



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Cammack

Respondent: Quantum Logistics Limited

Heard at: Lincoln **On:** Monday 22 July 2019

Before: Employment Judge Blackwell (sitting alone)

Representatives

Claimant: In Person

Respondent: Mr G Price of Counsel

RESERVED JUDGMENT

1. The Claimant is disabled within the meaning of Section 6 and Schedule 1 of the Equality Act 2010 (the 2010 act) in respect of the physical impairment of hearing loss.
2. The Claimant is not disabled within the meaning of Section 6 and Schedule 1 of the 2010 act in respect of the mental impairment of depression and anxiety.
3. The Claimant was not an employee of the Respondent within the meaning of Section 230(1) of the Employment Rights Act 1996 (the 1996 act).
4. The Claimant was however a worker as defined in Section 230(3) of the 1996 act.
5. The Claimant is entitled to the protection of the 2010 act because pursuant to Section 83(2)(a) she was employed under a contract personally to do work.

REASONS

1. Mrs Cammack represented herself, gave evidence on her own behalf and called two witnesses Mr S Castle and Mr R Weston. Mr Price of Counsel represented the Respondents and he called Mr Johnson the Respondent's Managing Director. There was an agreed bundle of documents and references are to page numbers in that bundle.

Introduction

2. This preliminary public hearing was held pursuant to a telephone case management discussion before Employment Judge Clark which resulted in orders being sent to the parties on 28 February 2019. Employment Judge Clark summarised in paragraphs 1 and 2 his understanding of the various claims being put forward by Mrs Cammack. He noted that they required further particularisation and this is a matter which I was not able to deal with at this hearing because of a lack of time. Orders are made subsequently.

3. Employment Judge Clark directed that the following issues would be determined:-

3.1 To determine whether the Claimant was disabled at the material time and;

3.2 to determine the Claimant's employment status.

Disability

4. The relevant statute law is Section 6 of the 2010 act:-

“Section 6 Disability

(1) A person (P) has a disability if:-

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”

5. Mrs Cammack relies upon two disabilities, the first being a physical impairment namely deafness. The Respondent's conceded having regard to a audiometric report of 13 March 2019 showing that Mrs Cammack had profound hearing loss in the right ear and a severe loss in the left ear, she was disabled in that regard. The second disability upon which Mrs Cammack relies upon is the mental impairment of depression and anxiety. Mrs Cammack provided a lengthy statement which in summary suggested that she had suffered from depression and anxiety for most of her life. That following the sudden death of her first husband on 14 July 2010 she had suffered a lengthy depressive reaction to her husband's death from which she took some considerable time to recover. Messrs Weston and Castle both supported Mrs Cammack's contention that she suffered a lengthy reaction to her husband's death in 2010 and took some time to return to a normal life.

6. I also had the benefit of Mrs Cammack's medical records and a letter from her GP which is at page 334 of the agreed bundle. Turning to the records it can be seen that on 19 July 2010 Mrs Cammack telephoned her general practice and the diagnosis was bereavement. She then met with her GP on 29 July 2010. Mrs Cammack says that she was prescribed antidepressants at that point which turned her into a zombie. However no such record is set out in the patient record.

7. The next relevant record is of 4 June 2013 in which it is recorded that Mrs Cammack has “ongoing palpitation. Says wake up in the morning and feel as if her heart stopped and then start again beating very fast. Lost her husband at the age of 53 with heart attack. Her mother had stroke”. Thereafter there is no relevant entry during Mrs Cammack’s service with the Respondents.

8. Turning now to her GP’s report prepared for the purposes of this hearing. That is at page 334 and is dated 12 November 2018.

9. The matters relevant to the issue read as follows:

“Mrs Cammack has asked me to provide a medical report regarding her and particularly regarding her mental state. Mrs Cammack never had any problems with depression in her life until the death of her first husband in July 2010, he died suddenly from a heart attack. She had a bereavement reaction but eventually started to find her feet again.

She eventually remarried. Unfortunately her second husband developed carcinoma of the colon and had surgery resulting in a colostomy and unfortunately has pulmonary secondary’s. She is obviously trying to support her husband through this illness but finding herself under considerable pressure. Mrs Cammack has become increasingly depressed over recent months and on 29 October we commenced her on an antidepressant Citalopram, 10 mg daily, she complained that she felt under pressure at work and she was sexually harassed in her employment. I saw her again today when we increased the dose of her Citalopram to 20 mg.”

10. The period that is relevant for the purposes of the consideration of whether Mrs Cammack was disabled through the mental impairment of depression and anxiety is from the commencement of her working for the Respondents on 7 December 2015 to her resignation with an effective date of termination of 25 May 2018. During that period Mrs Cammack was running her own function/catering business, though I accept on a very small scale. She was also carrying out driving duties for the Respondent. I accept that these are work related and not necessarily normal day to day activities, though driving clearly is a normal day to day activity. I have had regard to Schedule 1, paragraph 2 and in particular subparagraph 2 which reads:

“If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day to day activities it is to be treated as continuing to have that effect if that effect is likely to recur.”

11. However I am not satisfied that there is sufficient evidence to establish that the bereavement reaction diagnosed by Mrs Cammack’s GP in 2010 was one that satisfies that definition.

12. The only medical evidence supporting Mrs Cammack’s contention thereafter comes post the ending of her relationship with the Respondents. In conclusion therefore I am not satisfied that in respect of the impairment of depression and anxiety Mrs Cammack was disabled within the meaning of the 2010 Act.

13. In respect of Mrs Cammack's undoubted disability of hearing loss I note that there appears to be no real reliance in Mrs Cammack's claim form or extensive statement produced for the purpose of this hearing. However that is a matter that will have to be dealt with by way of particularisation.

Status – Statute Law

14. Section 230 of the Employment Rights Act, subsections 1, 2 and 3:-

“(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under):-

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.”

Case Law

15. There is a plethora of case law concerning the status of employee/worker. As I indicated to the parties my approach would be to begin with the oft cited case of **Readymix Concrete (Southeast Limited) against Minister of Pensions and National Insurance** [1968] 1 All England Reports 433 in which Mr Justice McKenna stated that:

“A contract of service exists if these 3 conditions are fulfilled:-

a) 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;

b) 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 (now read employer/employee) and;

c) The other provisions of the contract are consistent with it being a contract of service.

16. That passage was cited with approval by the Supreme Court in **Autoclenz Limited against Belcher and Others** [2011] ICR 1157. The following background facts are relevant:-

16.1 Mrs Cammack met with Mr Johnson. The Respondents is a small family run business providing refrigerated van services to local food production companies. At the relevant period there were 16 or so drivers; the great majority of which were employees within the meaning of Section 230 and treated as such.

16.2 From about 2013 Mrs Cammack set up a business called Carolan Functions. It was not a limited company and Mrs Cammack was the only person who had an interest in it. The business had its own premises and a liveried company van.

16.3 The extent of Carolan Functions business is far from clear. Mrs Cammack's evidence on the point was both confused and confusing. I accept however that it did very little business and such business as it seems to have done was between 2014 and 2017. The accounts show that it was loss making.

16.4 The accounts of Carolan also appear to show that the income received by Mrs Cammack in regard to her driving for the Respondents appeared as income in those accounts.

16.5 At page 339 is a list of the payments made to Carolan Functions by the Respondents between the dates of 18 December 2015 and 7 August 2018. It is clear from this record that Mrs Cammack worked on a regular basis and over that period was paid some £27,157.32. The weekly and monthly averages are consistent over the period.

16.6 Mrs Cammack throughout her service used the Respondent's vehicles.

16.7 The payments to Mrs Cammack were not subjected to the deduction of tax or national insurance.

16.8 Mrs Cammack was not paid sickness pay nor holiday pay.

16.9 Mrs Cammack had no financial interest in the Respondents and was not paid any form of bonus or profit share.

17. With those matters in mind I turn now to the RMC elements. There would appear to be 3 elements that are essential, the first being control.

18. Notwithstanding Mr Price's submissions to the contrary it is absolutely clear that Mrs Cammack was under the control of Mr Johnson. It was he or the transport manager who directed when and where and by what route Mrs Cammack should work. The Respondent's vans had trackers and Mr Johnson kept a close eye on the routes being taken by all drivers. If Mr Johnson was not happy with a route being taken he would contact Mrs Cammack (and any other driver) and re-route them if necessary.

19. The next matter is one of personal performance. There was no written contract between the parties. It was an oral contract about which there is a significant conflict of evidence to which I shall return. However on the matter of personal service the parties are agreed that that was not discussed. In cross examination Mr Johnson said that the matter ie of personal service had not crossed his mind. In my view it is clear that both parties assumed at the time of the formation of the oral contract that Mrs Cammack would carry out all driving duties personally.

20. The next matter is that of mutuality of obligation which in my view is fundamental to any contract of employment.

21. On this point Mr Price submits that Mrs Cammack was able to reject work and that she specifically rejected work on a Sunday. However we have the record at page 339 and although there are differences between weeks it seems to me that there is a reasonably consistent provision of work in exchange for pay and that the Respondents when they had work did offer it to Mrs Cammack.

22. Thus far then Mrs Cammack satisfies the RMC test but the third issue arising from RMC is whether the other provisions of the oral contract between the parties are consistent with it being a contract of employment.

23. Mr Price correctly submits that it is evident from Mrs Cammack's tax returns that:-

23.1 She knew she was being declared as self-employed to HMRC.

23.2 Ostensibly declared only her income from the Respondents in the tax year 2016-17 despite evidence of other income ie from the performance functions.

23.3 Claim the costs of running her other business against the income received from the Respondent.

23.4 She requested payments to be made in the name of Carolan Functions and supplied the Respondent with business invoices.

24. I referred above to a conflict of evidence as to what was said about status. Mr Johnson's evidence was that Mrs Cammack wished to be treated as self-employed, that the request to do so came from her. He went on to say that the great majority of his drivers were employees, employed on zero hour contracts and there would have been no difficulty in treating Mrs Cammack in that way.

25. On the other hand Mrs Cammack alleges that she expressed the wish to be employed and that the provision of invoices in the name of Carolan Functions was no more than a submission of a time sheet.

26. I prefer the evidence of Mr Johnson. Mrs Cammack was not a straightforward witness on the point. She claimed that she did not understand self-employed status, that she did not understand Carolan Functions accounts. I think she was being disingenuous. In my view she understood full well the advantages of being self-employed and being able to off-set the costs of Carolan Functions against the income she received from the Respondents.

27. This arrangement as part of the oral contract is, in my view, clearly not a sham as was the case in **Autoclenz**

28. On balance therefore I find that Mrs Cammack was not an employee of the Respondents and it follows that she cannot bring a claim for unfair dismissal.

29. However on the same facts and reasoning Mrs Cammack was a “worker” within the meaning of sub section 3 of Section 230 of the 1996 act.

Equality Act Status

30. The relevant provision is Section 83(2)(a):-

“(2) “Employment” means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.”

31. As to case law Mr Price correctly draws my attention to the leading authority of **Givraj against Hashwani** [2011] UK SC 40 in which Lord Clark said:

“The essential questions in each case are whether, on the one hand the person concerned performed services for and under the direction of another person in return for which she receives remuneration, or on the other hand she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Put another way, was this contract in essence in the field of dependent work relationships or was it a contract between two independent business undertakings.”

32. I am firmly of the view that it is the former. This was a dependent work relationship. By way of illustration of the latter, had Mrs Cammack been discriminated against whilst providing catering or function services to the Respondents in the capacity of Carolan Function then the latter would have been the case. The facts here point conclusively to a relationship where Mrs Cammack was subordinate to the Respondents in the person of Mr Johnson.

33. For that reason therefore Mrs Cammack is entitled to the protection of the Equality Act.

Employment Judge Blackwell

Date: 05 September 2019

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE