



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Koka

AND

Mr Joe McKay

Heard at: London Central

On: 8 February 2019

Before: Employment Judge Oliver Segal Q.C. (Sitting alone)

Representation

For the Claimant: In person

For the Respondent: Mr A Viridi, Solicitor

JUDGMENT

The Claimant was employed by the Respondent until about 9 April 2018.

REASONS

1. This was an open Preliminary Hearing listed by Employment Judge Elliott on 12 November 2018 to decide whether the Claimant was an employee or a worker of either the Respondent Mr Joe McKay or of a Limited Company MJM Dental Technicians Ltd ('The Company').
2. Directions had been given which included that the Respondent have an opportunity to obtain a medical report in relation to the Respondent's capacity; the Respondent has suffered from increasing dementia for some years and from at least 2016 significantly so. The parties were ordered to disclose documentation and provide witness statements in writing of the evidence that they intend to give at this Preliminary Hearing.

Evidence

3. I was provided with two bundles that I should refer to respectively as R/ and C/. Within those bundles were the following witness statements.

3.1. For the Claimant, three statements from himself at C/41, R/171 and R/175 together with a short statement from Elaine Thomas dealing with her experience of the treatment provided for her mother who required dentures and repairs to those dentures over a period between 2010 and 2017.

3.2. For the Respondent, a short statement from the Respondent's solicitor dealing with an issue of disclosure that was not directly relevant to today's proceedings; a statement from one of the Respondent's daughters at R/159 Johanna Clare Wanner-Halder; a statement from the accountant of the company from 2016, Mr Mark Donlan; and a statement from another of the Respondent's daughters Lana Jane Beatty.

4. The Respondent's representative was under the impression, he told me at the outset of today's hearing, that there would not be live evidence at this hearing and therefore had not arranged for any of the Respondent's witnesses other than himself to attend. This was a little surprising. Mr Viridi immediately offered to arrange if possible for attendance from as many of the witnesses as were available to come at short notice and it transpired that Ms Beatty was able to attend to give evidence this afternoon. The other witnesses, her sister and Mr Donlan, were not able to attend today.

Facts

5. The Respondent had operated a business providing dentures and related equipment and dentistry supplies over a period of, I was told, some 30-40 years, at least for the majority of that time from the same premises ('The Clinic').

6. From at least 2004, the Claimant worked as a dental technician assisting the Respondent. He worked for a supposed 10 hour week, roughly two hours per day per minimum, but frequently worked hours that were longer than those.

The Claimant was, and he tells me, still is, suffering from PTSD or its after-effects and that was one of the reasons why he did not work longer hours. The other reason, he said, was because the Respondent's business either did not have the capacity or the funds to allow him to work for much more money than was paid to him.

7. He and Mr McKay signed an employment contract dated 23 February 2004 at R/40 it is a contract said to be between:

- '1. Joseph McKay of MJM Dental Laboratories Ltd (the employer); and
2. Murteza Koka (the employee).'

8. The contract is in relatively standard terms. It records the engagement of the Claimant as a dental technician at a salary of £2,600 a year to be paid by equal monthly instalments, which someone has noted in handwriting at the side equates to £50 per week. It records the 10 hours a week, Monday to Friday, and makes allowance for holidays, sick pay etc.

9. From around the same time, the Claimant asked and was provided with annual P60s. I have P60s dating between 2003/2004 to 2010/2011. They record the employment of the Claimant and list the employer's name as the Company's name. They record the money paid to be £2,600 a year throughout that period.

10. Mr McKay was born in 1945 and thus in 2010 was 65 years old. The Claimant's case, and I have no reason not to accept this, is that Mr McKay had told him some time previously that when he retired, which he has anticipated doing earlier, the Claimant would in some way take over the business, but it is not in dispute that in fact Mr McKay continued working, at least in so far as his dementia allowed him to do so, right up until the closure of the business in April 2018.

11. It is the Respondent's case that when Mr McKay was 65 years old, thus in 2010, he made an agreement with the Claimant to replace the contract of employment with a wholly different contract that is not recorded or evidenced at

all but was to the effect that the Claimant would take 50% of the gross income of the business as either a self-employed consultant or a partner.

12. Technically, there is almost no evidence even in the form of witness statement evidence before the Tribunal to this effect, since the only witness statement that deals with the points is that of Ms Wanner-Halder who did not attend to give evidence. Her statement says that her father told her of that arrangement and indeed that he said the arrangement was in place when she was in attendance at the clinic in March 2018 when both the Claimant and her father were together. However, I did allow the evidence of Ms Beatty to be expanded considerably orally both in examination-in-chief and in answer to questions principally from the Tribunal and her evidence was that she was also aware from the same time of that arrangement which had been discussed at times at family dinners which took place very regularly and she herself has no doubt that that arrangement was in place during that period.

13. Mr McKay was also asked by the Claimant and again obliged him by providing short "To whom it may concern" letters each year from 2005 without a break to 2015, the relevant contents of which reads: 'This is to confirm Mr M Koka is working at the above address as Assistant Dental Technician under medical supervision working 10 hours a week and his earnings are £61 cash per week'.

14. The evidence of the Company's books and accounts is deplorably unsatisfactory. There is not a single reliable profit and loss account for the entire period. The nearest one gets is as follows. In 2011, the Respondent's then accountants prepared abbreviated accounts in which they record that the company was a dental equipment manufacturer. The company secretary at that time was the Claimant's daughter, Johanna. They note that 'We have not been instructed to carry out an audit or review of the financial statements of the company, have not verified the accuracy or completeness of the accounting records or information and explanations you have given to us and we do not therefore express any opinion on the statutory financial statements'. They record turnover of £47,000 in 2011, £32,790 in 2010 and an operating profit of £10,000 in 2011 and £1,200 in 2010. They show that the Respondent took rent (he

owned the premises from which the Clinic operated) of £5,000 a year and dividends in 2010 of £1,500 and in 2011 of £7,500. The profit and loss account is a single sheet which includes very few entries of relevance but one is 'wages £2,600'.

15. The Claimant told me that until 2015 when the business started to go downhill there were three sources of income for the business. The primary source of income was private patients paying for dentures to be supplied, repaired, fitted etc and he estimated the income from that source to range between about £40,000 and £80,000 per annum and he says, and this is corroborated by all the evidence that is before the Tribunal, that the large majority of that was paid in cash at the request of Mr McKay. The second source of income was work referred from local dentists which brought in about £20,000 per annum; and the third source of income was the repairing of dentures sent to the business which he estimated brought in about £12,000 per annum. Conservatively, then one was looking at a turnover of something in the order of £70,000 per year. The accounts from 2011 do not reflect that. The accounts from 2012 to 2017 are still more inconsistent with that picture. There is no profit and loss account at all from that period, all of the accounts from two different firms of accountants show that the total profit in each year ranged from almost nothing to a few hundred pounds.

16. The bank statements for the Company in the bundle which covered the period 2011 to 2017, show relatively low-level income and outgoings and a consistent overdraft for several years from 2014 ranging between about £2,000 and £10,000. There is nothing in the bank statements that indicate that the bulk of the income from the business was being banked into the Company's bank account and nothing to suggest that the Claimant was ever paid either in cash by way of cash withdrawal from the bank account or by way of cheque.

17. The Claimant said, and I accept, that he was paid in fact always by cash which Mr McKay kept in a safe (at least until such time as he was unable to manage the proper care of his money) to which only he had the combination. During a period of years when the Respondent's second wife who is from Brazil was spending periods of a month or sometimes even more with the Respondent

in Brazil, the cash taken from customers of the Clinic was kept in a bag hidden within the laboratory until such time as the Respondent returned and could place it more securely in the safe.

18. The last set of accounts is prepared by Mr Donlan's firm MSD Accountancy Ltd for the year ended 31 March 2017. It makes clear that there are no trading and profit and loss accounts. It records a profit for the year of £19 and it states there were no employees of the Company in 2017 or indeed in 2016. There was one other employee of the business, a long-standing friend of the Respondent, Ms Michelle Wenningen who came in for an hour or two once or twice a week to assist with the administrative side of the business. It seems to be agreed that the Respondent would have paid her something and almost certainly again in cash. There is no suggestion that she was treated as an employee of the Company including in 2016 and 2017 as the accounts disclosed.

19. There is no question that in the last several months of the businesses' operation at least, things were going very badly indeed as a result of the extremely unfortunate increase in dementia of the Respondent. He was unable properly to deal with his personal or professional affairs. He had at some time previously given power of attorney to at least some of his children and he was leaving cash around accidentally at times where it could not be safely retrieved. There is a suggestion, I do not know how accurate, that his second wife may have been using some of the cash that he was able to provide to her for own benefit.

20. The patients who attended the clinic were inevitably increasingly aware of the Respondent's dementia and unsurprisingly less willing to have work done at the Clinic as a result; such that income fell substantially and the care of such money as was received by the business became lax and unfortunately chaotic. There is a very recent document in the context of the business closing which shows the incoming and outgoing sums of the company prepared by Ms Wenningen in the early months of 2018 which shows a few £100 at most coming in each week and sometimes less than that and some cheques for the regular expenses of the business going out to people like the council and utility suppliers.

21. The Respondent's family decided in April 2018 in consultation with their professional advisors, that the business had to close. They were obviously right to take that step and, without criticising them at all, it is clear in with hindsight that it is a step that should have been taken some long while before it was. They closed the doors of the business on 6 April and the Claimant attended work on 9 April to find that the business had been closed.

22. There was a meeting on 11 April between the Respondent, his wife, the Claimant, Ms Wenningen and a dentist then retired, My Hymns, who had provided the business with a certain amount of work. During that meeting a document was signed which I quote as follows:

"I J McKay agreed to pay Mr Murteza Koka the sum of £30,000 as an ex gratia/payment for redundancy to be paid on the completion of the sale or transfer or ownership of 24 Western Mews ... or within one calendar year commencing 11 April 2018.'

23. It is signed by him and his wife and witnessed by Mr Wenningen and Mr Hymns. Whether that document constitutes an enforceable contract is nothing that I have to examine today. However, I do note that it is consistent with Mr McKay believing that Mr Koka had been his employee and that he was redundant at that date and that he felt, whether in law or morally only, some responsibility personally in that regard. It is suggested to me that the document may have been signed by him under coercion and that the other signatory and the two witnesses may well have collaborated in that coercion. I find that unlikely and it is certainly contrary to the Claimant's evidence. However, it cannot be ruled out that Mr McKay even if not coerced was not able to grasp the implications of what he was signing, and I bear that in mind.

24. Prior to the business actually closing, at a time when at least Johanna was taking a more active concern with the business, the Claimant sent an email dated 23 February 2018. In the email he describes an agreement that he had had informally with the Respondent for the transfer of the business to him and how that had been deferred over the years. At one point he writes:

'I have been very patient and worked hard with very low wages, no sick pay, no holiday pay nor pension entitlement with the understanding that Joe would finally allow me to take over the business and earn enough to secure my retirement ...'

25. He also refers to two options available to the family at that point. One is to provide him with a redundancy payment of £30,000 and the other to transfer the business as a going concern to him for himself and his son to run. There was apparently no written reply to that email and the Respondent's case through the evidence of Ms Beatty is that it is a concoction in the part quoted and that Mr Koka did so believing that Mr McKay's daughters would not be aware that the true position was very different from the one he was presenting. I find that implausible though I do not doubt that Ms Beatty believes it. It is in my view much more plausible that the Claimant was portraying the situation as in fact it had been and as I find it was.

26. Finally, I note by omission that I can make no findings as to what happened to the large majority of the income taken in the form of cash from patients during the years before the Respondent's dementia became more serious. There is no disclosure of the Respondent's own bank statements, there is no disclosure of any cash books or any profit and loss or business accounts, if they ever existed. All that seems certain from comparing the known income with the accounts and bank statements is that a considerable amount of cash was disposed of in some way deliberately and perhaps towards the end accidentally by the Respondent in ways that on the evidence in front of me cannot be identified.

Conclusions

27. On the factual findings I have made, there is no relevant legal principle engaged beyond that if a person is employed under a contract of employment, he is both an employee and a worker within the meaning of those terms in the material parts of the Employment Rights Act 1996.

28. Given the findings of fact I have made, it is in my opinion absolutely certain that the Claimant was employed under a contract of employment

throughout the relevant period up to and including 9 April 2018, within both the definition in the 1996 Act of employee and therefore within the definition of worker in the same Act.

29. I note in particular that the suggestion which I have discounted as a fact, that the Claimant and Respondent entered into this very different sort of profit sharing arrangement in about 2010, is flatly contradicted by a whole series of documents including the documents signed by the Respondent himself at C/24, 25 and 26 going all the way up to 2015, where he records the Claimant as still being employed on £65 a week.

30. The more difficult question is the identity of the Claimant's employer. There are indications both ways at least in the early years.

31. The contract of employment on its face indicates that the employer was the Respondent. It is highly unusual if a company is the employer to list the director of the company as the employer but it is possible, not having taken sufficient legal advice, the Respondent did just that.

32. The P60s indicate that the employer was the Company; as does the entry for wages in the 2011 accounts, although the latter is not of great significance given that it appears simply to have been a piece of information provided by the Respondent, I do not doubt innocently, to his accountants at that time and was not explored by someone who was able to understand the difference between whether the employer was Mr McKay as an individual or the Company.

33. However, the later documents rather suggest that the Respondent was indeed the employer. If, as I have found, the Claimant was employed by somebody in the years 2016-2018, it is surprising to put it at its lowest, that the accounts for 2016 and 2017 record the company as having no employees if in fact the company had at least one and possibly two with Ms Wenningen being the second.

34. Further, the affairs of the Company seem, from the bank statements and the 2018 document I referred to, to have been conducted on a very limited basis during the latter years and indeed the accounts going all the way back to 2012

indicate very little activity and very little income and expenditure on the part of the Company (as opposed to the Respondent).

35. With the caveat that I have spoken of above, the documents at R63 and R79, the email from the Claimant of 23 February 2018 and the agreement signed on 11 April 2018, also support the proposition that the Claimant was employed and by the Respondent personally.

36. Finally, I note that Mr McKay appears throughout to have paid the Claimant's wages himself, out of cash some or all of which does not seem to have gone through the Company's books but was rather treated (it seems) as his personal money.

37. I note the submission that Mr Viridi makes that, given that Mr McKay had gone to the trouble of setting up a limited company, it is on the face of it unlikely that he would want to employ anybody on his own account in parallel. That is in the abstract a perfectly proper and persuasive submission. However, the other facts and documents just do not on balance support that proposition and whatever might appear logical to Mr Viridi or indeed an external professional unconnected with the parties, may well not have seemed so obvious to Mr McKay himself, a layman who was dealing with his affairs in what on any view was an irregular and unusual way and who, at least on the Claimant's account which I believe in this respect, felt close to the Claimant over a long period and indebted to him morally if not financially.

38. I therefore find, as I say that the Claimant was employed at least from 2015 by the Respondent, Joe McKay, and was probably employed by him continuously from 2004.

Employment Judge Segal

Dated: 18 February 2019

Judgment and Reasons sent to the parties on:

20 February 2019

For the Tribunal Office