Case Number: 2303282/2017

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr A Haskard		**The White Wall Company Limited**

Held at London South **On 11 December 2018**

BEFORE: Employment Judge J Nash (Sitting Alone)

Representation

For the Claimant: **Ms Z Sideris, Friend**

For the Respondent: **Mr P Singh, Solicitor**

JUDGMENT

JUDGMENT having been sent to the parties and 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

The Hearing

1. Following a period of ACAS Conciliation from 2 October 2017 to 2 November 2017, the Claimant presented his originating application on 16 November 2017. The Respondent submitted its ET3 on 1 February 2018.

2. At the hearing, in respect of witnesses, the Tribunal heard from the Claimant. He did not bring copies of his witness statement with him. The statement was then emailed to the Tribunal but during his evidence it transpired that the correct witness statement had not been emailed. However, this was rectified during the hearing and the claimant swore to his correct witness statement. The

claimant's second witness was Mr James Woodgate, a former fellow freelancer - according to the Respondent's description. The Respondent's witnesses were Mr Ashley Elliott, its Managing Director, and Mr Benjamin Ryan, described by the respondent as a self-employed Workshop Technician.

3. There was an agreed Bundle. However, at the hearing the claimant sought to rely upon a number of extra documents. Resolving this took considerable time. Primarily, these documents consisted of an amended calendar showing the dates when the Claimant worked for the Respondent plus documents provided by the Respondent or Claimant to each other. As there was no prejudice to the Respondent, the late documents were admitted. In addition, the Respondent provided a schedule setting out its case as to when showing when the Claimant had worked. As this was provided late in the day, there was no time to agree this.

The Claims

4. The claims were for:-

   a. unfair dismissal under section 95 Employment Rights Act 1996,
   b. wrongful dismissal,
   c. annual leave,
   d. wages, being sick pay,
   e. either detriment or unfair dismissal in respect of a public interest disclosure, depending on the claimant's employment status.

The issues

5. The issues for this open preliminary hearing were as follows: –

   a. what was the employment status of the Claimant?
   b. if his status was either that of an employee or a worker, was his email to the Respondent of 18 August 2017, a qualifying disclosure under Section 43 (a) of the Employment Rights Act?

6. During the hearing, it became clear that the listing was proving short, so it was agreed that the Tribunal would not consider the public interest disclosure point, as this would cause the hearing to go part heard.

The Facts

7. The respondent employs about 14 staff. Its business is the installation and fabrication of art works for museums and artists. During the Claimant's time working for the respondent, its business grew considerably. The Claimant's work in the respondent's workshop required a significant level of skill and it was necessary to abide carefully by health and safety protocols on account of potentially dangerous machinery and tools.

8. The parties entered into what the respondent described as freelance/contractor agreement for the Claimant to work as an Art Technician in or around 2011. At

this time, the pattern was that the Claimant worked for the Respondent for a period, and then he left to do other things and then came back to do some further work for the respondent a further period. There was little if any evidence that the claimant was an employee or a worker at this period and the Claimant himself drew a distinction between his working arrangements with the respondent before and after the middle of March 2014. It was after mid-March 2014 that he contended that he became an employee or a worker of the respondent.

9. In the middle of March 2014, the Claimant returned from another period where he had been working elsewhere in order to work for the Respondent. Mr Elliott, the Managing Director, emailed the claimant on 29 January 2014 that he wanted to build up a body of consistent full-time technicians for installations, because the current arrangements were not working well. However, Mr Elliott had no short-term jobs available for the Claimant at that time.

10. The Respondent provided its “freelancers”, including the claimant, with a freelance consultancy agreement, on or around 25 May 2016 (at page 283). This agreement included a right of substitution with prior written approval. It also provided for overtime to be paid with permission. However, there was a dispute between the parties as to whether the Claimant had actually signed the agreement. There was no copy of the signed agreement in the otherwise relatively full bundle. Before the tribunal, the claimant’s evidence was that he could not remember with certainty and was not sure if it had been signed. However, he had said during his employment that he had not signed the agreement. The Claimant was paid by way of invoicing the Respondent and the Respondent paid on these invoices, albeit not always on time.

11. During the Claimant’s working for the respondent, he on occasion left work early without permission, for instance to ensure that he could vote in the election. This was raised by the Respondent as an invoicing issue, i.e. how much should be paid for the amount of time he had worked, rather than a performance issue, i.e. leaving work without permission. The respondent carried out some form of work review with the claimant but this on the evidence did not go to performance but matters such as appearance.

12. On 7 March 2016, (at page 98), the Claimant informed the Respondent that he would be working in France for a month. The Respondent replied, “I can’t stop you”, and said that if the claimant came back for definite this would be a relief because the business was very busy.

13. On or around 30 June 2016 Claimant emailed the Respondent to say that he wanted to go, “on the books”. As a result, the Respondent offered a written contract of employment. The Claimant refused this offer because he did not find the pay or the role as Production Manager sufficiently attractive.

14. Mr Elliott and the claimant then met on or around 27 September 2016. It was agreed that the Respondent could not afford to take the Claimant, “on the books” at the rate of pay the Claimant wanted. The claimant would be paid

£185. The Claimant contended that the Respondent had unilaterally reduced his rates from double time to time and a half on Sundays.

15. In November 2016, an important and expensive artwork was damaged. The claimant was one of a number of people involved in this job. Due to the misuse of equipment, an important mirror effect was spoiled. There was a meeting including the claimant and Mr Elliott at which Mr Elliott blamed the claimant for the damage and both of them became somewhat upset. The Respondent claimed that the Claimant was aggressive during this meeting, which he denied. After the meeting the claimant sent Mr Elliott a text to say that he had "messed up" and should have flagged up the problem earlier. No disciplinary action was taken, and the Claimant continued to work for the Respondent.

16. From 6 December 2016 to 20 January 2017 the Claimant took about a 6 week break from working for the Respondent. On 17 January 2017 he sent an email to the Respondent saying, "I am coming back if you will have me". He said he would be available from Monday, and he duly returned to work.

17. The Claimant did not work for the respondent from 14 to 30 July 2017. During the first week he was on holiday in Italy and in the second week the Respondent said that there was a pause in the work that he was doing. The Claimant then sent an email to the Respondent, having spoken to accountants and sought other advice, that he believed that he was entitled to have what was described as, employment rights. The Respondent sent an email reply terminating their working arrangement on 18 August 2017.

The Applicable Law

18. The applicable law is found in the Employment Rights Act at Section 230 as set out below. According to the case law (for instance Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent) [2018] UKSC 29), the definition of "worker" in the other applicable jurisdictions are essentially the same and the same test may be safely applied.

> *230 Employees, workers etc.*
>
> (1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3)In this Act "worker" (except in the phrases "shop worker" and "betting 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;

and any reference to a worker's contract shall be construed accordingly.

(4)In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5)In this Act "employment"—

(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b)in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

Submissions

19. Both parties made brief oral submissions and the Respondent provided a skeleton submission.

Applying the law to the facts

20. The claimant contended that that he was either an employee or a worker as defined in the Employment Rights Act 1996. The question of employment status, that is whether an individual enjoys employment rights either as an employee or what is usually known as a "limb b worker" under Section 230(3), has been the subject of considerable authority in recent years.

21. In addition to the distinction between an employee and a limb b worker, there are, in effect, two types of limb b worker, as set out by the Employment Appeal Tribunal in Addison Lee Ltd v Lange & Ors UKEAT/0037/18. A person may be a worker by virtue of an overarching contract which governs the whole working relationship with the other party. But a person may also be a worker, even in the absence of such an overarching contract, by virtue of individual contracts for individual pieces of work or periods of duty.

22. The Court of Appeal in Pimlico Plumbers explained on this distinction at paragraph 145:

"… It is necessary to distinguish two separate circumstances in which the issue of whether a putative employee/worker is engaged on a casual basis might arise. The first is where the substantive claim directly depends on their enjoying employee/worker status in respect of their periods of work (e.g. because the claim concerns their pay or some discriminatory treatment in the workplace). In such a case the question whether the engagement is casual is indeed relevant, but only on the basis that it may shed light on the nature of the relationship while the work in question is being done … But it is not only legal obligations that may shed light of that kind. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the

same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work. The second situation is where the claim directly depends on the claimant's status during periods of non-work, either because he or she has to establish continuity of employment or because the claim itself relates to their treatment during that period: in such a case mutuality of legal obligations is essential."

23. In considering employment status, the Supreme Court's in Autoclenz Ltd v Belcher and ors, held that the contracts signed by the workers did not reflect the true agreement between the parties and could in effect be disregarded. The Court approved the comments of the Court of Appeal, who had identified the relative bargaining power of the parties as a relevant factor in deciding whether the terms of a written agreement truthfully represented what was agreed: 'Frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.' The Employment Appeal Tribunal in Addison Lee Ltd v Lange & Ors UKEAT/0037/18 applied this "realistic and worldly-wise approach". The question for the Tribunal is to establish the true contractual relationship between the parties.

24. In this case there was no real dispute that there was a contract between the parties – the task for the Tribunal is to determine its nature. As in Autoclenz, a Tribunal should consider if this true contractual relationship amounts to a contract of employment or a contract as a limb b worker. In determining the true contractual relationship, the Tribunal may well have regard to the contemporaneous documents and the views of the parties at the time, but these are not necessarily determinative. In considering employment status, the Supreme Court's in Autoclenz held that the contracts signed by the workers did not reflect the true agreement between the parties and could be disregarded. Thus, a Tribunal is entitled to find the contractual documentation does not reflect the reality and go on to determine the true agreement between the parties. Therefore, the fact that the contract describes the claimant as a freelancer is not determinative.

25. The Supreme Court in Pimlico Plumbers held that a Tribunal may consider a number of factors when determining employment status. In Hall v Lorimer [1993] EWCA Civ 25, the Court of Appeal reminded a Tribunal to be cautious of using a checklist approach in which it runs through a list of factors. Rather, the object of the exercise is to paint a picture from the accumulation of detail, the overall effect can only be appreciated by standing back from the detailed picture, it is a matter of evaluation of the overall effect of the detail. Not all details are of equal weight or importance.

26. In this case, the Tribunal started by considering the written freelance contract, which was relied upon by the respondent as an exclusive record of the

contractual relationship between the parties. According to this, the claimant was self-employed. However, it was unclear if the Claimant had actually signed the freelance contract; the evidence was remarkably unclear from all parties. The Tribunal had no sight of the signed contract. Accordingly, the Tribunal was unable to find that the written contract was, in effect, the start and end of the contractual relationship, and went on to consider the surrounding factual matrix as well.

27. This does not mean that the freelance agreement was irrelevant. In determining the true nature of the bargain between the parties, the Tribunal considered the context of the agreement between the parties. The respondent offered the Claimant the opportunity to "go on the books" and enter into a written contract of employment. The Tribunal found that both parties understood that "going on the books" meant employee status, including entitlement to annual leave, sick pay and, being paid and taxed via PAYE rather than being responsible for his own tax returns under Schedule D. This would be qualitatively different from the existing arrangement. The claimant refused because he was unhappy with the terms offered and he preferred to continue with the status quo, that is the existing freelance agreement, whether or not he had signed a written contract to that effect.

28. In determining the true nature of the bargain between the parties, the Tribunal started by considering the terms of the contract between them and then went on to determine the character of that contract.

29. The tribunal considered mutuality of obligation. The Tribunal found that there was mutuality of obligation when the Claimant was working for the respondent – both parties expected that, having agreed to perform a piece of work, he would complete it. The relationship between the parties would not function without such obligation.

30. However, the next question was whether this mutuality of obligation existed when the claimant was not working for the respondent. Was there a global or umbrella contract between the parties or only a series of specific contracts for specific periods? The Tribunal directed itself in line with Carmichael and anor v National Power plc 1999 ICR 1226, HL, in which case casually employed guides had no contractual relationship with the "employer" when not actually working because there was no mutuality of obligation to offer or perform work. According to the House of Lords in that case, 'the parties incurred no obligations to provide or accept work, but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other'. The question is whether the parties mutually expect that work will continue to be provided and does this amount to sufficient mutuality of obligation for a global contract.

31. According to the Court of Appeal in Stringfellow Restaurants Ltd v Quashie 2013 IRLR 99, CA a global contract will only exist where there is what is described as an 'irreducible minimum of obligation', which continues when the worker is not working for the "employer". If there is no irreducible minimum of

obligation during the breaks between work arrangements, there is no contract between the parties.

32. In Pimlico Plumbers, the Supreme Court stated that if a worker was regularly offered and regularly accepted work from the same "employer", so that they worked pretty well continuously that might weigh in favour of the conclusion that they had at least worker status. A Tribunal has to consider the regularity and consistency of the work done by the claimant for the respondent – what were the expectations of the parties as to whether work will continue to be provided?

33. On these facts, the Claimant did work for much of his time for the Respondent. Nevertheless, there were gaps which amounted to considerably more than the 28-day annual leave entitlement of the Respondent's employees. The Claimant had not worked for the respondent for 6 full weeks out of 8 months. When the Claimant came back to work for the respondent in in January 2017 he said, "I am coming back if you will have me". The Tribunal accepted that this was a light-hearted comment and indicated that he was confident that the Respondent would indeed offer him work. But this was not the same as a Claimant who understands that a Respondent is required to offer work. Further, in January 2016 the Respondent had said, "I can't stop you" when the Claimant wanted to stop work at a time which was inconvenient for the Respondent.

34. The Tribunal did not find that this was a case, such as in Autoclenz where there was a very considerable difference in bargaining power between the parties. Whilst the respondent was "in charge" and could offer or fail to offer work, the claimant had some real choice. He could refuse work, even if this inconvenienced the respondent.

35. The Claimant accepted that he could take annual leave simply by giving notice, rather than requiring permission from the Respondent. What happened in practice was that the Claimant would tell the respondent his availability and there was usually work for him because the Respondent was so busy. However, there were exceptions. On 22 July 2017, there was a pause in the work on an artwork and Respondent told the Claimant that there was no work available from 22 July to 1 August and perhaps later. This pause in fact suited the Claimant, although he had returned from annual leave and was available. The Claimant did not object to the Respondent saying there was no work for him from the 22 July to 1 August. There was no evidence that he thought that the Respondent did not have a right to do this.

36. In effect, an umbrella contract surviving when the claimant was not working for the respondent founders on the rock of mutuality of obligation. The Supreme Court in Pimlico Plumbers pointed out that the casual nature of a relationship can shed light on its true characterisation. What sheds light on this relationship is the fact that both parties could refuse either to perform or provide work at their own convenience, and both in practice accepted the other's right to do so. The facts in this case are not indicative of worker status between the periods of work, despite the long running working relationship between the parties.

37. The Tribunal went on to consider the nature of the relationship between the parties when the claimant was working for the respondent and when there was mutuality of obligation.

38. The Tribunal found that the true nature of the relationship between the parties was not one of employer and employee. The primary reason for this is that the parties actively considered the claimant becoming an employee and the respondent made an express offer of employment which the claimant expressly refused. This fact is simply inconsistent with employee status

39. The Tribunal went on to consider if the Claimant was a limb b worker whilst he worked for the respondent. The Tribunal considered the question of substitution. According to the freelance contract, the Claimant had the right of substitution with prior written permission. However, there was no evidence of substitution ever happening. The Tribunal reminded itself that in considering such matters, it should be "realistic and worldly wise". The respondent took an unavoidable risk when allowing someone to work on expensive and vulnerable pieces of art. This was shown by the damage to the artwork in November 2016 and the subsequent quarrel. The Tribunal found the respondent would not accept a substitute except where such a person was very carefully vetted and, further, would not continue working with the Claimant if he in any regular way used substitutes. Permitting the claimant to send in substitutes would not fit at all with the respondent's wish to establish a team of skilled technical people as the business expanded. The Respondent needed reliable and skilled staff. On these facts, the real nature of the bargain was that there was very limited if any right of substitution.

40. The Tribunal next considered if the Claimant was integrated into the respondent's workforce and business. It is true as the respondent pointed out that the Claimant had no respondent business email address. Nevertheless, he worked with employees who were carrying out very similar duties to himself, he wore a uniform whilst on site (although not at base), so he was identifiable as one of the respondent's team. He was carrying out a core function of the Respondent's business - the building, preparation and installation of artworks. The Tribunal found that the claimant was integrated into the respondent's business.

41. The Tribunal next considered whether the Claimant was under the Respondent's control. this is a case where, applying Catholic Child Welfare Society and ors v Various Claimants and ors 2013 IRLR 219, SC, the Claimant had specialist knowledge and skill and there was accordingly a necessary degree of independence in how he carried out his work. Nevertheless, he worked to the Respondent's orders. "Thus, the significance of control …is that this employer can direct what the employee does, if not how he does it. The respondent in this case manifestly exercised control over the claimant's work as shown by the its concern over the damage to the artwork and how it happened and its further instructions about how the Claimant should work in future.

42. The Tribunal finally considered other factors which might point to or against worker status.

43. The Respondent set the Claimant's rate of pay at first, but the Claimant, on his own case. then varied his rate of pay. According to his evidence, he said that as a freelancer, "my rates are my prerogative". This is a factor arguably pointing against worker status, but the reality of the situation was that the respondent had the final say about what pay it would provide. As to tax, the Claimant was responsible for his tax and NI under Schedule E.

44. In respect of personnel issues, there was no suggestion that the Claimant could hire or fire. He was subject to something resembling a regular review. The evidence did not suggest that this was a performance review, but it did cover matters such as personal appearance. The Claimant was not entitled to holiday pay or sick pay. There was no evidence of any disciplinary procedure or sanction being applied when the Respondent was dissatisfied with his performance following the damage to the artwork in November 2016.

45. In respect of financial risk, the Claimant appeared to run little financial risk; for instance, he bore no cost in respect of the damage to the artwork. He was not in business on his own account.

46. In respect of other work, the Claimant's evidence was that he did not carry out paid work for others. The custom and practice in the sector appeared varied, some of the Respondent's staff were employees, some were contractors. In respect of tools, the Claimant started using his own tools after 2014, when it became difficult to rely on the Respondent's tools. However, he also used the Respondent's heavy machinery, although this might be termed "plant" rather than "tools".

47. Taking all the above factors into account and bearing in mind the Court of Appeal's warnings against a tick list approach, the Tribunal found that the Claimant was a worker pursuant to Section 230(3)(b), when he was working for the respondent. However, there was insufficient mutuality of obligation to bridge the gaps between the different times that he worked for the Respondent and there was no global contract between the parties.

48. The Claimant had not sought in any strong terms to contend that he enjoyed any employment status prior to March 2014 and the Tribunal's finding as to his worker status accordingly only applies to the period from mid-March 2014.

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Employment Judge Nash
Date: 6 February 2019