Appeal No. UKEATS/0035/18/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On: 23 July 2019
At: 10:30am

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

TOWN AND COUNTRY GLASGOW LIMITED — APPELLANT

Ms S MUNRO — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Kenneth Maguire Advocate Instructed by bto Solicitors 48 St Vincent Street Glasgow G2 5HS
For the Respondent	Mr Michael Briggs Solicitor Thompsons Scotland Berkeley House 285 Bath Street Glasgow G2 5HS

SUMMARY

Sex discrimination – pregnancy and discrimination; Contract Workers; Jurisdiction

Contract of employment

Maternity Rights and Parental leave – sex discrimination

In this case the Employment Appeal Tribunal heard an appeal against the Employment Tribunal's decision under s 83(2)(a) of the Equality Act 2010. The EAT allowed the appeal and concluded on the facts found proved the work provided by the Claimant was not under "a contract personally to do work". The EAT considered that the ability of the Claimant to provide a substitute to do the work of receptionist in the business in question deprived the contract of its personal character. The EAT discussed the degree of latitude the Claimant enjoyed in the provision of a substitute and concluded that the main interest of the Respondents was the provision of a suitably qualified worker and that the identity of the worker was not a significant factor.

THE HONOURABLE LORD SUMMERS

1. I am asked to decide whether the contract between the Claimant and the Respondents is one of the contracts which qualifies as a form of "employment" for the purposes of section 83 of the Equality Act 2010. The Claimant relies on this provision in her claim of unlawful discrimination based on pregnancy or maternity.

2. The section provides (so far as relevant) as follows –

> 83(2) "Employment" means -
>
> (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

3. The Claimant accepts in this case that she does not have a contract of employment. There was therefore no examination of whether her arrangement with the Respondents was in substance a contract of employment. She also accepts that her arrangement was not a contract of apprenticeship. The Claimant argues rather that her contract qualifies as one of "employment" because she was engaged under a "contract personally to do work." The Employment Judge decided on the evidence that that the Claimant's contract with the Respondents was a "contract personally to do work". The Respondents appeal this decision.

4. It is not in dispute that "a contract personally to do work" embraces those who are self-employed. The Claimant was self-employed (see paragraphs 14-16). She was described as a "freelance" worker (paragraph 22) and looked after her own tax returns, received no holiday pay and was not required to submit a sick line if she could not attend work through ill health. She belonged to a pool of workers numbering between four and six whose services could be

called upon. Unlike other staff the pool workers were not subject to appraisal. Nor is it in dispute that the Respondents exercised control over the Claimant's work and that the Claimant was in a position of subordination; one of the key indicators of "a contract personally to do work". The Claimant did her work as she was directed to perform it and in the manner directed by the Respondents. As will appear, the evidence disclosed one significant qualification to the exercise of control over her work. She was at liberty to choose when to work. She was at liberty to leave work when she chose. When she was not at work, a substitute filled her role. To begin with she covered weekends but after a period she worked during the week. The substitute workers were sourced from the pool referred to above. To the extent that she was entitled to exercise such a right, she could not be said to be in a relationship of subordination.

5. The law has interpreted the phrase "a contact personally to do work" as meaning that the contract must be impressed with a personal quality, a feature described in other contexts as *delectus personae*. The effect of this personal quality is that substitutionary performance is unacceptable. This is a necessary corollary of its personal character. Thus while issues of control and subordination are relevant to determining whether the contract is a contract for services, they are also relevant in this specific connection since a worker who can send a substitute if he or she wishes is in a material sense not subject to the control of the employer.

6. If the contract permits the worker to send a substitute in his or her place speaking generally, the contract lacks this personal quality. The case law that has sprung up around this distinction is varied and complex. Three of them have been decided by the Supreme Court (**Jivraj v Hashwani** [2011] IRLR 872; **Autclenz v Belcher** [2011] IRLR 820 and **Pimlico Plumbers Ltd & Anr v Smith** [2018] ICR 1511). I propose however to start by looking at the judgement of the Master of the Rolls Sir Terence Etherton. In his judgement he sets out a number of principles derived from the case law (paragraph 84). Although the case was later

heard by the Supreme Court these principles were not in dispute and are in my view a helpful starting point.

7. He states at p 674 -

> "An unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly a conditional right to substitute another person may or may not be inconsistent with personal performance depending on conditionality. It will depend on the precise contractual arrangements and in particular the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that that entails a particular procedure, will subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

8. Bearing these principles in mind I note that the Employment Judge found that the Respondents' contractual arrangement with the Claimant permitted the use of substitutes. The Claimant knew that she had the right to decide whether she worked or not (paragraph 23). The Respondents did not limit the use of substitutes to specified circumstances such as those occasioned by ill health or holiday leave (paragraph 25). The Claimant could in principle absent herself when she wanted without ascribing a reason thereto. These factors point towards the conclusion that the Claimant was not providing personal services.

9. The Respondents did place some limits on who did the Claimant's work. The evidence in this connection was to a degree contradictory since in practice the substitute came from the pool of freelancers whose identity and abilities the Respondents had pre-approved. But on the other hand, the Respondents accepted in the evidence of Mrs Mackenzie (paragraph 88) that their main concern was whether the person supplied could do the work, not whether they were from the pool. Mrs Mackenzie accepted that a worker who was unknown to them would be acceptable provided the person was reasonably competent. Sir Terence Etherton's fourth principle indicates that where the right of substitution is circumscribed only by the necessity of supplying someone equally qualified to do the work, the work is not personal. This is because it suggests that the focus is on the work to be done as opposed to the identity of the worker. His fifth principle is that where the employer or some other person has a right to determine who should provide substitutionary performance, this would indicate that the work is being performed personally. In this connection I note that the Respondents did not exercise a high degree of control. Although they expected a substitute to come from the pool, as I have noted someone who was unknown to them would have been an acceptable substitute if "the person was reasonably competent". This indicates that the identity of the substitute was not an important issue except insofar as it bore on the ability of the substitute to do the work required. I also note that the Respondents permitted the Claimant to organise cover if she was unable to work. She could contact one of their substitute workers in the "pool" (paragraph 26). The Respondents did not therefore reserve the task of identifying the substitute to themselves. That said they normally organised cover and it was not routinely the Claimant's task to contact a substitute. In addition she was aware that the Respondents preferred some pool workers over others and the Claimant bore their preferences in mind when making contact with the pool.

10. Having regard to this state of affairs it would appear to me that this arrangement was not "a contract personally to do work" since substitution was permissible when the Claimant did

not wish to work and the degree of control the Respondents exercised over the choice of the substitute was weak.

11. The Employment Judge in his discussion of authority quotes from **Jivraj v Hashwani** [2011] IRLR 820 and the reasoning of Lord Clarke at page 833. There Lord Clarke identified the question for the Supreme Court as -

> …whether on the one hand the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services.

12. **Jivraj** required the Supreme Court to construe the Employment Equality (Religion and Belief) Regulations 2003. Regulation 2 of the 2003 Regulations is identical to s 83(2)(a) of the Equality Act 2010. As appears from the paragraph of Lord Clarke's judgement reproduced by the Employment Judge the focus of the Supreme Court was on whether an arbitral appointment was a "contract personally to do work". Unsurprisingly the Supreme Court has nothing to say about the meaning and significance of the word "personal". This no doubt is because one can scarcely think of a more personal appointment than that of an arbitrator. The focus lay rather on whether he was an autonomous contractor or in a relationship of subordination to his employer. The Supreme Court decided that since an arbitrator was not in a relationship of subordination, the proposed appointment of Sir Anthony Colman was not caught by regulation 2 of the 2003 Regulations.

13. On appeal before me the Respondents chose not to focus on the issues of subordination and autonomy. The focus was on whether the work was personal in character and whether

performance by a substitute deprived the contract of its personal character. The effect of this shift in emphasis is that many of the factors relied on by the Employment Judge go to the issue of subordination but are not so closely connected to the personal character of the work. He does not address the fourth and fifth principles articulated by the Master of the Rolls in **Pimlico** when it was before the Court of Appeal.

14. He considered that the fact that the Claimant was "part of the organisation" indicated that she had a contract personally to do work. I can see that the degree to which a person is integrated into an organisation may go to the question of whether the Claimant was self-employed or whether she was in a relationship of subordination but as a bald statement it does not shed much light on the issue of whether the work she provided was personal or not. She was not required to be present at her place of work and arrangements existed for substitutionary performance. That does not suggest that she personally was "part" of the estate agency in the sense of being integrated into the organisation. It rather suggests that the role of receptionist was integral but that the Respondents did not consider that it was important to them that she perform that role. In analysing things in this way I have focused on the understanding that existed between the parties when she was recruited. That over time they came to hold her in regard and would prefer her over other candidates does not seem to me to be relevant. In the absence of a written contract the terms of the contract are primarily to be discerned from the arrangement entered into at the point of recruitment.

15. The Employment Judge notes that the Claimant was identified by a process of advertising and interview. I accept that such a process must be designed to identify whether a candidate has suitable personal qualities. But this evidence must sit alongside other evidence that the role could be performed by someone who had not been identified by a process of advertising and interview. I should note in this connection that I do not know by what means the other members of the pool were identified by means of advertisement and interview. The

Respondents acknowledged however that persons who had not been recruited in this fashion were permitted to carry out the role of receptionist.

16. The Employment Judge also placed emphasis at paragraph 87(b) and (c) on the control which Ms Egan of the Respondents exercised over the Claimant's work and the fact that her tasks were routine and repetitive. While these factors are relevant to the question of subordination, they do not alter the evidence that the Claimant's work was "swappable". This feature in the absence of the special circumstances identified by the Master of the Rolls deprives a contract of the personal quality desiderated by s 83(2)(a).

17. The Employment Judge notes that as time went by the Respondents found that the Claimant excelled at the job. They asked her to shift her work pattern away from the weekend and to provide cover during the week. The Employment Judge notes that this implied that the Respondents preferred her "to anyone else". The Employment Judge concludes that she was not just "a body" to carry out the work of a receptionist on a particular day" (paragraph 87(d)). The regard in which the Respondents came to hold her however could not have informed their offer of work. That being so it is difficult to see how this evidence can have any bearing on the terms upon which she came to be recruited. I acknowledge that where (as here) there were no written terms of employment, it may be appropriate to assemble the terms of employment from the conduct of the parties over time. But it is difficult to see how a decision to engage on a personal basis could be discerned in evidence of later behaviour.

18. The Employment Judge acknowledges (paragraph 88) that the Claimant was at liberty to work or not to work and that she was at liberty to go home when she wished. But he contrasts that right with "the reality". He considers that the reality was that she would never do such a thing. She would not leave the Respondents "in the lurch". In addition, the Respondents expected her to co-operate with them. The Employment Judge sets out at length a variety of

facts that demonstrate that the parties co-operated with one another so that the business could operate smoothly. He states, "the reality was not therefore one of the Claimant coming and going as she pleased". In my judgement, however, the helpful attitude adopted by the Claimant was not required by her contract and is simply indicative of the good behaviour that ought to mark personal interactions. This may be illustrated by examining what occurred at the end of her period of work. Although she had been warned at the outset (paragraph 10) that estate agency work was seasonal and that there was a downturn at Christmas, she walked out of the office on Thursday 2 November when she read an email asking her (and other "part time staff") to finish "this Friday". There was then an exchange of correspondence in which it would appear the Claimant alleged that the Respondents had discriminated against her because she was pregnant. The Respondents replied –

> "We were all very disappointed to see you walk out at the start of your recent shift without the courtesy of an explanation or reason for your actions.
>
> As you are fully aware, you were employed on the basis of being freelance with no fixed hours. The business is very much seasonal and there is no demand for additional staff at certain times of the year."

19. In my judgement there is a distinction between the legal "reality" and the "reality" described by the Employment Judge. The Respondents were clearly stung that the Claimant had walked out of the office. It seems to me however that this upset occurred because of a perceived breach of behavioural norms not a breach of a contractual obligation. Her decision to leave was consistent with her right to do so. She was not obliged to stay at her place of work. It would appear to me that if the role she filled was one that could be performed by a substitute and she was at liberty to decide when she worked (paragraph 23) this was not a personal contract as that has been understood by the courts.

20. I agree with the Employment Judge that **Windle v Secretary of State for Justice** [2016] ICR 721 is not in point. It addresses a set of facts that are materially different from those presented in this case. There the work in question was supplied on an assignment by assignment basis. The absence of an "umbrella" contract was a relevant factor in assessing whether there was the requisite degree of independence or lack of subordination. It likewise appears to me that **Jivraj v Hashwani** [2011] IRLR 872 addresses a completely different set of facts. The issue there was whether a contract to appoint an arbitrator was covered by s. 83(2)(a). Unsurprisingly it was held that an arbitrator is not a person in a position of subordination and that accordingly there was no employment within the meaning of the Equality Act 2010. In the Supreme Court (**Pimlico Plumbers Ltd v Smith** [2018] ICR 1511) Lord Wilson dealt with the meaning of s. 83(2)(a) and gives a helpful outline of the genesis of the law (paragraph 20-22). Thereafter he engages with the facts of that case where it is evident that the power to substitute was limited in character (paragraph 33 and 34). I do not need to concern myself with the question of whether the Claimant was a "client or customer". That issue does not arise in this case. It is evident however on reading **Pimlico** that the Claimant in this case had a far greater degree of independence and her right to substitute, though constrained by a laudable desire to co-operate with the Respondents, was largely unfettered.

21. In these circumstances I am satisfied that the Employment Judge failed to attach sufficient weight to the Respondents' willingness to accept substitutionary performance from members of the pool of workers or if it was necessary anyone who they were satisfied was suitable for the role of receptionist. I will allow the appeal.