Case No: 1600289/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Davies**

Respondent: **Travis Perkins Trading Company Ltd**

Heard at: **Cardiff** **On:** **19 July 2018**

Before: **Employment Judge C Sharp (sitting alone)**

Representation
Claimant: Mrs M Davies (spouse)
Respondent: Ms R Dawson (solicitor)

RESERVED JUDGMENT

1. The Claimant's status since 26 August 2015 has been found to be that of worker. Accordingly his claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Background and agreed facts

1. Mr Robert Davies, the claimant, has brought a claim of unfair dismissal against the respondent Travis Perkins Trading Company Limited. I have to determine whether he was an employee or a worker as defined under the Employment Rights Act 1996. If Mr Davies was an employee at the time of dismissal, he is able to bring his claim; if the claimant was a worker, he is not able to claim unfair dismissal and his claim must be dismissed.

2. Most of the relevant facts in this case are agreed by the parties. Mr Davies was employed originally as a full time employee from 16 May 2011 in the Pontypool branch of the respondent. He is a fully qualified Heavy Goods Vehicle ("HGV") driver and delivered goods by lorry to customers of the respondent, a builders' merchant.

3. In August 2015, the claimant spoke with his line manager, Mr Jeff Clutterbuck, and explained that he was about to resign as he wanted to be able to work more flexibly for various reasons. The claimant said that his intention was to

work for an agency as a HGV driver. Mr Clutterbuck thought highly of the claimant and his work and asked if it was possible to work on a similar basis for the respondent as a relief HGV driver, would the claimant be interested? The claimant was interested and it was agreed that the full time employment would end on 18 August 2015. The claimant would then be a relief HGV driver for all the respondent's branches in the region and be paid for the hours he worked. He would not be a full time employee any longer.

4. On 26 August 2015, the claimant commenced his new role with the respondent and signed a contract. It was headed "statement of terms and conditions of employment" and "temporary general staff". The job title stated was "casual labour" and the contract said that the claimant worked zero hours. The contract also stated that the "employment" started on 26 August 2015, that the employment could only be terminated with notice, except in cases of gross misconduct, and that the claimant could not work for anyone else without the respondent's consent. There are references to holiday and sickness pay, the existence of disciplinary and grievance procedures, and access to a pension plan. The contract does not require the respondent to offer work, nor the claimant to accept it.

5. The parties agree that the contract on the face of it is a contract of employment. However, the respondent asserts that the contract from its Head Office was supplied in error – it should have been a contract for a zero hours worker as that is what was agreed between the parties earlier in August 2015. In essence, the respondent's case is that the contract was a "sham" and did not reflect the actual intentions of the parties, as shown by the reality on the ground during the claimant's time as a zero hours worker.

6. The claimant worked as a relief HGV driver for the respondent for some time. The payslips show that he worked a variety of hours, and for some weeks did not work at all. He was required to personally carry out his work, not least because a HGV licence and other specific training was required to be a HGV driver. The claimant did not refuse work when offered until January 2017, following a dispute about the respondent's failure to pay holiday pay – Mr Clutterbuck was not aware that zero hour workers were entitled to holiday pay, but the matter was eventually resolved after the claimant raised the issue again in November 2016.

7. On 26 January 2017, the claimant had not received the monies owed to him in full from the respondent. He was unable to speak to his line manager about the issue. It is agreed that the claimant left his duties in Blackwood due to the respondent's failure to make the required payment. The claimant says he had to go to his bank to transfer monies to avoid financial issues due to the lack of payment; the respondent's view is that the claimant walked out and left it in some difficulties with that day's deliveries. 26 January 2017 was the last day the claimant carried out work for the respondent. He was offered work shortly after this event and turned it down. There was a later proposal for the claimant to go to the Newport branch to undertake work, but he was then told that Mr Clutterbuck had advised the Newport branch against letting the claimant work.

8. The respondent's position is best summarised by Mr Clutterbuck's evidence. He confirmed that due to the events of 26 January 2017, he was unhappy with the claimant and was not willing to give him work in the future. Mr Clutterbuck's

view was that he was not required to offer the claimant work. His manager, Mr Watkins, also gave evidence and said as the claimant was a zero hours worker, disciplinary procedures were not possible and it was best just to not use his services.

9. On 27 November 2017, the claimant was dismissed by the respondent and sent his P45. The parties agree that no procedure was used to consult him. The respondent's position was that it was receiving reminders that the claimant needed to attend training (which would cost money), and as it was not using his services, it decided to dismiss him. As the claimant in the respondent's view was a worker, the procedures required to dismiss an employee were in its view not necessary.

10. The claimant asked why he had been dismissed; he suspected it was connected to his assertion of his statutory rights. Mr Clutterbuck responded (in a letter that the claimant says he never received) that the claimant was on a zero hour contract and did not have to be told why he was no longer working for the respondent; he added that the branch had no need for a zero hour colleague.

11. ACAS early conciliation failed to resolve the dispute, and the claimant issued his unfair dismissal claim in the employment tribunal on 19 February 2018. The respondent defended the claim on the basis that the claimant was a worker, and in any event that the dismissal had been for misconduct. At the start of the hearing, the respondent applied to amend its defence to state that the principal reason for dismissal was redundancy, but this application was unsuccessful (with oral reasons provided at the time).

Issues to be determined

12. In order to bring a claim for unfair dismissal, the claimant must be an employee; workers are not able to bring such claims. There is no suggestion that the claimant is self-employed. I am required to determine whether the claimant is an employee or worker.

13. I heard oral evidence from the claimant, Mr Clutterbuck and Mr Adam Watkins (the regional director of the respondent for South Wales). I also received a witness statement from Mr Sidnall, though he did not attend and its contents did not assist with the issue to be determined. I also considered the contents of the hearing bundle and the oral submissions made by each party.

The relevant law

14. S.230(1) of the Employment Rights Act 1996 ("ERA") states that an employee "*means an individual who has entered into or works under (or where employment has ceased, worked under) a contract of employment.*" It then goes on to state at s.230(2) that a contract of employment is "*a contract of service…whether express or implied, and (if it is express) whether oral or in writing*".

15. S.230(3) states that *"a worker is an individual who has entered into or works under (or, where the employment has ceased, worked under) either (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."

16. Any decision about employment status must start by looking at the words of the statute, but largely case law has set out how to interpret the above sections of the ERA. As the claimant was not legally represented, I set out at the start of hearing the legal tests to be applied and the key parts of the relevant cases, with the approval of Ms Dawson, who represented the respondent.

17. Unfortunately, there is no clear bright dividing line between worker status and being employed. There is no single question or fact that will determine the whole issue. The Tribunal must to apply a balancing test and consider all the facts and factors identified by the senior courts.

18. The key precedents relevant to the issue of status were considered as part of my deliberations. The cases were:

- Carmichael v National Power Plc [1999] 1 WLR 2042;
- Ready Mixed Concrete (South East Ltd) -v- Minister of Pensions [1968] 2 QB 497;
- Autoclenz Ltd -v- Belcher [2011] UKSC 41;
- Pulse Healthcare Ltd v Carewatch Care Services Ltd UKEAT/0123/12/BA;
- Consistent Group Ltd -v- Kalwak [2008] EWCA Civ 1553;
- Stringfellow Restaurants Ltd v Quashie 2013 IRLR 99, CA;
- Pimlico Plumbers Limited and Charlie Mullins -v- Gary Smith; and
- Ministry of Defence HQ Dental Service v Kettle UKEAT/0308/06/LA.

19. It is more convenient to summarise the legal tests distilled from these cases. The critical point, to which I referred to on several occasions during the hearing, is that for the claimant to be employed there is an "irreducible minimum" required. There must be a mutuality of obligation between the parties, personal performance by the claimant must be mandatory, and the respondent must have control over the claimant for me to find that there is an employment relationship between the parties.

20. In addition, normally the starting factual point at which a tribunal analyses the status of an individual is the contract signed by the parties. In this case, the respondent's case is that the contract (called "statements of employment terms and conditions") did not reflect the intentions of the parties correctly. Its case was that the parties agreed that the claimant would cease to be an employee in August 2015 and become a zero hours worker; the contract was one for casual labour employed temporarily in the yard. I am therefore required to consider whether the contract is a "sham" or in some other way does not reflect the intentions of the parties. How matters proceeded in reality may assist with that consideration.

21. The case of *Autoclenz* makes it clear that a contractual clause may be disregarded if it simply fails to represent the true intentions of the parties. An employment tribunal should ascertain the true intentions or expectations of the

parties, not only at the start of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied their agreement. It is admittedly unusual for a respondent to submit the whole contract should be disregarded, but the respondent's case here is that the wrong contract was generated and signed in error. If I am persuaded that the written contract does not reflect the true intentions of the parties, then it is clear, from the *Kettle* case amongst other precedents, that I am entitled to look at what happened both when the parties discussed the contract and after the contract was signed to decide the claimant's status.

22. An analysis of what happened in reality may assist in other ways. As the House of Lords stated in the *Carmichael* case, the determination of employment status may depend on a consideration of the facts as well as on the construction of written documents. It is possible that if the course of dealings between the parties gives rise to mutual expectations that work will continue to be provided, this may amount to sufficient mutuality of obligation to found the basis of an umbrella contract, particularly if work is regularly provided over a lengthy period of time.

23. If a zero-hours contract is an umbrella contract of employment, continuity of employment will exist even when the employee is not working. However, it is also possible for each period of work to be covered by a separate contract of employment, which will mean an employee may struggle to establish continuity of employment. More than a week between contracts will break continuity, unless it is a temporary cessation of work or an arrangement exists that the employee is regarded as continuing in employment (S.212(3) ERA), as is common for example in the education sector. It is therefore possible for a series of employment contracts to give a claimant enough continuity of employment, even in the absence of an umbrella agreement, if it is shown that the gaps in working were simply a temporary cessation of work.

24. For an umbrella contract to exist, it is necessary to show that there is at least 'an irreducible minimum of obligation', either express or implied, which continues during the gaps in work. The irreducible minimum determines whether a contract exists at all during the periods of non-work. Assuming that there is a contractual basis for the parties' relationship, then the extent of the obligation, and the presence of factors such as control, will determine whether the contract is one of employment.

25. In summary therefore, I have to decide if the contract signed in August 2015 was a "sham" agreement or in some other way failed to reflect the true intentions of the parties. If I find that the contract does reflect the intentions of the parties, I must interpret it alone to decide the claimant's status. If I find that the contract does not truly reflect the intentions of the parties, I must then consider the facts surrounding its creation and then up to the claimant's dismissal. I must then apply those facts to decide whether there was a mutuality of obligation between the parties, whether personal performance by the claimant was required, and whether the respondent had control over the claimant. This will then enable me to conclude whether the claimant was a worker or an employee.

Submissions

26. Ms Dawson on behalf of the respondent accepted that the contract signed on 26 August 2015 was a contract of employment, which under s.230 of the ERA would mean the claimant was an employee, but explained that it was generated by mistake. The respondent's case was that it was never the intention of the respondent to enter into a zero hours employee relationship with the claimant. Ms Dawson highlighted the irreducible minimum required to be an employee and submitted that this was not in existence in reality from 26 August 2015.

27. Ms Dawson submitted that the respondent had no control over the claimant, that there was no obligation to offer or accept work, and noted that there were significant breaks in service in any event which affected the continuity of employment. Ms Dawson denied that there was an umbrella contract which covered the breaks in work. It was accepted that the claimant himself had to carry out the work, but this alone was not sufficient to establish employee status. Ms Dawson also pointed out that the claimant made no complaint to the respondent about the lack of work and the decision to not allow him to work for the Newport branch. She submitted that taken in the totality, the reality was that the claimant was a worker and it was never the intentions of the parties for him to be an employee.

28. Mrs Davies on behalf of the claimant submitted that the claimant signed a contract of employment and no-one ever said anything different to him. She observed that a contract should be worth the paper it is written on. Mrs Davies said that the claimant did the same as everyone else at the branch and was controlled by the respondent. She submitted that the claimant was able and willing to work from January 2017 and had to do the work himself. In her view, the claimant was an employee.

Findings

29. The first area which requires a determination is what did the parties agree in August 2015? Does the contract correctly reflect the agreement and the intentions of the parties? Was there a mistake? Only two individuals were present at the key discussions in August 2015 – the claimant and Mr Clutterbuck. If I find that the contract does not reflect the true intentions of the parties, then I am permitted to look at the reality of the situation. That said, I am reminded by the senior courts to bear in mind the disparity in bargaining power between the claimant and the respondent when deciding whether the terms of any written agreement represented what was really agreed (*Autoclenz*).

30. The evidence of the claimant was that all that changed in August 2015 were his working hours and that he was now a relief HGV driver for the area, as opposed to a branch HGV driver. He said that during his discussions with Mr Clutterbuck where the claimant said that he was considering leaving the respondent's employ to work less hours, the word "worker" wasn't used but the term "zero hours" was mentioned. The claimant agreed that in August 2015 his full time employment ended by mutual agreement and he moved onto a zero hours contract.

31. The claimant's evidence was that after moving to zero hours, he remained under the control of the respondent – it told him which lorry to drive, to whom

to deliver items, he wore uniform, and effectively there was no difference in the control over him from when he was full time. His line manager remained Mr Clutterbuck and the claimant expected to be disciplined if he behaved inappropriately. The claimant also pointed out that the contract signed in August 2015 stated that he was employed and he had relied on its terms when waiting for work, as opposed to working elsewhere in 2017.

32. The claimant confirmed that he was paid for the hours he worked, and was not on a fixed salary. He accepted that he could decline work if offered, but said that he did not do so until 27 January 2017 when he was unhappy about the holiday pay issue. The claimant also conceded under cross-examination that there were periods when he did not work at all for the respondent; for example, a six week period between September and October 2016, another three week period with no work and the period from 27 January 2017 to dismissal. The claimant also was initially denied holiday pay by Mr Clutterbuck due to his status.

33. The evidence of Mr Clutterbuck was that on or around 18 August 2015, he offered to see if the claimant could effectively work as an agency worker for the respondent and get paid for the hours he worked. His understanding at the time was that zero hours people were workers, not employees, and that such individuals were not entitled to holiday pay. Mr Clutterbuck accepted that it was later explained to him that this was incorrect and workers were entitled to holiday pay, after the claimant raised the issue more than once. However, he was adamant that he never intended for the claimant to be an employee if he became a relief HGV driver.

34. Mr Clutterbuck explained that after he and the claimant agreed to end his full-time employment, he used the HR computer system to mark the claimant as a leaver and then set up a new contract. This was because he thought agency workers were workers and he believed that the claimant was going to work for the respondent on the same basis as agency worker i.e. just be paid for the hours worked and that there was no obligation to offer work or accept it. Mr Clutterbuck changed the claimant on the system to zero hours casual labour and then asked the claimant to sign the contract on 26 August 2018 that was sent by head office. He accepted that he did not read the contract, except to check the phrase “zero hour” was there, but his intention had been to hire the claimant as a worker, not an employee. Mr Clutterbuck also said that head office also believed the claimant was a worker as he was shown on the system as casual labour.

35. After the incident on 26 January 2016, Mr Clutterbuck admitted that he was annoyed with the claimant and decided simply not to use his services again. The evidence of Mr Watkins, Mr Clutterbuck’s manager, was that as the claimant was listed as casual labour, he understood that the claimant was a worker and could not be subjected to any disciplinary process. Mr Watkins said that he advised Mr Clutterbuck simply not to give the claimant any further work. Mr Clutterbuck’s evidence was that in any event he no longer had a need for a relief driver as new full time drivers were now employed, and he agreed that he told the Newport branch not to use the claimant’s service either. However, Mr Clutterbuck started to receive training requests from HR for the claimant to carry out refresher training in November 2017, which would cost the respondent

money. As he and the respondent viewed the claimant as a worker, Mr Clutterbuck was advised to simply end the contract.

36. Under questioning by me, Mr Clutterbuck accepted that he did not expressly tell the claimant in August 2015 that he would no longer be an employee. It was clear that Mr Clutterbuck had not received any training about the differences between employees and workers and had little understanding of their employment rights, as shown by his surprise that workers were entitled to holiday pay. It was evident that his assumption, from August 2015 to the current hearing, was that zero hours contract equated to worker status. He was surprised to learn that it was possible for a zero hours contract to be one of employment.

37. I do not criticise Mr Clutterbuck, particularly as he gave honest answers which was consistent with his conduct towards the claimant, but his understanding in my view informed the initial conversation with the claimant in mid-August 2015. I am persuaded that it is more likely than not when Mr Clutterbuck offered the claimant a zero hour contract, acting on behalf of the respondent, in his mind he was offering a job as a worker, not an employee; the reference to the claimant not going to an agency and doing the same work for the respondent instead further supports this conclusion. It was Mr Clutterbuck who inputted the information into the HR system which generated the contract signed on 26 August 2015.

38. After the contract was signed, it is apparent that Mr Clutterbuck viewed and treated the claimant as a worker, including acting under the mistaken belief that the claimant was not entitled to holiday pay as a result. Equally, the complete lack of process used to dismiss the claimant is consistent with the respondent's belief that the claimant was a worker, albeit it is an unattractive way to treat staff. The fact that Mr Clutterbuck did not read the contract, other than to check it contained the phrase "zero hours", is unfortunate but does not detract from what was in his mind about the relationship with the claimant. Mr Clutterbuck envisaged a worker relationship at the time the contract was entered into.

39. As a result of the above findings of fact, I am forced to conclude that the true intention of the respondent, through its agent and employee Mr Clutterbuck, was to employ the claimant as a worker, not an employee.

40. I must then look at the reality of the situation and whether the claimant was an employee or worker in practice. There is no dispute that the claimant had to personally perform his role. While the respondent asserts that it had no control over the claimant, I disagree. As the case law confirms, the significance of control in the modern era is that the employer can direct what the employee does, not how he does it. From the facts of this case, there can be no doubt that the respondent controlled the claimant – it told him what goods to take where, ensured that he was suitably qualified and trained, and there was little practical difference between the control exerted when the claimant was a full time employee and a zero hours person.

41. That leaves the issue of mutuality of obligation. Again, the case law makes it clear that this requires 'some measure of commitment on both sides'. This does not necessarily mean that the employer must be obliged to offer work and the employee/worker must accept the work if offered, though it is a relevant fact if

work was regularly offered and accepted. Allowing for the relatively short periods where the claimant did not undertake work for the respondent, a review of the payslips demonstrates that the claimant generally did work most weeks for the respondent between August 2015 and January 2017. After January 2017, no work was undertaken. However, the length of time for which the claimant worked regularly for the respondent totaled no more than seventeen months; to establish employment status a lengthy period of regular working is required as shown in the case of *Nethermere (St Neots) Ltd v Gardiner and another* 1984 ICR 612. The period of work in the claimant's case is not sufficient in my view.

42. A question I am obliged to consider is whether the history of the relationship between the parties showed that it had been agreed that there was an obligation on the claimant to do at least some work and a correlative obligation on the employer to pay for it? The evidence before me does not support a conclusion that the claimant was obliged to carry out some work, though if the work was carried out, the respondent unquestionably was obliged to pay for it. The claimant himself accepted reluctantly that if he did not wish to work, he could decline work. Indeed, he did decline work in January 2017 and the claimant's refusal was not seen as a breach of his obligations towards the respondent according to either party's case. The periods where the claimant did not work, apart from the period from January 2017, remain unexplained – was it because there was no work available? The claimant initially said that he worked every week, but under questioning accepted this was not correct.

43. The complete cession of work from January 2017, to which the claimant did not raise any objection despite being told that suitable work was available but would not be offered to him, in my view demonstrates two points – first, that the claimant knew work would not be provided to him in the future and made no objection; second, that the respondent considered that it had no obligation whatsoever to offer the claimant work. The claimant was also initially denied holiday pay because he was told he was not entitled to it; this shows the respondent was not treating him as an employee, despite the signed contract.

44. While the contract signed in August 2015 I have found does not correctly reflect the true intentions of the parties regarding the claimant's status, it is not irrelevant. No working hours were specified for example. There is no evidence of regular working hours undertaken by the claimant; in fact, Mr Clutterbuck's evidence was that because the claimant was not an employee, he did not expect the claimant to be present during all working hours. The claimant's evidence was that he did not seek any alternative work due to the contents of the contract of employment, but the contract only required consent; alternative work was not forbidden. It is also odd, to put it mildly, that during nearly eleven months of no work in 2017, the claimant did not complain to the respondent. The only logical conclusion is that the claimant did not regard the respondent as being obliged to offer him work, even when it was available (as shown by the Newport incident), and the claimant accepted during cross-examination that he was not obliged to accept work.

45. The facts of this case lead me to the conclusion that there was no mutuality of obligation from August 2015 onwards. I cannot establish any obligation owed by one party to the other, with the exception of the obligation on the part of the respondent to pay for any work undertaken by the claimant. The irreducible

minimum to be an employee does not exist in this case. The question of whether there were periods of employment, any mutuality of obligation during the gaps in working or if an umbrella contract existed does not therefore arise for determination. I find that the claimant was a worker, and not an employee, of the respondent, and working under a contract for services or work, not a contract for service.

Conclusion

46. As a result of the above finding, I am obliged as a matter of law to dismiss the claimant's claim for unfair dismissal as such claims can only be brought by an employee. I anticipate that the claimant may understandably feel aggrieved by his treatment by the respondent, whose behaviour towards the claimant I would characterise as unprofessional, unattractive and not a course of conduct any tribunal would endorse. It is possible that future developments regarding the protection of workers in the modern economy may help those who find themselves in similar circumstances as the claimant, but that time has not yet come.

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Employment Judge **C Sharp**

Date: 7 August 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30 August 2018

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FOR EMPLOYMENT TRIBUNALS