the Claimant applied for the position of Advertising Administrator. Following an interview with Mr Walczyk the Claimant commenced work for the Respondent on 2 June 2015, initially on a two week trial. The Claimant was given what appears to have been some basic initial instruction/training by Doug, a friend of Mr Walczyk, who has IT expertise.
8. There was a dispute as to whether the Claimant was required to work fixed hours Monday to Friday. The Tribunal accepts that it is likely that apart from occasions when the Claimant worked at home or was not attending work, he was expected to attend the Respondent's premises during its normal trading hours: 8 am to 5 pm Mondays to Fridays with 30 minutes for lunch; and 8 am to 3 pm on Saturdays with 30 minutes for lunch. However, there appears to have been a degree of autonomy in the days and hours the chose to work.

There was a dispute as to whether the Claimant asked for a daily rate of £50 or whether it is what Mr Walczyk said the Respondent would pay; regardless, the Claimant invoiced and was paid at the rate of £50 a day.

9. The work the Claimant was engaged to do involved posting parts and components on Ebay, one of the Respondent's employees handing the Claimant a memory stick containing photographs of the items. The Claimant would be responsible for determining the market prices for the items, with some guidance from time to time from Mr Walczyk or Mr Marsh, and writing a description of the item for posting on Ebay. From time to time the Claimant would answer telephone calls in the office and would assist taking the photographs and packing items for despatch when the Respondent was short-staffed but these were merely occasional subsidiary duties. Mr Walczyk would also post items on Ebay; (there was a dispute, which the Tribunal has no need to determine, as to whether or not Mrs Walczyk also posted items when working at home). For the most part, the Claimant carried out the work from a desk assigned to him in the Respondent's offices using the Respondent's computer although he worked from home from time to time. The Claimant provided no tools or equipment.
10. The Claimant was required to undertake the work personally. Although it was never discussed between him and Mr Walczyk, the Claimant feels it would not have been acceptable to the Respondent for the Claimant to have provided a substitute to do the work instead.
11. The Claimant was initially paid cash in hand. After a period of time, the Respondent paid the Claimant by way of its Paypal account into the Claimant's bank account. The Claimant registered with HMRC as a self-employed person and submitted tax returns in the usual way. He invoiced the Respondent monthly using the trading name NCOAST. His invoices include the following:

NCOAST

Professional online auction advertising specialising in the second-hand motor parts trade
12. The Claimant used this business name for the purposes of invoicing the Respondent. When submitted his tax return to HMRC, the Claimant would include deductible allowances for items such as stationery and car allowance for travel to and from work.
13. He did not work or provide services for anyone else (apart from an hour or two assisting a bodywork company near the Respondent's premises with a computer problem). The Claimant did not advertise his services.
14. When the Claimant incorrectly priced a posted item, he would be reprimanded by Mr Marsh but no formal disciplinary action taken. The Respondent did not provide the Claimant, or any other employees, with written employment policies or procedures.
15. During the first year of his employment, the Claimant took one week's holiday for which he invoiced and was paid. In the second year of his employment, the Claimant took two or three days' holiday for which he invoiced and was

paid. He did not invoice and was not paid for other days he chose not to work, when he was sick or had a hospital appointment (the Claimant has type 1 diabetes and attends a 3 to 6 monthly medical check-up at Guys Hospital). Every other weekend the Claimant saw his son and did not work on the Saturday: again, he did not invoice for those days and was not paid for them.

16. While at work, the Claimant and the Respondent's employees wore polo shirts, and in colder weather hoodies, which were printed with the Respondent's logo.
17. When the Claimant commenced work, the Respondent was posting in the region of 4,500 items. By the time the Claimant finished working for the Respondent, items posted numbered in the region of 10,000.
18. On occasions, the Claimant used his own credit card to purchase stock on behalf of the Respondent and on one occasion settled an outstanding Royal Mail Parcelforce account. The Respondent then reimbursed the Claimant when it was able to do so.
19. The Claimant stopped working for the Respondent on 20 December 2017.

Applicable law

20. 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.
21. Section 230(3) provides that a worker means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
 - 21.1. a contract of employment; or
 - 21.2. 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
22. Under section 230(5)(b) the term "employment" in relation to a worker means employment under his contract.
23. The section 230 definition of worker is adopted for the Working Time Regulations 1998.
24. Thus, what the definitions of worker and employee have in common under domestic law is the requirement for a contract.
25. There is extensive case law on the question of who is an employee. In Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 it was said that a contract of employment exists if these three conditions are fulfilled:

- 25.1. The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service of his master.
 - 25.2. He 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.
 - 25.3. The other provisions of the contract are consistent with it being a contract of service.
26. The Tribunal is not bound by the label the parties attach to their relationship (although it carries some weight). See: Autoclenz v Belcher [2011] UKSC 41, a case which considered the significance of the terms of a written agreement.
27. In Carmichael v National Power plc 2000 IRLR 43 the House of Lords confirmed that there is an "irreducible minimum" of mutual obligation necessary to create a contract of employment. Mutuality of obligation is said to be the obligation of the putative employer to provide work and the obligation of the putative employee to accept it. Unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.
28. In Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471, the Employment Appeal Tribunal stated that 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 employment rather than some other kind of contract.
29. If the "irreducible minimum" is established, the other considerations include the degree of control which the employer exercises over the individual, how the parties have labelled or characterised their relationship, the treatment of tax and national insurance, and any other matters that form part of the working relationship; all of which are relevant but not, in themselves, conclusive.
30. The Tribunal must consider the whole picture to see whether a contract of employment emerges.
31. As the definition of worker makes clear, an individual undertaking to do or perform work or services to clients or customers in the context of a profession or business undertaking carried on by the individual will not be a worker.
32. In the recent case of Pimlico Plumbers Ltd v Smith [2018] UKSC 29, the Supreme Court considered, among other things, whether Pimlico should be regarded as a client or customer of Mr Smith. The Court referred to two authorities which may be of some assistance in the conduct of the inquiry: Cotswold Development Construction Ltd v Williams [2006] IRLR 181 and Hashwani v Jivraj [2011] UKSC 40. These cases are referred to below.
33. Considerations will include: the degree of control exercised by the "employer"; the exclusivity of the engagement and its typical duration; the method of payment; what equipment the individual supplied; and the level of

risk undertaken. Thus, in Byrne Bros (Formwork) Ltd v Baird [2002] ICR 667 the Employment Appeal Tribunal held that carpenters and a labourer on a building site were a good example of the kind of worker who might well not be carrying out a business undertaking and therefore workers. In Byrne Brothers the Employment Appeal Tribunal held that three carpenters and a carpenter's labourer were workers because they were obliged to provide their services personally. Although there was a power to delegate under the contract, it was exceptional and limited. The Employment Appeal Tribunal stated that:

“as a matter of common sense and common experience, where an individual carpenter or labourer is offered work on a building site, the understanding of both parties is that it is he personally who will be attending to undertake the work”.

34. Factors such as the individual having business accounts, being paid at a rate that includes an overheads allowance and not being paid when not working, can all be relied upon to support the view that the individual is running a business and that the person for whom the work is performed is a customer of that business.

35. In Bates von Winkelhof v Clyde & Co LLP [2014] ICR 730, Lady Hale drew a distinction between two types of self-employed person. One kind are people who carry on a profession or business undertaking on their own account and enter into contracts with clients or customers who provide work or services for them. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. Thus, a general medical practitioner in Hospital Medical Group Ltd v Westwood [2012] IRLR 834, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and a therefore worker within the meaning of section 230(3) of the 1996 Act. Lady Hale also cited the words of Langstaff J in Cotswold Developments in which he said:

“... a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls”

36. In Hashwani Lord Clarke stated, at paragraph 34:

“... whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services”.

37. However, while the question of subordination is clearly important in distinguishing a worker from those genuinely in business on their own account, Tribunals must be aware that a small business may be genuinely an independent business but be completely dependent upon subordinate to the demands of a key customer. While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a

freestanding and universal characteristic of being a worker; see paragraph 30 of Bates.

38. In James v Redcat (Brands) Ltd [2007] ICR 1006, Elias J agreed that this would often assist in providing the answer and provided the following analogy:

“in a general sense the degree of dependence is in large part what one is seeking to identify – if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached...”

39. It was held in Community Dental Centres Ltd v Sultan-Darmon [2010] IRLR 1024, the unfettered right to appoint a substitute without any sanction means that the employee cannot be a worker.

40. When determining an individual's work status, the construction of the contract is of critical importance; see Redrow Homes v Roberts and others [2004] ICR 1126 CA. It does not follow from the fact that the work was done personally that the individual undertook to do or perform the work personally.

Conclusion

41. Although not reduced to writing, there was a contract between the Claimant and Respondent agreed orally. The essential substance of the agreement was that the Claimant would carry out Ebay advertising work on the Respondent's behalf in return for payment at the rate of £50 per day.

42. Although the words on the Claimant's invoices might suggest that the Respondent was a customer or client of the Claimant's business undertaking, that does not reflect the reality of the situation. NCOAST was not a separate legal entity, such as a company, but simply a trading name subsequently created by the Claimant for the purposes of invoicing the Respondent. The trading name NCOAST was unknown to anyone other than the Claimant and Respondent. The Respondent paid the Claimant direct for services the Claimant undertook to provide, and did provide, personally. The Claimant did not market his services to the world (he was previously employed in administration and Ebay advertising was the sort of job he and Mr Walczyk thought he would be capable of doing). The Claimant did not bear any business risk (apart from the risk that the Respondent might fail to reimburse him for credit card purchases).

43. Although the Tribunal finds there was mutuality of obligation in the relationship and a certain degree of control, the Tribunal is mindful of the evidence of Mr Walczyk that the Claimant would say he should not have to take instructions because he was self-employed. The Claimant clearly had a degree of autonomy: he did not attend work on each and every working day and it appears that he felt free not to attend on occasions when seeing his son, for example, or when attending hospital appointments. He priced the items for sale largely without reference to the Respondent. The parties labelled the relationship as one of self-employment. The Claimant held himself out as a self-employed person vis a vis the Respondent (by way of his invoices) and HRMC whereby he realised the benefits of self-employment by including deductible expenses on his tax return. This is not to say that the Claimant was truly in business on his own account but it militates against a

finding that he was an employee. The Tribunal finds that that there was insufficient control for the relationship to be that of employment.

44. The Tribunal concludes that the Claimant was not an employee.
45. On the other hand, the Respondent undoubtedly exerted some control over the Claimant in that he was, for the most part, required to attend the office during working hours and was instructed, albeit indirectly by being handed the memory stick, what items were to be posted on Ebay.
46. The Claimant was recruited to work for the Respondent as an integral part of the Respondent's operations. He wore polo shirt and hoodie bearing the Respondent's logo. He was subordinate to Respondent's management. He was reprimanded when things went wrong.
47. The Claimant worked exclusively for the Respondent over a period in excess of two years.
48. The Tribunal concludes that the Claimant was a worker.

Employment Judge Pritchard

Date: 20 December 2018