Case No: 2202617/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr Leo Davis**

Respondent: **Trinova Real Estate LLP**

Heard at: **London Central** **On: 24 & 25 May 2019**

Before: **Mr N Deol (Employment Judge)**

Representation

Claimant: Mr Davies (Counsel)
Respondent: Mr D Dyal (Solicitor)

JUDGMENT

The Claimant was neither an "employee" nor a "worker" of the Respondent and accordingly all of his claims are dismissed.

Employment Judge Deol

Date 07/08/2019

JUDGMENT SENT TO THE PARTIES ON

07/08/2019

FOR THE TRIBUNAL OFFICE

REASONS

Introduction

1. The Claimant pursues claims for:

    (i) unpaid wages;
    (ii) notice pay;
    (iii) pay in lieu of accrued but untaken holiday pay;
    (iv) an uplift pursuant to s.38 Employment Act 2002.

2. The List of Issues was agreed between the parties. Both parties accept that the Claimant's claims turn on whether he can establish that he was an "employee" or "worker" of the Respondent.

3. A significant part of the evidence focussed on a dispute as to the arrangements for remuneration agreed upon by the Claimant and Respondent, and it was suggested that these were inextricably linked to the issues of his employment status. It would seem to be the nature of these arrangements, rather than the detail of them, that is relevant to the employment status issue.

4. The Tribunal heard evidence from the Claimant by reference to a witness statement and a supplementary statement. The Tribunal also heard evidence from Miss S Wilson for the Claimant and from Mr Forsberg for the Respondent and was assisted by the cross examination of all the witnesses and detailed written submissions from both representatives.

Findings of Fact

5. The facts are set out below insofar as they are relevant to the issue of the Claimant's employment status, given that the claim falls at this hurdle.

6. The Claimant was familiar with the Respondent when the arrangement between them was agreed. Although he did not market his services commercially there was an obvious and prevalent commercial element to the arrangement that was eventually struck up between the Claimant and Respondent.

7. There was a dispute as to the precise terms that were agreed at the time of the arrangement, but it did not take the form of a traditional employer-employee arrangement whereby services were performed in return for reward. Rather, on either account, the arrangement involved the payment on the completion of a deal of commission based on the percentage of a transaction fee or a fixed sum along with backdated or forward payments. There were arguments about whether this was capped and how future or backdated

payments were to be made, which do not shed any light of the Claimant's employment status.

8. The Claimant's remuneration was not entirely contingent on the success, or failure, of his business transactions. He had received payments whilst he explored those business transactions, although these were made in response to invoices that he provided for "consultancy services" using the name "Realflex Capital" a business that the Claimant said had ceased trading. The payments were made on a gross basis and the Claimant was expected to account for his own tax and National Insurance on the amounts paid. Notably the amounts paid were small; below the NMW and tax threshold as asserted by the Claimant.

9. The Respondent's evidence that these were advance payments, to be set against any future payments due to the Claimant, was far more convincing than the Claimant's argument that this was some form of salary, that conformed an employment relationship between the parties. Mr Forsberg gave robust evidence of the reasons why these payments were made, to assist the Claimant who was facing difficult personal circumstances and ultimately to be offset against any payment that was due. There was little relationship between the payments the Claimant received and the actual work that he did.

10. The Claimant's evidence on this issue was inconsistent. He accepted that the risk of profit/loss remained with him but at the same time argued that the arrangement was not one in which he was acting in an entrepreneurial capacity. His own evidence regarding the detail and complexity of the financial terms was more consistent with that of a "joint venture" between him and the Respondent, than one of an employment relationship, whether as an employee or a worker.

11. The fact is that the Claimant was offering a service to create opportunities for the Respondent, and where those opportunities led to income he would share in that income based on a formula that was disputed between the parties. He was in fact providing a service to Trinova Real Estate, who were effectively a customer of his. He was under no obligation to provide those opportunities or meet a certain threshold of activity. He could do as little, or as much as he liked but would have to accept the risk if he failed and enjoy the success if he succeeded.

12. There were attempts by the Claimant to align his circumstances with that of an employee or a worker, through reference to a probation period and examples of how his situation was comparable to that of other employees; of how integrated he was within the Respondent's organisation.

13. It's fair to say that some of the indicators point to relationship that was perhaps deeper than that of someone who was genuinely self-employed, but Mr Forsberg's evidence on these matters is preferred. It is of no surprise that the Respondent sought to assist the Claimant with his endeavours with desk space, a telephone, an e-mail address, expenses etc to further his business endeavours and ultimately to secure a deal from which both the Claimant and Trinova could benefit.

14. The Claimant's evidence that these were indicators of employment was not credible. He knew that he was not subject to a probation period or a notice period, or that a contract of employment would not be forthcoming. He was aware that the payments to him were by way of an advance and not a salary and that he remained solely responsible for accounting for tax and national insurance. He knew of the potential income should his ventures be successful, and he knew of the risks if they were not.

15. The appraisal of the Claimant's work was an anomaly, as was the decision to recognise him as employee of the month. Mr Forsberg's' evidence as to how contractors and employees were treated alike in these respects did not undermine the other, more obvious indicators that this was not an employment relationship, whether as an employee or a worker.

16. It is of some significance that the Claimant had full autonomy over how he worked and the opportunities that he created. He had the same autonomy to do other work, unrelated to the Respondent. Mr Forsberg's obvious disappointment if he were to divert an opportunity away from Trinova did not equate to an expectation that he never would or that he would face repercussions for doing so.

17. Ultimately the Claimant was not controlled by Mr Forsberg or the Respondent. He provided a service for Trinova and the arrangement that he had was a business one. He has only chosen to assert that he is an employee for the purposes of pursuing this claim, and not because he had always considered that he was.

18. The Claimant could have suggested a substitute to provide the services. It is clear that the Respondent expected the Claimant to provide the services because of his enthusiasm and contacts but that it would have been prepared to accept an alternative with suitable qualifications and experience.

19. It was equally obvious that the Claimant was not subordinate to the Respondent. He was independent and autonomous in what he did and how he did it. He was not fully integrated into the business and the facilities provided to him, and engagement with him, were for administrative convenience rather than evidence of an employment relationship.

20. It is fair to say that where there is any conflict between the evidence of the Claimant and Miss Wilson on the one hand and the evidence of the Mr Forsberg on the other, Mr Forsberg's evidence is preferred. The Claimant's evidence was contradictory and inconsistent with the documentary evidence available.

The Law

21. The issue of employment status is often both a question of fact and a question of law (**Carmichael v National Power plc [2000] IRLR 43**).

22. The classic test of the existence of the employment relationship is that set out in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433** per McKenna J:

> *"A contract of service exists if the following three conditions are fulfilled: (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."*

23. Only an employee can claim for breach of contract in the Employment Tribunal and the Claimant accepts that a claim for notice pay must be brought as a claim for breach of contract: **Delaney v Staples [1991] 2 QB 47, HL.**

24. **Section 230 of the Employment Rights Act 1996** ("ERA") ERA provides:

> (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' … 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 …

25. If the Claimant is able to establish that he was an employee, he would be a worker too. In the case of **Byrne Brothers (Formwork) Ltd v Baird and others [2002] IRLR 96**, which laid down guidelines for the consideration of each element of the statutory definition, the EAT noted that the effect of the definition of "worker" is to lower the "pass mark", so that those who fail to reach the high pass mark necessary to qualify as employees may still qualify as workers. Therefore, where there are some factors which point towards employment, it may be possible for an individual to qualify as a worker, even though they do not reach the higher pass mark to qualify as an employee.

26. The key elements required to satisfy the statutory definition of a worker under section 230(3)(b) of ERA 1996 are:

> (i) existence of a contract.
> (ii) personal service.
> (iii) The other party is not the customer or client of any business undertaking or profession carried on by the individual.

27. After determining that there is a contract, the first question to ask is whether the individual undertook under that contract to personally perform work or services. The Court of Appeal in **Redrow Homes (Yorkshire) Ltd v Wright [2004] EWCA Civ 469** confirmed that, whether or not an individual so undertook depends entirely on the terms of the contract, construed in light of the circumstances in which it was made including the parties' intentions.

28. In **James v Redcats (Brands) Ltd [2007] ICR 1006** the EAT approved a line of authority that tribunals should enquire into whether personal service was the dominant purpose of the contract, although it preferred the term dominant feature to purpose. The case was approved by the Supreme Court in **Jivraj v Hashwani [2011] IRLR 827** and Pimlico Plumbers Ltd.

29. The requirement for personal service is often analysed through the lens of whether there the individual has the right to offer a substitute to do the work. Following **Ready Mixed Concrete (South East) limited v Minister of Pensions and National Insurance [1968] 2 QB 497)**, the EAT noted in Byrne Brothers that a limited power to appoint substitutes is not inconsistent with an obligation of personal service.

30. In **Yorkshire Window Company Ltd v Parkes UKEAT/0484/09**, the EAT reviewed the authorities on the statutory definition of "worker". At paragraph 77 of its judgment, it drew the following principles:

    (i) The question of whether or not a contract provides for the performance of personal services is essentially a matter of construction. The court is concerned with construing the contract, rather than with general policy considerations.

    (ii) The fact that the individual chooses personally to supply the services is irrelevant; the issue is whether he is contractually obliged to do so.

    (iii) The right or obligation to employ a substitute will not necessarily mean that there is no obligation on the part of the individual to perform personal services unless that right to employ a substitute is unfettered.

    (iv) In cases where the individual has accepted an obligation to perform those services but is unable (as opposed to unwilling) to do so, and where he himself does not bear the costs of employing a substitute, a limited or occasional power of delegation may not be inconsistent with a contract to provide personal services.

31. The EAT in **Community Dental Centres Ltd v Sultan-Darmon UKEAT/0532/09**, confirmed that an unfettered right for an individual to appoint a substitute for any reason without sanction will be fatal to a claim that they are a worker.

32. The substitution issue arose again in **Pimlico Plumbers Ltd and Mullins v Smith [2018] UKSC 29**, where the individual had a limited ability to offer a substitute in practice. The Supreme Court framed the relevant question as

"was Mr Smith's right to substitute another Pimlico operative inconsistent with an obligation of personal performance?" In order to answer that question the court held that it was helpful to assess the significance of Mr Smith's right of substitution by reference to whether the dominant feature of the contract remained personal performance on his part, although stressing that this did not supplant the statutory test.

33. Whilst an unfettered right to provide a substitute is inconsistent with an undertaking to provide services personally, a conditional right to provide a substitute may or may not be inconsistent with personal performance. It will depend on the precise contractual terms and the degree to which the right is limited or occasional.

34. The next question is whether the status of the "employer" is that of a customer of a business undertaking, or client of a profession, carried on by the individual. In Byrne Brothers, the EAT noted that it had not been referred to any authority on what it termed this "clumsily-worded exception" but concluded that:

> *"Carrying on a business undertaking" was capable of having a very wide meaning as, in one sense, every self-employed person carries on a business. However, such a wide meaning could not have been intended under the statute. The intention behind the definition of worker was to create an intermediate class for those who are not employees but at the same time cannot be regarded as carrying on a business.*
>
> *The EAT described this as the difference between "on the one hand, workers whose degree of dependence is essentially the same as that of employees, and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects". Where a worker was in a "subordinate and dependent position vis-à-vis their employers", they require similar protection to employees with regard to working hours and pay (paragraph 17(4)).*
>
> *The test of whether an individual is "carrying on a business undertaking and whether the "employer" is a "customer" of that business is similar to the test of whether a contract is a contract of service or a contract for services. Relevant factors could include: the degree of control exercised by the "employer"; the exclusivity of the arrangement; its typical duration; the method of payment; which party supplied the equipment used; the level of risk undertaken by the worker; and HMRC's view of the status of the individual.*
>
> *Sometimes it may be clear that a person is not an employee, but not easy to tell whether they are a worker or an independent contractor. The EAT noted in Cotswold Developments Construction Ltd v Williams UKEAT/0457/05 that, when assessing whether a person is a worker or a self-employed contractor, it can be helpful to look at whether the worker actively markets their services to the world in general (which might infer independent contractor status), or whether they have been recruited by a "principal" to work as an integral part of the principal's operations (tending to infer worker status). This is known as the "integration test".*

35. Where the integration test is not appropriate, for example where the individual does not market their services at all, the EAT has held that the "dominant purpose," or "dominant feature," test may be useful **(James v Redcats (Brands) Ltd [2007] ICR 1006)**. If the dominant feature of the contract is the obligation personally to perform work, that will indicate either employment or worker status. If, on the other hand, the dominant feature is a particular outcome or objective, and the obligation to provide personal service is incidental or secondary, the contract will lie in the business field.

36. The Court of Appeal considered both the integration and dominant feature tests in **Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005**. The court found that, although neither test was of universal application and both may provide material assistance, the integration test in Cotswold will often be appropriate. Kay LJ also suggested that there is no "single key with which to unlock the words of the statute in every case", which was cited with approval by Lord Wilson in **Pimlico Plumbers v Smith [2018] IRLR 872**.

37. In **Jivraj v Hashwani [2011] IRLR 827** the Supreme Court held that it can be helpful to consider whether the individual performs services for and under the direction of another, in return for remuneration, or whether the individual is an independent provider of services who is not in a relationship of subordination with the person who receives the services.

38. Similar decisions in the employment tribunals in other "gig economy" cases such as **Gascoigne v Addison Lee Ltd ET/2200436/2016** (subsequently upheld on appeal in **Addison Lee Ltd v Gascoigne UKEAT/0289/17)** and **Dewhurst v Citysprint UK Ltd ET/220512/2016** have taken a similar approach to the question of control / subordination, and have considered other factors including whether the individual bears any financial risk, whether they are held out to customers as an integral part of the business (as might be the case if they are required to wear a uniform), whether the individual had any power to negotiate terms, and whether the written contract reflected the reality of the arrangements.

39. In **Bacica v Muir [2006] IRLR 35** the EAT emphasised that worker status cannot be determined by a requirement to provide personal service alone; the statutory test also requires that the other party is not the customer or client of any business undertaking or profession carried on by the individual. In Bacica the EAT noted that many sole-traders perform their services personally, but if they provide those services as part of a business, they will not qualify as workers.

40. The Respondent advocates that the test set out in Nolan LJ in **Hall (HM Inspector of Taxes) v Lorimer [1994] IRLR 171** is a useful starting point:

> *"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from, a given situation. 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 which has been*

painted, by viewing it from a distance and making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another." (para.11)

41. This is supported by the findings in Cotswold Developments Construction Limited v Williams [2006] IRLR 181, Langstaff P, para 53:

> *"It is clear that the statute recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that 'other' is neither a client nor customer of theirs – and thus that the definition of who is a 'client' or 'customer' cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls. It is not necessary for this decision to examine more closely the individual cases which may fall much closer to the dividing line, and the principles upon which those cases should be determined, because in the present case the tribunal determined that Cotswold was not in the position of a client or customer of any profession or business undertaking carried on by the claimant reason of 'the nature of the claimant's relationship with the respondent' (paragraph 7.3). They did not elaborate further. However, it seems to us that they were entitled to draw that conclusion, in particular because no finding of fact suggests that the claimant operated as an independent tradesman, and much of it is suggestive if not determinative of the fact that Cotswold recruited him to work for it. Accordingly, we reject that submission on behalf of Mr Gordon."*

42. In **Bates van Winkelhof v Clyde & Co LLP**, the Supreme Court rejected the view that worker status requires a relationship of subordination (see LLP members).

Decision

43. This claim turns on whether the Claimant was an employee or worker within the meaning of s.230 ERA (2)

44. There was a contract in place between the parties but surprisingly, given the

value of that contract to both sides, it had not been condensed to a more formal written arrangement.

45. From the evidence and the agreement that was struck between the Claimant and the Respondent the obvious conclusions are:

    (i) The arguments as to the financial arrangements were detailed and unusual and it was suggested by both sides, inextricably linked to the issue of issue of employment status. It had the hallmarks of a joint venture, where the Claimant had agreed to a reward, in return for certain business achievements which were by no means guaranteed or even likely. Going one step further, the arrangement was effectively a "trial" joint venture.

    (ii) The business achievements were acquisitions, for which illustrative remuneration would be paid, presumably determined by the value of the acquisition.

    (iii) The Claimant was not entitled to a salary, although this arrangement was complicated by the provision of a monthly advance against any anticipated commission. This was a modest payment, paid gross and upon invoices submitted by the Claimant identifying himself as a consultant.

    (iv) There was an expectation that the Claimant would provide the service but that was no surprise given that the whole arrangement was predicated on his contacts and knowledge of the market. Mr Forsberg's reluctance to accept a substitute, save for if that alternative was very skilled in the same filed of work, was more a realistic description of what he had signed up for, than a hallmark of personal service.

    (v) Despite Mr Forsberg's acknowledgment the Claimant had wide autonomy and independence to find suitable deals and follow them up, ultimately the deals had to be ones that were acceptable to the Respondent. This however was more a commercial reality than a direction or expectation from the Respondent.

    (vi) The Claimant had a wide autonomy and independence as to how he structured his work, how he identified and sourced deals and how he followed them up. If he was unsuccessful in securing a deal that was suitable for the Respondent, the Respondent has no obligation to reward him and the commercial arrangements between the two would not be triggered.

    (vii) There was no exclusivity requirement. The Claimant was free to pursue other opportunities, although the Respondent would hope that the commercial terms that they had agreed with the Claimant would focus his attention on securing suitable deals for them. The Claimant was not otherwise restricted or prevented from pursuing outside opportunities.

46. The Claimant's case focussed more on the day to day arrangements, that he

had a desk and work station, a work e-mail address (with many e-mails) and a telephone. He was expected to attend a meeting every Monday morning and received an award for "employee of the month". He referred to the advance as a salary, albeit a poor one, and suggested that this too was an indication of "employee" or "worker" status.

47. The contract was for potential significant transactions of high value. It is not surprising that the Respondent wished for the Claimant to have access to facilities and to do business in the name of the Respondent, with the support of the Respondent. The risk, after all, was shared.

48. There are obvious parallels between how the Claimant was treated and how employees and workers may be treated. They were however just that; parallels rather than anything more substantial. It is particularly notable that the Respondent had a culture of treating contractors in a similar way to employees. The treatment of the Claimant was happenstance – not evidence of integration within the business or evidence that the Respondent controlled the Claimant.

49. The Claimant, in his evidence, mixed up notions of control and exclusivity with expectation. In a business situation a degree of expectation is normal – it wouldn't be normal to be indifferent about what a contractor does. Mr Forsberg's evidence confirmed what he hoped the Claimant would achieve, not what he insisted upon or expected from him.

50. The Claimant argued that the characteristics of the kind of mutuality of obligation which make a contract of employment in relation to that work were there. He suggested that real estate investment opportunities were the very core of the agreement and that he was obliged to follow the Respondent's instruction and direction in that regard. The requisite level of control over the core activity of the agreement was therefore present he suggested and this was therefore an employment relationship. The Claimant's position did not however reflect the basis of the agreement that it was for the Claimant to identify opportunities and for Respondent to decide whether it wished to pursue them – a different matter entirely.

51. The Claimant argues that he engaged to work personally for the Respondent. The Respondent had engaged him personally; not a provider of client sourcing, marketing, or business development services. He argued that if he could not fulfil the contract, Mr Forsberg would have considered him to have been in breach of the contract. Again, this argument does not sit comfortably with the evidence - it was the Claimant after all who put himself forward as an individual as part of Realflex Capital (UK) Limited and had he not delivered what he promised, there was no suggestion that the Respondent would treat him as in breach of contract. There was no expectation from the Respondent that the Claimant had to provide a certain level of output.

52. The nature of the contract was that the Claimant was provding a commercial service to the Respondent. This service was to look for suitable acquisitions, for the Respondent to consider for investment purposes.

53. The Claimant cannot show he was a worker of the Respondent and neither can he meet the higher hurdle of showing that he was an employee. As he cannot demonstrate that he crosses either of these thresholds his claims must fail at first base.

Employment Judge

Date 07/08/2019

REASONS SENT TO THE PARTIES ON

07/08/2019

FOR THE TRIBUNAL OFFICE