EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Omollo	**V**	**The Governors of Oldfield Primary School**

Heard at: Watford **On:** 10 January 2019

Before: Employment Judge McNeill QC

Appearances:
For the Claimant: In person
For the Respondent: Mr P Quill, Solicitor

JUDGMENT having been sent to the parties on 1 February 2019 and 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 claimant claimed that she was unfairly dismissed by the respondent. She also claimed for a payment in lieu of annual leave. The claim was listed for a preliminary hearing to determine jurisdictional issues: did the claimant have the necessary status, as an employee or worker, to bring her claims? The respondent contended that the claimant was neither an employee or worker but was a self-employed contractor.

2. The claimant could only claim for unfair dismissal if she was an "employee" of the respondent. She could bring her claim in respect of a payment in lieu of annual leave if she was a "worker". There was a dispute flagged up in the respondent's written submission, but not pursued in oral argument, as to whether the claimant had properly made a claim in her claim form in respect of a payment in lieu of annual leave. Judgment was given on the assumption that such a claim had been made.

Law

3. The definition of "employee" is set out in s230(1) of the Employment Rights Act 1996 (ERA): *"…an "employee" means an individual who has entered into or works under…a contract of employment"*.

4. The definition of "worker" is set out in regulation 2 of the Working Time Regulations 1998 (WTR):

" *"worker" means an individual who has entered into or works 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."*

A person who works under the type of contract described at (b) is often referred to as a "limb (b) worker".

5. Deciding whether a claimant is employed under a contract of employment involves looking at a number of different matters. First and fundamentally, was there a contract between the claimant and the respondent under which the claimant agreed to provide work personally to the respondent and pursuant to which the respondent agreed to pay her for her work? I was referred to **Cotswold Development Construction Ltd v Williams** [2006] IRLR 181, a case very different on its facts from the present case but in which the Employment Appeal Tribunal (EAT) (Langstaff J) confirmed the need to look at mutuality of obligation first. I was also referred to **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471, an agency worker case, in which the EAT confirmed the need for mutuality of obligation between the claimant and respondent in order for a contractual relationship to exist. This principle was not contentious.

6. Where there is mutuality of obligation, the test for determining whether a claimant is an employee is multifactorial. The tribunal should not just apply a checklist but should look at the facts of the case and a range of factors bearing on whether the claimant worked under a contract of employment. The degree of control the respondent has over the claimant's work is one factor. But it is also relevant to look at matters such as the degree to which the individual is integrated into the respondent's organisation and what equipment, if any, was provided to the claimant by the respondent. The individual's tax position may be relevant but is not determinative. Looked at objectively, what was the arrangement between the parties? Was it a contract of service or was it some other type of contract?

7. In relation to whether the claimant was a limb (b) worker, I was referred to the recent decision of the Supreme Court in **Pimlico Plumbers Ltd v Smith** [2018] ICR 1511 where the Court analysed the approach for determining whether a claimant was a limb (b) worker: both personal performance and whether a claimant was providing services to the respondent as the respondent's client or customer.

8. In relation to personal performance, the Supreme Court considered the right to substitute. At paragraph 34, the Court concluded that even where there was a limited right to appoint a substitute, the obligation of personal performance could still be satisfied. The Supreme Court analysed the obligation of personal performance by considering the limitation on the power to provide a substitute and contrasting a situation where a respondent was uninterested in the identity of the substitute and only interested in getting the work done, it not really mattering who did that work.

9. As to whether a claimant was carrying out work as a client or customer of the respondent, the Supreme Court set out its analysis of the appropriate approach in paragraphs 47 and 48 of its judgment, recognising that it is for

the employment tribunal to determine the question and for the appellate courts only to interfere with the tribunal's decision if the tribunal was not entitled to reach the conclusion it did. In **Pimlico Plumbers,** considerations pointing to the respondent being a client or customer of the claimant included matters such as the claimant's entitlement to reject an offer of work; being free to take outside work; the respondent having no right to supervise or interfere in the manner in which he did his work; and the financial risks that the claimant in that case took on. On the other hand, there were features of the contract which militated against the respondent being a client or customer of the claimant: the respondent's tight control over the claimant, requiring him to wear uniform, drive a tracked, branded van, carry an identity card and closely follow the administrative instructions of the control room. The claimant's contract contained references to "wages", "gross misconduct" and "dismissal" and contained restrictive covenants. The Supreme Court concluded that the employment tribunal had been entitled to find that the claimant was a worker.

Facts

10. The facts in the current case are largely uncontentious. The claimant is a skilled, specialist professional who works as an Applied Behaviour Analysis (ABA) Tutor. She works with children with autism. She has her own business and describes herself as a Consultant and as "self-employed". As a Consultant and through her business, she will sometimes recommend other ABA Tutors, less experienced than herself, for certain jobs.

11. There was a period before 2014/2015 when the claimant provided her services directly to the parents of two children, referred to as 'K' and 'D'. Those parents paid her. Both children attended the respondent's school at the times relevant to this claim. The claimant provided services to one of the children before he joined the respondent's school.

12. Until about December 2014 in respect of K and September 2015 in respect D, the claimant had no contract with the respondent. After those dates, matters changed, when the claimant's service began to be paid for by funding provided to the respondent by the Local Authority. From those dates, the claimant was paid directly by the respondent in respect of each child. She was paid on invoice, headed with her business name, on a monthly basis (although payments were sometimes late).

13. In due course, the arrangement between the claimant and the respondent was formalised with written service level agreements. There was an agreement in relation to each child and the terms of the agreements were materially identical. One agreement was provided in 2016 and one in 2017. The agreements reflected the arrangements which were already in place.

14. Pursuant to the written agreements, the claimant agreed to provide her specialist services to the respondent at an hourly rate. She stated that she would endeavour to honour her weekly commitment. In the event of unforeseen circumstances, such as sickness, she would telephone the Head on the day of absence. If she knew about a potential absence the night before, she would telephone in the evening, allowing adequate cover to be sought for the child. She would issue an invoice each month which would be processed and paid. She would liaise with certain staff at the

school, including the Deputy for inclusion, the Class Teacher and Teaching Assistant (TA) working with the child. She would also liaise with the child's mother. There was a section on Professional Membership and Insurance. The claimant was required to obtain her own Public Liability Insurance and had to have an enhanced DBS Check, which she would pay for.

15. The purpose of her role was stated to be "delivering high quality ABA teaching support as part of a Class Team working directly with children and young people with autism and supporting the ABA Supervisor in ensuring the efficient and effective running of the class to meet the day-to-day needs of the pupils".

16. Under the heading "Services Provided", key accountabilities and dimensions were set out, including understanding and implementing school policies, participating in class and certain meetings, carrying out other duties, responsibility for health and safety, teaching and learning in small group teaching sessions and supervising some indoor/outdoor break sessions. There was reference to safeguarding, data collection, resources and training. In terms of training, the claimant was obliged to attend safeguarding training; she was offered other courses which she could choose whether or not to attend. Her contracts referred to management responsibilities, safeguarding and safety and to the school providing the claimant with resources such as the use of stationery and the use of a photocopier. There was also a confidentiality provision.

17. The contracts did not provide that the claimant could send somebody in her place as a substitute if she was unable to attend for work nor did they require that she should do so. If the claimant was unable attend for work, she would inform the Head Teacher or somebody else at the school who would then find a substitute for her. If the claimant could help with finding a substitute, she would do so and that happened on at least one occasion. The contracts did not give the claimant the option of sending somebody in her place if that is what she chose to do.

18. In terms of her work, the claimant worked set hours on a Tuesday, Wednesday and Thursday. She was paid an hourly rate capped in due course at a daily rate of £150. She was required to take half an hour for lunch, although it was difficult for her to do so on occasions. She had to work until the end of the school day, which was 3:15. She was given a small pay rise in 2017 after D's mother raised the issue of the claimant's pay with the respondent. She was not paid for days when she did not work.

19. From time to time, if D or K were not at school, the school would allocate other pupils to the claimant but the parties that there was no obligation on the school to do so.

20. The claimant had a school email address, passwords for her computer and could use school resources such as the photocopier. She could use tea, coffee and school meal facilities, for payment, just like other staff.

21. The claimant worked at the school for seven years and was subject to a disciplinary process which, in due course, led to her dismissal. She did not take holidays in term time and, unlike her work with other clients outside the school, she had no flexibility as to when she worked.

22. In 2014, the claimant was asked to fill in a questionnaire for the London Borough of Ealing headed "Ealing Council Employment Status Questionnaire". The questionnaire was designed to enable Ealing to form an assessment as to whether the claimant was genuinely self-employed or whether she was in fact employed or a worker. The claimant duly filled in that questionnaire. As a result of the answers in the questionnaire, it was determined by the London Borough of Ealing that the claimant should be paid on a PAYE basis with tax and NI contributions deducted at source. That is what the respondent did from then on.

23. When the claimant was working at the School she had, as a professional, a high degree of autonomy. Both in the classroom and elsewhere in the school, she worked with others, including Speech and Language Therapists and Occupational Therapists, who were self-employed, and with employees of the school, such as TAs and Classroom Teachers.

24. The respondent's general process of appointment involved recruitment by advertisement. Staff at the school had employment contracts which were with the Local Authority. The respondent did not directly employ its teaching and other staff.

25. The claimant was not named on the school website. She did not have to attend inset days as other staff did. She did not undergo performance appraisals.

Conclusions

26. The claimant had a contract relationship with the respondent which involved mutual obligations. At its most basic, she was required to work for the respondent on the days stipulated and was paid for her work. The claimant was not able to send a substitute. Given the nature of her job, it would have been surprising if she were simply able, at will, to send a substitute whenever she wished to do so. I concluded that the claimant was required under her contract to perform personally the work which she agreed to provide to the respondent.

27. Was the claimant providing work to the respondent as a client or customer of the claimant's profession or business undertaking? It was not in dispute that the claimant had a business, that she was operating her business at the time that she was working for the respondent and that the invoices she sent to the respondent were headed with her business name. On the other hand, the work that the claimant was doing for the respondent was different in character to her ordinary freelance consultant work. Her work for the respondent gave her little flexibility. She was subject to closely defined working hours; required to take breaks; and worked during school term times. She had normal school holidays when she could carry out her own freelance work, as she could during term time outside the hours during which she was committed to work for the respondent.

28. The services provided to the respondent were very different from the provision of services to other clients. Referring back to the analysis of the EAT in paragraph 53 of the judgment in **Cotswold Developments,** was the claimant, in working for the respondent, pursuing a professional business

activity, marketing her services as an independent person to the world in general, or was she was recruited by the respondent to work for the respondent as an integral part of the respondent's operations? That type of analysis, the EAT stated, will in most cases, demonstrate on which side of the line a given person falls.

29. The respondent submitted that the claimant was not recruited to be an integral part of the respondent's operations. Indeed, she was not recruited by the respondent but rather was selected by the parents. I accepted that that was the origin of the arrangement between the claimant and the school. However, from 2014/2015, matters changed and the arrangement between the claimant and the respondent was governed by contract and, from 2016/2017, by written contracts between the claimant and respondent.

30. The respondent submitted that had the parents no longer wished to have the claimant provide services in respect of their child, the claimant would have ceased to do so and the relevant contracts between the respondent and the claimant would have terminated. That may be correct, although it is clear that there were occasions when the respondent did use the claimant's services to work with other children and it is quite possible that if her contract in respect of one of the children had ceased, the respondent may have continued to engage her services with another child: it was not possible to say one way or the other. Certainly, the respondent would have had no obligation to provide the claimant with work with another child under the contracts she had signed.

31. The respondent submitted that the claimant was not an integral part of the school's general operations. Although I accepted that the claimant was not in the same position as a Classroom Teacher or TA, I did not accept that she was not an integral part of the school. She worked with others at the school in and outside the classroom, working regular hours which finished at the end of the school day, agreeing to supervise break sessions and having the same access to catering facilities as other staff. She had an email address, passwords to use the respondent's systems and was able to use the photocopier. She was provided with safeguarding training.

32. While the view of the London Borough of Ealing is not decisive as to whether the claimant was a limb (b) worker, the London Borough of Ealing did form its view, after careful consideration of answers provided by the claimant in a questionnaire specifically designed to assist in assessing her employment status. The claimant has been taxed and has paid NI accordingly. Although I looked at this issue independently and in the light of legal authority on employment status, the view of the London Borough of Ealing was supportive of my conclusion.

33. For all the reasons set out, I concluded that the claimant's status at the the time of her dismissal was that of a limb (b) worker.

34. The issue of whether the claimant was an employee required a different analysis. The claimant described herself as "self-employed", saying in closing submissions: "I am not saying I am an employee". The claimant represented herself and made that comment while still pursuing her claim for unfair dismissal. I therefore did not treat it as a concession but considered whether she was an employee.

35. I considered a range of matters. On the basis on my factual findings, I concluded that the respondent exercised a degree of control over the claimant, including over her hours of work, although, as a professional person, she had a high degree of autonomy. She was integral to the organisation in the sense that she took part in the school's general operations, was provided with some of the benefits provided to those with a contract of employment and was made subject to a disciplinary process. On the other hand, she was not in the same position as those employed under the standard contracts of employment with the London Borough of Ealing. She did not attend inset days, she was not required to attend training other than safeguarding and she did not undergo appraisals. In short, she was an integral part of the organisation to some extent but not to the same extent as those who were working for the London Borough of Ealing under contracts of employment.

36. The Service Level Agreements differed from a contract of employment not just in label but also in substance. It was relevant that the claimant was paid against invoice headed with the name of her business and was not paid when she did not work. In short, while some features of her work pointed to her being employed under a contract of employment other features pointed away from a contract of employment. Weighing up all of the evidence, I concluded that the arrangement between the parties was not and was never intended, looked at objectively, to be a a contract of employment.

37. The claimant did not work under a contract of employment; her unfair dismissal claim was bound to fail and was dismissed. The claimant was a worker and her claim for pay in lieu of annual leave would proceed to a full hearing.

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Employment Judge McNeill QC

Date: 29 March 2019

Judgment sent to the parties on

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For the Tribunal office